

In the Matter of the Fire Protection and Prevention Act, 1997

BETWEEN:

Kingston Professional Firefighters Association

(the Union)

-AND-

The Corporation of the City of Kingston

(the "Employer")

RE: Association Grievance Dated March 24,
2017 – G-2017-2 (POL) – Vacation and
Statutory Holiday Entitlements for WSIB

DATE AND LOCATION OF HEARING: April 28, June 1, 2022, proceedings on
Zoom

ARBITRATOR: Brian Etherington

APPEARANCES FOR THE UNION: Christine Davies, Counsel
Willow Petersen, Counsel
Steven Barker, KPFFA President
Ann Bryan, Past President

APPEARANCES FOR THE EMPLOYER: Leanne Fisher, Counsel
Shawn Armstrong, Fire Chief
Melanie Jones, Dep. Fire Chief
Kevin Donaldson, Dep. Fire Chief
Deanne Roberge, Director, HR & Org. Dev.
Gail Cusson, Mgr. HR, Lab Rel & Org. Dev.

AWARD

Introduction

This award deals with a policy grievance filed by the association on March 24/17, alleging that the employer violated several provisions of the collective agreement and the Ontario Human Rights Code (HRC) by failing to compensate members of the association who were on WSIB approved leaves due to occupational illness or injury for their unused vacation and statutory holiday entitlements.

The parties agreed to argue this case on the merits on the basis of an Agreed Statement of Facts (ASF). The ASF is as follows:

I. Grievance and Applicable Collective Agreement

1. The Kingston Professional Fire Fighters Association [**“KPFFA”**] and the City of Kingston [**“The City”**] are parties to a collective agreement.
2. The Association filed a policy grievance on March 24, 2017, G-2017-2 (POL) Vacation and Statutory Holiday Entitlements for WSIB (the **“Grievance”**) (Tab 1).
3. The Grievance states *“the Association grieves the failure of the Employer to compensate members of the Association on Workplace Safety and Insurance approved leave for their unused vacation and statutory holiday entitlements.”*

4. At the time of the filing of the Grievance, the collective agreement in effect was the 2015-2017 collective agreement [**“The CBA”**] (Tab 2).

5. Without Prejudice to any other matter between them, the parties agree to the following facts concerning the Employer’s practices for the purposes of the arbitration of the Grievance. The City states that its practices have been in place since at least 2010 and that the Association is or ought to be aware of them. The Association states that it is not aware of when the City’s practices as set out below began, and does not agree with them. It is agreed that, prior to the current Grievance, no grievance has been filed in relation to the practices described.

II. Practices re: Vacation and Lieu Days:

(a) Scheduling of Vacation:

6. All Firefighters [**“FF’s”**] (whether or not actively at work) are, in the fall of each year (i.e. October/November), required to select vacation time slots for the following calendar year (i.e. January 1 - December 31).

7. All FF’s schedule the amount of vacation that accords with their years of continuous service (per Article 5 of the CBA) regardless of time away from active employment – i.e. there is no pro-rating based on time away from active employment. The City states that what is being scheduled is ‘vacation time’. The Association states that what is being scheduled is ‘vacation with pay’.

8. FFs who are away from active employment (even if not scheduled to return to active employment) are required to participate in the vacation scheduling process. The City states this is in order to maintain appropriate staffing and so that scheduling rotations are maintained. The Association states that it is not aware of the reasons for the Employer’s practice and states that these reasons have not been communicated to the Association. If a FF who is away from active employment does not schedule vacation, the Chief (or the Chief’s designate) does so for them.

(b) Absences During Scheduled Vacations

9. If a FF has scheduled vacation (as above) but is away from active employment during the time scheduled, the following occurs:

(a) If the FF does return to work within the calendar year (for which the time was scheduled) they are permitted to reschedule the vacation within the same calendar year

without reduction or proration (provided that sufficient time remains within the calendar year for doing so¹).

(b) If the FF does not return to work within the calendar year (or they return to work but sufficient time does not remain within the calendar year for rescheduling), the vacation is not carried over or rescheduled for a subsequent year, nor is it paid out (subject to the comment in the footnote below)².

(c) An exception exists for those on a modified work program as provided for at Appendix C (pg. 45) of the CBA.

(d) For a FF who is drawing down sick leave credits when the scheduled vacation occurs, and who does not return to work within the calendar year (or who does return to work but sufficient time does not remain within the calendar year for rescheduling), vacation is also (as above) not carried over or rescheduled for a subsequent year or ‘paid out.’ However, the vacation is coded as ‘vacation’ (not sick days) such that sick leave credits are not depleted for the vacation days in question.

(c) Lieu Days – Scheduling

10. FFs (whether or not actively at work), in the fall of each year, are also required to schedule lieu days for the upcoming calendar year. The Employer states that its practice is that where a FF is scheduled to be absent for a portion of the upcoming calendar year (with a known return date) the FF is permitted to schedule only the number of lieu days corresponding to the holidays that are scheduled to occur during the time they will be actively at work. For example, if a FF has a return to work date in March, they will be permitted to schedule ten (not twelve) lieu days in total (i.e. as they will be away from active employment on Jan 1 and Heritage Day). The Association states that all FFs on WSIB leave schedule their lieu days in the same manner regardless of whether there is a known return to work date or whether a return to work date is unknown.

11. FF’s who will be drawing down sick leave credits for the time they are scheduled to be away schedule a full complement of lieu days (however, ‘usage’ of such days is addressed as per paragraph 13 below).

¹ For example, if a FF returns to work on December 17, and has 3 weeks of vacation to reschedule, only 2 weeks will be possible to reschedule.

² The City states that persons on WSIB leave will have been paid by virtue of having received their “normal net salary” during the applicable time.

(d) Absence during Scheduled Lieu Days

12. If a FF has scheduled lieu days (as above) but is away from active employment on the holiday in respect of which the lieu day has been scheduled, the Employer considers the FF to have received the lieu day on the holiday for which they have been away from active employment.

13. If a FF is drawing sick leave credits for a lieu day on which they are away from active employment, they may request to reschedule the lieu day within the calendar year. If the lieu day cannot be rescheduled within the calendar year (i.e. because the FF does not return to work or sufficient time does not remain to reschedule within the calendar year in which they return), the lieu day will be coded as a 'lieu day' rather than a sick day (such that sick leave credits are not depleted for the lieu days in question).

14. Where FF's are absent from active employment on a lieu day/holiday, they are not paid out for such lieu days³. An exception exists for those on a modified work program as provided for at Appendix C (pg. 45) of the CBA.

(e) Selling Lieu Days

15. FF's away from active employment at the time of scheduling lieu days are also permitted (as are those in active employment) to 'sell' a certain number of lieu days (i.e. four as of the 2015-2017 CBA, Article 6.02). An employee who agrees to "sell" a lieu day is agreeing they will work on the lieu day, and be paid, in December of the year, an additional 1/182 of their annual salary for each 'sold' day that they actually work. If a FF does not work the 'sold' lieu day, they will not receive the additional 1/182 of annual salary for the 'sold day'.

III Payment of Employees Injured on Duty

16. The Employer is a Schedule 2 Employer for purposes of the *Workplace Safety and Insurance Act* ["*WSIA*"]. In other words, the Employer self-insures the provision of benefits under the *WSIA* and pays workers' claims directly.

³ The City states that persons on WSIB leave will have been paid by virtue of having received their "normal net salary" during the applicable time.

17. Employees who are injured on duty and become eligible for compensation under the Ontario *Workplace Safety and Insurance* Act, are paid their ‘normal net salary’ by the City in accordance with the provisions of Article 8.01(5)(ii)/(iii).

18. “Normal net salary”, as paid by the City, includes the FF’s regular salary (including recognition pay), minus statutory deductions, association dues and any other benefit-related deductions (i.e. precisely the net sum the FF would have received, had they been actively at work, working regular hours).

Union Argument

Association

The association noted at the outset that there appeared to be some divergence of opinion on the issue of entitlement to overlapping or pyramiding of benefits or forms of indemnity in the arbitral jurisprudence, but argued that ultimately the analysis had to focus on the language of the collective agreement that is in issue. Under the applicable collective agreement vacation entitlement is based solely on continuous service, and it is not broken by reason of an absence caused by an occupational accident. It contended that there is no distinction made in the collective agreement between vacation pay and vacation time. The agreement provides for vacation with pay as the only type of vacation recognized. The only condition precedent for eligibility for vacation are the years of continuous service of the employee. Unlike other collective agreements, there is no specific disentitlement for people who are on leave for the vacation with pay benefit. Rather the agreement provides for a benefit for all employees that is not limited by any requirement for active service. Further the entitlement is not tied to receipt of wages. Similarly for lieu days, the agreement provides them to all fire fighters and they are linked to status as a fire fighter. There is nothing limiting the benefit to employees who are on active duty.

In essence the union is asking me to find that, based on the language of this collective agreement, the employer’s practice of failing to pay vacation and lieu day pay, on top of their full normal net pay, to those firefighters who are on WSIB, is contrary to the collective agreement.

The union noted that article 12.07 provides that seniority and length of service begins on the day that the firefighter “begins work” and there is nothing in the agreement to break seniority or service due to WSIB leave. In its view, that means that when the agreement refers to continuous service it must mean all time in employment since they began work, including active and non-active service. The union also referred to article 8.02 (a), which provides that fire fighters who are on a leave of absence without pay for a period of greater than 30 days will not accrue seniority, holidays or sick pay credits for such absence, but will retain accumulated seniority and credits to the date of leave. However, if they are on sick leave and receiving sick pay they are not treated as being on unpaid leave, and similarly a fire fighter on WSIB is being paid and is on paid leave and is treated the same as someone on sick leave. They cannot be treated as someone who is on leave without pay. Thus employees on WSIB leave are being paid and their seniority and service are not interrupted. The union also points to article 8.01(5) which provides for the paid status of employees on WSIB leave to be paid their normal net salary as if they were on sick leave, for a period of two years or until they return to duty, and they will continue to accrue seniority and sick leave credits. Thus, the union contends that WSIB is treated as a form of sick pay under the collective agreement, and there is no interruption of service or seniority.

The association referred to article 5.01, showing that days of “vacation with pay” were based on months of service during the first year of employment, and then article 5.02, that based entitlement to weeks of “vacation” on the completion of years of “continuous service”, with no provision for a break in continuous service based on WSIB leave. Article 5.01 refers to “vacation with pay” as the entitlement during the first year of service but subsequent sections for entitlement based on years of service simply refer to “vacation”. The union described this as a length of employment benefit, for which the only requirement is to be employed for a specified period of time. It submitted that to the extent some of the caselaw refers to a presumption of requiring active service, the language used herein rebuts such a presumption. It also submits that it is significant that this agreement does not make entitlement to vacation with pay dependent on the employee’s gross earnings or wages. It notes there is no express distinction in this agreement between vacation time off and vacation pay. The employee is entitled to both

simply on the completion of the length of employment specified. Thus, it submits that on a plain reading of the language of the agreement a firefighter on WSIB leave is not disentitled because of that leave from getting vacation with pay.

The collective agreement does not provide for a specific payment of vacation pay. A necessary corollary of a vacation with pay is to have that vacation paid out if they cannot use it due to circumstances beyond their control. The union contends that this is what the employer does for sick leave due to non-occupational illness as well as when an employee returns to modified duties following a WSIB leave. The union also notes that all employees schedule vacation time for the following year in October or November regardless of whether they are actively at work or not (par, 6 of ASF). It submits this is consistent with the association position that all employees are entitled to vacation with pay. Also, when doing so the amount of vacation scheduled is dependent on the employee's years of service only, regardless of time off from active employment (para 7 of ASF).

The union notes that if a firefighter is off due to an accident during their vacation time they can reschedule their vacation in the same year if there is time to take it, but if there is not time to take it in the same year then the vacation time is simply lost and is not paid out at all. The association says this is problematic for them because there is a different practice for employees returning to work on modified duties with respect to vacation with pay. For those employees the parties have agreed to the following provision as paragraph 9 of Appendix C to the collective agreement:

9. Vacation Entitlement for Employees on Modified Work Program

The employee may utilize or reschedule his/her vacation and lieu day(s) within the current calendar year based on operational requirements. If the employee is unable to utilize vacation or lieu day(s) within the current calendar year, the employee shall be paid out for these vacation or lieu entitlements.

Thus, if an employee is returning from a WSIB leave on a modified work program they will be paid out for vacation that they were not able to use within the current calendar year. The association notes that they get this pay out notwithstanding the fact these employees get their normal net salary for the period when they are on a modified work program. The union argues that the collective agreement also requires that employees who are on WSIB leave, and return from

that leave to regular duties rather than modified duties should also get their unused vacation paid out. They argue it does not make sense to have a superior entitlement for employees returning to a modified work program rather than returning to regular duties after a WSIB leave. The association argues that it is a necessary corollary to the entitlement to vacation with pay to have that paid out if the employee cannot use it for reasons beyond their control. It says Appendix C of the agreement is consistent with that theory.

Further, the association notes that for those who are off on sick leave credits and unable to use their vacation time in the calendar year, the employer's practice is to code the scheduled vacation time that has not been taken as vacation instead of sick leave so that the employee does not use up his or her sick leave credits (para 9(d) of ASF). It argues this demonstrates that vacation pay is not forfeited for those on sick leave credits because they end up receiving both entitlements during the calendar year. This treatment of those who are on sick leave credits at the time of a scheduled vacation is provided for under articles 8.01(6) and art. 8.02(e) of the collective agreement. It submits that these provisions show that the agreement does not anticipate not providing the vacation with pay for those on sick leave credits. However, the vacation with pay provisions do not anticipate the recoding of the WSIB time off like these provisions do for sick leave time.

The association also offered an alternative argument to be resorted to only in the event I was not persuaded that the collective agreement provided for pay out for unused vacation time due to WSIB leave. The alternative argument is that the firefighter is entitled to a vacation pay entitlement of 4% under the ESA for years prior to 2017 and 6% after the 2017 amendment to the ESA for unused vacation.

With respect to entitlement to a pay out for lieu days, the union begins with article 6.02 which allows for fire fighters to sell up to four lieu days per year. It noted that under article 6.01 a fire fighter is entitled to all of their lieu days for a year with nothing in the language to limit them to lieu days when they are actively at work on the designated holidays. It referred me to para. 10 of the ASF, noting that, although the employer says its practice is to only allow fire fighters to schedule the number of lieu days corresponding to the number of holidays when they will be actively at work if the fire fighter is scheduled to be absent for part of the upcoming year, it asserts

that all fire fighters on WSIB leave schedule their lieu days in the same manner regardless of whether there is a known return to work date or there is no known return date. However, if a firefighter has scheduled lieu days but is away from active employment on the holiday for which the lieu day is scheduled, the employer considers the employee to have received the lieu day on the holiday for which they have been away from active employment. The union contends the employer treatment of those who are on WSIB is not consistent with the language of the collective agreement with respect to the fact that every firefighter is to get them and not just those who are on active service. It points to the fact that if the employee is drawing sick leave credits for a lieu day when they are away from active employment, they may request to reschedule the lieu day within the calendar year. If it cannot be rescheduled in the same year, the lieu day will be coded as a lieu day rather than a sick day, so that the sick day credits are not depleted for those days. However, when firefighters are absent from active employment on a lieu day/holiday they are not paid out for those days unless they fall within the exception for those on a modified work program (MWP) covered by Appendix C. The employer takes the position that persons who are on WSIB leave will have been paid by virtue of having received their normal net salary during that time period. The association argues it does not make sense to treat employees who are on a MWP better than those who are returning on regular duties. It argues that it is required to provide all employees with lieu days without reduction for the fact they are missing lieu days because they are on WSIB leave.

The union submits that the practice of allowing those on MWPs to reschedule their lieu days or get paid out is consistent with its view that the collective agreement does not provide that those who are not on active service do not get paid out for those days. It argues lieu days apply to all fire fighters and is not restricted to those on active service. It argues that a corollary of the lieu days benefit is that if it cannot be rescheduled it must be paid out. It also asserts that the fact the agreement allows a certain number of lieu days to be sold is consistent with the notion that they can be paid out because they have a recognized value. They should at least be able to be paid out to the extent they can be sold (4 days).

The union anticipated the employer would argue it would be unfair to pay out for vacation and lieu days to employees who are on WSIB leave because they are already getting their full net

salary. It submitted it was not unfair to provide all fire fighters with the benefits provided to them under the collective agreement. Further, it pointed to the practice set out in Appendix C for those on MWPs, that says employees on MWP who are getting their normal net salary will be given vacation pay or lieu days pay, if those days cannot be rescheduled for the same calendar year. It submits this must mean it is not unfair to provide it to those on WSIB leave.

The union relied on *Kingston Regional Ambulance Service and O.P.S.E.U., Loc. 462*, [1991] O.L.A.A. No. 89 (Walters) for the principle that where continuous service is not defined in the collective agreement most arbitrators have found that vacation entitlement predicated on length of service will not be affected by involuntary absences from active employment, unless there is clear and express language providing otherwise. It argues where an agreement refers to continuous service, unless there is a specific provision to the contrary, that includes time when an employee is not in active service, such as when they are on disability leave. The decision of arbitrator Marcotte in *Whitby (Town) v. Canadian Union of Public Employees, Local 53 (Full-Time Unit) (Vacation Entitlement Grievance)* [2019] O.L.A.A. No. 107, further supports that principle. The union argues that principle is applicable herein.

The union placed emphasis on the decision of Arbitrator Parmar in *Oakville (Town) v Oakville Professional Firefighters' Association*, 2020 CanLII 94876. The issue there was whether employees accrue vacation and designated holiday (hereinafter referred to as statutory holiday) benefits set out in the collective agreement during periods when they are off work and in receipt of long-term disability (LTD) benefits. There was no dispute that they accrued vacation and statutory holiday benefits when they were on STD, but the employer noted that LTD was an insured benefit. The association noted there was nothing in the collective agreement to distinguish between the two types of benefits when it came to vacation with pay and stat holidays. They were simply based on service which was defined as uninterrupted service. The vacation benefit was referred to as 'vacation with pay', which the union says is analogous to the case herein. It noted that in both cases the employees were absent due to sickness. The arbitrator noted that the vacation benefit in this agreement was vacation with pay, a single benefit not two separate benefits, as were provided for in some of the cases relied on by the employer. The arbitrator followed the precedents noted above to the effect that where entitlement was based on continuous service, and

there was no express provision providing for an interruption in service due to involuntary absences, an employee continued to accrue vacation and stat holiday benefits when on LTD. The union argued this decision was similar to the situation herein where the employer does already make provision for entitlements to vacation for those who are receiving sick leave credits or are on a MWP. It contends the *Oakville (Town)* award deals with the same issues with similar agreement language and asks me to adopt that analysis.

The association also relies on *Atlantic Packaging Products Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 333 (Holiday Pay Grievance)*, [2001] O.L.A.A. No. 220 (Goodfellow). The issue was the employer's failure to pay holiday pay for those employees who were on weekly indemnity benefits. The union asserted that these were two independent legal entitlements under the collective agreement and holiday pay entitlement was based solely on length of service, with a higher rate of pay for those who worked on the holiday. There was nothing in the agreement to suggest they should be viewed as double recovery. Arbitrator Goodfellow agreed with these arguments and noted that the case law establishes that the two forms of benefit perform different functions and are directed at different purposes. Hence there was no difficulty in their simultaneous application and no issue of "double recovery" or "pyramiding" of benefits arises. He found the presumption from prior cases was that the employee is entitled to both in the absence of language to the contrary. *Abbott Laboratories Ltd. v. CAW, Local 462 (Burbridge Grievance)*, [2009] O.L.A.A. No. 467 (Baxter) adopted this approach as well.

The association acknowledged that there are cases in this area of law that support presumptions in both directions when it came to issues of double recovery or pyramiding, and submitted that presumptions are not that helpful so it is necessary to focus on the language that is used in the subject agreement, as was done by Arbitrator Parmar in *Oakville (Town)*, *supra*.

In *Kingston (City) v. Ontario Nurses' Assn. (Muloin Grievance)*, [2004] O.L.A.A. No. 311, Arbitrator Nairn faced the issue of whether the employee continued to accrue vacation entitlement while on LTD. In upholding the grievance it was held that "Explicit words would be required in order to limit a benefit otherwise derived on the basis of continuous service" (para 20). The arbitrator found that entitlement to vacation benefits was based solely on years of service under

the language of that agreement ('employed on a full time regular basis').

Similarly, in *Regional Municipality of Ottawa-Carleton and The Ottawa-Carleton Public Employees' Union, C.U.P.E. Local 503*, 1994 CarswellOnt 6198, 33 C.L.A.S. 618 (Tacon) the issue was whether the employer violated the collective agreement by not allowing the accumulation of vacation during the period the grievor was off work on long term disability ("LTD"). The arbitrator described the thrust of the current arbitral jurisprudence in 1994 as examining the "relevant provisions in the collective agreement with the presumption, where broad phrases such as "continuously employed" or "in service" are utilized, that employees are entitled to count periods of time spent on various forms of leave or absences unless the contrary intention is expressly set out in the agreement." (para 15) In upholding the grievance, the arbitrator noted that there was a specific provision in that collective agreement limiting accrual for employees off on WSIB but there was no similar provision for those off on LTD. *Labatt's Ontario Breweries, (London Plant) and National Brewery Workers' Union, Local 1* (1987), 31 L.A.C. (3d) 231 (Brandt) is to similar effect with regard to a presumption in favour of entitlement.

The association also relied on *Toronto Transit Commission v. Amalgamated Transit Union, Local 113 (Group/Policy Grievance)* [2009] O.L.A.A. No. 408 (Brunner); [2011] O.J. No. 2666 (Div. Ct.); [2013] O.L.A.A. No. 313 (Slotnick). It argued the outcomes in that case, that reference to continuous service included inactive service such as time spent on WSIB leave and thus employees on WSIB remained entitled to holiday pay and vacation pay as long as they were not disentitled by specific language in the agreement (as was the case for bereavement leave in that collective agreement), were consistent with the union's position in this case.

In *Sleeman Brewing & Malting Co Ltd v Sleeman Employees Association*, 2014 CanLII 652 (ON LA), Arbitrator Nairn dealt with a grievance concerning the employer's failure to pay holiday pay to employees who were off on sick leave. She noted that there were competing presumptions concerning issues of whether employees who were absent on sick leave or WSIB should be entitled to claim benefits like vacation with pay and holiday pay. She noted the presumption from *Atlantic Packaging, supra*, to the effect that benefits like holiday pay and indemnity benefits are independent legal entitlements, and absent express language to the contrary, being in receipt of sick leave pay does not operate to exclude employees from receiving holiday

pay. She described this as a prevailing view, but went on to note there was a conflicting line of cases, led by *Complex Services Inc. and OPSEU* (unreported decision of a Board of Arbitration chaired by Arbitrator Surdykowski dated May 10, 2011) that operated on the presumption that vacation pay and holiday pay are earned benefits and as such are to be earned based on active employment rather than mere status as an employee. Arbitrator Nairn then questioned whether the presumption alluded to in *Complex Services, supra*, was perhaps inappropriately based on the finding in *Ontario Nurses' Association v. Orillia Soldiers Memorial Hospital* (1999), CanLII 3687 (ON CA), that it was not discriminatory to provide for a differential in compensation based on ability to attend and perform work. She noted that a presumption against independent benefits being earned simply by continuous service or employment unless there was express language to the contrary was not a natural corollary of that finding. It still required one to look at the agreement language concerning when or how a benefit was to be earned. And that decision did not require arbitrators to read a limitation on entitlement to a benefit into the agreement where none was expressed. She ultimately concluded, "One is simply reinforced in the direction that an arbitrator must look to the words used by the parties and apply those words using their ordinary meaning." (at para. 24).

The association thus contends that ultimately the arbitrator's task is to review and determine what the collective agreement bargain requires for entitlement. It submits that herein we have holiday pay provisions (art. 6.01) that simply refer to "a Firefighter shall be entitled to one working day off for each Statutory Holiday listed below".

Greater Sudbury (City) v Sudbury Professional Fire Fighters' Association, 2012 CanLII 90057 (Surdykowski) was also referred to by the union for its finding that a collective agreement distinction between employees on WSIB and those on sick leave for the purposes of entitlement to statutory holidays is a violation of the Ontario Human Rights Code. It argued this reasoning, that employees on WSIB cannot be treated differently from those on sick leave credits, should be applicable here as an alternative argument, only if I find that the collective agreement does not entitle all firefighters on WSIB to vacation pay and holiday pay. On that point it noted the OHRC does contain a specific reference to those who have made a WSIB claim as a specific type or ground of disability.

In summary, the association submits that the CA explicitly provides for the benefit of vacation with pay for all firefighters based on continuous service and that is not interrupted by WSIB leave or their receipt under the agreement of their normal net pay. It asked me to find that they are entitled to vacation with pay and lieu days and compensation for those benefits, and seeks a declaration that the employer's practice of not providing them breaches the agreement, and an order that it comply with the agreement by providing appropriate remuneration. It asked me to leave the matter of compensation to the parties and remain seized to deal with that issue in the event the parties fail to agree on that matter.

Employer Argument

The employer began by reminding me that the union was asking for entitlement to an important financial benefit and as such the onus was on it to prove clear evidence of the parties' intention to confer such a benefit. In support of that principle, it referred me to Brown & Beatty, Canadian Labour Arbitration, 5th Ed., Chapter 4, The Collective Agreement, 4:2120, for a summary of numerous cases holding that a benefit that has a monetary cost to the employer must be clearly and expressly granted under the collective agreement (eg. *Cape Breton Victoria Regional Centre for Education* (2020), 314 L.A.C. (4th) 196, 2020 CarswellNS 271, 143 C.L.A.S. 155 (Richardson)).

The employer also notes that the association is effectively asking the arbitrator to find that employees on WSIB leave should be entitled to what could be up to 9 weeks of vacation pay and pay for lieu days on top of being paid their normal net salary at the same time, thus entitling them to be paid more than anyone else, including those who are actually working during the same time period. That is because vacation time can be up to 7 weeks under article 5.06, and 12 days for statutory holidays are recognized under article 6. The agreement already provides that employees on WSIB are to be paid their normal net salary under article 8.01(5)(ii) and (iii). Normal net salary amounts to the same net sum the firefighter would have received had they been actively at work on regular hours. The employer is a Schedule II employer under the WSIB and as such is self-insured.

The employer submits that article 8.01(5)(ii) and (iii) is a complete statement of the

compensation to be provided to employees who are on WSIB leave: their full normal net salary and normal sick leave credits. The union is asking that on top of that pay they should get paid out for vacation pay if they are not able to take vacation, and if and when they return to work they are not able to reschedule vacation for that calendar year. As per paragraphs 9(a) and (b) of the ASF, any employee returning to active duty, including those who have been on WSIB, are allowed to reschedule their vacation within the same calendar year to the extent that sufficient time remains in that year to do so. However, unused vacation cannot be carried over to the following year, and that is the same for anyone returning to work, whether on WSIB or not. The employer says the association is asking that those returning from WSIB who are not able to reschedule in the same calendar year should have their vacation paid out, something that other employees are not able to do if they are unable to use their vacation.

In addition, the association is asking for a payout for the 12 days of statutory holidays if the employees on WSIB leave are absent on the day that the statutory holiday occurs and they are not able to schedule the lieu days in the same calendar year. This would result in an employee who is on WSIB for the entire year receiving up to 9 weeks of pay more than those who are on active duty for the entire year. The employer argued that was a substantial benefit request, and when applied to all employees who have been on WSIB back to the filing of the grievance in 2016, could amount to a large financial burden.

Thus, the onus is on the association to prove that there is clear and unequivocal language to grant this benefit to the association. In that respect, the employer noted that although the union reviewed several authorities and principles, it did not bring to my attention any case that deals with what is before me here, or point to a specific provision concerning what people who are on WSIB will receive with respect to the benefits claimed. Further the employer, asserted there was a long line of cases that speak directly to this issue and find that where the employee on WSIB is receiving 52 weeks of full normal pay they are not entitled to vacation and statutory holiday pay on top of that full net pay. It asserts that it would require extremely clear and express language to establish that kind of entitlement.

The employer asserts that when the relevant language of the agreement is analysed it is far from clear that a bonus of up to 18% per year was to be paid to employees who were on WSIB

leave. It notes that the only reference to vacation “with pay” is found in article 5.01, dealing with vacation entitlement during the first year of employment. Each subsequent paragraph in article 5 dealing with increases in entitlement based on years of continuous service refers only to ‘vacation’ and not ‘vacation with pay’. The employer submitted that this distinction was an important one. On that point it referred to pages 21 and 22 of my decision in *Windsor Professional Firefighters Association and The Corporation of the City of Windsor* (unreported decision, 9 July 2008), where I found that the failure of the entitlement paragraphs to refer to ‘vacation pay’ or a payout for unused vacation time was significant for the finding that the agreement did not provide for such a payout on top of full normal pay for employees on WSIB leave. The employer also noted that the vacation article is very clear that entitlement to vacation is for the calendar year and there is no provision for payout anywhere in the article, making it a ‘use it or lose it’ benefit for everyone (see paras. 9(a) and (b) of the ASF).

The employer also noted that the specific language providing for a pay out for unused vacation that is found in Appendix C to the collective agreement for a discrete group of employees, those who are on a Modified Work Program (MWP), is exactly the type of explicit language that is required to confer such an extraordinary benefit, and further demonstrates the absence of such entitlement for other employees. It further asserts that, if the parties had intended that employees on WSIB who are already receiving full pay, then the language set out in Appendix C is what clear language to provide for such a benefit looks like. In fact the existence of this language for those returning on MWPs suggests that other employees are not entitled to a pay out for unused vacation. This appendix signals that it was not the parties’ intention to provide that extra benefit to everyone who is on WSIB leave. It can only be seen as a very specific exception that was negotiated for only this clearly defined group. The employer further argued that this specific exception made sense because employees who are on a graduated RTW program cannot schedule time off for vacation if it would interfere with their work hardening program. Thus, it made sense to allow for this separate scheme to encourage and facilitate participation in MWPs, which people who are returning from WSIB leave may also be able to participate in. However, it would make no sense to agree to this exception for employees returning to work on a MWP if all employees who were on WSIB were already entitled to the pay out benefit.

The employer also noted that the ASF states that the practice of not paying out anyone who was not able to take their full vacation in a calendar year dates back to at least 2010 and no grievance had been filed up until the present case. It suggests that this past practice is itself helpful with respect to the intention of the parties.

The employer asks me to reject the union contention that the language of the vacation clause, with a single reference to vacation with pay based on continuous service, is enough to grant the significant benefit asked for here. It agrees with the union that the cases on continuous service vs active service are not consistent. It urged me to give weight to the ruling of Arbitrator Surdykowski in *City of Greater Sudbury, supra*, at para 33:

33. In *Orillia Soldiers Memorial Hospital*, the Court of Appeal quite rightly distinguished between service and status for benefits purposes. As I wrote in *Complex Services Inc.* (in paragraph 55), the monetary components of a collective agreement compensation package are earned benefits, and unless the collective agreement specifies otherwise entitlement to an earned benefit depends on service not merely employment status. An earned benefit derives from the performance of work. It is a benefit in return for services rendered. A propos to this case, I wrote in paragraph 56 that:

56. There is no doubt that an employee who is totally disabled and unable to work has a reasonable excuse for being absent from work. There is no doubt that in the absence of an express termination of the employment relationship an employee who is absent from work due to a compensable injury or illness continues to have the status of an “employee” for all purposes. There is equally no doubt that this does not lead to the conclusion that an employee who is or has been absent from work for reasonable cause or excuse is entitled to an earned benefit as though he is not or was not absent because the employee has not in fact earned it. The first question is whether the employee is eligible for the benefit. If the answer to the question is “no” that is the end of the inquiry. If the answer to that question is “yes”, a second two-part question must be asked; namely, is the employee entitled to the benefit at all, and if so, to what extent (that is, to what extent has it been earned)?

With respect to the union claim for a pay out for statutory holidays, the employer noted that firefighters are excluded from the ESA for that benefit. Article 6 of the collective agreement make no reference of any kind to a pay out for statutory holidays. The entitlement provided is for lieu days for each specified holiday. The only entitlement to pay is provided for with respect to the ability under article 6.01 to choose to work up to four lieu days per calendar year and sell those days for compensation. But if they are on WSIB leave they are not able to actually work those lieu days and they are actually receiving their full net salary during those days in any event. All

employees who are away from active employment when they have scheduled lieu days are considered by the employer to have received the lieu day on the holiday when they were absent and are paid full normal net salary for those days. They are not paid out any additional sum for those days, but if they are receiving sick leave credits at the time, those lieu days are coded as lieu days and sick leave credits are not used on those days. The only exception to these practices are for those who are on a MWP at the time as provided for under the express language of Appendix C with respect to pay outs for vacation and statutory holidays for employees on MWPs.

The employer referred me to a number of cases that favour its practices and approach with respect to firefighters who are already receiving full normal salary on WSIB leave, not being entitled to get double pay unless there is clear and express language providing for such extra payment. It noted that none of the cases have found that language similar to what is present in this case is sufficient to provide such an extraordinary benefit.

Toronto (City) and Toronto Civic Employees Union Local 416 (Malcolm) 2004 CarswellOnt 1725 (Goodfellow) was an example, with language very similar to the present case. The issue was whether an employee receiving full normal salary on WSIB leave should be entitled to be paid out for unused vacation. The vacation language of that agreement was similar to that found herein, providing for entitlement to ‘vacation with pay’ based on continuous service. The agreement also provided that employees on WSIB leave would continue to accrue seniority, service, vacation and sick leave credits. After noting that the union was asking for a finding that the employee on WSIB leave for the entire year would be entitled to 56 weeks pay, instead of the 52 weeks paid to those who worked the entire year, the arbitrator rejected the grievance, finding that such an extraordinary result would require very clear and specific language to prevail (para 30). He noted that the agreement language providing for full net pay for those employees on WSIB leave meant that any vacation pay entitlement for vacation that was not able to be taken was included in the payment of full net pay for the year. As such, employees were receiving the vacation benefit provided for in the agreement (para 26 to 29).

Arbitrator Knopf dealt with a similar issue in *Toronto District School Board v. C.U.P.E., Local 4400*, 2004 CarswellOnt 10925. The issue was what happened to the three weeks of vacation with pay under the agreement for an employee who was off on WSIB for the entire year

and received full normal net pay for those 52 weeks. The vacation language of the agreement was more favourable for the union in that it provided for vacation with pay for all levels of entitlement. The arbitrator held there was no entitlement to a pay out or carry over for unused vacation time in the absence of any express language providing for a vacation bank or carry over (para 14 & 15). The employer submits this case is directly applicable to the matter addressed herein.

The employer next referred my decision in *Windsor Professional Firefighters Association and The Corporation of the City of Windsor* (9 July 2008), noting that the language of the agreement was actually more favourable to the union in that case. It noted that the language of the agreement in our case is clear that vacation must be used in the calendar year, whereas the Windsor collective agreement did allow for some limited carry over of unused vacation in specified circumstances. In that case I rejected arguments by the union that the denial of vacation pay outs for employees who were unable to use vacation due to WSIB leave was discriminatory under the OHRC. I found that because of the provision in the agreement for top up to full normal pay for employees on WSIB leave, the same pay they would have received had they been working, there was no discrimination against the grievor contrary to the OHRC. I also found that arbitral jurisprudence following *Orillia Soldiers, supra*, had uniformly held that employers do not violate the Code where they provide less compensation (including benefits and benefit coverage) to employees who are not working due to illness than they provide to employees who are working. I also concluded that to require the payment of an additional 6 or 7 weeks of pay per year on top of full net salary, an additional amount that employees who worked that same period would not be paid, would appear to fall within the concern for reverse stereotyping expressed in *Orillia Soldiers, supra*.

In *City of Windsor, supra*, I noted that although WSIB injury is expressly included within the definition of disability found in s. 10 of the OHRC, it is at least arguable that making a distinction between those who are in receipt of WSIB benefits, and those who suffer from a non WSIB disability but are covered by a sick leave benefit, is not a differentiation made on the basis of disability but rather one made on the basis of coverage by legislation or entitlement to a particular government benefit. I found that was in no way analogous to making a differentiation between coverage under a benefits plan between employees with physical and mental illnesses as

was the case in *Gibbs v Battlefords and District Co-operative Ltd.*, [1996] 3 SCR 566. Two employees may suffer from exactly the same type of disability, i.e. mental, musculoskeletal, neural, etc. and the determination of whether it is a WSIB compensable disability or not will depend on the timing, location and cause of the injury or illness, not the type of disability itself. In short, the same types of disability may fall under WSIB coverage or sick leave benefits coverage, making it questionable as to whether that is a distinction made on the ground of disability contrary to the OHRC. I also noted that there may be quite reasonable and meritorious reasons for wanting to make distinctions for the purposes of benefit coverage between persons with disabilities on the basis of whether they are covered by a particular legislative program for benefit coverage and income protection.

Greater Sudbury (City) v. Sudbury Professional Fire Fighters' Association, (2012) CanLII 90057 (Surdykowski) dealt with a similar issue: whether firefighters under a use it or lose it vacation clause who were not able to use their vacation because they were on WSIB leave were entitled to be paid out for that unused vacation. Similar to this case, such a pay out would have resulted in those firefighters receiving more than 100% of their annual pay. Arbitrator Surdykowski referred back to his adoption of the reasoning of Arbitrator Knopf in *Toronto District School Board*, *supra*, in his earlier decision in *Complex Services*, *supra*. The employer argued this case was on all fours with all three of those decisions, dealing with the same issue under the same type of 'use it or lose it' language for vacation entitlement, and asked me to come to the same conclusion based on that reasoning. It asked me to pay particular attention to the following paragraphs from *Greater Sudbury*:

43. The *Toronto District School Board* case is as close to being on principled "all 4s" with this case as a labour arbitration case can be. As in this case, the issue in *Toronto District School Board* concerned entitlement to payment for unused vacation time when an employee cannot use his collective agreement vacation time because he is off on a WSIA compensable leave of absence and the collective agreement does not provide for vacation time carryover. In *Complex Services Inc.* (paragraphs 50-51), I agreed with Arbitrator Knopf's conclusion that an employee in those circumstances receives WSIA benefits calculated on the basis of earning capacity including vacation entitlement and that because of that (and the reasons suggested above) the employee is not also entitled to be paid for unused vacation time.

44. In this case, there is no evidence or even suggestion that the grievor is being treated differently from any other similarly situated firefighter because of his compensable

disability. In the circumstances, the denial of vacation pay does not constitute discrimination contrary to the Human Rights Code (*Orillia Soldiers Memorial Hospital*). Indeed, the Association acknowledges that if the grievor was paid for the unused vacation time in issue, he would receive more than 100% of the equivalent of the wages that he would have earned if he had worked during the vacation accrual period. That is, he would receive a greater, or more than equal, benefit than other bargaining unit firefighters. The Code's objective is to ensure that disabled employees who have a disability (as defined in s. 10(1)) have equal rights and opportunities – not greater ones, which would be the result of the Association's position prevailed. (paras 43 & 44).

The employer also relied on the more recent decision of Arbitrator Wacyk in *Windsor Professional Fire Fighters Association v Corporation of the City of Windsor* (2021), CanLII 34197. She dealt with an issue raised but not decided by me in my earlier *City of Windsor, supra*, award, dealing with a claim of discriminatory treatment of firefighters on WSIB leave because of a provision that called for a prorating of vacation entitlement if the firefighter was off on WSIB leave for longer than 6 continuous months. She ultimately rejected the grievance, adopting some of my earlier reasoning, that making a distinction on the basis of coverage by different government benefit plans or insurance schemes did not necessarily amount to discrimination on the basis of disability. She also relied on the reasoning in *Messier-Dowty Inc. v. I.A.M. & A.W., Local 905*, 1999 CarswellOnt 3616 (Knopf) and *Toronto Real Estate Board v. C.E.P., Local 87-M*, 76 L.A.C. (4th) 90 (Albertyn) to a similar effect, where both arbitrators recognized the important distinction between the statutory program in place to compensate workers who have been injured while working, and a sickness benefit plan entered into between the parties, to assist employees who are absent from work because of a non- work-related illness or injury, and rejected claims of discrimination on that basis. For example, in *Messier-Dowty Inc., supra*, Arbitrator Knopf found that the distinction in calculating vacation pay for those in receipt of Workers' Compensation Benefits and those on negotiated sickness benefits was not a violation of the Code, as the difference was inherent between the scheme protecting against workplace accidents, and that protecting against mischance or illnesses which were non-work-related.

The employer argues that the several cases discussed above represent a very strong line of cases that make it clear that, absent some very specific language, there is no right for employees to claim a benefit that would entitle them to more than 100% of their normal full pay while they

are on WSIB. The employer noted that this line of cases dates all the way back to *The Corporation of the City of Kitchener and The Kitchener Professional Fire Fighters' Association* (1987), (Unreported decision of Arbitrator Kennedy, Sept. 15, 1987)), that held that someone who is already getting full pay on WSIB is not entitled to vacation and statutory holiday pay.

While most of the decisions deal with claims for vacation carry over or vacation pay, the employer asserts that the same principles should apply to statutory holiday pay or pay for lieu days. It notes that the language of article 6.01 is clear that during each year firefighters are entitled to one working day off for each of the listed holidays, but does not provide for carry over or pay out for unused lieu days. It also noted that firefighters are excluded from this part of the ESA so there is not a requirement in that Act to provide them with any kind of statutory holiday. Further the employer has the same practice for all employees who are absent from active employment on a scheduled lieu day or holiday (they are considered to have received the lieu day and they are not paid out for unused lieu days), except for the limited and express exception provided under Appendix C, for employees who are unable to make use of lieu days because they are on a MWP. Further, employees are only allowed to schedule lieu days for holidays that are scheduled to occur during periods when they anticipate they will be actively at work.

Thus, the employer contends that both the language of the agreement and the case law are very clear that people receiving their full normal pay while on WSIB leave are not entitled to extra compensation for days during which they are already being paid their full normal salary. In short, there is no express entitlement to be paid better than those workers who are actually at work. The employer further notes that the Brown and Beatty, *supra*, passages relied on by the association deal with the continued accrual of benefits, but the proper passages from that text to be referenced on the issues herein are those that deal with pyramiding, or the attempt to claim double or extra benefits for a particular period. In its view the most relevant passage re pyramiding of benefits is as follows:

In some cases, the question of whether a claim for a paid vacation or vacation pay and some other kind of leave or compensation constitutes an improper pyramiding of benefits may arise, and when it does arbitrators have again focused on both the language in the agreement and the nature and purpose of the benefits in the case. For example, where an employee's scheduled vacation coincides with a period of illness or injury, most arbitrators have concluded that, in the absence of clear language in the agreement or an established

practice to the contrary, it is not proper to claim both vacation pay and sick leave benefits, or disability income, simultaneously. Similarly, where an employee was absent from work on maternity leave, it has been held that she was not entitled to go on vacation and receive vacation pay during that period, and would only be entitled to a vacation or vacation pay upon her return to work and before the end of the vacation year. In these circumstances, arbitrators have reasoned that because such benefits are in essence an indemnity for lost earnings due to an employee's inability to work, it would be inconsistent to allow an employee who was on vacation with pay to claim such a benefit. (*Brown and Beatty, supra*, Para 8:35, Vacations and Other Benefits)

The employer submitted this passage is mirrored in a discussion about pyramiding of Holiday Pay and Other Benefits at Para. 8:30 of the same publication. These passages reflect the line of cases it submitted on the issue above. It submitted that if we look at the purpose of Statutory Holidays or Lieu Days and Vacation Pay and WSIB, that consideration leads to the same result. The purpose of WSIB is to indemnify people who must be off work due to illness or injury and to provide that compensation when they need time off to recover. Vacation and statutory holiday benefit language also reflects the purpose of providing people time away from work without loss of pay, something that has already been accomplished under article 8.01(5)(ii). The focus of these benefits is to provide the time off with pay, and not on providing extra pay for time off. The employer submitted that was why there was no reference to “with pay” after the first year of entitlement and why there was no reference to pay outs for unused time off. That is why if they are not actively at work they are not paid for the day.

The employer also relied on *Toronto (City) v. Toronto Civic Employees Union, C.U.P.E., Local 416*, 2004 CarswellOnt 1725 (Goodfellow) to show that arbitrators have rejected union arguments that being off on WSIB leave is not the same as being off on a lieu day or a vacation day because of the different quality of the time off. The arbitrator found that the fact that the employee was unable to actually take the vacation for the same reason that he was unable to work (compensable illness or injury) was of no moment as long as he was receiving full normal salary during that time (para 32). It also relied on *Peel (Regional Municipality) v. Canadian Union of Public Employees, Local 966*, (2014) CanLII 59307 (Albertyn) for an arbitral consideration of the purpose of holiday pay and sick leave. The arbitrator found that because sick leave pay was intended as an indemnity against loss of pay for time off due to illness, the employee was not

entitled to both holiday pay and sick leave pay, because if they received holiday pay there was no loss of wages.

The employer asks me to reject most of the precedents put forward by the association on the basis that they are not dealing with employees receiving WSIB benefits, but are dealing with other types of benefits. It also noted that many of the cases they relied on that deal with vacation entitlements are older cases. It also submitted that the several of the association cases have language that goes far beyond the language in the subject agreement. It noted that *City of Kingston, supra*, had language that goes far beyond what is present herein in referring to ‘vacation with pay’ for all levels of entitlement. Further it dealt with people who were on LTD benefits being paid by an insurance company, not WSIB payments of 100% of normal pay. *Kingston Regional Ambulance Service, supra*, expressly referred to vacation with pay and dealt with people on sick leave or LTD, not WSIB. The employer similarly distinguished other association cases, like *City of Kingston, supra*, as dealing with different language and employees off on LTD or for reasons other than WSIB.

The employer also distinguished the cases tendered by the association to support its claim for statutory holidays on a similar basis, that they had different language and dealt with persons who were off for different reasons or circumstances than those that pertain herein. It noted that *Atlantic Packaging Products Ltd. v. C.E.P. Union of Canada, Local 333 (Holiday Pay Grievance)*, [2001] O.L.A.A. No. 220 (Goodfellow) dealt with people on weekly indemnity, and the same arbitrator three years later held in *City of Toronto, supra*, that employees receiving full normal pay on WSIB leave could not receive more than that in the form of vacation pay or statutory holiday pay. Similarly, the employer noted that the TTC cases dealt with very different collective agreement language and very different circumstances dealing with holiday pay under the ESA. *Oakville (Town) v Oakville Professional Firefighters’ Association*, 2020 CanLII 94876 (ON LA) (Parmar), dealt with vacation and statutory holiday benefits for people who were absent on LTD and STD, not those on WSIB at 100% of pay.

The employer also submitted that the association claim that employees who are on non-WSIB related leave are actually receiving pay for statutory holidays and or vacation is inaccurate. It noted that if you look at paragraphs 9(d) and 13 of the ASF it is clear that those who are receiving

sick leave credits do not receive vacation pay on top of the sick leave pay. The practice is to code the time of the scheduled vacation as vacation taken for those who are on sick leave credits so they do not use the sick leave credits unnecessarily. They do not get both types of pay, one on top of the other, as the association is seeking for those on WSIB in this grievance. The same is done for those who are on sick leave credits when the scheduled statutory holiday or lieu day arrives. The coding as a statutory holiday instead of sick leave does not mean they get both, rather it avoids the unnecessary use of sick leave credits. Thus, those off on sick leave do not get differential treatment. If the association grievance were upheld so that those off on WSIB could get both types of payment then they would get a much richer result than others on non WSIB leave. The association also relies on the ruling of Arbitrator Wacyk on this point in *City of Windsor* (2021), *supra*, on this refutation of the different treatment of those on sick leave as not amounting to preferential or discriminatory treatment. The decisions of in *Toronto District School Board*, *supra*, and *City of Windsor* (2008), *supra* are to the same effect.

The employer urged me to remain focused on the express language of article 8.01(5)(ii) as stating precisely what compensation is to be received by employees who are on WSIB leave. If they were to be entitled to vacation pay or statutory holiday pay on top of 100% of normal salary, then this is where that entitlement would be stated. It noted that article 8.02(a) is a general provision that simply does not provide for such additional payments. The specific provision dealing with those on WSIB (article 8.01(5)(ii)) must prevail under general principles of interpretation (citing Brown and Beatty, *supra*, para 4.2120). It also points to a further principle of interpretation that in the case of a conflict between two provisions the provision that comes earlier in the agreement is to prevail over that which appears later.

The employer also notes that firefighters are excluded from the operation of the ESA with respect to its statutory holiday provisions and they are exempt with respect to its application regarding vacation or vacation pay by virtue of the greater benefit provisions in s. 5 of the ESA. The use it or lose provisions in firefighter agreements similar to those in force herein have been regarded as providing a greater benefit (i.e. *Complex Services Inc.*, *supra*, at para 57 & 58). This is especially the case for a collective agreement that provides for up to 7 weeks of vacation for longer term employees, far more than required under the ESA. Further the same cases have

found that WSIB payments are not earnings or wages and as such cannot be viewed as gross regular wages for the purposes of calculation of vacation pay under the ESA. As such, only the collective agreement is relevant to the issues in dispute, not the ESA.

In summary the employer repeated that the union is asking for a very significant financial benefit that could be as much as 18% of full annual salary as an extra payment for employees who are on WSIB leave, over and above the annual pay of a firefighter who works the entire year. It submits that the collective agreement clearly does not support such an extraordinary excess payment. Nor does the case law on the same issue, or past practice of the employer, support such a claim. Therefore it is asking for total denial of the grievance. However, it asks that if I find that there has been a violation of the collective agreement that the parties be allowed to make submissions as to remedy.

Reply

In reply, the association noted that according to the ASF the employer asserts that the current practices with respect to treatment of employees on WSIB leave and sick leave have been in place since at least 2010, but the association does not know when they commenced and does not agree with them. Thus it notes there is no agreement between the parties as to a past practice to be considered as a factor to influence the interpretation of the collective agreement.

The association also argues that the employer argument that article 8.01(5)(ii) can be read as exhaustive on what employees on WSIB will receive cannot be accepted, as there are other benefits, such as the dental benefits that employees on WSIB receive, that are not referred to in that article. It argues the fact it refers to some benefits does not mean it excludes others. It argues that article 8.01(5) should simply be read as the basis for the continued accrual of seniority.

The association also argues I should not place any significance on the fact that only the first vacation clause dealing with the level of vacation entitlement for the first year of employment refers to ‘vacation with pay’, as argued by the employer. It argues that it would be very strange for the benefit to be different for the prorated entitlement during the first year and not for the other clauses dealing with other levels of entitlement to vacation. It contends that the fact only the first clause refers to “vacation with pay” is due simply to the fact that the article was intended to be

read as a whole, in its entirety.

The association noted that most of the employer cases expressed the view that vacation is tied to active service unless it is expressly stated to be otherwise, whereas the union cases expressed a presumption in the other direction. It argued that the cases in both directions were equally strong and the real task here is to interpret what the subject agreement language requires. It submitted that even if I accepted the employer cases on the presumption with respect to a vacation benefit for inactive service, that presumption is rebutted by the language in the agreement at issue. It also asked me to disregard the employer's *in terrorem* argument, that the association's interpretation could be very expensive for the employer, and simply interpret and apply the agreement.

The association also distinguished *City of Windsor (2008)*, *supra*, on the basis that it dealt with a claim that employer violated the OHRC by following the collective agreement terms, and as such that grievance dealt only with a Code based claim. It argued it was not a grievance alleging that the collective agreement gave them a right to vacation pay and statutory holiday pay on top of their full normal salary under WSIB leave. It made the same argument with respect to the 2021 *City of Windsor* award.

The association also argued there was no meaningful basis for a distinction between employee absence on LTD benefits and absence on WSIB leave and argued that should not affect the analysis. It asserted that the fact Arbitrator Goodfellow decided both *Atlantic Packaging*, *supra* and *City of Toronto*, *supra*, does not mean that WSIB leave is different and should have a presumption against those on WSIB on full pay getting vacation pay, but rather simply shows the analysis is dependent on the language of the particular agreement.

The association agreed with the employer that, if I found the employer had violated the collective agreement, I should reserve jurisdiction to deal with remedies and invite the parties to provide submissions on remedy.

Decision

After careful consideration of the ASF, the relevant articles of the collective agreement, the submissions of the parties, and the relevant caselaw, I have decided that the grievance must be

dismissed. In my view, the association has failed to prove that the employer has violated the collective agreement by its current practice of not paying out vacation pay or lieu day pay, when a firefighter is unable to make use of vacation or lieu days because they are on WSIB leave. While this finding is based first and foremost on the language of the collective agreement, I note that there appears to be an arbitral consensus concerning the need for very clear and express language in an agreement to support an entitlement for employees who are receiving their full normal pay on WSIB leave to additional and excess payments for unused vacation and statutory holidays, over and above their full normal net pay. Despite the association's attempts to persuade me otherwise, there is no clear language herein expressing the parties' intention to see employees who are on WSIB leave receive significant financial compensation over and above what regular firefighters who are on active duty receive for performing their duties.

I accept the employer's contention that an arbitral consensus has developed with respect to union claims for pyramiding of vacation pay and statutory holidays on top of full normal pay for employees who are off on WSIB leave. There is a strong line of cases on that issue in support of the employer's position: *Toronto (City)*, *supra*, (2004 - Goodfellow), *Toronto District School Board*, *supra*, (2004 - Knopf), *Greater Sudbury (City)*, *supra*, (2012 - Surdykowski), and *Complex Services Inc.*, *supra*, (2011 - Surdykowski). These cases all support the view that an entitlement to a vacation pay out, in addition to payment of full normal net pay while on WSIB leave, would require clear and express language providing for a vacation carry over or a pay out of unused vacation time. The first two of those arbitral authorities had language that was arguably more favourable to the union in terms of references to vacation with pay for all levels of vacation entitlement, or express language (in *Toronto (City)*) providing that employees on WSIB would continue to accrue seniority, service, vacation and sick leave credits. In the agreement at issue herein, article 8.01(5)(ii) only provides for continued accrual of seniority and sick credits and article 5 only refers to entitlement to "vacation" as a benefit for all levels of entitlement after 1 year of service. The union's request for pay outs for unused vacation on top of 100% of normal pay on WSIB were denied in all four of these cases.

I am in agreement with the association's contention that it is important to focus on the language used by the parties in the collective agreement to express their intention. I am also in

agreement that the language of article 5 connotes an intention that employees who are on WSIB, and thus not in active service, are still viewed as being in continuous service for the purpose of vacation entitlement accrual. And the practice of the employer supports that view as well, with time spent on WSIB counting as continuous service for the calculation of vacation entitlement (para 7 of ASF). However, the language of article 5 also appears to be typical “use it or lose it” language with respect to vacation entitlement. There is no provision in that article for vacation carry over, pay outs for unused vacation, or a vacation bank. As such there is no language, let alone the clear and express language required by the above noted arbitral consensus, that would mandate the extraordinary result of paying out up to 7 weeks additional pay for unused vacation on top of full normal net pay for 52 weeks, as sought by the association.

The association argued that the addition of a provision for the pay out of unused vacation or lieu day entitlements for employees who are on MWP's under Appendix C somehow supported its argument, that the language of articles 5 and 8.01 and 8.02 should be read to provide for pay outs for unused vacation and lieu days for employees who are unable to use them because they are on WSIB leave. However, in my view the parties' agreement to this specific entitlement to pay outs for unused vacations and lieu days for the specifically defined group of employees on MWP's supports the contrary interpretation of the general collective agreement provisions concerning vacation and holidays/lieu days for employees on WSIB leave. If the parties had intended that the general collective agreement provisions on those issues would create entitlement to vacation carry over or pay outs for unused vacation and lieu days for employees on WSIB, or otherwise unable to use vacation because they were not on active employment, there would have been no reason to agree to paragraph 9 of Appendix C to provide it for employees who are unable to use their vacation or lieu days while they are on a MWP. Thus, Appendix C does not support the association argument that vacation pay outs are a “necessary corollary” to the provision of vacation with pay in a “use or lose it” vacation clause. Nor does it support the argument that pay outs for unused statutory holiday/lieu days for those on WSIB leave are a corollary of the entitlement to those days “During each year...” in article 6.01. It in fact implies the opposite result. The parties have also demonstrated, by the wording of Appendix C, that they are familiar with the language necessary to provide for such pay outs for unused vacation and lieu day entitlements where such a

result is intended.

I hasten to add that this special provision for employees returning to work on a MWP does not indicate any discriminatory treatment of employees on WSIB leave, as I note that employees returning to work on a MWP may be returning from a WSIB, a non-WSIB sick leave, or an LTD absence. Creating a pay out exception for employees who are unable to use their vacation or lieu day entitlements because they are in a MWP is not in itself discriminatory on any prohibited ground of discrimination. The parties may have wished to create an incentive for employees who were off work due to illness or injury to participate in MWPs, such as work hardening, to get them back to work as quickly as possible. Thus, there may be rational reasons for agreeing to this limited exception to the general scheme. But in any event, there is no basis for a finding of discrimination contrary to the OHRC on that basis.

Further, I am unable to accept the association's contention that the employer's practice to allow employees who are collecting sick leave credits while off work to have portions of their time off on sick leave recoded for payroll purposes as vacation or lieu days, to avoid the unnecessary depletion of sick leave credits, supports its interpretation of articles 5, 6 and 8, as providing for pay outs of unused vacation or lieu days to those on WSIB leave. Such a practice is in no way akin to pay outs for unused vacation or lieu days for employees who are receiving 100% of normal net salary on WSIB leave. The employer's practice with respect to sick leave credits being recoded as vacation or lieu days is also provided for in the collective agreement (article 8). Also, this practice does not result in pyramiding of benefits or double compensation for any period of days during the absence on sick leave. One form of compensation or indemnity is replaced by another under this practice, for the benefit of the employee, but the practice does not result in any bonus or extraordinary surplus payment.

I am in agreement with the employer that the cases tendered by the association to support its claim for pay outs for unused vacation and statutory holidays/lieu days can be distinguished on the basis that they dealt with different benefits, or they had different language and dealt with persons who were off for different reasons or circumstances than those that pertain herein. *Atlantic Packaging Products Ltd. v. C.E.P. Union of Canada, Local 333 (Holiday Pay Grievance)*, [2001] O.L.A.A. No. 220 (Goodfellow) dealt with people on weekly indemnity, and the same arbitrator

three years later held in *City of Toronto, supra*, that employees receiving full normal pay on WSIB leave could not receive more than that in the form of vacation pay or statutory holiday pay. Similarly, the employer noted that the TTC cases dealt with very different collective agreement language and very different circumstances dealing with holiday pay under the ESA. *Oakville (Town) v Oakville Professional Firefighters' Association*, 2020 CanLII 94876 (ON LA) (Parmar), dealt with vacation and statutory holiday benefits for people who were absent on LTD and STD, not those on WSIB at 100% of pay. The association was unable to point to any case that was on all fours with the case before me, in terms of a claim for pay outs for unused vacation or statutory holidays for employees who were on WSIB leave and receiving full normal net pay, that was successful.

Having found that the collective agreement does not provide for entitlement to pay outs for unused vacation and lieu days for firefighters who are on WSIB leave and receiving full normal net pay, I must address the association's alternative argument. It argued, in the alternative, that there is a distinction made by the employer between those on WSIB and those on sick leave for non-WSIB illness or injuries with respect to vacation pay and holiday pay, and that this distinction violated the Ontario Human Rights Code. This argument appeared to be based almost entirely on the finding of Arbitrator Surdykowski in *Greater Sudbury (City), supra*, that a collective agreement distinction between employees on WSIB and those on sick leave for the purposes entitlement to statutory holidays was a violation of the OHRC. I am unable to find that the treatment of employees on WSIB leave and those on non-WSIB sick leave with respect to vacation and statutory holidays/lieu days has resulted in a disadvantageous impact or can be viewed as discrimination contrary to the OHRC. My reasons for that conclusion are as follows.

First, as I noted in *City of Windsor* (2008), *supra*, although WSIB injury is expressly included within the definition of disability found in s. 10 of the OHRC, it is at least arguable that making a distinction between those who are in receipt of WSIB benefits, and those who suffer from a non WSIB disability but are covered by a sick leave benefit, is not a differentiation made on the basis of disability, but rather one made on the basis of coverage by legislation or entitlement to a particular government benefit, or insured indemnity plan. I found that was in no way analogous to making a differentiation between coverage under a benefits plan between employees

with physical and mental illnesses, as was the case in *Gibbs v Battlefords and District Co-operative Ltd.*, [1996] 3 SCR 566. Two employees may suffer from exactly the same type of disability, i.e. mental, musculoskeletal, neural, etc. and the determination of whether it is a WSIB compensable disability or not will depend on the timing, location and cause of the injury or illness, not the type of disability itself. In short, the same types of disability may fall under WSIB coverage or sick leave benefits coverage, making it questionable as to whether that is a distinction made on the ground of disability contrary to the OHRC. I also noted that there may be quite reasonable and meritorious reasons for wanting to make distinctions for the purposes of benefit coverage between persons with disabilities on the basis of whether they are covered by a particular legislative program for benefit coverage and income protection.

Those findings in *City of Windsor, supra*, have been echoed in several other cases. Arbitrator Wacyk in *Windsor Professional Fire Fighters Association v Corporation of the City of Windsor*, (2021), CanLII 34197. She ultimately rejected the grievance claiming discrimination, adopting some of my earlier reasoning, that making a distinction on the basis of coverage by different government benefit plans or insurance schemes did not necessarily amount to discrimination on the basis of disability. She also relied on the reasoning in *Messier-Dowty Inc. v. I.A.M. & A.W., Local 905*, 1999 CarswellOnt 3616 (Knopf) and *Toronto Real Estate Board v. C.E.P., Local 87-M*, 76 L.A.C. (4th) 90 (Albertyn), where both arbitrators recognized the important distinction between the statutory program in place to compensate workers who have been injured while working, and a sickness benefit plan entered into between the parties, to assist employees who are absent from work because of a non- work-related illness or injury, and rejected claims of discrimination on that basis. In *Messier-Dowty Inc., supra*, Arbitrator Knopf found that the distinction in calculating vacation pay for those in receipt of Workers' Compensation Benefits and those on negotiated sickness benefit plans was not a violation of the Code. She found the difference was inherent between the scheme protecting against workplace accidents, and that protecting against mischance or illnesses which were not work-related.

Second, I do not see the practice of allowing those employees who are off on sick leave when a vacation or statutory holiday/lieu day occurs to have those days coded as vacation or statutory holidays/lieu days, rather than as sick days, as having any discriminatory or

disadvantageous impact on those on WSIB leave. The purpose of WSIB is to indemnify people who must be off work due to illness or injury and to provide that compensation when they need time off to recover. The vacation and statutory holiday benefit language of the agreement also reflects the purpose of providing people time away from work with compensation, something that has already been accomplished under article 8.01(5)(ii). The focus of these benefits is to provide the time off with pay, and not on providing extra or double pay for time off. The stated purpose of article 6 is to entitle the firefighter to one working day off with pay for each statutory holiday/lieu day listed in the article “during each year”. Those on WSIB are not working and are being paid full normal pay and as such are not in need of a working day off with pay. They are receiving full pay while being off work on the days in question. Thus, the purpose of the benefit is met. The same can be said for vacation pay for those who are being fully compensated on WSIB leave. Further, the fact that a firefighter can sell up to 4 lieu days a year under article 6.02 does not change this analysis, given that the same provision stipulates they must work the ‘sold’ lieu day to get paid for it, and they will not be paid for any sold lieu days if they don’t work them (ASF, para 15), avoiding any prospect of double payment.

The fact that the collective agreement allows for employees off on sick leave to have vacation or statutory holiday/lieu days that occur during that sick leave to be coded as vacation or lieu days, and avoid the unnecessary depletion of sick leave credits, does not appear to disadvantage those being paid their full normal net pay on WSIB leave. The net effect of these practices is that both employees, those on WSIB and those on sick leave, are receiving their full normal pay during those days, whether coded as WSIB leave, sick leave, vacation or statutory holiday/lieu day. However, both are also not receiving any extra or double pay for the vacation or statutory holiday/lieu days that occur during their non-working absences. Thus, I am unable to find any violation of the Ontario *Human Rights Code* arising from the practice of the employer of recoding vacation or statutory holidays that arise during sick leave absences as vacation or holiday/lieu days for payroll purposes, to avoid unnecessary depletion of sick leave credits

In summary, for the foregoing reasons I am not able to find that the employer has violated the collective agreement by its current practice of not paying out vacation pay or statutory holiday/lieu day pay, when a firefighter is unable to make use of vacation or holiday/lieu days

because they are on WSIB leave. I have also concluded that the association's alternative argument, that the collective agreement provisions and past practice with respect to the treatment of employees on WSIB leave and those on sick leave for the purposes of unused vacation and statutory holidays/lieu days constituted discrimination contrary to the OHRC, must be rejected. Therefore, the association's grievance is hereby dismissed.

Signed in Guelph, this 23th day of September, 2022.



Brian Etherington
Arbitrator