IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

DRESDEN INDUSTRIAL

- The Employer

-and-

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175

- The Union

AND IN THE MATTER OF the grievances of Michelle Simpson, Ethel Bowers and Sandra Couture regarding holiday pay

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

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| Landon P. Young | - Counsel |
| Craig Arnold | - General Manager |
| Pat Coles | - Human Resources Manager |

On behalf of the Union:

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| Larry J. Fisher | - Advocate |
| Susan Bayne | - Union Representative |
| Dennis Fraser | - Chief Steward |
| Michelle Simpson | - Grievor |
| Ethel Bowers | - Grievor |
| Sandra Couture | - Grievor |

Hearing held April 10, May 22 and June 5, 2003, in Chatham, Ontario.

# AWARD

## I. INTRODUCTION

These three grievances concern holiday pay. The matter at issue is the number of hours work required the day before and the day after the holiday to entitle the grievors to holiday pay.

In addition, the Employer asserted that the signed collective agreement did not record the true agreement between the parties. The Employer sought to have the agreement rectified.

## II. THE EVIDENCE

The Employer, Dresden Industrial, operates an auto parts plant in Ridgetown, Ontario. The auto industry is highly integrated and operates on a just-in-time basis for the manufacture and delivery of parts. As parts made at the Employer's facility are promptly shipped to an assembly plant, the Employer needs to maintain production at the expected level. Therefore employee attendance at work for the entire shift is important.

All the auto assembly plants to which the Employer ships parts are closed during the Christmas season. The Employer similarly closes its facility and the parties' collective agreement provides for five paid holidays during that shutdown. The agreement also provides that an employee must work both the day before and the day after the holiday in order to collect holiday pay. Those days are commonly referred to as "qualifying days". Language regarding work on qualifying days is common in collective agreements and is intended to discourage employees from taking additional time off to lengthen the holiday.

The three grievors each worked only part of the shift before or after the Christmas holiday and received no holiday pay. They grieved this denial of holiday pay.

The first grievor, Michelle Simpson, worked the day shift December 20, 2002, her last shift before the holiday. She arrived at work about one and one-half hours late. She said she knew when she arrived at work that she would lose all five days holiday pay.

During the shift December 20 the Employer reviewed its inventory position, decided it did not need to continue full production for the entire shift, and sought volunteers to leave early. Ms Simpson inquired whether she could improve her holiday pay situation by staying the whole shift and was advised that she could not. She left work early.

The other two grievors, Ethel Bowers and Sandra Couture, worked the afternoon shift January 2, 2003, their first shift after the holiday. There was a snow storm that evening and, as they both lived a considerable distance from work, they were concerned about driving home in a snow storm late at night. During their first break about 6:00 pm they checked the weather and decided they wished to leave early.

Employees wishing to leave early require permission from the Employer. The two grievors spoke to their lead hand, Phil Johnson. Mr. Johnson did not have authority to grant their request but Mr. Johnson spoke to the shift supervisor, Tom Giglione, who dealt with this matter. At this point there were conflicting versions in the evidence as a number of employees testified about the January 2 conversations.

Mr. Johnson testified that Mr. Giglione said he would not give permission to leave early and if employees left early: (1) they would lose eight hours holiday pay; (2) it would go against their attendance; and, (3) there could be other negative consequences. Mr. Johnson reported back to several employees who had inquired about leaving early. Mr. Johnson said he told the employees that their absence would be unexcused, they would lose eight hours holiday pay, and it would be marked against their attendance. Mr. Johnson testified at the hearing that he felt

the employees had permission to leave, but the absence was unexcused and it would go against their attendance.

Grievor Bowers testified Mr. Johnson reported that employees who left early would lose eight hours pay, the absence would go against their attendance record and they would get a verbal warning. She said she felt she had permission to leave, but that it was unexcused. Ms Bowers said she was also advised by another lead hand, Trish Dierickse, that if she left early she would lose eight hours pay, it would go on her attendance record and she would get a verbal warning.

Grievor Couture testified Mr. Johnson reported that Mr. Giglione said employees could leave but that he would not sign the excuse note, the employees would lose eight hours pay, the employees would have their absence noted on their attendance records and they would get a verbal warning. She, too, testified she felt she had permission to leave. Ms Couture also said she was advised by Ms Dierickse that Mr. Giglione would not sign the excuse note, that employees could leave but if she left it would go on her attendance record and she would get a verbal warning.

Dennis Clark is another employee. He said he heard Mr. Johnson report back to a group of employees including Ms Bowers and Ms Couture. Mr. Clark said he understood that if he left early he would lose eight hours, it would go on his attendance record and there would be discipline. Mr. Clark promptly went to speak to Mr. Giglione and said Mr. Giglione told him he would lose all his holiday pay and that it would go on his attendance record.

Mr. Giglione testified that when Mr. Johnson inquired about employees leaving early he told Mr. Johnson that he would not give permission. He said they discussed what would happen if employees left without permission and Mr. Giglione testified he told Mr. Johnson that

employees would possibly forfeit their holiday pay and it would have negative consequences against their attendance. He said he gave the same message to Trish Dierickse and Sara Burdick, two other lead hands, when they inquired on the same topic. He said he told both Ms Dierickse and Ms Burdick that employees could possibly lose holiday pay and it would have negative consequences against their attendance. Mr. Giglione also said he spoke to Dennis Clark and another employee who came directly to him and gave them the same message.

Trish Dierickse testified that she asked Mr. Giglione about employees leaving early and was told that if an employee wanted to go home early it would be unexcused, there would be a loss of holiday pay and, according to their attendance record, disciplinary action would be taken. She denied that she told any employees that they would lose eight hours holiday pay.

Sara Burdick testified Mr. Giglione told her if employees left early it would be unexcused and they would lose all their holiday pay and be disciplined according to their attendance record.

The Employer has an "employee request" form which employees wishing to leave early are required to complete and submit to a supervisor. After getting the oral report from Mr. Johnson, both Ms Bowers and Ms Couture completed the forms and submitted them to Mr. Giglione through Mr. Johnson. The printed form has a place for the supervisor to mark either "excused" or "unexcused." Mr. Giglione did not approve their requests to leave early; he marked both forms as unexcused when he received them around 8:00 pm. Both Ms Bowers and Ms Couture left at the meal break which began at 8:00 pm without inquiring as to whether Mr. Giglione had approved their requests.

I note that the witnesses agreed any employee who desired to leave work early could always leave in the sense that the Employer would make no effort to physically stop the employee. Some employees regarded this as "having permission to leave", but acknowledged that their

absence would be "unexcused."

*Language of the agreement:*

The relevant provision of the collective agreement states an employee must work "the last regular work day prior to" and "the first full scheduled work shift following" the holiday. The Employer said the parties had agreed to other language during the negotiations and asked that I rectify the agreement to reflect the true agreement between the parties. I turn now to the evidence of negotiations.

Pat Coles was a member of the Employer negotiating team along with Rod Nunn, the Chief Executive Officer, who acted as the Employer's chief negotiator. Ms Coles said she took notes of the negotiations but Mr. Nunn did not.

This is the first collective agreement between the parties for the Ridgetown plant. However the parties had a collective bargaining relationship and a collective agreement covering another similar plant in St. Mary's. Ms Coles said that the negotiations proceeded swiftly as the parties modelled this collective agreement on their St. Mary's agreement. The negotiations were concluded in three or four sessions.

Ms Coles acknowledged that she did not remember the negotiations on this particular issue and that she relied on her notes. She said that on September 20, 2000, the Employer had proposed that the relevant language read "the last scheduled full work shift prior to the holiday and the first scheduled full work shift following the holiday". Her copy of the proposal indicates "agree" in her hand writing and there is a tick mark, or check mark, beside it which she said meant the Union had agreed to that proposal.

The parties signed a draft agreement January 16, 2001. The language in the printed version prepared for signing had been "the last regular work day prior to the holiday and the first regular work day following the holiday". A. G. Sherman, the chief negotiator for the Union, then crossed out the second "regular" and "day" and substituted in his hand writing "full scheduled" and "shift" so that it read "the last regular work day prior to the holiday and the first *full scheduled* work *shift* following the holiday" (my emphasis). The changes were initialed by Mr. Nunn for the Employer and by Mr. Sherman for the Union.

January 29, 2001, Ms Coles sent a fax to Mr. Sherman and indicated she thought the language of this provision in the draft agreement which the Union had submitted to its members for ratification was incorrect. That language was the same as in the agreement initialled January 16. Ms Coles suggested in her fax that the language should read ". . . the last scheduled full work shift prior to the holiday and the first scheduled full work shift following the holiday". She said she received no reply and sent another fax February 12, 2001. That second fax raised a concern about shift premiums but did not specifically mention the issue before me. The matter was not pursued.

The parties met in St. Mary's October 30, 2001, and signed both collective agreements. This Ridgetown agreement contained the language in Article 18.04 as amended by Mr. Sherman, initialled by both Mr. Nunn and Mr. Sherman January 16, and ratified by the members of the bargaining unit. Ms Coles said there was no time that day to read this agreement in its entirety as the parties were signing two agreements. However she agreed that several changes were made to the agreement which had been prepared for signature that day - a change in, for example, Article 18.03 and another change in Article 18.06. The parties signed the collective agreement.

A. G. Sherman was a Union Representative and chief negotiator for the Union. He, too, relied

on the documentation, rather than his memory. He testified generally about his practice in negotiations. He said his practice was to sign, or initial, agreements as they were reached. In particular he said the changes in the article made January 16, 2001, were in his hand writing and were initialed by the parties and that meant to him that this was the language which the parties had agreed upon.

Mr. Sherman said he did not think he had ever agreed to the Employer's proposed language for Article 18.04 dated September 20, 2000.

## III. PROVISIONS OF THE COLLECTIVE AGREEMENT

The relevant provision of the parties' 2000-2004 collective agreement is as follows:

> ARTICLE 18 - HOURS OF WORK, OVERTIME AND HOLIDAYS
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> 18.03 Holidays
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> . . .
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> 18.04 In order to qualify for holiday pay, an employee must have worked the last regular work day prior to the holiday and the first full scheduled work shift following the holiday except where absence is occasioned by bona fide personal sickness or accident (the onus of proof as to such sickness or accident being upon the employee) or where permission has been obtained for one or both of such days. . . .

## IV. UNION SUBMISSIONS

The Union said that Ms Simpson was late for work December 20 but there was not much work and she was invited to leave early. She was not required to work the full shift before the holiday, unlike the full shift after the holiday. As she worked the last day before the holiday and the full shift after, she qualified for holiday pay under the agreement.

As for the other two grievors, Ms Bowers and Ms Couture had permission to leave work. They understood that the absence would be unexcused but they understood they had permission. Under a reasonable interpretation of Article 18.04 they qualified for holiday pay.

In the alternative, if Ms Bowers and Ms Couture did not have permission to leave, it was unreasonable to withhold all five days holiday pay. Both Ms Bowers and Ms Couture were told they would lose eight hours pay. They received that same message from two lead hands, Mr. Johnson and Ms Dierickse, and it was unreasonable for the Employer to deduct five days pay after advising the grievors they would lose only one day.

In the further alternative the Union said the grievors were entitled to claim under the *Employment Standards Act*. The Union said that the holiday pay provisions in the agreement and those in the *Act* must be compared and if the holiday pay provisions in the *Act* are superior for an employee, then that employee is entitled to the benefit of those provisions. The Union said the provisions of the *Act* were better for each of the grievors and asked that I direct the Employer to pay the grievors the holiday pay to which they were entitled under the *Act* and that I remain seised.

In reply to the Employer's submissions on rectification of the collective agreement, the Union said the Employer had not proven there was a different agreement. The evidence did not show the parties had negotiated the language the Employer claimed. The two chief negotiators had, however, expressly agreed upon and initialled the language now found in the printed agreement. In order to rectify the agreement, the Union said I had to be certain that the agreed language was other than in the agreement and that was not the case here.

The Union referred to the following authorities: *United Food and Commercial Workers International Union, Local 175 and Zehrs Markets* (May 16, 2002), unreported (Howe);

*Service Employees' International Union, Local 210 and Alexandra Marine & General Hospital* [2001] O.L.A.A. No. 165 (Dissanayake); *Montebello Packaging, a Division of Great Pacific Enterprises Inc. and United Steelworkers of America, Local 8952* [1999] O.L.A.A. No. 434 (Bendel); *Re Corporation of the City of Timmins and Canadian Union of Public Employees, Local 210* (1997), 66 L.A.C. (4th) 391 (R. M. Brown); *Re Board of Education for City of York and Canadian Union of Public Employees, Local 1749-B* (1989), 9 L.A.C. (4th) 282 (H. D. Brown); *Re National Auto Radiator Manufacturing Co. Ltd. and Canadian Automobile Workers, Local 195* (1990), 13 L.A.C. (4th) 393 (Watters); *Re College Printers Ltd. and Vancouver Printing Pressmen, Assistants and Offset Workers Union, Local 25* (1997), 67 L.A.C. (4th) 167 (Albertini); and *Canadian Labour Arbitration,* Brown D.J.M., and D.M. Beatty, 3rd edition, looseleaf (Aurora, Ont.: Canada Law Book, 1997 - ).

## V. EMPLOYER SUBMISSIONS

As for the issue of rectification of the agreement, the Employer said there was a mistake in the agreement. The parties' real agreement differed from that now found in the written collective agreement and for me to fail to correct the collective agreement would allow the Union to take advantage of the mistake. The precise form of the prior agreement was known. The rationale for the agreement the Employer said had been reached was clear - the parties had agreed that an employee must work both the full shift before and the full shift after the holiday. In addition there was evidence explaining why the Employer had not caught the mistake and it was equitable to correct the agreement now.

Regardless of whether the agreement was rectified, the Employer said the result would be the same. It had no effect on Ms Bowers and Ms Couture as the language already required them to work the full shift after the holiday.

The only impact was on Ms Simpson and she did not comply with the language of the agreement as it was printed. Ms Simpson had been an hour and a half late for work and she did not have a valid reason. There was work to be done and she had missed that work. It did not matter that she was later offered and took the opportunity to leave early after the Employer decided to limit production. Ms Simpson did not meet the requirement of the agreement.

As for Ms Bowers and Ms Couture, who claimed to have been told that they would lose only eight hours pay, it was clear that if they left early there would be negative consequences, they would lose some holiday pay, it would go on their attendance record and there might be other discipline. It was also clear that Mr. Giglione did not tell anyone that they would lose only eight hours pay and all employees understood that the decision on the issue of permission to leave work early was one for a supervisor, not a lead hand.

The Employer acknowledged there was a semantic debate about "permission," "excused," and "authorized" but said that all employees, including both Ms Bowers and Ms Couture, knew there would be negative consequences from leaving work early, and that they were required to complete an employee request form and have any absence "excused" by the supervisor. The grievors did not speak to Mr. Giglione, did not wait to get their forms back before leaving, and did not have their absence excused by a supervisor.

As for the *Employment Standards Act,* the grievors were entitled to nothing under the *Act* as they failed to work all of the last shift before and all of the first shift after the holiday. The Employer also disagreed with the Union as to the proper comparison to be made between the *Act* and the collective agreement in determining whether to apply the provisions of the *Act*.

The Employer referred to the following cases: *Public Service Alliance of Canada v. NAV Canada* [2002] O.J. No. 1435, 59 O.R. (3d) 284 (C.A.); *Re C.W. Carry Ltd. and United*

*Steelworkers of America, Local 5575* (1994), 42 L.A.C. (4th) 237 (Power); *Re C. R. Snelgrove Co. and United Electrical, Radio & Machine Workers, Local 514* (1986), 24 L.A.C. (3d) 127 (Solomatenko); *Re Magnetic Metals Ltd. and United Automobile Workers, Local 397* (1986), 25 L.A.C. (3d) 93 (Rayner); *Re Patons and Baldwins (Canada) Ltd. and Amalgamated Clothing & Textile Workers Union, Local 836* (1980), 25 L.A.C. (2d) 332 (Brunner); *Re Dorr-Oliver Canada Ltd. and United Steelworkers, Local 4697* (1986), 23 L.A.C. (3d) 92 (Weatherill); *Re Queen's University and Fraser et al.* (1985), 51 O.R. (2d) 140 (Divisional Court); and *Re Dempster's Bread and Teamsters, Local 647* (2000), 90 L.A.C. (4th) 397 (Barrett).

## VI. CONCLUSIONS

*Rectification of the collective agreement*

The primary question confronting me on the issue of rectification is this:

> *Is the parties' actual agreement that which was signed in October 2001, which reproduced the relevant language as revised by hand and initialled by the two chief negotiators in January of that year, or is the parties' actual agreement the September 2000 proposal from the Employer?*

The *Labour Relations Act, 1995* supports the written collective agreement. All collective agreements must be in writing. There is an assumption made by persons involved in labour relations that a written and signed collective agreement reflects the true agreement of the parties. However, there are occasions when the written collective agreement contains a mistake and in that situation it is now clear that an arbitrator can correct that mistake so that the written document truly reflects the agreement of the parties. The onus of proof is on the party which asserts that the written agreement is incorrect and the requirements to be met are

described in the recent Court of Appeal decision, *Public Service Alliance of Canada v. NAV Canada, supra.* The first requirement is that the written agreement does not reflect the agreement the parties reached in the negotiations.

In order to rectify this agreement I must first find that the parties' agreement was as the Employer suggested, rather than as it is now written. For the Employer, Ms Coles had no memory of the negotiations on this point although her notes say the parties agreed on the Employer's proposed language. For the Union, Mr. Sherman doubted that he had agreed to that language. More importantly, however, the parties clearly addressed this issue some four months later when on January 16 they altered the printed text of Article 18.04 by hand and initialled that revised language. The hand written alteration made only to the second part of the text, the work required after the holiday, is similar to, but not identical to, that which the Employer had proposed - the Employer had proposed "first scheduled full work shift following the holiday" and Mr. Sherman wrote by hand "first full scheduled work shift following the holiday." Nevertheless, the two chief negotiators then initialled that language with the changes. As noted, the changes were made months after Ms Coles' notes suggested the parties had agreed to the Employer's proposal.

Parties sometimes reach tentative agreement on language and later revise it. I am uncertain as to precisely what happened in these negotiations as neither witness had any memory of the discussions on this issue. However, I conclude from the hand written and initialled changes that the parties directed their minds to this issue on January 16, 2001, and that they reached a different agreement than that which the Employer said they had reached earlier. Therefore I am not persuaded that the written and signed collective agreement contains a mistake in Article 18.04. The request for rectification is denied.

*The grievances*

As for the first grievance, Ms Simpson worked only part of the last day prior to the holiday. The collective agreement requires an employee to work "the last regular work day prior to the holiday."

I have considered whether the difference in language in Article 18.04 between the "last regular work day" before and the "first full scheduled work shift" after the holiday meant that the parties contemplated employees who worked for only part of the day before the holiday should receive holiday pay, whereas an employee was required to work the full shift after the holiday. However, that does not seem to be the normal meaning of this language. If the parties intended to require an employee to work only part of the day before the holiday I would have expected them to have said so more clearly.

Nor can I can see any policy rational for interpreting this language as requiring work for only part of the day before the holiday. The clear intention behind qualifying day provisions is to ensure that employees do not extend the holiday by taking additional time off work the day before, or the day after, the holiday. I read this provision as requiring an employee to work the full day before the holiday. An employee who arrives an hour and a half late for the start of work runs afoul of this provision as she does not work the full day. I find that Ms Simpson did not qualify for the holiday pay.

Turning to the other two grievances, Ms Bowers and Ms Couture required "permission" to leave work early because their absences were not for sickness nor for accident. They did not have permission in the usual manner as the request forms were promptly marked "unexcused." Moreover, they were previously told that they were not being excused, that if they left early they would lose some holiday pay and that there might be a reprimand or other discipline. I cannot find that an employee who is told of those consequences of an early departure from work has "permission" to be absent, as that term is used in Article 18.04. While there was a

suggestion that all employees can always leave early, in the sense that the Employer will take no steps to stop them, and thus they have "permission," I cannot accept that such an interpretation of "permission" was intended in this agreement. Under the language of the agreement I find that neither Ms Bowers nor Ms Couture had permission to be absent and therefore neither grievor qualified for the holiday pay.

In the alternative, the Union suggested that it was unreasonable to deduct five days holiday pay from Ms Bowers and Ms Couture when the lead hands told them they would lose only eight hours. But the parties agreed in their collective agreement that the employee must meet the qualifications in order to receive holiday pay. That result may appear unreasonable to the Union but my role is to interpret and enforce the collective agreement. There is no plausible interpretation of the language of this agreement which leads me to any conclusion other than the loss of all five days holiday pay.

As for the Union's other alternative argument that the grievors were entitled to holiday pay under the *Employment Standards Act,* I note that Section 26 (2) of the *Act* reads as follows:

> The employee has no entitlement under subsection (1) [which deals with payment of holiday pay] if he or she fails, without reasonable cause, to work all of his or her last regularly scheduled day of work before the public holiday or all of his or her first regularly scheduled day of work after the public holiday.

Ms Simpson did not work all of her last regularly scheduled day before the holiday and neither Ms Bowers nor Ms Couture worked all of her first day after the holiday. Ms Simpson offered no explanation for arriving late the day before the holiday and I conclude she did not have "reasonable cause" to miss the first hour and a half of work. As for Ms Bowers and Ms Couture, simply desiring to drive home early so as to avoid the possibility of driving home later in the evening in more difficult driving conditions does not amount to reasonable cause for missing work. As each of the three grievors failed to work all of the day before or the day after the holiday and each did so "without reasonable cause," I find none of the three grievors

entitled to holiday pay under the *Act.* As none of the grievors qualified for holiday pay under the *Act,* I do not need to determine whether the grievors are entitled to claim under the provisions of the *Act,* rather than the provisions of the collective agreement.

The three grievances are dismissed.

Dated at London, Ontario this 3rd day of July, 2003.

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Howard Snow, Arbitrator