Date: 20100603

File: 566-32-950

Citation: 2010 PSLRB 74

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

JAMES ARTHUR VAUGHAN

Grievor

and

CANADIAN FOOD INSPECTION AGENCY

Employer

Indexed as
Vaughan v. Canadian Food Inspection Agency

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Dan Butler, adjudicator

For the Grievor: John Haunholter, Public Service Alliance of Canada

For the Employer: Karl Chemsi, counsel

Heard at Halifax, Nova Scotia,
October 6 and 7, 2009 and May 11, 2010.

I. Individual grievance referred to adjudication

[1] James Arthur Vaughan ("the grievor") contends that his employer, the Canadian Food Inspection Agency (CFIA or "the employer"), violated clause 40.01 (Injury-on-Duty Leave) of the collective agreement between the employer and the Public Service Alliance of Canada ("the bargaining agent") that expired on December 31, 2006 ("the collective agreement"). Clause 40.01 reads as follows:

> ***40.01*** *An employee shall be granted injury-on-duty leave with pay for such period as may be reasonably determined by the Employer when a claim has been made pursuant to the* Government Employees' Compensation Act*, and a Workers' Compensation authority has notified the Employer that it has certified that the employee is unable to work because of:*
>
> *(a) personal injury accidentally received in the performance of his or her duties and not caused by the employee's willful misconduct,*
>
> *or*
>
> *(b) an industrial illness or a disease arising out of and in the course of the employee's employment, if the employee agrees to remit to the Receiver General of Canada any amount received by him or her in compensation for loss of pay resulting from or in respect of such injury, illness or disease providing, however, that such amount does not stem from a personal disability policy for which the employee or the employee's agent has paid the premium.*

[2] When he filed his grievance on September 9, 2005, the grievor stated its details as follows:

> *I grieve the denial of credit for all Leave* [*sic*] *dating back to my compensable injury of October 21, 1992.*
>
> [corrective action]
>
> *I request to be made whole.*

[3] At the first level of the grievance procedure, the employer partially upheld the grievor's claim (Exhibit G-28). Noting two decisions of the Workers' Compensation Board of Nova Scotia (WCB) in May and November 2005 respectively, the employer approved 74.8 days of injury-on-duty leave for the period from June 2, 2005 to September 26, 2005 and an additional 87 days of injury-on-duty leave during a period

retroactive to May 5, 2003. The employer reinstated annual and sick leave credits to the grievor for those periods of approved injury-on-duty leave.

[4] At the final level of the grievance procedure, the employer continued to deny the grievor's claim for further periods of injury-on-duty leave dating back to 1992 (Exhibit G-29). During the hearing, the grievor identified those periods as follows (Exhibit G-26): November 19, 1993 to January 1, 1994; September 10, 1994 to January 15, 1995; January 16, 1995 to March 31, 1996; April 1, 1996 to April 26, 1997; April 27, 1997 to May 19, 1997; February 20 and 21, 2001; September 6, 2003 to September 21, 2003 and September 21, 2003 to June 9, 2005.

[5] With the support of his bargaining agent, the grievor referred the grievance to the Public Service Labour Relations Board for adjudication on March 7, 2007, under paragraph 209(1)(*a*) of the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22. The Chairperson of the Board has appointed me as an adjudicator to hear and determine the matter.

[6] In a letter dated September 25, 2009, the employer gave notice of its intent to question the jurisdiction of the adjudicator on the grounds that the filing of the grievance was untimely. The employer confirmed its objection at the beginning of the hearing. The parties agreed and I accepted that they would address the objection to jurisdiction as part of their final arguments.

[7] At the continuation of the hearing on May 11, 2010, the employer withdrew its objection to the timeliness of the grievance.

II. Summary of the evidence

[8] Two witnesses testified: the grievor and Freeman Libby, the manager who decided the grievor's injury-on-duty leave application.

A. The grievor's evidence

[9] The grievor joined the public service in August 1984 as an employee of the (then) Department of Agriculture, performing the duties of a primary product inspector at the agricultural research facility located in Kentville, Nova Scotia. The grievor was hired as an indeterminate seasonal employee. Normally, he began work each year in July at the beginning of the export season for apples and continued to

work until the end of the export season, when he was laid off. The grievor's seasonal indeterminate status in his Kentville position continued until March 26, 1993, when the employer eliminated his position and placed him on surplus status.

[10] The employer proposed deploying the grievor to a position as a full-time meat hygiene inspector in Port Williams, N. S., effective June 7, 1993 (Exhibit G-8). For reasons related to the workplace injury that the grievor suffered the previous year — as detailed later in this decision — he declined the deployment. The employer placed him back in his previous seasonal position until November 19, 1993, when it permanently laid him off. The grievor remained without work until January 16, 1995.

[11] The grievor's initial grievance against the layoff under the National Joint Council Workforce Adjustment Directive (WFAD) in effect at that time was unsuccessful. In a second WFAD grievance, he contended that the deployment to the meat hygiene inspector position in Port Williams did not comprise a "reasonable job offer" within the meaning of the directive. The grievor learned that his grievance had been upheld at the final level in August 1994 (Exhibit G-12). Until November 19, 1994, he remained on the employer's priority reappointment list but did not receive a job offer. With the expiry of his priority status, the grievor sought the assistance of his Member of Parliament, who intervened with the Minister of Agriculture. Within a short period, the grievor received an offer of an indeterminate part-time primary product inspector position in Halifax, N. S. He accepted the offer and signed a memorandum of agreement that reversed his permanent layoff of November 19, 1993. The grievor started his new position on January 16, 1995, working 18 hours per week.

[12] On May 20, 1997, the grievor began working full-time hours in his Halifax position. Shortly after, the newly created CFIA confirmed his full-time indeterminate status in that position.

[13] On April 1, 1998, the CFIA transferred the grievor to a vacant full-time primary product inspector position in Kentville, where he has remained. The employer later reclassified the position to the Engineering and Scientific Support Group (EG-04).

[14] The origins of the grievance date to an incident on October 21, 1992. During work hours, the grievor sustained a back injury while lifting a truck box with several co-workers. The following day, the doctor who treated his injury at the local hospital submitted a report about the incident to the WCB (Exhibit G-3). There ensued a

complex, multi-year story of representations by the grievor to the WCB about the status of his injury and his entitlement to various WCB benefits. The story includes multiple WCB rulings as well as a second workplace accident report in 2003 when the grievor reaggravated his back injury (Exhibit G-20), causing him to be absent from work for over two years. When he filed the grievance in this case, the story had been unfolding for 13 years and would continue.

[15] The principal themes of the grievor's story as it relates to the WCB were his persistent efforts to gain recognition that the back injury that he sustained on October 21, 1992 was incurred in the course of performing his duties, that the medical problems that he subsequently faced with his back over the years were linked to the original injury and that his situation warranted WCB Temporary Earnings Replacement Benefits (TERB) for several periods as well as a Pain Related Impairment (PRI) Benefit Award and a Permanent Impairment Benefit (PIB) Award. In my view, it is unnecessary in this decision to outline in full detail how those issues were addressed over 13 years by several WCB review officers and hearing officers, by the WCB sitting as the Board and by WCB appeal tribunals. For the purpose of this decision, the following highlights are sufficient:

- In January 1993, the grievor received notice from the WCB that it was unable to pay him any benefits because the incident of October 21, 1992 was not work related (Exhibit G-7). The WCB's decision was based on information submitted by the employer that the grievor's absence from work on sick leave for five and one-half days was the result of a personal injury that did not qualify as an accident while at work (Exhibits G-5 and G-6).

- The grievor continued to pursue the matter with the WCB with the assistance of a lawyer provided under the auspices of a WCB workers' advisor program. The employer maintained its position that the grievor's injury was not work related (Exhibit G-14). A WCB review officer ruled against the grievor in a decision dated December 21, 1995.

- The grievor appealed the ruling. As a result of a hearing held on March 19, 1996, a WCB hearing officer determined that the grievor's injury of October 21, 1992 was suffered arising out of, and in the course of, his employment (Exhibit G-17). He allowed the appeal and invited the grievor to

submit evidence about his time lost from work and his medical expenses for a subsequent ruling on remedies.

- In a decision dated February 17, 1997, a WCB hearing officer ruled that the grievor was entitled to temporary total disability benefits for work time lost from the date of the accident until he resumed full-time duties in December 1992. However, the hearing officer denied the grievor's claim to a Permanent Medical Impairment (PMI) Assessment and to associated permanent partial disability benefits (Exhibit E-1).

- The grievor again appealed. An appeals tribunal considered the grievor's argument that he was entitled to benefits beyond November 5, 1993, the date on which a physician determined that he was medically unfit to perform the duties of a meat hygiene inspector that the grievor had been offered, and that he refused, after the employer eliminated his seasonal position in Kentville in March 1993 (Exhibit G-9). In a decision dated March 31, 2000, the tribunal accepted that the grievor experienced a loss of earnings from being unable to accept the meat hygiene inspector position for medical reasons. Nonetheless, it found that the grievor's wage losses beyond November 1993 were the result of his pre-existing degenerative spinal disease and not of his work injury on October 21, 1992. The tribunal rejected the grievor's claim to TERB payments beyond November 1993 and to permanent partial disability benefits (Exhibit E-2).

- Four years later, in September 2004, a WCB hearing officer found that there was new evidence in the wake of the grievor's second accident report in 2003 that warranted a reconsideration of the appeal tribunal's decision of March 31, 2000 (reported in Exhibit G-21). The WCB ordered further medical assessments and then ruled on May 20, 2005 that the grievor was entitled to TERB benefits retroactive to the May 5, 2003 recurrence of his compensable injury (Exhibit G-21). It also assessed him with a 3% PRI benefit. With respect to the grievor's claim to benefits for his earnings losses dating back to his original injury in 1992, the WCB indicated that it would decide that claim in the future when his TERB payments ended.

- On August 5, 2005, a WCB hearing officer further allowed that the grievor was entitled to ". . . a Permanent Medical Impairment Ruling of greater than 0% in relation to the compensable injury of October 21, 1992" (Exhibit G-22).

- On September 26, 2005, the WCB set the PMI level at 10% and ordered that it take effect retroactive to December 2, 1994. It assigned November 27, 1992 as the effective date for the 3% PRI benefit. As for the grievor's claim of lost earnings due to his inability to accept the meat hygiene position, the WCB officer wrote as follows:

. . .

> *. . . I find the evidence supports that you may be entitled to an earnings loss as a result of not being able to accept the Meat Hygiene Inspector position. However it is unclear from the earnings information currently on file what your earnings would have been in the event that you had been able to accept the* [meat hygiene] *position, compared to what you were paid following the MOU and your re-hire in January of 1995, and your current earnings at your present occupation. I have requested such earnings information from your employer . . . a subsequent decision detailing your eligibility for any earnings loss benefits will be forthcoming once this information is received. . . .*

. . .

- On October 17, 2005, the WCB determined that the grievor was entitled to a retroactive benefit of $26 854.00 for the periods from November 19, 1993 to January 2, 1994 and from September 10, 1994 to May 20, 1997 (Exhibit G-24).

- On November 15, 2005, the WCB found further that the grievor was entitled to a retroactive TERB payment of $59 491.60 for hours missed from work for the period from May 5, 2003 to September 25, 2005 (Exhibit G-31).

- In a letter dated January 20, 2006, the WCB informed the grievor that the issue of the replacement of sick leave and annual leave taken by him in relation to his compensable injury of October 21, 1992 and to the recurrence of that injury on May 5, 2003 was a matter between the grievor and his employer (Exhibit E-3).

- A February 2, 2006 decision of the WCB considered the grievor's claim for further TERB payments for periods when he took sick leave and vacation leave between November 27, 1992 and May 4, 2003 as well as his entitlement to an Extended Earnings Replacement Benefit (EERB) (Exhibit G-32). The WCB determined that TERB payments were appropriate for the periods from June 12 to 21, 1995 and from February 20 to 21, 2001. It awarded a total retroactive PIB payment of $8927.06. It denied the grievor's claim to an EERB.

[16] The grievor testified that he did not submit a request for injury-on-duty leave to the employer when he returned to work the week after his original injury in 1992. He recounted that he spoke at that time with his immediate supervisor, Brian Woodland, who told him that he did not believe that the grievor was entitled to injury-on-duty leave because he had not sustained a workplace injury. Mr. Woodland asked the grievor to sign a statement to that effect, but the grievor refused. Considering Mr. Woodland's stance, the grievor did not believe that the situation welcomed an injury-on-duty leave application. He submitted a sick leave request instead.

[17] The grievor later testified that he tried to submit leave forms for injury-on-duty leave on several subsequent occasions when he was absent from work because of his back injury. He stated that the employer "never co-operated." He indicated that the employer approved injury-on-duty leave on one occasion in 2001 but could not say definitely whether he had submitted a request for that leave.

[18] In 2005, once he received the new favourable WCB rulings, the grievor felt confident that he could ask the employer to substitute injury-on-duty leave for the sick leave and annual leave that he had taken over the years to cover absences from work. In an email dated August 10, 2005 to Jo-Ann Milburn, a human resources officer with the employer, the grievor made the following request (Exhibit G-25):

. . .

> *I am asking the department to fully re-credit all salary, pension service and leave lost as a result of my workplace injury of October 21, 1992. I wish to "be made whole." . . .*

. . .

[19] On September 6, 2005, the grievor wrote to Barbara Tait, a compensation and benefits advisor for the employer, asking for an updated leave statement dating back to October 21, 1992 ". . . based upon recent WCB decisions . . . ." Ms. Tait replied that she had asked Ms. Milburn about the grievor's leave and determined that the employer was ". . . not going to be crediting [his] sick leave back to 1992. [His] current leave balances are up-to-date" (Exhibit G-27). The grievor reacted to Ms. Tait's response by contacting his bargaining agent representative and filing a grievance the next day.

[20] The grievor testified about the financial impact of all that had occurred as a result of his accident in 1992 and of the employer's decision to lay him off in 1993. He indicated that he received Employment Insurance (EI) benefits when he was out of a job between November 1993 and his return to part-time work in Halifax in January 1995. He repaid some of those benefits when the department paid him 36 weeks of salary as part of the return-to-work memorandum of agreement. While working in the new job on a part-time basis, the grievor indicated that he was forced to withdraw funds from a registered retirement savings account. He also recalled that he received disability payments on one occasion but repaid them once he became entitled to WCB benefits.

[21] The grievor stated that he had no doubt that he would have been able to work full-time continuously from 1992 were it not for his workplace injury. He wants the employer to grant injury-on-duty leave for all periods for which he received WCB benefits to fully recover the financial losses that he has sustained.

[22] In cross-examination, the employer asked the grievor whether he had submitted a request for injury-on-duty leave when he received the WCB hearing officer decision in 1996 ruling that his October 21, 1992 injury was work related (Exhibit G-17). The grievor replied that he believed that the WCB asked the employer at that time to re-credit any leave that he took as a result of the injury. He confirmed that the employer granted 41 hours of injury-on-duty leave for his absences in 1992.

[23] Referring to the appeals tribunal decision of March 31, 2000 (Exhibit E-2), the employer asked the grievor whether it had provided injury-on-duty leave at that time in accordance with the decision. The grievor agreed that the employer had granted leave in accordance with the decision and that it had recredited his bank of sick leave credits.

[24] As a result of several further questions from the employer, the grievor made the following statements: 1) he never filed a human rights or other complaint alleging that the employer failed to accommodate his injury as a disability; 2) he "took what he could" in signing the memorandum of agreement in 1995, received 36 weeks of salary as a result and did not pursue the matter of his treatment under the WFAD any further; and 3) he was either compensated by the employer or received EI, WCB or disability benefits every time he was off work and was never without an income but was sometimes compensated at a lower rate than what his salary would have been had he not been injured.

[25] In re-examination, the grievor testified that he understood that the employer received all WCB decisions when they were issued and that it would clearly have been aware of the progress of all his WCB claims over the years.

B. Mr. Libby's evidence

[26] Mr. Libby, now retired, began working with the CFIA on its creation in 1997 as an inspection manager for the Nova Scotia South region. In 2004, he became the CFIA's regional director for N.S.

[27] Mr. Libby first became involved with the grievor's concerns at a meeting in spring 2003 in his role as the grievor's manager. The grievor outlined the history of his case at that meeting and stated that his "ideal resolution" required the employer to acknowledge that he had been treated unfairly in 1992 and during the years that followed and that he should have enjoyed the status of a full-time indeterminate employee from the outset. The grievor confirmed that he was asking for the difference between what he would have been paid had he been accorded full-time indeterminate status, were it not for his 1992 injury, and what he actually earned, first as an indeterminate seasonal employee and then as a part-time indeterminate employee. Mr. Libby responded that there was nothing that he could do to retroactively alter the grievor's past seasonal or part-time status. Mr. Libby testified that the grievor did not identify injury-on-duty leave as the issue at the meeting. While the grievor mentioned his outstanding applications before the WCB, the WCB decisions from 1997 and 2000 then in the employer's hands had denied his claim. As a consequence, the employer could not have processed an application for injury-on-duty leave at that time.

[28] The issue of injury-on-duty leave arose two years later, after the employer received notice of the WCB's May 20, 2005 ruling (Exhibit G-21) that reversed its previous decisions. Mr. Libby, now the regional manager, discussed the ruling with Ms. Milburn. He testified that they considered the issue raised by the new WCB decision relatively straightforward because the grievor's second injury had occurred in the employer's laboratory and was certified by the WCB. Mr. Libby authorized a total of 74.8 days of injury-on-duty leave replacing the sick leave that the grievor had taken from June 2 to September 26, 2005, a decision conveyed to the grievor by his inspection manager, Claude Comeau, in his December 2, 2005 response to the grievance (Exhibit G-28).

[29] Mr. Libby also discussed the WCB's November 15, 2005 decision with Ms. Milburn when the employer received it (Exhibit G-31). Because that decision involved a retroactive period, he testified that they found the issue less straightforward. Based on advice received from the human resources section, Mr. Libby considered the following factors in reaching his decision: the grievor's employment status, his length of service, the extent of the injury that he had sustained, the "worthiness of the employee" as a fully trained inspector who performed good work and the fact that the employer had already granted him 74.8 days of injury-on-duty leave. As a consequence, Mr. Libby decided to grant a further 87 days of leave to replace sick leave and annual leave taken by the grievor from May 5, 2003 to September 5, 2003. Mr. Libby's determination was also communicated to the grievor in Mr. Comeau's grievance reply of December 2, 2005 (Exhibit G-28).

[30] Asked why he did not approve injury-on-duty leave for September 5, 2003 to June 2, 2005, Mr. Libby stated that the grievor had received disability benefits from Sun Life for those months. Factoring in those benefits, Mr. Libby maintained that his decision to grant an additional 74.8 and 87 days of injury-on-duty leave ensured that the grievor received some type of payment for all the period that he was off duty because of his second injury.

[31] Mr. Libby used a document prepared by Ms. Milburn that charted the grievor's employment status and WCB claims history from August 13, 1984 through November 15, 2005 (Exhibit E-6) to discuss the grievor's claim for injury-on-duty leave for five distinct periods between November 19, 1993 and May 19, 1997, all of which had been retroactively certified by the WCB (Exhibit G-26). Mr. Libby argued that the

employer could not grant injury-on-duty leave for any of those periods because the grievor was either in seasonal lay off status at the claimed times or because he was seeking leave for hours that he was not required to work as a part-time employee; that is, for the difference between full-time hours and his scheduled 18 hours per week.

[32] In cross-examination, Mr. Libby said that he was aware that the employer's policy requires management to review an employee's case after 130 days of injury-on-duty leave (Exhibit E-5). He confirmed that there was no formal review in the grievor's case but maintained that the employer had fully assessed his situation when deciding to grant him additional injury-on-duty leave in light of the May and November 2005 WCB rulings. Mr. Libby also confirmed that he had not involved the grievor or his union representative in his discussions with Ms. Milburn before granting the additional leave and that the grievor had not seen, or verified the contents of, Exhibit E-6. However, he noted that the contents of Exhibit E-6 coincided with the chronology of events that the grievor had provided at their spring 2003 meeting.

[33] Referring to two entries in Exhibit E-6 for June 1993, the grievor asked whether the employer could have offered him an indeterminate position at the 7KK poultry plant at that time. Mr. Libby answered that he had not been involved in 1993 but that he was aware that the employer had offered the grievor a position as a meat inspector.

[34] Mr. Libby confirmed his understanding that there was no period when the grievor was absent from work due to injury for which he did not receive a benefit from some source. He stated that he was not qualified to conclude that WCB benefits or Sun Life disability payments did not equate in value to injury-on-duty leave because some of the former benefits are non-taxable. He testified that he was uncertain whether a non-taxable benefit paid at 70% of the grievor's salary and a 100% taxable salary while on injury-on-duty leave produced the same value.

[35] With respect to the Sun Life disability payments received by the grievor, Mr. Libby testified that the employer did not receive an official notice that the grievor had subsequently reimbursed Sun Life for the periods of injury-on-duty leave later granted but was aware that the grievor received directions from the employer to do so. Asked later whether he would have made a different decision about injury-on-duty leave had he known that the grievor repaid Sun Life, Mr. Libby answered "probably not." He suggested that the grievor repaid Sun Life out of monies subsequently received from the WCB.

[36] Mr. Libby reconfirmed his agreement with the following statement in Mr. Comeau's December 2, 2005 grievance reply (Exhibit G-28):

. . .

> *There is no authority to compensate you for periods not worked, although Workers' Compensation has awarded earnings loss for the periods off work between November 19, 1993 and May 19, 1997.*

. . .

He stated that the WCB could order payments for periods when an injured employee is not supposed to be working but that he had no authority to grant injury-on-duty leave for times that an employee was not required to be on duty. Pressed further on the point, Mr. Libby agreed that there was a difference between what the WCB and the employer considered compensable.

[37] Mr. Libby agreed that the grievor's second injury occurred after he asked the employer to make adjustments to the workplace and that the requested ergonomic changes were not in place at the time of the second injury.

[38] In re-examination, the grievor referred to the employer's *Policy on Workers' Compensation* (Exhibit E-7) for confirmation that WCB benefits are non-taxable and that they are calculated on the basis of 75% of regular earnings.

III. Summary of the arguments

A. For the grievor

[39] The grievor argued that the employer did not reasonably determine the period for which he received injury-on-duty leave as it was required to under clause 40.01 of the collective agreement. The employer abrogated its responsibility to pay the grievor for all periods when he was certified by the WCB as unable to work because of a workplace injury.

[40] The test is not whether the grievor received money from some other source. The obligation under clause 40.01 of the collective agreement is clear. The grievor ". . . shall be granted injury-on-duty leave . . . ." The grievor should not have been forced to resort to the grievance procedure once the WCB had pronounced upon his entitlement to benefits.

[41] The failure of the employer to conduct the required review of the grievor's situation after 130 days of injury-on-duty leave is significant. The employer should have considered the grievor's situation further at that time. The fact that it did not speaks to its lack of reasonableness in determining the grievor's entitlement to leave.

[42] The grievor referred me to *Sabiston v. Treasury Board (Department of National Defence)*, PSSRB File No. 166-02-10395 (19820105), for the proposition that the onus should be on the employer to show that it exercised its discretion reasonably. *Sabiston* also identified a number of factors used in making a reasonable assessment. In the grievor's case, Mr. Libby was only concerned with whether the WCB or Sun Life had provided benefits when he identified the appropriate periods for injury-on-duty leave.

[43] The grievor also referred me to *King v. Canadian Food Inspection Agency*, 2006 PSLRB 37. In light of *King*, he argued that it is incumbent on the employer to demonstrate that its decision was more reasonable than what the WCB determined. In particular, Mr. Libby should have directed his mind to the pension and benefits losses that the grievor sustained. If he had acted more reasonably, those losses would not have occurred. In the sense discussed in *King*, the employer was ". . . oblivious to the existence of a significant factor . . ." (see *King,* at paragraph 35).

B. <u>For the employer</u>

[44] The employer characterized the wording of the grievance as vague. It lacked any mention of injury-on-duty leave or of the specific periods for which the grievor sought such leave.

[45] In cross-examination, the grievor confirmed that he was compensated every time that he was absent from work due to injury. His only concern is the rate at which he was compensated. In other words, the alleged "unreasonableness" on the employer's part is the fact that it did not compensate him under clause 40.01 of the collective agreement for the entire duration of his absence due to injury. The grievor wants all periods of WCB benefits replaced by injury-on-duty leave but failed to provide any scintilla of evidence about the difference in earnings between what he received from the WCB and what he would have earned had the employer granted him injury-on-duty leave at all times. There are only unsubstantiated allegations before the adjudicator that it was less favourable for the grievor to be on WCB benefits.

[46] The employer cited *King* at paragraph 27 on the nature of the injury-on-duty leave provision as follows:

. . .

> *. . . there is nothing in the provision to support the proposition that only a period of leave that coincides with the absence of the employee is reasonable. Indeed, the variation in lengths of leave in the cases put before me suggest that it is open to the employer to decide on different periods of leave, at least within the range of what is considered reasonable.*

[47] The employer argued that the grievor seeks to defeat the intent of the system by claiming the option to decide between receiving WCB benefits and taking injury-on-duty leave. Clause 40.01 of the collective agreement envisages that employees who are injured while on duty will be supported by WCB payments, as outlined in the employer's *Policy on Workers' Compensation* (Exhibit E-7) as follows:

. . .

> *3.1 Benefits*
>
> *The* Government Employees Compensation Act *provides for employment injury benefits (workers' compensation to all federal government employees . . . who are injured in the course of their duties and are not covered under any local legislation. . . .*

. . .

Clause 40.01 comprises an additional benefit that allows employees to be on injury-on-duty leave for a certain limited period. It does not confer on the employee the right to choose between workers' compensation benefits and that leave.

[48] The review requirement after 130 days of injury-on-duty leave cited by the grievor in fact reconfirms the rule that injury-on-duty leave is limited. The policy requires the employer to stop and consider after 130 days of leave whether that leave should be extended. The purpose of the review is not to provide less leave, but more — something that the employer did by providing a total of 169 days of leave in the grievor's case. In any event, the issue of the 130-day review arises only when an employee continues to be unable to work. It does not apply to determining a retroactive entitlement, as occurred in this case. In the grievor's situation, all the employer had to do was look at the past and determine what was reasonable as a

retroactive grant of leave. As outlined in *King* at paragraph 21, there has been substantial variation in the length of injury-on-duty leave considered to have been reasonably determined by the employer. Even 15 to 20 days of leave has been considered reasonable in some cases; see *Juteau v. Treasury Board (Solicitor General of Canada)*, PSSRB File No. 166-02-15113 (19851206), and *Demers v. Treasury Board (Solicitor General of Canada)*, PSSRB File No. 166-02-15161 (19860616).

[49] The employer disagreed with the reversal of the onus of proof in *Sabiston*. As an issue involving the interpretation or application of a collective agreement, the burden falls to the grievor to demonstrate that the employer exercised its discretion unreasonably and to prove his entitlement to leave. Even if *Sabiston* was correct, the grievor has not made out a *prima facie* case that the employer acted unreasonably, which is the precondition in *Sabiston* for reversing the burden of proof.

[50] In *King*, the adjudicator did not specifically discuss the issue of burden of proof. Nonetheless, she still required the grievor to demonstrate that the employer failed to ". . . consider all of the factors relevant to the employee requesting leave . . ." (at paragraph 35). In *King*, the grievor provided substantial evidence of that failure. According to the employer, that is not the situation in this case, especially because the alleged "unreasonableness" on the employer's part is essentially that it did not compensate the grievor for the whole WCB benefit period.

[51] The employer contended that the fact that the WCB compensated the grievor for certain periods when he was not required to work — whether during a seasonal layoff or for times in addition to his scheduled 18 hours per week as a part-time employee — does not change the fact that the employer may grant injury-on-duty leave only for periods when the grievor was supposed to work but could not because of an injury. An adjudicator cannot change a grievor's employment status retroactively, which would be the effect of ordering injury-on-duty leave for periods paid by the WCB that were not periods of required work for the grievor.

[52] The employer referred me as well to *Colyer v. Treasury Board (National Defence)*, PSSRB File No. 166-02-16309 (19871105), *Labadie v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 90, *Bouchard v. Treasury Board (Solicitor General of Canada – Correctional Service)*, 2002 PSSRB 81, and *Levesque v. Treasury Board (Solicitor General of Canada)*, PSSRB File No. 166-02-15114 (19851206).

C. <u>The grievor's rebuttal</u>

[53] Concerning the characterization of the grievance by the employer as vague, the grievor maintained that the grievance was a general document that alerted the employer to his situation and that it was not intended to spell out the details of his claim. The December 2, 2005 response to the grievance (Exhibit G-28) showed that the employer fully understood what the grievor was seeking.

[54] According to the grievor, the employer is taking the WCB to task if it does not follow its determination about the grievor's compensable periods. Once the grievor presented the employer with the WCB's rulings, the employer had to demonstrate that it followed a reasonable and fair process in deciding whether to grant injury-on-duty leave. It did not, and it does not have a rationale for paying for only part of the WCB benefit period. The purpose of clause 40.01 of the collective agreement is to ensure that an employee does not suffer a financial loss for an injury sustained at work, which is what occurred because of the employer's decision.

[55] In response to a question that I posed, the grievor accepted that the language of clause 40.01 of the collective agreement does not require that injury-on-duty leave must be co-extensive with the WCB benefit period. Nevertheless, the grievor argued that the employer must consider all factors. It must explain why it paid for part of the time and then show, by extension, why it did not grant leave for the rest of the period. Simply having the benefit of payments from Sun Life is not good enough as a factor. The intent of clause 40.01 is to make the grievor whole.

[56] Asked further what significant factors were not considered by the employer, the grievor answered that the employer could have asked the grievor, but did not, to participate in discussions before making its decision about injury-on-duty leave. He alleged that Mr. Libby was not aware of some relevant information; for example, whether the grievor repaid Sun Life and whether the benefits he received from other sources were taxable. The employer did not know what the grievor actually received and the nature of his "real loss."

[57] I asked the grievor at the close of his rebuttal whether he was asking me to order the employer to grant injury-on-duty leave during periods of seasonal layoff or part-time employment as if the grievor were a full-time indeterminate employee throughout. The grievor replied in the affirmative. He contended that, if it were not for

his injury in 1992, he would have been deployed to a full-time indeterminate position in 1992 or 1993.

IV. Reasons

[58] The employer originally objected to my jurisdiction to hear this matter on the grounds that the grievor did not submit his grievance in a timely fashion. Withdrawal by the employer of that objection means that I must accept that the grievor filing his grievance on September 9, 2005 was procedurally sound with respect to its identified subject matter — the granting of injury-on-duty leave back to October 21, 1992. While I did receive evidence that might otherwise have led me to question whether the grievor could have, or should have, filed a grievance on earlier occasions, there is no basis to subject those elements of the evidence to further scrutiny in the absence of an objection on timeliness.

[59] As a result, I must turn directly to the merits of the allegation that the employer breached clause 40.01 of the collective agreement, the relevant parts of which read as follows:

> ***40.01*** *An employee shall be granted injury-on-duty leave with pay for such period as may be reasonably determined by the Employer when a claim has been made pursuant to the* Government Employees' Compensation Act*, and a Workers' Compensation authority has notified the Employer that it has certified that the employee is unable to work because of:*
>
> *(a) personal injury accidentally received in the performance of his or her duties and not caused by the employee's willful misconduct*
>
> . . .

[60] Clause 40.01 of the collective agreement operates within the statutory framework established by the *Government Employees Compensation Act*, R.S.C. 1985, c. G-5 (*GECA*), to which the clause refers. The *GECA* applies to any federal government employee who "is caused personal injury by an accident arising out of and in the course of his employment"; subparagraph 4(1)(*a*)(i). Under subsections 4(2) and (3) of the *GECA*, such an employee is entitled to benefits in accordance with the workers' compensation legislation of the province where he or she is normally employed, as follows:

> *(2) The employee or the dependants referred to in subsection (1) are, notwithstanding the nature or class of the employment, entitled to receive compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed respecting compensation for workmen and the dependants of deceased workmen, employed by persons other than Her Majesty, who*
>
> > *(*a*) are caused personal injuries in that province by accidents arising out of and in the course of their employment; or*
> >
> > *(*b*) are disabled in that province by reason of industrial diseases due to the nature of their employment.*
>
> *(3) Compensation under subsection (1) shall be determined by*
>
> > *(*a*) the same board, officers or authority as is or are established by the law of the province for determining compensation for workmen and dependants of deceased workmen employed by persons other than Her Majesty; or*
> >
> > *(*b*) such other board, officers or authority, or such court, as the Governor in Council may direct.*

[61] While the case before me does not require that I directly interpret or apply any provision of the *GECA*, I must recognize as context that the legislator intended that employees in the public service who are injured while on duty have access to, and benefit from, the regime of income security provided under provincial workers' compensation systems. In that sense, there is nothing inherently problematic when an injured employee receives workers' compensation benefits as opposed to income directly from the employer. The extent to which the employer has an obligation to displace workers' compensation benefits by providing income security directly to an employee is an issue governed by the collective agreement. In interpreting that agreement, there is no presumption that it replaces what the legislator has put in place through the *GECA*, but rather that the collective agreement functions within the framework established by the *GECA*.

[62] Through the wording of clause 40.01 of the collective agreement, the parties have agreed that the granting of injury-on-duty leave with pay is subject to two

preconditions. The first precondition is that ". . . a claim has been made pursuant to the *Government Employees' Compensation Act . . . ."* The second precondition is that:

> *. . . a Workers' Compensation authority has notified the Employer that it has certified that the employee is unable to work because of . . . [a] personal injury accidentally received in the performance of his or her duties and not caused by the employee's willful misconduct . . .*

Once the employer receives the required notification from the workers' compensation authority, clause 40.01 stipulates that it shall grant injury-on-duty leave. The question is, how much leave?

[63] Clause 40.01 of the collective agreement does not state that, as it might have, the employer shall grant injury-on-duty leave for the period that the employee is unable to work, as certified by the workers' compensation authority. Nor does it state that an employee shall be entitled to a "reasonable period" of injury-on-duty leave. The latter wording was at issue in *Sabiston*, *King* and each of the other cases to which I was referred by the parties. It is not the formulation in question in this case. Instead, clause 40.01 provides that the employer shall grant leave for such period as it may reasonably determine.

[64] In my view, the wording of clause 40.01 of the collective agreement focuses the analysis preeminently on how the employer made its determination — did it do so reasonably — rather than on the result itself. In their choice of collective agreement language, the parties appear to have endorsed the proposition that the amount of injury-on-duty leave granted by the employer will be appropriate if the process used to make that determination is reasonable. Viewed practically, the distinction between a reasonable decision process and a reasonable outcome may well seem artificial. Nevertheless, the wording of clause 40.01 clearly directs my attention to the former rather than to the latter.

[65] Parenthetically, the adjudicators in several of the cases cited by the parties in the end chose to examine the reasonableness of the employer's decision-making process as the determinative element even though the collective agreement clause obligated the employer to provide a "reasonable period" of leave. In *King*, the adjudicator summarized at paragraph 30 two tendencies in the case law as follows:

> *[30] The other point to be drawn from previous cases has already been alluded to; several of these cases support the proposition that the determination by the employer of what constitutes a "reasonable period" is open to scrutiny. In* Juteau *(*supra*) and* Demers *(*supra*), the adjudicator assessed whether the period itself was reasonable, given the surrounding circumstances, and substituted a different period for the one initially granted by the employer. In other cases, notably* Colyer *(*supra*) and* Sabiston *(*supra*), the adjudicator focused on whether the process used by the employer in determining the length of leave was reasonable rather than on whether some particular length of time could be seen as reasonable or unreasonable. In* Colyer *(*supra*), the adjudicator, once satisfied that the criteria applied in determining whether the length of leave was reasonable, expressed reluctance to second-guess the decision made by the Review Board in question about the actual length of leave, despite a finding that a more generous period of leave "would not have been inappropriate." In* Haslett *(*supra*), having made a finding that the employer had failed to appreciate the significance of a particular factor in the decision, the adjudicator remitted the decision to the employer to be reconsidered and did not dictate any particular length of leave that would be reasonable.*

[66] "Reasonableness" is at issue because the employer enjoys discretion in determining the amount of leave to which an employee is entitled, as recognized consistently throughout the case law. Critically, several of the decisions cited by the parties make it clear that it is <u>not</u> necessarily unreasonable for an employer to grant injury-on-duty leave for a period that is different from, and less than, the benefit period determined by a workers' compensation board. For example, the adjudicator in *Colyer* stated as follows:

> . . .
>
> *. . . While injury-on-duty leave is predicated upon the existence of a valid claim for worker's compensation benefits, I can find no suggestion in the collective agreement that the extent to which injury-on-duty leave shall be granted must necessarily coincide with worker's compensation. If such were the case, there would be no need here in permitting the employer to exercise a reasonable discretion since injury-on-duty leave would almost automatically be the preferred form of relief. Such an intention surely would have been more clearly expressed by simply allowing employees, once they had a claim approved by a worker's compensation board, to substitute a claim for injury-on-duty leave. That is not what the collective agreement provides here. It permits the employer to grant injury-on-duty leave for as much of the*

> *period of absence due to accident or injury as it feels is reasonable.*
>
> . . .
>
> [*Sic* throughout]

[67] In *Labadie*, the adjudicator observed at paragraph 25 that the wording of the injury-on-duty leave clause ". . . does not in any way indicate that the injury-on-duty leave period must correspond to the period of disability."

[68] In *King*, the adjudicator found as follows at paragraph 27:

> *[27] . . . If the parties had intended that IODL should be a means of covering the full income of injured employees while they are absent from work, they could have made this clear in the collective agreement. Couching the provision in terms of an employer determination of a "reasonable period" indicates that their intention was to allow the employer some latitude in deciding what combination of IODL and other forms of support, including workers' compensation benefits, should be used to address the situation of an injured employee. Though this discretion is not perhaps as unlimited as counsel for the employer in this adjudication would suggest, in the sense that the employer's view of what is reasonable is open to scrutiny, there is nothing in the provision to support the proposition that only a period of leave that coincides with the absence of the employee is reasonable. Indeed, the variation in lengths of leave in the cases put before me suggest that it is open to the employer to decide on different periods of leave, at least within the range of what is considered reasonable.*

[69] In light of the case law and of the specific wording of the injury-on-duty leave provision in this case, the issue to be decided is whether the employer reasonably decided the amount of injury-on-duty leave; that is, was the way in which the employer determined the amount of leave reasonable in the circumstances of the grievor's application?

[70] The parties contest the assignment of the burden of proof in this case. Citing *Sabiston*, the grievor contends that the onus falls to the employer to demonstrate the reasonableness of its determination, provided that a *prima facie* case has first been made for a violation of clause 40.01 of the collective agreement. The employer disagrees. It maintains that the normal approach to establishing a breach of the

collective agreement applies — it is the grievor's burden to prove that the employer acted unreasonably, in violation of clause 40.01.

[71] I accept the employer's position. By alleging that the employer breached clause 40.01 of the collective agreement, the grievor has assumed the burden of proving, on a balance of probabilities, that the employer did not act reasonably in determining the amount of leave to which he was entitled in the circumstances of his application. Specifically, the grievor must prove through the evidence that the way that the employer made its determination was unreasonable, presuming that the grievor first establishes that the two preconditions set by clause 40.01 have been satisfied. I thus reject the grievor's argument that the burden of proof should be reversed presuming he has established a *prima facie* case for a breach of the collective agreement. Injury-on-duty leave is a collective agreement provision like any other. In my view, there is no reason to relieve the grievor of his normal onus to prove, on a balance of probabilities, a violation of that provision.

[72] The grievor depicts his email of August 10, 2005 to the employer (Exhibit G-25) as his application for injury-on-duty leave. That email reads as follows:

. . .

> *I am asking the department to fully re-credit all salary, pension service and leave lost as a result of my workplace injury of October 21, 1992. I wish to "be made whole." . . .*

. . .

The employer has criticized the wording of the grievance as vague. I do not believe that anything turns on that point. Although the email does not mention clause 40.01 of the collective agreement, I am satisfied in the circumstances that the grievor intended it to be an application for injury-on-duty leave and that the employer understood it as such. To be sure, injury-on-duty leave is the collective agreement mechanism by which the employer recredits salary and leave for absences from duty as the result of a workplace injury. That is exactly what the grievor asked for and what the employer addressed during the grievance procedure (Exhibits G-28 and G-29). There is no indication that the alleged vagueness of the grievance created any misunderstanding or caused difficulty for the employer.

[73] As of August 10, 2005, were the two preconditions stated in clause 40.01 of the collective agreement satisfied? That is, had the grievor made a claim pursuant to the *GECA* and if so, had a workers' compensation authority ". . . notified the Employer that it has certified that the employee is unable to work because of . . . [a] personal injury accidentally received in the performance of his or her duties and not caused by the employee's willful misconduct . . . "?

[74] The existence of claims made by the grievor, or made on his behalf, to the provincial workers' compensation authority about the original accident in 1992 and the recurrence of the back injury in 2003 is non-controversial. In my view, the evidence of those claims in a number of the exhibits in this case satisfies the first precondition stated by clause 40.01 of the collective agreement.

[75] As for the second precondition, the grievor identified the May 20, 2005 decision of the WCB (Exhibit G-21) and the findings of a WCB hearing officer on August 5, 2005 as the favourable rulings that gave him confidence to apply for injury-on-duty leave. He testified that it was the standard practice of the workers' compensation authority to forward copies of its decisions to the employer. The employer did not contest that the decisions of May 20, 2005 and August 5, 2005 certified the grievor as ". . . unable to work because of . . . [a] personal injury accidentally received in the performance of his . . . duties and not caused by the employee's willful misconduct . . . ," as required by clause 40.01 of the collective agreement. Again, in my view, the precondition was satisfied.

[76] Therefore, the remaining issue is whether the grievor has proven that the employer unreasonably determined the amount of injury-on-duty leave to grant him in the circumstances, taking into account the partial corrective action that it awarded during the subsequent grievance process.

[77] There are two time frames to examine. The first involving absences arising in the wake of the grievor's initial injury in 1992, consists of five periods between November 1993 and May 1997 certified as compensable by the WCB. The second covers three periods falling between February 2001 and June 2005, also certified by the WCB (Exhibit G-26).

[78] Unfortunately, I have not found the evidence adduced by the parties about events during the two time frames complete or uniformly helpful. While certainly

forthcoming and sincere in his testimony, the grievor's recall of the details of his story during examination-in-chief was not always confident or precise. At least in part, the gaps in his testimony can be attributed to the difficulties that any witness faces when trying to reconstruct events that occurred over such a long period and that sometimes involved complex issues. On the employer's side, the principal document tendered by its witness to chart the grievor's employment and leave status and WCB claims history during the time frames in question (Exhibit E-6) must be characterized as hearsay. The person who prepared the document, Ms. Milburn, was not called as a witness. Mr. Libby, who relied on the document during his testimony, and who may have relied on it when he made his decision, was not in a position to speak authoritatively to the accuracy of its contents or to how it was created. I thus have no sound basis to accept Exhibit E-6 as definitive proof of what occurred and must rely on the limited oral evidence that I did receive as well as WCB documents to establish the pertinent facts. I note also that there was no employer witness who had any personal involvement in the case before 2003. What I am left with is a partial picture of the past with which to weigh the reasonableness of the employer's decision in 2005 about claimed entitlements dating to periods as much as 12 years earlier.

[79] With respect to the first time frame, Mr. Libby testified that he could not grant injury-on-duty leave for any of the five periods claimed by the grievor and compensated by the WCB because the grievor was either on seasonal layoff status or claiming an entitlement for hours in excess of his 18-hour part-time schedule. While I have no source beyond Exhibit E-6 to confirm the accuracy of that testimony, the grievor did not dispute Mr. Libby's depiction. To be sure, the grievor in rebuttal argument confirmed that he was asking me to order the employer to grant injury-on-duty leave during periods of seasonal layoff or part-time employment as if the grievor had been a full-time indeterminate employee throughout. He stated that he based his claim on the proposition that he would have been deployed to a full-time indeterminate position in 1992 or 1993 were it not for his original injury. He also argued that the employer should grant injury-on-duty leave for any and all periods determined compensable by the WCB.

[80] As I have outlined earlier in this decision, the case law supports the finding that the employer is not obliged to grant injury-on-duty leave coterminous with all periods deemed compensable by the WCB. The wording of clause 40.01 of the collective agreement confirms that the employer enjoys discretion to determine when, and for

how long, it should grant injury-on-duty leave — provided that it makes that determination reasonably. Thus, I reject the grievor's argument that he was entitled to injury-on-duty leave for all periods for which he was compensated by the WCB. To be sure, the grievor eventually conceded the point when I questioned him during rebuttal argument.

[81] With respect to the grievor's contention that the employer should have applied clause 40.01 of the collective agreement as if the grievor had been appointed to a full-time indeterminate position throughout the first time frame, I find that he is advancing a proposition that goes well beyond the ambit of clause 40.01. Clause 40.01 is a leave provision. Leave entitlements under the collective agreement pertain to periods when an employee is required to perform work. There is no requirement for an employee to apply for leave for hours for which he or she is not required to be on duty; nor is there any contractual basis for the employer to grant leave for time not scheduled as work. In the specific case of injury-on-duty leave, the primary, practical purpose of the entitlement is to provide a mechanism by which the employer can substitute leave with pay for any other form of paid leave — primarily sick leave or vacation leave — which an injured employee has used during an absence from work pending certification of a workplace injury by the WCB. I believe that the displacement of leave credits with injury-on-duty leave was exactly what the grievor originally sought in his grievance when he used the following words:

. . .

> *I grieve the denial of credit for all Leave* [*sic*] *dating back to my compensable injury of October 21, 1992.*

. . .

The evidence indicates that the credit claimed by the grievor was for sick leave that he took to cover absences form work due to his injury, although, once more, I have no proof of how much sick leave was actually taken or for what periods. The grievor stated that he grieved when Ms. Milburn informed him that the employer was ". . . not going to be crediting [his] sick leave back to 1992 . . ." and that his ". . . current leave balances are up-to-date" (Exhibit G-27). The subject matter of his grievance, quite clearly, was the replacement of sick leave credits with paid injury-on-duty leave.

[82] In my view, the grievor has not offered any proof that the employer determined injury-on-duty leave unreasonably when it took the position that it could not grant

such leave for periods of seasonal layoff or for hours beyond his part-time work schedule during the first timeframe. Regardless of what the WCB deemed compensable, the employer could act only within the confines of the collective agreement and of the *GECA*. It could grant injury-on-duty leave only for periods of required work. It could replace sick leave or other paid leave with injury-on-duty leave only if the grievor actually took such leave. There is no evidence to suggest that it unreasonably declined to do so during the first time frame.

[83] As mentioned, the grievor made it clear that his real objective for the first time frame was to be treated as if he had been appointed to an indeterminate full-time position in 1992 or 1993. By Mr. Libby's uncontested testimony, the grievor made the same claim when they first met to discuss his concerns in 2003. It seems clear to me that the grievor wants to reopen a matter that he tried to address much earlier, at the time of his two WFAD grievances; that is, his alleged entitlement to an offer of full-time indeterminate status after his layoff on November 19, 1993. In examination-in-chief, the grievor said that he "took what he could" after his second WFAD grievance was upheld, signed a memorandum of agreement in 1995, received 36 weeks of salary as a result and did not pursue the matter of his treatment under the WFAD any further. Taking "what he could" was accepting a part-time indeterminate position. Obviously, the grievor has remained convinced that he was treated unfairly despite agreeing to the settlement. Whatever he now feels about that decision, it is not open to him through this grievance about injury-on-duty leave to relitigate the issue of his appointment status. By his own words, he closed that matter when he signed the settlement memorandum in 1995. I hold the grievor to the essential subject of his September 9, 2005 grievance — injury-on-duty leave — and decline to consider further any question related to his appointment status almost two decades ago.

[84] In the result, I find that the grievor has failed to prove that, on a balance of probabilities, the employer unreasonably determined his entitlement to injury-on-duty leave regarding the five periods claimed during the first time frame.

[85] Turning to the second time frame, the grievor claims injury-on-duty leave for three periods between February 20, 2001 and June 9, 2005 (Exhibit G-26). His onus is to prove that the employer unreasonably determined injury-on-duty leave for each of those periods.

[86] For one of the periods — February 20 and 21, 2001 — the only evidence that I have is that the WCB awarded TERB benefits for those two days in a ruling dated February 2, 2006 (Exhibit G-32), five months after the grievor filed his grievance and more than two months after the employer's final-level grievance reply (Exhibit G-29). The WCB document states that a " . . . [m]edical from Dr. Nichols dated February 22, 2001 supports that you were unable to work February 20th and 21, 2001 due to back pain." There was no evidence as to whether the grievor took paid leave for the two days, and I have found nothing about any determination concerning injury-on-duty leave by the employer for that incident. Because the grievor offered no argument to prove a violation of the collective agreement specific to those circumstances, his claim fails.

[87] The remaining two periods cover those parts of the grievor's absence from work due to his second workplace injury for which the employer did not grant injury-on-duty leave in its December 2, 2005 grievance reply (Exhibit G-28); that is, from September 6, 2003 to June 9, 2005. Once more, I note that I have no documentary confirmation of the grievor's official leave status during this period or of exactly what payments he may have received from other sources before being retroactively awarded benefits by the WCB. Instead, I have Mr. Libby's uncontradicted testimony that he believed that his determination of injury-on-duty leave ensured that there was no time when the grievor was absent from work that he did not receive a benefit from some source. In deciding to grant injury-on-duty leave for a total of 169 days out of the grievor's (approximately) 2-year absence following the second workplace injury, he testified that he considered the grievor's employment status, his length of service, the extent of the injury that he had sustained and the "worthiness of the employee" as a fully trained inspector who performed good work.

[88] What is the grievor's proof that the employer's determination of injury-on-duty leave for the second time frame was unreasonable?

[89] The grievor alleged that Mr. Libby was only concerned with whether the WCB or Sun Life had provided benefits when he identified the appropriate periods for injury-on-duty leave. He stated that Mr. Libby should have directed his mind to the pension and benefits losses that the grievor sustained. By not doing so, the grievor submitted that the employer was ". . . oblivious to the existence of a significant factor . . ." as contemplated in the adjudicator's reasons in *King*.

[90] During rebuttal argument, I tried to learn more from the grievor about the significant factors allegedly missing from Mr. Libby's determination that made it unreasonable — the grievor's main submissions had been sparing on that point. As reported earlier, he answered that Mr. Libby failed to involve him in discussions before making his decision, was not aware whether the grievor had repaid Sun Life for disability payments received or whether such benefits were taxable and did not know the nature of grievor's real loss.

[91] On the balance of probabilities, has the grievor proved "unreasonableness" through his submissions? I think not. In my view, the cumulative effect of the grievor's argument about the factors that the employer allegedly ignored or did not take adequately into account amounts to one substantive point. It is that the employer did not make the grievor whole by ensuring that he suffered no real income and benefit losses while absent from work due to the second workplace injury. For the grievor, the employer made its determination about injury-on-duty leave unreasonably because it left him in a position of having sustained a real loss.

[92] To the extent that the issue of a real loss appears to be the grievor's essential concern, I find it perplexing that he provided me with no concrete evidence defining that real loss during the second time frame. The only hard numbers that I have before me are the amounts that the WCB retroactively awarded the grievor for the different time periods. I have no idea what the grievor actually received in the form of disability payments from Sun Life or from any other source. As I have mentioned, I do not even know when, and for how long, the grievor took sick leave or other paid leave. On the issue of non-salary benefits, the grievor offered nothing that would allow me to appreciate the nature of his losses, particularly about the important issue of his pension entitlement.

[93] Even had I been in a better position to understand the scope of the grievor's real losses, the question would still remain whether a demonstrated failure to eliminate those losses, or perhaps to mitigate them to some greater extent, would have comprised sufficient proof that, on a balance of probabilities, the employer determined injury-on-duty leave in a way that was unreasonable in those circumstances. From my perspective, I could reach a conclusion in favour of the grievor only if I were convinced that the intent of the grant of discretion to the employer in clause 40.01 of the collective agreement is that it be exercised so as to "make the grievor whole" by

eliminating or minimizing his losses. As much as I sympathize with the proposition that an employee should not suffer any loss because he or she is injured in the line of duty, or that the loss should be reduced to the maximum extent possible, the wording of clause 40.01 does not take me there. Moreover, it remains the case that the *GECA* mandates the payment of workers' compensation benefits as the first-order measure for income security for an injured employee — in full recognition that such payments may not in the end reproduce the real value of the employee's normal terms and conditions of employment. Had the parties wanted to provide full income protection and to foreclose the possibility of any shortfall, they would have negotiated a collective agreement provision that clearly had that effect and that did not provide any discretion to the employer to do something different.

[94] On the specific points made by the grievor, I do not believe that an alleged failure by the employer to involve him in discussions about injury-on-duty leave would necessarily prove unreasonableness. In any event, the employer's December 2, 2005 grievance reply (Exhibit G-28) indicates that the parties met on November 15, 2005 at a grievance hearing to discuss his claims. I have no evidence about what transpired at that meeting, but it stretches credibility to think that the parties did not discuss the circumstances of the grievor's claim at least to some extent. Were there evidence that the employer refused to consider information provided by the grievor at that meeting, before it or in its wake, then perhaps a case might have been made that the employer failed to consider some "significant factor." As it is, the grievor's suggestions that the employer did not consider his pension and benefit losses, the impact of taxation or the history of his transaction with Sun Life is entirely speculative. To prove that the employer acted unreasonably by ignoring those or other "significant factors" requires a factual foundation that the grievor provided that information to the employer or that it was otherwise available to the employer and that it was ignored or inappropriately discounted. I do not accept the implied proposition that clause 40.01 of the collective agreement imposed an obligation on the employer on its own to inform itself comprehensively about the nature of the grievor's real losses. Surely, there must have been some onus on the grievor to bring forward information if he felt that such information was crucial to the employer's decision about injury-on-duty leave. As it is, I have the testimony of Mr. Libby that his decision to grant an additional 74.8 and 87 days of injury-on-duty leave ensured that the grievor received some type of payment for all the period that he was off duty. That testimony suggests that the employer took

some step to assure itself about the grievor's income security, although not to the extent advocated by the grievor of eliminating all "real losses." I do not believe that the grievor has proven, on balance, why the employer's decision making in that regard was unreasonable.

[95] I note in passing that the grievor's submission about the required 130-day review of injury-on-duty leave has no foundation. An examination of the employer's policy (Exhibit E-5) makes it clear that the 130-day review occurs when an employee receives leave on an ongoing basis. As argued by the employer, the determination it made in this case concerned a retroactive entitlement to leave, a situation that is quite different.

[96] In summary, I find that the grievor has not proven, on a balance of probabilities, that the employer acted unreasonably in determining injury-on-duty leave for the second time frame. Lacking that proof, I find that there was no violation of clause 40.01 of the collective agreement.

[97] For all of the above reasons, I make the following order:

(The Order appears on the next page)

V. Order

[98] The grievance is dismissed.

June 3, 2010.

Dan Butler,
adjudicator