

**ARBITRATOR FINDS THAT EMPLOYER IS NOT LIABLE TO PAY NEW HEALTH CARE PREMIUM AS A BENEFIT FOR EMPLOYEES**

*Jazz Air Inc. and Air Line Pilots Association, International* (unreported), September 27, 2004 (Teplitsky).

In a recently released decision, an arbitrator dismissed the union's argument that the employer is liable to pay the new Ontario Health Premium ("OHP") on behalf of its employees. The arbitrator held that the parties never contemplated the imposition of the OHP and therefore never bargained for the payment of the premium as a benefit under the collective agreement.

In an unusually short decision, the arbitrator noted that the OHP is actually a "tax" notwithstanding that it has been dubbed a health "premium". However, the distinction between a "tax" and a "premium" was not central to the disposition of the case. For the purpose of determining liability for payment of the OHP, the arbitrator set out three collective bargaining considerations that guided his decision to dismiss the grievance:

First, at the time the parties negotiated their Collective Agreement, they were contemplating a health care environment in which the [Employer Health Tax] had replaced the premiums previously paid by individuals. They could not have contemplated this new tax which did not exist. Such an increase in compensation, as much as \$900.00 per annum, cannot usually be achieved in a "rights" arbitration.

Second, the "tax" fluctuates with income. No employer would agree to pay the tax on income earned in outside employment. Determining this issue would require each pilot's T4 and presumably a deduction for the portion of the tax because of other employment. However, the Collective Agreement does not provide any mechanism for such disclosure or for limiting the employer obligations to the tax related to employment with Jazz.

Finally, benefits are always specifically bargained for and identified. This "tax" is not a benefit under Article 7.

On the basis of these considerations, the arbitrator concluded that the employer could not be held liable for payment of the OHP for its employees under the collective agreement.

The *Jazz Air* case is the second arbitral decision to comment on the issue of liability for the OHP. The arbitrator's ruling stands in stark contrast to the decision in *Lapointe Fisher Nursing Homes and U.F.C.W., Local 175/633* (unreported), October 6, 2004, wherein arbitrator Anne Barrett found that the OHP was a "premium" which the employer was liable to pay on behalf of its employees. Unlike the decision in *Lapointe Fisher*, the *Jazz Air* decision appears to be correctly decided. The decision in *Jazz Air* clearly recognizes the undue administrative and financial burden that would fall to employers if liability for the OHP was assigned to them. Additionally, the decision is consistent with the intent of the OHP as proclaimed by the Liberal Government, which is to require taxpayers, rather than their employers, to subsidize the health care system through payment of the health premium on an individual basis.

Several more arbitration decisions on this issue are pending. Accordingly, the debate over whether employers or employee must bear the cost of the OHP will likely continue until arbitrators receive clear direction from the courts.