Date: 20130522

File: 566-34-5756

Citation: 2013 PSLRB 55

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

DEREK WAMBOLDT

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Wamboldt v. Canada Revenue Agency

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Augustus Richardson, adjudicator

For the Grievor: Christopher Schultz, Public Service Alliance of Canada

For the Employer: Caroline Engmann, counsel, Treasury Board Secretariat Legal Services

Heard at Charlottetown, Prince Edward Island,
March 15, 2013.

Individual grievance referred to adjudication

[1] The question that arises in this grievance is whether the Canada Revenue Agency ("the employer") is obligated pursuant to clause 14.06(a) of the relevant collective agreement at issue to pay an employee for the time he or she spends preparing with his or her counsel or union representative for the hearing of his or her grievance at adjudication. Derek Wamboldt ("the grievor") stated that the employer is so obligated. The employer stated that it is not.

[2] By way of background, at all material times, the grievor was an SP-03 administrative clerk working for the employer in its Summerside Tax Centre in Prince Edward Island. The grievor was represented by the Public Service Alliance of Canada ("the union").

[3] The union and the employer are parties to a collective agreement (for the Program Delivery and Administrative Services Group) with an expiry date of October 31, 2010 ("the collective agreement"). Article 14 of the collective agreement deals with "Leave With or Without Pay for Alliance [Union] Business." Clause 14.06 ("Adjudication") provides as follows:

> *14.06 When operational requirements permit, the Employer will grant leave with pay to an employee who is:*
>
> *(a) a party to the adjudication,*
>
> *(b) the representative of an employee who is a party to an adjudication, and*
>
> *(c) a witness called by an employee who is a party to an adjudication.*

[4] In July 2006, the grievor filed a grievance (not this one) about acting pay. That matter wound its way through the grievance process and eventually went to adjudication on October 29, 2009 in Charlottetown, Prince Edward Island; see *Cooper and Wamboldt v. Canada Revenue Agency*, 2009 PSLRB 160. The day before the hearing, the grievor sought leave with pay pursuant to clause 14.06(a) of the collective agreement to prepare with his representative. The grievor said that, in effect, clause 14.06(a) required the employer to grant him leave with pay since he was a party to an adjudication. The request was denied. The grievor then filed the present grievance.

[5] The parties proceeded by way of an agreed statement of facts, together with one witness, called by the employer.

[6] The agreed statement of facts reads as follows (with the paragraph numbers changed to letters):

> *a. On October 28, 2009 Derek Wamboldt (the "grievor") requested five (5) hours of leave with pay to meet with his Union representative prior to the presentation of his grievance at adjudication on October 29, 2009.*
>
> *b. At the same time, the grievor was an SP-03– Administrative Clerk, working in the CRA Summerside Tax Centre, Prince Edward Island.*
>
> *c. This request was denied by the Employer.*
>
> *d. On November 10, 2009 the grievor filed a grievance as follows: "I grieve the employer's decision to deny me time to meet with my representative prior to my adjudication hearing."*
>
> *e. In the final level reply issued on June 30, 2011, the Employer denied the grievance on the grounds that there were no requirements set forth in the Collective Agreement for management to grant leave with pay to meet with a union representative to prepare for an adjudication hearing.*

[7] The employer's witness, Coleen Duval, was in October 2009 the manager of individual and benefits services at the employer's Summerside office. She explained that the grievor had asked for leave with pay to meet with his union representative to prepare for the hearing of his grievance. In her opinion, and on the advice of the employer's human resources branch, no provision in the collective agreement provided an employee with leave with pay to meet with counsel or a union representative to prepare for a hearing. Accordingly, she denied the request. She testified that the grievor met with his union representative during normal working hours. He was paid vacation pay for that time. He was also granted leave with pay to attend the grievance hearing.

[8] The union also filed a book of documents as Exhibit U1. That exhibit included at Tab 6 an unsigned agreed statement of facts, which the parties agreed at the hearing was in fact applicable and which is cited in para 6 above.

[9] The grievor's representative emphasized that the issue was essentially one of

interpretation. He stressed the following rules of construction that he submitted ought to be employed in the case before me:

> a. when interpreting a collective agreement a broad, liberal and balanced approach should be adopted: *Babcock v. Treasury Board (Health and Welfare Canada)*, (1989), 5 LAC (4th) 15 at p.21;
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> b. the clause under consideration must be interpreted within the "entire context" of the matter, which includes the collective agreement as a whole: *Communication, Energy and Paperworkers Union, Local 777 v. Imperial Oil Strathcona Refinery (Policy Grievance)*, [2004] A.G.A.A. No. 44 at paras.43-46; and
>
> c. that where there is more than one possible interpretation of a provision, the one "which best harmonizes with the whole of the document" is to be preferred: *International Union of United Automobile, Aircraft and Agricultural Implement Workers of America, Local 439 v. Massey-Harris Company Ltd* (1947) 1 LAC 68 at p.69; *Kootenay-Columbia School District No. 20 v. Canadian Union of Public Employees, Local 1285 (Salsiccioli Grievance)*, [2009] B.C.C.A.A.A. No. 153 at para.33.

[10] The grievor's representative submitted that article 14 of the collective agreement, which as noted deals with leave with or without pay for union business, does not exist in a vacuum. He submitted that some 30 provisions in the collective agreement grant several types of leave with or without pay. Many if not most have limitations associated with them in terms of when leave can be granted, how it should be calculated and whether such leave is with or without pay. So, for example, article 32 ("Travelling Time") has detailed provisions establishing how much, when and under what circumstances travel time is payable. Similarly, article 48 ("Court Leave") limits pay with leave to only those circumstances in which an employee is compelled by different means to attend court or court-like proceedings, such as adjudications.

[11] By way of contrast, clause 14.06(a) of the collective agreement is broad and without limit. The only considerations with respect to the leave it grants are the following:

> a. the employer's operational requirements;
>
> b. the person is a party to an adjudication; and
>
> c. there is an adjudication scheduled.

[12] Since the parties did not limit the circumstances under which leave could be granted under clause 14.06 of the collective agreement, as they did with other provisions, they must be considered to have agreed that it was to be interpreted broadly. Moreover, a grievor's right to pursue his or her grievance through to adjudication necessarily carries with it the right to prepare with his or her representative. Otherwise, the right to present his or her case would be impaired or even frustrated.

[13] The grievor's representative submitted that, while the generality of the wording of clause 14.06(a) of the collective agreement supports his interpretation of its scope, it does not mean that the provision is unlimited. He submitted that clause 14.06(a) allows only reasonable time to prepare. He pointed to the introductory words, "[w]hen operational requirements permit," as purporting a requirement that only reasonable leave with pay is authorized by the clause. He submitted that a manager was able to judge, on the basis of several factors, what period of time was reasonable.

[14] The grievor's representative concluded by submitting that I should declare that clause 14.06(a) of the collective agreement authorizes granting leave with pay to a grievor as a party to an adjudication for both of the following situations:

> a. reasonable preparation time with his or her representative; and
>
> b. the time spent at the hearing.

[15] Counsel for the grievor also submitted that, in this case, reasonable preparation time would be five hours and that, accordingly, the grievance ought to be allowed.

Submissions for the employer

[16] The employer's representative commenced by noting that she had not been able to find any case discussing clause 14.06 of the collective agreement. In her submission, clause 14.06(a) provides leave with pay only for the actual attendance of a grievor, as a party, at an adjudication hearing. It does not extend to preparation time.

[17] Counsel for the employer did not disagree with the general principles of interpretation urged by the grievor's representative but noted that they supported her position. In particular, she submitted that the fact that the collective agreement

provides for preparation time in other situations meant that its failure to do so for adjudication must have been deliberate. For example, she pointed to clause 14.07 ("Meetings During the Grievance Process"), which provides as follows:

> *14.07 Where an employee representative wishes to discuss a grievance with an employee who has asked or is obliged to be represented by the Alliance in relation to the presentation of his or her grievance, the Employer will, where operational requirements permit, give them reasonable leave with pay for this purpose when the discussion takes place in their headquarters area, and reasonable leave without pay when it takes place outside their headquarters area.*

[18] The parties had directed their attention to the need of a grievor to meet with his or her representative during the grievance process and had expressly allowed for leave with pay. The fact then that they did not allow for a similar grant once the matter reached adjudication could mean only that they understood and agreed that leave with pay would not be granted for preparation time at that point.

[19] The employer's representative also pointed to clause 14.09 ("Contract Negotiation Meetings") and 14.10 ("Preparatory Contract Negotiation Meetings") of the collective agreement. Both deal with attendance at meetings before or during contract negotiations. Both could be considered as forms of preparation. Both grant leave "[w]hen operational requirements permit." But, in both cases, the leave is without pay. So, the parties had been aware of the issue of preparation time and whether it should be permitted with or without pay when they negotiated the collective agreement. They had considered it but had agreed that it should not be with pay. The fact then that the issue was not dealt with expressly in clause 14.06 (as it was in the case of other types of union business) could mean only that the parties did not consider preparation time for an adjudication to include leave with or without pay under that provision.

[20] The representative for the employer submitted that the other provisions of the collective agreement referred to by the grievor's representative deal with different matters and cannot be used as an aid in interpreting clause 14.06. Article 48 deals with proceedings in courts or court-like bodies and has nothing to do with adjudications under section 209 of the *Public Service Labour Relations Act*, S.C. 2003, c.22, s.2 ("the *Act*"). Other provisions (such as those dealing with travel time) deal with different situations and have to be confined to those situations. The fact that a liberal leave-with-pay policy had been agreed to in respect of one situation cannot be used to

modify, enlarge or even interpret the leave-with-pay provision dealing with a different situation.

[21] The employer's representative also pointed to the problem of how a manager was to determine reasonable preparation time. She submitted that the suggestion that a manager make that decision based on his or her evaluation of the grievance would represent an unwarranted interference with the rights of the grievor and his or her union to proceed with a grievance as they saw fit. It would put a manager in an impossible position. How could one know how much preparation time for any particular grievance is reasonable without at the same time passing judgment on the union's strategy or tactics? But neither a manager nor the employer is entitled to know about a union strategy.

[22] The employer's representative submitted that the grievor's interpretation of clause 14.06(a) of the collective agreement, if followed, would necessarily grant preparation time not just to a party to the adjudication but also to witnesses called by an employee party. In other words, there is no way to read clause 14.06(a) as permitting leave with pay for preparation for parties without, at the same time, reading it so as to provide leave with pay to witnesses or to representatives.

[23] Accordingly, the employer's representative submitted that I ought to dismiss the grievance.

Reply of the grievor

[24] The grievor's representative submitted in reply that, given the two competing interpretations, I ought to choose the one that is more harmonious within the overall context of the collective agreement as a whole. He agreed that the language of clause 14.06(a) might be ambiguous in that it does not expressly deal with preparation time but suggested that the broadness of the grant he said exists is tempered or fettered by the rest of the collective agreement. Managers have a broad discretion, unless otherwise expressly restricted, and they have the power and the right under clause 14.06(a), precisely because of the provision's generality, to determine how much leave with pay for preparation should be granted.

Analysis and decision

[25] I will commence by observing that I have no difficulty with and that I agree in general with the principles of interpretation cited and relied upon by the grievor's representative. My task is to garner what the parties agreed to from the words they used. In doing so, I cannot change or alter the words they used when they entered into the collective agreement. When interpreting the words used in a collective agreement, I must use their ordinary, everyday meaning, unless doing so would lead to an absurd result or unless the agreement defines them in a special or particular way. I must interpret the words used within the overall context of the agreement in which they appear. And finally I am prohibited from amending the collective agreement by virtue of section 229 of the *Act*.

[26] However, those are only some of the principles to be relied upon when interpreting a particular provision in a collective agreement. In my opinion, two others are relevant to this case.

[27] First, a benefit that has a monetary cost to the employer must be clearly and expressly granted under the collective agreement; see, for example, *Cardinal Transportation B.C. Inc. v. Canadian Union of Public Employees, Local 561* (1997), 62 L.A.C. (4th) 230, at para 27; *Greater Sudbury (City) v. Ontario Nurses' Association,* [2011] O.L.A.A. No. 471 (QL), at para 23; and *Essex (County) v. Canadian Union of Public Employees, Local 2974.1* [2006] O.L.A.A. No. 689 (QL), at para 23.

[28] Second, parties to a collective agreement are generally considered to have attempted to arrive at an agreement that is easy to apply in daily practice. Hence, an interpretation that produces a clear result is generally to be preferred to one that produces a messy or uncertain result, if only because a clear result is more likely to produce and maintain the ". . . harmonious and mutually beneficial relationships between the Employer, the Alliance, and the employees . . ." that is one of the purposes of the collective agreement; see clause 1.01. In short, an interpretation that makes applying the provision easy in practice as a rule is to be preferred over one that makes that application difficult if not impossible.

[29] I will turn now to the wording of clause 14.06(a) of the collective agreement that I am called to interpret, which is, "[w]hen operational requirements permit, the Employer will grant leave with pay to an employee who is . . . a party to the

adjudication . . . ." The question I have to address is whether, by those words, the parties intended and agreed that the employer would grant leave with pay to a grievor for the purpose of meeting with his or her representative to prepare for an adjudication or only for the day or days of the actual adjudication hearing.

[30] The parties did not define "adjudication" in the collective agreement. Nor, for that matter, did they define "grievance." However, both parties are sophisticated. Both have long histories of dealing with each other. And both conduct their relationship within the framework established by the *Act*. That being the case, I am satisfied that both understood that the words at issue refer to the grievance and adjudication processes provided for in the *Act*, in particular sections 208 and 209 in Part 2 ("Grievances") of the *Act*.

[31] That brings me to the question of how I am to interpret the parties' use of the phrase "the adjudication." An adjudication under the *Act* involves a number of steps. A grievance that involves the interpretation of a collective agreement (as the one before me does) must first be approved by the union. It is then filed with the Board. Often the employer files an objection to jurisdiction, to which a response must be filed. The possibility of mediation is often discussed. Mediations are sometimes held. Adjudication hearings will sometimes run longer than the time allotted and must be continued later on dates that are usually several if not many months in the future.

[32] Most if not all of those steps may require consultation or preparation time between the grievor and his or her representative. If the parties intended that preparation time was to be implied by the word "adjudication" in clause 14.06(a) of the collective agreement, the employer could and would be expected to shoulder a potentially large monetary cost that could not easily be controlled or predicted. It strikes me as unlikely that the employer would have agreed to assume such a liability in the absence of clear wording to that end.

[33] The grievor's representative sought to avoid that difficulty by submitting that management has a right and a discretion under clause 14.06(a) of the collective agreement to limit such preparation time to <u>reasonable</u> preparation time. But such a limit creates its own problems of both interpretation and application.

[34] First, if the grievor's interpretation is correct, and preparation time was included within the meaning of "adjudication" in clause 14.06(a) of the collective

agreement, then nothing in clause 14.06(a) limits the preparation time that is to be allowed. In other words, any preparation time between the time the reference to adjudication is made and the hearing concludes would be entitled to leave with pay. To then suggest that I could limit what might otherwise appear to be an unlimited liability by reading in the word "reasonable" would require me to do what I am prohibited by section 229 of the *Act* from doing – amending the collective agreement.

[35] Second, even if a "reasonableness" limit could be smuggled into the interpretation of clause 14.06(a) of the collective agreement, the resulting interpretation would in practice not provide a manager with an objective criterion by which to determine what would be reasonable. Is it one hour? Five hours? A day? While uncertainty in application is not necessarily fatal to a particular interpretation, it creates doubt as to whether the interpretation represents an accurate reflection of what the parties agreed to. This is particularly true when the other interpretation contended for, as is the employer's in this case, is easy to apply in practice. It is easy to base leave with pay on the number of days of a hearing; it is difficult to determine how much preparation time is necessary for a hearing.

[36] Third, to interpret clause 14.06(a) of the collective agreement as including a power on the part of management to limit the preparation time to "reasonable" in my opinion would be to invite confusion and more, rather than less, conflict between the parties. Giving a manager the right to determine how much preparation time for any particular grievance is "reasonable" would invite managers to inquire into the union's strategy, to ask who it intends to call as witnesses and to advise as to the issues it intends to raise, all to help the manager decide what is "reasonable." Such an inquiry would inevitably (and not unreasonably) be considered an unwarranted intervention into the union's business. Even if it did not, the decision could spark another grievance, leaving the employer in a situation in which one grievance then becomes two. Such a result could hardly be conducive to the maintenance of ". . . harmonious and mutually beneficial relationships between the Employer, the Alliance and the employees . . ." that is one of the purposes of the collective agreement, as set out in clause 1.01.

[37] Fourth, when one considers clause 14.06 of the collective agreement in the context of article 14 as a whole, it becomes clear that the parties were aware of the fact that the union's activities often require preparation time before they are carried out.

For example, in the case of grievances filed under section 208 of the *Act* (that is, grievances that have not reached the stage of being referred to adjudication), clause 14.07 allows for leave with pay for the preparatory meetings with the grievor's representative, and clause 14.08 provides for leave with pay when meeting with the employer during the different stages of the grievance process. Similarly, in the case of contract negotiations, clauses 14.09 and 14.10 provide leave without pay for both the negotiations and the time necessary to prepare for those negotiations.

[38] But clause 14.06 of the collective agreement does not provide a similar differentiation between preparation time and attendance time. The fact that it does not – especially when considered in the context of other provisions that do – suggests to me that the parties did not intend the leave with pay provided for in clause 14.06 to extend beyond attendance at an adjudication.

[39] I am satisfied that the leave with pay available under clause 14.06(a) of the collective agreement does not include the time spent by a grievor with his or her representative preparing for an adjudication hearing.

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

(The Order appears on the next page)

Order

[41] The grievance is dismissed.

May 22, 2013.

Augustus Richardson,
adjudicator