IN THE MATTER OF AN ARBITRATION

B E T W E E N:

CANADIAN RED CROSS SOCIETY
COMMUNITY HEALTH SERVICES
ONTARIO ZONE
("the Employer")

-and-

SERVICE EMPLOYEES INTERNATIONAL UNION
LOCAL 1 CANADA
("the Union")

AND IN THE MATTER
OF A POLICY GRIEVANCE

Arbitrator:	**Randy L. Levinson**	
For the Employer:	**Amanda J. Hunter**	**-Counsel**
	Cindy Malcolm	**-Director of Regional Operations**
	Sandra Fougere	**-Manager of Labour Relations**
For the Union:	**Jesse Kugler**	**-Counsel**
	Cathy Carroll	**-Secretary-Treasurer**
	Judy Dearden	**-Union Representative**

Introduction

1. On or about November 5, 2009, Service Employees International Union Local 1 Canada ("SEIU" or the "Union") filed a policy grievance against Canadian Red Cross Society - Community Health Services ("Red Cross" or the "Employer") asserting that Red Cross improperly submitted contributions and calculated hours to the benefit plan, contrary to the parties' collective agreement and to all applicable legislation. Article 22 "Health and Welfare Benefits" of the collective agreement reads, in part, as follows: "The Union has established a multi-Employer trust fund to provide Health and Welfare Benefits for SEIU members". These benefits include life insurance, accidental death & dismemberment, short term disability, long term disability and drugs. Article 22.02(a) reads as follows: "The Society agrees to contribute thirty-nine (39¢) ***per hour worked*** plus Retail Sales Tax for all Employees, towards the coverage of eligible Employees." [emphasis added] The parties disagree about whether the Employer contravened the collective agreement and the ***Employment Standards Act, 2000***, S.O. 2000, c. 41 ("***ESA, 2000***") by not paying $0.39 per hour for employees who are on leaves of absence, pursuant to the ***ESA, 2000***. Red Cross did not contribute thirty-nine cents ($0.39) per hour to the plan on the basis that employees in the above-noted category did not have "hours worked" within the meaning of article 22.02(a) of the collective agreement.

2. The basic thrust of the parties' arguments is as follows. The Union argued that the Employer contravened section 51 of the ***ESA, 2000*** by not paying $0.39 per hour for employees who are on leaves of absence pursuant to the ***ESA, 2000***. By so

doing, the Union argued that such employees did not continue to participate in the type of benefit plans and the Employer did not continue to make its required contributions for such plans, as section 51 of the ***ESA, 2000*** otherwise provides. The Employer argued that it fully met its obligations under the collective agreement and the ***ESA, 2000***, by contributing $0.39 per hour for Health and Welfare benefits for each hour worked for all employees. The Employer argued that it was not obliged to make any contribution for any employee who was on a leave of absence pursuant to the ***ESA, 2000***. More particularly, the Employer argued that these employees did not have hours worked. The Employer also argued that the benefit plan fell outside the ambit of section 51(2) of the ***ESA, 2000***, as it had no control over the Health and Welfare benefits in article 22. Additionally, the Employer argued that the employees here fall outside the ambit of section 51(3) of the ***ESA, 2000***, as they continue to be eligible to participate in Health and Welfare benefits and because it made what it characterized as the required "global contributions" for Health and Welfare benefits.

The facts

3. This matter proceeded by way of an agreed statement of fact. SEIU is a trade union within the meaning of section 1(1) of the ***Labour Relations Act, 1995***, S.O. 1995, c. 1, Sch. A ("***LRA, 1995***"). SEIU represents a broad range of employees across the Province of Ontario in, *inter alia*, the health and service industries. Red Cross is an organization that aims to improve the lives of vulnerable people in Canada by, amongst other things, the provision of community health services. The Red Cross is funded

primarily by the Community Care Access Centres. The volume of work is determined by the Community Care Access Centres in the local area based on a competitive bidding process. Across the province, the Red Cross has contracts in 13 of the 14 Local Health Integration Network/Community Care Access Centre ("LHIN/CCAC") catchment areas with approximately 18% of the volume. In each catchment area, the Red Cross has a contract with the CCAC for a particular percentage of the volume, which is awarded based on the submitted bid. Clients are referred to the Red Cross by the CCAC. The Red Cross bills the CCAC for all services provided based on a negotiated hourly rate. The volume varies depending on the CCAC budgets, wait lists and other factors beyond the control of the Red Cross. There is no guarantee of a minimum number of service hours. However, the CCAC will assign the Red Cross the percentage of funded service hours agreed to in the contract. In addition to the above, the Red Cross also provides services to private individuals and other funding agencies. Such work is also billed on an hourly basis. Finally, there is a new program in one branch (Waterloo Wellington) that is funded on a project basis, not strictly based on hours of service provided by Red Cross employees.

4. SEIU represents approximately 3,300 employees employed by Red Cross in 31 bargaining units located across the Province of Ontario. These employees provide a variety of services for seniors, children and individuals with conditions requiring an element of home care. SEIU and Red Cross have negotiated a central collective agreement which encompasses all 31 bargaining units. The collective agreement has a term of August 1, 2008 to March 31, 2011. Prior to April 2008, employees employed by

Red Cross and represented by SEIU participated in a health and welfare benefit plan administered by OASSIS. The Red Cross paid $70.00 per month towards coverage for all eligible employees. The relevant terms of the prior collective agreement are set out in Schedule “A” of this award. Pursuant to article 23.03, the SEIU notified the Red Cross that it intended to create a Union administered, Trusteed Health and Welfare Plan. Global Benefits was identified as the administrator of the new plan. The health and welfare benefit plan (“Plan”) to the SEIU Locals 1 and 2 Trust Fund was created and was thereafter administered by Global Benefits. The Red Cross commenced paying $0.39 per hour worked for all employees (not just eligible employees) once the new plan was in place. The parties negotiated the current collective agreement, which includes language regarding benefits set out in this award.

5. The health and welfare benefit plan administered by Global Benefits contains eligibility requirements that must be satisfied in order to participate in the plan. The eligibility requirements are set out at page 4 of the plan booklet and provide as follows: “All permanent employees who have worked 1,352 qualifying hours during the most recent Qualifying Period (Qualifying Period June 1 to May 31 = 1 year period preceding the Benefit period during which the required number of qualifying hours are accumulated)”. A qualifying hour under the plan is calculated in accordance with article 22.02(a). Only those hours for which the plan receives a thirty-nine cent ($0.39) contribution from Red Cross are treated as qualifying hours. However, the Plan’s practice is to treat time spent by members on leaves under the ***ESA, 2000*** and time spent by plan members off work and in receipt of WSIB as qualifying hours.

6. In or around May 31, 2009, the new plan administrator, Global Benefits, had amassed data for the Qualifying Period (June 1, 2008 to May 31, 2009) that was necessary to determine benefit eligibility for the upcoming benefit year (June 1, 2009 to May 31, 2010). Upon reviewing the data amassed by Global Benefits, the SEIU became aware that the Red Cross was not paying $0.39 per hour for employees who are on leaves of absence pursuant to the ***ESA, 2000***. When SEIU and Global Benefits advised Red Cross of the discrepancies, Red Cross advised that employees in the above-noted category did not have "hours worked" within the meaning of article 22.02(a) of the collective agreement. On that basis, Red Cross did not contribute to the plan thirty-nine cents ($0.39) per hour. The amount of contributions remitted by Red Cross to the plan is consistent with the "hours worked" as reported in the monthly remittance reports. None of the employees on ***ESA, 2000*** leaves have given the Employer written notice that they do not intend to pay the employee deductions under the plan.

The current collective agreement

Article 22 – Health and Welfare Benefits

The Union has established a multi-Employer trust fund to provide Health and Welfare Benefits for SEIU members. The SEIU Locals 1 and 2 Trust Fund (hereinafter referred to as the Trust) is administered by Global Benefits, 545 Wilson Avenue, Toronto, Ontario M2H 1V2.

22.01 It is understood that the benefit plans are not part of this agreement and are not subject to the grievance and arbitration procedure.

22.02 a) The Society agrees to contribute thirty-nine (39¢) per hour worked plus Retail Sales Tax for all Employees, towards the coverage of eligible Employees.

b) Cheques are to be made payable to SEIU Locals 1 & 2 Benefit Trust Fund and forwarded to:
SEIU Locals 1 & 2 Benefit Trust Fund
c/o the Plan Administrator
545 Wilson Avenue, Toronto, Ontario M3H 1V2

c) The Society shall pay these amounts to the Trust, care of the Administrator, at the address as indicated by the Union, no later than 15 days following the last Pay Period of each month.

d) The Society agrees to provide reports to accompany each monthly remittance and Employee benefit deductions for each work month. Remittance reports will include the following information:

Employee Name
Employee Social Insurance Number
Employee's Monthly Gross Wages
Hourly Rate of Pay
Hours Worked
Employee deductions

22.03 Payroll Deductions - The Society shall make payroll deductions on behalf of the Employees for benefit coverage as directed by the Union.

Employment Standards Act, 2000 S.O. 2000, Chapter 41

5(1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.

51(1) During any leave under this Part, an employee continues to participate in each type of benefit plan described in subsection (2) that is related to his or her employment unless he or she elects in writing not to do so.

51(2) Subsection (1) applies with respect to pension plans, life insurance plans, accidental death plans, extended health plans, dental plans and any prescribed type of benefit plan.

51(3) During an employee's leave under this Part, the employer shall continue to make the employer's contributions for any plan described in subsection (2) unless the employee gives the employer a written notice that the employee does not intend to pay the employee's contributions, if any.

***Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F**

64(1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects**.**

The decision

7. The parties disagree about whether the Employer contravened the collective agreement and the ***ESA, 2000*** by not paying $0.39 per hour for employees who are on leaves of absence, pursuant to that legislation. After objectively reviewing article 22.02a), it is apparent that the parties have plainly expressed their intention regarding the Employer's obligation to contribute monies to the Plan. In that regard, the parties there provide that: "The Society agrees to contribute thirty-nine (39¢) per hour worked plus Retail Sales Tax for all Employees, towards the coverage of eligible Employees." [emphasis added] As the affected employees on leaves of absence pursuant to the ***ESA, 2000*** were not paid while off work, article 22.02a) does not oblige the Employer to contribute monies to the Plan.

8. The next issue to consider is whether the Employer's practice is consistent with section 51 of the ***ESA, 2000***. In section 48(12)(j) of the ***LRA, 1995***, an arbitrator is given the power to interpret and apply employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement. This arbitral power includes the ***ESA, 2000***, a statute designed to protect certain employee interests of individuals employed in unionized and non unionized workplaces. In interpreting the ***ESA, 2000***, an arbitrator must consider section 64(1) of the ***Legislation Act, 2006***, S.O.

2006, c. 21, Sch. F ("***Legislation Act, 2006***"). It provides that: "An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects."

9. In interpreting the ***ESA, 2000***, it is also useful to consider the instructive analysis of two cited Supreme Court of Canada ("Court") decisions dealing with employment standards legislation in Ontario. In ***Machtinger v. HOJ Industries Ltd***., [1992] 1 S.C.R. 986 (S.C.C.), the Court at paragraph 32 reasoned, in part, as follows: "[a]n interpretation of the *Act* [*Employment Standards Act*, R.S.O. 1980, c. 137] which encourages employers to comply with the minimum requirements of the *Act*, and so extends its protections to as many employees as possible, is to be favoured over one that does not.". In ***Re Rizzo & Rizzo Shoes Ltd.***, [1998] 1 S.C.R. 27 (S.C.C.), the Court at paragraph 36 reasoned, in part, as follows: "Finally, with regard to the scheme of the legislation, since the *ESA* [*Employment Standards Act*, R.S.O. 1980, c. 137] is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner."

10. Having considered the parties' submissions and having regard to section 64(1) of the ***Legislation Act, 2006***, to the foregoing judicial authorities and to the nature of the ***ESA, 2000***, I conclude that the Employer did not continue to make its contributions, within the meaning of section 51(3). The statutory notion of continuity during applicable leaves of absence pursuant to the ***ESA, 2000*** from the standpoint of an

affected employee and an employer is apparent from sections 51(1) and 51(3). In that regard, section 51(1) reads as follows: "***During any leave under this Part, an employee continues to participate in each type of benefit plan described in subsection (2) that is related to his or her employment*** unless he or she elects in writing not to do so." [emphasis added] Section 51(3) reads as follows: "***During an employee's leave under this Part, the employer shall continue to make the employer's contributions for any plan described in subsection (2)*** unless the employee gives the employer a written notice that the employee does not intend to pay the employee's contributions, if any." [emphasis added] More particularly, section 51(1) statutorily mandates that an affected employee will continue to participate in an enumerated benefit plan on the same basis and at the same benefit level that an employee would otherwise be entitled. Section 51(3) statutorily obliges an employer to continue to make its contribution for an employee on an applicable leave of absence pursuant to the ***ESA, 2000*** on the same basis that it made such contribution, before such leave was taken. In other words, the legislature intended to mandate continuity in two separate respects. One is the level of individual employee participation in the applicable benefit plan. The other is the level of employer contributions. Moreover, section 5(1) of the ***ESA, 2000*** maintains the integrity of these stipulated statutory protections. In that regard, it reads, in part, as follows: "[no] employer or . . . agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void."

11. The parties disagree about the scope and application here of the statutory protection in section 51 of the ***ESA, 2000*** for continued participation in certain

enumerated benefit plans. Section 51(1) reads, in part, as follows: “During any leave under this Part, an employee continues to participate in each type of benefit plan described in subsection (2)”. Further to my interpretation of section 51(2) in the next paragraph of this award. I note that the Plan contains eligibility requirements which include working a certain number of qualifying hours in order to participate in it. If these eligibility requirements were strictly applied, the Employer’s practice not to pay $0.39 per hour for employees who are on leaves of absence pursuant to the ***ESA, 2000*** could potentially result in a diminution in the level of individual employee participation in the Plan. However, the Plan’s practice is to treat time spent by members on leaves under the ***ESA, 2000*** as qualifying hours. I consider this practice to be consistent with and otherwise mandated by section 51(1) of the ***ESA, 2000***. Additionally, the express exception to the otherwise comprehensive application of section 51(1) to individual employees does not apply here, namely “unless he or she elects in writing not to do so.”

12. This takes us to section 51(2). The Employer argued that the benefit plan fell outside the ambit of section 51(2), as it had no control over the Health and Welfare benefits in article 22. Section 51(2) reads as follows: “Subsection (1) applies with respect to pension plans, life insurance plans, accidental death plans, extended health plans, dental plans and any prescribed type of benefit plan.” Having considered the parties’ submissions and having regard to section 64(1) of the ***Legislation Act, 2006***, to the foregoing judicial authorities and to the wording in section 51(2) of the ***ESA, 2000***, I am satisfied that the Health and Welfare Benefits in issue which include life insurance, accidental death & dismemberment, short term disability, long term disability and drugs

clearly fall within the ambit of the benefit plans so described in section 51(2). The fact there is a Union administered, Trusteed Health and Welfare Plan does not take it outside the ambit of section 51(2). In that regard, neither the nature of the plan or its method of funding constitutes a statutorily recognized distinction that would take it outside the ambit of the enumerated benefit plans. If I were to adopt the Employer's interpretation in this regard, I would effectively be adding an exception to the otherwise comprehensive application of article 51(2) that the legislature could have specified, but did not. In the present circumstances, I consider an interpretation that would effectively add such an unspecified exception to be inconsistent with section 64(1) of the ***Legislation Act, 2006*** and with the Court's approach regarding the interpretation of employment standards legislation found in ***Machtinger v. HOJ Industries Ltd.*** (supra) and ***Re Rizzo & Rizzo Shoes Ltd.*** (supra).

13. The parties also disagree about the scope and application here of the Employer's statutory obligation in section 51 of the ***ESA, 2000*** to continue to make its contributions for certain enumerated benefit plans. Section 51(3) reads, in part, as follows: "During an employee's leave under this Part, the employer shall continue to make the employer's contributions for any plan described in subsection (2)". Having considered the parties' submissions and having regard to section 64(1) of the ***Legislation Act, 2006***, to the foregoing judicial authorities and to the wording in section 51(3) of the ***ESA, 2000***, I am satisfied that the affected employees fall within the ambit of its intended protection. In that regard, there is only one specified exception, namely "unless the employee gives the employer a written notice that the employee does not intend to

pay the employee's contributions, if any." On this issue, the parties agree that none of the employees on ***ESA, 2000*** leaves have given the Employer written notice that they do not intend to pay the employee deductions under the Plan.

14. The Employer submitted the circumstances here fall outside the ambit of section 51(3) because it made what it characterized as the required "global contributions" for Health and Welfare benefits. I note that the collective agreement does not characterize the Employer's obligation to contribute to the Plan as a global obligation. Moreover, the collective agreement does not establish an obligation to contribute a fixed sum, regardless of the number of hours that individual employees work. Rather, the Employer's obligation to contribute in article 22.02a) of the collective agreement is based on hours worked by individual employees and will vary. Even if one could properly characterize the Employer's obligation to contribute as being global, this would not in my view constitute a statutorily recognized distinction that would take it outside the ambit of the specified obligation to continue to make the employer's contributions for certain enumerated benefit plans in section 51(3). In that regard, the legislature did not qualify the obligation that section 51(3) establishes by the nature of an employer's contribution. If I were to adopt the Employer's interpretation in this regard, I would effectively be adding an exception to the otherwise comprehensive application of article 51(3) that the legislature could have specified, but did not. In the present circumstances, I consider an interpretation that would effectively add such an unspecified exception to be inconsistent with section 64(1) of the ***Legislation Act, 2006*** and with the Court's approach regarding the interpretation of employment standards

legislation found in ***Machtinger v. HOJ Industries Ltd.*** (supra) and ***Re Rizzo & Rizzo Shoes Ltd.*** (supra).

15. The Employer further submitted the circumstances here fall outside the ambit of section 51(3) because employees on leaves of absence pursuant to the ***ESA, 2000*** continue to be eligible to participate in Health and Welfare benefits. As I have previously indicated, I consider the Plan's practice to treat time spent by members on leaves under the ***ESA, 2000*** as qualifying hours to be consistent with and otherwise mandated by section 51(1). In that sense, the present circumstances seemingly differ from ***Re Hunter Amenities International Ltd. and The Employees of Hunter Amenities International Ltd.*** (2009), 96 C.L.A.S. 461 and ***Re Jungbunzlauer Canada Inc. and United Food and Commercial Workers Canada, Local 175 (Harris)*** (2009), 183 L.A.C. (4th) 186. In those cases, the employers were found to have contravened section 51 of the ***ESA, 2000*** in circumstances involving a diminution in the participation of the grievors in the respective plans in issue.

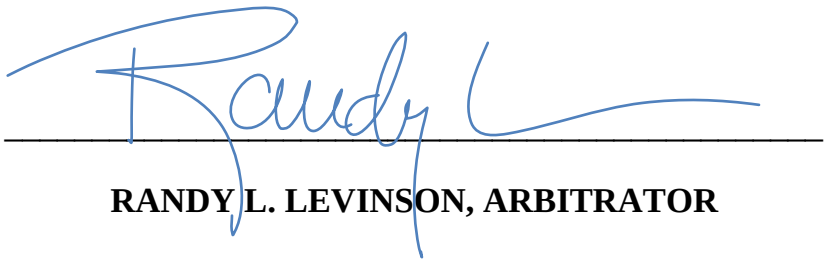
16. In my view, the fact that employees on leaves of absence pursuant to the ***ESA, 2000*** at present continue to be eligible to participate in Health and Welfare benefits does not materially impact the separate and statutorily distinct Employer obligation to continue to make its contributions found in section 51(3). More particularly, the legislature did not qualify the obligation established in section 51(3) to be one that is based on whether an employee continues to participate in an enumerated benefit plan under a collective agreement or pursuant to section 51(3). As such, the fact that employees on leaves of absence pursuant to the ***ESA, 2000*** at present continue to be

eligible to participate in Health and Welfare benefits does not take the present circumstances outside the ambit of the specified obligation on the Employer in section 51(3) to continue to make its contributions for certain enumerated benefit plans. If I were to adopt the Employer's interpretation in this regard, I would effectively be adding an exception to the otherwise comprehensive application of article 51(3) that the legislature could have specified, but did not. In the present circumstances, I consider an interpretation that would effectively add such an unspecified exception to be inconsistent with section 64(1) of the ***Legislation Act, 2006*** and with the Court's approach regarding the interpretation of employment standards legislation found in ***Machtinger v. HOJ Industries Ltd.*** (supra) and ***Re Rizzo & Rizzo Shoes Ltd.*** (supra).

17. To summarize, I conclude that section 51 of the ***ESA, 2000*** overrides the Employer's application of article 22.02a) to the affected employees who are on leaves of absence pursuant to the ***ESA, 2000***. I further conclude that the Employer contravened section 51 of the ***ESA, 2000*** by not contributing any monies for affected employees who are on leaves of absence pursuant to the ***ESA, 2000*** to the Plan. In that regard, the affected employees do not otherwise fall within the ambit of the specified exceptions in section 51 of the ***ESA, 2000***. As part of the agreed statement of fact, the settlement requested in the policy grievance is as follows: "That the Employer adhere to the provisions of the collective agreement, reimburse the trust fund for all lost contributions with interest, provide payments to the trust for members premiums which were not deducted to eliminate all adverse effects, to credit members with any lost seniority, and any other redress deemed appropriate." A further agreed statement of fact was that: "The

parties have agreed on a without prejudice basis to hold the issue of the backlog of deductions and any remedies that flow from that in abeyance. The parties agree to meet on February 22, 2010 to discuss the records. In the event that the issue is not resolved at that meeting, the Union may proceed to arbitration." In the circumstances, I consider it appropriate to remit the matter to the parties. I shall retain jurisdiction, should any issues arise in implementing this award. Finally, I would like to thank Ms. Hunter and Mr. Kugler for their thoughtful presentation.

DATED at Ancaster, this 8th day of March, 2010.



RANDY L. LEVINSON, ARBITRATOR

Schedule "A"

The prior collective agreement

Article 23 – Health and Welfare Benefits

23.01 The Society agrees to contribute one hundred percent (100%) of the billed premium up to a maximum of seventy dollars ($70.00) per month, towards the coverage of the OASSIS Core Benefit Plan, of eligible Employees who have successfully completed their probationary period. It is understood that Employees and Attendants shall be required to pay, by way of payroll deduction, one month in advance, any amounts in excess of those paid by the Society.

23.02 Eligible Employees and Attendants who are eligible for coverage, may also participate in the OASSIS Optional Benefit Plan. Employees and Attendants electing Optional Benefit Coverage shall be required to pay, by way of payroll deduction, one month in advance, one hundred percent (100%) of the billed premiums for the optional benefits.

23.03 (a) Ninety (90) days following notification by the Union, the Employer agrees to contribute to the Union administered, Trusteed Health and Welfare Plan. The Union acknowledges and agrees that other than making its contributions to the plan as set out in this Article, the Employer shall not be obligated to contribute towards the cost of benefits provided by the plan, the Employer shall not be responsible for providing any such benefits and the Employer shall not be liable for anything related to the Plan beyond its contribution set out in this Article.

(b) The Society agrees to contribute thirty-nine cents (39¢) per hour worked for all Employees, towards the coverage of eligible Employees who have successfully completed their probationary period and who meet the qualification requirements outlined in the clause below. It is understood that eligible Employees shall be required to pay, by way of payroll deduction, one month in advance, any premium specified by the Plan. These contributions and deductions along with the Society's contributions will be forwarded to the Trusteed Plan

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23.04 The parties agree that the Trusteed Plan will provide extended health care, dental, life insurance, weekly indemnity insurance and long term disability (LTD).

23.05 The hours which an Employee is regularly employed for the purposes of this Article, shall be determined annually on the basis of the total hours worked by the Employee during the preceding twelve (12) calendar months, it being understood that an Employee must work a total of 1,352 hours in a year in order to qualify for benefits in the next year. Annual totals shall be calculated and considered as outlined below.

23.06 On June 1, according to the records of the Employer as of May 31, the Employer shall total each eligible Employees' hours worked for the period June 1 to May 31 of the previous year to determine eligibility for the period July 1 to June 30.

23.07 Where an Employee is absent from work on vacation or during the first four (4) weeks of absence due to an approved leave of absence (medical or otherwise) the total hours required for benefits qualification for the Employee will be reduced by three point seven (3.7) hours for each day of leave (up to a maximum of 208 hours).