IN THE MATTER OF AN ARBITRATION

BETWEEN:

Canadian Union of Operating Engineers and General Workers

Union

- and -

Baffin Inc.

Employer

AND IN THE MATTER OF a grievance by Mirjana Vujic

BEFORE: Shari Novick

APPEARANCES:

For the Union: Rosemary Tait, counsel

For the Employer: Jeffrey Murray, counsel

A hearing into this matter was held in Hamilton, Ontario on March 27, 2000

AWARD

This arbitration arises from a grievance filed by Mirjana Vujic ("the grievor"), in which she claims entitlement to holiday pay for three statutory holidays that fell during the Christmas / New Year's period.

There are no material facts in dispute. The grievor is a twenty-year employee with an exemplary attendance record. She became ill a few days prior to Christmas 1999, but worked until the end of her shift on December 24th. She was not required to report back to work until January 3, 2000, as the plant was closed during the week between Christmas and New Year's day. Unfortunately, Ms. Vujic was not able to return to work until January 17, 2000 as a result of her illness. The Employer does not question the grievor's explanation that she did not attend work between January 3 and January 17 because she was sick.

Ms. Vujic was not paid holiday pay for Christmas Day, Boxing Day and New Year's Day as a result of her absence on January 3, 2000.

The parties' collective agreement provides for nine paid statutory holidays during the course of the year. It stipulates that employees must have been continuously employed for three months and must have earned wages on at least twelve days during the four weeks immediately preceding a holiday in order to be paid holiday pay. One further condition is enunciated. As the grievor meets the first two requirements, this final condition became the focus of the case. It is set out in article 19.02(c) of the agreement, and requires that an employee -

> (c) ...work the full regularly scheduled day of work immediately preceding and the full regularly scheduled day of work immediately following the holiday.

The Union alleged that another employee who had not completed her shift on a day which preceded a statutory holiday earlier in 1999 had nonetheless received holiday pay. The evidence on this point

was inconsistent, and as it was not ultimately relied on by the Union in its submissions I will not address it.

The Union's argument

Counsel for the Union acknowledged that the language in article 19.02(c) of the collective agreement addressing entitlement to holiday pay is clear and contains no exceptions to the requirement to work both the day preceding and following a statutory holiday. She contended, however, that its strict application in this case leads to a harsh result which unfairly penalizes the grievor. Counsel urged me to find a way to accommodate the grievor's request within the language of the agreement, and asserted that the parties could not have intended that an employee would lose three days of pay because she was too ill to work on one particular day.

Union counsel filed various cases in which holiday pay was awarded to employees, despite the fact that the relevant language in the applicable collective agreement did not expressly permit such payment. These cases set out the following general principles regarding holiday pay:

1. It is an "earned benefit" that forms part of an employee's remuneration package as opposed to a gratuitous payment;

2. It consequently ought not to be denied an employee unless the facts and relevant collective agreement language dictate that result;

3. The purpose of the qualifying requirement in collective agreements that holiday pay be payable only if an employee works on the day or shift preceding and immediately following the holiday is to deter "holiday stretching" (i.e. extending a long weekend one more day);

4. A presumption exists in favour of an employee receiving holiday pay in the absence of any evidence of the employee prolonging their holiday or weekend without the employer's consent.

(See *Re United Packinghouse, Food & Allied Workers, Local 469, and York Farms Division of Canada Packers Ltd.* (1970), 21 L.A.C. 188 (Schiff), *Re T.C.F. of Canada Ltd. and Textile Workers' Union of America, Local 1332* (1972), 1 L.A.C. (2d) 382 (Adell), *Re Galco Food Products Ltd. and Allied Food Workers* (1978), 18 L.A.C. (2d) 220 (Beck), *Re FBI Foods Ltd. and United Food and Commercial Workers International Union, Local 1172-2* (1985), 22 L.A.C. (2d) 157 (Emrich), *Re*

Caressant Care Nursing Home of Canada Ltd. and London & District Service Workers' Union, Local 220 (1987), 29 L.A.C. (2d) 347 (Watters), *Re Rheem Canada Ltd. and United Steelworkers, Local 6868* (1990), 15 L.A.C. (4th) 252 (Whitehead)).

In the cases relied upon by the Union, the employees involved were either on layoff, pregnancy leave or were absent due to compensable injuries and did not work either the day immediately before or after the statutory holiday in question. While none of these situations fell directly within the exceptions set out in the parties' agreement, the arbitrator in each case found that the employees were entitled to holiday pay. In referring to these authorities, the Union argued that the arbitral jurisprudence on this issue leans toward reading in exceptions to the qualifying language in an agreement when a non-culpable absence falls on one of the days noted, either immediately preceding or following a statutory holiday.

Counsel contended that I should similarly interpret article 19.02 of the collective agreement between these parties in a manner which permits payment of holiday pay in non-culpable circumstances such as this.

The Employer's argument

Counsel for the Employer submitted that the relevant language in the collective agreement is clear, and accordingly does not permit any exceptions to be "read in" to the requirement that an employee work both the day preceding and the day following a holiday in order to be entitled to receive holiday pay. He acknowledged that holiday pay is an earned benefit, but contended that it is earned through attendance at work, in accordance with the eligibility requirements negotiated by the parties.

Employer counsel also referred to article 11.03 of the parties' agreement, which states:

> The arbitrator shall not be authorized to make any decision inconsistent with the provisions of this Agreement nor to add to, alter, modify, or amend any part of this Agreement, nor to adjudicate any matter not specifically assigned to him or her by the notice to arbitrate.

He contended that this clause is indicative of the parties' intention that an arbitrator not read things into the collective agreement, when there is no basis for doing so.

Analysis and findings

It is clear that Ms. Vujic's absence on January 3, 2000, the first regularly scheduled day of work following all of the three statutory holidays in question, was due to her being ill and could therefore be characterized as a non-culpable absence.

I accept and agree with the general principles regarding the payment of holiday pay enunciated in the cases filed by the Union, namely, that it is best described as an earned benefit and that the purpose of the usual eligibility requirements that an employee work both the regular shift or day immediately preceding and following the statutory holiday is to prevent voluntary absenteeism or "holiday stretching". I also agree with the resulting theory that a presumption should therefore exist in favour of an employee receiving holiday pay, if his or her absence on a qualifying day is non-culpable.

I have carefully reviewed the jurisprudence on this issue, and have noted one other point that is often raised in the discussion regarding holiday pay. That is, that the presumption in favour of paying an employee holiday pay as outlined above is subject to the proviso that the collective agreement language must support this presumption. I note the following comments in *Re T.C.F. of Canada Ltd., supra,* at page 387:

> Arbitrators are largely in agreement in their definition of the purpose of provisions which limit eligibility for holiday pay to those employees who have worked before and after the holiday. This purpose is to prevent employees from voluntarily turning a one-day holiday into a longer period of absence. In light of that purpose, *and as long as the words of the collective agreement do not point to a contrary conclusion,* a grievor ought not to be held in breach of the eligibility requirement unless his absence was wilful on his part.
>
> (emphasis added)

A similar statement appears in the decision in *Re FBI Foods, supra,* at page 162:

> If the provision for recognizing plant holidays creates a general presumption favouring entitlement and the qualifying proviso operates as a penalty to deny that entitlement, then it should follow that the qualifying proviso should be narrowly construed, and any exceptions therefrom liberally construed. In *Re U.E.W., Local 512 and Standard Coil Products (Canada) Ltd.* (1971), 22 L.A.C. 377 (Weiler), the board pointed out that *this purposive approach to interpretation is constrained by the meaning which the language chosen by the parties can reasonably bear.*
>
> (emphasis added)

The arbitrator in *Re FBI Foods* then cites a passage from the *Standard Coil Products* decision, referenced above, which repeats the rationale behind the usual eligibility requirements that an employee work the regularly scheduled shifts both before and after a statutory holiday, and goes on to state (at page 380) -

> However, in drafting such clauses, the parties to the agreement often forget to deal with situations where the employee is absent from work due to no fault of his own. An arbitration board is entitled, though, to give effect to the underlying aim of the clause, and prevent the employee being penalized by the loss of holiday pay, *only* where it can do so by imputing to the clause a meaning which it can reasonably bear.
>
> (emphasis in the original)

As mentioned above, each of the cases filed by the Union in which employees were found to be entitled to holiday pay despite being absent on a qualifying day involved the interpretation of "exception language" in the holiday pay provisions of the collective agreements. In this case, the language used by the parties is clear and straightforward. Article 19.02(c) simply states that an employee "must work the full regularly scheduled day of work immediately preceding and...immediately following the holiday". There are no exceptions to these eligibility requirements, nor is there any mention that the requirements do not apply in cases of illness or circumstances

beyond an employee's control, phrases that do appear in the agreements being interpreted in the cases filed.

The Employer argues that I must determine the grievor's entitlement to holiday pay in accordance with the bargain struck by the parties, as set out in article 19.02 of the agreement. In interpreting collective agreement provisions it is well accepted that the fundamental object is to discover the intention of the parties. The cardinal rule of construction in determining the intention of the parties is that they are assumed to have intended what they have said, and that the meaning of the collective agreement is to be sought in its express provisions *(Brandon General Hospital* (1996), 56 L.A.C. (4th) 174 (Chapman), *Burns Meats* (1995), 50 L.A.C. (4th) 415 (Hamilton)). It is also well accepted that when there is no ambiguity or lack of clarity in the relevant language, effect must be given to the words chosen, notwithstanding that the result may be unfair or oppressive.

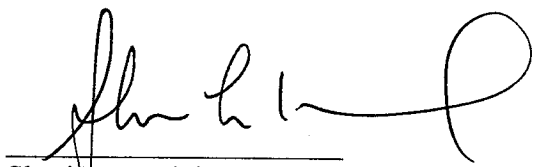
While I appreciate that it seems unfair that the grievor should lose three days pay as a result of a non-culpable absence in light of the fact that that is not the mischief that the relevant language is generally intended to remedy, I simply cannot find that she is entitled to holiday pay. The only way I could do so would be to create an exception to the qualifying language in article 19.02 to the effect that employees who are sick on one of the days noted are nevertheless still entitled to holiday pay. In my view, this would constitute a significant addition to or modification of that article, which would be inconsistent with the stated intention of the parties and would contravene both the letter and spirit of article 11.03, cited earlier in the decision.

While I do not presume to know the intentions of the parties regarding this issue, I would go as far as to say that given the frequency with which exceptions to the eligibility requirements for holiday pay in cases of illness appear in other collective agreements, the fact that no such language appears in this one indicates an underlying acknowledgement or intention by the parties that the requirements will be applied without exception. It would have been simple for the parties to have excepted absences due to illness, as many other agreements do, but they have, for reasons which are best known to themselves, chosen not to. If they had included any exceptions to the requirement to

work both the day preceding and following statutory holidays which even implied that a non-culpable absence would not disqualify an employee from receiving holiday pay, I would be prepared to approach this in the manner that the Union urges me to, given the arbitral authority presented and the particular circumstances of this grievance. However, in the absence of any exceptions appearing in article 19.02, I am constrained by the clear language of that provision to find that Ms. Vujic is not entitled to holiday pay for the three days in question as a result of her absence on January 3.

Accordingly, the grievance is dismissed.

DATED AT TORONTO, ONTARIO THIS 25TH DAY OF APRIL, 2000.



Shari L. Novick
Sole Arbitrator