IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE NORTHWEST TERRITORIES POWER CORPORATION

(the "Employer)

- and –

THE UNION OF NORTHERN WORKERS

(the "Union")

Re: Vacation Leave Grievance

AWARD

BEFORE:

John Moreau, Q.C. **- Arbitrator**

IN ATTENDANCE FOR THE UNION:

Blake Storey **- Counsel**
Anne Marie Thistle **- Advisor**
Avery Parle **- Witness**
Darren Hazenberg **- Witness**

IN ATTENDANCE FOR THE EMPLOYER:

Michelle Thériault **- Counsel**
Sharmayne Horton **- Witness**

The Hearing was held virtually on August 24, 25, 2021

AWARD

INTRODUCTION

This grievance centres on whether the Employer has breached article 15.02 by responding verbally to employee leave requests for vacation leave. The Union maintains that a plain reading of the collective agreement requires the Employer to insist on written vacation leave requests and seeks a declaration to that effect. The Employer submits that the collective agreement does not preclude it from responding to an employee's verbal request for vacation leave with a verbal response. The Employer maintains that Article 15.02 only requires a written response when an employee makes a request in writing for vacation leave.

The Employer also raised a preliminary objection to the grievance. The Employer maintains that my jurisdiction is limited, under the submission to arbitration, to only inquire into whether a vacation leave policy is required pursuant to article 15.02. The Employer submits that I have no authority to expand the scope of the grievance to deal with the issue of written leave requests, given the absence of any reference to it in the grievance documents.

An agreement was reached with the Union and the Employer to lead evidence and provide submissions on both the Employer's preliminary objection and the merits involving the alleged breach of article 15.02. The parties provided several authorities in support of their submissions, some of which are referred to herein.

The Union called Service Officer Avery Parle as well as Darren Hazenberg, an experienced Powerline Technician and a member of the Union's Executive Committee. The Employer responded by calling Sharmayne Horton, Human Resources Specialist.

COLLECTIVE AGREEMENT PROVISIONS IN DISPUTE

ARTICLE 15
VACATION LEAVE

15.02 Granting of Vacation Leave

In granting vacation leave with pay to an employee, the Employer shall, subject to unforeseen emergencies or unusual operational requirements of a temporary nature, make every reasonable effort:

(a) not to recall an employee to duty after he/she has proceeded to vacation leave;

(b) (i) To grant the employee vacation leave during the period requested, providing the employee completed the appropriate vacation leave application form and submitted it to the Employer;

(ii) Vacation leave requests for time off between June 1 and September 30 must be submitted by February 28, after which time they will be reviewed and responded to within two weeks.

Vacation leave requests for time off between December 1 and January 7 must be submitted by July 31, after which time they will be reviewed and responded to within two weeks.

(iii) to grant employees their vacation preference and in situations where two (2) or more employees express a preference for the same period of vacation leave, length of continuous service will prevail. If an employee applies to change the date of his/her initial vacation leave request after it has been approved, or submits his/her vacation leave requests for periods specified in 15.02 (b)(ii) after the dates specified in 15.02 (b)(ii), and such request conflicts with a leave request of another employee, length of continuous service will no longer be the determining factor in granting the amended leave application.

(c) to reply, as soon as possible in writing, to an employee's written vacation request but in any event not later than two (2) weeks from the date of receipt, except where an employee requests vacation leave for the periods specified in 15.02(b)(ii), in which case the reply will be within two (2) weeks of the deadlines set out in 15.02(b)(ii);

…..

ARTICLE 31
GRIEVANCE PROCEDURE

31.18 No proceedings under this Article are invalid by reason of any defect of form or any technical irregularity.

31.19 Arbitration

Where a difference arises between the parties relating to the interpretation, application or administration of this Agreement including any question as to whether a matter is arbitrable, or where an allegation is made that a term or condition of this Agreement has been violated, either of the parties may, after exhausting the grievance procedure in this Article, notify the other party in writing within twenty-one (21) days of the receipt of the reply at the Final Level, of his/her desire to submit the difference or allegation to arbitration under Section 43 of the Public Service Act.

GRIEVANCE DOCUMENTS

a) Grievance

GRIEVANCE FORM/FORMULAIRE DE GRIEF

Case #: 21-P-NTPC-02729 **Employer Case #:** **Date of Issue:** 02-17-2021
Filed By: Avery Parle **Filed For:**
Employer: Northwest Territories Power Corporation **Location:**
Email to Director/Supervisor: **Phone #:**
Sup. Email:
Nature of Grievance: Leave

Alleged Article(s) Violated

Refer To: ARTICLE 15 - VACATION LEAVE Sub.:
..., though not exclusive of other articles that will apply to the facts as determined.

I/We the undersigned claim that: Je/Nous soussigne(e)(s) affirmme(ons) que:

The Union of Northern Workers hereby files this Final Level grievance on behalf of all affected members in accordance with Article 31 of the Collective Agreement. The Employer is in violation of Articles 15 and any other related Articles of the Collective Agreement, pertinent Legislation, and/or Regulations, Policies and past practices.

Therefore I/We request that: Je/Nous demande(ons) que:

1. A declaration that the Employer has misinterpreted, misapplied, and/or violated the Collective Agreement;

2. To be made whole in all respects without restriction, including being awarded interest on monies owing or made part of redress, and further to be awarded monetary damages.
3. Any other remedy that is deemed just to address the concerns that present and as are disclosed through the evidence the Union will adduce up to the point of referral to arbitration."

4. That the employer immediately develop and implement a comprehensive policy on the granting of annual leave.

5. That the Employer seek no further retaliation or other action against our members for the Union having exercised its right to grieve this matter on their behalf.

6. That the employer make all affected members whole in terms of compensation, including but not limited to any loss of wages (inclusive of overtime, where applicable), benefits, pay increments premiums or any other items deemed just and appropriate under the circumstances, and that compensation be made with the addition of interest, compounded daily and calculated at prime plus 2%.

Details

During a discussion regarding granting of annual leave between employer representatives and a representative of the union on or around January 19th, 2021 the employer representatives assured the union that it following the Collective agreement when granting leave. Despite this the employer claimed not to have a policy except but to generally follow the Collective Agreement.

The union specifically asserts that other issues may present and it places the Employer on notice that as the union becomes aware of such it shall put the Employer on notice, either through the process of this grievance up to the point of referral to arbitration or through the filing of a further grievance. The union maintains that where those other issues are so determined the union does not regard itself restricted.

Step 1 For Employer : Date Due: 3-3-2021 Step Skipped
Reply **Date:** 02-17-2021 **Skip to Next Step**

Action:
Step 2 For Employer : Date Due: 3-3-2021 (0 Days Left)
Step 3 For Employer : Date Due: 4-14-2021 Step Denied

Reply **Date:** 03-18-2021 **Step Denied**

Action: Step denied received by Avery from Sharmayne via email

Step 4 For Employer : Date Due: 04-06-2021 (0 Days Left)

Complaint Discussed with Director/Supervisor (see above):	No/Non
Complaint Date	02-12-2021
Signature(s) Grievor(s)	**Date: M_____-D_____-Y_____**
Signature Union Representative	**Date: M_____-D_____-Y_____**

THE UNION RESERVES THE RIGHT TO UTILIZE ANY APPLICABLE ARTICLE OF THE CURRENT COLLECTIVE AGREEMENT

b) Grievance Covering Letter

Submitting at step 3
17 February 2021
Ms. Erin Dean
Director, Human Resources
Northwest Territories Power Corporation

RE: Grievance #21-P-NTPC-02729-Granting of Leave/Lack of Policy
Dear Ms. Dean,
The Union of Northern Workers hereby files this Final Level grievance on behalf of all affected members in accordance with Article 31 of the Collective Agreement. The Employer is in violation of Articles 15 and any other related Articles of the Collective Agreement, pertinent Legislation, and/or Regulations, Policies and past practices.

During a discussion regarding granting of annual leave between employer representatives and a representative of the union on or around January 19th, 2021 the employer representatives assured the union that it following the Collective agreement when granting leave. Despite this the employer claimed not to have a policy except but to generally follow the Collective Agreement.

The union has recently become aware that the employer lack of a policy on the granting of leave is causing confusion creating issues for UNW members applying for leave.

The Union of Northern workers alleges that the Northwest Territories Power Corporations lack of a policy regarding granting of annual leave does not satisfy either rule 2, 3 or 6 of the KVP test. A description of the KVP test can be found below and was extracted from the arbitrators decision on UNW-GNWT POLICY GRIEVANCE (# 10-E-01189).

The KVP test from POLICY GRIEVANCE (# 10-E-01189):

> *Under the collective agreement in general and article 7.01 in particular, management has the right to establish workplace rules (Canadian Labour Arbitration (4th), section 4:1520).*
>
> *To be enforceable, such rules must comply with the tests set out in KVP, a 1965 arbitration award that has been widely adopted by arbitrators and recognized by courts. Under KVP, "a rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following prerequisites:*
>
> *1. It must not be inconsistent with the collective agreement.*
> *2. It must not be unreasonable.*

3. It must be clear and unequivocal.
4. It must be brought to the attention of the employees affected before the company can act on it.
5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
6. Such a rule should have been consistently enforced by the company from the time it was introduced."

The union contends that the Employer has been negligent in developing and applying a comprehensive policy on the granting of annual leave. Principle 2 is violated by the fact it is unreasonable to not have a policy for such an important part of the terms and conditions of employment. This creates an air of confusion and can only lead to issues with actually ensuring the terms and conditions of employment under the Collective Agreement are met.

The lack of a policy violates principle 3 of the KVP test as it cannot be clear and comprehensive if it does not exist.

Finally it is near impossible to ensure a rule is consistently enforced by a large corporation like the employer without such a policy. This is clear from the employers own admission that departments determine their own ways of granting leave and that it is a patchwork which could never be consistently enforced. This violates principle 6.

The union specifically asserts that other issues may present and it places the Employer on notice that as the union becomes aware of such it shall put the Employer on notice, either through the process of this grievance up to the point of referral to arbitration or through the filing of a further grievance. The union maintains that where those other issues are so determined the union does not regard itself restricted.

If you would like to discuss please feel free to give me a call or contact me via email,

Avery Parle
Service Officer
Union of Northern Workers
Yellowknife NT
867-873-5668 (ext 236)

c) Grievance Response

March 18, 2021

Dear Mr. Parle:

Re: Final Level Grievance – 21-P-02729 – Granting of Leave/Lack of Policy

I have received and reviewed the grievance submitted February 17, 2021. The Union alleges that the Employer has been negligent in developing and applying a comprehensive policy on the granting of annual leave.

The Employer follows the Collective Agreement that outlines the terms and conditions of the Leave Article 15 and asserts that a policy on leave is not required. We believe that following the Collective Agreement is reasonable, the article within the Collective Agreement is clear and unequivocal, and that we are consistent when granting leave.

There has been no violation of the Collective Agreement and therefore this grievance is denied.

Sincerely,

Noel Voykin,
President & CEO
Human Resources

SUMMARY OF THE EVIDENCE

Mr. Parle has been a Service Officer with the Union since July 2017. He was approached by Darren Hazenberg in January 2021 about concerns over the vacation leave process. Mr. Hazenberg indicated to Mr. Parle that he was told by his Manager that his vacation leave request for time off in December 2020 would be approved and subsequently learned that it was denied. That led Mr. Parle to contact Ms. Horton on January 14, 2021 and express to her that the absence of a vacation leave policy was causing concerns in the membership, and in particular with Mr. Hazenberg. Mr. Parle's email to Ms. Horton reads as follows:

From: Avery Parle <parlea@unw.ca>
Sent: Thursday, January 14, 2021 1:53 PM
To: Sharmayne Horton <SHorton@ntpc.com>
Subject: Granting of Vacation Leave
Email originated outside NTPC.

Does the employer have any written policies on the granting of vacation leave you can provide me. Can you describe the process for how an employee would apply for leave and how the employer goes about granting or approving it?
Thanks,

Avery Parle
Service Officer
Union of Northern Workers
Yellowknife NT
867-873-5668 (ext 236)

Ms. Horton responded the next day as follows:

From: Sharmayne Horton <SHorton@ntpc.com>
Sent: Friday, January 15, 2021 1:59 PM
To: Avery Parle <parlea@unw.ca>
Subject: RE: Granting of Vacation Leave

I am free Tuesday except 11-2pm. I'm not sure that im the best one to have a conversation with though. Darren has been communicating with the Director, HR and his manager and another HR Specialist on the topic and it sounds like that is continuing. I don't have any policies to offer…it sounds like he may have wanted/thought that there is only be one way for leave to be approved (through the system) and that is not the case. He indicated that he understood that in one email with the HRS but then it doesn't seem like he is satisfied in his correspondence with the Director.

Mr. Parle emailed Ms. Anne Marie Thistle, Executive Director of the Union, on February 17, 2021 and explained the circumstances. He noted that the Employer was aware of Mr. Hazenberg's inquiry about the vacation leave issue and that he had indicated to Ms. Horton in a conversation on January 19, 2021 that the Union had advised the Employer that *"…the union would prefer to see an actual policy".* Mr. Parle then

proceeded to file the current grievance on February 17, 2021 along with the above covering letter.

Mr. Hazenberg testified that he began his employment with the Northwest Territories Power Corporation ("NTPC") in 1997 and resides in Yellowknife. Apart from performing his duties as a Powerline Technician, he also supervises crews and provides customer service. His schedule varies and includes having to be away from home for several weeks at a time.

Mr. Hazenberg testified that he applied for leave for the Christmas period (between December 15, 2020 and December 24, 2020) on November 12th or 13th, 2020 through the Employer's software system known as "Penny Soft". He recalled having a discussion with his Manager about the status of his leave request a few days later. His Manager indicated to him during their conversation that approval of his vacation leave request should not be a problem as only one other Powerline employee had applied for vacation leave prior to Mr. Hazenberg's vacation request.

Mr. Hazenberg testified that he never received an actual notice on the Penny Soft system that his vacation leave request was approved. He did, however, receive an email from his Manager the day he was supposed to commence his Christmas leave indicating that his vacation leave request had been denied. He understood up until that time that his request was in fact approved given that there was no indication in the Penny Soft system that it was declined.

Mr. Hazenberg understood that the person who received vacation approval for the period Mr. Hazenberg had requested in November 2020 required extra time off because of the 14-day COVID isolation rule. Mr. Hazenburg said he was very upset when he received the email denying his leave and it caused a hardship to his family.

Mr. Hazenberg explained there are several practices in place when applying for vacation leave. He described that one way was through the time sheet request form found in the Penny Soft system, which is the option he used for his Christmas 2020 leave request. Other accepted practices included: verbal requests for leave, email requests for leave; or, fax requests for leave.

Mr. Hazenberg emphasized the shortcomings of the time sheet option through the Penny Soft system. He noted in that regard that the system did not indicate the date the actual vacation leave request was made. Further, there was no group calendar in the system showing the leave requests submitted by other employees for the same vacation time. Mr. Hazenberg stated that it was confusing and frustrating for advance planning purposes when not everyone's leave is posted in a common calendar.

Further, Mr. Hazenberg noted in particular that those employees who make verbal vacation requests are not necessarily required to input their requests into the Penny Soft system. Employees often rely on their Manager to input their verbal vacation requests. In the end, Mr. Hazenberg was of the view that a process should be adopted which is the same for all employees. In his view, inputting all vacation leave requests into the Penny

Soft system would minimize the risk of the kind of disappointment he experienced when he was denied his vacation leave request.

Ms. Horton is a Human Resources Specialist with 19 years of service with the Employer. Her duties include administering pay and benefits as well as related labour relations matters.

Ms. Horton explained that the Employer has some 215 positions operating out of 5 main offices and 26 plants in the NWT. Each of the 26 plants is staffed by one employee, as well as a casual employee when required. All employees report to one of 40 designated Managers. She estimated that about fifty per cent of the workforce operate out of the same location as their designated Manager. That figure drops to less than fifty per cent when employees are required to travel while on duty. Ms. Horton confirmed that Managers are authorized to grant vacation leave for those employees under their supervison.

Ms. Horton confirmed that employees may request vacation leave in writing in one of four ways: fax, email, text message or through the Penny Soft time-sheet system. Ms. Horton explained that the choice of requesting leave through these methods allows for flexibility, particularly for those employees who may be technically challenged and have difficulty navigating a vacation request through the Penny Soft system. Ms. Horton testified that the Employer responds to all written requests for vacation leave in the same

manner it was requested. For example, if a written request is made by fax, the Manager will similarly respond by way of fax.

Once a vacation leave request is approved for an employee, the date of the leave period will be entered into the Penny Soft system with an orange colour highlight, along with a specific code number which is used to identify vacation leave in the system. The approved leave then appears on the Leave Calendar within the Penny Soft system. Only individuals in a specific work group, or their Manager, can view the Leave Calendar. The Leave Calendar does not show the approved leave for all employees.

Ms. Horton was asked about the matter of vacation leave being requested verbally. She testified that the expectation is that employees will apply for vacation leave in writing, but verbal vacation requests are also permitted. In the case of a verbal request, the Manager will similarly respond verbally and either approve or deny the request. The rationale for allowing verbal requests, according to Ms. Horton, is that employees, particularly those in the remote communities, should not be impeded from booking time off simply because of a processing requirement of the vacation leave request. In her view, the key factor is to allow the employee easy access to their request for vacation leave.

Ms. Horton underlined that the existing system, which permits verbal vacation leave requests, has been in place without complaint since her tenure began some 19 years ago under the same collective agreement language found in article 15.02. In her

view, Mr. Parle's request for a vacation leave policy as set out in the grievance is unnecessary because the current practice is working properly.

SUBMISSIONS OF THE EMPLOYER ON THE PRELIMINARY OBJECTION

The Employer submits that the issue raised by the Union in the grievance procedure is the absence of a policy on vacation leave.

The Employer cites at the outset the North West Territories Supreme Court decision of Justice J.E. Richard in *Government of Northwest Territories v Northern Workers Public Alliance of Canada* 2011CarswellNWT 41. In that case the Union argued on appeal that the issue of union representation was inherent in a dismissal without just cause grievance. The Court disagreed and found as follows:

> [17] It cannot be said that a breach of Article 37.07 (d) union representation rights goes to the essential character or constitution of a grievance against dismissal without just cause, i.e. it is not inherent in such a grievance.

The Employer maintains in this case that it cannot be reasonably understood from a reading of the grievance that the Union was requesting anything other than the Employer implement a vacation leave policy. The Employer submits that the Union is essentially attempting to file a new grievance at arbitration which is different from the one that has been processed through the grievance procedure. See: *Greater Sudbury Hydro Plus Inc. v. C.U.P.E., Local 4705*, 2003 CarswellOnt 5849; *OPSEU and Ontario (Ministry of Community Safety and Correctional Services),* 2018 CarswellOnt 18001; *Children's Aid Society of Toronto and CUPE, Local 2316*, 2020 CarswellOnt 2565

The Employer further maintains that the issue of verbal vacation requests does not form any part of the grievance, nor is there any reference to it elsewhere in the conveyance of the grievance. The only issue raised in the grievance was an absence of a policy pursuant to article 15.02 to which the Employer, in its Final Level grievance response, asserted *"…that a policy on leave was not required".* This was the only issue that required a response. The Employer also pointed out the lengthy analysis in the grievance covering letter regarding the absence of a policy, which included a reference to the *KVP* decision. The Union's submission in relation to the requirement for a written leave request under article 15.02 is neither expressly nor inherently found in the grievance or related documents. As such, the issue of whether leave requests must be in writing under article 15.02 falls outside the scope of the arbitrator's jurisdiction and is inarbitrable.

SUBMISSIONS OF THE UNION ON THE PRELIMINARY OBJECTION

The Union submits that the Employer's claim that the grievance is inarbitrable is without foundation. The Employer was well aware of the issue in dispute as a result of the complaint of Mr. Hazenberg and that the Union took issue with the verbal leave request process. The scope of the grievance concerned the application of article 15.02 which was clearly referenced in the correspondence between Mr. Parle and Ms. Horton as well as the grievance documents and the Employer's grievance response. The Employer took the position in the grievance response that there had been a consistent application of the vacation leave provision. The Employer knew from earlier correspondence and discussions between Mr. Parle and Ms. Horton that the grievance issue involved article

15.02 and its misapplication by the Union, particularly with respect to verbal requests for vacation leave.

The Union cites in support article 31.18 which is clear that proceedings of this kind should not be considered *"…invalid by reason of any defect of form or any technical irregularity".* The Union notes that the Ontario Court of Appeal reached the same conclusion in *Blouin Drywall Contractors Ltd and United Brotherhood of Carpenters and Joiners of America, Local 2486 (1975) O.R. (2d) 103* where it states *at p. 4*:

> The company contends that the grievance must be strictly construed and read so that it is not a claim by the union for any loss which it has suffered, but rather for a loss suffered by non-employee union members. I neither regard the grievance as being restricted to such an interpretation nor do I agree that the grievance must be so strictly construed. Dealing first with the latter -- save as in art. 7.03 there is nothing in the contract which requires that the grievance or dispute be defined with precision in writing. *No doubt it is the practice that grievances be submitted in writing and that the dispute be clearly stated, but these cases should not be won or lost on the technicality of form, rather on the merits and as provided in the contract and so the dispute may be finally and fairly resolved with simplicity and dispatch.* (emphasis added in italics)

The Union also cites in support *St. Lawrence Lodge v. Canadian Union of Public Employees, Local 2107* 2013 CarswellOnt 16532

> **41** Similar considerations are apparent in the decision on point (also referred to in *City of Windsor, supra*) of Arbitrator Dissanayake in *Re Greater Sudbury Hydro Plus Inc. and C.U.P.E., Local 4705 (2003), 121 L.A.C. (4th) 193* who at p. 198 describes the "two countervailing principles" to weigh in resolving disputes concerning the proper scope of a grievance. The first principle recognizes that even where an issue is not clearly raised or "not articulated well" in the written grievance, applying a liberal reading of the grievance an arbitrator ought to take jurisdiction over the issue "despite any flaws in form or articulation" where it can be said to be "inherent" within the dispute. But the countervailing principle is that an arbitrator ought not, "in the guise of "liberal reading", permit a party to raise at arbitration an issue which was not ***in any manner, even inherently***, joined in the grievance filed" (emphasis added). It is also said that failure to follow this countervailing principle would "defeat the very purpose of the grievance and arbitration procedure", which is intended to give the parties the opportunity to discuss (and hopefullyresolve) the dispute between them.
>
> **42** The foregoing authorities indicate the written grievance is not determinative in defining the full extent of the dispute; but rather in ascertaining the scope of the grievance one is

> to consider all of the surrounding circumstances, which is a non-exhaustive list of factors that includes the context in which the grievance arises, the relevant discussions of the parties leading up to and in the course of the grievance procedure, as well as an assessment of whether an issue not explicitly identified in writing or even the subject of oral or written dialogue between the parties is nonetheless implicit or inherently joined with the grievance filed, applying a broad prospective in that analysis.

The Union accordingly submits that the allegation the Employer has violated article 15.02 by permitting verbal vacation leave requests is within the scope of the grievance and consistent with the view that grievances should be liberally construed in order to deal with the real issue between the parties.

DECISION ON THE PRELIMINARY OBJECTION

One of the leading authorities on the scope of an arbitrator's jurisdiction in the NWT is the 2011 Northwest Territories Supreme Court decision of Justice Richard, cited by the Employer, where he highlights the importance of the steps in the grievance procedure in resolving disputes in a provision similar to article 31.19 found in the current collective agreement:

> **7.** Article 37 of the collective agreement between these parties sets out a regime for the resolution of disputes. Article 37 describes different categories of grievances, establishes a first level and a final level as steps in the processing of grievances, sets timelines for the presentation of grievances, sets timelines for the employer to reply to grievances at each of the levels, provides for the participation of the union in the processing of an employee's grievance, etc. Where the difference that has arisen between the parties has not been resolved to the satisfaction of a party at the final level of the grievance process, that party can refer the unresolved dispute to arbitration, pursuant to Article 37.19:
>
> > 37.19 Where a difference arises between the parties relating to the interpretation, application or administration of this Agreement including any question as to whether a matter is arbitrable or where an allegation is made that a term or condition of this Agreement has been violated, either of the parties may, *after exhausting the grievance procedure in this Article*, notify the other party in writing

> within twenty-one (21) days of the receipt of the reply at the Final Level, of his/her desire to submit the difference or allegation to arbitration under the Public Service Act.

Justice Richard, as noted in many of the authorities cited by the parties, underlines the importance of maintaining flexibility in the processing of grievances and yet ensuring that the issues being raised arise out of the grievance. He states in that regard:

> **14** Although the value in maintaining a flexible approach to grievances filed before a board of arbitration is readily apparent in so far as the parties are not operating under the same rules of practice that would guide counsel in normal litigation, there is another value that must be kept in mind. The whole process of grievance arbitration, and grievance procedure, is designed to permit the parties at the earlier stages to resolve the dispute between themselves. Hence, collective agreements invariably contain grievance procedure provisions so that grievances are funnelled to an arbitration board only after the parties have had a chance to resolve the matter. It is our view that the comments of Professor Laskin and the decision in the *Re Blouin Drywall* case attempt to accommodate both values. *If the issue raised at the arbitration hearing is in fact part of the original grievance, a board of arbitration should not deny itself jurisdiction based on a technical objection as to the scope of the original grievance. To do so would be to deny the value of flexibility and would be to compel the parties to draft their grievances with a nicety of pleadings. On the other hand, if the issue raised by one of the parties is not inherent in the original grievance, for the board to permit the party to raise that issue as part of the original grievance would be to deny the parties the benefit of the grievance procedure in an attempt to resolve the issue between themselves. In fact, it would be to permit one party to substitute a new grievance for the original grievance.* (emphasis added in italics*).*

What is clear from both the grievance documents is that the key allegation and the basis for the grievance is that the Employer, in the words of the grievance, had not developed a *"…comprehensive policy on the granting of vacation leave"* (Paragraph #4) and were in breach of article 15. 02. The grievance was filed at the Final Level pursuant to article 31 of the collective agreement on February 17, 2021 and the Employer responded on March 18, 2021.

There is no reference however in either the grievance, or the supporting covering letter, to the issue involving the necessity for vacation leave requests having to be in writing. Indeed, the supporting covering letter goes into great detail about the absence of a vacation policy in the context of the *KVP* test. It states in that regard *"…that departments determine their own ways of granting leave and that is a patchwork which could never be consistently enforced. That is a violation of principle 6"*[1]*.*

The Employer's response to the grievance is in keeping with the focus of the Union in the grievance itself and the supporting letter that the Employer was following the collective agreement *"…and asserts that a policy on leave is not required".* The fact that the Employer added that it was following the requirements of the collective agreement when granting leave cannot be read as an acknowledgement, as the Union argues, that it understood there was live issue concerning the manner in which vacation leave can be approved. The Employer's response is consistent with the issue raised in the grievance which is the absence of a leave policy.

The correspondence between Mr. Parle and Ms. Horton leading up to the filing of the grievance does reference an awareness by the Employer of Mr. Hazenberg's concerns regarding his vacation leave. As Ms. Horton put it in an email to Mr. Parle on January 15, 2021 *"…it sounds like he may have wanted/thought that there is one way for leave to be approved (through the system) and that is not the case".* The issue of Mr. Hazenberg's leave and the manner in which leave can be approved in general under

[1] *KVP* principles.

article 15.02, however, was not specifically raised in the grievance itself nor in the covering grievance correspondence. The need for vacation leave requests to be in writing is the critical issue being raised by the Union at arbitration, but there has been no reference to this centrepiece issue in the grievance procedure leading up to these proceedings.

The parties must be in a position to address the issues that remain unresolved after being vetted through the grievance procedure. To put it succinctly in this case, the issue of approval of leave absences other than in writing cannot be read as being inherent in a grievance which focusses on the absence of vacation leave policy. To permit the Union to argue the issue in these proceedings would, in the words of Justice Richard, *"…be to deny the parties the benefit of the grievance procedure in an attempt to resolve the issue between themselves".*

CONCLUSION

The preliminary objection of the Employer regarding arbitrability is upheld. The Union is precluded from expanding the scope of the grievance by raising the issue of verbal requests for vacation leave for the first time at arbitration. To find otherwise, to paraphrase Justice Richard, would amount to substituting one grievance for another.

I would nevertheless urge the parties to address the issue of verbal requests for vacation leave in order to avoid further instances of similar hardship that occurred in this case with Mr. Hazenberg.

John Moreau QC

November 25, 2021