In the Matter of an Arbitration

BETWEEN:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION, LOCAL 5114

(The "Union")

AND

THE HOSPITAL FOR SICK CHILDREN

(The "Employer")

(RE: Policy Grievance #2018-5114-0002 and Individual Grievances #2019-5114-0038 (Akber), #2018-5114-0065 (Huynh) and #2019-5114-0008 (Kokhar))

BEFORE: Eli A. Gedalof, Sole Arbitrator

HEARING HELD: December 22, 2020

APPEARANCES (By Video Conference):

For the Union

Brittany Ross-Fichtner, Counsel, Morrison Watts
Ashley Low, Articling Student
Ann Ledwidge, Staff Representative, OPSEU
Christine Laverty, Staff Representative, OPSEU
Kayla MacNeil-De-Sousa, Staff Representative, OPSEU
Sarah Akber, Grievor
Tina Huynh, Grievor
Bushra Kokhar, Grievor

For the Employer

Craig S. Rix, Counsel, Hicks Morley Hamilton Stewart Storie LLP
Jamie Burns, Student-at-Law, Hicks Morley Hamilton Stewart Storie LLP
Sandra Paiva, Labour Relations Consultant
Joseph Kuzma, Operational Leader
Karen Greenock, Operational Leader

AWARD

INTRODUCTION

1. This matter consists of three individual grievances and a policy grievance concerning the scheduling of vacation time for part-time employees in the Department of Pediatric Laboratory Medicine under the first collective agreement between the Union and the Employer. The Employer maintains that under Article 19.01(b) of the collective agreement vacation for part-time employees must be scheduled in blocks of one or more "calendar weeks". The Union grieves that under Article 19.01(b) of the collective agreement, part-time employees have the "option" of requesting some or all of their vacation time in calendar weeks, but they are not required to do so. While the scheduling of vacation is subject to mutual agreement and the Employer's operational needs, the Union maintains that Article 19.01 does not specify a minimum duration for scheduled vacation, and that it is a breach of Article 19 and an unreasonable exercise of management rights for the Employer to impose, by rule, a blanket prohibition on vacation of less than a week.

2. Both parties maintain that the language in Article 19.01(b) is clear and unambiguous, and neither party sought to formally admit extrinsic evidence in support of their interpretation. They did, however, refer in argument to documents related to bargaining and arbitrating the first collective agreement, to the corresponding part-time vacation provision in the OPSEU Central Hospital agreement, and to scheduling practices at the Hospital both before and after implementation of the Collective Agreement. The Union objected to the Employer's reliance on some of these documents and representations as "evidence" of the parties' intentions in reaching the terms of a stand-alone first collective agreement. As I indicated at the hearing, I am prepared to consider these materials to the extent that they illustrate or clarify the parties' interpretive arguments. However, in light of the parties' agreement that the language is clear and unambiguous and that it is not necessary to consider extrinsic evidence, I have been careful to reach my decision in this matter on the basis of the language found in the collective agreement.

THE COLLECTIVE AGREEMENT

3. As noted, these grievances arise under a first collective agreement between the parties. The language of the vacation provision in issue resulted from an interest arbitration award. While the Union asserted that the board of interest arbitration had awarded the Union proposal, and while it is true that many elements of the provision awarded track the proposal put forward by the Union in its brief, it is also the case that the language differs from either party's position at arbitration. It also differs significantly from the language

found in the OPSEU Central Hospital Agreement. The relevant portions of the provision read as follows:

ARTICLE 19-VACATIONS

19.01 a) **Vacations** (Full-time)

…

b) (Article 19.01(b) is applicable to regular part-time Employees only)

All regular part-time employees shall be entitled to vacation pay based upon the applicable percentage provided below in accordance with the vacation entitlement of full-time employees of their gross salary for work performed in the preceding year. Scheduling of vacations shall be in accordance with local scheduling provisions

Full-Time Increment	Vacation Entitlement (FT)	Part-Time Increment	Part-Time Vacation pay
Less than 1 year continuous service	1.25 days per month	Less than 1650 hours of continuous service	6%
After 1 year of continuous service	3 weeks (1.25 days per month)	After 1650 hours of continuous service	6%
After 3 years of continuous service	4 weeks (1.67 days per month)	After 4950 hours of continuous service	8%
After 13 years of continuous service	5 weeks (2.08 days per month)	After 21,450 hours of continuous service	10%
After 20 years of continuous service	6 weeks (2.5 days per month)	After 33,000 hours of continuous service	12%
After 28 years of continuous service	7 weeks (2.92) days per month	After 46,200 hours of continuous service	14%

Equivalent years of service shall be used to determine vacation pay entitlement. Equivalent years of service shall be calculated on the basis of one (1) year of service for each 1650 hours worked.

Notwithstanding this provision, the calculation of service for purposes of vacation entitlement will include service accrued during a pregnancy leave or parental leave on the basis of seniority accrual during such leaves in accordance with Article 10.03(a)(ii) of the agreement.

Part-time employees have the option of requesting all or part of the equivalent unpaid vacation time off in calendar weeks, to be taken at mutually agreeable times. Such requests are subject to the employer's operational needs. There shall be no carry-over of unpaid vacation time for part-time employees. **[emphasis added]**

4. I note that while the opening paragraph refers to "local scheduling provisions", there is no separate local agreement, and the only provisions are those found in the Collective Agreement.

5. The parties also referred to the Management Rights clause found at article 2.06 of the Collective Agreement, the relevant portions of which read as follows:

2.06 **Management Rights**
The Union recognizes that the management of the Hospital and the direction of the working force are fixed exclusively in the Hospital and shall remain solely with the Hospital except as of the foregoing; it is the exclusive function of the Hospital to:

…

d) Make and enforce and alter from time to time reasonable rules, policies and regulations to be observed by the employees in a manner consistent with the best interest of the patients and the general public in the community, provided that such rules and regulations shall not be inconsistent with the provisions of this Agreement.

e) All other rights and responsibilities of management not specifically modified elsewhere in this agreement. It is agreed that these rights shall not be exercised in a manner inconsistent with the provisions of this Agreement.

ARGUMENT AND ANALYSIS

<u>The Union's Argument</u>

6. The Union's primary position is that Article 19.01(b) of the Collective Agreement provides the Employer with the discretion to deny single days of vacation only where it can show that it is doing so for reasons related to

operational needs. Prior to implementation of the Collective Agreement, the Union asserts that employees were able to schedule vacation in 1 hour increments, half days, full days or full weeks. The Union seeks a declaration that under Article 19.01(b) employees continue to be entitled to take vacation in these smaller increments, subject only to the Employer's operational needs. The reference to taking vacation at "mutually agreeable times", argues the Union, restricts the Employer's ability to unilaterally dictate a minimum duration. Further, it argues, the assessment of operational needs must be considered on an individual basis, having regard to the particular circumstances of the request. To unilaterally impose a blanket prohibition on vacations of shorter duration, as the Employer has done here, breaches both the vacation scheduling provision in Article 19.01(b), and the obligation under Article 2.06 to exercise management rights in a manner that is reasonable and consistent with the provisions of the Collective Agreement.

7. In support of its argument the Union relies on paragraph 8:3240 from *Brown & Beatty*, in which the authors note that arbitrators have found that where a collective agreement provides for vacation scheduling by mutual agreement, employers are not entitled to unilaterally dictate the timing of vacations, and that the exercise of management rights around vacation scheduling must be done fairly and reasonably. The Union also relies upon arbitral awards in *Trim Trends Canada Ltd.*, 1997 CarswellOnt 6533 (Williamson) ("*Trim Trends*"), *Pinehaven Nursing Home*, 1993 CarswellOnt 1277 (Levinson) ("*Pinehaven*") and *U.A.W. v. O.P.E.I.U.*, Local 343*, 1978 CarswellOnt 829* (Shime) ("*U.A.W*"). *Trim Trends* and *Pinehaven* each specifically address the question of whether an employer can insist that vacation be taken in one week blocks and find that the employer is precluded from creating such a blanket rule and is required instead to consider the individual circumstances of each request. The *U.A.W.* award addresses only the timing, as opposed to the duration, of a vacation request, but finds that where vacation is to be scheduled at a "mutually agreeable" time, an employer is not authorized to unilaterally impose its own preference.

<u>The Employer's Argument</u>

8. The Employer does not dispute that prior to the implementation of the Collective Agreement employees were able to enter into a number of different arrangements for taking their vacation. But it maintains that the implementation of the Collective Agreement altered the *status quo* and set a new balance around the vacation entitlement. On the one hand employees obtained an enhanced vacation benefit, with the potential for greater time off and greater compensation. On the other hand, the Collective Agreement placed restrictions on how vacation could be taken. In particular, the Employer maintains that under Article 19.01(b) the phrase "all or part" refers to the

entirety of the vacation entitlement, and that it is necessary to give meaning to the subsequent reference to "calendar weeks" in this context. Read in its entirety, the Employer argues that the Article 19.01(b) means that employees who are entitled to multiple weeks of vacation time can, subject to operational requirements, take their full entitlement in one block, or can break it up into multiple blocks of calendar weeks. Thus, in the Employer's submission, Article 19 imposes an agreed-to minimum duration on vacation time of one week. This interpretation, argues the Employer, is consistent with the preceding vacation chart, which expresses the vacation entitlement in weeks. The imposition of the one week minimum is not, therefore, an exercise of management rights subject to reasonable limitations, but rather the application of the parties' explicit agreement. Consequently, the Employer maintains that it is not required to exercise its discretion to consider requests for vacations of a lesser duration.

9. In asserting that Article 19.01(b) does not require the Employer to even turn its mind to considering vacation requests of less than a week, the Employer emphasises, citing *Petro Canada Lubricants Inc.*, 2019 Carswell Ont 10685 (Ont. Arb.) (Surdykowski), that the parties are entitled to no more or less than the deal that they have made. Absent some ambiguity in the language or grounds for estoppel, arbitrators ought not to import principles of fairness to save the parties from the consequences of their own agreement (see also *York University and YUFA*, 2013 CarswellOnt 3046 (Steinberg)).

10. Further, to the extent that the Union identifies what it asserts are unreasonable consequences for employees, such as having to use a full week of vacation in order to cover, for example, a single day's medical appointment, the Employer asserts that there are other mechanisms under the collective agreement that may be available to employees to obtain a single day off. More significantly, however, the Employer maintains that what the Union has identified is an interest, and not a right, more properly addressed through collective bargaining and, if necessary, interest arbitration. The purpose of the minimum duration rule with respect to part-time employees, it argues, is to strike a balance between affording unpaid time off and making sure that the lab is properly staffed: an interest that is particularly acute during a pandemic where part-time employees are called upon to fill sick calls and staff shortages. The Employer allows that the absence of a provision to allow for single days under any circumstances may have even been an oversight in bargaining a first collective agreement. But any change to this balance should be addressed in the context of collective bargaining and not through a rights arbitration.

11. In support of its argument, the Employer also referred to the corresponding OPSEU Central Hospital provision, which reads as follows:

(d) Part-time employees have the option of requesting all or part of their equivalent unpaid vacation entitlement as time off in calendar weeks, unless the local parties agree to an arrangement that permits the use of individual days.* There will be no carry-over of unpaid vacation time.

* Should existing local scheduling provisions provide unpaid time off for part-time employees, this language shall be maintained but not altered, unless the local parties agree to delete the language and move to the Central Language.

12. The Employer argues that if the language relied upon by the Union already means that employees can take vacation of less than a week, as the Union asserts it does, it would be unnecessary to include a clause providing that the local parties could agree to an arrangement that "permits the use of individual days." The inclusion of this "local parties" clause in the central agreement, argues the Employer, supports the conclusion that the reference to calendar weeks is otherwise intended to provide for a minimum duration of vacation time.

13. Finally, in response to the arbitral awards relied upon by the Union, the Employer notes that none of those awards addresses a vacation scheduling clause that includes a minimum duration. It further notes that there does not appear to be any decisions interpreting the OPSEU Central Hospital agreement in the manner put forward by the Union.

Reply

14. In reply, the Union argues that in seeking to interpret Article 19.01(b) as containing a minimum duration clause, the Employer is reading words in to the agreement that are not there. Article 19.01(b) simply provides that employees have the "option" of taking all or part of their vacation in "calendar weeks". There is no language in the clause to say that they are required to do so. The Union further notes that there are material differences between the language in the collective agreement with the Employer and the language under the OPSEU Central Hospital agreement, particularly with respect to the vacation being scheduled at "mutually agreeable times" and subject to "operational needs". It is this language, argues the Union, and not a minimum duration, that protects the Employer's interest. Finally, the Union notes that none of the cases relied upon by the Employer address the circumstance where an employer imposes a rule requiring employees to take their vacation in blocks.

Analysis

15. The starting point in any contract interpretation dispute must be the words used by the parties to express their bargain. In general, absent some indication to the contrary, these words should be given their plain and ordinary meaning and read grammatically and harmoniously together in the context of the agreement as whole. Applying this approach, I find that Article 19.01(b) does not impose a minimum duration of one week for vacation. I reach this conclusion based on both the words used and the structure of the critical sentence in issue, which reads:

> Part-time employees have the option of requesting all or part of the equivalent unpaid vacation time off in calendar weeks, to be taken at mutually agreeable times. Such requests are subject to the employer's operational needs

16. With respect to the first sentence, the Employer's interpretation essentially divides the first phrase before the comma into two parts. It argues that the "option" referred to is the option of taking all of one's vacation entitlement in a single block, or of dividing it into more than one block. It then argues that the words "in calendar weeks" mandate a minimum duration for those blocks. There are several problems with this reading of the sentence.

17. First, there is no mandatory language attached to the reference "in calendar weeks". Had the parties (or in this case the interest arbitration board) intended to impose a minimum duration they could easily have included a phrase such as "which must be taken in calendar weeks".

18. Second, and perhaps more significantly, there is no grammatical basis for reading the reference to "calendar weeks" in isolation from the rest of the phrase that precedes the comma. In particular, read in its ordinary grammatical sense, the entire phrase describes an "option" that is available to part-time employees. If one asks the question "what is the option that part-time employees are afforded by this provision?", the answer is that they have the option of "requesting all or part of the equivalent unpaid vacation time off in calendar weeks". The "option" to ask for something cannot be read as synonymous with the "obligation" to ask for it, let alone the authority to impose it.

19. Further, the optional nature of the phrase prior to the comma stands in contrast to the phrase that follows the comma: "to be taken at mutually agreeable times". It is this second phrase, separate from the option to request vacation in calendar weeks, that imposes a mandatory parameter around how

vacation is "to be taken". Again, it would have been a simple matter to also articulate a mandatory duration, such as "to be taken at mutually agreeable times and in calendar weeks", but that is not what the parties have agreed to here.

20. In reaching this conclusion, it is useful to compare the unique language before me to the OPSEU Central Hospital language. I do so not as "evidence" of the parties' intentions but rather for how it illustrates the importance of reading the specific words of the Article 19.01(b) before me in their particular context. As noted above, the corresponding Central Hospital language reads:

> Part-time employees have the option of requesting all or part of their equivalent unpaid vacation entitlement **as** time off in calendar weeks, **unless the local parties agree to an arrangement that permits the use of individual days**" [emphasis added].

The words bolded in the preceding sentence highlight critical differences between the language at issue in the instant grievance and the Central Hospital language. First, the insertion of the word "as" creates a separation between the option of taking all or part of one's vacation and the reference to how that vacation may be taken, i.e., "**as** time off in calendar weeks". Second, the use of the word "unless" following the comma indicates a counter example to what would otherwise be the case in the preceding phrase, implying that unless the parties reach a local agreement to permit the use of individual days, the use of such days is not permitted. Neither of these features, both highly significant in defining "calendar weeks" as a minimum duration under the Central language, are found in the language at issue in the instant grievance. Instead, Article 19.01(b) introduces two completely different parameters around vacation scheduling: mutual agreement and operational needs.

21. I have also considered the Employer's argument that its reading of Article 19.01(b) is more consistent with the vacation entitlement chart, which expresses the vacation entitlement in weeks. However, it bears noting that the chart also expresses the vacation entitlement in terms of days and part days accrued per month and, in the case of employees with less than 1650 hours of continuous service, only in days. And in any event, the mere fact that the vacation entitlement is expressed primarily in terms of weeks in the chart is not sufficient to alter the plain meaning of Article 19.01(b) which grants employees the option of requesting only "part" of their vacation entitlement in calendar weeks.

22. For these reasons, I find that Article 19.01(b) does not impose a minimum duration for vacation scheduling. But that is not the end of the analysis required to interpret the vacation scheduling provisions of the

collective agreement in the instant grievance. The Union has argued that Article 19.01(b) restricts the Employer's discretion to deny vacation requests of less than a week to only those circumstances where it can demonstrate that it has done so in order to meet its operational needs. In my view, this articulation overstates the constraints that Article 19.01 places on the Employer and fails to account for the employee's role in arriving at a "mutually" agreed time for vacation.

23. Certainly, the scheduling of part-time vacation is "subject to the employer's operational needs", and the Employer is therefore entitled to look after those needs when deciding whether or not to grant a particular vacation request. But Article 19.01(b) also requires that vacation be taken at "mutually agreeable times". The concept of "mutual agreement" does not, on its face, restrict the Employer's discretion to determining only whether, in the strictest sense, it is operationally capable of granting the request. The concept of "mutual agreement" is addressed in the authorities relied upon by the Union and warrants careful consideration in the context of Article 19.01(b).

24. The vacation scheduling clause in issue in *U.A.W. v. O.P.E.I.U. Local 343* stipulated that vacation was "to be taken annually at a time mutually agreed". The employer, a union, dictated that the employee take her vacation during the summer when the union office would be closed and there would be little work for the grievor to do. The grievor, who had just returned from a sick leave, did not want to take her vacation so early and wanted rather to take it around Christmas. The employer maintained that Christmas was too busy a time in the union office to permit the grievor to take her vacation then. The question before Arbitrator Shime was therefore how to apply a clause that contemplated that the parties would reach an agreement on when the employee would take her vacation but was silent on what would occur if they did not. In answer, he reasoned as follows (at paras. 10-11):

> The difficulty with the language of the collective agreement is that it contemplates the employer and the employees being able to arrive at an agreement, but is silent as to what will occur where the parties are unable to agree. Clearly, if there is no agreement, the employer cannot unilaterally dictate the timing of vacations, and in this regard I agree with the grievor's representative that the employer cannot unreasonably fix a mandatory vacation period. At the very least the agreement contemplates that the parties will act reasonably in trying to arrive at a mutually agreeable time for vacations. Thus, for example, if the grievers had planned a vacation with friends or relatives, or had purchased tickets or rented accommodation with the knowledge of her employer, it would be manifestly unreasonable for the employer to dictate that the grievor take her vacation at another time. Also, the grievor cannot determine unilaterally when she will take her vacation. For example, she could not

> elect to take a vacation at the busiest time of the year when her services would be required most.
>
> Thus, each party must act reasonably in striving to find a mutually acceptable vacation period, and the issue in this case is whether the employer violated the collective agreement by acting unreasonably.

25. There are, then, two key principles that emerge from Arbitrator Shime's reasoning, with which I agree. First, where vacation scheduling is to be at a mutually agreed time, the employer is not entitled to unilaterally impose its preference as a matter of right. And second, in attempting to reach an agreement on vacation scheduling, the concept of mutual agreement requires both parties to act reasonably. Further, in assessing what is "reasonable", it is necessary to consider the specific facts surrounding the vacation request. On the facts before Arbitrator Shime, he found that both parties had good reasons for wanting to schedule the grievor's vacation when they did. In the circumstances, he concluded that the employer did not act "so unreasonably" by failing to reach a mutual agreement as to constitute a violation of the collective agreement (at paragraph 12).

26. It bears noting that the *U.A.W.* decision concerned only the timing of a vacation request, and not specifically the duration of that request. However, as Arbitrator Williamson noted in *Trim Trends,* vacation scheduling generally involves both a start date and a duration. In *Trim Trends*, the operative standard for scheduling vacation was by "mutual convenience", and Arbitrator Williamson found that this specific requirement superseded the employer's management right to unilaterally impose either a specific start date or a minimum duration. Rather, the employer was required to consider vacation requests on an individual basis, in light of its operational needs, looking to individual circumstances and the employer's particular needs (at paras. 19-20). In sum, he found, as did Arbitrator Shime in *U.A.W.*, that both the employer and the individual must act reasonably in attempting to find a mutually convenient vacation time, and that it was a breach of this requirement for the employer to unilaterally impose a minimum duration for vacations (at para. 22).

27. In the instant case, I find that it is particularly clear that both start date and duration of vacation are subject to the mutual agreement of the employer and the employee. This conclusion follows from the fact that under Article 19.01(b), employees have the option of taking some, but not all, of their vacation in calendar weeks, "to be taken at mutually agreeable times". The language in Article 19.01(b) specifically contemplates that an employee can request that some of their vacation be taken in a duration other than calendar weeks, but that it must be taken at mutually agreeable times. It is therefore

necessary to consider both the start date and the duration of the vacation, in light of the employer and the employee's specific needs and circumstances, in order to assess whether it was or was not reasonable for the Employer to deny a request for a vacation of less than a week. What the Employer cannot do, however, is refuse to even consider the employee's request on the grounds that it is for a duration of less than a week. The imposition of such a rule without regard to circumstances surrounding the request is a breach of the mutuality requirement in Article 19.01(b).

28. Before concluding, it is important to emphasise the fact-specific nature of any inquiry into what constitutes a reasonable approach to finding a mutually agreeable time for vacation. In its argument, the Employer identified a number of difficulties associated with granting individual vacation days, particularly with respect to part-time employees during the ongoing pandemic. The Employer noted that in light of the role that part-time employees play in covering full time absences, and the impact of the pandemic on absenteeism generally, it was particularly important to maintain predictable schedules. It also noted that the master schedule for part-time employees covers at least 4 weeks and is posted at least 4 weeks in advance, providing employees with ample notice to schedule activities around their days off. In the case of the individual grievors, the Employer asserts that they are among the part-time employees that have regular schedules, and therefore have even more notice around which to plan.

29. At this stage I have not heard evidence or argument with respect to the appropriateness of any particular remedy arising from the Employer's unilateral imposition of a minimum vacation duration, particularly with respect to the individual grievances. I simply note that the factors and considerations identified by the Employer as justifying a general rule against vacations of less than a week, together with any number of other considerations the parties bring forward, may be equally relevant to the assessment of how reasonable it might be for the Employer to deny a request for vacation of less than a week in any given case.

CONCLUSION

30. For all of these reasons, I find that Article 19.01(b) requires both the Employer and individual employees to act reasonably in attempting to schedule vacation at a mutually agreeable time, and that this obligation extends to requests for vacation of less than a week. In failing to consider such requests on the basis of a general and unilaterally imposed rule, the Employer breached Article 19.01(b) of the Collective Agreement and I so declare.

31. The parties agreed to bifurcate the question of what if any remedies follow from the interpretation of Article 19.01(b), particularly in the case of the individual grievances. I therefore remit this issue to the parties and remain seized in the event that they are not able to reach a resolution.

Dated at Toronto, Ontario, this 11th day of January 2020.

Eli A. Gedalof
Sole Arbitrator