

IN THE MATTER OF AN ARBITRATION UNDER
THE *LABOUR RELATIONS CODE*, R.S.B.C. 1996 c. 244

BETWEEN:

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

AND:

BRITISH COLUMBIA TEACHERS' FEDERATION

(Provincial Grievance – Return to Work Agreement)

ARBITRATOR:

Christopher Sullivan

COUNSEL:

Michael Hancock
and David Woolias
for BCPSEA

Carmella Allevato
for BCTF

DATE AND PLACE OF HEARING:

July 20 and 21, 2016
Vancouver, BC

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This case concerns a provincial grievance filed regarding the application and interpretation of a Return to Work (RTW) Agreement negotiated between the parties at the conclusion of collective bargaining for their 2014-2019 collective agreement. The specific matter in dispute relates to the matter of pay for teachers on Friday, September 19, 2014. The RTW Agreement contained a provision stating: “Friday will be a paid day.”

The grievance letter dated April 23, 2015 from BCTF Representative, John Wadge, to BCPSEA Representative, Renzo Del Negro, outlines BCTF’s claim as follows:

The BCTF is pursuing a grievance at Step 3 regarding the failure of BCPSEA and school boards to comply with the September 17, 2014, back to work agreement. It is the BCTF’s position that the back to work agreement provides that Friday, September 19 will be a paid day for all BCTF members, such that a member working full time would be paid for eight days in September, 2014. BCTF members in several districts have not been paid in compliance with the back to work agreement.

The grievance applies to 15 School Districts in the Province that paid teachers for seven days in September 2014, rather than the eight days claimed, based on local collective agreement language regarding pay for partial months worked. Teachers in Districts using the “deduction” method received pay for seven days for September 2014, whilst those in Districts using the “aggregation” method, or a “best of both worlds” approach, received pay for eight days that month.

The background to the grievance may be briefly summarized as follow. Prior collective agreements had expired in June 2013, and a very difficult round of bargaining ensued that involved the commencement of job action in March 2014. Subsequent rotating strikes were implemented starting the end of May 2014, and at the about the

same time the government imposed a series of partial and full lockouts, and various forms of strike and lockout continued.

All secondary teachers were scheduled to be locked out on June 25 and 26, 2014, and both elementary and secondary teachers were scheduled to be locked out on June 27. However, on June 17, 2014 teachers began a full strike, which continued until the end of the school year.

The first day of school the following school year was scheduled as Tuesday, September 2, 2014, but the strike continued past that date. Collective bargaining continued and, in the early morning of September 16, 2014, the parties reached an agreement in principle with the assistance of acclaimed mediator Vince Ready.

On Wednesday September 17, 2014 the parties met and put the terms of their agreement in principle into a written Memorandum of Agreement. In the afternoon of September 17, the parties commenced discussions regarding an agreement to return to work, and such an agreement was eventually reached in the early morning of September 18, 2014. The text of the RTW Agreement provided as follows:

The following is subject to the union's ratification of the tentative agreement:

1. The parties agree on the language setting out changes to the collective agreement, as per the attached memorandum.
2. Friday will be a paid day. There will be no pickets, and there will be no interference with the return to work of support staff. Teachers will attend their worksite at their own discretion.
3. Monday will be a full day or partial day of student instruction, depending on the decision of the local board and superintendent. In extraordinary and limited circumstances, individual teachers may be permitted at the employer's discretion to work less than a full day, even

where the school is working a full day. It is understood, in this context, that time constraints will result in varying levels of difficulty without constituting extraordinary circumstances.

In a province-wide vote on September 18, 2014, teachers voted in favour of ratifying the proposed collective agreement, and picket lines were removed. Teachers returned to work on Friday, September 19, 2014; students commenced school on Monday, September 22.

All teachers in the Province are paid under what is effectively an income averaging arrangement. If a teacher works every working day in a particular month they receive 10% of their annual salary regardless of how many working days happen to be in the month. Put differently, even though some months have more working days than others, a teacher who works every working day in the year will receive the same amount of pay every month. In addition, local collective agreements in the Province contain different daily rates of pay for teachers calculated in a number of ways, such as, for example, 1/189, 1/194, 1/195, or 1/200 of annual salary.

Due to the number of instructional days in September 2014, teachers in School Districts using the “deduction” method for calculating pay for a partial month worked, received pay for seven days rather than the eight received by those that used the “aggregation” method, or a “best of both worlds” approach.

The deduction method of calculation involves starting with the teacher’s ordinary pay for the month (i.e. 10% of their annual salary) and then deducting the number of days the teacher did not work in the month multiplied by the teacher’s daily rate of pay. Daily rate of pay is annual salary divided by the total number of working days in the year. Put another way, under the deduction method a teacher who works a partial month is paid

their regular monthly salary less their daily pay multiplied by the number of days without pay in the month.

An example of local collective agreement language containing the deduction method is the School District No. 10 (Arrows Lakes) agreement, which provides: “For any working day in a month that a teacher is not entitled to pay, the board shall deduct 1/200th of annual salary.”

The aggregation method for calculating partial months worked involves multiplying the number of days the teacher actually worked in the month by the teacher’s daily rate of pay. An example of a local collective agreement with best of both worlds language that includes both the deduction and aggregation methods is the one covering School District No. 36 (Surrey), which states:

Where an employee is to be paid for less than a full month’s salary, the employee shall be paid the greater of:

- i. One-twentieth (1/20) of the regular monthly salary for each day taught, or
- ii. The full regular monthly salary less 1/20 of the salary for each day not taught.

For months that have greater than average number of working days in them, the aggregation method results in the employee receiving more pay in that month. For months that have fewer than the average number of the working days in them, the deduction method results in the employee receiving more pay in that month. Both methods result in the employee receiving the same amount of pay for months that have precisely the average number of working days in them.

September 2014 was a month that contained more than the average number of working days in it, as it had 21 instructional days.

The parties led evidence regarding the discussions that led to the RTW Agreement and their respective understanding of the meaning of the language; specifically, what was understood regarding the term “Friday will be a paid day”. Both parties called their chief bargaining spokespersons as witnesses to testify what was said and understood.

During their RTW Agreement discussions in the afternoon of Wednesday September 17 the BCTF initially sought pay for the entire 5-day week from September 15 to September 19. BCPSEA resisted paying for any period of time that teachers were engaged in a strike with its pickets up, and offered to pay for two days – Thursday and Friday – on the condition that the strike be suspended those days pending ratification of the tentative agreement. The BCTF, which was unable to bring down the pickets and stop its strike until after the ratification vote, lowered its demand to four days. The parties reached an impasse on this matter before agreeing to the wording: “Friday will be a paid day.”

The evidence indicates the RTW Agreement language at issue was initially drafted by BCPSEA chief spokesperson, Peter Cameron, and sent to BCTF chief spokesperson, Jim Iker, at 11:46pm on Wednesday, September 17, 2014. The first draft of the RTW Agreement differed slightly from the end product in regards to the third sentence of point 2, but such difference is irrelevant to the present grievance.

SUMMARY OF ARGUMENTS

On behalf of the BCTF, Ms. Allevato argues that the “Friday will be a paid day” provision in the RTW Agreement was intended to constitute a benefit for teachers that they would not have received but for the RTW Agreement. The parties called it a “paid” day as opposed to a “work” day purposely to reflect it being additional pay. The RTW

Agreement commitment was unrelated to the operation of local collective agreement language, and this is consistent with Mr. Iker's evidence to the effect discussions at the bargaining table were centred on an amount of additional pay for teachers in recognition of the work they generally perform on their own time, particularly in relation to preparing for a new school year. Counsel adds funding for the RTW Agreement Friday pay commitment was not a real issue in the circumstances given School Districts saved money during the labour dispute.

Ms. Allevato asserts the nature and purpose of the pay benefit in question should be broadly construed and granted, and any exceptions to it require clear language, which does not exist in the present case. The RTW Agreement pay for Friday provision constituted an important promise that was of particular significance at the time it was agreed upon. Pay for the Friday in question was meant to be a real and tangible benefit, which it is not if the Employer's interpretation is accepted.

Ms. Allevato argues the *contra proferentum* principle of construction applies, which essentially calls for an ambiguous document to be interpreted against the party responsible for drafting the terms. BCPSEA's negotiator, Mr. Cameron, drafted the document and, to the extent there is an ambiguity in the language, it should be construed against the interests Mr. Cameron represented.

In support of its arguments the BCTF cites the following authorities: *British Columbia Public School Employers' Association v. British Columbia Teachers' Federation (Job Share Grievance)*, [2014] BCCAAA No. 76 (Brown); *BC Ferry Services Inc. v. British Columbia Ferry and Maine Workers' Union (Family Day Grievance)*, [2014] BCCAAA No. 157 (Sullivan); *Catalyst Paper (Elk Falls Mill) v. Communications, Energy and Paperworkers Union of Canada, Local 1123*, May 3, 2012 (Hall); *Catalyst Paper Corporation v. Communications, Energy and Paperworkers Union of Canada, Local 1123 (LTD Benefits Grievance)*, February 20, 2013 (Pekeles); Brown &

Beatty, *Canadian Labour Arbitration*, paras 4:2120 and 4:2300; and *Collective Agreement Arbitration in Canada*, 5th ed. (LexisNexis, R. Snyder).

On behalf of the BCPSEA Mr. Hancock argues the parties intended to interpret the RTW Agreement term, “Friday will be a paid day” in accordance with local collective agreement language on the precise topic of pay for partial months worked. Counsel notes the parties did not agree on eight days pay for September or otherwise commit to an additional day’s pay for September, but rather they specifically identified pay for Friday September 19, and the fact is all teachers were paid for that day.

Mr. Hancock asserts BCTF’s interpretation is without foundation based on the language of the RTW Agreement itself, and it also results in a *de facto* signing bonus being paid to teachers that was vehemently opposed by BCPSEA at the bargaining table at the time in question. Counsel states there is no evidence of mutual intention supporting BCTF’s interpretation of the disputed language, particularly as BCPSEA was consistent and adamant in its resolve that no signing bonus would be paid under any circumstance, since such had been rejected at the end of the previous school year.

Mr. Hancock states BCTF’s claim in its grievance would cost the government in excess of \$2 million, and that BCTF requires clear language to show the parties intended this significant financial benefit would be paid to teachers.

In support of its arguments BCPSEA cites the following authorities: *Catalyst Paper Corp. v. Communication, Energy and Paperworkers Union of Canada, TYEE Local 686*, [2010] BCCAAA No. 49 (Germaine); *Health Employers Association of BC v. Hospital Employees Union*, [2002] BCCAAA No. 130 (Gordon); *BCPSEA v. BCTF (Rondinelli Grievance)*, [2008] BCCAAA No. 192 (Sullivan); *Columbia Hydro Contractors v. Construction and Specialized Workers Union, Local 1611*, [2013] BCCAAA No. 183 (Sullivan); *Hertz Canada Ltd v. Canadian Office and Professional*

Employees' Union, Local 378, [2012] BCCAAA No. 143 (Hall); *City of Vancouver v. Vancouver Fire Fighters Union, Local 18*, [2016] BCCAAA No. 21 (McPhillips); *Canadian Newspaper Co. (Times Colonist) v. Victoria Mailers' Union, Local 121*, [1984] BCCAAA No. 219 (Hope); *BC Sugar Refining Co. v. Retail Wholesale Union, Local 517*, [1987] BCCAAA No. 165 (Bird); *Manulife Bank of Canada v. Conlin*, [1996] 3 SCR 415; and *Saam Smit Westminster v. Canadian Merchant Service Guild*, [2016] BCCAAA No. 59 (McConchie).

DECISION

The present case involves an interpretative dispute regarding the meaning of the parties' commitment in their RTW Agreement that "Friday (September 19, 2014) will be a paid day." The narrow issue in dispute is whether that term was intended to be read in the context of local collective agreement language regarding pay for partial months worked, or whether that particular pay obligation/entitlement arises independently from the RTW Agreement.

To be clear, there is no serious dispute each of the School Districts involved in this grievance properly treated September 19, 2014 as a paid day under their respective local collective agreements insofar as it was not treated as a day "that a teacher is not entitled to pay". Every District deducted a day's pay for each of the working days when teachers were on strike in September 2014 – that is, September 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17, and 18 – but no other days. None of the School Districts involved in this case deducted a day's pay for Friday, September 19 and, as such, all teachers covered by the grievance received pay in respect that specific day.

Teachers covered by the grievance received exactly the amount of pay proportional to the days they worked in the 2014/2015 school year, including being paid on the assumption they worked Friday, September 19, 2014. If September 19 had not been agreed to be a "paid day" in the RTW Agreement, pay for the month under

agreements with deduction language would have paid 1/10 annual salary less 14 unpaid days rather than 1/10 annual salary less 13 unpaid days as actually occurred. Put differently, absent the RTW Agreement provision that “Friday will be a paid day”, teachers would have been deducted for 14 days in the School Districts covered by the grievance.

As noted above, the narrow issue in dispute between the parties is whether the RTW Agreement pay commitment was intended by the parties to constitute a pay obligation over and above what is provided for in the parties’ local collective agreements. On this matter, the preponderance of evidence regarding mutuality of the parties’ intentions supports a conclusion that the RTW Agreement did not establish a separate and independent basis upon which teachers would be paid for Friday September 19, 2014.

The RTW Agreement included significant provisions that paved the way for employees going back to work and schools reopening. However, the RTW Agreement does not create a separate payment obligation for the Friday over and above what the local agreements provide for based on the “Friday will be a paid day” commitment in question. There is no evidence to justify departure from a straightforward interpretation of the plain and ordinary meaning of the provision in question.

The primary objective for an adjudicator seeking to interpret the meaning of a contract is to determine the parties’ mutual intentions primarily from the written document they have themselves crafted to reflect their consensus. This basic statement was comprehensively elaborated upon by Arbitrator Germaine in *Catalyst Paper Corporation (Port Alberni Division) and Communication, Energy and Paperworkers; Union of Canada, TYEE Local 686*, as follows, with many citations omitted:

31 The applicable law is uncontroversial. Both parties direct me to this recent statement of the relevant principles in *Government of BC*, supra, at pages 6 to 8:

It is well established that an arbitration board must attempt to determine what the mutual intention of the parties was when they arrived at their agreement: ... It is certainly not the role of an arbitration board to impose its own sense of fairness or equity into a particular dispute. The overriding object of the exercise is to determine what the parties meant when they made their part.

Many authorities have discussed the “rules of construction” which are to be applied in interpreting the terms of an agreement... The most frequently cited list is the one set out by Arbitrator Bird in *Pacific Press*:

1. The object of interpretation is to discover the mutual intention of the parties.
2. The primary resource for an interpretation is the collective agreement.
3. Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself), is only helpful when it reveals the mutual intention.
4. Extrinsic evidence may clarify but not contradict the collective agreement.
5. A very important promise is likely to be clearly and unequivocally expressed.
6. In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.
7. All clauses and words in a collective agreement should be given meaning, if possible.
8. Where an agreement uses different words one presumes that the parties intended different meanings.

9. Ordinarily words in a collective agreement should be given their plain meaning.
10. Parties are presumed to know about relevant jurisprudence.

...[I]t is the actual language of the collective agreement which is the primary source for determining the mutual intention of the parties.... As well, the words of the parties must be given their plain and ordinary meaning and an arbitration board must presume the parties intended to mean what they said....

Moreover, it is not only the words of a particular phrase but also the context of the sentence, the section and the collective agreement as a whole which must be considered.... as a result, interpretation of any specific provision in a collective agreement must be consistent with the remainder of the collective agreement. In other words, there are occasions where the wording of a particular section might be interpreted more than one way but when the words at issue are considered in the overall context of the entire provision in which it exists or of the remainder of the contract, one particular meaning may be more likely to reflect the actual intentions of the negotiators.

Finally, it is appropriate for arbitrators to consider extrinsic evidence (bargaining history or past practice) which sheds light on the mutual intention of the parties....

32 Accepting the direction provided by these principles, I appreciate that an arbitrator has no authority to alter, revise or amend the terms of the collective agreement. The Union emphasized this fundamental concern out of a concern that its interpretation would be viewed as unduly burdensome to the Company or unfairly advantageous to the employees on PMS during the curtailment. I need not recite the authorities in this regard; I accept that it is the parties' mutual intention which is sought and which is determinative, even if conditions may have changed since the applicable terms were negotiated and even if another meaning might seem more suitable in the new conditions. An arbitrator's "own sense of fairness or equity", to borrow the words of Arbitrator McPhillips, does not inform the search for mutual intention, and it would be wrong to disguise the application of some abstract standard by couching it in terms of "the parties' reasonable expectations"...

Application of these interpretive principles to the present case support a conclusion the grievance cannot succeed. The term “Friday will be a paid day” in the RTW Agreement is to be read in the context of the local collective agreement language that specifically addresses the matter of partial months worked by teachers. There is no basis upon which to conclude the parties intended their RTW Agreement commitment to be read outside of the local collective agreement language and that, effectively, a signing bonus had been agreed upon.

The plain and ordinary meaning of the words: “Friday will be a paid day” is that Friday is a day in respect of which all teachers in the Province shall receive pay, and this was complied with. The fact that teachers in the Districts being grieved received less pay for the month of September 2014 than their counterparts in other Districts is a result of the different local collective agreement language, which were not amended or otherwise supplemented by the RTW Agreement.

The recorded comments of the respective chief negotiators at the bargaining table on Wednesday September 17, 2014 show BCTF sought to obtain additional pay for its members – first for the full 5 days of that week, and then 4 days – and BCPSEA was adamant in its response that the time for a signing bonus had long passed as one had been offered in June, and would not be considered at this time. At the bargaining table Mr. Cameron, on behalf of BCPSEA, clearly articulated it was not prepared to pay for any time that the pickets were up, and it even offered to pay for the Thursday and Friday of the week in question if the pickets were down for both of those days, notwithstanding the outcome of the ratification vote. At no time did BCPSEA ever resile from its expressed position that it would not pay for teachers on strike; it remained steadfast in its position that teachers would not be paid for days that BCTF pickets remained up.

While the BCTF may have intended the RTW Agreement language to have provided a benefit separate from that contained in the local collective agreements, with the practical consequence of receiving an additional paid day for its members while they were on strike, there is no sign this was mutually intended. Such an interpretation regarding the term, “Friday will be a paid day” was never expressed to the BCPSEA, or otherwise discussed between the parties. Further, such an outcome does not accord with the relevant wording of the RTW Agreement, wherein the parties did not just agree to one additional day of pay for September, but that it was tied to a particular day, Friday, being paid, and the evidence is clear that all teachers received pay for the Friday September 19 in question.

One would reasonably conclude that if the parties intended the RTW Agreement to establish a separate right to pay for Friday September 19, 2014, there would have been some discussion about the actual pay entitlements to teachers. Of particular note the parties did not discuss or even apparently contemplate the calculation of a paid day outside of the terms of local collective agreements, and how this would differ between teachers in the Province due to the various methods of calculating daily pay, such as, for example, 1/189 or 1/200 annual salary. There is no evidence the parties discussed any matters that indicate they intended the RTW Agreement to include an independent basis for claiming pay for the Friday in question. Matters such as teachers being paid twice for Friday September 19, or total teacher pay for the month of September were not raised at all, and all this suggests the parties intended the pay provisions of the local collective agreements to apply.

Contrary to the suggestion in the grievance letter quoted at the outset of this award, there was no commitment that all full time teachers “would be paid eight days in September”. If the parties had mutually intended such a result they would likely have described their consensus on such clear terms.

Of significance is the fact that if the RTW Agreement constitutes a separate and independent basis for the payment for the Friday in question, then teachers in Districts that use the aggregation method or best of both worlds approach should have received nine days pay for September 2014, and this did not occur, and was not grieved.

With a view to addressing this inconsistency the BCTF's present argument is that the parties first intended teachers to be paid under the RTW Agreement for Friday September 19, and then secondly receive their pay benefit for that same day in accordance with their local collective agreement. That way of calculation ensures all teachers end up being paid for eight days in September 2014. Suffice it to observe this method for calculating pay was not something raised or discussed by the parties and one would reasonably conclude it would have been had the parties intended the RTW Agreement to constitute a basis for paying Friday September 19, 2014 independent of local collective agreement language on the matter.

There is no basis upon which to find that the parties intended a pay arrangement whereby any teacher would essentially get paid twice for Friday September 19, much less only those covered by a particular type of local agreement pay calculation method language. Nor is there any basis or indication that the agreed upon language invites a two-part process wherein teachers are first paid the Friday pursuant to the RTW Agreement, and then secondly receive pay for the day pursuant to their local collective agreements. Again, if the intention was to pay all teachers for eight days in September the parties could easily have said as much. The fact they did not shows they likely did not have that mutual intention.

Viewed in context, the BCTF now seeks to effectively achieve in pay what BCPSEA had previously offered in exchange for pickets being taken down on the Thursday and Friday of the week in question. To now find the parties mutually intended the same result without those pickets down would be wholly inconsistent with what was

expressed between the parties at the bargaining table. There was no discussion whatsoever, much less any acknowledgement or agreement to the effect teachers would effectively receive two bonus days' pay, which is the real life outcome of the present grievance. The BCTF did not succeed in obtaining 5, 4 or 2 days pay to prepare for the return of students. It obtained one day of pay and is not now entitled to claim the benefit of a deal that was not made.

The *contra proferentem* rule of contract interpretation serves of no assistance in relation to determining the meaning of the written words in dispute. The present case is not one where the side that drafted the language was not willing to engage in further discussion or change the words. Both parties were sophisticated in drafting language and some language changes were in fact made to the RTW Agreement after some back and forth. In the circumstances nothing turns on who wrote the initial draft.

The grievance is therefore denied. It is so awarded.



Christopher Sullivan