Temporary help agency RPNs are subject to a hospital's collective agreement

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In *Canadian Union of Public Employees, Local 2119 v. Perth and Smiths Falls District Hospital*, a Board of Arbitration, chaired by Laura Trachuk, was tasked with determining whether Perth and Smiths Falls District Hospital's (the Hospital) use of agency registered practical nurses (RPNs) to address critical staffing challenges was a violation of its collective agreement with the Canadian Union of Public Employees (CUPE).

Background

The Hospital has two sites and, like many health care employers, faced significant staffing challenges, largely due to the COVID-19 pandemic. This made recruiting staff to fill vacancies difficult.

To address these challenges, the employer used temporary help agency nurses. Originally, the Hospital advised CUPE it was going to use an agency nurse on one unit for a limited period of time. That nurse stayed at the Hospital for most of a year and the Hospital ended up using several more agency nurses during the same timeframe.

CUPE filed a grievance alleging that the use of temporary help agency nurses violated numerous articles in the collective agreement, including but not limited to articles addressing temporary employees, contracting out, contracting in, and bargaining unit work.

This article focuses on Arbitrator Trachuk's conclusions respecting the Hospital's ability to contract out (or in) bargaining unit work through the use of agency nurses.

Key facts

- The agency nurses were supervised by and working under the direction of the Hospital and no one from the staffing agency ever attended at the Hospital.
- The nurses contacted the agency for sick days or to request vacation, and the agency would in turn advise the Hospital.
- The agency determined the nurses' pay rates and paid the nurses. The Hospital paid the agency.

- The Hospital did not discipline agency nurses. However, the Hospital had the ability to have agency nurses removed and bring forward performance concerns to the agency. A Hospital manager spoke directly to one nurse about performance issues.
- The agency sent resumes to the Hospital and the Hospital chose which nurses would work at the Hospital.
- The agency had sole authority to discharge the nurses, although the Hospital could, as noted above, direct that the agency nurses no longer attend at the Hospital.
- The agency was the party contracting directly with the nurses.
- The nurses were promised a certain number of shifts and the agency's contracts with the nurses provided they would work at the Hospital for several months.
- Agency nurses completed the same number of training shifts as newly hired Hospital staff.
- The Hospital did not evaluate performance except to the extent it found performance unsatisfactory.

The decision

In any case like this, the collective agreement provisions govern whether an employer can contract out or contract in bargaining unit work.

The collective agreement in this case, among other things, restricted non-bargaining unit employees from performing bargaining unit work, but allowed for contracting out, except where it resulted in a layoff of any employees. The collective agreement also contained temporary employee provisions permitting the use of temporary employees for a limited period. While the collective agreement contained a contracting in provision, it largely dealt with an assessment of existing contractor relationships.

The key issue before the panel was whether the Hospital's use of agency nurses constituted a contracting out, or whether the Hospital was contracting *in* RPNs, such that the Hospital was their "true employer", in violation of the collective agreement.

The panel considered several factors, including the following:

- Who controls the work;
- Who has control over recruitment, the selection process and hiring;
- Who has the responsibility and ability to discipline;
- Who bears the burden of remuneration;
- The duration of time for which the services are provided;
- The level of integration into the alleged employer's business;
- The nature of the work being done;
- Perceptions of who is the employer; and
- Intention (or not) to create an employment relationship.

The Hospital essentially argued that it had little choice about whether to use the agency nurses because of its staffing challenges. The Hospital made significant efforts to recruit and retain nurses and, at the same time, it had an unusually high number of leaves. The Hospital noted that the bargaining unit was never undermined and it only used agency nurses for shifts offered to bargaining unit members first.

Arbitrator Trachuk sympathized with the Hospital's staffing issues and understood its reasoning for using agency nurses; however, she noted that these matters were more relevant to the question of remedy as opposed to the question of whether the collective agreement was violated.

Arbitrator Trachuk relied upon the key facts recited above and noted that the Hospital assigned the agency nurses work, oversaw their work, scheduled them and chose their unit assignments. The agency nurses also performed exactly the same tasks as the Hospital's staff nurses, they had access to the same medical records and systems, they had ID badges, and they worked alongside Hospital nurses. Importantly, the agency nurses worked at the Hospital for over a year and "were integrated into its operation".

In the result, Arbitrator Trachuk found that the Hospital contracted *in* the agency nurses and that it "essentially used the Agency to recruit the RPNs as temporary employees." Accordingly, the temporary employee articles of the collective agreement applied, and the agency nurses were bargaining unit employees.

The Hospital was ordered to pay union dues that should have been paid, and the implementation of the award on a go-forward basis was remitted to the parties. It was decided that an order for retroactive damages was not appropriate in the circumstances.

Takeaway

The unfortunate staffing challenges faced by the employer in this case is a reality many health care employers have faced and are still facing coming out of the COVID-19 pandemic. Using temporary help agencies for frontline work is often a necessity to ensure continuity of care and service to patients. However, the use of agency workers needs to be consistent with the applicable collective agreement.

This case is a good reminder to review temporary help agency arrangements and the relationships health care employers have with temporary help agency employees.

For additional questions, please reach out to any of the authors or key contacts listed below.

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