GRIEVANCE & ARBITRATION UPDATE

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

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Does the Employer or the Union Determine the Full Time Equivalent of Union Leave Under Article G.6?

School District No. 6 (Rocky Mountain)/BCPSEA v. Rocky Mountain Teachers' Association/BCTF

Issue

Was the school district required to pay an employee on union leave according to the full time equivalent (FTE) of her union position, or was it correct in paying her at the lower pre-leave FTE rate?

Significance

In those school districts where the entirety of Article G.6 of the Provincial Collective Agreement has been adopted into the local agreement, this decision clarifies that the employee on a union leave is entitled under Articles G.6.1.a and b to be paid for the FTE of their union position, not their pre-leave district position.

Many districts have not adopted G.6 in its entirety. In those districts, the extent to which this decision is applicable will depend on local language and practice.

The arbitrator's discussion of the provincial grievance timeline language is also instructive for school districts wishing to raise timeliness objections in the future.

Facts

The grievor was elected as President of the Golden Teachers' Association on May 25, 2015. She applied for leave to take that full-time position. Her leave was granted the same day. At the time of her request for leave the grievor was employed by the school district teaching music and drama for a total FTE of 0.8199.

The union claimed the grievor should be paid 1.0 FTE while the school district took the position that, while on leave, the grievor was only entitled to be paid the 0.8199 FTE she was earning at the time of applying for the leave.

The parties agreed that, in other situations, sometimes the union provides only a part time union position (e.g., 0.5 FTE). In those circumstances, historically, the school district has released the teacher and paid for the union work (which is reimbursed by the union) but has also provided part time work for the teacher to make up the amount worked prior to the leave.

The issue at hand has not been addressed at arbitration previously, because in many situations a teacher takes union leave from a 1.0 FTE position.

Relevant Collective Agreement Language

Article G.6 of the Provincial Collective Agreement states:

1. a. Any union member shall be entitled to a leave of absence with pay as authorized by the local union or BCTF and shall be deemed to be in the full employ of the board.

   b. "Full employ" means the employer will continue to pay the full salary, benefits, pension contributions and all other contributions they would receive as if they were not on leave. In addition, the member shall continue to be entitled to all benefits and rights under the Collective Agreement, at the cost of the employer where such costs are identified by the Collective Agreement.

2. The local or BCTF shall reimburse the board for 100 per cent of such salary, benefits, pension contributions and all other contribution costs upon receipt of a monthly statement.

3. Where a TTOC replaces the member on union leave, the reimbursement costs paid by the local or the BCTF shall be the salary amount paid to the TTOC.

4. Where a non-certified replacement is used, the reimbursement costs paid by the local or the BCTF shall be the salary amount paid to the replacement.

5. Where teacher representatives are requested by the board to meet on union-management matters during instructional time, representative(s) shall be released from all duties with no loss of pay.
   …

Article A.6 provides:

…

2. Step One
   …
   b. The grievance must be raised within thirty (30) working days of the alleged violation, or within thirty (30) working days of the party becoming reasonably aware of the alleged violation.
   …

Decision

In reaching his decision on the merits, Arbitrator Somjen based his interpretation of the language on the circumstances of the case and the wording and purpose of G.6, with a particular focus on the words of G.6.1.a — "shall be entitled to a leave of absence with pay as authorized by the local union…" — and the meaning of the term "full employ" as defined in G.6.1.b.

The arbitrator determined that, because the level of work is not always 1.0 FTE for the Union position, even for a leave from a 1.0 FTE school district position, the more likely interpretation of G.6.1.a is that the union authorizes the level of pay for the union position.

He also concluded that the appropriate contextual interpretation of the term "full employ" in G.6.1.b is that the employee on leave is "still treated as fully employed by the Board and not partly employed by the Board and partly employed by the Union", which would have been the result if the school district's position was accepted.

Consequently, Article G.6 allows the union to authorize the level of pay (and work) for the position, and the school district pays the corresponding amount with reimbursement from the union. The words "full employ" demonstrates the parties' mutual intention that the school district will continue to be the

employer for all purposes. While there may be some hidden costs to the school district, the majority of costs, if not all, are covered by the union.

In the result, the school district was required to make the grievor whole for salary and benefits to 1.0 FTE for the two years of her leave, with those amounts to be reimbursed by the union once paid.

The school district also raised a preliminary objection about timeliness. While Arbitrator Somjen ruled in favour of the union on the issue, he clarified that the Provincial Collective Agreement's use of the word "must" in reference to the timeline for filing a grievance rendered the language strongly prescriptive. He also stated that "time is often of the essence" in labour relations, and where there is a reasonably long time frame for a grievance (such as the 30 days in this school district's agreement) then it should generally be filed within that time.

BCPSEA Reference No. A-11-2018

Labour Relations Board Denies Union Appeal on Pension Costs for Union Leave

School District No. 44 (North Vancouver)/BCPSEA v. North Vancouver Teachers' Association/BCTF

Issue

We previously reported in *Grievance & Arbitration Update No. 2018-02* about Arbitrator Korbin's arbitration decision that the union was obligated to pay a union officer's pension costs during their union or union officer leave. The union appealed her decision to the Labour Relations Board (LRB), arguing that the award was inconsistent with the principles of the *Labour Relations Code* and the union was denied a fair hearing.

Decision

The LRB dismissed the union's appeal on all grounds but one. In her original decision, Arbitrator Korbin had dismissed the union's second grievance regarding the return of a union officer to their position after union leave, because it was not filed in accordance with the timelines in the collective agreement. The LRB found that, while the arbitrator demonstrated a genuine effort to consider the facts and interpret the collective agreement in her decision, she had not clearly distinguished another arbitration award on the same issue or stated why that decision was clearly wrong. The LRB referred that part of the award back to the arbitrator to provide further analysis.

Additional Reasons Pending

The union has not filed an application to review the LRB's decision. BCPSEA will keep you updated on Arbitrator Korbin's further reasons on the timeliness issue.

BCPSEA Reference No. LB-02-2018
Original Decision: BCPSEA Reference No. A-08-2018

School District Entitled to Change Mileage Policy Despite "Present Conditions" Clause

School District No. 39 (Vancouver) v. CUPE Local 15

Issue
Did the school district's changes to its mileage reimbursement policy violate the collective agreement?

Significance
No. The school district's new policy was reasonable and did not violate a "present conditions" clause in the collective agreement. "Present conditions" provisions are relatively common and state that any existing benefits not set out in the collective agreement will be continued during the term of the agreement. The decision reinforces the rights of school districts to make changes to existing policies and confirms that a union may not expand its rights under the collective agreement through a broad interpretation of a "present conditions" clause.

Facts
As a result of budgetary pressures, the school district changed its longstanding Mileage Reimbursement Policy. One of the changes to the policy negatively affected the district's itinerant Information Technology Technicians (ITTs) who work at locations throughout the district to install, maintain and support computer equipment and systems and are required to hold a driver's license. Instead of being paid $3.23 per km in mileage reimbursement under the former policy, the ITTs were paid $1.11 per km under the new policy.

Prior to changing the policy, the district consulted with stakeholders and provided the union with the opportunity to provide input but the union did not contest the changes, provide input during the consultation process, or raise the issue in bargaining which was occurring around the same time.

Relevant Collective Agreement Language
Article 11.J of the collective agreement provides:

> Any conditions and welfare benefits, or other conditions of employment at present in force which are not specifically mentioned in this Agreement and are not contrary to its intention, shall continue in full force and effect for the duration of this Agreement.

Article 11.P, however, mentioned the district's mileage policy as follows:

> Employees in schools who do not normally claim mileage under the standard policy of the Board may claim and shall be paid from school funds at the casual rate in effect and set by the Finance Division if, as and when required by the Principal to use the employee's vehicle on school business.
>
> Mileage claims by persons in schools are arranged between the employee and the Principal. Mileage claims which are paid by central office are required to be submitted at the end of the month during which the mileage costs were accrued through the appropriate department head to the Accounts Department.

Decision
The union argued that because the mileage benefit was not specifically mentioned in the collective agreement, the district was obliged to continue it as a working condition or condition of employment under Article 11.J. Arbitrator Peltz disagreed. He found that mileage is specifically mentioned in Article 11.P of the collective agreement and, therefore, could not be protected from unilateral change under Article 11.J. While the reference to mileage in that provision merely references the existence of a

standard policy and addresses employees who do not fall under the standard policy, Arbitrator Peltz nonetheless found that the thrust of the provision is that the parties recognize mileage reimbursement as a matter of Board policy, and that the rate is set by the Board's Finance Division, not by collective bargaining.

Arbitrator Peltz also rejected the union's argument that it was arbitrary and discriminatory to treat the ITTs different from other trades who are required to travel among different locations in the district. The employee groups had different collective agreements with distinguishable obligations on the part of the employer. Specifically, the trades agreement stated that "responsibility for the transportation of the individual and tools from one job site to another is that of the Employee." There was no similar language in the CUPE agreement. Further, both the rates for the ITTs and trades employees exceed the Canada Revenue Agency rates for compensation for costs incurred due to business use of a personal vehicle, which was $0.54 per km at the time of the hearing. While reducing the ITT mileage rate resulted in a loss of income, Arbitrator Peltz found that that the negative impact was not unfair or inequitable. The district had legitimate concerns about administrative efficiency under the former policy and engaged in a consultative process before making its decision to change the policy to bring it in line with express collective agreement obligations, which differed among employee groups.

BCPSEA Reference No. A-16-2018

Three-day Suspension Imposed for Hostile Remarks About Manager

School District No. 39 (Vancouver) v. International Union of Operating Engineers, Local No. 963

Issue
Did the district have just cause to impose a ten-day suspension for an employee's hostile and threatening remarks about his manager?

Significance
Justifiable discipline is highly dependent on the facts of each case. In this case, the grievor's very long service, clean record, and the arbitrator's assessment that his remarks were not serious threats warranted a three-day suspension.

Facts
The grievor and his supervisor had a telephone conversation about the grievor's return to work from medical leave. The district's standard procedure was to schedule an employee's outstanding vacation immediately upon a return to leave. The grievor requested to start his vacation one week later. When his supervisor denied his request and told the grievor he had already discussed the issue with the employee's manager, the grievor became agitated and told his supervisor:

- "He [the manager] is going to regret this for the rest of his life; he will remember me for this."
- "He [the manager] is training you to be like him and treat me this way."
- "This is just another way for you guys to screw me up."

In the investigation meeting about his comments, the grievor denied making these remarks or otherwise being argumentative.

Decision
Arbitrator Ready did not find there was just cause for a 10-day suspension, considering the whole context of the relevant conversation. In particular, Arbitrator Ready distinguished the remarks made by the grievor from other arbitration decisions in which significant discipline was imposed for threats, considering that the grievor's remarks:

- did not imply physical violence
- were not made directly to the manager, but through an intermediary
- were a "flare up" in a single conversation rather than the culmination of several encounters
- occurred in the context of a non-violent history between the grievor and the manager (i.e., cross-complaints of harassment).

Considering the grievor's 40 years of service, no previous discipline, and lack of premeditation in his conduct, the arbitrator found that a lesser three-day suspension was appropriate. Arbitrator Ready also dismissed the union's grievance that the grievor was entitled to overtime on the days of his suspension when overtime was worked outside of regular working days.

BCPSEA Reference No. A-17-2018

Vacation Earned From Service Does Not Accrue During Leaves of Absence

School District No. 35 (Langley) v. CUPE Local 1260

Issue
Was it discriminatory or a violation of the collective agreement for the district not to credit employees with vacation entitlement during an unpaid medical or long-term disability leave?

Significance
No. Vacation under the collective agreement was intended to be a benefit earned through the performance of work, and so it was not a violation of the agreement or discriminatory not to accrue it for employees on leave.

Facts and Relevant Collective Agreement Language
The parties' collective agreement provides that all employees shall receive an annual vacation with pay as follows:

> Article 15
> b. Vacation Entitlement
>
> > ii. Employees shall be entitled to receive their annual vacation in the year following the year in which it was earned. Employees, during the first (1st) calendar year of service, shall accumulate one (1) working day for each completed month of employment or major fraction thereof, to a maximum of ten (10) working days. …

The collective agreement was silent on proration of vacation entitlement, whether paid or unpaid, and the district did not have a policy addressing accrual of vacation during leaves. In practice, employees accumulated paid annual vacation during a variety of paid and unpaid leaves, including leave for union duties, WCB leave, paid sick leave, and parental leave. However, the district did not accrue vacation entitlement for employees on unpaid medical, long-term disability, unpaid general or self-funded leaves. There was no relevant bargaining history evidence. The district had applied the practice of calculating vacation during leaves since the language was first bargained, but there was no evidence that the union was aware of the practice.

Decision
Arbitral law recognizes two basic ways that an employee gains vacation entitlement — through their status as an employee or as a benefit earned through actual work performance. The key issue to be decided by Arbitrator Sullivan was which way of accruing vacation the parties intended in their collective agreement.

Without relevant bargaining evidence, Arbitrator Sullivan relied on the language chosen by the parties to determine their mutual intention. He found that the language used in Article 15(b)(ii) demonstrated that the parties intended annual vacation is a benefit that is "earned" and not granted simply on the basis of an employee's employment status. For the same reason, it was not discriminatory for the district not to provide accumulated paid vacation during the grievors' leaves since the benefit is earned based on work performance, and not their status as employees.

BCPSEA Reference No. A-18-2018

Questions

If you would like a copy of any of the decisions cited above, please contact Nancy Hill (604 730 4517; nancyh@bcpsea.bc.ca) and quote the BCPSEA Reference No. found at the end of each case summary.