8-14-2006

Re Izaak Walton Killam Health Centre and NSGEU (P-05121)

Innis Christie

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IN THE MATTER OF AN ARBITRATION

BETWEEN:

NOVA SCOTIA GOVERNMENT AND GENERAL EMPLOYEES UNION
(The Union)

and

IZAAK WALTON KILLAM HEALTH CENTRE
(The Employer)

06 244 056

RE: Healthcare Bargaining Unit and Office and Clerical Bargaining Unit – Policy Grievance – Leaves for Storms or Hazardous Conditions.
NSAHO file IWK.05.020; NSGEU file P-05121

BEFORE: Innis Christie, Arbitrator

DATE OF HEARING: July 11, 2006

FOR THE UNION: Kim Turner, Counsel
Art Beaver, Servicing Co-ordinator for Health Care

FOR THE EMPLOYER: Patrick Saulnier, Counsel, NSAHO
Janet MacIntosh, Counsel, NSAHO
Sharon Robinson, IWK, Manager, Employee Relations
Marilyn Hicks, IWK, Employee Relations

DATE OF AWARD: August 14, 2006

Union policy grievance dated February 4, 2005, alleging breach Articles 5 and 18 and any other relevant provision of the Collective Agreements for the Healthcare Bargaining Unit and Office and Clerical Bargaining Unit between the Employer and the Union effective November 1, 2000 - October 31, 2003, which the parties agreed were maintained in effect and are the relevant collective agreements here. The Union seeks a declaration that the Employer's practice under, and interpretation of, Article 18.12 in respect of time losses of less or more than two hours violated the Collective Agreement. The Union also seeks full redress for any employees impacted by the Employer's breaches, including retroactive compensation (vacation, time and pay), within the period limited for the filing of grievances.

At the outset of the hearings in this matter the parties agreed that I am properly seized of it, that I should remain seized after the issue of this award to deal with any matters arising from its application, and that all time limits, either pre- or post-hearing, are waived.

AWARD

Counsel proceeded directly to argument on the basis of a succinct agreed statement of facts, and of the issue, which could only suffer by embellishment:

AGREED STATEMENT OF FACTS

1. The Nova Scotia Government and General Employees Union ("Union") is the exclusive bargaining agent for employees employed by the Izaak Walton Killam Health Centre ("Employer") within the Health Care and Clerical bargaining units.

2. Located in Halifax, Nova Scotia, the IWK Health Centre provides quality care to children, youth, women and families in the three Maritime Provinces and beyond. The IWK has more than 2,400 staff and 173 active medical and dental staff. The Children's Health Program provides care for children who require surgery for very critical, serious or on-going health needs; children requiring emergency care; children and newborns requiring critical care while being transported by an air ambulance and within the Pediatric Intensive Care Unit. The IWK operates full time, around the clock, every day of the year.

3. On Feb. 4, 2005, the Union filed a policy grievance for employees in both bargaining units alleging that the Employer was violating the Collective Agreements between the parties in the manner they were compensating employees on storm days, as set out in Article 18.12 of each Agreement. (Grievance – Exhibit 1)

4. Article 18.12 of the Collective Agreements in place at that time provided:

> **18.12 Leaves for Storms or Hazardous Conditions**
> (a) It is the responsibility of the employees to make every reasonable effort to arrive to work and to notify their Supervisor if unable to arrive at work due to storm or hazardous conditions.
>
> (b) Time lost by an employee of less than two (2) hours for a scheduled shift due to such conditions will be compensated as regular time worked.
>
> (c) All time lost in excess of two (2) hours in a scheduled shift will be deemed to be leave, and shall, at the employee's option, be:
> (i) made up by the employee at a time agreed upon between the employee and the employee's immediate supervisor; or
> (ii) charged to the employee's accumulated vacation, accumulated holiday time or accumulated overtime; or
> (iii) otherwise be deemed to be leave without pay.
>
> (d) Where an employee requests permission to leave work prior to the completion of her scheduled shift because of hazardous conditions arising from a storm, the Employer may, where operational requirements permit, excuse the employee, in which case Article 18.13 [sic – 18.12](b) and (c) above shall apply. (Collective Agreements – Exhibit 2 and 3)

5. The grievances arose because the Employer is compensating employees pursuant to Article 18.12(b) for any time less than two hours **only if** the employees total lost time is less than 2 hours.

6. For example.

    a. If an employee makes every reasonable effort to arrive at work in storm conditions, but fails to arrive until 4 hours after their shift commences, the employer will not pay the employee for the first 2 hours of their shift in accordance with 18.12(b) but will require the employee to take vacation, leave without pay, or make up the full 4 hours lost in accordance with article 18.12(c). The Union takes the position that two hours of this time should be compensated as regular time worked in accordance with 18.12(b) and that only the remaining time lost should be subject to 18.12(c).

    b. If an employee makes every reasonable effort to arrive at work but fails to attend at all on a storm day, the employer is not compensating them under 18.12(b) but requiring them to take leave in accordance with article 18.12(c) for the entire time lost.

    c. If an employee leaves work more than 2 hours early in accordance with 18.12(d) the employer will not compensate that employee for the time less than 2 hours lost in accordance with 18.12(b).

The Union sought a declaration that Article 18.12 is to be interpreted in accordance with its submission and full compensation for all employees affected, from twenty-five working days prior to the to the date the Grievance was filed, February 5, 2005. The Employer did not dispute that, if I allowed the Grievance, this would be the appropriate remedy.

The Arguments.

Both counsel submitted that their positions were supported by the plain meaning of the Article 18.12 and relied on the normal rules for the interpretation of documents discussed in Brown and Beatty, *Canadian Labour Arbitration* (3rd ed.) CD Rom: paras. 4:2100, "The Object of Construction: Intention of the Parties"; 4:2110,

"Normal or ordinary meaning"; and 4:2150, "The context of the agreement". Neither relied on past practice, estoppel or evidence of negotiation history.

Ms. Turner, counsel for the Union, submitted that the parties to the Collective Agreement have, in three ways, changed the normal rule that an employee who fails to report to work is absent without leave and receives no pay. They have agreed that in storm or other hazardous conditions, if the employee meets the conditions of Article 18.12(a), the loss is divided between the employee and the employer; by Article 18.12(b) the employer has agreed to pay for the first two hours and by Article 18.12(c) the employee has agreed to take the loss, one way or another, for time missed beyond two hours. In Article 18.12(d) they have agreed that the employer can determine whether employees can leave early because of storm or other hazardous conditions, and that, if they do, Articles 18.12 (b) and (c) apply.

Ms. Turner further submitted that if I were to accept the Employer's position, i.e. that the Employer only pays for the first two hours in accordance with Article 18.12(b) where the employee arrives for work within those first two hours, a "gap" would be created. For example, she said, where an employee arrives two hours and ten minutes late she or he would not be paid for the first two hours and could neither make it up at a time agreed, in accordance with Article 18.12(b)(i), nor have it charged to accumulated vacation, holiday or overtime, in accordance with Article 18.12(b)(ii).

Ms. Turner had been unable to find any arbitral awards with language similar to the words in Article 18 upon which this Award turns but cited several awards which I

consider below. She placed particular emphasis on the Award of Arbitrator Gregory I. North, Q.C. in *St. Vincent's Guest House and C.U.P.E., Local 1082*, October 18, 2001(2001 C.L.A.S.J. LEXIS 4023; 2002 C.L.A.S.J. 2947; 68 C.L.A.S. 51), where the learned arbitrator commented in para. 86 that refusing to pay employees on a storm day "could result in employees attempting to report for work in unsafe weather conditions."

For the Employer Mr. Saulnier submitted that the normal rule of "no work, no pay" applies except where there is provision to the contrary in the Collective Agreement, and applies here. Clear language is needed to confer such a monetary benefit. He argued that the "gap" alleged by the Union to be created by the Employer's interpretation of Article 18.12 (b) and (c) does not arise because the Union's interpretation of the 18.12(c) is over-broad and is not how the Employer has applied Article 18.12(c). That is, the phrase "All time lost in excess of two (2) hours ..." means all time lost longer than two hours, not all time lost after the first two hours.

In reply Ms. Turner referred me to Article 14.01 of the Collective Agreement, which deals with overtime. It provides that the overtime rate applies to "All hours worked in excess of the scheduled work day ... or in excess of seventy (70) hours in a two (2) week period ...". This, she submitted, demonstrates that in this Collective Agreement the parties have used "in excess of" to mean "after" not "longer than".

Mr. Saulnier further submitted that if the Union's position were to be accepted any incentive employees might have to get to work during the first two hours of a

stormy day would be diluted, if not entirely destroyed. The balance of responsibility for lost time struck by the language of the Collective Agreement would be lost. He pointed out that the Employer's interpretation of the Collective Agreement struck the same balance as did the Collective Agreement in *St. Vincent's Guest House*, *supra*, with the added benefit to the employees here that the Employer pays for the first two hours if the employee makes it in to work in that period.

Mr. Saulnier also made contextual arguments based on Articles 15.01 and 15.03 of the Collective Agreement for the Office and Clerical Bargaining Unit (similar wording appears in the Collective Agreement for the Healthcare Bargaining Unit), and on two documents entitled "Work Attendance During Storm Conditions" setting out the entitlement of non-Union staff, and on the provisions in the collective agreements for the other three bargaining units at the IWK, to which Ms. Turner replied.

Decision. This Grievance is dismissed for the reasons that follow. I will deal first with the arguments set out in some detail above, then with the Employer's submissions based on Articles 15.01 and 15.03 and the broader context of the arrangements for the Employer's other bargaining units and non-union employees. Finally, I will briefly review the arbitration awards cited to me by counsel for the Union.

Counsel seemed to agree that the normal rule in an employment relationship is that an employee who fails to report to work receives no pay, unless the collective agreement provides otherwise. Of course, all collective agreements do provide

otherwise, in a wide variety of contexts, but this starting point underscores the onus on the Union, as the grieving party, to persuade me that its interpretation of the Collective Agreement is the one more likely to have been intended by the parties, or, if there is no discernable common intention, is the one that more closely accords to the normal or ordinary meaning of the words used. The clearest, and yet a nicely nuanced, statement of the general point in the cases cited to me by counsel is that of Arbitrator R.B. Bird in *Canada Post and CUPW (Schlosser)* (1993), 39 L.A.C. (4th) 6, put before me by counsel for the Employer, at p. 13:

> To succeed in an interpretation grievance, so as to require a party to a collective agreement to pay money, clear contractual language is required: see Re. B.C. Transit and Independent Canadian Transit Union, Loc. 1 (1987), 30 L.A.C. (3d) 208 (Bird) at p. 223, referring to Re Noranda Mines Ltd. (Babine Division) and U.S.A.W., Loc. 898, [1982] W.L.A.C. 246 (Hope), as explained in Re B.C. Transit and I.C.T.U., Loc. 1, unreported, April 14, 1987 (Larson) at p. 9:
>
> > ...what it said is that where one party to a collective agreement asserts an interpretation that is not credible it should not be accepted by the arbitration board. The probability that the obligation would have been undertaken except by express words is an important factor in persuading the board of that assertion. But the board should not be taken to have stated that a monetary obligation can only be undertaken by an employer by express words to that effect.

See also *Vancouver Hospital and H.E.U., Loc. 180* (1996), 54 L.A.C. (4th) 35, at p. 44 (Morrison, Chair), cited by the counsel for the Employer, and *The Prince Edward Island Union of Public Sector Employees and The Queens Health Region* (December 2, 2004) (Kydd), cited by counsel for the Union, where, at p. 12, the learned arbitrator quotes Palmer and Palmer, *Collective Agreement Arbitration in Canada* (3rd ed), at p. 602:

> In the absence of clear provisions to the contrary, pay is only for time worked and wages are not guaranteed. ...

In storms or hazardous conditions the first steps in this Collective Agreement toward displacing this "normal rule" are those set out in Article 18.12(a), that the employee "make every reasonable effort to arrive work and to notify their Supervisor if unable to arrive at work due to a storm or hazardous conditions".

If those conditions are met, the Employer has agreed in Article 18.12(b) to pay for "time lost of less than two (2) hours". I note the agreement is not that in these circumstances the Employer will pay for the first two hours, as Union counsel suggested, but for that it will pay for "time lost of less than two (2) hours". This wording strongly suggests that what the parties had in mind was payment of compensation by the Employer for the time missed to an employee who did get to work and was late, but less than two hours late.

The wording of Article 18.12(c) makes this less clear, in providing that the employee will be responsible, in one of three ways, for "All time lost in excess of two (2) hours in a scheduled shift" rather than for time loss longer than two hours in a scheduled shift. Standing alone, the quoted phrase might well be thought to make the employee responsible only for the time lost after the first two hours, but it does not stand alone. It follows Article 18.12(b), which does not require the Employer to pay for up to the first two hours of a shift missed due to storms or hazardous conditions, but rather, as I said above, for time lost of less than two hours. Taking 18.12(a) and (b) together, the interpretation that more closely accords to the normal or ordinary meaning of the words used is that argued for by counsel for the Employer; that the employee is to be responsible for time losses of less than two hours and the employee is to be responsible for time losses of longer than two hours.

I recognize that there is a minor drafting problem in Article 18.12(a) and (b) in that (a) covers time losses of "less than" two hours and (b) covers time losses "in excess of", or, as I have read it, "longer than" two hours, which leaves time losses of exactly two hours unprovided for. This anomaly is not cured by either the Employer's or the Union's interpretation, but I find it hard to imagine that in such a case the baseball adage that "the tie goes to the runner", i.e. the employee who made the effort to get in to work, would not be applied.

This omission in the drafting of Article 18.12(b) and (c) is the only "gap" I see in these provisions. I do not accept Ms. Turner's submission for the Union that if I were to accept the Employer's position, a "gap" would be created. Where an employee arrives two hours and ten minutes late she or he would not be paid for the first two hours but, because the whole two hours and ten minutes would all be "time lost in excess of two (2) hours" in the sense of "time lost longer than two hours", the employee could make it all up at a time agreed, in accordance with Article 18.12(b)(i), or have it charged to accumulated vacation, holiday or overtime, in accordance with Article 18.12(b)(ii).

I see the point of Ms. Turner's policy argument, based on the comment of Arbitrator North in *St. Vincent's Guest House and C.U.P.E., Local 1082*, (*supra*) that refusing to pay employees on a storm day "could result in employees attempting to report for work in unsafe weather conditions", but am not persuaded by it in this context. No less cogent is Mr. Saulnier's argument that the Employer should not be taken to have removed all financial incentive for employees to try to get to work at least in the first two hours of a storm day.

In *St. Vincent's Guest House* the applicable provision of the collective agreement provided, simply:

> 29.01 When employees are unable to report for word due to storm days, such absences shall be reinstated by being replaced with a statutory holiday, vacation or time owed as accrued in a bank if requested by the employee.

That is, the relevant provision was much like Article 18.12(c) before me here, without the added benefit to employees of Article 18.12(b). The grievances dealt with by Arbitrator North arose out of the Employer's implementation of a policy which defined what constituted "storm days" and allowed the Employer to make that determination in each case. Arbitrator North concluded that, given the fact that the employee, not the employer, would, ultimately, pay for the storm day, the intent behind Article 29.01 was that each individual employee could decide whether a day was, in effect, "a storm day" for her or him. This was the context, quite different from the context of the question before me here, in which the learned arbitrator stated, in paras. 84-87:

> 84. The intent of the Policy [challenged by the union], as the Employer acknowledges, is not to address financial concerns but rather to ensure that the facility is appropriately staffed at all times.
>
> 85. To respond to the employee's failure to report to work by refusing to pay them on a storm day is to attempt to punish certain employees and force them to reconsider whether they will report for work or not.
>
> 86. This could result in employees attempting to report for work in unsafe conditions.
>
> 87. This points out the difficulty in developing a Policy which has the effect of turning Article 29.01into a disciplinary tool. It is, in fact, a provision which confers a benefit.

My opinion on the correctness of this conclusion is irrelevant. The point is simply that *St. Vincent's Guest House* and these comments by Arbitrator North involved a different issue. Here financial concerns are very much the question.

Has the Employer in Article 18.12 (b) guaranteed every employee two hours pay on each storm day, not from any bank of benefits of the employee's, as long as she or he has made a reasonable effort to arrive to work and to notify her or his supervisor if she or he is unable to make it? I think not. I think that in Article 18.12(b) the Employer has granted employees who have made it in to work a paid grace period of up to two hours.

In Article 18.12(d) the parties have agreed that the employer can determine whether employees can leave work early because of storm or other hazardous conditions, and that, if they do, paragraphs (b) and (c) of Article 18.12 apply. The application of the Employer's interpretation and the Union's interpretation of 18.12(a) and (b) in the context of the 18.12(d) scenario has not assisted me in choosing one or the other, although applying the Employer's interpretation will undoubtedly reduce the likelihood that employees will ask to be allowed to go home more than two hours early on a storm day.

As submitted by Ms. Turner for the Union, Article 14.01 of the Collective Agreement, which deals with overtime and provides that the overtime rate applies to "All hours worked in excess of the scheduled work day ... or in excess of seventy (70) hours in a two (2) week period ..." uses the phrase "in excess of" to mean "after" not "longer than", as I have interpreted that phrase in Article 18.12(c).

This could be some indication of the parties' intention when they used the phrase in Article 18.12(c), but I am not persuaded by it. The contexts are quite different. In the context of Article 18.12 reading "in excess of" in paragraph (c) as "longer than", as I have done, simply, in my opinion, accords better with the plain meaning of paragraph (b).

Mr. Saulnier also made contextual arguments based on Articles 15.01 and 15.03, and on two documents entitled "Work Attendance During Storm Conditions" setting out the entitlement of non-Union staff, and on the provisions in the collective agreements for the other two bargaining units at the IWK, to which Ms. Turner replied.

Articles 15.01 and 15.03 of the Collective Agreement for the Office and Clerical Bargaining Unit provide:

> 15.01 **Standby Compensation**
>
> Employees who are required by the Employer to standby shall receive standby pay of five dollars ($5.00) for each standby period of four (4) hours or less.
>
> ...
>
> 15.03 **Failure to Report**
>
> No compensation shall be granted for the total period of standby if the employee is unable to report for duty when required.

Similar wording appears in the Collective Agreement for the Healthcare Bargaining Unit.

Mr. Saulnier submitted that it would be incongruous to hold that employees could get more money for not going to work in storm or other hazardous conditions than

for being on standby. Because the contexts are quite different I do not find this argument convincing and have not relied on it in reaching my conclusion here.

Two documents dealing with work attendance during storm conditions by non-union staff of the Employer are in evidence. One, headed "ADMINISTRATIVE POLICY AND PROCEDURE ... WORK ATTENDANCE DURING STORM CONDITIONS" and bearing a "Last Review Date" of December 1994 states in part:

> 1. Less than two hours lost in a scheduled shift will be compensated at regular rate of pay provided the employee works the remainder of the shift.
>
> 2. All time lost in excess of two hours will be deemed as leave whereby the employee has the option to take the time as unpaid or have the time charged to:
>
>   accumulated overtime,
>   holiday time,
>   accrued vacation
>
>   in order to maintain and employee's pay whole.

The other, headed "ADMINISTRATIVE MANUAL Work Attendance During Storm Conditions" and bearing a "Last Review Date" of April 1996, and the words "Target Audience: Non-Union Staff", states in part:

> If an employee arrives at work within two hours of the start of this shift [i.e. a shift affected by storm conditions], he/she shall not have any loss or [sic, "of"] regular pay.
>
> All time not worked in excess of two hours may be deemed as leave subject to discussions with the employee's immediate manager. At this time, the parties my discuss options regarding payment. These options include: [as in the Collective Agreements before me here].

For the Employer, Mr. Saulnier submitted that the Collective Agreement provisions before me should not be interpreted such that the first two hour period by which an employee is late under storm conditions is treated differently from the way it is treated for non-union staff. For the Union Ms. Turner submitted that these two documents demonstrate that the Employer is familiar with language which clearly states the effect it seeks in this arbitration, and that I should presume it would have used that language in the Collective Agreements before me if that it what was intended.

I appreciate the thrust of both arguments, but in the context of the wording before me, for the reasons I have already stated, I am not convinced by the submission for the Union. Rather, my conclusion, that what must be taken to have been intended was that the phrase "in excess of" in Article 18.12(c) means "longer than", not "after", is buttressed by the fact that in these two documents "in excess of" unarguably means "longer than". Both make it very clear that an employee is not guaranteed pay for the first two hours, as the Union contends is the case under the Collective Agreements before me, provided he or she has made every reasonable effort to get to work and notify her or his manager.

The Collective Agreements for the Employer's CAW and Nurses Union bargaining units are also in evidence. The wording in both with respect to storm other hazardous conditions is so different that I have not found either to be of assistance here.

For the Union, Ms. Turner cited three arbitral awards dealing with absence due to storms. I have dealt above with the award of Arbitrator Gregory I. North, Q.C. in

St. Vincent's Guest House and C.U.P.E., Local 1082 and need not comment further. For the reasons that follow, I have not found either of the other two storm awards she cited useful here, one way or the other.

In *The Prince Edward Island Union of Public Sector Employees and The Queens Health Region* (December 2, 2004), in allowing the grievances before him, Arbitrator William H. Kydd, Q.C., at p. 24, applied Article 23.17 of the applicable collective agreement which provided:

> Leave of absence with pay or without pay and for reasons other than those stated above may be authorized in exceptional circumstances by the Employer. Such leave shall not be unreasonably withheld.

The collective agreement before Arbitrator Kydd also contained the following provisions:

> 24.01 No Closure Due to Storms
>
> The Employer will not be closed due to storm conditions, and as such, all employees are expected to report for duty and remain at their workstations without exception.
>
> 24.02 Time Lost to Absence or Lateness
>
> Time lost by an employee as a result of absences or lateness due to storm conditions ... must be: [made up at a time agreed, out of vacation or holiday time etc.]
>
> 24.03 No Discrimination
> ...
>
> 24.04 Reasonable Lateness
>
> Notwithstanding Article 24.02, but subject to Article 24.03, reasonable lateness beyond the beginning of an employee's starting time shall not be subject to the provisions of Article 24.02 where lateness is justified by the

> employee being able to establish to the satisfaction of the Employer that every reasonable effort has been made by the employee to arrive at his/her workstation at the scheduled time. No arbitrary time limits shall be placed on reasonable lateness.

Arbitrator Kydd concluded at p. 24 that, in the circumstances of the storm conditions in evidence before him, Article 24 was in conflict with the P.E.I. Occupational Health and Safety Act and therefore did not apply.

Arbitrator Kydd's award in *The Prince Edward Island Union of Public Sector Employees and The Queens Health Region* does not assist me here. The issues were not the same and there was no reliance here on any provision equivalent to Article 23.17 in the collective agreement before him.

In *Nova Scotia Government and General Employees Union and Capital District Health Authority* (October 26, 2005) Arbitrator Bruce Outhouse, Q.C., dealt with a policy grievance filed as a result of the employer's refusal to pay employees for time missed during White Juan, a severe snow storm which hit Nova Scotia in\on February 19, 2004. The collective agreement before him had provisions like those in Article 18.12 (a) and (c) in the Collective Agreement before me but did not contain any equivalent to Article 18.12(b), which is the subject of the Grievance here. Thus, while the learned arbitrator's observations on the rights and obligations in severe storm conditions of the employees under the collective agreement before him are of great interest, they do not assist me here.

Conclusion and Order. For all of the foregoing reasons this Grievance is dismissed. The Union has not discharged that onus of persuading me that paragraphs (b) and (c) of Article 18.12 read together and in the context of the rest

of the Collective Agreement here, mean that the Employer is violating the Collective Agreement by compensating employees pursuant to Article 18.12(b) for any time less than two hours missed due to storms or other hazardous conditions only if the employees' total lost time is less than two hours.

Innis Christie
Arbitrator