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Citation: 2019 FPSLREB 23

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

KERRY CARROLL, MAREK JANCZARSKI, STEPHEN HARTLING, AND MARCELO FERME

Grievors

and

TREASURY BOARD (Department of Public Works and Government Services and Department of Industry)

Employer

Indexed as
Carroll v. Treasury Board (Department of Public Works and Government Services and Department of Industry)

In the matter of individual grievances referred to adjudication and the matter of an application for an extension of time referred to in paragraph 61(b) of the *Federal Public Sector Labour Relations Regulations*

Before: David Orfald, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievors: Denise Giroux and Sarah Godwin, Professional Institute of the Public Service of Canada

For the Employer: Adam Gilani, counsel

Decided on the basis of written submissions, filed January 24 and February 14 and 22, 2018, and an in-person case conference held January 16, 2019.

I. Summary

[1] This case is about the leave with income averaging (LWIA or LIA) program offered to Treasury Board employees and the extent to which employees earn vacation and sick leave credits while participating in the program.

[2] Leave with income averaging is a "special working arrangement" in which an employee takes leave without pay of between five weeks and three months within a specific one-year period. The employee's pay for the year is reduced proportionately, averaged over the year, and paid in regular biweekly amounts.

[3] This case involves four employees who filed grievances in three different years and who work under three different collective agreements for two different departments. They have in common that they are all employees of the Treasury Board and are represented by the Professional Institute of the Public Service of Canada ("the bargaining agent").

[4] The three collective agreements at issue do not include provisions directly related to the LWIA program. However, each one contains language that provides that the employer may grant leave with or without pay for other reasons. The employer created the *Directive on Leave and Special Working Arrangements* ("the *Directive*"), which provides for LWIA as a form of leave without pay. By reference, the *Directive* engages the articles of the collective agreements on earning vacation and sick leave credits.

[5] Common to the relevant articles in all three collective agreements is language that states that vacation and sick leave credits are accrued for calendar months "during which" or "for which" the employee "… receives pay for at least seventy-five (75) hours." In the end, this case turns upon the interpretation of these words: What does it mean to receive pay for at least seventy-five (75) hours in a month?

[6] Each grievor was denied vacation or sick leave credits for certain months of their "non-work" or leave-without-pay portions of their LWIAs. The employer's position is that the non-work portions of their special leave arrangements were leave without pay and that employees should not accrue vacation and sick leave credits in months in which they do not work the 75-hour threshold.

[7] The grievances challenge this denial. The position of all the grievors, collectively Kerry Carroll, Marek Janczarski, Stephen Hartling, and Marcelo Ferme, is that they should have been granted vacation and sick leave credits during the entire unpaid leave portions of their leave arrangements because for each month in question, they received at least 75 hours of pay (or, in the case of the one grievor who is a part-time employee, at least 60 hours of pay).

[8] The employer and the bargaining agent assert that the language of the collective agreement is clear and unambiguous. I do not find that to be the case. The interpretative exercise required is not simple and straightforward.

[9] However, for the reasons that follow, I do not find that the grievors met their burden of proof that the collective agreements have been violated, and the grievances are dismissed.

II. Grievances referred to adjudication

[10] As noted, this decision concerns four separate grievances referred to adjudication.

[11] At the relevant time, Ms. Carroll worked for Public Works and Government Services Canada, now Public Services and Procurement Canada. She was classified CS-01 and was covered by the Computer Systems (CS) collective agreement with an expiry date of December 21, 2014. Ms. Carroll's status was a part-time employee working 30 regular hours per week. Her grievance originally concerned two periods of LWIA, one in 2013, and one in 2014. Her grievance was referred to adjudication on May 21, 2015, and became file 566-02-11212.

[12] The employer objected on the basis of timeliness to the portion of the grievance addressing the 2013 LWIA period. In response, Ms. Carroll requested an extension of time, and the Public Service Labour Relations and Employment Board (PSLREB) opened file 568-02-355. In subsequent submissions, her representative dropped the 2013 period from the grievance, rendering the extension-of-time application moot. As a result, I order file 568-02-355 closed.

[13] Ms. Carroll's grievance also initially challenged the employer's denial to substitute a portion of the 2014 LWIA with paid bereavement leave. However, her representative later dropped that aspect of the grievance. Therefore, the remaining portion of her grievance concerns the denial of earned vacation and sick leave credits

for the month of August 2014 during an LWIA period from July 29 to August 29, 2014.

[14] At the relevant time, Mr. Janczarski worked for the Department of Industry, now Innovation, Science and Economic Development Canada (ISED). He was classified SG-PAT-05 and was covered by the Applied Science and Patent Examination (SP) collective agreement with an expiry date of September 30, 2014. His grievance, filed on December 3, 2016, was referred to adjudication on May 19, 2017, and became file 566-02-14183. It concerns the following four non-work periods taken under two separate LWIA arrangements:

- January 2 - February 6, 2015, and August 22 - October 19, 2015; and
- January 4 - February 4, 2016, and August 22 - October 7, 2016.

[15] At the relevant time, Mr. Hartling also worked for ISED. He was classified SG-PAT-05 and covered by the same SP collective agreement as was Mr. Janczarski. His grievance, filed on July 22, 2016, was referred to adjudication on May 19, 2017, and became file 566-02-14184. It concerns six LWIA arrangements and the following six non-work periods:

- July 14 - August 15, 2008;
- July 13 - August 14, 2009;
- July 15 - August 20, 2010;
- July 11 - August 12, 2011;
- July 12 - August 29, 2014; and
- August 1 - September 2, 2016.

[16] At the relevant time, Mr. Ferme also worked for ISED. He was classified EN-ENG-03 and was covered by the Architecture, Engineering and Land Survey (NR) collective agreement with an expiry date of September 30, 2014. His grievance, filed on May 3, 2017, concerns two non-work periods during one LWIA arrangement, July 4 to August 19, 2016, and January 3 to February 6, 2017. His grievance was referred to adjudication on July 18, 2017, and became file 566-02-14366.

[17] At the time of the referrals to adjudication, all four grievances had been submitted to the PSLREB.

[18] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts*

and to provide for certain other measures (S.C. 2017, c. 9) received Royal Assent, changing the name of the PSLREB and the titles of the *Public Service Labour Relations and Employment Board Act*, the *Public Service Labour Relations Act*, and the *Public Service Labour Relations Regulations* (SOR/2005-79) to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, the *Federal Public Sector Labour Relations Act* ("the *Act*"), and the *Federal Public Sector Labour Relations Regulations* ("the *Regulations*").

[19] As proposed by the bargaining agent, the Board ordered the four grievance files joined with Ms. Carroll's extension of time request, which had originally been set for a hearing on January 4 and 5, 2018.

[20] Following a pre-hearing conference on November 29, 2017, the Board directed that the case proceed on the basis of written submissions. These were received from the bargaining agent on January 24, 2018, from the employer on February 14, 2018, and in reply from the bargaining agent on February 22, 2018.

[21] In addition to its timeliness objections, upon the referral to adjudication of Ms. Carroll's grievance, the employer raised timeliness objections with respect to the grievances of Messrs. Janczarski and Hartling. It withdrew them at the pre-hearing conference and in its submissions. However, at that conference, the employer indicated its intent to rely on the principle in *Canada (National Film Board) v. Coallier*, [1983] F.C.J. No. 813 (C.A.)(QL), to limit the remedies sought.

[22] In November 2018, I was assigned as the panel of the Board to decide the case. Following an initial analysis, I invited the parties to clarify certain aspects of their written submissions, which was done via oral arguments at an in-person case conference January 16, 2019.

III. Issues

[23] Three issues emerged from the parties' submissions:

a) Issue 1: Do the relevant collective agreements oblige the employer to accredit vacation and sick leave credits to employees during the full non-working period of an LWIA?

b) Issue 2: Was the employer prohibited from raising *Coallier* because it did not raise it at the time the grievances were referred to adjudication?

c) Issue 3: If it was not prohibited, does the *Coallier* principle limit the remedies available to the grievors in these particular circumstances?

[24] Issue 1 is the core issue raised in these grievances. If the answer to this issue is yes, then the two further issues arise from the parties' submissions, related to *Coallier*.

[25] In its submissions, the bargaining agent objects to the employer raising *Coallier* at the pre-hearing conference (after the reference to adjudication). Its position is that the employer was obligated to raise its *Coallier* objection at each level of the grievance process and within 30 days of the referrals to adjudication. In support of its position, it cites s. 95 of the *Regulations*, as well as jurisprudence.

[26] The employer refutes the objection. Thus, Issue 2 arises. If I find in its favour on this issue, then the third and final issue arises.

[27] As explained below, I find that the answer to Issue 1 is "no" and conclude that the grievances must be dismissed. Accordingly, Issues 2 and 3 are rendered moot and I do not address them any further in my reasons.

IV. Reasons

A. Issue 1: Do the relevant collective agreements oblige the employer to accredit sick and vacation leave credits to employees during the full non-working period of an LWIA?

1. The *Directive*

[28] Both parties acknowledge that there is no specific LWIA provision in the collective agreements. However, their arguments quote the *Directive* extensively.

[29] In its submissions, the employer argues that LWIA is anchored in the collective agreement provisions that give it the discretion to grant leave not otherwise specified in the agreements. It references the following clauses:

…

> [CS collective agreement]
>
> ***17.16 Leave with or without Pay for Other Reasons***
>
> *At its discretion, the Employer may grant leave with or without pay for purposes other than those specified in this Agreement.*
>
> …
>
> [NR and SP collective agreements]
>
> ***17.21 Other Leave Without Pay***
>
> *At its discretion, the Employer may grant leave without pay for purposes other than those specified in this Agreement, including enrolment in the Canadian Armed Forces and election to a full-time municipal office.*
>
> …

[30] The employer explains that in exercising its discretion to grant other leaves without pay, it created LWIA provisions through the *Directive*.

[31] In its submissions, the bargaining agent did not dispute this relationship between the collective agreements and the *Directive*.

[32] The *Directive* comprises several parts, as it governs a range of leave and special arrangements. Following the general content are four appendices. At issue here is Appendix D - "Leave with Income Averaging: A Special Working Arrangement."

[33] When quoting from the *Directive* and its Appendix D, both parties choose to emphasize certain clauses and indeed certain words from the *Directive*. The bargaining agent quotes from section 4, "Definitions", with the following emphases:

> ***leave with income averaging*** **(congé avec étalement du revenu)**
>
> *Is an authorized working arrangement whereby eligible persons are able to reduce the number of weeks worked in a specific 12-month period by taking leave without pay for a period of between 5 weeks and 3 months. Although pay is reduced and averaged out over the 12-month period, pension and benefits coverage (as well as the applicable premiums and contributions) continue at the pre-arrangement levels.*

[Emphasis added by bargaining agent]

[34] The bargaining agent quotes from Appendix D, Section 1, with the following emphases:

> ***1. Special working arrangement***
>
> *Leave with income averaging is an arrangement whereby eligible persons reduce the number of weeks worked in a specific 12-month period by taking leave without pay for a period of between a minimum of 5 weeks and a maximum of 3 months.*
>
> *Pay for the participating person would be reduced and averaged out over the 12-month period to reflect the reduced time at work; however, his or her pension and benefits coverage, as well as premiums and contributions, would continue at the pre-arrangement levels.*
>
> *The person continues to be subject to the provisions of the relevant collective agreement or terms and conditions of employment, and his or her employment status (for example, full- or part-time) would remain unchanged during the working arrangement.*
>
> *The leave without pay portion of the working arrangement may be taken in two periods within the 12-month period. Each period must be at least 5 weeks and the sum of the two periods must not exceed 3 months.*
>
> *Although persons participating in the leave with income averaging working arrangement receive income throughout the 12-month period, the person is deemed to be on leave without pay during the non-work period of the arrangement.*
>
> [Emphasis added by bargaining agent]

[35] Finally, the bargaining agent cites section 5.13 of Appendix D, which provides explicit instruction with respect to vacation and sick leave credits, with the following emphases:

> ***5.13 Vacation and sick leave credits***
>
> *Vacation and sick leave credits will continue to be earned in accordance with the provisions of the relevant collective agreement or terms and conditions of employment.*
>
> *Earned vacation and sick leave credits may be used on the at-work days' portion of the working arrangement only. During the leave without pay portion of the working arrangement, vacation and sick leave credits will be earned in accordance with relevant collective agreement or terms*

> *and conditions of employment.*
>
> [Emphasis added by bargaining agent]

[36] The bargaining agent's position is that the employer unfairly rests its position on the emphasized wording in the final paragraph of section 1, "… the person is deemed to be on leave without pay during the non-work period of the arrangement." It argues as follows:

> *… the Employers'* [*sic*] *final level responses failed entirely to address, explain, interpret or apply the* specific *provisions included in Appendix D which direct the Employer on the question of how sick and vacation leave credits … are to be treated during the non-working period of the LIA* ***and*** *to explain how their approach was consistent with the language of the collective agreements.*
>
> [Emphasis in the original]

[37] Through its choice to emphasize certain words within section 5.13, the bargaining agent argues that the clear language of the *Directive* indicates that vacation and sick leave credits will be earned during the leave-without-pay portion.

[38] The employer quotes the same section but chooses to highlight different words, as follows:

> ***5.13 Vacation and sick leave credits***
>
> *Vacation and sick leave credits will continue to be earned in accordance with the provisions of the relevant collective agreement or terms and conditions of employment.*
>
> *Earned vacation and sick leave credits may be used on the at-work days' portion of the working arrangement only. During the leave without pay portion of the working arrangement, vacation and sick leave credits will be earned in accordance with relevant collective agreement or terms and conditions of employment.*
>
> [Emphasis added by employer]

[39] Through its submissions, the employer seeks to emphasize that the non-working period is a leave without pay and that credits will be earned in accordance with the relevant collective agreement.

[40] While the *Directive* exists outside the collective agreement, both parties rely on it significantly in their arguments. Furthermore, the bargaining agent's representatives refer me to *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2008 PSLRB 84 at para. 55, as follows, for the proposition that the *Directive* could be subject to adjudication:

> ***55*** *Every policy adopted by an employer, whether incorporated into the collective agreement or not, is subject to adjudication if the dispute relating to the policy concerns its compliance or consistency with the collective agreement….*

[41] Despite this, I do not find the *Directive* ultimately very instructive on the key issue of whether the grievors are entitled to accrue vacation and sick leave credits during the entire period of their LWIA. In particular, I do not find the emphasized versions of it useful. I think is it correct to read it, and its section 5.13 in particular, as a whole and in the context of the collective agreement. The plain and ordinary meaning of the words in 5.13 that credits "will continue to be earned" is modified significantly by the words, "… in accordance with the provisions of the relevant collective agreement …"

[42] From that reading and my earlier observations, I reach the following conclusions:

a) None of the collective agreements in force contain specific language providing for LWIA or governing its administration.

b) The collective agreements provide the employer with the discretion to grant leave with or without pay for other reasons, and the employer released the *Directive* to provide direction on some aspects of how these leaves are to be granted, including Appendix D, which provides for LWIA.

c) The *Directive* provides that the non-work period of an LWIA is leave without pay. No collective agreement provision modifies that direction.

d) The specific provision of the *Directive* related to vacation and sick leave credits provides that vacation and sick leave credits "will continue

to be earned in accordance with the provisions of the relevant collective agreement or terms and conditions of employment."

e) In the end, the *Directive* refers the reader to the specific provisions of the relevant collective agreement. Thus, the question posed by these grievances must be answered by looking at that language.

2. <u>The collective agreements</u>

[43] The relevant introductory sentences to the vacation leave clauses of all three collective agreements are similar, as follows:

…

[CS collective agreement]

15.02 Accumulation of Vacation Leave Credits

An employee shall earn vacation leave credits at the rate described in (a) below for each calendar month during which he or she receives pay for at least seventy-five (75) hours.

…

[NR and SP collective agreements]

15.02 Accumulation of Vacation Leave Credits

An employee shall earn vacation leave credits for each calendar month during which the employee receives pay for at least seventy-five (75) hours at the following rate:

…

[44] The relevant sick leave clauses are identical in all three, as follows:

ARTICLE 16

SICK LEAVE

16.01 Credits

(a) An employee shall earn sick leave credits at the rate of nine decimal three seven five (9.375) hours for each calendar month for which the employee receives pay for at least seventy-five (75) hours.

…

[45] It should be noted that because Ms. Carroll is a part-time employee with

a normal workweek of 30 hours, her vacation leave credits are earned on a prorated basis. The bargaining agent notes that specific clauses in her collective agreement are relevant to part-time employees, including clause 37.02 (providing for the general principle of proportionality), clause 37.09 (providing for specific provisions in respect of vacation leave credits), and clause 37.10 (sick leave), which read as follows:

> ***37.02*** *Part-time employees shall be entitled to the benefits provided under this Agreement in the same proportion as their normal scheduled weekly hours of work compare with the normal weekly hours of work of full-time employees unless otherwise specified in this Agreement.*
>
> …
>
> ***Vacation Leave***
>
> ***37.09*** *A part-time employee shall earn vacation leave credits for each month in which the employee receives pay for at least twice (2) the number of hours in the employee's normal work week, at the rate for years of employment established in clause 15.02, prorated and calculated as follows …*
>
> …
>
> ***Sick Leave***
>
> ***37.10*** *A part-time employee shall earn sick leave credits at the rate of one-quarter (1/4) of the number of hours in an employee's normal work week for each calendar month in which the employee has received pay for at least two (2) times the number of hours in the employee's normal work week.*

[46] Thus, in Ms. Carroll's case, instead of earning vacation and sick leave credits for every month in which she receives pay for 75 hours, these clauses provide that she earns credits for every month in which she receives pay for 60 hours — twice her normal workweek.

3. <u>The grievors' arguments</u>

[47] The grievors' position is that the plain and ordinary meaning of the language "during which the employee receives pay" or "for which the employee receives pay" should therefore be interpreted as meaning the act of actually receiving pay. Their representatives argue as follows:

> *… It is indisputable that all 4 grievors "received pay" for each calendar month in the minimum amounts stipulated in their*

> *collective agreements, during both the at-work and non-work periods of their LIA, so as to earn the leave credits provided for in their respective clauses dealing with Vacation Leave and Sick Leave.*

[48] In other words, because the averaged out pay amounted to more than 75 hours per month (60 hours for Ms. Carroll), and that pay was paid to and received by the grievors in each calendar month of the relevant years, they should receive vacation and sick leave credits for each calendar month of the relevant years.

[49] The bargaining agent asserts that the employer is attempting to equate the words "receives pay" with the "earning" of pay and that in effect, it is seeking to revert to a term that was used in previous versions of the collective agreements, which stated as follows:

> [CS collective agreement]
>
> *19.02 An employee who has earned at least ten (10) days' pay for each calendar month of a fiscal year shall earn vacation leave credits at the following rates …*
>
> [Emphasis added by bargaining agent]

[50] In negotiations for the CS collective agreement that expired in 1986, the vacation leave article was redrafted. The word "earned" was replaced by the current wording, "receives pay." The same was true in the negotiations of the SP and NR collective agreements that expired in 1999. Neither party sought to introduce extrinsic evidence about the negotiations of these changes. However, the bargaining agent used this point as the basis to argue that there is a plain-language difference between earning pay and the act of receiving it. It cites the Merriam-Webster Dictionary's definition of earn as a verb meaning "to receive as return for effort and especially for work done or services rendered …" and the definition of receive as a verb meaning "to come into possession of …"

[51] While the grievors might not have earned pay in certain months to meet the thresholds required, they did indeed receive pay at the required level. Therefore, the bargaining agent argues, the plain and ordinary meanings of the clauses require that they receive the vacation and sick leave credits to which they are entitled.

[52] Further, the bargaining agent argues that were I to interpret "receive pay" as requiring employees to have worked 75 hours in a month, it would alter the collective agreement, which I am prohibited from doing by virtue of s. 229 of the *Act*. That section reads as follows:

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

[53] In addition, the bargaining agent mentions the principle that no limits should be placed on collective agreement entitlements and rights unless they are specifically stated, citing both *Delios v. Canada Revenue Agency*, 2013 PSLRB 133 at para. 22, aff'd 2015 FCA 117, and *Cianciarelli v. Treasury Board (Department of the Environment)*, 2017 PSLREB 32 at paras. 7 to 12 and 36 to 39. Since no language in the collective agreement clearly removes the entitlement to vacation and sick leave credits, the grievors should be entitled to accrue them, argues the bargaining agent.

4. <u>The employer's arguments</u>

[54] The employer also argues the plain and ordinary meaning of the language in the collective agreement and states that the clauses in concern are "clear and unambiguous," as follows:

> *47. The ordinary meaning of pay is understood as compensation for services rendered. The employer submits that although employees subject to an LIA agreement receive money from the employer during the non-work LWOP* [leave without pay] *period, this does not constitute pay for that non-work period within the meaning of the Collective Agreements.*
>
> *48. The money received by employees on LIA during the LWOP period is best understood as monies received, in exchange for services rendered during the on-work periods, that are held by the employer and disbursed on a deferred (or advanced) basis, as agreed to in each LIA agreement.*

[55] The employer points me to clause 47.02 of the CS collective agreement and to clauses 46.02 of the SP and NR collective agreements, which deal with pay administration. The clauses state, "An employee is entitled to be paid for services rendered …" In other words, pay is tied to work performed. For the employer, when reading the phrase, "… receives pay for at least seventy-five hours (75) hours," the word "for" is a key word. It requires one to ask, "For what?" And since pay is

received for hours worked, one must interpret the clause as requiring that the pay must be for services rendered in the period under consideration.

[56] When it was pushed for clarification on this point, the employer acknowledged that pay is also received as a result of collective agreement provisions negotiated by the parties, such as vacation leave, sick leave, and several other forms of leave with pay (such as family related leave), and that such paid leaves also contribute to the receipt of pay and therefore to achieving the thresholds of clauses 15.02 and 16.01 of the collective agreements.

[57] In support of its proposition that the language of the agreement is a true reflection of the parties' intent, the employer cites *Chafe v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112. For the proposition that the plain and ordinary meaning must be applied despite the fact that the result may appear obnoxious or unfair, the employer cites *Allen v. National Research Council of Canada*, 2016 PSLREB 76, aff'd 2017 FCA 81. And for the proposition that for unambiguous and clear words, there is no need to examine the broader context or extrinsic evidence, the employer cites *Fehr v. Canada Revenue Agency*, 2017 FPSLREB 17. The Federal Court of Appeal dismissed an application for judicial review of this decision, holding that its findings were reasonable (*Canada (Attorney General) v. Fehr,* 2018 FCA 159).

[58] In contrast to the bargaining agent's argument that no limits should be placed on collective agreement entitlements and rights unless they are specifically stated, the employer argues that consistent with the jurisprudence of this Board and the state of labour relations law, a clear expression of intent is required to confer a financial benefit. It argues that vacation and sick leave benefits are a form of monetary benefit, and it cites *Wallis v. Treasury Board (Correctional Service of Canada)*, 2004 PSSRB 180 at para. 37, for the proposition that employees working on a special work arrangement cannot receive a greater benefit than those working regular hours, "… unless it clearly says so in the Collective Agreement."

[59] The employer points to the fact that while specific clauses in the collective agreement provide for a payout of unused vacation leave credits upon termination or death and that specific clauses provide for the advance and recovery of sick leave credits, nothing in the collective agreement clearly confers a monetary benefit of either vacation and sick leave credits to employees who are on leave without pay.

5. Analysis and conclusion

[60] It is well established that the basic principles of collective agreement interpretation require that words are to be given their ordinary meanings, that provisions within an agreement or contract are to be read as a whole, that effect must be given to every word, and that specific provisions are to take precedence over general principles. The employer cites these (and other) basic principles from Palmer and Snyder, *Collective Agreement Arbitration in Canada*, 5th edition, at pages 21 to 55. The bargaining agent cites essentially the same principles from Brown and Beatty, *Canadian Labour Arbitration*, 4th edition, at 4:2000.

[61] As noted, this case turns on the question of what it means to receive pay for seventy-five (75) hours in a calendar month. Both the bargaining agent and the employer are convinced that these basic principles should lead me to support their respective interpretations of the collective agreement. Both are also convinced that the additional principles of interpretation that they offered and the case law that they cited point me towards their respective conclusions.

[62] The bargaining agent believes that the plain and ordinary meaning of the words in clauses 15.02 and 16.01 of the collective agreements relate to the act of receiving pay in the month in question. From that perspective alone, it is reasonable for the grievors to conclude they had met the threshold required by clauses 15.02 and 16.01. In uncontested fact, each of them received a biweekly deposit of pay in the months under dispute in these grievances, at a level that meets the clauses' criteria. If collective agreement interpretation must stop at the plain and ordinary meanings of each word taken together, in those clauses alone, the grievances would be allowed.

[63] The employer believes the plain and ordinary meanings of the words require that the threshold can be met only through the receipt of pay in return for services rendered in a month or paid leave taken in the month. Pay is not received for months in which an employee is on leave without pay; therefore, an employee cannot receive pay for that month, and therefore, she or he is not entitled to the vacation and sick leave credits for that month.

[64] I cannot accept either party's contention that the wording of clauses 15.02 and 16.01 is clear and unambiguous. The employer's interpretation fails to adequately account for the plain and ordinary meaning of the word receive, which is commonly defined as to be given, to come into possession of, or to be presented with something.

Its argument of a distinction between pay received and monies received ignores the fact that money is given to employees only because it is pay.

[65] On the other hand, the bargaining agent's interpretation fails to adequately account for the word "for" in the phrase "receives pay for", which implies that pay is for something, certainly not for leave without pay.

[66] If I were governed solely by the exact wording of each clause, I could make a distinction between the wording of clauses 15.02 and 16.01. Reading both clauses carefully, one can see a minor difference in the wording, as follows:

> [CS collective agreement]
>
> ***15.02 Accumulation of Vacation Leave Credits***
>
> *An employee shall earn vacation leave credits at the rate described in (a) below for each calendar month during which he or she receives pay for at least seventy-five (75) hours.*
>
> …
>
> ***16.01 Credits***
>
> *(a) An employee shall earn sick leave credits at the rate of nine decimal three seven five (9.375) hours for each calendar month for which the employee receives pay for at least seventy-five (75) hours.*
>
> [Emphasis added]

[67] The French versions of the agreements in question also contain subtle differences between the words used in the relevant vacation and sick leave clauses:

> [CS collective agreement]
>
> ***15.02 Acquisition des crédits de congé annuel***
>
> *L'employé acquiert des crédits de congé annuel selon les modalités décrites à l'alinéa a) ci-dessous pour chaque mois civil au cours duquel il a touché la rémunération d'au moins soixante-quinze (75) heures.*
>
> …
>
> ***16.01 Crédits***
>
> *a. L'employé acquiert des crédits de congé de maladie à raison de neuf virgule trois sept cinq (9,375) heures pour chaque mois civil durant lequel l'employé touche la rémunération d'au moins soixante-quinze (75) heures.*

[Emphasis added]

[68] In the English version of the clause, the use of the words "during which" ("*au cours duquel*" in the French rendition) in clause 15.02 could be interpreted as leading more clearly to the bargaining agent's interpretation, which is that it is the act of receiving pay in a month during which an employee receives pay that determines the result. Given that the employees did receive 75 hours of pay during the months at issue, they would meet the threshold.

[69] On the other hand, the use of the English words "for which" ("*durant lequel*" in French) in clause 16.01 imply that the pay has to be for that month, regardless of when the pay is actually received. For the months in question, the grievors were on leave without pay, so no pay was received "for" those months, and therefore, they did not meet the threshold.

[70] So am I to conclude that based on the different wording in clauses 15.02 and 16.01, the parties intend a different result for vacation leave than sick leave?

[71] Were I to follow the Board decision in *Fehr*, as suggested by the employer, I might in fact make that distinction and award that the grievors are entitled to their vacation leave credits but not their sick leave credits. *Fehr* dealt with an employee who changed bargaining units partway through a year and sought to claim family related leave of up to 45 hours under each collective agreement. The Board's decision in favour of the grievor turned on the definition of the word "employee," which was defined as a member of the bargaining unit, and on the fact that the collective agreement did not state that family leave credits had to be earned, in contrast to some other forms of leave..

[72] The result is that employees who change bargaining units partway through a fiscal year are entitled to family related leave of up to 45 hours in each collective agreement, which is twice the benefit of someone who does not change agreements (and by extension, someone who works in three different bargaining units would be entitled to three times the leave allotment for a year).

[73] The bargaining agent could have used *Fehr* to argue that the plain and ordinary meaning interpretation principle must take precedence over other principles, even if that produces a result that might be perceived as unfair or results in additional costs.

[74] As for principles of interpretation, I prefer the following paragraph of Fehr:

> ***67*** *This more modern approach of contract interpretation has evolved towards being more practical and based on common sense and not being dominated by technical rules of construction. The overriding concern is to determine the parties' intent and the scope of their understanding. To do so, a decision maker must read the contract as a whole, giving words their ordinary and grammatical meanings, consistent with the surrounding circumstances known to the parties at the time the contract was formed.*

[75] Following that principle, I cannot conclude that in this case, the parties intended a different result for vacation and sick leave credits. Neither party argued that result. In fact, they both argued that both collective agreement clauses should be interpreted in the same way.

[76] Also following from that principle, I cannot conclude that the earning of credits can be governed solely by the month in which the employee receives pay; i.e., in the sense that the accrual of credits is tied to the actual deposit of pay into an employee's bank account, which is effectively the bargaining agent's position.

[77] Were I to equate the receiving of pay with the deposit of pay, it would have some absurd results. Consider the example of an employee whose last day of work is January 31, 2019. Because of the structure of the "pay in arrears" system, she will receive a good portion of her pay (for 16 days of work) in February 2019. If the receiving of pay in a month is dependent on the deposit of pay in that month, she would earn vacation and sick leave credits for February. Both parties acknowledge this is not the case. (However, the bargaining agent asserts that this would not be the case because in February, the employee at issue will no longer be an employee.)

[78] On the other hand, consider the example of an employee hired to start

on January 14, 2019. Because of the structure of the pay-in-arrears system, she does not receive any pay until February 6, 2019. Having worked 14 days in January, she would expect to receive vacation and sick leave credits for that month. Should she not receive them because she has not yet received pay? I do not believe that this is what the parties intended; in fact, such an employee would accrue vacation and sick leave credits for the month of January 2019.

[79] Nor would the parties have intended that as a result of the temporary failure of the pay system, an employee who does not receive any pay for three months in a row should not receive vacation and sick leave credits. She has been — or must still be — credited the vacation and sick leave credits earned for those months, even if she has to date received no pay for them.

[80] Thus, "receives pay for 75 hours" clearly means something different from "I received deposits of pay totaling 75 hours or more" in a particular month.

[81] At the same time, it is also clear that pay is not simply for services rendered. The pay received by employees comprises both pay received for services rendered and pay received for authorized leave with pay and pay for designated paid holidays. An employee who is on paid vacation leave or paid sick leave for a month renders no direct services yet does receive pay for that month and therefore is credited under clauses 15.02 and 16.01 for vacation and sick leave credits for the month.

[82] I find that the wording of clauses 15.02 and 16.01 is properly read as being triggered when the hours of pay to be received for a month reach the 75-hour threshold. Counting towards that level are both pay that is to be received for services rendered, and pay that is to be received for different forms of negotiated paid leaves taken, in that month. This does not involve adding to or altering the words in the collective agreement; it is instead an interpretation of the words and the agreement as a whole.

[83] Therefore, leave without pay taken in a month does not count towards meeting the threshold of hours required under these clauses. Given that LWIA involves significant periods of leave without pay, the words "without pay" have to mean something and as such must affect the application of clauses 15.02 and 16.01 in some way.

[84] Similarly, I do not conclude that there is a difference between the phrases

"earns pay" and "receives pay" in the operation of these clauses. I apply the employer's logic, under which received pay for services rendered expands to include negotiated forms of leave with pay, and therefore, earned pay would also expand to include negotiated forms of leave with pay.

[85] There is a second "common sense" way of looking at the issue. Were the grievors' interpretation to prevail, they would receive the same vacation and sick leave credits as someone who worked the full year.

[86] I do not believe that that is the intent conveyed by the collective agreement. By participating in the LWIA program, all the grievors reduced their level of paid work in a year. Most of them did so by 5 weeks, but as per the program, the reduction could be up to 3 months. Thus, the non-work or leave without pay portion of the year ranges between about 1/10 (5 weeks out of 52) and 1/4 of a year (3 months out of 12). The employer's application of the collective agreement in effect prorates vacation and sick leave credits for the year.

[87] Prorating is a concept that the parties have applied within the collective agreement when it comes to part-time employees, such as Ms. Carroll. Because she normally works 30 hours per week, she does not have to meet the 75-hour threshold under clause 15.02; instead, she has a 60-hour threshold to meet, by virtue of clause 37.02. The hours of vacation leave credits she receives are not the same as a full-time employee would receive; hers are prorated based on her normal hours of work. Similarly, the hours of sick leave credited are not the 9.375 hours per month earned by a full-time employee but 0.25 times 30 hours, or 7.5 hours per month.

[88] However, the employer did not prorate the grievors' vacation and sick leave credits by, for example, reducing the annual allotment by 1/10 to 1/4. There is no provision for directly prorating the credits.

[89] Instead, the employer applied the wording of clauses 15.02 and 16.01. Vacation and sick leave credits are not allotted on a percentage of pay basis but accredited as hours of paid time earned if a minimum threshold of pay has been received in a given month and not accredited if that threshold has not been received.

[90] The following explores one example per grievor:

- Ms. Carroll, whose non-work period of leave was from July 29 to August 29, 2014, did meet the 60-hour threshold in July 2014 but not in August 2014 and therefore did not receive credits for that month.
- Mr. Janczarski's non-work periods in 2016 included January 4 to February 5 and August 22 to October 7. He met the 75-hour threshold in February, August, and October and earned credits for those months. However, he did not meet it in January and September and did not receive credits for those months.
- Mr. Hartling's non-work period of leave in 2016 ran from August 1 to September 2. He did not meet the 75-hour threshold in August and did not receive credits for that month, but his leave did not impact his credits for September.
- Mr. Ferme's non-work periods of his LWIA arrangement included July 4 to August 26, 2016, and January 3 to February 6, 2017. Thus, he did not earn credits for July and August 2016 or January 2017 but did meet the threshold for February 2017 and earned credits for that month.

[91] Third, both parties also acknowledged that other forms of leave without pay can trigger the loss of vacation and sick leave credits in a particular month. For example, maternity and parental leaves are considered leaves without pay, and employees who take them do not accrue vacation and sick leave credits during their leave without pay, a fact noted in *Canada (Canadian Human Rights Commission) v. Canada (Human Rights Tribunal)*, 1997 CanLII 5899, [1997] F.C.J. No. 1734 (T.D.)(Q.L.). However, the parties recognize that a woman who commences a maternity leave late in a month might in fact receive pay for that month at a level that meets the 75-hour threshold, and for that month, she would receive the relevant vacation and sick leave credits.

[92] In a case involving the interpretation of a collective agreement, the burden of proof lies with the grievor, or in this case, with the grievors. I find that they and their bargaining agent have not demonstrated that the employer contravened the collective agreement. I find on balance that it properly considered the application of clauses 15.02 and 16.01, and for that reason, the grievances are dismissed.

[93] That said, I must comment further on the employer's assertion that the provisions of the *Directive* and the wording of clauses 15.02 and 16.01 are clear and unambiguous. Were that the case, I suspect that these grievances would not have been referred to adjudication. It would be of great benefit to employees participating in the LWIA program if the employer were, in consultation with the union, to develop a communications tool, such as a question and answer document or a revised application form, to make it clear in advance to them how their LWIA arrangement will impact their vacation and sick leave benefits.

B. Issue 2: Was the employer prohibited from raising *Coallier* because it did not raise it at the time the grievances were referred to adjudication?

C. Issue 3: If it was not prohibited, does the *Coallier* principle limit the remedies available to the grievors in these particular circumstances?

[94] Given my finding that the grievances have not been substantiated and should be dismissed, Issues 2 and 3 are rendered moot and need not be addressed.

[95] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[96] The grievances are dismissed.

[97] File 568-02-355 is closed.

February 19, 2019.

David Orfald,
a panel of the Federal Public Sector
Labour Relations and Employment Board