IN THE MATTER OF AN ARBITRATION, PURSUANT TO THE
B.C. LABOUR RELATIONS CODE, RSBC 1996 c. 244 (the "Code")

BETWEEN:

THE BOARD OF SCHOOL TRUSTEES OF SCHOOL DISTRICT NO. 43 (COQUITLAM)

(the "Employer")

AND:

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 561

(the "Union")

Re: Cheryl Dionisio Pay for Full Day Leave

A W A R D

Arbitrator:	Gabriel Somjen, QC
For the Employer:	David Woolias
For the Union:	Shona Moore, QC
Date of Hearing:	May 14, 2019
Date of Award:	May 22, 2019

This case arises from the grievance of Cheryl Dionisio (the "Grievor") regarding payment for a leave of absence. She took the day off, in accordance with Article 6.3 D of the collective agreement, to attend her daughter's graduation from SFU on October 4, 2018.

Her regular workday was 8 hours but she was paid 5.5 hours for that day. The remaining 2.5 hours were considered an unpaid leave by the Employer.

The Grievor works at School District 43 as a Continuing Education staff member. She made an application for a paid leave for one day pursuant to Article 6.3 D which states:

1. An employee, with benefits, shall be entitled to leave of absence with pay for up to one (1) day per year for the following:

    i. To attend an employee's own graduation or a graduation ceremony of an employee's child at high school or a recognized post-secondary educational institute. This leave shall be provided when the ceremony is held during the employee's regular hours of work. …

The normal workday for the Grievor was 8:30am to 4:30pm.

After she took the leave she was questioned by Brenda Niehaus, Manager of Human Resources, as to the time of the ceremony and when it ended. The information provided by the Grievor was that the ceremony started at 9:45am, ended at 1:00pm and she stayed for a reception after the ceremony and to have a family photo taken. The whole process ended at 2:30pm.

Based on this information, Ms. Niehaus approved pay until 2:00pm based on the ceremony ending at 1:00pm and allowing for one hour travel time to return to work. The Grievor was given 2.5 hours unpaid leave of absence for the remainder of that day.

I heard evidence about the past practice of the parties in respect of leaves for graduation ceremonies as well as the bargaining history of the clause in question.

Although the Employer argued that extrinsic evidence should not be considered in interpreting this clause and it should be interpreted on the basis of its plain meaning, I find that the language relating

to this clause, particularly the words "… up to…" is capable of two interpretations. The Union's interpretation would be that the discretion as to how much time the employee needs is up to the employee and if they ask for a full day they are entitled to it provided they meet the criteria for receiving the benefit in the first place.

On the other hand, the Employer argues that the phrase "… up to…" means that the Employer can take into consideration how much time is actually needed to attend the ceremony and if it is less than a day then the leave may be for less than a full day.

Past Practise

Because the language is clearly capable of either interpretation, I considered extrinsic evidence. The evidence showed that in many cases over the course of approximately 10 years of the Employer's records employees seeking this leave of absence were granted a full day. However, on some occasions the employee was granted only a partial day because the employee only asked for a partial day but in other cases it was not clear from the evidence whether the pay was for a partial day because the Employer rejected a claim for a full day.

In other cases, the employee requested a full day's pay and was only paid for a partial day.

The evidence showed that prior to 2017 the Employer frequently paid a full day's pay and their policy was to be "generous" in considering the requests for leave.

Ms. Niehaus became the HR Manager responsible for considering graduation ceremony leaves in late spring 2018. It was uncontroverted that the Employer's policy with respect to granting these leaves changed somewhat around that time although there is no written record of a change in policy.

Coincidentally, the Grievor worked as a human resources clerk with respect to requests for graduation ceremony leaves for 3 years beginning in 2012. During that time her experience was that when an employee asked for a full day they were paid for the full day leave. She was somewhat surprised and upset when her request for leave in 2018 was only paid in part.

With respect to the evidence of past practice, I found it helpful from a historical point of view but it does not clearly indicate the meaning of the words… “up to one day…”. In many cases the full day was paid but, in some cases only part of the day was paid. Based on that evidence I cannot conclude that the practise was consistent; therefore, I cannot base the interpretation on past practise.

Bargaining History

The parties also reviewed the history of negotiating this clause. It is well established that negotiating history can sometimes be helpful in interpreting the proper meaning of words that are not entirely clear on their face. In this case, the bargaining history was helpful in determining the intent of the parties and the meaning of the language.

In 1992 the parties entered into a collective agreement which, for the first time, provided this type of leave.

The Union's original proposal read: "An employee shall be entitled to leave of absence with pay for one day for the following: [a] to attend the graduation ceremony of an employee's child…".

If the Union had obtained this language then it clearly would succeed in the current grievance. However, the Employer counter proposed language on the same day which introduced the new words “… up to…” and that the leave would be per calendar year. The Employer's counterproposal also added the words “… at a high school or recognized post secondary education institution when the ceremony is held during the employee's regular hours of work”.

In the Employer's bargaining notes for that day there is a reference to the Employer's counterproposal: “Up to one day per calendar year and Identify the type of school and only for the ceremony but not to get their hair done.”

The Employer's counterproposal was accepted, and the language took its present form with some minor changes.

What is apparent from this exchange is that the Union originally asked for language that clearly would have entitled the employee to a day's pay in the circumstances but the ultimate language incorporated the concept of "… up to one day…" at the Employer's request.

I conclude that the Employer's interpretation of "…up to one day…" in Article 6.3 D is correct to the extent that, in certain circumstances, the Employer might only be obliged to pay for a part of the day even where the employee meets all the other criteria for obtaining the leave: [that the purpose is to attend a graduation ceremony; that the ceremony is held during the employee's regular hours of work; that it is a high school or recognized post secondary educational institute; and that the employee is entitled to benefits].

For example, if the employee's workday is 8:30am - 4:30pm and the ceremony starts at 4:00pm it may be appropriate to pay only for part of the day.

Estoppel

However, that does not end the matter. The Union made an alternative argument based on estoppel. The Union argued that because of a long policy of applying the words of this clause in a certain manner the Employer is now estopped from changing that practise. The Union argued that, even if the Employer may in some cases pay less than a full day, the way the Employer has administered this clause has created an estoppel.

I agree with the Employer that a long standing practise in and of itself does not create an estoppel: see *Fording Coal Ltd. (Re)*, [2003] B.C.L.R.B.D. No. 2, *Vancouver (City) (Re),* [2008] B.C.L.R.B.D. No. 12 and *NCR Canada Ltd.* [2014] B.C.L.R.B.D. No. 188 in which the BC Labour Relations Board stated at para. 52:

> Here, the Employer does not allege the Arbitrator failed to apply the established test for estoppel, which the arbitrator summarized correctly in the Award at page 23 ("an existing legal relationship, an unequivocal representation by the first party, reliance on that representation by the second party and detriment to the second party if the first party is allowed to change its position"). …

To establish an estoppel there must be a representation and detrimental reliance on it.

In this case there was more than a practise of usually allowing a full day to attend a graduation ceremony. The Employer had a policy of being "generous" in interpreting the words "…to attend…a ceremony". The Union and the Grievor had seen this for many years and reasonably relied on the generous interpretation. This case was the first instance where the Union learned of a more stringent interpretation and the Grievor was told of a new policy regarding such leaves, but that it was not written. The Grievor said her view might have been different had she known of a written change in policy. Also, she did not learn of the more restrictive policy of the Employer until after she had attended the ceremony

The reason that the Employer denied the last 2.5 hours of the day in the case of the Grievor was because she could have returned to work by 2:00pm that day based on the end time of the ceremony and allowing some travel time back to work. However, the Employer also conceded that the paid leave is not strictly limited to the formal ceremony. For example, if an employee had to leave work to go home in order to change clothing and then travel to the ceremony that would be reasonably associated with the ceremony in order to allow payment for that time.

The Employer also recognizes that travel to and from the ceremony would be reasonably associated with the ceremony. These concessions, made by the Employer, clearly indicate that the leave is not limited strictly to the graduation ceremony but includes other necessary or appropriate arrangements in order to attend the ceremony. Travel arrangements, changing clothing and other such activities are included in the concept of attending a graduation ceremony.

The Grievor attended the ceremony which ended at 1:00pm but stayed for a reception and photo shoot which took until 2:30pm. These activities, while not strictly circumscribed by the time of the graduation ceremony, could reasonably be considered part of "attending the graduation ceremony". For an employee to leave right after the ceremony, not celebrate the event with other students and parents and not have photos to commemorate the event would seem like an unnecessary truncation of such a happy event.

Also, if the employee had to change to attend the ceremony the employee might want to change into work clothes to return to work. In the circumstances of this case it would be contrary to a

“generous” reading of the clause to require the employee to return to work for 2:00pm on October 4.

Indeed, the Employer argued that it did not necessarily expect the Grievor to return to work but merely that she was not entitled to pay for the remaining 2.5 hours of the day. This is a rather restrictive interpretation of “… to attend … a graduation ceremony …”.

The Union and the Grievor were reasonably entitled to rely on the past practise of the Employer and the policy of the Employer to take a more generous interpretation of the clause, until the Employer decided to change that policy.

All elements of an estoppel exist in this case. The Employer had a practise and a policy of interpreting the clause in a generous manner, for many years, through several rounds of bargaining. The Grievor had seen how this generous interpretation had been applied. The Union and the Grievor could have changed their conduct had they been notified of a change in this policy.

The Employer is, therefore, estopped from changing its policy regarding this clause without some notice to the Union that it intended to change from a generous interpretation to a more restrictive one. The notice in this case should be until the end of the current collective agreement on June 30, 2019.

Therefore, I conclude that the grievance should succeed, not because the Union is correct in its interpretation that in every case the employee should be granted a full day but because the Employer's interpretation of the clause in the Grievor’s circumstances was restrictive and the Employer was estopped from changing its interpretation without notice. For future cases the Employer should maintain its previous policy of being generous in interpreting this clause at least until the expiry of the collective agreement.

For the above reasons, the grievance succeeds, and the Employer is required to pay the Grievor 2.5 hours pay.

Dated this 22nd day of May 2019 in Vancouver, British Columbia.

" *G. Somjen, QC* "

Gabriel Somjen, Arbitrator