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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ST. JOSEPH'S HEALTH CENTRE
- The Employer

-and-

CANADIAN HEALTH CARE WORKERS UNION
- The Union

AND IN THE MATTER OF the grievance of Mary Larson

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Frank A. Angeletti	- Counsel
Sarah King	- Consultant, Human Resources
Brett Mason	- Consultant, Human Resources

On behalf of the Union:

Ernest D. Coetzee	- Counsel
Audrey McKay	- Union Representative
Ed Secord	- Committee Member
Mary Larson	- Grievor

Hearing held April 22, 1999 in London, Ontario

AWARD

INTRODUCTION

The grievor, Mary Larson, had been a part-time Registered Practical Nurse (RPN) with two different employers, but in the recent reorganization of London hospitals her employers merged. While the grievor continues working at two locations, she now has only one Employer.

Her statutory holiday pay grievance involves the application of the holiday pay provisions for an employee working under two collective agreements and in two locations, issues which the parties did not anticipate when negotiating the collective agreement. The parties asked that I address the issues of interpretation in a general manner leaving the specifics of the grievance for them to resolve.

THE FACTS

In 1993 the grievor began part-time work as a Registered Practical Nurse (RPN) for St. Joseph's Health Centre (the Employer) at what is now called the Mount Hope site. The London and District Service Workers' Union, Local 220 has been the bargaining agent there for the RPN's including the grievor. In 1994 the grievor began a second part-time job with Parkwood Hospital as an RPN. The London and District Service Workers' Union, Local 220 was also the bargaining agent for the RPN's here. The grievor was therefore employed by two employers in two jobs but was represented by the same union in both jobs.

During the reorganisation of the health care system in December 1997 Parkwood Hospital became part of St. Joseph's Health Centre. The grievor then had only the single Employer.

In 1998, the Canadian Health Care Workers was certified as the bargaining agent for the grievor's bargaining unit at the Parkwood Hospital site, replacing the London and District Service Workers. The grievor currently has one Employer (St. Joseph's Health Centre), two work sites (Parkwood and Mount Hope), two collective agreements and two bargaining agents (Canadian Health Care Workers and London and District Service Workers). The parties to this dispute are St. Joseph's Health Centre (the Employer) and the Canadian Health Care Workers (the Union).

As for the specific facts leading to this grievance, the grievor worked for the Employer at the Mount Hope site on December 25 and 26, 1998. While the parties agreed that the grievor qualified for holiday pay under the Parkwood collective agreement, they disagreed as to how to calculate her statutory holiday pay (there is a very small difference in the grievor's pay rate between the two collective agreements). That disagreement raised other issues of interpretation regarding holiday pay for employees who are part-time employees of the Employer in both bargaining units.

This grievance was pursued to arbitration under the parties' first collective agreement. The parties sought a resolution to the following questions regarding an employee who works part-time at two locations under different collective agreements:

1. If an employee works on a statutory holiday, which pay rate is used to calculate the employee's pay?
2. If an employee does *not* work on a statutory holiday:
    a) How does the employee qualify for statutory holiday pay? and,
    b) If the employee qualifies for statutory holiday pay, which pay rate is used to calculate the statutory holiday pay?

PROVISIONS OF THE COLLECTIVE AGREEMENT AND STATUTE

The following are the relevant provisions of the parties' collective agreement:

ARTICLE 19 - PAID HOLIDAYS

. . .

Clauses 19:09 to 19:12 apply to PART-TIME ONLY

. . .

[Note: Clause 19:09 lists 11 holidays and 19:10 provides for a 12th holiday]

. . .

19:11

Effective January 1, 1986, an employee who is required to work on any of the above-mentioned holidays shall receive pay at the rate of two and one-half (21/2) times the employees regular rate for all hours of work performed on such holiday.

19:12

Holiday Pay shall be in accordance with the Employment Standards Act, except as provided in Article 19:01. [Note: Article 19:01 is not relevant to the issues raised here.]

The relevant sections of the *Employment Standards Act* incorporated by clause 19:12 read as follows:

PART VII
PUBLIC HOLIDAYS

25.(1) Application. - This section does not apply to an employee who,

. . .

(b) has not earned wages on at least twelve days during the four work weeks immediately preceding a public holiday;

. . .

(2) Holiday with pay. - Subject to subsections (3), (4) and (5), an employer shall give to an employee a holiday on and pay to the employee his or her regular wages for each public holiday.

. . .

(5) Holiday pay.- . . .where an employee is employed in a . . .hospital, and the employee is required to work and works on a public holiday, the employer shall,

(a) pay the employee in accordance with subsection 26(1); or

. . .

26.(1) Premium rate for holiday. - Subject to subsection 25(5), where an employee works on a public holiday, the employer shall pay to the employee for each hour worked a premium rate of not less than one and one-half times the employee's regular rate and, where the employee is entitled to the holiday with pay, his or her regular wages in addition thereto.

. . .

The parties provided me with the collective agreement between the Employer and the London and District Service Workers' Union, Local 220 which regulates the grievor's employment at the Mount Hope site. That agreement provides for the same 12 holidays and also provides as follows:

17:01 An employee who is required to work on any . . . paid holiday will receive pay at the rate of two and one-half times the employee's regular straight time hourly rate of pay . . .

17.03 . . .
Holiday Pay shall be in accordance with the Employment Standards Act.

CONCLUSIONS

The grievance arose under the Parkwood collective agreement. However, I have also reviewed the collective agreement regulating the grievor's employment at the Mount Hope site. While I have no jurisdiction to provide a binding interpretation of that agreement, it is obviously very similar to the Parkwood agreement in its approach to holidays for part-time Registered Practical Nurses such as the grievor. That is perhaps to be expected given that the Employer is the same in both locations. Moreover Article 19:11 of the Parkwood agreement includes a reference to January 1986 which suggests that the parties based their agreement regarding holiday pay on the provisions of the previous collective agreement at Parkwood with the London and District Service Workers' Union.

This collective agreement does not deal specifically with the holiday pay for an employee

working in more than one job. But it does deal generally with holiday pay and when an unforseen situation arises, as it has here, it is necessary to derive the parties' intention from the general language which the parties have used. The general language of the collective agreement is the primary basis for determining that intention. In some instances, other related provisions of the collective agreement are of assistance; however none were suggested by the parties in resolving these issues. Similarly past practice or negotiating history is sometimes helpful; but in this instance I received no evidence of either. I am thus left with the task of finding the parties' wishes in a specific and unusual context from the general language on holiday pay which they included in their collective agreement.

What approach should I adopt in deriving their desires from this general language regarding holiday pay? The Employer referred me to *Trenton Memorial Hospital v. Ontario Nurses Association* [1980] O. J. No. 37 (Divisional Court). In the context of the judicial review of an arbitration award, Mr. Justice Robbins addressed this problem of general language which had to be applied to a particular fact situation. He commented as follows:

> The language of a collective agreement is to be construed, not technically, legalistically or literally, but in a fair and common sense manner having regard to the relationship between the parties and in the context of the employment involved. ... The Board in making its decision is not precluded from examining the substance of the situation or restricted to matters of form.

That is the approach applied in this award. In determining the parties' intention in this unusual context I have also considered both the employees' right to know their pay rate and the Employer's need to administer the agreement efficiently.

I turn now to the issues outlined earlier.

1. If an employee works on a statutory holiday, which pay rate is used to calculate the employee's pay?

In this instance the grievor worked at least twelve qualifying days (that is earned wages under the provisions of Section 25(1)(b) of the *Employment Standards Act)* at the Parkwood site, but she actually worked for the Employer on the two holidays at the Mount Hope site. Should her pay be based on the rate at Parkwood where she qualified for holiday pay, or the rate at Mount Hope where she worked on the holiday?

While the agreement (Article 19:11) speaks of an employee receiving two and one-half times the "regular rate", that amount is commonly understood to consist of two components - a premium one and one-half times rate for the actual work plus a straight time holiday pay component (see, for example, Section 26(1) of the *Employment Standards Act, supra*). Thus sixty percent of the pay for an employee who works on the holiday is the pay for the actual work performed that day. The pay for the work is based on the pay rate in the collective agreement in place at the location where the work was performed. I believe most employees would reasonably expect their pay on a holiday to be a multiple of the pay rate at the location where they work on that holiday. Common sense and the practical realities of calculating holiday pay suggest that the parties intended the holiday pay be calculated using the same rate of pay rather than using one pay rate for the work and another rate for the holiday pay. I thus conclude that the pay for an employee who works on the holiday was intended to be two and one-half (2 1/2) times the pay rate *in the collective agreement in force at the location where the employee worked on that holiday.*

The more difficult issues arise when an employee does not work on the holiday.

2 (a) If the employee does *not* work on a statutory holiday how does the employee qualify for statutory holiday pay?

The provisions regarding qualifying for holiday pay are set out in the *Employment Standards*

Act, and are incorporated into this collective agreement by Article 19:12. Section 25(1)(b) of the *Act* requires an employee to work on 12 days in the preceding 4 work weeks in order to qualify for holiday pay. The question which arose was this:

> Does all the work have to be at the same site and under the same collective agreement or could an employee work fewer than 12 days at Parkwood and fewer than 12 days at Mount Hope and qualify for holiday pay because that employee worked in total 12 or more days for the Employer?

I begin by noting that there is only one Employer - while an employee may work in two locations for the Employer, there is still only one Employer. In addition, I note that the general purpose of holiday pay is to allow an employee to enjoy the holiday without suffering a monetary loss. Finally, holiday pay is often seen as part of the compensation for work already performed.

This issue is best addressed through an example. Compare one employee who works on 15 days in the qualifying period at one site with a second employee who works the same 15 days but at two sites. The first employee is clearly qualified for holiday pay. On what logical or practical basis would the Legislature, in enacting the *Employment Standards Act*, or the parties, in incorporating those provisions into their collective agreement, have concluded that the second employee should be denied holiday pay? Since they both worked the same number of days for the same Employer during the same four week qualifying period, is the second employee somehow less entitled to enjoy Christmas? I think not. In my view, to exclude the second employee from the holiday pay makes no sense; it supports no general purpose of holiday pay. In the words of Mr. Justice Robbins quoted above, I conclude that the "fair and common sense" approach to this issue, and what the parties intended, is to count all the days worked for the Employer. In order to qualify for holiday pay an employee must have worked for the Employer on at least twelve days in the four work

weeks immediately preceding the holiday, *regardless of the location of that work.*

2 (b) If an employee does *not* work on a statutory holiday but qualifies for statutory holiday pay, which pay rate is used to calculate the statutory holiday pay?

Such an employee qualifies for holiday pay by working at two locations, and thus at two pay rates. Article 19:12 incorporates Section 25(2) which entitles an employee to his or her "regular wages" on the holiday. But having worked at two locations and at two wage rates, what is the employee's "regular wage" for this purpose?

This issue again calls for a practical response. I believe the parties would have intended a solution that makes common sense. The solution should permit an employee to know how much she will be paid, and should be one which the Employer can administer relatively easily. From that I conclude the pay rate for the holiday pay is to be based on the rate of pay where the employee *worked the greater number of days during the qualifying period.* Thus if the employee worked 9 days at Parkwood and 6 days at Mount Hope during the 4 preceding weeks, the employee's holiday pay would be paid at the Parkwood rate. If the greater number of days had been worked at Mount Hope the holiday pay would be based on the Mount Hope rate.

One complication may arise from this conclusion. Suppose an employee works an equal number of days at each location - what is that employee's "regular wage" for holiday pay purposes? In this situation I can do no better than to apply the old “officious bystander” approach under which I ask the following:

> If an officious bystander had been present at the negotiations and asked this as the parties were negotiating this agreement, how would they have responded?

I acknowledge that this is an artificial way of determining intent, an approach which has me

finding as the parties' intent something which they never considered. While there are other possibilities, I believe the parties would have said that in the unlikely situation of an employee who works an equal number of shifts in both locations, the easiest solution and the one which they would thus want to follow is to pay the holiday pay based on the higher pay rate. Thus I find that if an employee qualifies for holiday pay by working an *equal* number of days at two locations, the holiday pay is based on *the higher pay rate*.

While I believe the parties can resolve the situation involving the grievor, I will remain seised to deal with any matters which may arise in the implementation of this award.

Dated in London, Ontario, this 14th day of May, 1999.

Howard Snow, Arbitrator