Arbitration decision clarifies vacation entitlements for part-time and casual employees – Hospital's method correct

Date : March 12, 2020

A recent arbitration centred on the proper calculation of vacation entitlements for part-time and casual employees under the CUPE Central hospital collective agreement. The resulting decision will be very positive for many employers in the hospital sector.

In *Royal Ottawa Health Care Group and Canadian Union of Public Employees, Local 942* (January, 2020), the issue was whether part-time and casual employees were being provided the proper amount of time off as vacation under Article 17.01 of the CUPE Central hospital collective agreement. Emond Harnden's Porter Heffernan and Sébastien Huard were successful in demonstrating to the Board of Arbitration (the "Board") that the Hospital was correct in its approach and interpretation of the relevant collective agreement provisions.

By way of background, the collective agreement between the Royal Ottawa Health Care Group (the "Hospital") and the Canadian Union of Public Employees (the "Union") applicable to part-time and casual employees set out the vacation entitlement. It provided for vacation pay as a percentage of hours worked "plus the equivalent time off". The applicable percentage would increase with an employee's continuous hours of service.

In the normal course, the application of the vacation pay entitlement for part-time and casual employees was relatively uncontroversial. Such employees would be provided vacation pay based on the applicable percentage of hours worked. Regular part-time employees would also be provided corresponding vacation time off from their regularly scheduled shifts. Since casual employees controlled when they worked (subject only to their minimum availability for work), and generally worked less frequently, they did not have scheduled vacation time.

This seemingly straight forward approach was challenged by the Union in an individual grievance and a policy grievance. With regard to the individual grievance, the Grievor was a part-time orderly that often worked shifts beyond the level of his regular part-time assignment. Although he was provided the appropriate amount of vacation pay, he was not provided any scheduled vacation time beyond what was applicable to his regular work schedule. The Union claimed this was a violation of the collective agreement's requirement to provide "the equivalent time off". In the Union's view, the term "equivalent time off" meant that the time off granted to a part-time employee was equivalent to the hours worked, multiplied by the applicable percentage, expressed as a number of hours off. This argument was reiterated in the case of casual employees in the policy grievance.

The Union also argued that by not scheduling the additional vacation time part-time and casual employees were potentially being deprived of the benefit of the collective agreement provision that

provided for a premium wage in the event that an employee was required to work during their scheduled vacation.

The Hospital defended its approach to vacation entitlements by arguing that the phrase “equivalent time off” referred to time off equivalent to that which would be received by a full-time employee at the same service level. The basis for this position was that the origins of the part-time vacation entitlement was the 1990 *Participating Hospitals and CUPE* interest award (referred to as the “Gorsky award”). The Gorsky award stated that “part-time employees are to receive “time off”, as well as pay, according to our formulation described above for full-time employees.” Ever since the Gorsky award, the ratio of part-time vacation pay and leave has corresponded to the equivalent in the collective agreement for full-time employees.

The Hospital asserted that for regular part-time employees, any hours worked beyond their regular assignment was wholly voluntary and within their control. The choice to work beyond the regularly scheduled work days did not impact the vacation time that the Hospital was required to schedule. The Hospital submitted that as a result, the Grievor could use as many non-regularly scheduled work days as he chose as time off for the days he volunteered to work beyond his regular shift.

For casual employees, the Hospital asserted that they could choose how much or how little they want to work, subject to the minimum availability requirement (at least one shift every three months). By being able to choose when they work, casual employees could allocate any of the days when they chose not to work as their vacation time. The Hospital further argued that to start scheduling vacation time for casual employees (and for part-time employees beyond their regular shift) would be a “huge, unnecessary, impractical administrative burden”.

The Board agreed with the Hospital’s position. Arbitrator Albertyn stated that it was clear that the phrase “equivalent time off” referred to the time off received by a full-time employee as set forth in the Gorsky award. The following example was used to illustrate:

> For the reasons advanced by the Employer, the proper comparison for equivalency is between the full-timer with the same service as the part-timer. So, 8 days a year time off per year for a .4 FTE (2 days a week) part-time employee is the same as 4 weeks off for the full-timer working 5 days a week. That is the correct proration, done by comparing the part-timer to the full-timer when they have the same service, because each then has 4 weeks a year when they are not required to work. The full-time employee is paid during those 4 weeks of vacation; the part-time employee is paid for their vacation time off through in lieu percentage payments on the hours they work.

The decision went on to note that the Union was essentially arguing that the Grievor should have the time off for the extra shifts applied within the Grievor’s regular schedule. The Board’s decision noted that in practice this would distort the equivalency with full-time employees of the same

service required by the collective agreement. The Union's interpretation could in some cases result in a part-time employee getting more scheduled vacation than a full-time employee with the same service. Arbitrator Albertyn discussed the effect of the Grievor working additional shifts and stated:

> His additional hours of work beyond his regular schedule entitle him to the accumulation of hours for the purposes of seniority and service, they entitle him to additional vacation pay, but the equivalent time off is that which pertains to his level of service.

The Board of Arbitration also rejected the Union's argument relating to the potential to be deprived of the premium for working during a scheduled vacation under Article 17.02. The decision stated that the premium applied only to the scheduled vacation. If the Grievor was requested by the Hospital to return to work during his scheduled vacation, and he agreed, only then he would be entitled to the premium.

The Board proceeded to dismiss the grievances noting that the Hospital was correct in its method of applying the collective agreement vacation provisions.

In our view

This decision provides a reasonable and workable interpretation of the CUPE Central hospital collective agreement vacation provisions and should prove to be useful for a number of employers in the hospital sector.

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