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Citation: 2004 PSSRB 103

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

URS BREITENMOSER AND OTHERS
(See attached list)

Grievors

and

TREASURY BOARD
(Solicitor General Canada – Correctional Service)
(Citizenship and Immigration Canada)
(Human Resources Development Canada)
(National Defence)

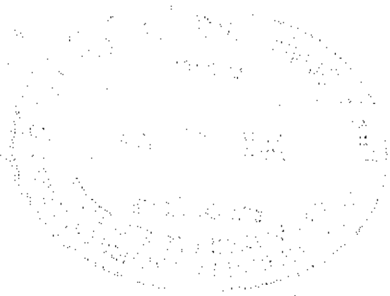
Employer

Before: Ian Mackenzie, Board Member

For the Grievors: Jacquie de Aguayo, Counsel

For the Employer: Neil McGraw, Counsel

(Decision rendered without an oral hearing.)



[1] This decision covers 18 grievances dealing with the interpretation of the variable hours of work provisions and various leave provisions (family-related leave, marriage leave, personal leave and volunteer leave) in two collective agreements between the Public Service Alliance of Canada (PSAC) and Treasury Board: the Program and Administrative Services (PA) group and the Operational Services (SV) group. The 18 grievors work in four departments: Correctional Service Canada, the former department of Citizenship and Immigration Canada, the former department of Human Resources Development Canada and National Defence.

[2] The employer requested that these grievances be dealt with by way of written submissions, and the bargaining agent agreed. The parties were advised by the Public Service Staff Relations Board (Board) on March 16, 2004, that written submissions were to be submitted by both parties by March 31, 2004, and replies were to be submitted by April 6, 2004. The written submissions appear below.

BACKGROUND

I Hours of Work and Variable Hours of Work

[3] All the grievors are on variable hours of work and subject to the variable hours of work provisions in their respective collective agreement. (The scheduled hours of work for each grievor are set out below, starting at paragraph 9.) Variable hours "vary" from the regular hours of work applicable to employees not on variable hours of work. For those employees not on variable hours, the collective agreements provide that the "normal work day" shall be 7.5 hours under the PA agreement (clause 25.06) and 8 hours under the SV agreement (Appendices "C" and "D"). These specified "normal work days" are different for those on variable hours:

> ***25.09 Variable Hours – PA Agreement***
>
> *(a) Notwithstanding the provisions of clause 25.06, upon request of an employee and the concurrence of the Employer, an employee may complete the weekly hours of employment in a period of other than five (5) full days provided that over a period of fourteen (14), twenty-one (21) or twenty-eight (28) calendar days, the employee works an average of thirty-seven and one-half (37 1/2) hours per week.*

> (b) *In every fourteen (14), twenty-one (21) or twenty-eight (28) day period, the employee shall be granted days of rest on such days as are not scheduled as a normal workday for the employee.*

[4] The terms and conditions for the variable hours of work scheme are set out in Article 28 of the SV agreement and clause 25.24 of the PA agreement:

> ***Terms and Conditions Governing the Administration of Variable Hours of Work***
>
> *25.24 The terms and conditions governing the administration of variable hours of work implemented pursuant to clauses 25.09, 25.10 and 25.23 are specified in clauses 25.24 to 25.27, inclusive. This Agreement is modified by these provisions to the extent specified herein.*
>
> *25.25 Notwithstanding anything to the contrary contained in this Agreement, the implementation of any variation in hours shall not result in any additional overtime work or additional payment by reason only of such variation, nor shall it be deemed to prohibit the right of the Employer to schedule any hours of work permitted by the terms of this Agreement.*
>
> *25.26*
>
> *(a) The scheduled hours of work of any day as set forth in a variable schedule specified in clause 25.24, may exceed or be less than seven and one-half (7 1/2) hours; starting and finishing times, meal breaks and rest periods shall be determined according to operational requirements as determined by the Employer and the daily hours of work shall be consecutive.*
>
> *(b) Such schedules shall provide an average of thirty-seven and one-half (37 1/2) hours of work per week over the life of the schedule.*
>
> > *(i) The maximum life of a shift schedule shall be six (6) months.*
> >
> > *(ii) The maximum life of other types of schedule shall be twenty-eight (28) days, except when the normal weekly and daily hours of work are varied by the Employer to allow for summer and winter hours in accordance with clause 25.10, in which case the life of a schedule shall be one (1) year.*
>
> [...]

25.27 Specific Application of this Agreement

For greater certainty, the following provisions of this Agreement shall be administered as provided herein:

[...]

(d) ***Overtime (clauses 28.06 and 28.07)***

Overtime shall be compensated for all work performed in excess of an employee's scheduled hours of work on regular working days or on days of rest at time and three-quarter (1 3/4).

(e) ***Designated Paid Holidays (clause 30.08)***

(i) *A designated paid holiday shall account for seven and one-half (7 1/2) hours.*

(ii) *When an employee works on a Designated Paid Holiday, the employee shall be compensated, in addition to the pay for the hours specified in sub-paragraph (i), at time and one-half (1 1/2) up to his or her* ***regular scheduled hours worked*** *and at double (2) time for all hours worked in excess of his or her regular scheduled hours.*

(f) ***Travel***

Overtime compensation referred to in clause 32.06 shall only be applicable on a workday for hours in excess of the employee's daily scheduled hours of work.

(g) ***Acting Pay***

The qualifying period for acting pay as specified in paragraph 64.07(a) shall be converted to hours.

II Leave Provisions

[5] The definition section of both collective agreements defines "leave" as: "authorized absence from duty by an employee during his or her regular or normal hours of work" (clause 2.01 of both the PA and SV agreements).

[6] The general leave provision (clause 33.01 of the PA agreement and clause 34.01 of the SV agreement) reads as follows:

33.01

(a) When an employee becomes subject to this Agreement, his or her earned daily leave credits shall be converted into hours. When an employee ceases to be subject to this Agreement, his or her earned hourly leave credits shall be reconverted into days, with one day being equal to seven and one-half (7 1/2) hours.

(b) When leave is granted, it will be granted on an hourly basis and the number of hours debited for each day of leave being equal to the number of hours of work scheduled for the employee for the day in question.

(c) Notwithstanding the above, in Article 47, Bereavement Leave with Pay, a "day" will mean a calendar day.

[7] The four leave provisions at issue in these grievances use identical language in both collective agreements. However, the grievance on the marriage leave provision is under the PA agreement only. In all other cases, for simplicity, the provisions from the PA agreement are reproduced with the corresponding article number for the SV agreement indicated in parentheses. Since the eligibility for the requested leave is not at issue, only the portions of the leave provisions that refer to the entitlement are included:

VOLUNTEER LEAVE

42.01(41.01) Subject to operational requirements as determined by the Employer and with an advance notice of at least five (5) working days, the employee shall be granted, in each fiscal year, one (1) day of leave with pay to work as a volunteer for a charitable or community organization or activity, other than for activities related to the Government of Canada Workplace Charitable Campaign.

LEAVE WITH PAY FOR FAMILY-RELATED RESPONSIBILITIES

43.02(42.02) The total leave with pay which may be granted under this Article shall not exceed five (5) days in a fiscal year

MARRIAGE LEAVE WITH PAY

45.01 After the completion of one (1) year's continuous employment in the Public Service, and providing an employee gives the Employer at least five (5) days' notice, the employee shall be granted five (5) days' marriage leave with pay for the purpose of getting married.

53.02 (52.02) Personal Leave

Subject to operational requirements as determined by the Employer and with an advance notice of at least five (5) working days, the employee shall be granted, in each fiscal year, one (1) day of leave with pay for reasons of a personal nature.

III Circumstances of Grievors and Requested Remedies

[8] The circumstances of each grievor are not in dispute. The specific circumstances of each grievor are adapted from the submissions of the parties and are set out below, as well as the requested remedy in each grievance.

Program and Administrative Services (PA) Group Grievances

[9] Bradley Kawulych has scheduled hours of work of 10.5 hours per day. In July 2002, he requested five days of marriage leave with pay (Article 45) for October 26, 27 and 28 and November 7 and 8, 2003. (He was on authorized days off between October 29 and November 6, 2003, in accordance with his variable shift schedule.) The Department approved 37.5 hours of leave and Mr. Kawulych was required to take 15 hours of annual leave. The remedy requested is that 15 hours of annual leave be restored.

[10] Chantelle Etherington's scheduled hours of work are 10.5 hours per day. On March 3, 2003, she requested leave with pay for family-related responsibilities (Article 43) to care for her daughter. The Department approved 7.5 hours of paid leave and Ms. Etherington was required to use 3 hours of annual leave to make up the difference. The remedy requested is that 3 hours of annual leave be restored.

[11] Monique Laplante's scheduled hours of work per day vary between 7.5 hours to 8.5 hours but must total 150 hours over a four-week period. She requested five days of leave with pay for family-related responsibilities (Article 43) on August 29 and 30 and September 3, 5, and 6, 2003, in order to care for her mother who had just had heart surgery. The Department required that she submit an additional leave form for 3.475 hours of annual leave, the amount of leave in excess of 37.5 hours. The remedy requested is that 3.475 hours of annual leave be restored.

[12] Francine Côté's scheduled hours of work are 8.5 hours per day. Ms. Côté took a personal leave day (clause 53.02) on January 30, 2003. The Department authorized 7.5 hours of leave and required that she work an additional hour on January 23, 2003. The remedy requested is that she be credited an additional hour of leave to compensate her for the extra hour worked on January 23, 2003.

[13] Gloria Ferri's scheduled hours of work are 9.5 hours per day. She sought personal leave (clause 53.02) for January 16 and April 8, 2003 (credited to the 2003-2004 fiscal year). She took a volunteer leave day (Article 42) on March 11 and on April 7, 2003 (credited to the 2003-2004 fiscal year). The Department authorized 7.5 hours of leave and required her to take an additional 2 hours of other leave (annual or compensatory) per leave request. The remedy requested is the restoration of 8 hours of leave.

[14] Linda Wilcox's scheduled hours of work are 8 hours per day. She took volunteer leave (Article 42) on April 25, 2003. The Department authorized 7.5 hours of leave and Ms. Wilcox was required to take an additional half hour of annual leave for that day. The remedy requested is to have the half hour of annual leave restored.

[15] Judith Lynne Sandyke's scheduled hours of work are 8.5 hours per day. She requested a day of volunteer leave (clause 42.01) for February 14, 2003, and the Department authorized 7.5 hours of paid leave. Ms. Sandyke was required to take 1 hour of annual leave for that day. The remedy requested is to have 1 hour of annual leave restored.

[16] Cheryl Lynn Steinson's scheduled hours of work are 9 hours per day. She requested a day of volunteer leave (clause 42.01) for March 13, 2003. The Department authorized 7.5 hours of paid leave and the grievor was required to take 1.5 hours of annual leave for that day. The remedy requested is to have 1.5 hours of annual leave restored.

[17] Dave Leicester's scheduled hours of work are 8.5 hours per day. He requested a personal leave day (clause 53.02) for January 31, 2003. The Department authorized 7.5 hours of paid leave and Mr. Leicester was required to take an additional hour as annual leave. The remedy requested is for 1 hour of annual leave to be restored.

Operational Services (SV) Group Grievances

[18] Urs Breitenmoser's scheduled hours of work are comprised of 11.25-hour shifts. He requested a personal leave day (Article 52) for March 4, 2002, and a volunteer leave day (Article 41) for January 27, 2002. The Department authorized 8 hours of paid leave per day of leave and he was required to take an additional 3.25 hours of annual leave per leave day. The remedy requested is for a total of 6.5 hours of annual leave to be restored.

[19] Cheryle Donnelly's scheduled hours of work are comprised of 11-hour shifts. She requested a volunteer leave day (Article 41) for January 31, 2002. The Department authorized 8 hours of paid leave and Ms. Donnelly was required to take an additional 3 hours of annual leave. The remedy requested is for 3 hours of annual leave to be restored.

[20] Beat Helfer's scheduled hours of work are comprised of 11.5-hour shifts. He requested a personal leave day (Article 52) for March 21, 2002, and a day of volunteer leave (Article 41) for March 12, 2002. The Department approved 8 hours of paid leave per day and Mr. Helfer was required to take an additional 3.5 hours of annual leave per leave day. The remedy requested is for 7 hours of annual leave to be restored.

[21] Ronald Wallmann's scheduled hours of work are comprised of 12-hour shifts. He requested a volunteer leave day (Article 41) for February 28, 2002. The Department authorized 8 hours of paid leave and Mr. Wallmann was required to take 4 hours of other leave. The remedy requested is for the 4 additional hours of leave to be restored.

[22] Robert Couture-Wiens' scheduled hours of work are comprised of 12-hour shifts. He requested family-related leave (Article 43) for June 21 and 22, 2003, for the birth of his son. The Department authorized 8 hours of paid leave per day and Mr. Couture-Wiens was required to take an additional 8 hours of annual leave. The remedy requested is for 8 hours of annual leave to be restored.

[23] Barry Conroy's scheduled hours of work are comprised of 12-hour shifts. He requested a personal leave day (Article 52) for February 26, 2002, and a volunteer leave day (Article 41) for February 27, 2002. The Department approved 8 hours of paid leave and Mr. Conroy was required to take an additional 4 hours of compensatory leave

per leave day. The remedy requested is for 8 hours of compensatory leave to be restored.

[24] Mohammad Kaleemuddin's scheduled hours of work are comprised of 12-hour shifts. He requested a personal leave day (Article 52) for March 28, 2002. The Department approved 8 hours of paid leave and Mr. Kaleemuddin was required to take an additional 4 hours of compensatory leave. The remedy requested is for 4 hours of compensatory leave to be restored.

[25] Robert Norris's scheduled hours of work are comprised of 12-hour shifts. He requested a personal leave day (Article 52) and a volunteer leave day (Article 41). The Department approved 8 hours of paid leave per leave day and Mr. Norris was required to take 4 hours of compensatory leave per leave day. The remedy requested is for 8 hours of compensatory leave to be restored.

[26] Michael Shoniker's scheduled hours of work are comprised of 12-hour shifts. He requested a personal leave day (Article 52) and a volunteer leave day (Article 41). The Department authorized 8 hours of paid leave per leave day and Mr. Shoniker was required to take 4 hours of annual leave per leave day. The remedy requested is for 8 hours of annual leave to be restored.

ARGUMENTS

[27] Both parties submitted written arguments on March 31, 2004, and submitted their replies on April 6, 2004. The summaries of the facts submitted by both parties have been incorporated into the background section, above. As well, the collective agreement provisions reproduced in the submissions have been eliminated, as those provisions are reproduced above, as well. The written submissions have also been edited for style and length. The employer made two submissions: one for each of the two collective agreements. With some minor variations, the submissions were essentially identical. The submissions of the employer have been merged into one for ease of reading. The full written submissions of the parties are on file with the Board.

SUBMISSIONS OF THE BARGAINING AGENT

[28] The bargaining agent's submissions are as follows:

Overview

These submissions are based on two collective agreements, involve 18 individual grievances and relate to entitlements under those agreements to four different types of paid leave. Notwithstanding the apparent breadth of the factual context in which these grievances arise, the common issue that binds them is an attack on the meaning attributed by the employer to the entitlement to a "day", or "days", of paid volunteer, personal, marriage and family-related leave for employees who work variable hours of work.

Each of the 18 individual grievors requested a day, or days, of paid leave and took the full work day(s) off. Each individual grievor works variable work hours that differ from those of employees on a regular shift; the latter being 8 hours under the Operational Services agreement and 7.5 hours under the Program and Administrative Services agreement.

In response to the grievors' leave requests, the employer asserted that their entitlement to a "day" cannot exceed 8 or 7.5 hours of pay. As each grievor was normally scheduled to work hours in excess of this amount, the employer required that each of them work or debit their annual or compensatory leave credits to make up the difference.

By their grievances, the grievors maintain that the collective agreement entitles them to a full day of leave regardless of their scheduled hours of work. Accordingly, they seek reinstatement of the leave credits debited by the employer, as well as a declaration that a day of leave in the paid leave provisions in the collective agreement is to be understood in its normal sense -- an entitlement to be absent from duty for the entire work day.

The Wording of the Relevant PA and SV Leave Articles is Identical

The leave article at issue before Chairperson Tarte in the decision *John King and Karen E. Holzer* v. *Canada Customs and Revenue Agency*, 2001 PSSRB 117 (Tarte), was article 43 of the PSAC and CCRA collective agreement – "Leave with pay for family-related responsibilities". The language of that article is identical to the language in the same articles in the PA and SV collective agreements between Treasury Board and the PSAC: *John King and Karen E. Holzer* v. *Canada Customs and Revenue Agency*, 2001 PSSRB 117, at para. 2.

The leave articles in issue before Adjudicator Mackenzie in the decision *Stockdale et al.* v. *Treasury Board*, 2004 PSSRB 4, were Articles 46 - Volunteer Leave - and Article 55 – Personal Leave - of the Technical Services ("TS") collective agreement entered into between the PSAC and Treasury Board. The language of the Volunteer and Personal Leave articles in the TS collective agreement is identical to the same leave entitlements in the PA and SV collective agreements: *Stockdale et al.* v. *Treasury Board*, 2004 PSSRB 4 (Mackenzie), at p. 2, para. 4 & p. 6.

The PSAC submits that there is nothing in the language of the leave articles themselves that affords a basis to distinguish the PA and SV grievances in the present case from each other, or from the leave provisions dealt with the *King and Holzer* and *Stockdale* matters.

Defining the Word "Day" in the PA and SV Agreements

As is clear from its responses to the grievors' leave requests, the Employer's interpretation of the entitlement to a "day" of paid leave requires a finding that the word "day" is interchangeable with the phrase "the hours of work of employees working a regular shift". For employees under the SV agreement, this is equivalent to 8 hours. For employees under the PA agreement, this is equivalent to 7.5 hours.

For those employees who work variable hours of work, the impact of the Employer's position is clear - they have to use additional leave credits, use unpaid leave, or work additional hours in order to obtain a day of leave. As Adjudicator Mackenzie recognized in *Stockdale*, at paragraph 41, those on variable hours of work "are being penalized for taking leave entitlements that they have a right to take under their collective agreement".

For the reasons set out below, the PSAC submits that the Employer's interpretation is not supported by the language of the collective agreement generally and is anathema to the compassionate and community-based purposes that underlie the paid leave entitlements in issue.

Moreover, the PSAC submits that the provisions in the SV and PA agreements draw a distinction between (among other things) days, calendar days, shifts, workdays, and scheduled hours of work. A representative sample of these distinctions is provided below for both the SV and PA agreements. At the end of the day, it is the PSAC's position that the term "day" is used in the collective agreement in its normal sense - meaning the whole day rather than a set number of hours.

Finally, it is also the position of the PSAC that these matters have already been fully canvassed in the decisions of *King and Holzer* and *Stockdale.* The PSAC submits that the Employer's responses to the grievances herein demonstrates that it does not agree with the substance of those decisions. However, absent a basis for concluding that these decisions were manifestly wrong, and the PSAC maintains that no such basis exists, the reasons for decision in those cases are persuasive, are based on a thorough analysis of substantively identical collective agreement provisions, and ought to be given significant, if not determinative, weight in the present case.

Hours of Work

As with the collective agreements in *King and Holzer* and *Stockdale,* Articles 25.01 - Hours of Work - in both the PA and SV collective agreements define "day" in exactly the same manner: "a day is a twenty-four (24) hour period commencing at 00:00 hours": *King and Holzer, supra,* at para. 22, and *Stockdale, supra,* at paras. 30 & 36.

[...]

For the reasons that follow, the PSAC submits that the hours of work provisions in the SV collective agreement do not support the Employer's position that a "day" must be interpreted as equivalent to 8 hours.

Six of the nine grievances that relate to the SV agreement were filed by employees employed in the HP occupational group. All six work variable shifts. The hours of work for employees employed in the HP group are governed by Appendix D in the SV collective agreement.

Article 3.03 of Appendix D provides that employees *who are scheduled to work on a regular basis*, shall work 40 hours and five days per week and, on a daily basis, work eight hours per day. Articles 3.04 and 3.05, however, expressly provide that employee may also work variable schedules.

Appendix D employs terms such as "scheduled hours of work", "work days", "calendar days" and "days". A reading of Appendix D establishes that these terms are **not** used interchangeably and their use underscores that each term conveys a distinct meaning. For example, if a "day" must be read interchangeably with "8 hours", then the notice requirement for "two consecutive days of rest" in paragraph 3.01(b) of Appendix D means an employee is only entitled to 16 consecutive hours of rest. This cannot be the case.

The PSAC submits that there is no doubt that the provision that establishes some employees' hours of work on an 8 hour per day basis does not apply to the grievors. Moreover, the hours of work article makes clear that there are a range of hours that can comprise an employee's workday. Finally, references within the hours of work article show that the parties' use of the word "day" is to be given its normal interpretation. When a different meaning is intended, the agreement language uses different conceptual terms such as "work day", "calendar day" or "scheduled hours of work". As such, there is nothing in the hours of work article that compels the interpretation of "day" adopted by the Employer.

The Employer's position is equally discordant when considered in relation to the language in Appendix C of the SV collective agreement. Appendix C establishes the hours of work for employees employed in the GS occupational group and covers the remaining three of the nine grievances herein.

Persons employed in the GS group may be scheduled on a regular, non-rotating basis, with scheduled hours of work being 40 hours per week, over five days with a maximum of 8 hours per day. (See article 2.01 of Appendix C.) However, employees may equally be subject to variable hours of work with different hours of work per day.

As with Appendix D, Appendix C also uses the terms "scheduled hours of work", "work days", calendar days" and "days". Again, the PSAC states that these terms are not used interchangeably and necessarily convey distinct meanings. For example, article 2.03 provides for compensation for employees where they are not provided 7 days' notice where an employee's scheduled hours of work are changed. The reference here to "days" cannot be interchanged with the phrase "8 hours" without leading to an anomalous result.

The PSAC respectfully submits that, for the purposes of the hours of work provisions in the SV collective agreement, the reference to "day" must be understood in terms of its normal interpretation and in a manner consistent with article 25.01. To do otherwise imports an interpretation into the collective agreement that its language cannot reasonably bear. By corollary, therefore, there is nothing in the hours of work

provisions that compels, or indeed supports, the Employer's interpretation of the word "day" in the leave articles.

[...]

For the reasons that follow, the PSAC submits that the hours of work provisions in the PA collective agreement do not support the Employer's position that "day" must be interpreted as equivalent to 7.5 hours.

Article 25.06 states that a "normal" work day and week are 7.5 hours per day and 37.5 hours per week from Monday to Friday inclusive. This definition is expressly subject to article 25.09, which provides for variable hours of work. Moreover, variable shift schedules may also be established under article 25.23 of the agreement and employees may be scheduled to work more or less than 7.5 hours per day.

As with the SV agreement, the PA agreement hours of work provisions also distinguish between "day", "work day", "scheduled hours of work" and "calendar days". These terms are **NOT** used interchangeably and convey a separate meaning that takes into account the context in which the words appear. For example, paragraph 25.27(d) refers to scheduled hours of work, working days and days of rest within a single sentence. If the word "day" connotes 7.5 hours per day, then the use of the phrase scheduled hours of work is redundant.

Accordingly, for the purposes of the PA collective agreement, the PSAC submits that there is nothing in the hours of work provisions that compels, or indeed supports, the interpretation of the employer that the term "day" in the leave articles is interchangeable with the hours of work of an employee on a regular, rather than variable, shift.

The Collective Agreement Definitions

The PSAC submits that additional guidance to the interpretation of the word "day" may be taken from the definitions section of the SV and PA agreements.

"Leave" is defined in both agreements as an "authorized absence from work duty by an employee during his or her regular or normal hours of work": SV Collective Agreement, sub-article 2.01(o); PA Collective Agreement, article 2.01.

By definition, an employee who is on leave under one of the leave entitlements in issue here is authorized to be absent from duty. Moreover, it is evident from the hours of work provisions in the collective agreement that individuals' hours of work necessarily differ.

Similarly, a "day" of rest is defined in article 2.01 in each agreement as, in relation to a full-time employee, a "day other than a holiday on which that employee is not ordinarily required to perform the duties of his or her position other than by reason of the employee being on leave or absent from duty without permission". Again, the concept of a day with respect to days of rest contemplates that an employee will be absent for the entire day - not just 8 or 7.5 hours of work.

Leave General

The relevant provisions of the "Leave General" articles in the PA and SV collective agreements are the same as those that were before the Adjudicators in the *King and Holzer* and *Stockdale* decisions. In the SV agreement, Leave General is article 34, while in the PA it is article 33.

The PSAC submits that in determining the meaning to be attributed to the word "day" in the leave entitlements in issue here, the Adjudicator and Trial Division Judge in *King and Holzer* and the Adjudicator in *Stockdale*, have already concluded the types of paid leave in issue here are not earned leave credits and, accordingly, ought to be interpreted without reference to clauses 33.01 or 34.01 of the agreements.: *King and Holzer, supra,* at para. 21; *Canada (Attorney General)* v. *King and Holzer, supra*, at paras. 21-24; *Stockdale, supra*, at para. 37.

The PSAC repeats and relies upon the conclusions made in those cases, as well as the arguments made on behalf of the employees therein in maintaining that there are two distinct kinds of leave under the PA and SV collective agreements. The manner in which the entitlement to paid leave arises – being on a non-accrued as needs basis - as well as the purposes for which the leave is provided, amply support the distinction: *Stockdale, supra*, at para. 38.

Cost Neutrality

The employer made cost neutrality arguments before the Adjudicator in *Stockdale*, as did the employer in the *King and Holzer* decision and they were soundly rejected: *King and Holzer, supra*, at para. 18 & para. 27; *Stockdale, supra*, at para. 21-22 & para. 40.

The essence of the Employer's position, as the PSAC understands it, is that an employee working variable hours obtains a greater monetary benefit than those working a regular shift. This, asserts the Employer, is in violation of a provision common to the SV and PA agreements, the ST agreement in *Stockdale*, as well before Adjudicator Tarte in *King and Holzer*:

> Notwithstanding anything to the contrary contained in this Agreement, the implementation of any variation in hours shall not result in **any additional overtime work or additional payment** by reason only of such variation, nor shall it be deemed to prohibit the right of the Employer to schedule any hours of work permitted by the terms of this Agreement.
>
> [Emphasis added]
>
> PA Agreement, Article 25.25; SV Agreement, Article 28.04

The PSAC submits that none of the grievors was paid an additional payment by reason of their having exercised their entitlement to a day of paid leave.

As the Adjudicator recognized in *Stockdale:*

> an interpretation of "day" as a full shift does not violate this provision because there is no additional payment to the employee as a result of receiving a day of leave. At the end of the year, the employee will receive the same annual salary as an employee working regular hours: *Stockdale, supra*, at para. 40.

Moreover, Chairperson Tarte states that interpreting a day as a full shift does not violate this provision since the entitlement itself contemplates that very result: *King and Holzer, supra*, at para. 27.

The Word "Day" in the Leave Articles Should be Given its Normal Meaning

In *King and Holzer*, Chairperson Tarte held that a normal interpretation of a "day", that is a twenty-four (24) hour period, for the purposes of family-related leave is consistent with the intent of the collective agreement. This same conclusion was reached by Adjudicator Mackenzie in *Stockdale* in respect of the volunteer and personal leave entitlements.

In so finding, both Adjudicators engaged in a fulsome review of the provisions of the collective agreements before them - including the equivalent provisions to those reviewed above. The PSAC submits that there is no basis in the present case to deviate from the reasoning and findings of fact made by the Adjudicators in these previous cases.

Indeed, the PSAC points out that the positions taken by the employer in response to the grievances at issue here are the same as those advanced, considered and rejected in the *King and Holzer*, *Stockdale* and *Phillips* cases.

Although the Board does not strictly apply the doctrines of *res judicata* and *stare decisis*, it nevertheless adopted the following rule in *Francoeur* (166-2-25922), at page 7:

> ...The doctrine of *res judicata* should not be applied rigidly in the field of labour relations in the Federal Public Service. Nevertheless, a previous decision of a tribunal or of a member of a tribunal involving the same issue should be followed in a subsequent case *a fortiori* if it involves the same parties and the same collective agreement, **except where this initial decision is manifestly wrong.** [Emphasis added]

The Adjudicator in *Stockdale* also concluded, at paragraphs 34 and 35 of his decision:

> The decision of this Board in *King and Holzer (supra)* involved the interpretation of "day" under the family responsibility leave provisions for a different collective agreement. The decision was upheld by the Federal Court *(Canada v. King (supra))*. Mr. Done argued that I was bound by the decision in *King and Holzer*. I cannot agree that I am bound by this decision, since it involves different leave provisions and a different collective agreement.

> However, the reasons in that decision are persuasive, as are the comments of the judge in the judicial review of that decision. The reasons are persuasive because they relate to a similar leave provision, with similar contract language. **In the interests of consistency and certainty in labour relations, similar provisions should be interpreted similarly, unless there is a strong reason for changing that interpretation. It should be noted that although these grievances before me relate to a different collective agreement, the contract language related to variable shift arrangement is identical.** [Emphasis added]

Similar reasoning has been applied by Adjudicator Kuttner in *Breau et al.*, 2003 PSSRB 65 (166-2-31278 to 80), at page 12, and by Vice-Chairperson Potter in *Mackie*, 2003 PSSRB 103 (166-2-32060), at page 5.

The PSAC submits that there is no basis in the present case for a finding that these previous decisions are manifestly wrong. Indeed, the PSAC submits that the SV and PA collective agreements wholly support the interpretation and remedy adopted in previous decisions.

In *King and Holzer*, Chairperson Tarte expressly found that the events giving rise to family-related leave "do not fit within the confines of a 7.5 hour shift". In so finding, he cited favourably from a 1991 decision called *Phillips* where the Adjudicator was called upon to interpret the meaning of the word "day' in a Marriage Leave with Pay article:

> Clause M-21.01 – Marriage Leave with Pay [...] specifies that "providing an employee gives the employer at least five (5) days notice, the employee shall be granted five (5) days marriage leave with pay for the purpose of getting married". In this provision, the term "day" is used for two purposes: firstly, as the basis for notice to the employer and secondly, in describing the entitlement. **It is inconceivable to me that the notice required under this provision is in effect a little over two days for those employees who are working 18-hour shifts. Surely it would be quite disruptive to the employer's operation if the entitlement in this provision could be triggered on such short notice. A more logical interpretation would be that both the entitlement in respect of marriage leave and the entitlement to leave for family-related responsibilities were intended to allow the employee sufficient time off to respond to the real needs of employees which are envisaged in these provisions. To interpret it otherwise is neither consistent with the terms of the agreement nor would it be equitable to the employees as a whole.** [Emphasis added]
>
> *King and Holzer*, *supra*, at para. 25

The Employer, CCRA, sought judicial review of Chairperson Tarte's decision. In dismissing that application with costs, Justice Gibson of the Federal Court Trial Division rejected the Employer's assertion that the decision was patently unreasonable. The PSAC submits, however, that Justice Gibson went further and commented

favourably on the reasoning employed by the Chairperson in allowing the grievances before him. Justice Gibson stated that even a cursory analysis of the collective agreement reveals that paid leave for family related responsibilities is a type of compassionate leave - the entitlement to which arises on the basis of need rather than as an earned credit such as vacation or sick leave: *Canada (Attorney General)* v. *King*, [2003] FCJ No. 777 (TD) at para. 23

In the final analysis, therefore, the PSAC submits that the purpose of the leave entitlements themselves must be at the forefront of any analysis of the meaning to be attributed to the word "day".

All of the leave articles in issue in these grievances are exercisable on an "as needed basis" and in circumstances that relate to compassionate or community-based activities. The entitlement to these forms of paid leave is not accrued. Where the circumstances described in each article arise, an employee is entitled to the day, or days, of leave envisaged by the article. The right to a "day" is intended to allow the employee to meet the personal needs, activities or responsibilities contemplated therein.

On the basis of all the foregoing, the PSAC submits that the fact that the entitlement itself will have a differing impact on employees depending on the total hours worked on their regular work day does not compel or support the interpretation advocated by the Employer.

On the contrary, Mr. Couture-Wiens (166-2-32042) works 12-hour shifts. When he took two days of family related leave under article 43 when his son was born, the employer stated that he was only entitled to 8 hours of paid leave per day. He was then required to debit his annual leave bank by 8 hours in order to make up the difference for these two days.

The PSAC submits that it is consistent with the purposes of the leave entitlement, and it is not unfair to other employees, that Mr. Couture-Wiens have access to two full days off work to welcome and care for his newborn son. Indeed, if Mr. Couture-Wiens had no available, alternate leave on which to draw, the Employer's position would require that he come in midway through the next day's shift to complete the remaining eight hours that he "owes" the employer or lose 8 hours of pay.

The PSAC submits that this is not a result that the language of the collective agreement can support or reasonably bear.

Similarly, Mr. Kawulych (166-2-32070) regularly works a 10.5-hour day. In accordance with Article 45 of the PA collective agreement, he requested five days of leave as he was getting married. The employer told him he was only entitled to 37.5 hours of paid leave. In accordance with the employer's instructions, and the "obey now grieve later" rule, Mr. Kawulych had no choice but to debit 15 hours of his annual leave. If Mr. Kawulych had no additional leave, the employer asserts that the collective agreement must read in Mr. Kawulych's case as an entitlement to only 3½ days of leave rather than 5.

Again, the PSAC submits that this is not a result that the language of the collective agreement can support or reasonably bear.

The same scenario exists for all the grievors. Each sought a day of leave. There is no dispute that the circumstances giving rise to the request met with the requirements of the leave articles in issue. No one disputes, for example, that Ms. Etherington needed to care for her child. No one disputes that Ms. Laplante needed to care for her mother who had just had heart surgery. No one disputes that Ms. Ferri, Mr. Helfer or Mr. Conroy were performing charitable work. However, the interpretation advocated by the employer limits the ability, and right, of employees working variable hours to achieve the full purpose for which the leave is granted.

For all the foregoing reasons, the PSAC respectfully requests that the grievances be allowed on the basis that the reference to a "day" of paid leave in the subject articles is to be understood as an authorized paid absence from duty for the full period of the employees' scheduled hours for that day.

SUBMISSIONS OF THE EMPLOYER

[29] The employer's submissions are as follows:

Introduction

These grievances deal with the application and interpretation of the Operational Services Collective Agreement and the Administrative Services Collective Agreement as to the definition of a "day" in the context of Leave with pay for employees working on a variable shift schedule. This includes Leave with Pay for Family-related Responsibilities, Personal Leave with Pay, Volunteer Leave with Pay and Marriage Leave With Pay.

It is clear that, in the context of a variable shift schedule, the definition of the word "day" for this type of leave may have inequitable results, depending on the length of each employee's shift. The employer respectfully submits that the only definition of the word "day" which respects the *sine qua non* condition of the variable shift schedule, the absence of additional costs on the employer, is that of a "normal work day", or 7.5 hours/8 hours for employees who work an average of 37.5 hours/40 hours per week.

Construction of collective agreements

The word "day" as used in the each of the leave provisions is not explicitly defined in the leave provisions of the Collective Agreement. The definition of day cannot be interpreted as a 24-hour period, as it is used in Article 25 of the PA collective agreement, which deals with Hours of Work. Section 25.01 is very specific in that a day as a 24-hour period is only for the purposes of Article 25. Therefore, this definition of a day does not apply to other articles, such as the leave articles in question unless expressly provided for in those articles.

Further, Article 25 of the PA group agreement is also clear as to the definition of a normal day of work. At subclause 25.06(b), it clearly states that a normal workday shall be 7.5 hours.

Further, the Appendices that apply to the two groups of employees in question, HP and GS, are also clear as to the definition of a normal day of work. In both of these cases, a normal day of work for an employee who works an average of 40 hours per week is 8 hours.

The bargaining agent would have this Board believe that the default definition of a day is a 24-hour period, unless clearly indicated otherwise. In fact, the opposite is true. The very first section of Part IV – Leave Provisions of the Collective Agreement is quite clear that daily leave credits shall be converted to 7.5 hours/8 hours. The only exception to this rule is that of Bereavement Leave with Pay.

If the general rule were that a day was a 24-hour period, there would be no reason to include an exception for Bereavement leave. While some have suggested that the rule under the general leave provision only applies to "earned" daily leave credits such as sick leave or vacation leave, this reasoning does not take into account the fact that Bereavement Leave is not, by the above reasoning, "earned" leave. Therefore, if this reasoning were to apply, there would be no need for section 33.01(c) (PA) /34.01(c) (SV), since Bereavement Leave would, by default, apply the definition of a day as a 24-hour period.

It is a basic principle of collective agreement interpretation that each word, and by extension, each paragraph of a collective agreement should be given some meaning. This is known as the rule against redundancy. It has been clearly enunciated in Palmer and Palmer, *Collective Agreement Arbitration in Canada* (Toronto) (Butterworths), 1991, at page 126, as follows:

> It is a recognized canon of construction that in interpretating [sic] documents they should be construed so as to give effect to every word, and a word should not be disregarded if some reasonable meaning can be given to it. It has further been held that it is a good general rule that one who reads a legal document, whether public or private, should not be prompt to ascribe - should not without necessity or some sound reason - impute to its language, tautology or superfluity.

The rationale for this rule has been stated as follows:

> It is equally impossible to accept the contention of the company that this subsection is meaningless and consequently this board can attribute no meaning to it, as obviously the parties intended the subsection to have a meaning or the parties would not have bothered to insert it. [Footnotes omitted]

Therefore, the only definition of a day for leave purposes in the collective agreement is 7.5 hours/8 hours for employees. Any other interpretation would render the exception for bereavement leave superfluous. There would be no need for the clause since, according to the union's definition, a day is a 24 period. If the union were correct, there would be no need for the Bereavement Leave exception. It is also for this reason that the use of the words "earned leave" is not limited to vacation and sick leave.

It should also be noted that Bereavement Leave is also explicit in its definition of an employee's entitlement as 5 consecutive calendar days. None of the other leave provisions provide for leave as calendar days. According to the rules of interpretation stated above, it therefore flows that a day's leave is not defined as a calendar day for marriage, family-related, personal or volunteer leave with pay. The only logical conclusion is that a day's leave is 7.5 hours/8 hours for the employees in question.

Variable Shift Schedules

Also, the definition of a day for leave purposes is in keeping with the clauses relating to the variable shift schedule, which specifically state that a variable schedule will not result in any additional overtime or payment. However, the definition of a day for leave purposes as a 24-hour period creates additional overtime or payments to employees in clear contravention of the collective agreement.

If an employee works a regular schedule, that is, Monday to Friday, 8 hours a day, he or she would be entitled to a total of 40 hours of paid family-related leave. However, according to the union's definition of a day as a 24-hour period, an employee working a variable shift schedule of 12-hour shifts would be entitled to 60 hours of paid family-related leave. This means that an employee working a variable shift schedule would be entitled to a larger benefit, the number of hours paid for when an employee is not actually at work, due only to the fact that he or she is working a variable shift schedule.

Therefore, the definition of a day as a 24-hour period does not respect section 25.25 of the collective agreement since it would require the employer to schedule overtime in order to fill the vacancy created by an employee's absence for family-related leave. Further, it would require an additional payment to the employee requesting this leave since he or she would be paid for a longer period of time during which he or she did not work, due only to the fact that a variable shift schedule was instituted.

This clearly runs contrary to the provision in the collective agreement, which is explicit in that a variable shift schedule shall not result in additional overtime or payments.

Equity

The above point raises a secondary issue. The definition of a day as a 24-hour period is inequitable. Two employees, under the same collective agreement and in the same position, would receive different benefits depending on whether or not they work a variable shift schedule. As stated above, an employee working a 12-hour variable shift schedule would be entitled to 60 hours of paid leave for family-related purposes, while an employee working a regular, 8 hour-a-day schedule would only be entitled to 40 hours of paid leave for family-related purposes.

Clearly, the collective agreement cannot be read in a way that would give one employee a greater benefit than another, by virtue of the fact that he or she works a variable shift schedule. It is obvious that this reading of the collective agreement would be inequitable and grossly unfair. The only definition of a day which would be equitable to all members covered by the Collective agreement would be the one where a day is defined as a 8 hour period, thus entitling all employees to the same benefit of 37.5 hours/40 hours of paid leave for family-related purposes.

Conclusion

Based on the rules of interpretation of collective agreements, the rules that govern variable shift schedules and principles of fairness and equity, the only possible definition of day for the four types of leave with pay in question here is 7.5 hours/8 hours. The only exception to this rule is for bereavement leave, an exception that was not reproduced at any of the individual leave provisions in question. Any attempt to define a day as a calendar day or a 24-hour period is clearly wrong and contrary to the collective agreement.

REPLY SUBMISSION OF THE BARGAINING AGENT

[30] The bargaining agent's reply is as follows:

Construction of Collective Agreements

The Employer's position is, in a nutshell, that the only definition of "day" that the PA and SV collective agreements can bear is that it is equivalent to 8 hours under the SV agreement and 7.5 hours under the PA agreement.

In addition to arguments set out in its submission, the PSAC maintains that a reasonable, consistent, and plain language reading of the collective agreement does not support the three main grounds advanced by the employer in support of its position. A summary of each ground is set out in italics below.

The definition of a day as a 24 hour period is specifically limited to the "hours of work" article unless expressly provided otherwise. As such, it cannot apply to the term "day" in the subject leave articles.

In response to this argument, the PSAC states that one must have regard to first principles. The very issue before the Board is how to interpret the word "day" in the paid leave articles in question. It is the Employer's position, in response to these grievances, that ties that interpretation to an employee's hours of work. It is respectfully submitted that it is not open to the employer to suggest at the same time that the Board ought not to have any regard to the definition of "day" in the hours of work provision in resolving the matters at issue here.

The position advanced by the employer necessarily requires that the Board assess the Employer's interpretation of the word "day" in the context of articles relating to hours of work, variable shift schedules and the nature and purpose of the paid leave entitlement. Indeed, this is precisely what the Board has done in previously decided cases.

In addition, and taking the Employer's position on its face, if its proposition were true, then where the stand alone word "day" appears elsewhere in the collective agreement, it must be taken to mean 8 hours (SV Agreement) or 7.5 hours (PA agreement). This means that the five-day notice period in the marriage leave article only requires 37.5 hours (PA) or 40 hours (SV) of notice to the Employer. This also means that the references to "days" in the grievance procedure in article 18 of each of the PA and SV agreements must be read in hours.

Even a cursory review of the relevant collective agreements shows that the employer's assertion creates an absurd result. The PSAC submits that the word "day" derives its meaning from the context in which the word appears and in a manner consistent with the purposes of the article in question and the use of the word "day" in the collective agreement as a whole. Accordingly, the Board is entitled to have regard to, and rely upon, the definition of the word "day" as a 24-hour period.

The definition of "normal day of work" also necessitates the interpretation of "day" as 7.5 or 8 hours

The employer asserts that the PA and SV collective agreements contemplate a "normal work day" of 7.5 and 8 hours respectively. As such, the employer submits that the default definition of a day cannot be a 24-hour period but, rather, must be 7.5 or 8 hours.

In addition to the reasons set out in the PSAC's March 31, 2004, submissions, the PSAC maintains that the collective agreements in question do not support this proposition.

There is no doubt that the collective agreements expressly contemplate and provide for "regular" and "variable" shifts. This flexibility allows the employer to schedule work in order to meet its operational needs. One form of shift does not override the other. On the contrary, the two exist as independent methods of administering employees' hours of work.

One need look no further than article 25.09 of the "hours of work" article in the PA collective agreement. It provides for variable hours of work and expressly states that its terms apply "notwithstanding article 25.06". Yet this is the very article on which the employer relies in asserting that its definition of "day" as a "normal day of work" must prevail. A similar "notwithstanding clause" applies to distinguish between "regular" and "variable" shifts in the SV agreement as appears from the preamble of Appendices "C" and "D". It cannot be said, therefore, that the collective agreement contemplates that the definitions for regular shifts override the definitions applicable to those for variable shifts.

It is the case that the variable hours of work articles provide for averaging formulas over a range of periods of time and bringing the average hours of variable shifts into line with a 40-hour or 37.5 hour work week. The PSAC respectfully submits that the averaging provisions of both the PA and SV Agreements exist in order to ensure consistency and stability in the Employer's pay administration. As the Federal Court of Canada stated in *Attorney General of Canada* v. *King*, [2000] FCJ No 1987, "it is beyond dispute that the practical operation of the employment agreements in question relies on a fiction. The fiction is that the Respondent, and other employees in his situation, works a regular work day of 7.5 hours, when in reality he works 8.57 hours."

The PSAC respectfully submits that the employer seeks to perpetuate that fiction, to the detriment of employees on variable hours of work, in respect of their entitlement to the benefits of paid volunteer, marriage, family-related, and personal leave.

Articles 33.01 & 34.01 - Leave General

Paragraphs 34.01(a) and 33.01(a) state that "earned daily leave credits shall be converted into hours... with one (1) day being equal to seven and one-half (7½) hours".

The employer relies on this conversion formula in support of its position that the word "day" must be interpreted as interchangeable with the hours of work of an employee on a regular shift.

On its face, this position seems incongruous given that the 7.5-hour reference exists in both agreements, yet the employer relies upon it to assert that a "day" means 8 hours in relation to the SV agreement. On the basis of this alone, the Employer's position is flawed.

Moreover, the employer states, "*some have suggested* that the rule under 34.01(a) [or 33.01(a)] only applies to 'earned' daily leave credits such as sick leave or vacation leave". The PSAC presumes that the "some" to which it refers are Chairperson Tarte in *King & Holzer*, Justice Gibson of the Federal Court Trial Division in *King & Holzer* and Adjudicator Mackenzie in *Stockdale*. The persuasive weight of these decisions cannot be minimized by the employer by dismissing these decisions as mere suggestions. This is particularly the case where, as the PSAC has set out in its submission the collective agreement language and context at issue here are virtually identical.

Indeed, there is ample basis to conclude that vacation and sick leave credits - both of which are expressly "earned" and banked on the basis of formulas set out in the respective articles in the PA and SV agreements - are the earned daily leave credits to which paragraph 33.01(a) and 34.01(a) speak. Significantly, these paragraphs are temporally limited in that the conversion applies where an employee becomes subject to, or ceases to be subject to, the agreement. On its face, neither paragraph 33.01(a) nor 34.01(a) purports to apply or be of assistance in interpreting the word "day" in the context of the administration of the collective agreement and paid leave entitlements.

The PSAC submits, therefore, that there can be no doubt that there are at least two substantively different types of leave available under the PA and SV agreements: earned, cumulative and carried over sick and vacation leave or annual, fixed and finite entitlements to paid leave in defined circumstances. To find otherwise would result in the use of the word "earned" in paragraphs 33.01(a) and 34.01(a), and the sick leave and vacation leave articles as a whole, superfluous. As the employer has pointed out, such a result would lead to superfluity and would breach a fundamental canon of construction in interpreting collective agreements.

With respect to Bereavement Leave, in contrast to the leave entitlements in issue here, it specifically contemplates that calendar days will be factored into the number of days of leave available. It stands to reason, therefore, that the meaning to be attributed to paragraphs 33.01(c) and 34.01(c) is that the other unearned paid leave entitlements refers to work days. This view is supported by the reference in paragraphs 33.01(b) and 34.01(b) to a conversion that "each day of leave be equal to the number of hours of work scheduled for the employee for the day in question".

The PSAC submits that, at the end of the day, the employer has not demonstrated that the previous decisions of this Board and the Federal Court were manifestly wrong, much less that the interpretation of the word "day" as a 24 hour period is inconsistent with the intent of the collective agreement.

Additional Overtime or Payment by Reason Only of Such Variation

The employer also maintains that to give the word day its normal meaning would violate the proviso that "the implementation of any variation in hours shall not result in any additional overtime work or additional payment by reason *only* of such variation" [Emphasis Added]: PA Collective Agreement - Article 28.04; SV Collective Agreement - Article 25.25.

The PSAC submits that it is significant that the employer has omitted any reference in its submissions to the decisions of Chairperson Tarte in *King & Holzer*, the decision of Justice Gibson of the Federal Court of Canada refusing to quash Chairperson Tarte's decision, and Adjudicator Mackenzie's decision in *Stockdale*. As is set out in the PSAC's submission, there is no material difference between the collective agreement provisions in those cases and the interpretive issues in dispute here. The very same costs arguments were made in those cases and were rejected by Chairperson Tarte and Adjudicator Mackenzie. The employer clearly seeks to revisit this question notwithstanding the unequivocal reasons for decision of two previous Adjudicators dealing with analogous language.

Both parties, and in this case the Union, have a legitimate interest in finality and stability in decision-making and their concomitant ability to administer and apply the collective agreement. The PSAC respectfully submits that, in light of previously decided cases and this important labour relations principle, there is an onus on the employer to identify why these decisions are manifestly wrong rather than why it continues to simply disagree with the result. It has failed to do so.

Moreover, the PSAC submits that this language does not dictate the result the employer seeks. It is clear that employees do not receive any additional payment from the employer and no such evidence has been tendered in respect of these or any other previously adjudicated grievances. Employees receive the same annual salary regardless of whether they work a regular or variable shift. What the employer asks the Board to decide here is that the words "additional payment" must be interpreted as including circumstances where employees working regular or variable shifts may have variable *benefits*. This is evident from the Employer's assertion that "this means that an employee working a variable shift schedule would be entitled to a larger benefit".

Respectfully, this is a different issue, as it does not involve an additional "payment" as expressly set out in articles 25.25 and 28.04. Rather, this argument is addressed more fully under the rubric of "equity", below.

The PSAC submits that the entitlement and benefit to paid leave necessarily contemplates that an employee - regardless of their scheduled hours of work - is entitled to the full day off to address the circumstances set out in the leave article. This benefit ought not, and does not, have any impact on any payments made to the employees by the employer. However, the employer asks this Board to accept that its interpretation effectively means that the entitlement to a "day" as requiring an additional payment by the employee through other forms of leave or actual hours of labour by operation of variable hours of work. This cannot be the case.

With respect to overtime, the employer asserts that the PSAC position would "require the employer to schedule overtime in order to fill the vacancy created by an employee's absence". The PSAC states that there is no evidence that the employer

does, in practice generally or in individual cases, backfill for employees who have taken a day of paid leave. However, even addressing this argument in the hypothetical and assuming it would apply universally to the grievors herein, the PSAC states that the need or decision to back fill a position while an employee is on *any* form of leave or absence from duty exists regardless of whether an employee is working regular or variable shifts. As such, this general operational issue does not arise "by reason only of such variation" as required by articles 25.25 and 28.04 of the PA and SV collective agreements respectively.

For all the foregoing reasons, and for the reasons set out by the PSAC in its submission, it is respectfully submitted that the Employer's position on this issue ought to be rejected.

Equity

Finally, the employer submits that the definition of a day as proposed by the PSAC is inequitable. Its position rests on the premise that two employees working different scheduled hours of work would receive a different benefit from the same entitlement and that this is improper.

No employee has an automatic entitlement, or right, to the paid leave in issue. It is not, as the employer has suggested in previous cases, another form of holiday. The leave in question only vests in an employee when certain conditions precedent are met. In the absence of these conditions precedent, there is no entitlement whatsoever. Employees with no family have no entitlement to family-related leave. Employees who do not offer voluntary service have no entitlement to volunteer leave. Employees who do not get married have no entitlement to marital leave. In short, the collective agreement provides for certain types of paid leave, for only certain employees, in defined circumstances. The entitlement to this leave will never be "equitable" - as defined by the employer - as there will always be some who are entitled to the leave and those who may never be. The truth of the matter is that most workers, regardless of their hours of work, will never access the full amount of this unearned leave provided for in the collective agreement.

As a starting point, therefore, it is clear from the parties' intention that no matter what definition of day that is used some employees have a paid leave entitlement and others do not.

The scope of the *benefit* of the paid leave in the hands of the employee are purposeful by their very nature. The PSAC submits that access to these forms of paid leave is a measure by which a compassionate employer recognizes that employees have, from time to time, a need for leave to deal with their personal lives. This is a purpose repeatedly recognized by the Board's Adjudicators as well as by the Federal Court of Canada.

The compassionate *raison-d'être* for this type of leave is lost where illness, tragedy, birth, and service to others is measured in hours rather than by the purpose for which it is given. For example, the collective agreement expressly states that two *days* are available to employees to allow them to welcome and care for a newborn. How can reducing this period to a day-and-a-half for ten hour shift workers under the PA agreement appear as anything other than discordant when measured against the purpose for which the leave provision exists. Yet the Employer, by its submission,

suggests that to find otherwise is "grossly unfair" to other employees on different shifts who may also wish to take two days to care for a newborn.

When the Mr. Kawulych sought to use his entitlement to five days of marriage leave, his entitlement must be understood as an entitlement to leave from the workplace in an amount equal to five days off from his scheduled hours of work. Once he has used that leave, it is spent.

Using another example, where Mr. Couture-Wiens sought to take two days to welcome and care for his newborn son under the family-related leave provision, the purpose of the leave entitlement under the collective agreement was to provide him with leave from the workplace in an amount equal to two days off from his scheduled hours of work. As the family-related leave article contemplates a total of 5 days, however, his overall entitlement to use family-related leave again was not entirely spent, however, any entitlement that remained was reduced to the extent of the leave taken.

The employer's suggestion that the grievors' position creates a rift of inequity among PSAC members is to fall back on the false premise that the right to paid leave is a fixed pie. There is an odious implication that giving to one will somehow take away from the other - that there is a limited number of leave on offer. Allowing a ten-hour shift worker to take a full two days off on the birth of his child, or a full five days off to prepare for his or her marriage, does not deprive the next employee who meets the preconditions for leave access the benefit on the same basis - a set number of work days off. Again, how can reducing the period of leave to a day-and-a-half for ten hour shift workers under the PA agreement appear as anything other than discordant when measured against the purpose for which the leave provision exists?

REPLY SUBMISSION OF THE EMPLOYER

[31] The employer's reply is as follows:

As outlined in the employer's written submissions, the bargaining agent's proposal that a day's leave must be a full day cannot stand, since it ignores the construction of the collective agreement. Further, to define a day for leave purposes as a full day, regardless of the length of a person's shift would be inequitable and would ignore the specific directions in the collective agreement as to variable shift schedules, notably the principle of cost neutrality.

In their written representation, the grievors outline three main arguments based on the definitions in the collective agreement, the principle of cost neutrality and the PSSRB's jurisprudence on this subject, notably the *King and Holzer* (*supra*) and *Stockdale* (*supra*) decisions.

The definitions in the collective agreements

The grievors contend that the default definition of a day for leave purposes is a "whole day". They state that employees working variable shift schedules are being penalized for taking leave entitlements. Finally, they allege that, since the collective agreement draws a distinction between days, calendar days, work days and scheduled hours of work, the definition of a day for leave purposes should be a full day of work, irrespective of the individual's shift.

This final point was dealt with in the employer's written submissions and it is important to clarify what the grievors have omitted. While the collective agreement does draw distinctions between days and works days, calendar days, etc., the grievors have omitted reference to the most explicit distinction in the collective agreement. Article 25.01(a) is quite clear: a ""day" means a twenty-four (24) hour period commencing at 00:00 hour." What the grievors fail to draw your attention to is the line that immediately precedes this statement: "**25.01** For the purposes of this Article."

By any rule of legal interpretation, this statement is quite clear: while the use of the word "day" is not a 24-hour period in the rest of the collective agreement, it will be when it is used in Article 25 - Hours of work and only in Article 25. To conclude otherwise would render the specific use of the phrase redundant, which is inconsistent with the rules of interpretation.

If the parties had intended for the "default" definition of the word "day" in the collective agreement to be a 24-hour period, then that definition would have been included in the interpretation and definitions section at Article 2. If the parties had intended for the definition of a day as a 24-hour period to apply to more than one Article of the collective agreement, they would have, for example, stated: "For the purpose of this Article and Articles 42, 43, 45 and 53."

Since the parties did not do that, we must conclude that the definition of the word "day" as a 24-hour period is not the definition that the parties intended to apply to the leave provisions of the collective agreement. It must be a definition different from the one at Article 25.01(a). The employer submits that the only definition that could reasonably be interpreted from the construction of the collective agreement is that a "day" for leave purposes is a normal working day, or 7.5 hours. It must be clear that a period other than 7.5 hours is not a normal working day, but rather the length of a shift based on a variable shift schedule.

On the issue of penalty, the employer wishes to clarify a point. An employee is only required to reimburse the employer for the hours above the 7.5 hours of leave if the grievor's interpretation of a day is correct. If, as the employer submits, a day for the purposes of the leave provisions in question is a 7.5-hour period, then it cannot be said that the employee is being penalized. An employee receives paid leave for an 7.5-hour period and any hours above that period that he or she does not report for work must be claimed as some other form of leave, such as vacation or compensatory leave.

The submission that the default definition of a day is the "whole day" cannot be found anywhere in the collective agreement. A "day" is not defined in this fashion anywhere in the collective agreement. The definition of leave as authorized absence during regular or normal hours of work does not create an inconsistency with the employer's definition of a day. It simply clarifies that when an employee is absent from work during hours that are not his or her regular hours of work, he or she is not on leave. Leave only applies to the period when an employee would otherwise be at work. Further, the definition of a "day of rest" simply clarifies the use of the word for the purposes of that definition.

It is interesting that in their submission, the grievors would separate the word day from its use in the phrase "day of rest." It is clear that this definition applies to "day of rest" as it is used in the collective agreement.

The employer also submits that the reasons behind each individual's request for leave should not sway [the adjudicator] in concluding that the grievors' definition is correct. The circumstances of each grievor have no bearing on the proper interpretation of the word "day." The fact that a grievor may appear sympathetic due to the nature of the request for leave does not change the definition of the word "day."

Finally, with all due respect, to submit at paragraph 48, that this matter should be decided without reference to Article 33.01 ignores the use of the word "day" in a provision called "Leave General," which immediately precedes the leave provisions at issue in this case. This line of argument uses the definition of the word day in an Article that makes specific mention of the fact that it is only for the purposes of that Article, and that we should ignore the general Article that governs the section on leave. This does not logically follow. While the employer will deal with the issue of jurisprudence below, to state that the Board should simply ignore a part of the collective agreement because it is identical to the one used in *King* and *Stockdale* runs contrary to the entire principle of the adjudication of grievances. To properly decide the issue in this matter, this Board has the obligation of examining the entire collective agreement and should not dismiss any part of the collective agreement out of hand, especially not an Article that deals specifically with the central issue of leave.

Cost Neutrality

As stated in the employer's written representations, the implementation of variable shift schedule is governed by a number of Articles, notably Article 25.25, which states that it shall not result in any additional overtime work or payment. The grievors state that since they were not paid an additional payment, the principle of cost neutrality is not violated. They cite adjudicator Mackenzie's decision in *Stockdale* (*supra*), where he found that "[a]t the end of the year, the employee will receive the same annual salary as an employee working regular hours."

With all due respect to adjudicator Mackenzie, this conclusion is not consistent with the principle of cost neutrality. If the grievors had been working a regular work schedule, that is to say 8 hours a day, when requesting any type of leave in question here, they would be paid for 8 hours when they did not report for work. The employer would therefore be responsible to take these 7.5 hours in account when preparing overtime, scheduling and service delivery. The grievors submit that while on a variable shift schedule, if they request leave for a day totaling 12 hours, for example, there is no additional financial burden on the employer. This conclusion cannot be deduced from the facts. If the employer is required to pay an employee 12 hours for a day when the employee did not report for work, the employer must therefore shoulder the additional financial burden of this 4.5-hour period.

It is therefore inconsistent with the article of the collective agreement, which guarantees that a variable shift schedule will be cost neutral, to define a day as the grievors have done. The additional financial burden on the employer of an additional four hours of leave for each employee working a variable shift schedule, for each day of leave requested under the relevant articles, is in direct violation of the principle of cost neutrality. The only reason for this additional financial burden is that the employees are working a variable shift schedule.

The following example better illustrates the point. A variable shift schedule is implemented for a group of employees on April 1st, 2004. During the 2003-2004 fiscal year, each employee was entitled to a total of 90 hours of paid leave under the four provisions in question (marriage, personal, volunteer and family related). If the grievor's interpretation were correct, each employee would be entitled to 144 hours of paid leave for the 2004-2005 fiscal year. Therefore, only by reason of the implementation of a variable shift schedule, each employee would be entitled to an additional 54 hours of paid leave. The fact that this variable shift schedule would no longer be cost neutral should be evident on its face.

Jurisprudence

The grievors contend that since this matter has been dealt with by adjudicators Tarte and Mackenzie and found to be "not patently unreasonable" by the Federal Court, you should not come to a different conclusion. The employer respectfully submits that this is clearly wrong and flies in the face of the purpose of grievance adjudication and the concept of standard of review.

The principle of stability of arbitral jurisprudence does not bar litigants from referring grievances to adjudication. Moreover, this principle does not mean that an adjudicator's decision on a matter establishes the only "correct" definition of a term in a collective agreement. Each adjudicator is free to come to his or her own conclusions on a matter, irrespective of the decisions rendered by other adjudicators. Further, an adjudicator has the responsibility to take a fresh look at the matter presented before him or her. An adjudicator may even reverse his or her own decision, if he or she feels that the arguments presented are persuasive enough in law to do so.

An adjudicator is not bound by the decisions of his or her colleagues, as there is no *stare decisis* in administrative tribunals. The principle of *stare decisis* originates in the Latin phrase *stare decisis et non quieta movere*, translated as "to adhere to the judge-made rules and not to challenge them by surreptitiously altering them" (*Dumont Vins & Spiritueux Inc. v. Canadian Wine Institute*, [2002] 1 F.C. 231). Adjudicators are not judges and, therefore, their decisions cannot be considered judge-made rules.

On the issue of the Federal Court's decision in *King and Holzer* (*supra*), the principle of standard of review is very clear. If a Court were to review an administrative decision-maker's decision on a standard of correctness, the interpretation of the Court of a particular provision, legislative or otherwise, would be the "correct" decision and the administrative tribunal would be bound to interpret the provision in the same way in all future cases. On the other hand, should a Court decide that a tribunal's decision is "not patently unreasonable," that tribunal or another decision-maker would be entirely free to render a different decision, provided the latter is not patently unreasonable either. There is no further burden, nor should there be, imposed on an administrative tribunal to follow a prior decision based on the fact that it was not overturned by the Court. (*Blais, Marie-Hélène et al.*, *Standards of Review of Federal Administrative Tribunals*, (Butterworths), Toronto, 2003, at pages 30-37.

As stated by the Ontario Court of Appeal in *Essex County Roman Catholic School Board v. Ontario English Catholic Teachers' Association*, [2001] 205 D.L.R. (4th) 700 at paras. 34-35.

> In short, Osborne J.A. was dealing only with the matter before the court — was arbitrator Picher's award patently unreasonable? He was not trying to resolve conflicts in the arbitral jurisprudence or enumerate a "correct" and, therefore, binding precedent for future arbitrations. This is evident from his observation, "I do not think that the goal of consistency and thus predictability can trigger a correctness standard of review (to resolve conflict in arbitral jurisprudence) when the standard of review would otherwise be patent unreasonableness" (p. 441)....
>
> In summary, since this court's decision in Lanark determined only that arbitrator Picher's award was not patently unreasonable, it remained open for a different arbitrator to make a different award, provided that it was not patently unreasonable. It follows that the Divisional Court erred by concluding that it was patently unreasonable for arbitrator Brown to interpret article 7.2(d) in a fashion different from the interpretation of arbitrator Picher. The Divisional Court should have addressed the legal issue on the merits -- was arbitrator Brown's interpretation of article 7.2(d) patently unreasonable? It is to that inquiry that I now turn.

Justice MacPherson is very clear: two tribunal members can come to two completely different conclusions, provided that each conclusion is not patently unreasonable. Further, the employer would caution you from considering the comments made by the Federal Court in *King*, since they constitute *obiter* and do not bind this Board in any way whatsoever.

The employer respectfully submits that its definition of a day for leave purposes is not only reasonable, but correct and in accordance with the principles of collective agreement interpretation. The grievors' definition ignores these principles, as well as the specific language of the collective agreement. For this reason alone, the employer submits that you should, and in fact have every right to, conclude that a day for the purposes of the leave articles is 7.5 hours/8 hours.

Conclusion

The employer respectfully submits that for the reasons outlined above, the grievors have not met their burden of proof in establishing that the employer's definition of the word "day" for the purposes of the three leave provisions in question is incorrect. Based on the principles of interpretation and equity, the only reasonable definition of the word "day" is that of a regular workday.

REASONS FOR DECISION

[32] These 18 grievances relate to four different leave provisions and the interaction of those leave provisions with variable hours of work arrangements. Public Service Staff Relations Board (Board) adjudicators have examined variable hours of work and the leave provisions at issue in these grievances in the past: *Stockdale* (*supra*) (personal

leave and volunteer leave), *King and Holzer* (*supra*) (family-related leave) and *Phillips* (*supra*) (marriage leave). In each of these decisions, the adjudicator concluded that a day of leave was equivalent to the scheduled hours of work of the employee. The Federal Court upheld the decision in *King and Holzer* (*supra*) and the *Stockdale* (*supra*) decision is currently under judicial review. In all three adjudication decisions, the PSAC is the bargaining agent. In *King and Holzer* (*supra*), the employer is a separate employer (the former Canada Customs and Revenue Agency (CCRA)).

[33] The relevant collective agreement provisions are almost identical. However, there is one material difference in the two collective agreements applicable to these grievances. In the agreements at issue in the previous Board decisions in *King and Holzer* (*supra*) *and Stockdale* (*supra*), a definition of "day" as a 24-hour period appears in the general definitions section of the collective agreement. In the collective agreements at issue in these grievances, the definition of "day" as a 24-hour period is limited to the hours of work article. (The implications on the merits of the grievances are further discussed below.) Since there is a material difference in the agreements, the principle of *res judicata* is not relevant here and I do not need to discuss it. It should be noted, however, that previous decisions relating to similar collective agreement provisions are relevant to consider in reaching my decision on the merits of these grievances.

[34] The collective agreement defines "leave" as an authorized absence from duty during the employee's "regular or normal hours of work." This definition must be read in conjunction with each leave provision. Each leave provision at issue in these grievances entitles an employee to varying numbers of "days" of leave. Therefore, the proper interpretation of the four leave provisions at issue depends on the appropriate definition for "day": what is a "day" for the purposes of these leave provisions? Unfortunately, the parties have not explicitly defined "day" for the purposes of the leave provisions. Counsel for the employer is correct when he notes that the definition of "day" as a 24-hour period is limited to the hours of work provisions of the collective agreement. (In *King and Holzer* (*supra*), *Stockdale* (*supra*) *and Philips* (*supra*), the definition of "day" had general application to the collective agreement, as it was included in the general definitions section.) "Day" for the purposes of other provisions in the collective agreements is not defined; the agreement is silent. We must, therefore, look to other parts of the agreement to ascertain what a "day" of leave means.

[35] It goes without saying that a "day" of leave occurs on a working day (the exception is for the bereavement period of five consecutive calendar days). The "normal work day" for employees not on variable hours of work is specified as 7.5 (or 8) consecutive hours (clause 25.06 in the PA agreement and in the relevant appendices in the SV agreement). For those employees on variable hours of work, there is no explicit definition of a "normal work day". Clauses 25.26 (of the PA agreement) and 28.05 (of the SV agreement) state that the scheduled hours of work of "any day" as set forth in a variable schedule may exceed or be less than 7.5 or 8 hours.

[36] The terms and conditions for variable hours specify that an employee shall be "granted days of rest on such days as are not scheduled as a normal work day for the employee". This reference to a "day" implies that a "day" is the regularly scheduled hours of work for each employee. Also, it is clear that a day of rest for an employee on a variable-hours-schedule is for the entire day and not simply 7.5 or 8 hours. It is, therefore, a reasonable conclusion that "a normal work day" for those on variable hours of work is equivalent to their scheduled hours of work. As "leave" is defined as an authorized absence during normal or regular hours of work, and a "normal" work day is the regularly scheduled hours of work, it follows that a "day" of leave is equivalent to the regular scheduled hours of work for the individual employee.

[37] The treatment of designated paid holidays also supports this interpretation. Under the variable hours of work terms and conditions, a designated holiday is converted to 7.5 or 8 hours. The leave provisions at issue are not subject to such a conversion process. Elsewhere in the agreement, "day" is interpreted as being "working days" and not 7.5 or 8 hours. For example, notice of a disciplinary hearing is specified as one day (clause 17.02 in both agreements) and grievance time limits are set as days (clause 18.10 in both agreements).

[38] The acting pay provision in the variable hours of work section of the collective agreement also supports the interpretation of "day" as the regularly scheduled hours (paragraph 25.27(g) in the PA agreement and clause 28.06 in the SV agreement). The qualifying period for acting pay has been converted from days to hours and a similar provision could easily have been put in the agreement with respect to the leave provisions (*King and Holzer* (*supra*)).

[39] It is the employer's position that the provision in the general leave provisions that converts earned leave credits to hours applies to all the leave provisions at issue in these grievances. These provisions that convert "earned leave" credits at the rate of 7.5 or 8 hours per day of leave apply only to "earned leave" and not to the four leave provisions at issue here (see *King and Holzer* (*supra*) and *Stockdale* (*supra*)). This is further supported by direct reference to the vacation and sick leave articles. Those articles refer to "earned leave credits", whereas the leave provisions at issue here simply grant a day or days of "leave" (clauses 34.02 and 35.01 in the PA agreement and clauses 35.02 and 36.01 in the SV agreement).

[40] Bereavement leave has been referred to by the employer in support of its interpretation of the leave provisions in question. The general leave provision states that earned leave credits are to be converted to hours, but makes a specific exception for bereavement leave.

[41] It is important to note that bereavement leave (or "bereavement period") is different from the leave provisions at issue in these grievances in that it refers to five "consecutive calendar days", which can include days of rest. The Federal Court noted in *King and Holzer* (*supra*), that this was a sufficient distinction from family-related leave:

> *I am satisfied that it [family-related leave] is equally distinguishable from Bereavement Leave, which is for a period of five (5) consecutive calendar days, which must include the day of the funeral and which, almost inevitably, will not all be workdays in the majority of circumstances. I am satisfied that this distinction is sufficient to allow the Adjudicator to conclude as he did.*

The same distinction from bereavement leave applies to personal, volunteer and marriage leave.

[42] Counsel for the employer submitted that an interpretation of "day" as regularly scheduled hours of work violated the "cost-neutrality" principle contained in the agreement. He argues that an employee on variable hours would get a "larger benefit" under this interpretation because the number of hours he or she was paid for when not at work would be greater than an employee on normal hours of work. He also argues that this constitutes an "additional payment" because the employee on variable hours is paid for a longer period of time when not at work. In addition, it is the

employer's position that additional overtime costs are required when an employee on variable hours takes a full day of leave.

[43] This article of the agreement is focussed on avoiding additional overtime hours and avoiding "any additional payment" as the result of variable hours of work. The employer has characterized this as the principle of "cost neutrality". However, the article is more specific and refers only to overtime and "additional payments". An interpretation of "day" as regularly scheduled hours does not violate this provision because there is no additional overtime or additional payment to the employee as a result of receiving a day of leave. At the end of the year, the employee will receive the same annual salary as an employee working regular hours (see *Stockdale* (*supra*)). Although an employee does get more hours away from work by virtue of the fact that his or her workday is longer than 7.5 or 8 hours, there is no "additional payment". "Additional payment" refers to such payments under the collective agreement as shift premiums. Even if I were to accept the employer's interpretation of "cost neutrality" as including overtime paid to other employees, there was no evidence to show that the employees who took leave were replaced or, if so, whether that resulted in "additional overtime" being paid to the replacement. There are often costs associated with employees taking leave, whether or not they are on variable hours of work.

[44] In conclusion, the grievances are allowed and the requested remedies as set out in paragraphs 9 through 26 are granted.

Ian R. Mackenzie,
Board Member

OTTAWA, August 3, 2004.

LIST OF GRIEVORS

NAME	PSSRB FILE NO.
BREITENMOSER, Urs	166-2-32370
CONROY, Barry	166-2-31642
KALEEMUDDIN, Mohammad	166-2-31643
NORRIS, Robert	166-2-31644
SHONIKER, Michael	166-2-31645
WALLMANN, Ronald	166-2-31946
COUTURE-WEINS, Robert	166-2-32042
KAWULYCH, Bradley	166-2-32070
DONNELLY, Cheryle	166-2-32371
HELFER, Beat	166-2-32372
ETHERINGTON, Chantelle	166-2-32667
LEICESTER, Dave	166-2-32677
LAPLANTE, Monique	166-2-32793
WILCOX, Linda	166-2-32976
CÔTÉ, Francine	166-2-32978
FERRI, Gloria Francine	166-2-32979
SANDKYKE, Judith Lynne	166-2-32982
STEINSON, Cheryl Lynn	166-2-32983