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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE ESSEX COUNTY ROMAN CATHOLIC SEPARATE SCHOOL BOARD
- The Employer

-and-

SERVICE EMPLOYEES' UNION, LOCAL 210
- The Union

AND IN THE MATTER OF a grievance of Rick Gillett regarding compassionate leave

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Brian P. Nolan	- Counsel
Daniel J. Solan	- Manager, Human Resources
Linda Martin	- Manager, Payroll

On behalf of the Union:

E. R. Durham	- Union Representative
Ray Drouillard	- Vice President, Local 210
Ted Ouellette	- Chief Steward
Rick Gillett	- Grievor

Hearing held July 7, 1997 in Windsor, Ontario.

AWARD

I. INTRODUCTION

Rick Gillett grieved the number of days of compassionate leave which he received when his step-father died. The primary difference between the parties was whether the "five (5) days" of leave under this collective agreement were calendar days or working days. A second difference was whether the grievor's step-father qualified as a "parent".

II. THE EVIDENCE

The grievor, a 34 year old electrician, worked Monday to Friday from 8:00 am until 4:30 pm. He was paid only for the days on which he worked.

The grievor's step-father died on Friday May 9. The grievor attended the wake held on the weekend and attended the funeral on Monday. On Monday he sought compassionate leave which is "five (5) days" for the death of a "parent". His supervisor told the grievor that his leave entitlement was for five (5) calendar days and that he thus had to return to work on Thursday May 15. The grievor advised his supervisor that he understood he was entitled to five (5) working days of leave. The grievor's supervisor repeated that the grievor was only entitled to five calendar days of leave and that he had to be back at work on Thursday. The grievor did return on Thursday. The grievor did not make a request for an extension of his leave nor did he request any other form of leave for the Thursday and Friday.

While it was unclear how the grievor described his step-father to his supervisor, in the grievance the reference is to "my Father". In his testimony he referred to his step-father as his "father".

I heard few details of the grievor's relationship with his step-father. It was clear that he had

been close to this man who had been his step-father for 27 years, that is from the time the grievor was 7 years old. However the grievor had not been adopted by his step-father.

The grievor was actively involved in making the funeral arrangements, including the selection of the casket. He was involved throughout the week with his three sisters and brother in providing support to his mother who was the executor of his step-father's will. In addition he was involved in contacting insurance companies and making other arrangements for the purposes of administering his step-father's estate. He was involved in scheduling meetings for May 15 and 16 for those purposes but, with the exception of one evening meeting, he was unable to attend those meetings. Had the grievor not been at work on the Thursday and Friday he would have been involved in matters which arose as a result of his step-father's death.

The parties led evidence regarding the history of the compassionate leave provision in the collective agreement. The compassionate leave language in this agreement is new, having been introduced in the current 1997 agreement. The grievor's request was the first request for compassionate leave under this new language. In the last agreement the entitlement for leave in the event of the death of a "father" was "five (5) calendar days". In the last round of bargaining, the reference to "mother" and "father" was changed to "parent", and the word "calendar" which had appeared before the word "days" was deleted.

During the last round of bargaining one of the school trustees who was a member of the Employer negotiating team suggested to the Employer negotiators that the compassionate leave provisions in this collective agreement should be changed to those found in the collective agreement which the Employer had with the Canadian Union of Public Employees (CUPE). The Employer proposed that change to the Union and indicated to the Union in bargaining that the intent was to secure the language which existed in the CUPE agreement.

Dan Solan, the Employer's chief negotiator, indicated to the Union that the Employer did not think this change was a "take away" and said that "it may be a gain" for the Union.

At the time of the negotiations neither party knew how the compassionate leave provision in the CUPE agreement was administered. However, both sides had opinions on the matter. The Employer's chief negotiator, Dan Solan, testified that he had a personal interpretation that the provision referred to calendar days. He agreed that when this grievance arose he was not aware how the provision was administered under the CUPE agreement. As for the Union view, the Union's chief negotiator, Ray Drouillard, testified that he had a personal interpretation that the reference was to working days, a view which he shared with his caucus. During the negotiations he also was unaware how the language in the CUPE agreement was administered.

While both teams had opinions on the meaning of the provision, the meaning was not discussed in negotiations. The suggestion for the change was made by the Employer in its opening proposal. The next day the Union responded to the Employer's initial presentation and accepted the compassionate leave proposal on the condition that the Employer add what is now 17.01(f), a provision which had been in the last agreement between these parties. The Employer agreed and the matter was resolved. There was no discussion regarding how the new compassionate leave provision would operate.

Elsewhere in the agreement there are references to "days", "calendar days", "working days" and "employee's working days". Mr. Solan, the Employer's chief negotiator and Manager of Human Resources, testified that the article which provided twenty "days" sick leave per year gave employees twenty working days of sick leave.

Finally the parties agreed that the Employer had administered the CUPE agreement on

compassionate leave as though "days" meant calendar days, in the same way that it had administered the Union's earlier agreement which had used "calendar days".

III. PROVISIONS OF THE COLLECTIVE AGREEMENT

The relevant section of the parties' 1997 collective agreement follows:

ARTICLE 17 - COMPASSIONATE LEAVE

17.01 In the event of a death in the employee's family, he/she shall be entitled to the following bereavement leave with pay provided the employee attends or makes arrangements for the funeral:

(a)	spouse, parent, parent-in-law, child, child under legal guardianship, sibling	five (5) days
(b)	grandparent, grandchild, brother/sister in-law, daughter/son in-law	three (3) days
(c)	aunt, uncle, niece, nephew	one (1) day

(d) If extra time is required, employees shall make prior application to the Employer for an extension of this allotment. Each request is to be considered on its merit.

(e) Any other request for absence will be granted at the discretion of the Employer.

(f) Time for the attendance at a funeral of an employee may be granted by the Employer. In the event of a death of any employee within the bargaining unit, the Chief Steward or his delegate shall be given time off without loss of pay to attend the funeral.

In the previous collective agreement covering 1995-1996 the Article had been as follows:

ARTICLE 17 - COMPASSIONATE LEAVE

17.01 In the event of a death in an employee's family he shall be entitled to the following bereavement leave with pay provided the employee attends the funeral or makes arrangements therefore:

a) Mother, father, mother-in-law, father-in-law, brother, sister, wife, husband, daughter, son, or children under his/her legal guardianship - five (5) calendar days.

b) Grandparents, brother-in-law, sister-in-law - three (3) calendar days.

c) Aunt, uncle - two (2) calendar days.

d) Grandchildren - one (1) calendar day.

e) If extra travelling time is required, employees shall make prior application to the Employer for an extension of this allotment. Each request is to be considered on its merit.

f) Any other request for absence will be granted at the discretion of the Employer.

g) Time for the attendance at a funeral of an employee may be granted by the Employer. In the event of a death of any employee within the bargaining unit, the Chief Steward or his delegate shall be given time off without loss of pay to attend the funeral.

IV. POSITION OF THE UNION

The Union submitted that compassionate leave was intended to provide time off to gather with relatives in the event of a death. The grievor had done so, had been involved in casket selection, had attended the wake and the funeral, had planned meetings regarding insurance and the will, had offered comfort and assistance to his mother, and he had carried on with these activities on the Thursday and Friday although he was working. Considering simply the purpose of compassionate leave, the Union submitted the grievor would be entitled to leave on the disputed days.

The Union then addressed the question of whether the collective agreement provided an entitlement to a leave. The Union submitted that it did. It argued that the removal of the word "calendar" before "days" changed the meaning. As the Employer proposed the deletion of the word "calendar", any ambiguity should be resolved against the Employer as the party that had proposed the change.

In negotiations the Employer had proposed the CUPE language. The Employer's chief

negotiator had been candid in acknowledging that during negotiations he did not know what the Employer's payroll practice was regarding the CUPE language. He believed the language meant calendar days. He did not check this issue until after the grievance was filed. The fact that the Employer administered the CUPE agreement as though it read calendar days was not persuasive. Unlike this Union, CUPE had not had "calendar" days in its agreement and then agreed to delete the word "calendar".

The Union negotiators had thought the removal of "calendar" produced a change in the meaning from calendar days to working days. The Union negotiators had read the new Employer proposal in conjunction with the Article as it had existed in the previous agreement. The Union's chief negotiator and the Union caucus had believed the new wording changed the meaning from calendar days to working days.

The Union noted that when the word "days" is used in relation to sick leave elsewhere in the agreement, the meaning is working days. As both places references were to days of leave, the meaning should be the same in both places.

The Union relied on the following decision: *Re Treasury Board (National Defence) and McKay* (1986), 26 L.A.C. (3d) 187 (PSSRB, Nisbet).

As for remedy, the Union sought a declaration that its interpretation was correct. In addition the Union asked for a remedy for the grievor and suggested that the grievor receive two additional days off with pay, or that he receive two days' pay, or that he receive such other remedy as I might determine.

In its reply to the Employer's submissions, the Union addressed the Employer submission that step-father is not included in any of the categories listed in the Article. The Union noted

that the Article had previously read "mother, father" and had been changed to "parent". The Union submitted the relationship here was one of "parent". In the alternative, the Union noted that this issue had not been raised until the Employer's closing argument and submitted that issue estoppel should apply to prevent the Employer from disputing this point.

V. POSITION OF THE EMPLOYER

The Employer submitted firstly that the grievor did not have any entitlement to leave as the compassionate leave provision did not cover a step-father. To provide for a leave for the death of a step-father would require a new category of relationship to be read into the agreement. In response to my question as to what the Employer felt "parent" meant (that is was "parent" limited to biological parents, or biological and adoptive parents, etc.) the Employer declined to offer a meaning. Instead the Employer simply suggested that to include step-father required me to imply an additional category of relationship. On this issue the Employer relied on *Re Corporation of the City of Hamilton and Canadian Union of Public Employees, Local 167 et al.* (1997), 33 O.R. (3d) 5 (C.A.).

As for the meaning of "days", the Employer submitted that the ordinary meaning of day should be used. As a principle of construction, the ordinary meaning of a word should be used unless to do so would lead to an absurdity. Nothing here suggested that to interpret day in its ordinary sense would lead to an absurdity.

In the past the provision of "bereavement leave with pay" had not meant extra pay on weekends. Bereavement leave had included the weekends if weekend days had occurred in the period following the death. To accept the Union interpretation would require that I imply the word "working" and would suggest that the Union had bargained an extra benefit.

The Employer relied upon the following authorities: *Re Province of Ontario and Ontario Provincial Police Association Inc.* (1977), 16 L.A.C. (2d) 307 (Shime); *Re International Chemical Workers, Local 345, and Canadian Ohio Brass Co. Ltd.* (1970) 21 L.A.C. 429 (Weatherill); and *Re Board of Education for the City of Hamilton and Ontario Secondary School Teachers' Federation, Distract 8* (1983), 10 L.A.C. (3d) 126 (Kennedy).

As for remedy, the Employer asked that the grievance be dismissed. In the event that I found in favour of the Union interpretation, the Employer asked that I refer the matter back to the parties and remain seised.

VI. CONCLUSIONS

I deal first with the Employer submission that, as it had been the grievor's step-father who had died, the grievor had no entitlement to compassionate leave.

In dealing with this issue, it is helpful to note how it arose. In its opening statement the Union indicated that it was the grievor's step-father who had died. The Employer made no comment on this point in its opening statement but in closing argument submitted that a step-father did not qualify as a "parent" under the compassionate leave provisions.

Given the way this issue arose I will not attempt to define "parent". Instead I will simply determine whether the grievor's step-father was the grievor's "parent".

In its ordinary use I do not view "parent" as a restrictive term. If the parties had intended to place limitations on the type of parents, such as only biological parents, or only those biological parents who raise a child, or only biological parents and adoptive parents, or if the parties had intended certain exclusions, such as excluding a surrogate mother or a step-father,

they could have specified their intention. While I am mindful of the limitations on an arbitrator in implying a term into an agreement, in this instance my job is not one of implying an additional category but rather one of interpreting or applying a category (parent) which clearly already exists within the parties' collective agreement.

I turn to the relationship between the grievor and his step-father. No doubt because this matter first arose as an issue during closing argument, the evidence related to this is not as extensive as it might otherwise have been. I note that the grievor referred to his step-father as his father both in his testimony and in the grievance. From the evidence before me I conclude that grievor lived with his step-father from the age of seven until he left home, that his step-father had been a father figure to the grievor from the age of seven, and that while the grievor was growing up his step-father provided him with financial, emotional and social support of the sort which a child normally receives from a parent. As such I conclude that the grievor's step-father was within the category of "parent" as it is used in the compassionate leave article.

I move now to a consideration of the amount of leave to which the grievor was entitled. Although the grievor first sought leave on Monday May 12, the Union raised no questions as to whether the Employer could retroactively deem that the weekend had been a period of compassionate leave, or whether the Employer could compel the taking of compassionate leave on days other than those for which the leave was requested. The only issue raised by the Union was whether the entitlement under the article was a reference to "calendar" days or "working" days. I will restrict my conclusions to this issue.

The usual approach to interpretation is to search for the intention of the parties. To do this an arbitrator examines the words agreed to by the parties, as it was in those words that the parties expressed their intention. Those words should not be examined in isolation but in the

context of any other related provisions within the agreement. In this case however, Article 17 is a stand-alone provision - it is not linked in its operation to other articles. Thus there are in this instance no other articles which have to be examined in conjunction with this article in order to determine the intent of the parties.

Article 17 provides, in certain circumstances, an entitlement to "leave with pay". Employees, including the grievor, are only paid for working days. There was no suggestion that the grievor was paid, or should have been paid, for the Saturday or Sunday. As compassionate leave is "with pay", it suggests that the leave must have been intended to be taken on days on which the employee would otherwise have been entitled to pay. Paid days are "working" days, and in this grievance would exclude the Saturday and Sunday.

Another approach to interpretation is to determine whether a word has a particular meaning when used elsewhere in the agreement, as it is assumed that if the parties used the same word in two or more places they intended the same meaning. In this agreement the parties have used a variety of words in referring to periods of time. As noted earlier, the parties have used "days", "calendar days", "working days" and "employee's working days". It is not at all clear, however, that the use of these words shows a consistent purpose. I am unable to detect any clear and consistent approach to the parties' use of these words and none was suggested by the parties. However Mr. Solan, the Employer's Chief Negotiator and Manager of Human Resources, did agree that in the Sick Leave provision the reference to "days" of sick leave is a reference to "working days". While this does not clearly support a similar interpretation of the word in the compassionate leave article, it does indicate that in at least one other place in the agreement in a similar context the parties have used "days" without modification when the meaning was "working days".

Thus, looking only at the language of the agreement, there are factors which suggest that

"days" in Article 17 means working days, but the meaning is not clear. The wording is ambiguous.

The parties provided me with evidence of negotiating history. Arbitrators only rely on negotiating history when there is an ambiguity in the language of the agreement. As this language is ambiguous I have examined the evidence of negotiating history to determine what, if any, assistance it provides in determining the intention of the parties.

There are two aspects of the negotiating history to be considered in this case. The first is easily considered. Prior to this agreement the parties had used "calendar days" and changed to "days". On its face this would suggest that the parties intended to change the meaning and the only other meaning which they might have intended is "working days".

The other relevant aspect of the negotiating history is the actual discussion of this article by the parties during the negotiations. Unfortunately the evidence on this issue is of no assistance. There was no such discussion that would assist me in interpreting the words used. The Employer wished to secure language similar to that in the CUPE agreement. However the Employer did not actually know how that language was administered and did not share with the Union anything which would indicate the Employer's opinion as to the meaning of the words or the effect of the change. As for the Union, it read the proposed language and reached a view as to its meaning which was different from the Employer's. The Union, however, did not advise the Employer as to its interpretation of the meaning of the words or the effect of the change. There is thus nothing in the discussion between the parties which assists in determining any joint or shared intention of the parties.

While the Union urged me to interpret the language against the Employer as it had been proposed by the Employer, I do not think the principle of *contra proferentem* is of assistance

in this case. This principle of construction is one of many which have been suggested over the years as an approach to interpreting ambiguous language. The principle says that ambiguous language should be interpreted against the party which proposed the language. The principle may be of assistance in a situation of unequal bargaining power, or in a situation involving a standard form contract. It is commonly used, for example, in the "exemption" situations. Thus it may apply in interpreting a parking lot ticket or sign which purports to exempt the lot owner from responsibility for damage caused to a car parked on the lot. When damage occurs and an issue arises as to whether the ticket does exempt the lot owner from responsibility, the courts have sometimes applied this principle and said that, as the owner drafted the terms of the exemption, any ambiguity as to whether the exemption covered the damage then under consideration should be resolved against the party that prepared the provision. However, I see no similar policy reason to support the suggestion that this language should be interpreted against the Employer simply because the Employer made the proposal.

Finally I consider the arbitral jurisprudence. The parties each provided me with awards dealing with the interpretation of compassionate leave provisions. The reasoning from earlier awards is often helpful when the arbitrators have interpreted similar provisions.

I deal first with *Re Province of Ontario*, *supra*. This case involved a provision under which compassionate leave was discretionary. The issue before the arbitration board was whether the employer had properly exercised its discretion under a provision which allowed for "up to 3 days" leave. However, in the agreement before me there is no question of the Employer exercising a discretion. Thus the discussion about whether that employer had properly exercised its discretion by considering the employee's intervening non-working days in its award of compassionate leave is of little assistance.

I deal next with *Re Canadian Ohio Brass, supra.* Rather than the full text, only a summary appears in the Labour Arbitration Cases. The published summary of the decision supports the Employer's position. However the Employer also provided me with the full text of the award and, in my view, the full decision is of little assistance. That agreement provided for three days leave for bereavement. The arbitration board determined that those "days" were intended as calendar days for three reasons:

1. a review of the agreement indicated that "days" and "working days" were used deliberately and consistently by the parties;
2. the past practice of administering compassionate leave had been consistently one of counting calendar days as opposed to working days; and,
3. the language of the article itself indicated that "days" was intended to be calendar days.

In the case before me there is no consistent use of day and working day, there is no past practice, and the language of the article would appear to mean working days. Those differences make the *Canadian Ohio Brass* award clearly distinguishable.

The Employer also referred me to *Re Board of Education for the City of Hamilton, supra,* in which the arbitration board had to interpret the phrase "four consecutive days" for which compassionate leave was to be granted "without loss of salary". The issue was whether the consecutive days included weekend days. The arbitration board relied in part on past practice which indicated that the employer had always interpreted the phrase to include weekends. The board also accepted the following:

> . . . the authorities correctly set out the principle that the use of "days" without a modifier such as "working" indicates the intention of the parties to refer to calendar days. In the contract with which we are concerned, the use of the word "consecutive" would reinforce that view. (p. 130)

I note three differences. In the agreement before me the leave is "with pay" as opposed to "without loss of salary", the word "consecutive" is not used and these parties have elsewhere

used "days" without any modifier, such as working, in a leave situation where they meant "working days".

The Union referred me to *Re Treasury Board, supra.* In that case, the agreement provided for leave with pay but included a definition of leave as follows:

> "leave" means authorized absence from duty by an employee during his regular or normal hours of work;

The arbitration board decided that, given the definition of leave in the agreement, it made no sense to require an employee to obtain a leave for a period of time when not at work and thus at a time when such an absence from duty would not have to be authorized. The board thus interpreted days as meaning "working days" and not "calendar days". This agreement contains no similar definition.

While each of these awards is of assistance in a general way, none provide any clear guidance in interpreting the particular language used here. I am left with the words used and the fact that the parties had previously used "calendar days" and then changed it to "days". Given that:

1. the parties recently changed from "calendar days" to simply "days";
2. the leave is "with pay" as opposed to a phrase such as "without loss of pay" which could more easily encompass a period of working days together with unpaid weekend days; and,
3. the parties have used "days" in the sick leave article when the meaning is "working days";

I conclude that the "days" of leave under Article 17 are working days as opposed to calendar days.

I turn now to the matter of remedy for the grievor. The grievor was entitled to five (5)

working days compassionate leave with pay. The grievor worked two days on which he was entitled to leave with pay. In those circumstances, I direct that the Employer compensate the grievor with two days leave with pay to be taken by the grievor at a time agreed to by the grievor and the Employer.

For the above reasons the grievance is allowed. I remain seised to deal with any matter which may arise in the implementation of this award.

Dated at London, Ontario, this 26th day of July, 1997.

Howard Snow, Arbitrator