In the Matter of an Arbitration

Between Garda Security Screening Inc. [employer]

And

United Steelworkers, Local 1976 – Ottawa Airport [union]

And

In the Matter of a Policy Grievance regarding Sick Leave Credits

Before: M. Brian Keller arbitrator

Michel Brisebois, for the employer

David Lipton and Richard Leblanc, for the union

Hearing in Ottawa on January 15, February 4, March 23 and April 15, 2016

Award

The Union filed a policy grievance dated May 24, 2014, alleging that the employer had improperly applied the provisions of article 17.06 of the collective agreement.

Article 17.06 reads as follows:

*"**Sick Leave***

An employee who is normally working 1800 hours or more will receive 7 sick days per year. Effective April 7, 2013, this will increase to 8 sick days per year. Sick days may be accumulated and carried over year to year up to a maximum of 8 days. All days accumulated in excess of 8 days will be paid out to the employees on December 15th of each year.

An employee who is normally working less than 1800 hours per year will accrue an annual sick leave at the rate of 2.0% of regular hours worked. Employees will be permitted to accrue up to a maximum of one hundred and twenty [120] hours of sick leave.

'Regular hours' worked excludes vacations, statutory holidays not worked and overtime."

The issue between the parties revolves around the interpretation of the words "normally working". The employer interprets those words as to mean hours actually worked by an employee. It excludes all hours not worked in determining what makes up 1800 hours. The union seeks to include within the meaning of normally working all hours an employee would normally work during the course of a year. This would

include, for example, statutory holidays, scheduled vacations, approved leave, etc., days an employee has not worked.

The employer took over the contract for the Ottawa Airport in 2012 from the previous contract holder. There was no successorship.

Most facts were agreed to and stipulated by the parties. The stipulations were:

1-for the year 2012 the practice of the employer was that employees who had worked less than 1800 hours in the 12 month period prior to April 1, 2013, would get the 2% accrual.

2- employees who worked more than 1800 hours were granted eight days credit to their sick leave bank as of April 1, 2013.

3-hours worked included all hours actually worked. This included overtime and statutory holidays worked. It did not include non-working time.

4-in April 2012, the employer gave all full-time employees seven days sick leave entitlement based on data from the former employer. Part-time employees received 2%. The previous employer had paid all vacation pay entitlement at the termination of its contract.

5-very few employees took vacation between the period April 1, 2012 and April 1, 2013.

6-in that same time period, a fair amount of overtime was worked.

7-from the period April 1, 2013 to April 1, 2014, more employees took vacation and a number of employees, because of their seniority status, attained an extra week of vacation.

8-hours referred to in paragraph four above do not include any split shift hour allowances.

The employer took the position that the union was estopped from bringing the grievance. I will deal with this issue prior to dealing with the merits of the grievance. The evidence is clear, based on the documents filed and the testimony of witnesses that, at no time, did the union ever suggest to the employer, orally or in writing, that it agreed with the position that the employer took with respect to the interpretation of article 17.06. In fact, the evidence is to the contrary. During the course of collective bargaining, the parties exchanged proposals dealing with all issues in dispute, including article 17.06. The union was very careful to include a preamble to its proposals regarding this article. That preamble, read as follows:

"This language is presented without prejudice to the union's interpretation of the current collective agreement".

Additionally, the employer`s Director of Labour Relations, who was also the chief spokesperson during the bargaining, presented a document to the union, on October 31, 2012, during the course of those same negotiations. That letter read in part:

"This letter is hereby to advise the USW that as a result of Garda Security Screening Inc. transition into the Central Region, effective November 1, 2012, the employer shall commence to apply article 17.06 [sick leave] in accordance with the strict language of the collective agreement."

In order for an estoppel to be present, it must be established that there is a clear representation which would induce a party into concluding that the other party was agreeing to the interpretation of a provision, notwithstanding what the plain words of the provision might be. In the instant case, I am unable to find that any such representation was made. The reality is that the union made it consistently clear in its written proposals to the employer that it was <u>not</u> agreeing with their interpretation of article 17.06. On top of that, it was the employer, in its October 31, 2012 letter to the union, which made a representation to the union to ensure that the union was aware of how it would interpret article 17.06 going forward. The union never renounced its stated position expressed at bargaining repeated times.

Consequently, I do not find that any estoppel exists in the instant case that can be held against the union.

The Union's first argument on the merits is based on a grammatical interpretation of the words in dispute – "is normally working". It argues that the phrase is different from "has worked". It suggests that the word normal means conforming to a regular standard, or as a rule. It submits that the phrase has to be interpreted based on the progressive form of the word, that is, that the action is continuing. That is because, says the union, the provision does not say "an employee who has normally worked". Therefore, the union interprets the phrase to mean "normally expected to work".

The Union also argues that an interpretation to the phrase must not result in an absurdity or repugnancy. The union illustrates that by pointing out that if one subtracts from the normal number of hours that an employee would work based on a 40 hour week such things as vacation leave, paid sick leave, bereavement leave jury duty, etc., it would be difficult for an employee to actually achieve the 1800 hour threshold required in article 17.06. There is a further absurdity, argues the union, which is that the more senior employees who are entitled to greater vacation run a greater risk of not achieving the threshold than more junior employees whose vacation entitlement is less.

The Union also argues that not counting time away from work for such things as union business and parental or pregnancy leave violates applicable statute.

The Union made reference to the decision of an arbitration panel chaired by arbitrator Guy Thorne in the matter of an arbitration between Temiskaming Hospital, and the Ontario Nurses'Association, (2000),92 LAC (4th)164.

The issue decided by the Board was the calculation of a nurse's "normal weekly hours". The Board canvassed the jurisprudence dealing with that phrase and concluded, at paragraph 37 of its award as follows:

"It is apparent from the factual situation dealt with in these decisions that a fixed formula is unlikely to be able to determine "normal weekly hours" in every case. Most of the awards recognize, explicitly or implicitly, that the concept of an employee's "normal weekly hours" must relate to an individual's personal situation. A standard period of assessment and an averaging formula will work, and appears, in the vast majority of cases; in the present case the parties do not disagree that 20 weeks is appropriate in most cases. Sometimes, however, this formula will not correctly determine an individual's "normal weekly hours" and some way of assessing the individual situation must be found. One possibility is to select a more representative period, as was suggested in Freeport Hospital and Ottawa General Hospital. In other cases it may be more reasonable simply to exclude from the calculation absences which are anomalous or abnormal. The important thing is that in unusual situations the hospital must look at the situation and in some way make an adjustment of the simple formula does not produce an individual's normal weekly hours. It appears to us that all of the decisions reviewed recognize the personal nature of "normal weekly hours" and the need to assess them individually rather than arbitrarily."

I was also referred to a decision of arbitrator Allan Hope in Re Alcan Smelters and Chemicals Limited and Canadian Auto Workers, Local 2301, [1996], 61 L.A.C., (4th),90. The arbitrator was tasked with determining the meaning of the phrase "normally will not exceed" in reference to a cap on the use of temporary employees. The arbitrator adopted the argument of the employer that whereas the cap would not be exceeded in normal circumstances it could be exceeded in abnormal circumstances.

In summary, the Union argues that individual circumstances have to be looked at and that what has to be examined is the hours scheduled for employees on their line. By way of remedy, the union is seeking that additional working hours be added by the employer to the hours it has credited employees for the purposes of article 17.06, for the 12 months prior to April 1, 2014, and for subsequent years

The employer commences its analysis of the matter by focusing on the word `working` It submits that the meaning of the word is clear. It relies on the decision of arbitrator Russell Goodfellow in Re Rivera Inc. And Service Employees International Union, Local 1, unreported decision dated June 1, 2015. At page 12 of his award, the arbitrator wrote:

I agree with the Employer that an employee "works" an hour when he or she spends an hour engaged in activity for the benefit of the Employer...All that is required is the expenditure of effort on behalf of the Employer that were required of the employee by the Employer as a function of the employment relationship".

The arbitrator then went on to agree with the employer that what could be excluded from the definition of work is situations where the employee is away from work or absent from work. That would include, for example, vacation time.

The arbitrator also dealt with the arguments of absurdity and the violation of statute in case of pregnancy and union leave that the union has also made in the instant case.

At page 13 of his decision, dealing with the first of those arguments, the arbitrator wrote:

"Thus, while it is not difficult to appreciate the union's concerns with respect to vacation time in particular, given its relationship to seniority, perhaps also with the increasing seniority of the workforce and any increases in the available vacation time, that is a matter to be considered in collective bargaining; it cannot be relied on to support an interpretation of the agreement that is clearly at odds with the plain and ordinary meaning of the words used and the established case law".

The arbitrator adopted the position of the employer in dealing with the issue of pregnancy and union leave that making provisions for the accrual of credits for service for the purpose of salary increments, vacations or any other benefit included and prescribed under the employment standards act during pregnancy or parental leave does not make such periods time worked for purposes of the collective agreement.

The employer further submits that when interpreting a provision of a collective agreement, the agreement has to be looked at as a whole. It submits that wherever the parties wanted to include something as work it said so. For example, it references the definitions in article 3 where the word "worked" is used to establish what a probationary employee is, as well as what a regular [R1) and (R2) employee is. It references the union's education fund where one cent per our worked by each employee is remitted. The employer also makes reference to various provisions of the collective agreement that specifically provide for payment to an employee who is absent from work as, for example, while the employee is on union leave or meeting with the company for the renewal of the collective agreement during collective bargaining.

Specific reference was made to article 14.07 which provides that for the purposes of computing overtime, annual vacations and paid holidays which follows an employee`s normally scheduled workday shall be deemed to be working days. The employer further submits with respect to this provision that there is no real difference between the phrase normally scheduled found in the article and normally working.

The employer contrasts normally working with hours earned at article 21.01 [a] which provides that hours earned include such things as vacation pay and hours for which an employee is absent for approved union business and any other approved leave. Overtime and statutory holiday pay [not worked] are specifically excluded.

It refers also to article 26.02 which provides that for purposes of pension only total earnings means all monies an employee earns for wages and includes earnings for vacation, paid holidays, VRSC bonus, cola and approved union leave.

The review by the parties of the collective agreement was useful in a number of respects. First, it shows that there are numerous provisions where the parties have dealt with either the word work or schedule or some combination of those two words. This indicates to me that the parties, both of whom are sophisticated at negotiating collective agreements, understand that there are differences and distinctions between the various formulations used by them.

Second, the phrase "is normally working" is found only at article 17.06. In my view, this must be taken to mean that its interpretation is different from the interpretation of any of the various formulations elsewhere in the collective agreement.

Third, the word "normally" appears elsewhere in the collective agreement. In a somewhat related context, at article 14.07, annual vacations and paid holidays are, for the purpose of computing overtime, deemed to be working days if they fall on an employee's normally scheduled workday. It is clear that the parties are agreed that annual vacations and paid holidays would not otherwise be considered to be working days as they had to deem them to be so. Further, it is my view that the parties have used the word "normally" in this article to mean "regularly" or "usually".

The word "normally" also appears at article 4.02 which provides that employees not covered by the agreement shall not "normally" do work of employees covered by the agreement. In this context, I believe that the parties have used the word "normally" to mean "regularly" or "usually".

At article 8.07, there is a reference to a person who "normally" files grievances. Again, it is my view that the parties have used the word "normally" to mean "regularly" or "usually". The same can be said of the use of the word "normally" at article 15.02 [a] and in Letter of Understanding #3 at paragraph three.

Fourth, I believe it is reasonable to assume that the parties did not intend the phrase to mean "is normally working", to mean "normally required to work", "normally works", "normally scheduled to work", "regularly works", or any similar formulation or they could have done so as they did elsewhere in the collective agreement. Therefore, it must have a specific and unique meaning.

I believe it is trite law at this point that the word "work" [or for our purposes working] has an understood meaning. That meaning is reflected in the award of arbitrator Goodfellow, cited above. That is, work means the performance of a duty or function for the employer.

It is important to note, that arbitrator Goodfellow, at page 13 of his award, made a distinction between work and paid hours or hours in respect of which service and seniority accrue. In other words, there can be the accrual of hours of service and seniority in certain circumstances without those hours being "hours worked".

In the instant case, the word "working" is modified, or qualified, by the word "normally". That word cannot simply be ignored. As indicated above, that word is found elsewhere in the collective agreement and appears to have been given a consistent meaning by the parties. That meaning is, as already stated, "regularly" or "usually".

The task then is to marry the two words. If one substitutes the word "regularly" or "usually" for "normally", and the phrase "performing a function for the employer", the result is "usually performing a function for the employer".

If this is correct, then the interpretation of the employer cannot be correct. This is because the employer's interpretation gives no meaning to the word "normally". The employer's interpretation would have the article read "an employee who is working [or works]...". The employer's interpretation is also a formulaic one and gives no meaning to the construction of the clause which refers to "an employee". The word "an", requires a determination on an individual employee basis, as was made clear in the Thorne award cited above.

I'm also of the view that the union's interpretation cannot be correct. Its interpretation ignores the meaning of the word "working". Its interpretation would have the employer credit employees with hours that they are not working.

I'm satisfied that the clause requires the employer to make a determination on an individual employee-by-employee basis to satisfy the requirements of article 17.06. That exercise requires the employer to examine an individual employee's work schedule and to deduct only those hours that they would not normally be working, or normally have worked. Clear examples of this are an employee's vacation and statutory holidays or days substituted for statutory holidays. It is obvious that these are days that the employee is not normally working. On the other hand, ad hoc days missed, as for example sick days or days taken for bereavement leave, would not be deducted as those are days that an employee would normally work but for being sick or meeting the requirements of the bereavement leave. Longer-term leaves of absences would be deducted as those would be days not normally worked by the employee in those circumstances.

The Union raised the specific example of leave for union business. In my view, this is dealt with in article 7.07, which provides that employees absent under that article continue to accrue benefits during the absence. The accrual of sick leave is a benefit and, therefore, the provisions of article 7.07 govern.

The Union also made reference to an absence due to, for example, maternity leave. I adopt the reasoning and decision of arbitrator Goodfellow, cited above, and the find that there is no accrual of sick leave under article 17.06 in those circumstances.

Finally, I must deal with the argument of the union with respect to absurdity. I candidly acknowledge that there are circumstances where my interpretation of article 17.06 can produce an anomalous result. I point out first, that an anomalous result is not the same thing as an absurd result and second, that the

interpretation that the union is seeking would produce an equally anomalous result by crediting employees for work not performed.

Therefore, and for the reasons expressed above, the grievance is allowed in part. Commencing this year, the employer is to credit hours to conform with this award. At this point, I am not sure what the appropriate retroactive remedy should be. I say this because of the inherently difficult problem of trying to recreate what might have been, or what was normal for individual employees going back a number of years. There is, as well, the question of what to do, in a case like this, for persons who might no longer be employees or who could have had a change in status in the intervening period, thus affecting their rights under this award. Consequently, I am remitting the issue of remedy back to the parties. If no agreement is reached within 60 days, or such other time as may be jointly agreed, the matter is to be referred back to me for final determination in a manner to be discussed with the parties.

I remain seized as required.

Ottawa, this 2nd day of May, 2016

M. Brian Keller, arbitrator