FILE NO. AA93-10-006

EMPLOYER: Dominion Bridge Company

UNION: United Steelworkers of America, Local 4095

ARBITRATOR: Dr. B. Schwartz

APPEARANCES: K. Lercher, for the Employer
A. Porter, for the Union

GRIEVOR: F. Bednarski

DECISION RENDERED: October 14, 1993

EXPEDITED ARBITRATION: Yes

ISSUES: HOLIDAYS - Holiday pay - pyramiding; entitlement; Qualifying days - absent on leave; BENEFITS - Workers' Compensation; DISCRIMINATION - Evidence; INTERPRETATION - Words and phrases ("legitimate absences"); MANAGEMENT RIGHTS - Discretion; Arbitrariness; SECTION 80 of The Labour Relations Act: The Union filed a grievance contending that the Employer had to pay the Grievor for two statutory holidays that occurred during the time he was off work and receiving Workers' Compensation Benefits. It argued that although Article 19.03 of the collective agreement provided that for an employee to be entitled to receive statutory holiday pay he must work his full normal shift immediately preceding and immediately following such holidays, the provision may be waived in the case of "legitimate absence" which was defined as circumstances such as a death in the family, jury duty and "other justifiable absence acceptable to the employer". Article 19.06(b) added absence due to certified illness or injury, provided that two holidays only shall be paid for during each absence. The Union presented two witnesses who had received holiday pay while absent on Workers' Compensation. It argued that the Employer could not arbitrarily favour some employees over others. The Employer explained those employees were paid by mistake. It also argued that entitlement to statutory holiday pay was not a fixed right for a person who was away on extended absence. The Employer has some discretion on whether or not to pay.

AWARD: GRIEVANCE DENIED. The Arbitrator did not interpret Article 19.06(b) to be a guarantee to receive statutory holiday pay. Rather it helped define "legitimate absence". The language of the collective agreement clearly indicated that in cases of long but legitimate absences, the Employer had the discretion to decide if it "may" pay rather than "shall" or "must" pay. In addition, the Arbitrator could not find that denying the Grievor's claim would be discriminatory. The evidence showed the Employer only made two innocent mistakes over a seven year period in paying the two employees. Its general practice was to deny statutory holiday pay to those on Workers' Compensation. He also noted the Grievor received pay from Workers' Compensation for the holidays. Then if the Employer paid the Grievor he would be paid twice. In addition, the evidence did not establish that the Grievor was any worse off receiving workers compensation payment, as opposed to statutory holiday pay. Therefore, he could not say that the loss was so substantial that the Employer acted unreasonably.

AA93-10-06

Dominion Bridge Company

and

United Steelworkers of America, Local 4095

Case No. 572/93/LRA

re: Mr. Felix Bednarski
(denial of statutory holiday pay).

Date of Hearing: September 15, 1993
Place of Hearing: Place Louis Riel, Winnipeg
For the Union: Mr. Alan Porter
For the Employer: Ms. Kris Lercher
Arbitrator: Dr. Bryan Schwartz
Date of Award: October 14, 1993

AWARD 14 October, 1993

Introduction

The griever, Mr. Bednarski, was injured while working for the employer. He was away from work for a continuous period of many months. He was on workers compensation during a number of statutory holidays.

The union says that the employer must pay Mr. Bednarski for two of those statutory holidays. It says that the pay is an entitlement under the Collective Agreement. Even if the employer has some discretion whether to pay, says the union, it must exercise that discretion fairly and reasonably. Having given statutory holiday pay to some employees in similar circumstances, the employer cannot now deny Mr. Bednarksi.

The employer does not agree. It says that statutory holiday right is not a fixed right for a person who is away on extended absence. The employer claims that it has some discretion whether to pay. It believes that it has reasonable grounds for denying someone like Mr. Bednarski: that the employee already has a right to workers compensation. The employer says that if it paid one or two employees in Mr. Bednarski's situation, those were rare mistakes. Its generally consistent practice, claims the employer, has been to deny statutory holiday pay to someone who is away for extended periods of workers compensation.

Analysis of the Collective Agreement.

The key section of the Collective Agreement is section 19.03. It provides for statutory holiday pay where:

-the employee has worked for at least two weeks, and
-the holiday falls within the normal Monday-to-Friday work week.

There is a further proviso. Article 19.03 concludes:

"However, employees must have worked their full normal shift immediately preceding and immediately following such holidays. This proviso may be waived in the case of legitimate absence."

The phrase "legitimate absence" is defined in Article 19.06.
It includes circumstances such as a death in the family, jury duty and "other justifiable absence acceptable to the employer." Article 19.06 (b) specifically adds:

"Absence due to certified illness or injury, provided that two (2) holidays only shall be paid for during each such absence."

In my view, Article 19.06(b) is not, in itself, a guarantee of statutory holiday pay. Rather, it helps to define "legitimate absence" in Article 19.03.

According to Article 19.03, any employee who misses the surrounding days without a "legitimate" reason is disqualified from statutory holiday pay. If the employee has a "legitimate" reason for being away, then the employer still must make a judgment about whether to provide statutory holiday pay.

The Collective Agreement does not say that the employer "shall" or "must" pay when there is a legitimate absence. Rather, it says the employer "may" pay.

This point is crucial. An employees' fixed entitlements under a collective agreement must be honoured. The employer has no discretion over them. If rights are specifically guaranteed in a Collective Agreement, it does not matter whether the employer thinks those rights are "reasonable" or not. But in this case, the language of the Collective Agreement clearly indicates that in cases of long but legitimate absences, the employer has some discretion. It does not necessarily have to make the statutory holiday payment in every case.

The employer must exercise its discretion "reasonably, fairly and in good faith.

(i) Did the employer arbitrarily favour some employees over others?

Section 80 of the Labour Relations Act provides that employers must administer Collective Agreements "reasonably, fairly and in good faith". That requirement certainly applies to the employer's decision on how to apply Article 19.03(b).

The concept of "fairly" administering an agreement undoubtedly does mean that the employer does not arbitrarily favour one employee over another.

The union presented two witnesses who had received statutory holiday pay in circumstances similar to Mr. Bednarski. Mr. Robert Gault testified, and presented documentary evidence, that he received statutory holiday pay for July 1, 1986. Mr. Gault was on workers compensation at the time. He requested four weeks holiday pay. A personnel officer of the employer (Ms. Barb Campbell, according to my notes) told him he had a right to one day's statutory holiday pay if he was off for workers compensation or group insurance.

I fully accept Mr. Gault's account of the facts in his own case. The employer's position, however, is that paying Mr. Gault was a "mistake" - a departure from usual policy. The employer led evidence that Mr. Gault was also away on workers compensation for a long period in 1990 (enough to encompass a statutory holiday) and

yet did not receive any statutory holiday pay on that occasion. Mr. Gault agreed that he would have remembered if he had.

Mr. Bruce Kinnear also testified on behalf of the union. He presented convincing testimony that in 1992 he had received statutory holiday pay while on workers compensation. He speci-fically discussed receiving the pay with a secretary/timekeeper in the office of Mr. Gordon Koch, a senior manager.

Both Mr. Gault and Mr. Kinnear testified that no one in management ever told them that the pay was a mistake. Mr. Gault provided some additional information. He received the statutory holiday pay in 1986. He served on his union's negotiating committee in 1987. The Collective Agreement was changed to increase the cap in Article 19.06 to two days.

The union's case on this point, then, can be stated as follows:

-the employer cannot arbitrarily favour some employees over others;
-it paid statutory holiday pay to Mr. Gault and Mr. Kinnear while they were on workers compensation;
-the employer never told Mr. Gault or Mr. Kinnear that it had merely made a mistake;
-an employer would naturally seek repayment of any money that was paid by mistake;
-after the payment was made to Mr. Gault, the employer did not get the union to agree that statutory holiday rights should be cut back. Rather, the employer went in the opposite direction. It agreed to increase the cap to two days;
-having made the payments to Mr. Gault and Mr. Kinnear, the employer cannot now deny the benefit to Mr. Bednarksi.

The employer's position is that the payments to Mr. Gault and Mr. Kinnear were rare mistakes. Its general practice, claimed the employer, was to deny statutory holiday pay to employees who were receiving workers compensation. Mr. Gordon Koch, the general manager, testified as follows:

-the employer did not want to "pay double". It was contributing to the workers compensation system, and was content to see employees receive their pay from that source;
-the payments to Mr. Gault and Mr. Kinnear were "probably errors";
-the employer sometimes overpays by mistake (for example, due to errors in applying job classification schemes) but seldom gets the money back. The employer does not want to be "vindictive";

-the fact that Mr. Kinnear was given statutory holiday pay was discovered during the employer's handling of Mr. Bednarksi's grievance. The employer did

not seek repayment, because, again, it did not want to be "vindictive".

Mr. Koch asked his staff to prepare a list of employees who were on workers compensation during statutory holidays. It includes over fifty names. Mr. Koch testified that no one on the list was paid for statutory holidays. Among the names on the list were Mr. Gault; while he had received statutory holiday pay in 1986, he did not do so during his 1990 absence.

On cross-examination, Mr. Koch agreed that he had not personally checked the raw data, and there could be some mistakes on the list. Mr. Porter, the union's representative at the hearing, pressed Mr. Koch on another point. Was it not possible that employees would wait until returning to work before pursuing their statutory holiday pay? Mr. Koch agreed that was possible in some cases. But he observed that some of the employees were, to his knowledge, back at work (including Mr. Porter himself), and that many employees who were on compensation in 1990 or 1991 must have returned to work by now.

I believe the union presented its case very capably in this regard. But on reflection, I cannot agree that denying Mr. Bednarski's claim would be discriminatory. The evidence appears to sustain the employer's claim that it made a few innocent mistakes. Its general practice was to deny statutory holiday pays to employees on workers compensation. Only two contrary examples have been proved, and with one of the employees (Mr. Gault) the employer returned to its earlier practice.

It would not seem fair to require an employer to adjust its widespread and longstanding practice when it has only made two innocent errors over a period of about seven years.

This case would be very different if the mistakes were not innocent. If the employer had consciously singled out Mr. Gault or Mr. Kinnear for special treatment on improper grounds (e.g, because they were friends or relatives of managers) then it is possible that the exceptions would have to become the rule. On the evidence, however, I believe that the employer simply made a couple of errors in good faith.

(ii) Was the employer unreasonable in not providing statutory holiday pay to everyone on workers compensation?

The employer must administer the collective agreement "reasonably".

I have had occasions to discuss the meaning of Article 80 of the Labour Relations Act in a number of earlier cases. In the Victoria Hospital I adopted this view:

I would venture a few general comments about section 80 of the Labour Relations Act. First of all, the language it prescribes - "in administering the collective agreement, the employer shall act reasonably, fairly and in good faith..." - must be considered a full and legitimate aspect of every collective agreement in Manitoba. It must be given full force and effect by employers, and by arbitrators. It is often said that arbitrators must interpret the collective agreements as written, and not the agreement they would prefer to see. Just as arbitrators should not "supplement" collective agreements with provisions of their own invention, arbitrators should not diminish agreements by dismissing provisions that properly belong.

The second point I would make is that s. 80 should not be viewed as calling for "justice in a vacuum". It speaks of fair play in administering a particular collective agreement; it specifically calls upon employers to take account of the terms of the collective agreement as a whole. The terms of s. 80 are an integral part of a collective agreement, and just like any part, they must be read with the others....

Looking at other sections of the Collective Agreement can indicate some of the values that are most important to the parties. The values established can provide guidance as to what is "reasonable" with respect to issues not specifically addressed by a specific provision. The employer should try to develop a coherent approach to administering the agreement, in which the specific provisions operate smoothly together.[1]

Arbitrators must be careful not to usurp the role of management in running enterprises. But an employer is not necessarily acting "reasonably" merely because it is pursuing a business interest. I would think that in some cases, the employer must take into account the interests of employees. If the "reasonableness" of a management decision is challenged, an arbitrator might consider the following factors:

-whether the employer has a substantial business interest at stake, as opposed to one that is marginal or which could be easily achieved in ways that are

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[1]. Victoria General Hospital v Manitoba Association of Health Care Professionals, Manitoba Labour Board case # 912/92/LRA, December, 1992, pp 2-3. See Burns Meats and U.F.C.W., Loc. 832, 30 LAC (4d) 186 (Peltz) for a review of arbitral awards concerning reasonableness.

much less harmful to important employee interests;

-whether the express terms of the Collective Agreement place an especially high value on the employee interests at stake;

-whether the express terms of the Collective Agreement indicate that management is making the sort of decision that should not be second-guessed by an arbitrator;

-what general labour law has to say about the need to respect managerial discretion in a particular area or to give protection to the employee interests. For example, unless a collective agreement says otherwise, arbitrators tend to recognize that management has broad discretion over scheduling hours of work or setting job qualifications. On the other hand, arbitral awards have usually placed the burden on employers to justify dismissing an employee.

In this case, the issue is whether the employer must, in order to be "reasonable", provide statutory holiday pay to an employee who is on workers compensation during the surrounding days.

Looking at this particular Collective Agreement, I see that employees have a fixed right to receive statutory holiday pay when they work the surrounding days. That point has been explicitly set out and agreed to by both parties. What if an employee cannot work the surrounding days because he has been injured while serving the employer? My view is that any "reasonable employer" would have to take a respectful and accommodating approach to a worker in such a predicament. It could not be callously indifferent to the fact that the employee was hurt while serving the employer.

If Mr. Bednarksi had not received any other compensation for the statutory holidays, I would probably uphold this grievance. I would conclude that the employer was acting unreasonably.

In this case, however, the employer reasons that Mr. Bednarski would be compensated by Workers Compensation. The employer figures it is already contributing to that fund, and believes that it is reasonable, from the point of view of its interests and those of Mr. Bednarksi, to refrain from making the statutory holiday payment.

The union argued (and I will assume, for the purposes of argument) that Mr. Bednarksi would not have been paid "double" if the employer paid him. He would have had to report the income to Workers Compensation, which might have reduced or eliminated its own payment to Mr. Bednarski.

At the conclusion of the hearing, I asked the parties whether they wished to provide me with any information on whether Mr. Bednarski would be substantially worse off by receiving workers compensation, as opposed to statutory holiday pay. The union had not initially led evidence on this point. After a recess at which the parties discussed the issue between themselves, both sides suggested that I proceed to make a decision without further evidence on this point.

Let me explore some possible cases:

Case # 1: The injured employee gets sick leave pay or nothing at all.

What if Mr. Bednarksi's only source of income for the day were sick leave pay? As already explained, I would probably conclude that the employer must pay him up to two days of statutory holiday pay. Anything else would be "unreasonable."

Case # 2: The injured employee can get a full day's pay from Workers Compensation.

If Mr. Bednarski were receiving the equivalent of a full day's pay from Workers Compensation, I would say it is "reasonable" for the employer to deny the statutory holiday pay.

Case # 3: All things considered, including tax, the injured employee gets a little less than a full day's pay from Workers Compensation.

I would think that if the difference is slight, I would probably allow the employer to deny sick leave pay. I would probably agree if the employer made the following argument:

> "We are not denying a fixed entitlement here. We have some discretion. We must act reasonably, but it really is reasonable for us to save around a whole day's pay as long as the employee does not lose very much by having to rely on Workers Compensation."

Case # 4: the injured employee gets a great deal less than a full day's pay from Workers Compensation.

At some point, an employee would lose so much by getting workers compensation, as opposed to sick pay, that I would call the situation unreasonable. I would not want to say, in the abstract, exactly where that point is.

Where do the facts of this particular case fit in?

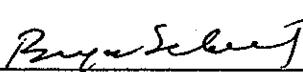
On an after-tax basis, is Mr. Bednarksi so much worse off under Workers Compensation that I should find the situation unreasonable?

The burden of proof in this case is on the griever. The evidence does not establish what, if any, loss Mr. Bednarski sustained by receiving a workers compensation payment, as opposed to statutory holiday pay. I am not in a position, therefore, to say that the loss is so substantial that the employer has acted unreasonably.

Accordingly, I must deny the grievance.

I would expressly retain jurisdiction in the event that any issues of interpretation or application arise out of this award.

I would conclude by thanking both sides for the cordial and co-operative way in which they presented their cases.



Bryan Schwartz
14 October 1993