Arbitration Award Summary

05-503 - Casual Employees - Statutory Holiday Pay

Case outline:

The grievance falls under the Collective Agreement expiring March 31, 2009.

The Employer issued a document intended to outline Casual Employee's entitlement to Designated Paid Holidays.

The document indicated the employer would only pay a stat to a casual if they had over 15 days of continuous employment, and worked the day immediately before a holiday. Then they would only get a prorated amount based on the previous month worked.

Employer's argument:

The Employer based their action on "fairness" They stated that an indeterminate employee who works 7.5 hours per day Monday to Friday would receive 7.5 hours pay for a designated paid holiday, while a part-time employee who might be working for fewer hours in his or her schedule would receive designated paid holiday pay based on a prorated portion of the standard yearly hours of work. The Employer indicated that casuals were "unique" in that they work sporadically and varying from month to month. The Employer indicated that they were attempting to be fair and equitable.

The Employer argued that employees did not have to be "pigeon holed" into one category to the exclusion of all other categories. Casual employees can also be full-time or part-time employees, depending on the nature of their contract. Appendix A5 and article 16 are effectively silent on how the benefits should be applied to casual employees who are eligible by having worked for 15 days. The Employer argues that there is a lack of clarity in the language and this allows for the comparison to part-time employees.

Union's argument:

The Union argued that under Appendix A5 casuals are entitled to the designated paid holiday after 15 days of continuous employment. The relevant provisions as applicable to casual employees are based solely on their employment status, and not on the basis of the work being performed by them or its scheduling. The Employer's policy imposes criteria which lie outside the collective agreement. The Union pointed out that nowhere in the collective agreement is there any reference to pay, or rate of pay, that expressly requires a pro-rata discount for casual employees; thus, a casual who is eligible for designated paid holiday pay would be entitled to a whole day. The Union also argued that a casual employee is defined separate from any other type of employee including part-time employees, therefore the Employer could not rely Article 4.02 for proration of benefits, as this clause deals with part-time employees.

The Union argued against the Employer's "fairness" argument. Casual employees already have employment rates lower under the collective agreement, which as a whole should be seen to balance the respective rights and benefits of all employees, not impute contractually binding language which

would further reduce their rights when they otherwise would have qualified for a day's holiday pay.

Arbitrator's decision:

The Arbitrator ruled that the grievance succeeds on the basis that the prorating calculation advanced by the Employer as policy, is contrary to the collective agreement.

The Arbitrator found that Article 2.01 (n) defines the categories of employees for purposes of their treatment under the collective agreement including it providing separate definitions for casual employees and part-time employees. The Arbitrator that he could not see that casual employment for purposes of this collective agreement can be equated with part-time employment unless he was shown a negotiated provision which directly combines or correlates the two categories, and more particularly here, for purposes of the designated paid holiday benefit. There is no such contractual connection, whether or not it can be observed that neither category necessarily works standard hours when compared with full-time indeterminate employees. He could not conclude that Article 4.02 speaks to the issue of casual employment and prorating benefits for that category of employee, just as it does not address payment of benefits to any other separately defined category of employees. Without Article 4.02, the Employer is left with Appendix A5, and article 16.

Two fundamental issues remain;

1. What does it mean for casual employees to be "absent without pay" on the two working days surrounding the designated paid holiday. Without any indications to the contrary, the arbitrator found that it is usual enough to equate "absent without pay" to having been scheduled or in some other way required in usual fashion to report to work and then having neglected or refused to do so. Such an absence would require the approval of the Employer, or leave having been granted under article 12, in order for the benefit to remain applicable.

2. If payable by operation of Article 16.02, the question is how to calculate the worth of the monetary payment known as holiday pay. There is no indication that prorating should apply on the collectively bargaining language, despite the Employer's view that it would be the fairest way to proceed. In the Arbitrator's view, for casual employees, whether their workday was a full one or not, or the hours associated with it the same or varied, there should be some realization that their paid holiday would reflect what they would have reasonably expected their working day to be, had they worked, just as the designated paid holiday when worked, reflects the length of the work day in the monies paid. Why should that person expect that the monetary benefits paid out for a designated paid holiday would be any more or less.

IN THE MATTER OF AN ARBITRATION

BETWEEN:

GOVERNMENT OF THE NORTHWEST TERRITORIES
as represented by the Minister responsible
for the *Public Service Act*

Employer

- and -

THE UNION OF NORTHERN WORKERS

Union

Grievance re: Casual Employees - Statutory Holiday Pay

05-503 GNWT

AWARD

BEFORE:	Thomas Jolliffe, Q.C.
FOR THE EMPLOYER:	Brad Patzer
FOR THE UNION:	Michael Penner
HEARING LOCATION:	Telephone Conference Calgary, Alberta
HEARING DATE:	July 26, 2007 August 15, 2007

Date Award Issued:
November 23, 2007

51905 (B) TJ

This matter concerns a Union policy grievance submitted on behalf of all eligible casual employees stating its disagreement with an Employer policy document. More particularly the grievance pertains to the advice and rulings contained therein relative to the Employer prorating payments for designated paid holidays applicable to "as and when casuals" and also "casual/term" employees. The disputed approach has affected these employees by establishing their holiday compensation at less than a full 7.5 hours of pay, possibly even less than the length of their ususal workday when scheduled, by reference to the number of "standard hours" an employee could have been working over a given period of time had he or she been so scheduled. The Union seeks a direction from the arbitrator that the Employer's policy be rescinded, together with it claiming monetary relief payable to the casual employees affected on a case by case basis.

The parties proceeded with the matter on the basis of agreed facts submitted together with their respective written arguments. Subsequent to my receiving the materials, counsel convened the hearing for oral argument based on their submissions, as made in telephone conferences held on July 26 and August 15, 2007. The filed Joint Statement of Facts is set out below is as follows:

The parties agree to the following facts regarding grievance #05-503 statutory holiday pay for casual employees.

1. **At all material times, the Employer is the Government of the Northwest Territories.**

2. **At all material times, the Union is the Union of the Northern Workers.**

3. **On October 28, 2004, the Employer, through its Labour Relations Office, presented a document to the Union entitled "Labour Relations' Advice and Rulings" (hereinafter called the "Ruling). The subtitle of the Ruling "As and When Casual Employees and Statutory Pay". The document was initially delivered on behalf of the Employer by Roger Snow, Labour Relations Officer to Union representatives working at the Stanton Territorial Health Authority in Yellowknife, Northwest Territories.**

4. **Attached as Exhibit "A" to this Joint Statement of Facts is a copy of the Ruling.**

5. **In a letter dated January 13, 2005 and directed to Ms. Sylvia Haener, Director of Labour Relations, Financial Board Secretariat, Government of the Northwest Territories (GNWT) from Dave Mathisen, Service Office of the Union of Northern Workers (UNW), the Union grieved at the final level the advice and rulings contained in the Ruling on behalf of all eligible Casual Employees who are currently in, or have had, employment with the GNWT.**

6. **Attached at Exhibit "B" to this Joint Statement of Facts is a copy of the aforementioned letter dated January 13, 2005 from Dave Mathisen to Sylvia Haener.**

7. **The Employer responded to the Grievance on April 5, 2005 in a letter to Dave Mathisen from Sylvia Haener whereby the Employer denied the Grievance.**

8. **Attached as Exhibit "C" to this Joint Statement of Facts is a copy of the aforementioned letter dated April 5, 2005 from Sylvia Haener to Dave Mathisen.**

9. **On April 7, 2005, Dave Mathisen responded to Sylvia Haener's letter indicating that the UNW did not agree with the conclusions reached by Ms. Haener in her letter dated April 5, 2005 and was therefore forwarding the Grievance to arbitration.**

10. **Attached as Exhibit "D" to this Joint Statement of Facts is a copy of the aforementioned letter dated April 5, 2005 from Dave Mathisen to Sylvia Haener.**

11. **Since the delivery of the Ruling by the Employer to the Union, the Employer has applied the terms of the Ruling upon the Union employees in the payment of statutory holiday pay.**

The Labour Relations Advice and Rulings document mentioned above sets out the Employer's position, indicating as follows:

As per Article 16.02 of the UNW Collective Agreement, an employee must work or be on approved leave the day before the stat holiday or the day after the stat holiday. Casuals are to be treated no differently than any other employee when administering these provisions. The difficulty here is to determine what is the day before or the day after the stat day for as and when casuals. The day before or the day after would include the day immediately before or following the statutory holiday.

As a result, to be fair and equitable, we will be paying as and when casuals and casual/term employees on a pro-rated basis, similar to part-time employees based on the previous month worked. In addition, casual employees must have 15 days of continuous employment.

For Example - Employee A
- Worked the day immediately before a statutory holiday
- Over 15 days of continuous employment
- October 11th statutory holiday (Thanksgiving)
- Total standard hours employee can work in one month would be 162.5 hours (1950 standard hours/12 months)
- Entitled to 50% stat pay, which would be 3.75 hours.

if the employee did not work any overtime during the previous month, the employee would not receiver statutory pay.

The grievance was filed under the Collective Agreement expiring March 31, 2005. In setting out the pertinent language of the collective agreement, one observes that the parties in art. 16 have designated a number of paid holidays for employees covered by the contract language. The following holiday pay provisions, as discussed by counsel, are set out:

16.01(1) The following days are designated paid holidays for employees covered by this Collective Agreement:

(a) New Year's Day;

(b) Good Friday;

(c) Easter Monday;

(d) The day fixed by proclamation of the Governor in Council for the celebration of the Birthday of the Sovereign;

(e) National Aboriginal Day, or for those employees working and normally residing in Nunavut, Nunavut Day;

(f) Canada Day;

(g) The first Monday in August;

(h) Labour Day;

(i) The day fixed by Order of the Government of the Northwest Territories as a general day of Thanksgiving;

(j) Remembrance Day;

(k) Christmas Day;

(l) Boxing Day, and;

(m) Any additional days when proclaimed by an Act of Parliament as a National Holiday or by an Act of the Legislative Assembly of the Northwest Territories as a Territorial Holiday.

...

16.02 Article 16.01 does not apply to an employee who is absent without pay on both the working day immediately preceding and the working day following the Designated Paid Holiday, except with the approval of the Employer or where leave has been granted under Article 12.

16.03 When a day designated as a holiday under Clause 16.01 coincides with an employee's day of rest, the holiday shall be moved to the employee's first working day following his/her day of rest.

...

16.05 When the Employer requires an employee to work on a Designated Paid Holiday as part of his/her regularly scheduled hours of duty or as overtime when he/she is not scheduled to work he/she shall be paid in addition to the pay that he/she would have been granted had he/she not worked on the holiday:

Twice (2) his/her hourly rate for all hours worked,

or

an equivalent combination of cash and a day of leave at a later date convenient to both the employee and the Employer.

...

The following contract language was also remarked upon in argument, namely:

2.01(n) "Employee" means a member of the bargaining unit and includes:

(i) a "casual employee" who is a person employed by the Employer for work of a temporary nature pursuant to the provisions of Appendix A5;

(ii) an "indeterminate employee" who is a person employed for an indeterminate period;

(iii) a "part-time" employee who is a an employee who has been appointed to a position for which the hours of work on a continuing basis are less than the standard work day, week or month;

(iv) a "professional employee" who is an employee appointed to a position in an area of work where there is a requirement for a highly developed or specialized body of knowledge acquired through University education or a member of a group governed or regulated by a professional body; and

(v) a "seasonal employee" who is an employee appointed to a position which is not continuous throughout the year but recurs in successive years;

(vi) a "term employee" who is a person other than a casual or indeterminate employee who is employed for a fixed period in excess of four (4) months and includes employees hired as a leave replacement, employees hired in relation to programs of a fixed duration or without ongoing funding, or employees hired in relation to or in support of training.

2.01(s)"Holiday means the twenty-four (24) hour period commencing

at 12:01A.M of a day designated as a paid holiday in this Agreement.

...

4.01 The provisions of this Agreement apply to the Union, the employees and the Employer.

4.02 Part-time employees shall be entitled to all eligible benefits provided under this Agreement except as limited by the eligibility provisions of the Public Service Health Care Plan, the Superannuation/Disability Insurance Plan and the Dental Plan in the same proportion as their yearly hours of work compared to the standard yearly hours of work for their position.

Also Appendix A5, entitled "Casual Employees":

A5.01 The Employer shall hire casual employees for a period not to exceed four (4) months of continuous employment in any particular department, board or agency.

Where the employer anticipates the period of temporary employment to be in excess of four (4) months, the employee shall be appointed on a term basis and shall be entitled to all provisions of the Collective Agreement from the first day of his/her employment.

A5.02 The Employer shall ensure that a series of casual employees will not be employed in lieu of establishing a full-time position of filling a vacant position.

A5.03 A casual shall be entitled to the provisions of the Collective Agreement except as follows:

(a) Clause 2.01(f) "Continuous Employment" in respect of a casual employee shall include any period of employment with the Government of the Northwest Territories which has not been broken by more than thirty (30) working days. Provided always that there will by no systematic release and rehire of casuals into the same positions primarily as a means of avoiding the creation of indeterminate employment or paying wages and benefits associated herewith.

(b) The following Articles and Clauses contained in this Collective Agreement do not apply to casual employees:

(i) Article 18 - Entire Article except Clause 18.05.
Article 20 - Sick Leave Clauses 20.09 and 20.10.

(ii) Article 21 - Other Types of Leave - Clause 21.04.

(iii) Article 33 - Layoff.

(iv) Article 39 - Superannuation.

(v) Article 35 - Employee Performance Review and Employee Files.
(vi) Article 49 - Entire Article

(c) The following Article in the Collective Agreement shall apply as follows:

(i) Article 16 - Designated Paid Holidays shall apply to a casual employee after fifteen (15) calendar days of continuous employment.

A5.04 A casual employee shall upon commencement of employment be notified of the anticipated termination of his/her employment, and shall be provided a one day notice of lay-off for each week of continuous employment to a maximum of ten (10) days notice.

A5.05 Casual employees are entitled to be paid on a bi-weekly basis for services rendered at the appropriate pay range of the Casual Step set out in Appendix B.

As indicated in the agreed facts, the Employer has responded to the grievance through Ms. Sylvia Haener, Director of Labour Relations and Compensation for the Financial Management Board Secretariat. Its stated position has it that an indeterminate employee who works 7.5 hours per day Monday to Friday would receive 7.5 hours pay for a statutory holiday, while a part-time employee who might be working for fewer hours in his or her schedule would receive statutory holiday pay based on a prorated portion of the standard yearly hours of work, (see art. 4.02). That much is settled contractual entitlement. However, with the issue being how to calculate statutory holiday pay for casuals Ms. Haener remarked on their being "unique" in that they work as and when required, sporadically, and varying from month to month. She set out the Employer's position that, in seeking to be fair and

equitable, it was a matter of considering how should the Employer compensate employees who were not working consistent standard hours to comply with the contract language, and noting that article 16, while applicable, was silent as to what the employee would be paid for the designated holiday. She went on to cite article 16.05 "for assistance": and stated in her written response:

> **Because as-and-when-required casual employees do not work regularly scheduled hours as required under the article, we cannot determine what the employees would have worked on that holiday, therefore, a fair and equitable way to compensate the employees would be to take the average hours worked in the previous month when calculating designated pay holidays entitlement.**

Ms. Haener's response to the grievance reiterated the pre-grievance explanation provided to the employees, contained in its Labour Relations advice and rulings document dated October 28, 2004, which is to say prorating casuals for statutory pay on the same general basis as part-time employees, albeit reducing the referenced proportional calculation from yearly to monthly. This is to say, in application, that if a casual was scheduled and worked seven full shifts out of a possible twenty-one during the month leading up to a designated holiday, i.e., one-third of the standard hours assignable as the Employer looked at it, he or she would receive one-third day's pay for the designated holiday. In addition, the casual would have to have 15 days of continuous employment to be eligible.

In its written argument, and later as addressed in his oral presentation by Mr. Penner, the Union has relied on Appendix A5 dealing expressly with casual employees, as setting out the terms for their specific treatment within the agreed confines of the collective agreement. This includes Appendix A5.03(c) stating that art 16 dealing with designated paid holidays applies to a casual employee after fifteen calendar days of continuous employment. It is important to note, the Union contends, that the relevant provisions as applicable to casual employees are based solely on their employment status, and not on the basis of the work being performed by them or its scheduling. At the same time, he said, the Employer's policy imposes criteria which lie outside the collective agreement, and amount to curtaining their monetary benefits bestowed on casuals in article 16 by inappropriately referencing the compensation as somehow being dependant upon the hours worked the previous month by

them or others which is nowhere found in the contract language. The Union accepts that the apparent rationale behind the prorata scheme is apparently predicated on the Employer's analysis of article 16 with its acknowledged application to casual employees. It is, however, the Union contends, with particular respect to article 16.02 where the Employer has fundamentally misinterpreted the meaning of casual employees' eligibility for the designated paid holidays. This language can be seen to disentitle an otherwise eligible casual employee only where he/she is absent without pay, and without approval, but does not negate or even diminish the entitlement because one or other day prior to, or following, the designated paid holiday has not been scheduled by the Employer. By application of article 2.01,(n) ,(i), casuals are defined under the collective agreement. Appendix A5 allows them to satisfy the eligibility criteria for the designated paid holidays listed under 16.01(1). The Union sees the Employer as having misconstrued the terms of article 16, and thereby having created a false rationale to impose the supposed prorata formula it has created by insisting that the casuals meet criteria outside the contract language in order to be ultimately eligible for a full day's pay to compensate them for a designated paid holiday. Despite the Employer apparently taking the view that casual employees who are eligible under the fifteen day rule are at least entitled to "some remuneration" for a designated paid holiday, the Union sees it as wanting to inject an element of ambiguity into the situation by coming up with an unsupportable policy directly applicable to the manner in which it administers the article 16 obligation. The Union asserts that there is no such ambiguity and that the language can be interpreted on its clear and ordinary meaning. Casuals are a distinct class of employees and are defined separate and apart from other bargaining unit members, including part-time employees. Nowhere in the language of article 16, nor in Appendix A5 dealing with casual employees, is there any reference to a "reduced day" of designated holiday for casuals which would require a calculation for compensation at less than it would be for those other eligible employees were they to have been working that day but for it having been a holiday. One can note that article 2.01 (s) of the collective agreement specifically defines a "holiday" as the twenty-four period commencing at 12:01a.m. of the day designated as a paid holiday in the collective agreement. Certainly, were a casual to have worked that day as a non-holiday assigned shift, he/she would have been paid, and should be paid the same compensation said to attach to the designated paid

holiday.

The Union, it can be said, was quick to point out that nowhere in the collective agreement is there any reference to pay, or rate of pay, that expressly requires a prorata discount for casual employees; thus, a casual who is eligible for statutory holiday pay was said to be entitled to a whole day, with the amount the employee should receive depending on that employee's daily rate of pay set for the employee in Appendix B.

The Union asserts that its interpretation is consistent with the *Public Service Act*, which in its regulations, section 12, addresses casual employees by stating that such employees are entitled to "a holiday with pay" so long as there has been continuous employment for thirty days (negotiated down to fifteen days in collective agreement) and where section 11 further states that every employees is entitled to a leave of absence with pay on the days declared to be holidays for the Public Service. The Union points out that it is trite law as discussed in Brown and Beatty, *Canadian Labour Arbitration*, topic 8:1400, that wage rates prevail during the life of the collective agreement and that employers are not entitled to unilaterally decrease or increase wages during a contractual term. Mr. Penner also tabled arbitrator Stanley's award in Re Pinkerton's of Canada Ltd. and U.S.W.A. (1999), 82L.A.C. (4th) 108 dealing with holiday pay as an entitlement with the presumption existing that it forms part of the general wage structure applicable to all employees, whether regularly scheduled to work on a holiday or not. The arbitrator determined that there was no room to impute an intention to exclude employees from holiday pay who did not happen to be regularly scheduled on that day. Interestingly, in his review of the contractual language applicable in that case, he noted that while there was no guarantee of hours of work per day, or per week, nor any regular daily hours of work defined in the agreement, he did not find it unusual that in attempting to compute holiday pay the parties had chosen to contractually refer to "the number of hours the employee would be regularly scheduled to work on such day if it were not a holiday", to quote the collective agreement before him. He went on to state that "I take the words to simply be an attempt to define, for the purposes of holiday pay, an employee's normal daily hours and nothing more", which to say their normal daily hours when scheduled to work and which he thought was an appropriate way to look at the compensation owing for the holiday.

The Union sees arbitrator Stanley's treatment of statutory pay in the Pinkerton's case

as being buttressed by arbitrator Surdykowski in Re Lennox and Addington, Community Health Services and Service Employees International Union, Local 663 (1995), 51 L.A.C. (4th) 28, with his reconfirming that an employee's entitlement to statutory holiday pay is determined by the contract language subject to the applicable statutory standard, and that it is generally regarded as part of the total monetary package along with wages and other benefits. There can be no question, Mr. Penner said, but that here the contact language over-rides any policy or unsupported prorata scheme as was said to be contained in the Employer's document. Further there was no reason to separate out as-and-when casuals "from any other kind" of casual employee, there being no difference in definition contained in the collective agreement, and knowing that the *Public Service Act* contains only a limited definition for employees, meaning a person employed in the Public Service. It defines "casual employee" as a person engaged to perform work of a casual nature or in an emergency. It is best, he said, to look to article 2.01(n) of the collective agreement which provides a full list of the types of "employee" contractually contemplated with its reference to person employed for work of a temporary nature pursuant to Appendix A5, there being no mention there or anywhere else in the contractual language of any prorating of the designated paid holiday benefit.

In addition, the Union made what it referred to as a "fairness" argument in taking issue with the Employer's supposed reason for imposing a prorata scheme dependent on hours worked the previous month. Casual employees already have employment rates which are significantly lower under the collective agreement, which as a whole should be seen to balance the respective rights and benefits of all employees, not impute contractually binding language which would further reduce their rights when they otherwise would have qualified for a day's holiday pay were the Employer to apply the ordinary meaning of the contractual language. He also remarked that were it not always based on a full day, it could come down to determining what would have been the assigned hours on the holiday if the casual employee was assigned to work that day. This would entail a different calculation than the Employer used which wrongly centered on the total number of hours worked by the casual over the preceding month when compared with full-timers, i.e. the supposed "standard" hours, or any other comparative period of time. In this respect article 16 should be reviewed in its entirety, including article 16.05 which contemplates employees working other than a normal/standard length day and

receiving compensation on that basis.

In its written argument, the Employer explained the situation with respect to part-time employees and their entitlement under the collective agreement, being to receive benefits on a prorated basis based on their yearly worked hours compared with the standard yearly worked hours. In dealing the definition wording of article 2.01, Mr. Patzer submitted that employees do not have to be "pigeon holed" into one category to the exclusion of all other categories, which is to say the Employer holds to the view, "as such, casual employees can also be full-time or part-time employees, depending on the nature of their contract. Similarly term employees can be part-time employees and/or professional employee." In its analysis, while observing that casual employees are only entitled to certain benefits by reference to Appendix A5.03, including sub-paragraph (c) which requires that a casual be employed for a minimum of fifteen calendar days before being entitled to designated paid holidays (being a greater negotiated benefit than provided by section 12 of the regulations), it also has noted that Appendix A5 does not explain how the benefit is to be applied to casual employees, whether they be part time, or full time by working "standard" hours, as the Employer looks at their designations. Reference was made to the exclusionary language of article 16.02, with the Employer taking the view that for most employees, being "absent without pay" both on the working day immediately preceding, and on the working day following the designated paid holiday, contemplates more than just not being scheduled to work. However, it views the "as and when" casual employee as at least capable of being "absent without pay" on the days surrounding a designated paid holiday if not working inasmuch as their working relationship is most likely not subject to formal scheduling, being brought into work on an "as and when required" basis. It leaves a difficulty there in one understanding how the designated paid holiday could ever be applied to such employees were they brought into work on an irregular basis. In the Employer's view, article 16 is effectively silent on how the benefits should be applied to casual employees who are eligible by having worked for fifteen days. Nevertheless, admittedly, Appendix A5.03 (c) makes article 16 applicable, however it is to be applied.

While the Employer sees there to be a lack of clarity in the language, it has noted that part-time employees are specifically contemplated by article 4.02 of the collective agreement to have the benefits to which they are entitled, prorated, in the same proportion as their yearly

hours of work compared to the standard yearly hours of work for their position. It leaves a ready comparison available if you will, Mr. Patzer submitted, for casual employees, whom the Employer admittedly views as being another kind of part-time employee, albeit for purposes of paying their benefits. However, he acknowledged, a problem exists in strètching the prorata calculation over a full year for casuals given that they are not supposed to be around for that long, and despite observing that article 4.02 requires that a comparison for part-timers be made with the standard yearly hours. Nevertheless, the Employer asserts that "applying the designated paid holiday proportionally to all casual employees ensures that all employees will receive the same amount of pay, proportionate to their hours of work, regardless of their schedule". It presumably means, as applied in referencing total hours worked over just the previous month, that the Employer recognizes the fact that the employment relationship for "as and when" casual employees may not extend back much further. The Employer has noted that the issue in the Pinkerton's case was whether employees were entitled to holiday pay if they were not scheduled to work on the designated holiday, not being the same issue here, counsel said, which realistically has become "how much should they be paid". It has to be observed however, that there was recognition in Pinkerton's that the employer calculations were made in an attempt to define for purposes of holiday pay, the employees' normal and daily hours. The arbitrator did not reject the employer's efforts, or methods used to carry through the parties' intent. There, one observes, the agreement itself stated that there were no stated regular daily hours of work, with the parties expressly contracting that the calculation should be based on "the number of hours the employee would be regularly scheduled to work on such day if it were not a holiday", which is to say incorporating the appropriate calculation on an agreed basis, a different situation than presents here. The Employer also cited arbitrator Surdykowski from the Lennox and Addington Community Mental Services case, for recognizing that in addition to statutory holiday pay being generally regarded as part of the total monetary package, "the payment that the employees are entitled to for statutory or recognized holidays is determined by the language of the particular collective agreement subject to the applicable statutory standards...".

It would seem that fundamental to the Employer's view of this matter is that the language of article 4.02 should have application to eligible casual employees, with Mr. Patzer

pointing out that it is not expressly excluded by Appendix A5.03 which refers to several other articles which do not apply to casual employees. The Employer summarized its position in this matter as follows:

> 27. **The language in Article 4.02 in the present Collective Agreement is clear on how benefits are provided to part time employees. Once again it states that "Part-time employees shall be entitled to all eligible benefits provided under this Agreement...in the same proportion as their yearly hours of work compared to the standard yearly hours of work for their position." A calculation to prorate the benefits must be made.**
>
> 28. **In the present case, the Employer submits that the ruling issued by Labour Relations is the Employer's reasonable application for article 4.02, and that it made these calculations in good faith in the same way calculations were made in the *Pinkerton's* case. In the Labour Relations ruling the Employer adopted a method of calculation that is fair and equitable to all employees. With the exception of those employees who fall within the parameters of article 16.02, the Employer has never suggested that some employees are not entitled tot he DPH benefit because they were not scheduled to work.**

In its reply argument, the Union disputed the applicability of article 4.02 dealing with prorating the benefits available to part-time employees, saying that it had no application for casual employees just as it would have no application for other specifically defined categories such as seasonal employees or term employees. The Union submitted that in the Employer's various Labour Relations' descriptions of casual employee's limited rights, there had been no mention in of its own Human Resources Manual which the Union has observed, sets out various pieces of straight forward information concerning casuals and not mentioning there being any supposed parallel with the category of a part-time employee. The document, one can observe, contains many tidbits of information relevant to the working life of casual employees, without any reference to their being considered as part-time employees for any purpose. Further, it can be noted that article 2.01(n) (iii) separately defines "part-time employee" and nowhere in the definition sections of the collective agreement is it suggested that a casual employee should be included in that separately defined category for any purpose. The article 16.02 payment requirement should also be read and interpreted in the context of

article 16 as a whole.

Having now set out the evidence and argument in this matter, I must observe that article 2.01 (n) defines the categories of employees for purposes of their treatment under the collective agreement, including it providing separate definitions for casual employees and part-time employees. The former is a person employed for work of a temporary nature pursuant to the provisions of Appendix A5, and the latter is an employee who has been appointed to a position for which the hours of work on a continuing basis are less than the standard work day, week or month. Realistically, by reference to the definition language, whether working standard hours, supposedly by comparison to a full-time indeterminate, or not, a casual employee is not one who has been appointed to a position. That issue has been previously discussed in the Bryan Tessier interim award between these same parties, June 26, 2002, Jolliffe, where the Employer's position was accepted by this arbitrator that casual employment in the context of this collective agreement does not constitute an appointment to the Public Service, it being pointed out that the "appointment" of a person to a position carries with it certain requirements under the *Public Service Act.* There was an argument made in that case, not accepted, that an appointment should be deemed to have taken place during the casual employment relationship which altered the employee status. In any event, I do not see that casual employment for purposes of this collective agreement can be equated with part-time employment unless I am shown a negotiated provision which directly combines or correlates the two categories, and more particularly here, for purposes of the designated paid holiday benefit. There is no such contractual connection, whether or not it can be observed that neither category necessarily works standard hours when compared with full-time indeterminate employees. Having so remarked, I cannot conclude that article 4.02 speaks to the issue of casual employment and prorating benefits for that category of employee, just as it does not address payment of benefits to any other separately defined category of employee. Without article 4.02 in its quiver relative to casual employees, the Employer is left with Appendix A5, and article 16 which has been made expressly applicable to casual employees after fifteen calendar days of continuous employment.

The two fundamental issues remain in the context of this grievance; firstly, what does it mean for casual employees to be "absent without pay" on the two working days surrounding

the designated paid holiday, which if that were to occur, makes the holiday inapplicable, and leaves the employee without any payment. Without any indications to the contrary, I think it is usual enough to equate "absent without pay" to having been scheduled or in some other way required in usual fashion to report to for work and then having neglected or refused to do so. Such an absence would require the approval of the Employer, or leave having been granted under article 12, in order for the benefit to remain applicable. Indeed the Employer in its submission ultimately did not dispute that approach. Secondly, if payable by operation of article 16.02, the question arises of how to calculate the worth of the monetary payment known as holiday pay. While the Employer asserts that it should reasonably be able to prorate the payment in line with the total hours/days worked during the previous month when compared with a standard schedule, the Union says that a day is a day and the casual employees should receive a full working day where 16.02 has applicability. I agree there is no indication that prorating should apply on the collectively bargained language, despite the Employer's view that it would be the fairest way to proceed based on a comparison over time with standard hours worked, either by analogy or direct reference to article 4.02 governing the approach taken with part-time employees.

In considering the rights secured by the collective agreement for casuals relative to holiday pay, once eligible, I note the reference in article 16.05 covering a situation of the employee, even a casual, actually working on the designated paid holiday as part of the regularly scheduled hours of duty. It requires, were one to work, "in addition to the pay that he/she would have been granted had he/she not worked the holiday" being paid twice the hourly rate for "all hours worked". In my view, for casual employees, whether their work day was a full one or not, or the hours associated with it the same or varied, there should be some realization that their paid holiday should reflect what they would have reasonably expected their working day to be, had they worked, just as the designated paid holiday when worked, reflects the length of the work day in the monies paid. With the designated paid holiday benefit itself, and the monies to paid out in connection therewith when worked, being tied to the person's working day I would querie that in the event a casual employee regularly/normally works four hours in a working day, why should that person expect that the monetary benefit paid out for a designated paid holiday would be any more or less, just as his

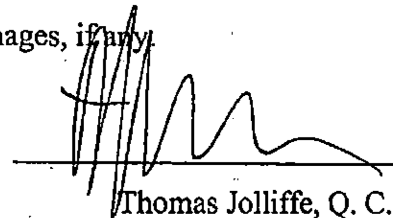
extra remuneration for the designated holiday were he/she to work would be paid at twice the hourly rate for the assigned hours? At the same time, how can it be said in the event that it was ususal for the casual employee to work seven and a half consecutive hours on those days that he or she was brought into work, and if they qualify for the designated paid holiday by application of Appendix A5.03(c), their monetary benefit for the day should be calculated on a lesser basis, one said by the Employer to be dependent on the total number of hours worked over a month or some other period time in comparison to another category of employee? I think not, or at least there is no language in the collective agreement to which I am referred requiring that their monies should be paid on some lesser basis, or calculated by comparison with others.

I conclude that this grievance succeeds on the basis that the prorating calculation advanced by the Employer as policy, is contrary to the collective agreement, with article 4.02 on which the Employer relies not being applicable to casual employees as separately defined by article 2.01(n). Where the designated paid holiday benefit is applicable to a casual employee by operation Appendix 5.03 (c) after fifteen calendar days of continuous employment, it should be payable on the basis the person's regular work day on an individual employee basis. It should not to be prorated on the basis of total hours worked over a given period of time, but rather measured against the employee's actual work day, were he or she to have been working that day, but for the designated holiday, or not being scheduled.

Further if it were to continue to be an issue on the face of the grievance, article 16.02 contemplates an employee being away from work with approval still qualifying, which would apply to casuals who were not actually scheduled to work the day preceding or following the designated holiday.

The award is to issue as a declaratory decision at this point with my remaining seized pending implementation and in the event there is any need for clarification or further directions, including on the issue of resulting monetary damages, if any.

Dated this 23th day of November, 2008.



Thomas Jolliffe, Q. C.