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Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Bargaining Agent

and

NATIONAL RESEARCH COUNCIL OF CANADA

Employer

Indexed as
Professional Institute of the Public Service of Canada v. National Research Council of Canada

In the matter of policy grievances referred to adjudication

REASONS FOR DECISION

Before: Steven B. Katkin, adjudicator

For the Bargaining Agent: Pierre Ouellet, Professional Institute of the Public Service of Canada

For the Employer: Martin Desmeules, counsel

Heard at Ottawa, Ontario,
September 13 and 14, 2012.

I. Policy grievances referred to adjudication

[1] On August 13, 2009, the Professional Institute of the Public Service of Canada (PIPSC or "the union") filed policy grievances on behalf of each of four bargaining units against the National Research Council of Canada (NRC or "the employer") pursuant to section 220 of the *Public Service Labour Relations Act* ("the *Act*") challenging the employer's interpretation of the vacation leave provisions of the applicable collective agreements. All the grievances were referred to adjudication on November 18, 2009. The bargaining units, the expiry dates of their respective collective agreements and the corresponding grievance files of the Public Service Labour Relations Board (PSLRB) are as follows: Library Science Group, June 30, 2011 (PSLRB File No. 569-09-56); Research Officer/Research Council Officer (RO/RCO) Group, July 19, 2011 (PSLRB File No. 569-09-57); Translator Group, June 20, 2011 (PSLRB File No. 569-09-58); Information Services Group, June 20, 2011 (PSLRB File No. 569-09-59).

[2] The wording of each grievance is identical, and reads as follows:

. . .

> *. . . we grieve the employer's interpretation that the one time vacation leave entitlement is part of the 262.5 hour vacation cap and has to be used by members in the year they become entitled to it and cannot be carried over.*

. . .

[3] As corrective measures, the PIPSC requested, among other things, a declaration that the one-time vacation leave entitlement is not subject to the vacation carry-over cap and that employees be permitted to carry over this entitlement, should they so desire.

[4] The employer's final-level response denying the grievances was as follows:

. . .

> *The language as specified in the respective agreements relating to the one time (37.5) hours vacation leave entitlement, as well as the vacation leave carry over and draw down provisions, is clear. Specifically the one time (37.5 hours) entitlement is referred to as "vacation leave". The relevant collective agreements also contain provisions that address the matter of a cap on "vacation leave" accumulation as well as the carrying over of "vacation leave" balances from one fiscal year to the next. These provisions*

> *make no distinction between the one time (37.5 hours) entitlement and vacation leave earned under the other relevant provisions of the collective agreement. Such provisions are interrelated and must be looked at collectively in administering and managing vacation leave balances for the subject bargaining units. Consequently the one time (37.5 hours) entitlement must form part of the cap on vacation leave accumulation.*
>
> *Further, to clarify, it is the NRC's position/interpretation that the one time (37.5 hours) vacation leave entitlement does not have to be used in the year in which it is earned and also that it can be carried over from one year to the next. This having been said, it must nevertheless count towards the vacation leave cap of 262.5 hours.*
>
> . . .
>
> [*Sic* throughout]

[5] The provisions dealing with the carry-over of vacation leave form part of the body of the collective agreements applicable to three of the four bargaining units. However, for the RO/RCO Group, those provisions are contained in a memorandum of understanding (MOU) set out at Appendix B of that collective agreement. The wording is identical in all the collective agreements. Since, as the evidence disclosed, the issue to be determined affects primarily the RO/RCO Group, the wording of that collective agreement and the MOU will be referred to in this decision, and that agreement will be referred to as "the collective agreement." The relevant provisions of the collective agreement are as follows:

> . . .
>
> ***ARTICLE 18 - VACATION LEAVE***
>
> . . .
>
> ***18.02 Accumulation of Vacation Leave***
>
> *An employee shall earn in respect of each fiscal year, annual vacation leave with pay for each calendar month in which the employee receives at least seventy five (75) hours, at the following rates:*
>
> *(a) twelve decimal five (12.5) hours per month until the month in which the employee's sixteenth (16th) anniversary of service occurs;*

(b) thirteen decimal seven five (13.75) hours per month commencing with the month in which the employee's sixteenth (16th) anniversary of service occurs;

(c) fourteen decimal three seven five (14.375) hours days [sic] per month commencing with the month in which the employee's seventeenth (17th) anniversary of service occurs;

(d) fifteen decimal six two five (15.625) hours per month commencing from the month in which the employee's eighteenth (18th) anniversary of service occurs;

(e) sixteen decimal eight seven five (16.875) per month commencing with the month in which the employee's twenty-seventh (27th) anniversary of service occurs.

(f) eighteen decimal seven five (18.75) hours per month commencing with the month in which the employee's twenty-eighth (28th) anniversary of service occurs.

. . .

18.07 Scheduling of Vacation Leave

(a) Both parties agree that the present practice of granting vacation leave shall continue for the duration of this Agreement. The parties agree that the present practice includes that the planning and timing of annual vacation leave shall be discussed during interactions between employees and supervisors in the context of the workload.

(b) An employee's vacation shall normally be taken in the fiscal year in which it is earned.

(c) (see Appendix "B")

. . .

18.11 Carry-Over Provisions

(see Appendix "B")

18.12 Liquidation of Vacation Leave

Upon application by the employee and at the discretion of the Council, earned but unused vacation leave credits in excess of one hundred twelve decimal five (112.5) hours may be liquidated by cheque in the month of March, at the employee's daily rate of pay at the last day of the fiscal year.

. . .

18.17 One Time Vacation Leave Entitlement

An employee shall be credited with a one-time entitlement of thirty seven decimal five (37.5) hours of vacation leave with

pay on the first (1st) day of the month following the employee's second anniversary of service.

18.17.1 Transitional Provision

Effective 11 May 2009, employees with more than two (2) years of service, as defined in clause 18.01, shall be credited a one-time entitlement of thirty-seven decimal five (37.5) hours of vacation leave with pay.

. . .

[6] The MOU reads as follows:

APPENDIX B

MEMORANDUM OF AGREEMENT
BETWEEN
NATIONAL RESEARCH COUNCIL CANADA
AND
THE PROFESSIONAL INSTITUTE OF
THE PUBLIC SERVICE OF CANADA
IN RESPECT OF THE
RESEARCH OFFICER AND RESEARCH COUNCIL OFFICER
(RO/RCO) GROUP

RE: VACATION LEAVE

Preamble

In an effort to reduce accumulated vacation leave credits, the parties agree that the following clauses will be implemented on a trial basis.

Application

1. Commencing on (date of signing) and ending 19 July 2011, the following clauses will be part of this collective agreement:

18.07 Scheduling of Vacation Leave

(c) Notwithstanding (a), if the employee has not filed with the Council the employee's preference by October 1st or if the Council has been unable to schedule vacation periods preferred by the employee, the Council shall, subject to operational requirements, schedule the vacation periods.

18.11 Carry-Over Provisions

(a) Employees shall be entitled to carry earned but unused vacation credits over into the following fiscal year to a maximum of two hundred sixty-two decimal five (262.5)

> *hours leave. The 262.5 hours limit may only be exceeded where the Council cancels a previously scheduled period of vacation leave and reschedules the excess for use at a later date or where the employee was unable to schedule vacation leave based on management's request. Earned and unused vacation leave credits in excess of the 262.5 hours shall be compensated monetarily at the end of the fiscal year at the employee's daily rate of pay as calculated from the employee's substantive position.*
>
> *(b) Notwithstanding paragraph (a), if on (date of signing) or on the date an employee becomes subject to this Agreement after (date of signing), an employee has more than two hundred sixty-two decimal five (262.5) hours of unused vacation leave credits, a minimum of seventy five (75) hours per year shall be granted or paid in cash by March 31st of each year, commencing on March 31, 2010 until all vacation leave credits in excess of two hundred sixty-two decimal five (262.5) hours have been liquidated. Payment shall be in one installment per year and shall be at the employee's daily rate of pay as calculated from the employee's substantive position on March 31 of the previous vacation year.*
>
> *2. This Memorandum of Understanding expires on 19 July 2011.*
>
> *Signed at Ottawa, this 11th day of May 2009.*
>
> . . .

II. <u>Summary of the evidence</u>

[7] Three witnesses testified in this matter: Bob Luce and Suzelle Brosseau on behalf of the union, and Benoît Chartrand for the employer. It is common ground that Messrs. Luce and Chartrand were involved in negotiating the clauses at issue on behalf of the union and employer respectively, both were experienced negotiators, the negotiations were conducted in the English language, and their bargaining notes were in English (Exhibits S-1, Tab 7, and E-1, Tabs 1 and 2). The employer's final offer concerning the vacation leave provisions were in English and were signed off by Messrs. Luce and Chartrand on November 26, 2008 for the Library Science, Translator and Information Services Groups, and on November 27, 2008 for the RO/RCO Group (Exhibit E-1, Tabs 3A, B and C).

[8] It is not in dispute that the one-time paid vacation leave entitlement of 37.5 hours was a conversion from the five days of leave with pay for marriage titled

"marriage leave" under the previous collective agreements governing the groups in question.

A. <u>For the union</u>

[9] Mr. Luce stated that he had been a PIPSC representative for 18 years and a negotiator for 17 of those years, of which 15 were spent negotiating with NRC groups. He retired in 2006, and he was asked to assist with the 2008 negotiations. He said that he was involved in the negotiations from November 26 to 28, 2008 and that he had been briefed on the outstanding issues, probably by Ms. Brosseau.

[10] Mr. Luce testified that the employer had been attempting to implement a more formal manner of vacation leave management and that the RO/RCO employees were concerned about how it would be handled. Mr. Luce stated that, for those employees, this issue was more important in 2008 than were the wage adjustments. For the three other groups, the wage adjustments were the main issue.

[11] Mr. Luce testified that he did not recall any discussion whatever at the bargaining table as to whether the one-time vacation leave entitlement was included in the 262.5-hour (35-day) cap. He also stated that he did not recall any such discussion among the PIPSC negotiators or with PIPSC members. He further stated that neither the employer's proposal nor the union's revised offer contained any reference that the one-time entitlement was part of the 262.5-hour cap. Mr. Luce expressed the view that the cap of 262.5 hours applied only to leave that had been earned by an employee.

[12] On cross-examination, Mr. Luce said that clause 18.02 of the collective agreement (Exhibit S-1, Tab 2) titled "Accumulation of Vacation Leave" dealt with earned leave, whereas clause 18.17, while referring to the one-time entitlement as "vacation leave with pay," differed from clause 18.02 in that clause 18.17 was not earned leave. He viewed clause 18.17 as a unique provision.

[13] Mr. Luce acknowledged that clause 18.17 of the collective agreement did not refer to an exclusion from the cap of 262.5 hours; nor was there such an exclusion in clause 18.11 of Appendix B of that agreement. He further acknowledged that the employer did not give the union any assurance that the one-time entitlement either would or would not be included in the cap.

[14] Mr. Luce said that vacation was a very sensitive issue in the negotiations and that the union had to take the employer's word concerning the extent of outstanding vacation liability in the RO/RCO Group.

[15] In re-examination, Mr. Luce stated that he viewed the one-time entitlement as different from what is usually referred to as vacation leave, since the employer granted that leave unconditionally. There was no requirement for a marriage or that an employee would have to claim an unusual circumstance, such as a fire at home, to benefit from the one-time leave.

[16] Ms. Brosseau stated that she has been a PIPSC representative for 26 years, 11 of which were as a negotiator in several sectors. In the 2008 bargaining round, she dealt with the RO/RCO Group and prepared the union's proposals with members of that group.

[17] Referring to the PIPSC's organizational structure as described in its *Guide for Members* (Exhibit S-2), Ms. Brosseau stated that each group within the PIPSC is autonomous and controls its own affairs. As an example, she said that one group could negotiate a collective agreement clause that is contrary to that bargained by another PIPSC group. The *Guide for Members* provides as follows on page 10:

> *GROUPS*
>
> *Members belong to Groups, which include all the members of the same bargaining unit. Each Group operates under its own Constitution which must be consistent with Institute bylaws. Members of the Group elect their own Executive.*
>
> *One of the main roles of the Group Executive is to determine collective bargaining objectives. The Group Executive prepares and approves collective bargaining demands, selects and mandates the bargaining team and approves or rejects a tentative settlement for ratification. A staff negotiator supports the Group Executive and coordinates negotiations with the employer.*
>
> . . .

[18] Ms. Brosseau testified that the parties were negotiating in a drastically shortened time frame due to the looming *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393. It was her understanding that parties had to reach an agreement by midnight on November 26, 2008, failing which the legislation would govern the terms and

conditions of employment, without any increase in employees' wages. Ms. Brosseau stated that she asked Mr. Chartrand whether that legislation would apply to the NRC as a separate employer, which he attempted to verify. She said that the negotiations for the RO/RCO Group commenced later than for the three other NRC bargaining units.

[19] Ms. Brosseau stated that the union made the proposal to convert the marriage leave to a one-time entitlement of 37.5 hours. She said that whether the one-time entitlement was included in the 262.5-hour cap was not discussed during the negotiations but that the union's position was that the one-time entitlement could not be counted in the cap, as it was only for a single occasion. Ms. Brosseau said that the employer had one code for vacation leave and a separate code for the one-time entitlement.

[20] On cross-examination, Ms. Brosseau stated that, at the relevant time, the approximate number of employees in each bargaining unit was RO/RCO - 1500; Translators – 2 to 4; Information Services – 40 to 50; and Library Science - 70.

[21] Ms. Brosseau referred to the French version of clause 18.17 of the collective agreement, which reads as follows:

> ***18.17 Droit au congé annuel unique***
>
> *L'employé a le droit de prendre une fois au cours de sa carrière trente-sept virgule cinq (37,5) heures de congé annuel payé le premier (1er) jour du mois suivant le deuxième (2e) anniversaire de son entrée dans la fonction publique.*

[22] Ms. Brosseau asserted that the phrase *une fois au cours de sa carrière* indicated that the 37.5-hour one-time entitlement was not subject to the vacation carry-over provisions, as it was granted once in an employee's career. Ms. Brosseau stated that annual vacation leave had to be earned, while the one-time entitlement did not.

[23] Ms. Brosseau said that the marriage leave had been a separate clause in previous collective agreements and that it had not been included in the vacation leave provisions.

[24] Ms. Brosseau was referred to an email dated December 17, 2009 and addressed to Mr. Chartrand with the subject, "one-time vacation entitlement leave" (Exhibit S-1, Tab 12). It reads in part as follows:

> *Your proposal to bring the MOU on the vacation carry-over cap into the collective agreement, in exchange for adding language in the collective agreement that would exclude the one-time vacation leave entitlement leave from the vacation carry-over cap, has been rejected. The MOU was negotiated as a pilot project and needs to remain as such in order for the parties to monitor its application.*
>
> . . .
>
> *As mentioned many times before, we believe given this last round of negotiations, that the one-time vacation entitlement leave is excluded from the vacation carry-over cap.*
>
> . . .

[25] Ms. Brosseau stated that the employer wanted the text of the pilot project to form part of the body of the collective agreement and not of an appendix to it.

[26] Ms. Brosseau was then referred to a union proposal dated October 27, 2011 concerning the one-time vacation leave entitlement for the RO/RCO bargaining unit (Exhibit E-1, Tab 9), which reads as follows, with the proposed changes in bold type:

> ***18.17 One Time Vacation Leave Entitlement***
>
> *An employee shall be credited with a one-time entitlement of thirty seven decimal five (37.5) hours of vacation leave with pay on the first (1st) day of the month following the employee's second anniversary of service.* ***The vacation leave credits provided in paragraph 18.17 above shall be excluded from the application of clause 18.11 (Appendix B) dealing with Carry-over of Vacation Leave.***

[27] The union made a similar proposal dated December 7, 2011 for the Translator and Information Services bargaining units (Exhibit E-1, Tab 10). Ms. Brosseau acknowledged that it was possible that she had prepared the language for clause 18.17, adding that she would have done so without prejudice to the present grievances.

[28] In re-examination, Ms. Brosseau stated that, in clause 18.17 of the collective agreement, the phrase *une fois au cours de sa carrière* did not mean "once in the following fiscal year."

B. For the employer

[29] Mr. Chartrand was the employer's chief bargainer in 2008 and had conducted negotiations with several unions earlier in his career.

[30] Mr. Chartrand said that the employer did not have greater knowledge than did the union about the potential effects of the *Expenditure Restraint Act*. He stated that he and his team were instructed by the Treasury Board to go to the final-offer stage. He said that the bargaining round with the RO/RCO Group was the last before the final offer was made. Two or three rounds had been held with the three other bargaining units in July, August and September.

[31] Mr. Chartrand stated that the outstanding vacation "liability" for the employer in respect of the RO/RCO employees was $24 million and that those employees accounted for 63% of the total liability. He said that at least 10 RO/RCO employees had outstanding vacation balances valued at greater than $100 000 and that two employees had balances valued at more than $200 000. Thus, the cap on vacation leave was an important issue for the employer.

[32] Mr. Chartrand said that the employer was aware that the union would propose converting the marriage leave to the one-time entitlement. Asked whether the parties interacted about the one-time entitlement and the vacation leave carry-over, Mr. Chartrand replied that there was no time to explore those matters in depth.

[33] Mr. Chartrand stated that the drawdown of 75 hours per year was introduced because one-third of the RO/RCO bargaining unit had vacation leave over the 262.5-hour cap. He said that, in his experience, if the parties wished to exclude the one-time entitlement from the vacation carry-over provisions, they would so stipulate in the collective agreement. In this regard, in an email he sent to Ms. Brosseau dated July 31, 2009 (Exhibit E-1, Tab 5), Mr. Chartrand stated the following:

. . .

> *1. We are still of the same view with regards to the one time entitlement. It does form part of the cap since no specific language exists to exclude it and it is basically another form of vacation leave.*

. . .

[34] In Mr. Chartrand's view, if the one-time entitlement were not a vacation leave, then there would be no requirement for a clause excluding it from the vacation leave cap.

[35] Mr. Chartrand referred to several collective agreements negotiated by the PIPSC and the Treasury Board in which the one-time entitlement was expressly excluded from the vacation carry-over provisions. The relevant PIPSC bargaining units and the collective agreement expiry dates are as follows (Exhibit E-1, Tab 12): Audit, Commerce and Publishing - June 21, 2011; Architecture, Engineering and Land Survey - September 30, 2014; Research - September 30, 2010; and Applied Science and Patent Examination Group - September 30, 2011.

[36] Mr. Chartrand also referred to the following two collective agreements between the same parties in the same exhibit in which the exclusionary clause was omitted: Computer Systems - expiry date, December 21, 2010; and Health Services - expiry date, September 30, 2011. He referred to an information bulletin published by the PIPSC on January 10, 2008 concerning the previous Computer Systems collective agreement (Exhibit E-1, Tab 13) titled, "CS, one week vacation entitlement." The bulletin reads in part as follows:

> *In 2006, the CS group agreement introduced a "one time" vacation entitlement of 37.5 hours (5 days); to this end, you may wish to refer to section 15.19 of the CS agreement.*
>
> *The intent of the parties, was: ensuring that employees have an opportunity to consume the above credit before April 1, 2008; should it not be consumed by said date and you have to credit more than 262.5 hours (35 days) of vacation, the "one week entitlement" would be rolled into the cash-out of vacation provision found at section 15.07 of the collective agreement.*
>
> . . .

[37] Mr. Chartrand also referred to an information bulletin dated January 14, 2008 published by the Treasury Board concerning the Computer Systems collective agreement (Exhibit E-1, Tab 14), the subject of which was "Computer Systems (CS) Group - Carryover and/or Liquidation of One-time Vacation Leave Entitlement." The bulletin reads in part as follows:

> *The purpose of this bulletin is to advise departments of the process for cash-out/carryover of excess vacation leave for*

> *CS employees who are entitled to the one-time vacation leave provision.*
>
> *Clause 15.19 of the present CS collective agreement (expiry date: December 21, 2007) allows some CS employees a one-time vacation entitlement of 37.5 hours. This entitlement is exempt from the 262.5 hour vacation carryover provision for the vacation year during which the employee becomes entitled to it. On March 31 of the following vacation year, the credits remaining in the one-time vacation entitlement bank are to be added to any remaining credits in the vacation leave bank solely for the purpose of calculating maximum carryover. The total of these two balances is not to exceed 262.5 hours. Any excess resulting from the addition of these two types of leave banks is to be cashed out of the vacation leave bank leaving the one-time vacation balance unchanged.*
>
> . . .

[38] On cross-examination, Mr. Chartrand confirmed that the employer offered to include the exclusion clause in the RO/RCO collective agreement in exchange for the union agreeing to incorporate the one-time entitlement in the body of that collective agreement.

[39] Mr. Chartrand stated that, as a result of an arbitral award, the employer intended to include the one-time entitlement as part of the 262.5-hour cap. He asserted that doing so was clear to him and to his bargaining team and that, as far as he was concerned, the union was aware of the employer's position. While acknowledging that the employer's intention was not clearly communicated to the union during bargaining, Mr. Chartrand stated that he believed that he was under no obligation to provide any clarification to the union. However, had the union questioned the employer, it would have stated that the one-time entitlement was included in the cap, as the amount of vacation carryover had to be controlled. Mr. Chartrand agreed with Mr. Luce's testimony that no discussions occurred about whether the one-time entitlement was included in the cap.

III. Summary of the arguments

A. For the union

[40] The union submitted that it never thought that the one-time entitlement was included in the vacation cap because the entitlement had replaced the marriage leave provision, which had been a separate clause in earlier collective agreements for the

same bargaining units. That issue was not discussed with the union's executive or members or with the employer during negotiations.

[41] The union submitted that the issue must be viewed contextually from two standpoints. First, the pressure due to the impending legislation, with the possibility of no wage adjustment, and a tight time frame meant that there was no time to explore issues in depth during bargaining. Second, the placement of the relevant clauses in the RO/RCO collective agreement must be considered. Clause 18.02 refers to the "Accumulation of Vacation Leave," while clause 18.17 refers to the "one-time vacation leave entitlement," which replaced the marriage leave. The vacation cap and drawdown provisions are in Appendix B.

[42] The union argued that it did not intend to place the one-time entitlement in the vacation leave provisions, while the employer's testimony was that it intended to include it in the cap. Thus the parties had differing intentions and did not communicate on the issue. The union noted that two experienced negotiators did not see fit to include a clause excluding the one-time vacation leave entitlement from the vacation cap and carry-over provisions of the collective agreement. They differed in their respective views of that leave. The union referred to Mr. Chartrand's testimony that it was evident to the employer that the one-time entitlement was part of the cap but that the union never intended to include it in the cap.

[43] In the union's submission, it had no interest in accepting the inclusion of the one-time entitlement in the cap and the drawdown, as that would have penalized its members. The union queried that, if the employer had such a large vacation leave liability in the RO/RCO Group, why did it offer to include an exclusionary clause in exchange for incorporating the relevant provisions in the body of the collective agreement?

[44] The union submitted that the French version of clause 18.17 of the collective agreement, which contains the phrase *une fois au cours de sa carrière*, meant that an employee would be penalized if the entitlement were included in the vacation leave cap. The union argued that the one-time entitlement was a right that was not subject to the cap. It submitted that as the one-time entitlement was granted once in an employee's career, it should be excluded from the vacation leave provisions, which had to be earned.

[45] The union referred to one of the authorities cited by the employer, Brown and Beatty, *Canadian Labour Arbitration*, (4th edition), at paragraph 4:2100, where it is stated that, when faced with a choice between two linguistically permissible interpretations, one of the elements guiding arbitrators is whether one of the possible interpretations would give rise to anomalies. The union submitted that an anomaly does exist in the present matter, in that the employer's interpretation of the one-time leave entitlement goes against the collective agreement drawdown provision of 75 hours.

[46] In support of its arguments, the union cited the following cases: *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board (Correctional Service of Canada)*, 2011 PSLRB 120; *Public Service Alliance of Canada v. Communications Security Establishment*, 2009 PSLRB 121;and *Bozek et al. v. Canada Customs and Revenue Agency*, 2002 PSSRB 60.

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

[47] The employer emphasized that the one-time vacation leave entitlement replaced the 37.5-hour marriage leave, which had been a separate clause in previous RO/RCO collective agreements. To qualify for the marriage leave, an employee had to get married. The marriage leave could not be banked, and, as Ms. Brosseau testified, it could not be cashed out. The employer submitted that the one-time vacation leave entitlement was a different type of leave.

[48] The employer underscored the fact that the one-time leave entitlement is found in article 18 of the RO/RCO collective agreement, titled "Vacation Leave." The employer referred to article 20, titled "Other Leave With or Without Pay," and said that the one-time leave entitlement could have been inserted there, but was not.

[49] The employer stated that, if the issue excluding the one-time entitlement from the vacation leave cap was so important to the union, it should have raised it during bargaining. The employer submitted that the union was aware of the exclusionary clause, as it had negotiated such a clause with the Treasury Board for the bargaining units referred to by Mr. Chartrand and contained in Exhibit E-1, Tab 12. The employer stated that, in the absence of an exclusionary clause, the one-time leave entitlement is vacation leave.

[50] The employer submitted that, although clause 18.02 of the collective agreement refers to the accumulation of vacation leave, which is earned according to length of service, it pointed out that clause 18.17 stipulates that an employee must have two years of service in order to be credited with the one-time vacation leave entitlement.

[51] As for the union's argument concerning the French version of the provisions, the employer submitted that it cannot be ignored that the negotiations were conducted in English. The employer argued that the phrase *une fois au cours de sa carrière* in clause 18.17 of the collective agreement does not mean that the one-time leave entitlement is not a vacation leave.

[52] The employer referred to clause 18.07(b) of the collective agreement, which states that "[a]n employee's vacation shall normally be taken in the fiscal year in which it is earned." The employer stated that there was no internal inconsistency in the vacation leave provisions and that the purpose was to ensure that employees had no more than seven weeks of vacation banked.

[53] In support of its arguments, the employer cited the following authorities: *Canadian Labour Arbitration*, at paragraphs 4:2000, 4:2100, 4:2110, 4:2120, 4:2130, 4:2150, 4:2200, 4:2220, 4:2240, 4:2250 and 4:2300. The employer also cited two arbitral awards, *Research Council Employees' Association v. National Research Council of Canada*, PSLRB File No. 585-9-6 (20070514), and *Research Council Employees' Association v. National Research Council of Canada*, PSLRB File No. 585-9-7 (20070514).

[54] The employer submitted that the union's interpretation of the one-time leave entitlement would create an anomaly in the meaning of the annual vacation leave provisions in the collective agreement as opposed to the provisions in Appendix B.

[55] The employer referred to the following statement at paragraph 4:2120 of *Canadian Labour Arbitration*: ". . . where the same word is used twice it is presumed to have the same meaning." The employer submitted that the use of "vacation leave" in article 18 as well as in the one-time leave entitlement clause means that the entitlement is included in vacation leave.

[56] The employer submitted that extrinsic evidence should be relied upon only when ambiguity exists in collective agreement provisions. The employer asserted that, in the present matter, the collective agreement was clear. The employer submitted in

the alternative that the exclusionary clause was known to the union, as mentioned in the two arbitral awards that it cited.

[57] With respect to negotiating history, the employer referred to Mr. Chartrand's evidence that the parties had been negotiating since July 2008 and that, if the vacation leave issue was especially sensitive for the RO/RCO Group, then the union should have consulted its members about it. The employer said that both negotiators were experienced and that Mr. Luce had not received any assurance from the employer concerning an exclusionary clause. In the employer's submission, its interpretation of the one-time leave entitlement was consistent with other collective agreements. The employer referred to the evidence that the union was still negotiating for an exclusionary clause.

C. Union's reply

[58] The union argued that, due to the 75-hour drawdown provision, the one-time vacation leave entitlement in clause 18.17 of the collective agreement compelled employees to take one more week of vacation leave than they desired, which contravened the collective agreement. According to this argument, those employees having in excess of 262.5 hours of unused vacation leave credits are required by clause 18.11(b) of the collective agreement to use or be paid for a minimum of 75 hours per year until all vacation leave credits in excess of 262.5 hours have been liquidated. As employees in such a position also have to use the one-time 37.5 hour vacation entitlement, they would therefore be required to liquidate 112.5 hours in the same year, thereby violating the collective agreement, which limits the required liquidation to 75 hours.

[59] The union pointed out that, while the employer bargained 10 collective agreements, only 4 of them were with the PIPSC. The union stated that there are 41 groups within the PIPSC, each of which with different realities, and referred to Ms. Brosseau's related testimony.

IV. Reasons

[60] In these grievances, the union seeks a declaration that a one-time 37.5-hour vacation leave entitlement, negotiated and agreed to by the parties during a collective bargaining process, is excluded from the vacation cap and carry-over provisions of the applicable collective agreements, despite the absence of a clause expressly providing

for such an exclusion. In determining this matter, I am prohibited from modifying the collective agreements by section 229 of the *Act*, which reads as follows:

> ***229.*** *An adjudicator's decision may not have the effect of requiring the amendment of a collective agreement or an arbitral award.*

[61] The principal arguments of both parties rest on the language of the collective agreement. However, as a background to the present dispute, both parties introduced evidence of the collective bargaining context in which the relevant clauses were introduced, as well as the negotiation history. It is well established that extrinsic evidence is relevant and admissible when the disputed language is patently or latently ambiguous. As the parties relied on the existing language, I shall deal first with the wording of the collective agreement.

[62] It is appropriate to begin by setting out certain principles of interpretation, which were summarized by the arbitrator in *DHL Express (Canada) Ltd. v. Canadian Auto Workers, Locals 4215, 144 and 4278* (2004), 124 L.A.C. (4th) 271, a decision referred to at paragraph 33 of *Public Service Alliance of Canada*, cited by the union. At pages 295 and 296, the arbitrator stated the following:

> *. . . The predominant reference point for an arbitrator must be the language in the Agreement . . . because it is primarily from the written word that the common intention of the parties is to be ascertained. Language is to be construed in accordance with its ordinary and plain meaning, unless adopting this approach would lead to an absurdity or repugnancy, but in these latter situations, arbitrators will interpret the words used in a manner so as to avoid such results. However, it must be remembered that these particular principles of interpretation are to be used in the context of the* written *Agreement itself. It is also well recognized that a counterbalancing principle is that anomalies or ill-considered results are not sufficient to cause the alteration of the plain meaning of words. Neither is the fact that one interpretation of the Agreement may result in a (perceived) hardship to one party.*
>
> . . .
>
> *It is well accepted that "arguability as to [different] construction[s]", standing alone, does not create an ambiguity, allowing the introduction of extrinsic evidence (in* Re Canadian National Railway Co. and Canadian Telecommunications Union *(1975), 8 L.A.C. (2d) 256 (H.D. Brown) at p. 259). When ascertaining the* common intention

> of the parties *objective tests must be used and "not to what the parties,* post contractu*, may wish to say was their intent, albeit with honesty and sincerity" (* Re Puretex Knitting Co. and C.T.C.U.*,* Loc. 560 (*1975*)*, 8 L.A.C. (2d) 371(Dunn) at p. 373).*
>
> *The foregoing principles are reinforced by the prescription in Article 4.05 of the Agreement under which I cannot "change, modify or alter any of the terms of this Agreement".*
>
> *It is also a well-accepted principle that the provisions of the Agreement are to be construed as a whole and that words and provisions are to be interpreted in context. . . .*

[63] As stated earlier in this decision, I shall refer to the RO/RCO collective agreement and the MOU for purposes of interpreting the relevant provisions. At the outset, it is important to note that, for that purpose, I must consider language that was mutually agreed to by the parties in collective bargaining.

[64] Article 18 of the collective agreement, titled "Vacation Leave," contains 17 clauses. The last, clause 18.17, concerns the one-time vacation leave entitlement. Its wording is set out earlier in this decision, and I will reproduce it again as follows for convenience:

> ***18.17 One Time Vacation Leave Entitlement***
>
> *An employee shall be credited with a one-time entitlement of thirty seven decimal five (37.5) hours of vacation leave with pay on the first (1st) day of the month following the employee's second anniversary of service.*
>
> ***18.17.1 Transitional Provision***
>
> *Effective 31 May 2009, employees with more than two (2) years of service, as defined in clause 18.01, shall be credited a one-time entitlement of thirty-seven decimal five (37.5) hours of vacation leave with pay.*

[65] In my view, clause 18.17 of the collective agreement is unambiguous. It clearly speaks to vacation leave and forms part of the vacation leave provision of the collective agreement.

[66] One of the principal submissions relied on by the union in arguing that clause 18.17 must be distinguished from the remainder of the vacation leave provisions was that vacation leave must be earned by an employee, while the one-time entitlement was

unearned and granted unconditionally. In support of its argument, the union relied on the French version of clause 18.17, which I will reproduce for ease of reference:

> ***18.17 Droit au congé annuel unique***
>
> *L'employé a le droit de prendre une fois au cours de sa carrière trente-sept virgule cinq (37,5) heures de congé annuel payé le premier (1er) jour du mois suivant le deuxième (2e) anniversaire de son entrée dans la fonction publique.*

[67] The union emphasized that the phrase *une fois au cours de sa carrière* meant that, as the 37.5-hour entitlement was granted once in an employee's career, it was thus excluded from the vacation leave provisions, which had to be earned. The union argued that, as the one-time entitlement replaced the marriage leave provision, which had been a clause separate from the vacation leave provisions in the previous collective agreement, it never thought that the one-time entitlement was included in the vacation cap.

[68] I am not persuaded by that argument for the following reasons. First, as stated earlier in this decision, it is common ground that the negotiations were conducted in the English language; the negotiators' bargaining notes were in English, and the employer's final offer concerning the vacation leave provisions was in English.

[69] Second, even were I to rely on the French version of clause 18.17 of the collective agreement, the union's argument ignores the words *congé annuel payé*, which are commensurate with the title of the French version of article 18, *congés annuels*. Throughout the French version of article 18, "vacation leave" is translated as *congé annuel*. I note in passing that the French version of clause 18.17 is not an accurate translation of the original English. The phrase *[l]'employé a le droit de prendre une fois au cours de sa carrière* does not have the same meaning as "an employee shall be credited with a one-time entitlement of . . . ." As stated in *Canadian Labour Arbitration*, paragraph 4:2110, dealing with the normal or ordinary meaning of collective agreement provisions, "… where there are French and English versions, the interpretation to be sought is one which is coherent in both texts." In my view, a flawed translation may not serve to create rights that cannot reasonably be interpreted to flow from the original version.

[70] Third, while the evidence disclosed that the marriage leave provision that was converted to the one-time vacation leave entitlement was a separate clause in previous collective agreements, the parties did not so provide in the agreements at issue. Each of the four collective agreements referred to in the grievances contains clauses titled "Other Leave with or Without Pay," which is article 20 in the RO/RCO collective agreement. Those articles include several leaves, such as bereavement leave, court leave, injury-on-duty leave, personnel selection leave, medical appointment for pregnant employees leave, volunteer leave, maternity and parental leaves, and others. The parties did not treat the one-time leave entitlement as "other leave." Rather, they subsumed it in the vacation leave provision.

[71] It is true that, as the union argues, clause 18.02 of the RO/RCO collective agreement provides that vacation leave is earned according to an employee's length of service within the public service, while the one-time vacation leave entitlement is not. However, that does not alter the ineluctable fact that the one-time entitlement, as agreed by the parties, is vacation leave. That is the plain and ordinary meaning of clause 18.17. Furthermore, it is noteworthy that clause 18.17 requires that an employee have two years of service in order to be afforded the one-time leave entitlement.

[72] The union also submitted that the employer's interpretation that clause 18.17 of the collective agreement is included in the vacation leave cap contravenes the 75-hour annual drawdown provision set out in clause 18.11(b) in Appendix B. The union argued that, by including the one-time leave entitlement in the cap and carry-over provisions, employees were compelled to liquidate one more week of vacation in a particular year than they would otherwise have been required.

[73] I do not agree. Both of these provisions must be read in conjunction with clause 18.07(b) of the collective agreement, which provides that "[a]n employee's vacation shall normally be taken in the fiscal year in which it is earned." The vacation cap and carry-over provisions are clearly intended to limit the amount of unused vacation leave credits accumulated by an employee, especially employees having more than 262.5 hours of vacation leave credits outstanding. Furthermore, there is no automatic requirement to liquidate one more week of vacation in a particular year. This was clarified in the internal grievance process. The employer's final level response noted the employer's interpretation of the one-time vacation leave entitlement, that it did not

have to be used in the year in which it is earned, but can be carried over from one year to the next. Nonetheless, it must count towards the vacation leave cap of 262.5 hours.

[74] The union submitted that, because clause 18.11(a) of the collective agreement refers to earned vacation credits, the one-time vacation leave credit is excluded from that provision. The union argued that would create the anomaly that the one-time entitlement would be excluded from clause 18.11(a), yet included in clause 18.11(b), because the latter provision does not refer to earned vacation credits. In my view, the wording of these two clauses, read together, is not anomalous and does not alter the plain meaning of the words of clause 18.17; nor does clause 18.17 create any inconsistency in the language of article 18 or indeed with the rest of the collective agreement. The union referred to *Canadian Labour Arbitration* at paragraph 4:2100 in support of its position that an interpretation that would give rise to an anomaly should be avoided. However, that text is instructive for other factors that may also need to be considered, such as the purpose of a provision, the reasonableness of each possible interpretation, and administrative feasibility. These provisions need to be interpreted with the provisions of the collective agreement as a whole, the express agreement of the parties to categorize the one-time entitlement as vacation leave, and the explicit reference to an accumulation of the one-time leave, but only after two years of service.

[75] I conclude that there is no ambiguity in the ordinary and plain meaning of article 18 of the collective agreement that flows from the inclusion of the one-time vacation leave entitlement in clause 18.17. Had the parties meant to exclude clause 18.17 from the vacation cap and carry-over provisions, they should have expressly stipulated that exclusion. In the present matter I find that the language of the collective agreement as mutually agreed to by the parties is clear, and therefore, I need not rely on extrinsic evidence as an aid to interpreting the relevant provisions.

[76] The cases cited by the union in support of its argument are distinguishable from the present matter. In *Union of Canadian Correctional Officers*, the adjudicator held that the employer violated the collective agreement by unilaterally changing a work schedule without the union's agreement. In *Public Service Alliance of Canada*, the issue was a disputed phrase that had been discussed in bargaining but not agreed upon. The adjudicator found that the extrinsic evidence of their negotiation discussions did not support the employer's position. In *Bozek et al.*, the adjudicator

found that the employer had unilaterally imposed a 35-day (262.5-hour) vacation cap without negotiation or the agreement of the bargaining agent.

[77] Even had I found some ambiguity in the language of the collective agreement, the extrinsic evidence introduced by the parties would not have changed my conclusion.

[78] Both parties referred to their respective intentions in respect of whether the one-time vacation leave entitlement was included in the vacation cap and carry-over provisions. It is well-recognized that extrinsic evidence may be used to aid in the interpretation of a collective agreement where such evidence indicates a clear mutual intention of the parties. The evidence of both negotiators and of Ms. Brosseau was that the issue was never addressed or discussed during the negotiations. The absence of explicit discussion on the vacation carryover does not necessarily mean that there was a common intention or that I should consider that failure to expressly discuss the clause as extrinsic evidence which I should take into account. The parties agreed to position the inclusion of the one-time leave in a section of the collective agreement that addressed vacation leave. They had an opportunity to discuss these matters, but did not do so. As stated earlier, it is noteworthy that the one-time entitlement was contingent on an employee having more than two years' service. As stated in *Canadian Labour Arbitration* at paragraph 4:2100:

> *… in determining the intention of the parties, the cardinal presumption is that the parties are assumed to have intended what they have said, and that the meaning of the collective agreement is to be sought in its express provisions.*

[79] Although *Essex (County) v. Canadian Union of Public Employees, Local 2974.1*, [2006] O.L.A.A. No. 689 (QL) was not cited by either party, I find the following passage on intention and the failure to address a contested provision instructive:

> . . .
>
> *Therefore, a simple failure to address a provision in the Collective Agreement can hardly be said to be evidence of mutual intent that would assist in interpretation. Had the parties addressed and discussed Article 24.04, their discussions might have been of assistance but their lack of discussion on the issue means that the extrinsic evidence is of no assistance.*
>
> . . .

[80] That statement applies all the more so in the present matter, in which the parties' intentions were not mutual but were opposed.

[81] The union raised the matter that the negotiations occurred under the pressure of a deadline that did not provide sufficient time to more fully explore the matter at issue. In my view, that is not a valid argument. The nature of the collective bargaining process is such that negotiators regularly face time constraints and other pressures on the path to eventually achieving mutual agreement.

[82] The union also submitted that its internal structure was not conducive to the awareness by one PIPSC bargaining unit of collective agreement clauses negotiated by another of its bargaining units, as each bargaining unit within the PIPSC is autonomous and controls its own affairs. I fail to see the relevance of this argument.

[83] The evidence shows that the PIPSC or its representatives had previously negotiated clauses that excluded the one-time entitlement from the vacation leave cap and carry-over provisions. In both of the arbitral awards cited by the employer, Mr. Luce appeared as one of the bargaining agent representatives. In PSLRB File No. 585-9-7, it is stated that, while the bargaining agent had proposed a clause excluding a one-time vacation leave entitlement from the vacation leave and carry-over provisions, it withdrew its proposal at the hearing. In PSLRB File No. 585-9-6, the bargaining agent made the same proposal, which was not accepted by the arbitration board.

[84] Mr. Chartrand referred to several collective agreements negotiated by the PIPSC at dates earlier than that of the RO/RCO collective agreement and that included the exclusionary clause, as well as some that did not. Among those cited by Mr. Chartrand was the agreement between the PIPSC and the Treasury Board covering the Architecture, Engineering and Land Survey Group, having an expiry date of September 30, 2014. I note that the PIPSC had negotiated the one-time 37.5-hour vacation leave entitlement clause and a clause excluding the one-time entitlement from the vacation carry-over provisions for the same group several years earlier in the collective agreement with the Treasury Board having an expiry date of September 30, 2007. The evidence demonstrates that the exclusionary clause was known to the union. For reasons unknown, it was not included in the collective agreements in the present matter.

[85] The evidence disclosed that, in 2011, the union proposed the inclusion of an exclusionary clause in the vacation leave provision (Exhibit E-1, Tabs 9 and 10). This appears to contradict the union's position that, under the current collective agreement language, the one-time vacation leave entitlement is excluded from the vacation cap and carry-over provisions.

[86] While I have considered the extrinsic evidence arguments, nothing in that evidence supports a finding of any ambiguity. The collective agreement language is clear that the one-time vacation leave entitlement is included in the vacation cap and carry-over provisions in the absence of a clause expressly excluding it from such provisions.

[87] The policy grievances stated that the one-time entitlement ". . . has to be used by members in the year they become entitled to it and cannot be carried over." One of the corrective measures requested by the union was that employees be permitted to carry over the one-time entitlement. The employer's final-level response addressed that issue.

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

(The Order appears on the next page)

V. Order

[89] The grievances are dismissed.

July 25, 2013.

Steven B. Katkin,
adjudicator