7-7-2005

Re Sisters of Saint Martha and CAW, Local 2017

Innis Christie

IN THE MATTER OF AN ARBITRATION:

BETWEEN:

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) LOCAL 2017

(The Union)

and

SISTERS OF SAINT MARTHA

(The Employer)

RE: Union Grievance - Holiday Pay Entitlement

BEFORE: Innis Christie, Arbitrator

HEARING DATE: June 10, 2005

AT: Antigonish, N.S.

FOR THE UNION: Carla Bryden, CAW-Canada National Representative
Brenda Kennedy, Unit Chair

FOR THE EMPLOYER: Carole Gillies, Counsel
Sister Anne Marie Proctor, Administrator, Bethany
Jerome Sullivan, Administrator, Bethany

DATE OF AWARD: July 7, 2005

Grievance by the Union alleging breach of Article 10, and any other applicable articles, of the Collective Agreement between the Union and the Employer dated June 11, 2002, effective September 1, 2001 - August 31, 2004, which the parties agreed is the Collective Agreement that governs this matter, and of the *Labour Standards Code*, R.S.N.S. 1989, c. 246, ss. 41 and 42, in that the Employer has failed to pay holiday pay at the rate of time and one-half the regular rate of pay.

At the outset of the hearing counsel to the Employer and the representative of the Union agreed that I am properly seized of this Grievance and should remain seized after the issue of this award to deal with any matters arising from its application. They also agreed that all time limits, either pre- or post-hearing, are waived.

AWARD

The parties put an "Agreed Statement of Facts" before me, which not only sets out the facts but also succinctly states the issue here:

Agreed Statement of Facts

The Sisters of Saint Martha is a body corporate, created by Private Act of the Nova Scotia Legislature, in 1907.

Bethany is the Motherhouse of the religious congregation of Sisters of Saint Martha, located in Antigonish, Nova Scotia and is the main residence for about 100 members of the congregation. The Motherhouse at Bethany is privately owned by the Corporation, and is primarily a residence which includes an infirmary, a cafeteria, and chapel, as well as the residences and offices of the Sisters and their employees.

CAW Local 2107 is the bargaining agent for the unionized employees at Bethany.

This Grievance was filed on October 6, 2004 by Brenda Kennedy, seeking "Holiday Pay Time and half as per the *Labour Standards Code*, Article 10 and any other related Articles."

Specifically, the grievance arises out of Article 10 of the Collective Agreement which recognizes eleven (11) holidays per year, and deals with the method of scheduling holidays or payment of holiday pay to unionized employees.

Because Bethany is a full-time residence for the Sisters, and does not close for weekends and holidays, some employees are scheduled to work of the recognized holidays.

Full-time unionized employees receive eleven paid holidays per year, as set out in Article 10:02 to 10:09 of the Collective Agreement.

Article 10:10 sets out the method of payment for part-time employees. Payroll Office calculates the number of hours worked by each part-time employee from September 1 to August 31 of each year.

The number of hours worked is divided by the total number of hours in a year, then multiplied by 88 hours holiday pay at the employee's hourly rate.

The part-time workers are paid holiday pay pro rata in September each year, whether or not they have worked some or any of the recognized holidays.

If a part-time employee has worked 1480 hours or more in a year, he or she has the option to take the equivalent time off with pay in lieu of holiday pay.

This is not an allegation of breach of terms of the Collective Agreement dated June 11, 2002, which was in effect at the time the grievance was filed, but rather, a claim by the Grievor that the Arbitrator should read in terms of the *Labour Standards Code* regarding Holiday Pay, notwithstanding the exception from the application of these provisions to workers under a Collective Agreement by the *Labour Standards Code* Regulation 2(5).

The Employer asks that the grievance be dismissed.

Positions of the Parties.

For the Union, Ms. Bryden relied on Brown and Beatty, *Canadian Labour Arbitration*, (3rd ed.), where the learned authors state at para. 2;2100 "it is now

established that arbitrators not only have the authority but also a responsibility to interpret and apply any applicable legislation." She also relied on *City of Saskatoon and P.S.A.C., U.C.T.E. Local No. 40404* (2004), 132 L.A.C. (4th) 367 (Hood), where the arbitrator held that he had jurisdiction over the dispute where the overtime provisions of the collective agreement fell below the statutory threshold set by the *Canada Labour Code*, R.S.C. 1985, c. L-2, the applicable labour standards legislation in that case. Counsel for the Employer agreed with the Union Representative that it is within my jurisdiction as arbitrator to apply the Nova Scotia *Labour Standards Code* and Regulations, the Nova Scotia *Human Rights Act* and the *Canadian Charter of Rights and Freedoms*, although she did not agree that the either the *Human Rights Act* or the *Charter* is relevant here. Therefore, I need not consider further the question of whether I have jurisdiction here to apply that legislation, although, clearly, I do, by virtue of both section 43(1)(e) of the Nova Scotia *Trade Union Act*, and the common law as established by the Supreme Court of Canada in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157.

For the Union, Ms. Bryden further submitted that ss. 41 and 42 of the Nova Scotia *Labour Standards Code* R.S.N.S. 1989, c. 246 entitled employees covered by the Collective Agreement applicable here to greater holiday pay than does the Collective Agreement notwithstanding the exception from the application of these provisions to workers under a Collective Agreement by the *Labour Standards Code* Regulation 2(5). She further submitted that otherwise the *Labour Standards Code* and Regulations discriminate against unionized employees contrary to the Nova Scotia *Human Rights Act*, the Nova Scotia *Trade Union Act*, and the *Canadian Charter of Rights and Freedoms*.

For the Employer, Ms. Gillies submitted that the Employer had paid holiday pay in accordance with the Collective Agreement, that the holiday pay provisions of the *Labour Standards Code* do not apply to employees under a Collective Agreement because of the exception from the application of these provisions to workers under a Collective Agreement by the *Labour Standards Code* Regulation 2(5), and that the Nova Scotia *Human Rights Act*, the Nova Scotia *Trade Union Act*, and the *Canadian Charter of Rights and Freedoms* have no application in these circumstances.

Decision. I agree with the submissions on behalf of the Employer.

The Union did not dispute that the payment of holiday pay to the employees for whom they are the bargaining agent at the Bethany Motherhouse, as described in the "Agreed Statement of Facts" above, is in accordance with the Collective Agreement. It is therefore unnecessary to set out the provisions of Article 10:01-10:10 in any greater detail than appears in the "Agreed Statement of Facts".

It appears that the Employer's payment of part-time workers who work on holidays does not accord with section 41(3)(a) of the Nova Scotia *Labour Standards Code.* However, section 41 does not apply to any of the employees for whom the Union has negotiated a collective agreement, including the Collective Agreement under which I am acting here, because the *General Labour Standards Code Regulations* made pursuant to sections 4(2) and 7 of the *Labour Standards Code* (O.I.C. 90-1321, Nov. 13, 1990), N.S. Reg. 298/90 as amended, provides:

> 1(1) In these regulations

(a) "Code" means the Labour Standards Code; ...

Application ...

2(5) Persons engaged in work as employees under a collective agreement are exempted from the application of

(a) Sections 37, 38, 39, 40, 41, 42 and 43, ... of the Code

My undisputed jurisdiction to apply the Nova Scotia *Labour Standards Code* also includes, and requires that I apply, the Regulations under the *Code*. In light of Regulation 2(5) the Labour Standards Code simply does not apply to override the Collective Agreement here. This is a quite different case from *City of Saskatoon and P.S.A.C.*, cited for the Union, where the relevant part of the labour standards provisions in the *Canada Labour Code* and regulations under it contained nothing to say that it did not apply to the employees under the Collective Agreement in question. In that case all the arbitrator decided was that he had jurisdiction to hear a complaint of non-compliance with the *Code*, and not the merits of the grievance. I confess to not understanding why the *Canada Labour Code* applied to employees of the City of Saskatoon, but it is clear that there was no exception under the applicable legislation there similar to that in Regulation 2(5) for holiday pay here.

For the Union Ms. Bryden submitted that Regulation 2(5) should be treated as void or otherwise disregarded because discriminates against unionized employees. In a sense it does, in that they are treated differently from non-unionized employees, but mere difference of treatment is not illegal, or even undesirable, discrimination. It is not discrimination contrary to the Nova Scotia *Human Rights Act* c. 214, R.S.N.S. 1989, as am. 1991, c.12 because that Act does not specify unionization, or being subject to a collective agreement, as a prohibited ground of discrimination or differentiation of treatment. Nor is it, as Ms. Bryden described it, "anti-union

discrimination contrary to the *Trade Union Act"*, because the *Trade Union Act*, c. 475 R.S.N.S. 1989, as am. 1994, c. 35; 2000, c. 4, ss. 81-84; 2004, c. 47, prohibits only discrimination by employers against those engaged in union activities (unfair labour practices). It does not purport to address the legality of other legislation or regulations.

More substantially, Ms. Bryden submitted that Regulation 2(5) is contrary to the *Canadian Charter of Rights and Freedoms* because it discriminates against unionized employees. For the Employer Ms. Gillies submitted:

> ...there is no principled basis upon which to argue that the *General Labour Standards Code Regulations*, s. 2(5) is unconstitutional. Bargaining unit employees cannot be considered a disadvantaged group, ...The arbitrator cannot expunge the very clear exemption set out in *Regulations*, s. 2(5).

I agree. Moreover, Ms. Bryden did not cite, nor am I aware of, any case in which it has been held that merely because a legislative enactment, which is what a regulation is, applies only to unionized employees it contravenes the *Charter.* There are many such statutes and regulations, which both grant unionized employees rights and place limits on their rights and freedoms. It could not conceivably be concluded that *General Labour Standards Code Regulations*, s. 2(5) in some way interferes with freedom of association.

This Grievance is dismissed.

Innis Christie, Arbitrator