

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE MINISTER OF HUMAN RESOURCES  
(GOVERNMENT OF THE NORTHWEST TERRITORIES)

Employer

-and-

THE UNION OF NORTHERN WORKERS

Union

**RE: SPECIAL LEAVE (BEREAVEMENT)**

**AWARD**

Before:	Tom Jolliffe, Q.C.
Counsel for the Employer:	Mark Ishack
Counsel for the Union:	Michael H. Penner
Joint Statement of Facts and Submissions Received:	March 25, 2020 (Union and Employer)
Hearing Date:	March 26, 2020 (via Teleconference)
<b>Date Award Issued:</b> <b>June 2, 2020</b>	

This matter concerns policy grievance #17-P- 02203 wherein the Union alleges that the Employer has not been properly applying Article 19.02(1)(a) in dealing with special leave requests following a death occurring in an employee's immediate family. This contractual issue arose over the Union's understanding that the Deputy Minister of Finance in exercising his authority as Deputy Head was insisting that the application to be accepted must be for requested leave contemporaneous with the death, with denials being based on the sole ground of not being sufficiently contemporaneous. The Parties are agreed on seeking an interpretation of this provision. The pertinent language reads as follows:

For the purpose of this article, immediate family is defined as an employee's father, mother, **step-parent**, brother, sister, spouse, common-law spouse, child, step-child, foster child, father-in-law, mother-in-law, grandmother, grandfather, grandchild, son-in-law, daughter-in-law, brother-in-law, sister-in-law and any relative permanently residing in the employee's household or with whom the employee presently resides.

- (1) The Deputy Head shall grant special leave earned with pay for a period of up to five (5) consecutive working days:
  - (a) when there is a death in the employee's immediate family. The employee may be granted up to three (3) additional days special leave for the purpose of travel;

...

The Union at this point seeks a declaratory award, leaving its application to the Parties while remaining seized in the event they fail to resolve any outstanding issues as between them based on my ruling.

The factual background of the grievance has been agreed upon. It is as follows:

- a. On or about November 22, 2017, a member of the bargaining unit submitted a Request for Special, Civic or Union Leave form requesting special leave pursuant to Article 19.02 with respect to the death of her grandfather ("the Leave Request"). The grandfather fit the definition of "immediate family" as set out in Article 19.02(1) of the Collective Agreement.
- b. As set out in the leave request, her grandfather had died on September 27, 2017. The requested leave dates were in December as that is when the member planned to meet with her extended family in Edmonton and assist with moving out the contents of the deceased's apartment in British Columbia.

- c. The requested special leave was denied by the Employer on the basis that the dates requested were not contemporaneous with the death of her grandfather.

It is also known from the description set out in the denied Special Leave Form that the circumstances giving rise to the policy grievance involved the employee seeking special leave on four days totalling 26.5 hours, having at time of application 77.3 hours accumulated special leave credits on which to draw. The Special Leave Form claimed that she was attending a medical appointment in Edmonton (not claimed) and that “right after that we are heading to family. Our entire break will be helping family with belongings and assisting getting grandma. At this time we will also be celebrating my grandfather’s life”. This being a policy grievance, the emphasis is not on this employee’s particular circumstances other than the significance of the timing of her requesting special leave to be taken some three months from the time of her immediate family member’s death. There were both written and oral argument presented by the Parties’ respective counsel instructed in this matter.

In opening remarks it was pointed out that employees earn their special leave credits as set out under Article 19.01(1), which is to say they earn special leave credits up to a maximum of 30 days at the rate of 0.023077 hours for each hour that an employee receives pay, and under para. (2) take the leave in hours based on regularly scheduled hours of work for the day the leave is taken. By quick calculation, an employee with a 40 hours per week schedule would earn approximately 46 hours special leave credits in a given year, which is to say 5¾ days. There should be no doubt, the Union contends, that in this example instance the leave request was related to a death in the immediate family. It accepts that if there is no such material connection there would be no access to this special leave category.

The position taken by the Employer in denying the employee’s special leave request was said to be one of relying on the wording of Article 19.02(1)(a) in that leave was to be granted: “When there is a death...”. The Employer asserts that consequently special leave in this category is available

to an employee “at a time that is contemporaneous to – although not necessarily immediately following – the death”. While it accepts there is no “hard and fast” date beyond which the special leave is no longer available it would be unreasonable for an employee to access this entitlement many months following the death. Such access well after the fact of the death was also said to be inconsistent with various cited articles of the Collective Agreement.

**Union argument:**

In argument Mr. Penner submitted that in interpreting Article 19.02(1)(a) it cannot be avoided that its language does not specify any time line for taking the special leave following the family member’s death, which is to say not requiring a strict contemporaneous application, or even a reasonable time line in the eyes of the Employer, although presumably it should be associated with the death in a material way. In the Union’s view, the stipulation that the death of an immediate family member must have occurred is the condition precedent for accessing the entitlement, it having “crystallized” as a contractual right. He submitted it is then that the obligation materializes for the Deputy Head to confer special leave if and when sought. There is no obligation on the employee to exercise his/her right to that earned leave on or around the date of death, nor does the passage of time extinguish that right, meaning one’s entitlement to the minimum bestowed by the Article. There is not even any express requirement to attend a formalized funeral set out in the language. Presumably, a celebration of life, or one needing to deal with issues pertaining to the family member’s death could occur in a some non-contemporaneous fashion. The language does not anywhere include the term “bereavement leave”. The Union views the Employer’s incorrect reading of the provision as an expansion of the language to include missing extra words that the consecutive working days are required to be “from the date of death”; or “contemporaneous with the death”; or “around the time period of the death” which limiting expressions have not been included, not bargained into the contract language; or possibly the Employer would want the extra words added that the stipulated

working days should be “within a reasonable time period from the date of death as may be determined by the Employer”. None of these restrictive approaches to an employee claiming the earned entitlement have been included in the contract language.

By way of contrasting the language with other contract provisions, Mr. Penner submitted that the Collective Agreement elsewhere has provided meaningful and restrictive “temporal context” to certain provisions, citing Article 45.09(a) dealing with recovering expenses incurred while travelling on behalf of the Employer. Its language states that the Employer shall authorize the duty travel by signing the appropriate form “before the start of the trip”, and at para. (c) requires that the request for advances should be submitted “at least three (3) working days before the trip commences”, and at para. (e) requires that the employee must submit the claim for expenses on the preauthorized form “within ten (10) days of completing the trip”. Counsel submitted that unlike some other contractual provisions there is no setting out a time frame for accessing the special leave, except that the death of a family member must have occurred. For example, Article 10.01 deals with Union representatives having access to Employer premises, and states: “upon reasonable notification”, and in such a case: “shall not be unreasonably denied”. Article 12.01 in dealing with arbitration hearings states that “upon reasonable notification” the Employer will grant leave with pay to a “reasonable number of employees” representing the Union and “upon reasonable notification” will grant leave with pay to an employee witness. Article 13.06 references pay deductions for Union dues and life insurance premiums, to be remitted to by the Employer “within a reasonable period of time after deductions are made...”. Article 19.02(d) in referring to various other types of special leave with pay indicates that “such leave will not be unreasonably withheld.”

Mr. Penner also submitted that the language of Article 19.02(1) can be compared and contrasted with a separate and distinct contract entitlement to special leave in order to attend a funeral, and is restrictive in its stating at Article 19.02(3):

The Deputy Head shall grant special leave for a period of up to three (3) days to allow an employee to attend the funeral of the employee's niece, nephew, aunt or uncle.

The Union relies on there being no such reference to "funeral" in Article 19.02(1)(a) in allowing special leave when there has been a death of an immediate family member as defined therein, no reference to bereavement, and no expressly restricted time frame. Mr. Penner submitted that it is important to remember that "granting" special leave is "not tantamount to a gratuity", in that each employee earns special leave credits as set out in Article 19.01(1), the leave being taken having already been earned by the employee. At the same time, it is different than the special leave available under Article 19.02(1)(b) which application would be anticipatory in nature, the event not yet having occurred. The Union also contends that its interpretation of the earned leave entitlement set out in Article 19.02(1)(a) is not contradicted by Article 18.03 dealing with displacing vacation. By the Union's perspective the purpose of Article 18.03 is to reimburse employees whose vacation is intersected by Article 19 special leave. It matters not when the Article 19.02(1)(a) leave is taken and the efficacy of Article 18.03 is not dependent on the Employer's interpretation of the special leave provision.

The arbitration case law cited by Mr. Penner, described factual circumstances where arbitrators needed to contrast the contract language which was free from explicit restrictive or qualifying conditions with provisions where there were such limitations. For example in *Hamilton Board of Education v. O.S.S.T.F., District 8*, 1983 CarswellOnt 2388, 10 L.A.C. (3d) 126 (Kennedy) the contract language read: "for absence occasioned by the death of a relative, leave shall be granted ...." there being differing periods of "consecutive days" for which one qualifies depending on the relative. The issue in interpreting the plain language centered on the meaning of "consecutive days". The arbitrator concluded that had the parties intended to include only work days they would have expressed that intention as opposed to contemplating the calendar days' meaning which was the usual interpretation to be applied. He sought to apply the language as written by reference to its plain

and ordinary meaning.

In dealing with the timing of taking the described bereavement benefit, in *Central Precision Ltd. v. U.S.W.A.*, 1977 CarswellOnt 744, 16 L.A.C. (2d) 29 (G.W. Adams) the language was not openly restrictive in that there was no express requirement for the three days' leave of absence with pay to be taken immediately following the death of one's immediate family member. There was consideration given to developed case law where such express contractual restrictions were present, such as requiring the leave to be taken "immediately following the date of death provided he attends the funeral". Arbitrator Adams considered that the time taken needed only to be "reasonably related" to the death or resulting funeral. In *Canada Post Corporation and Canadian Postmasters and Assistants Association*, 2009 CarswellNat 6778 (B. Pelton) the arbitrator dealt with a provision precisely entitled "Bereavement Leave" requiring that "when a member of his immediate family dies" the employee was entitled to special leave with pay for no more than four days and not to extend for more than one day beyond the day of the funeral, being restrictive in the sense that the provision referred to the funeral itself. The employer in that case asserted that the bereavement leave must commence on either the date of death or at the latest, the day after the date of death, in its describing the use of the word "when" as referencing the time period of the death rather than the parties using another conjunction "where" as referencing only the death event having occurred. The arbitrator rejected the argument in stating at 113:

113            In my view (the pertinent article) is clear and unambiguous. While Bereavement Leave is "triggered" by the death of a member's immediate family, (the pertinent article) does not stipulate that Bereavement Leave must commence on the date of death, or at the latest, the day after death.

....

116            The argument advanced on behalf of Canada Post Corporation that the use of the word "when", coupled with the fact that Bereavement Leave is comprised of consecutive calendar days, is as effective as the wording within either the *Canada Labour Code* or the CUPW Collective Bargaining Agreement in establishing the starting date is not persuasive.

117           While I can accept that the word “when” is a reference to time, that does not dictate that the calculation must commence on the date of death or, at the latest, the day after death.

118           While Bereavement Leave could commence on the date of death or the day after the death, and having regard to the evidence usually does, in my view the use of the word “when” also permits a later commencement date, provided such date is reasonably connected to the death.

119           While what date could be said to be reasonably connected to the death could vary from case to case, having regard to the underlying purpose of bereavement leave as outlined by Brown and Beatty, I expect that most individuals would choose to commence their Bereavement Leave sooner rather than later.

While showing that in many cases there is a specific stated connection between the paid leave and bereavement over the death in one’s immediate family, the Union relies on there being no reference to bereavement, nor even the funeral itself under Article 19.02(1)(a). At the same time, he submitted, the Union is not claiming that the special leave can be unrelated to the death having occurred. There should be a material connection.

In *Saputo Dairy Products Canada G.P. and Alberta Miscellaneous Employees (TC, Local 987) (Zimmer)*, 2016 CarswellAlta 2845, 274 L.A.C. (4th) 285 (Gunn), cited as another example of the arbitrator applying the plain meaning of the words, the contract language specifically referenced the employer granting “bereavement leave” for a period of time “including the day of the funeral or service...”. The issue was whether the clause necessarily obligated the employee to attend the funeral or service in order to be eligible for the full benefit. The arbitrator stated para. 34:

I am loath to imply a term when the parties negotiated and signed and agreed upon a written contract article which does not include any words setting out the requirement of mandatory attendance at the funeral. If the parties intended attendance at the funeral they most certainly have inserted specific words to that effect, such as in the collective agreements in some of the cases cited by the parties...

Mr. Penner also cited the relatively recent *Ross Memorial Hospital and CUPE, Local 1909, Local 1909 (Bereavement Leave)*, 2019 CarswellOnt 2313 (Parmar), where the arbitrator cited both the *Canada Post* award and the much earlier *Central Precision* award in considering whether the



period of contemplated leave time needed to correspond with the death. Unlike the GNWT/UNW Collective Agreement, the contract language in *Ross Memorial Hospital* repeatedly referenced “bereavement leave” within its several provisions in dealing with the parameters. The language provided for three consecutive working days off without loss of regular pay “in conjunction with the death” having occurred within the described immediate family group. On her review of the case law the arbitrator having acknowledged the purpose of bereavement leave as summarized in *Brown & Beatty*, determined that it need not commence immediately following the death as long as it was legitimately connected to the purpose of bereavement leave. She observed at para. 39 that in interpreting the provision:

I cannot help but notice that if the parties had intended that the leave must immediately follow the death, the words “immediately following” or even just “following” would certainly have been the simplest and most obvious choice to reflect that intention. As I stated earlier, the term “in conjunction with” is an unusual choice, and presumably the parties made that choice for a reason. It is reasonable to conclude that the fact that the parties chose language which encompasses a broader spectrum of situations reflects an intention for the benefit to have a broader scope.

At the same time arbitrator Parmar indicated that she was aware that there could be potential misuse where there are no restrictions as to timeliness, but noting that it would have to be a situation where there was no legitimate or rational basis to conclude the timing was not connected to the death for recognized labour relations purposes, such as bereavement, although that purpose is not mentioned in the language in hand which makes no reference either to bereavement or funeral. As she put it: the employer “certainly would be entitled to deny a request for leave where there was no legitimate or rationale basis for the timing of the leave” as she had found it to be a determining issue in one of her own earlier awards: *Durham District School Board and CUPE, Local 218 (Pereira)*, 2013 CarswellOnt 14892 (Parmar).

The Union argues for the same approach, in Mr. Penner contending that the case law discloses an arbitral consensus that specific restrictive language is required when the Employer is wanting to impose limitations to the negotiated provision, unless it is a situation of an employee

seeking something outside the contemplated scope of the Article. As Mr. Penner put it, in my dealing with the temporal limitations sought by the Employer: “it would not be appropriate to impute such language if it is absent from the contract itself and doing so in this instance would contravene Article 37.22 of the Collective Agreement”. It confirms that the arbitrator has no authority to alter or amend any of the contract provisions. The proper interpretation for the use of the word “when”, he submitted, does not denote any time restriction other than the entitlement becomes available when the death of the immediate family member occurs, corresponding with a parallel meaning: “in the event of a death”. The language on its face is broadly worded, no mention of when the leave has to be taken, no mention of a bereavement component, no mention of a funeral having to occur. He also acknowledged that presumably at some point it could be argued that the special leave request was somehow no longer materially connected to a death in the immediate family, which would raise a fact driven issue on that basis. The Union was not about to say that the entitlement was able to be accessed without any such connection.

**Employer Argument:**

The Employer holds to the view that Article 19.02(1)(a) is not ambiguous and can be interpreted on its plain language which is intelligible and leads to its application in the way the Employer has been applying it so as to indeed make it available *when* there is a death of an immediate family member, and as counsel submitted: “that is to say, such special leave is available to an employee at a time that is contemporaneous to – although not necessarily *immediately* following – the death. Although there is no ‘hard and fast’ date beyond which the leave is no longer available to an employee, it would not be reasonable for such leave to be available to an employee many months following the death. Applying this article otherwise would be inconsistent with other provisions in the Collective Agreement and could lead to absurd outcomes.” It would presumably leave room for the Employer assessing the timeliness requirement on an individual case basis,

pursuant to its own guidelines.

Mr. Ishak submitted that inasmuch as interpreting the contract provision lies at the heart of the grievance, it is helpful to consult the guidance provided by the Supreme Court of Canada in *Sattva Capital Corporation v. Creston Moly Corporation*, [2014] 2 S.C.R. 632 in Rothstein J. acknowledging at para. 46 that there has been a shift away from the historical approach in Canada, in that courts are now directed to have regard to the surrounding circumstances of the contract, often referred to as the factual matrix, and stating at para. 47:

[47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum: there is always a setting in which they have to be placed. ... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(*Reardon Smith Line*, at p. 574, *per* Lord Wilber-force)

[47] Relativement au premier changement, l'interprétation des contrats a évolué vers une démarche pratique, axée sur le bon sens plutôt que sur des règles de forme en matière d'interprétation. La question prédominante consiste à discerner « l'intention des parties et la portée de l'entente » (*Jesuit Fathers of Upper Canada c. Cie d'assurance Guardian du Canada*, 2006 CSC 21, [2006] 1 R.C.S. 744, par. 27, le juge LeBel; voir aussi *Tercon Contractors Ltd. c. Colombie-Britannique (Transports et Voirie)*, 2010 CSC 4, [2010] 1 R.C.S. 69, par. 64-65, le juge Cromwell). Pour ce faire, le décideur doit interpréter le contrat dans son ensemble, en donnant aux mots y figurant le sens ordinaire et grammatical qui s'harmonise avec les circonstances dont les parties avaient connaissance au moment de la conclusion du contrat. Par l'examen des circonstances, on reconnaît qu'il peut être difficile de déterminer l'intention contractuelle à partir des seuls mots, car les mots en soi n'ont pas un sens immuable ou absolu:

[TRADUCTION] Aucun contrat n'est conclu dans l'abstrait : les contrats s'inscrivent toujours dans un contexte. [...] Lorsqu'un contrat commercial est en cause, le tribunal devrait certes connaître son objet sur le plan commercial, ce qui présuppose d'autre part une connaissance de l'origine de l'opération, de l'historique, du contexte, du marché dans lequel les parties exercent leurs activités.

(*Reardon Smith Line*, p. 574, le lord Wilberforce)

In setting out the Employer's current position, Mr. Ishak cited the January 9, 2018 explanatory letter to the Union's Service Officer, Avery Parle, from the Deputy Minister of Finance, David Stewart, as he was then. In arriving at his interpretation, the Deputy Minister consulted the Webster's New Collegiate Dictionary definition for the word "when", namely: "at or during a time that"; "just at the moment that"; or "in every or any time that", and setting out his position as follows:

It is clear that the plain meaning of this Article is that the Special Leave is entitled *when there is a death* as the qualifier for the leave. The use of the word **when** qualifies the entitlement to Special Leave at the time of the occasion leading to entitlement; i.e. upon the death of an immediate family member.

Broadening the scope of the timeline, or eliminating the timeline consideration all together, is not within the range of acceptable outcomes for interpreting this leave entitlement. Without a time limit related to the death of an immediate family member, access to this leave would only be limited by the number of immediate family members, whom have passed away, that the employee can positively verify in support of this leave. Such an assertion does not comply with the standards of reasonableness.

**When** has not been defined by Article 2 of the Collective Agreement, and the implications of amending the plain meaning of this term could have a significant impact on the interpretation of other Articles in the Collective Agreement where **when** is used.

Mr. Ishak submitted special leave is "leave that is confined and restricted in its use", stating the Employer's position that the wording of Article 19.02(1)(a) and being included in the special leave category, "are evidence that the purpose of the Article is to offer a reprieve from work to the employee at the difficult time immediately contemporaneously to the death of an immediate family member", and that "boiled down to his essence, the Article states: *upon* the death of an employee's immediate family, the Deputy Head *shall* grant special leave for a period of up to five consecutive working days..." following the triggering event of an immediate family member's death. The fact there is no numerical time limit, he submitted, does not mean that the language is without time

qualifiers to consider. As he put it: “the word ‘when’ (or ‘at the time of’) results in the leave needing to be taken contemporaneous to the triggering event. The absence of such a contemporaneous occurrence could otherwise lead to absurd results”, i.e., the possibility of being entitled to such leave at any time in the future, as Deputy Minister Stewart feared, possibly even years following the death of the family member if it can be taken without any timeliness limitation. In that there is no express reference in the language to “bereavement leave”, he submitted that Article 19.02 can more accurately be characterized as “special leave in the event of a death in the employee’s immediate family”, therefore it was said not to be helpful to consider cases in the nature of examining the purpose of bereavement leave. Further while the special leave credits no doubt are earned under Article 19.01(1), the employee must still satisfy the eligibility parameters, which would mean drawing upon this leave for purposes of a death in the immediate family in some contemporaneous fashion, and should not be equated with vacation leave which is accrued at a different rate per hour paid, and the rate of accrual for specially does not increase in relation to service. Special leave confers an additional benefit to employees, as an additional bank of paid leave, not to be taken as a substitute for vacation leave.

Mr. Ishak submitted that while there were “myriad articles” in the collective agreement that use the word “when” in the same way as the Employer submits, it should be used with respect to Article 19.01(a) which is to say covering an event giving rise to one’s contemporaneous entitlement/rights under a specific contract provision. He cited Article 19.01(b) which provides special leave, “when an employee is to be married”, not specifying a date but presumably it should be interpreted to be contemporaneous to the triggering event, i.e., the marriage. He cited other articles such as Article 17.01 referencing what occurs with respect to certain entitlements “when the employment of an employee...is terminated”, presumably meaning that the triggering event is said

to be the termination. He referenced Article 18.03 which states: “Where in respect of any period of vacation leave an employee”: (a) is granted special leave, when there is a death in his/her immediate family as defined in Article 19; or is granted special leave with pay because of illness in the immediate family as defined..., or is granted sick leave on production of a medical certificate”, the period of vacation is displaced as described therein, to be added or reinstated for use at a later date. By the Employer’s interpretation, vacation is displaced by the special leave being granted contemporaneously to vacation, although there is no express mention in Article 19 of the special leave to be granted when there is a death in the immediate family having to be taken contemporaneous with the triggering event. Counsel referenced other Articles where the conjunctive/connecting word “when” is used such as Article 17.02 referring to “when an employee is in receipt of an extra allowance and is granted leave with pay”, and Article 17.05 which refers to required reimbursement for reasonable expenses “when any period of vacation leave, special leave or time of in lieu of overtime has been approved and that employee’s leave is cancelled, changed or reduced prior to being taken...” These provisions in using “when” were said to require immediacy or these contemporaneous application to the triggering event, as so should Article 19.02(1)(a).

Mr. Ishak went on to submit in his written argument in dealing with the context of this grievance:

.... we are not dealing with a future event, we are not dealing with a date that is known ahead of time, and it is much more difficult to plan for circumstances surrounding the death of an immediate family member than it is to plan for a financial transaction occurring before a known work-travel trip. The Article only comes into play once the death has occurred.

It would be unwieldy – and possibly inappropriate, or unusable – for the Collective Agreement to be too prescriptive about timelines surrounding the use of these leaves. Events such as the death of an immediate family member are difficult events for those involved and do not lend themselves well to being confined by prescriptive timelines. A one-size-fits-all, set number/expiration date would not be appropriate in every circumstance. For instance, if the Article stated that the leave had to be used

within six days of the death, that can lead to unsuitability for the employee who only learned of the death of an out-of-town family member on the seventh day following the death. The Article could also set out a matrix of considerations and eligibility criteria for the Employer to consider before granting such a leave, but again, and particularly against the backdrop of the tragic nature of the death of an immediate family member, the Article will become unwieldy in its length and intelligibility if it contained too many criteria, considerations and subclauses.

In short, contemporaneous relief for the employee facing a difficult event such as the death of an immediate family member is best served by the wording of the current article: short, clear, and absent any “hard and fast” deadlines.

Mr. Ishak in his submission pointed out that there were some articles in the Collective Agreement which mentioned “reasonable notification” in connection with various contractual responsibilities, which he referred to as the “reasonableness articles”. In disagreeing with such a formalized application of Article 19.02(1)(a), stating “the word ‘when’ conveys slightly greater immediacy than the words ‘reasonable notification’ . In other words, the Reasonableness Articles are applicable during a larger time frame than the Article” which the Employer views as having not just a triggering mechanism but a temporal limitation defined by the word “when”. and as he put it “the article is written in a way to provide relief to the employee at a time that is contemporaneous to the death – and not necessarily at a time that is more distant from the death”.

Mr. Ishak, in his written argument, distinguished the Union’s cases on the basis of factual differences in the contractual wording, or in the circumstances of the claim. Pointing out that the Employer is not taking the position that the special leave must immediately follow the death as was the position taken by the employer in the *Ross Memorial Hospital* case, nor has the Employer made the same kind of arguments as the employer in the *Canada Post Corporation* case, which he submitted was distinguishable in that the provision was explicitly limited at least by the timing of the funeral.

In *Saputo* the arbitrator was considering whether the period of special leave must include attendance at a funeral, the issue not being with respect to how contemporaneously with the death the leave should be taken.

**Conclusion:**

In my firstly looking at the dictionary meanings for some guidance, having noted the Deputy Minister's reference to Webster's Ninth New Collegiate Dictionary as supporting the Employer's position as to the limited temporal meaning of "when", I do not find that looking for a difference in the meaning between "when" and "where" is helpful in the labour relations context in dealing with the special leave entitlement under Article 19.01(2)(a). Nevertheless I too consulted Webster's New Collegiate Dictionary (an older edition), and observe that there are several descriptions covering the various described uses for the conjunctive /connective "when", which include:

- *just at the moment that:* < stop writing when the bell rings
- *at or during the time that:* WHILE < when he listens to music
- *at what time:* < when will he return
- *in the event that:* < IF when a contestant is disqualified; when he disobeys the rules
- *considering that:* < why use water at all when you can drown in it.

There is no doubt that the use of the term "when" includes referencing something needing to occur, here meaning the death of an immediate family member, giving rise to the right to access a negotiated entitlement. I accept that in the labour relations context there would be no distinction in the usage of "when" as opposed to "where" for purposes of applying Article 19.02(1)(a). Either way, the language speaks to an event having to occur in order for the entitlement to crystallize. The Parties chose to introduce the entitlement with a when-clause to cover the contingency of a death occurring in one's defined immediate family. Notably, the contract language does not set out any other express limitation or restriction unlike many collective agreements which narrowly set out the



usage parameters, or at least less broadly. While one's immediately or almost immediately, applying for the entitlement upon the death occurring may be considered by the Employer to be appropriate, the contract language does not support that interpretation. The language is silent on any such limitation and the question would be whether it is permissible to import restrictive words into the Collective Agreement as sought by the Employer, although even it struggles with the idea of importing too strict temporal limitations, presumably wanting to exercise application guidelines through a discretionary approach, case by case.

I also have difficulty with the Deputy Minister's assertion that in application, the Union's view of the special leave entitlement would only be limited by the number of immediate family members who have passed away at some point in the past, raising the possibility of absurd results, a matter of speculating about what the Employer views as possible future ramifications. The Union has pointed to the special leave accumulation language in that Article 19.01(1) allows for one earning credits up to a maximum of 30 days at the rate of 0.023077 hours for each hour that an employee receives pay. This is to say that an employee is able to accumulate some 46 hours or 5¾ days per year were one to have an eight hour workday. At the same time, one observes, Article 19.02 in its various enumerated paragraphs and subparagraphs contemplates numerous other relevant family circumstances for granting special leave, such as where an employee is to be married; where a member of one's immediate family requires surgery or becomes ill and the employee is required to care for his/her dependents, or care for the sick person; where a member of the immediate family becomes seriously ill; where an employee needs time to deal with serious household domestic emergencies; or where there have been transportation problems caused by weather where the employee makes every reasonable effort to report for duty; and for serious community emergencies where the employee is required to render assistance; also for the birth of a child or adoption of the

child; or to attend the funeral of a relative expressly referenced as niece, nephew, aunt or uncle. Given the range of special leave entitlement events, covering serious personal and family exigencies which might occur at any time during one's working career, and the limited accumulation figure, it would be difficult to accept any speculation that employees would want to go back years to use the entitlement for long dead relatives. There is no evidence pointing in that direction. Were one to invoke the vagaries of speculation, a better likelihood might well be that an employee would want to protect his or her access to the entitlement to cover serious family issues which might arise.

My review of the case law submitted at hearing persuades me that dealing with language covering the deaths of others, here relating to immediate family members as defined, there is a general consensus that arbitrators should be careful not to import confining temporal limitations where those kinds of restrictions have not been negotiated into the leave provisions. It is noteworthy that Article 19.02(1)(a) makes no reference to bereavement nor even to a funeral having to occur, and no language indicating that the special leave must be taken contemporaneous to the death. It does reference the triggering event, namely: "when there is a death in the employee's immediate family". However, as with arbitrator Parmar in *Ross Memorial Hospital*, I appreciate the concern that employees could potentially attempt to misuse such leave were there to be no limitations to be applied, she having noted that there should be awareness as to the legitimate basis and rationale for the timing of the leave. Arbitrator Adams decades ago in *Central Precision* recognized that the leave needs to be "reasonably related" to the death. I do not see that this broad view of such language, where there are no specific restrictions, is disputed in any subsequent arbitration awards which were included for my reference.


In my view, on reviewing the crucial qualifying words in Article 19.02(1)(a): "when there is a death in the employee's immediate family", thereby providing access to paid special leave

without there being any additional limiting language except for defining the immediate family group and stipulating consecutive days, it is a matter of recognizing that special leave in the usual labour relations context should have a valid and subsisting connection at the time it is taken to the death having occurred. It should be recognized that the time off work is in connection with the death for an activity related thereto and not being a situation of looking to extend or displace vacation for unrelated reasons. It is not so much a matter of applying a temporal connection as such, as there needing to be a subsisting factual connection, although the passage of time presumably could play a role in looking at the rationale behind one's accessing the special leave entitlement. It is notable that the language does not include any requirement to attend the funeral, or even any reference to bereavement both of which might well suggest a closer timeliness aspect than the broadly worded language the Parties have chosen.

In reaching this conclusion, I expect that it bears observing that societal norms now include celebrations of life and other ceremonies held weeks or even months following the death occurring in an employee's immediate family, and also that it might well take some time to organize family assemblages following the loss to deal with family responsibilities associated with the death. The problem with applying the concept of the special leave having to be reasonably contemporaneous, as suggested by the Employer, is that it would inevitably lead to management setting its own temporal guidelines to be imposed on employees which is not supported on the contract language. In terms of dealing with this policy matter, I would say that an employee at least can be imposed upon to support the timing of the special leave as having a legitimate basis, a realistic and rational connection to the death of the immediate family member without the language suggesting any other guidelines.

All in all, this policy grievance is successful and requires a declaration to hereby issue that the language of Article 19.02(1)(a) does not include the temporal guidelines as determined by the Employer to be imposed upon employees who qualify by reason of there having been a death in their immediate family, and that were an application to be denied it would have to be on the basis of the time sought being without any legitimate or material connection to the death, no supportable rationale. I remain seized were any further directions to be required.

DATED this 2<sup>nd</sup> day of June, 2020

A handwritten signature in black ink, consisting of several vertical strokes followed by a horizontal line and a long, sweeping tail.

Tom Jolliffe, Q.C.