IN THE MATTER OF AN ARBITRATION

BETWEEN:

QUESNEL PLYWOOD
(A DIVISION OF WEST FRASER MILLS LTD.)

(the "Employer")

AND:

UNITED STEELWORKERS, LOCAL 1-424

(the "Union")

(K. Tolofson Grievance)

ARBITRATOR:	Christopher Sullivan
COUNSEL:	Donald J. Jordan, Q.C. for the Employer
	Dan Will for the Union
DATE AND PLACE OF HEARING:	July 26, 2013 Prince George, BC
PUBLISHED:	September 17, 2013

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The parties agree I have jurisdiction to hear and determine the matter in dispute. The case involves a grievance filed by the Union on behalf of Kim Tolofson, alleging the Company improperly withheld statutory holiday pay for the August 6, 2012 BC Day statutory holiday.

The facts surrounding the grievance are not in dispute. The grievor was involved in an altercation with a co-worker on Friday July 27, 2012, which was the grievor's last day at work prior to a week of scheduled vacation. The grievor was sent home after the altercation and was informed not to return to work until he was directed to do so. Monday, August 6 was the BC Day statutory holiday. The grievor returned to work from his vacation on Tuesday, August 7, and at this time he was issued a letter of discipline that stated he was being suspended for his shift that day and was to return to work on August 8 for his regular scheduled shift. As a result of the grievor not having worked his first regularly scheduled work day after the holiday the Company did not pay him for the statutory holiday.

The relevant Collective Agreement provision is Article XII, Section 2(d), which provides as follows:

> **Article XII – Statutory Holidays**
>
> Section 2
> ...d) An employee, to qualify for holiday pay, must have been on the payroll thirty (30) calendar days immediately preceding the holiday, and must have worked his/her last regularly scheduled work day before, and his/her first regularly scheduled work day after the holiday, unless his/her absence was due to a compensable occupational injury or illness, which occurred within six (6) months preceding the holiday, or such employee was on authorized leave of absence. In the case of illness or injury the Company shall have the right to request a certificate from a qualified medial practitioner. Notwithstanding the other requirements of this Section, an employee may only qualify for statutory holiday pay if he/she works one (1) day before and one (1) day after the holiday providing the

> said two (2) days fall within a ninety (90) calendar day period. Employees while on leave of absence under Article IX Section 6 (a) or any employee while a member of a negotiating committee under Section 6(b) shall not qualify for paid statutory holidays.

SUMMARY OF ARGUMENTS

On behalf of the Union Mr. Will argues the grievor is entitled to the statutory holiday pay in question. Counsel acknowledges the grievor's conduct warranted a one-day suspension, but due to the timing of the suspension it in effect amounted to a two-day suspension as the real impact to the grievor was denial of two days of pay. Counsel asserts that if the Company intended to punish the grievor by effectively revoking two days' pay, it could and should have expressly done so.

Mr. Will states the negotiated statutory holiday pay provision contained in Article XII, Section 2(d) constitutes an earned benefit, and there is a presumption in favour of the employee receiving such pay unless clear wording of the Collective Agreement requires otherwise. The statutory holiday benefit should be given a purposive interpretation and that, viewed properly in context, the provision serves to prevent employees from taking additional time off either before or after a statutory holiday while still collecting payment for the statutory holiday. This is not the situation in the present case, as the grievor did not choose to be absent from work on the day in question, but rather was compelled to be absent due to a decision of the Company. The first day the grievor was eligible to work after the suspension should be used to allow the grievor to meet the statutory holiday pay requirements, as he should not be denied the ability to meet the requirements for payment as a result of his actions.

In support of its position the Union relies on the following case authorities: *United Automobile Workers, Local 252, and Canadian Trailmobile Ltd.,* 1966 CLB 558 (Arthurs); *Sudbury General Workers, Local 101 and Dominion Stores Ltd.*, 1970 CLB 930 (Brown); *Sudbury Mine, Mill & Smelter Workers, Local 598, and International*

Nickel Co. of Canada Ltd., 1961 CLB 604 (Bigelow); *Corporation of the City of Brampton and Amalgamated Transit Union, Local 1573*, 1978 CLB 5621 (Shime); and *Cancoil Thermal Corp. and UFCW, Local 175*, 2006 CLB 13342 (Weatherill).

On behalf of the Company, Mr. Jordan argues the grievor failed to meet the conditions required under the Collective Agreement to receive statutory holiday pay for the August 6, 2012 statutory holiday, and he is therefore not entitled to receive such pay. Counsel adds the precise issue was addressed with identical collective agreement language in the BC forest industry in 1964 and was decided in the employer's favour on the basis that the express conditions were not met. Counsel states this decision has created a climate of expectations, at least in the forestry sector, consistent with the approach taken by the Company in the present case.

Mr. Jordan asserts that when a suspension is a responsive action by the Company to an employee's problematic behaviour, any consequent loss to the employee is their own fault. The statutory holiday pay that the grievor missed was not due to the imposition of discipline, but rather was a result of the straightforward application of clear Collective Agreement language. The fact there may be different consequences for different individuals does not affect the proper operation of the Collective Agreement provision. The grievor in the present case is the author of his own misfortune and must bear the consequences of such.

The Company relies on the following cases in support of its position: *International Woodworkers of America and Various Forest Products Industries*, 1964 CLB 705 (Munroe, J.); *United Automobile Workers, Local 252 and Canadian Trailmobile Ltd.*, 1966 CLB 558 (Arthurs); *Lamco Die Cast Co. and United Steelworkers, Local 8097*, 1980 CLB 7057 (McLaren); *Alcan Smelters and Chemicals Ltd. and Canadian Association of Smelter and Allied Workers*, 1985 CLB 8102 (Hope); *Hudson Bay Mining & Smelting Co. Ltd. and USWA, Local 8262*, 1990 CLB 10800

(Chapman); *Atlantic Packaging Products Ltd. and GCIU, Local 466*, 1996 CLB 11682 (Barrett); *Canadian Timken, Ltd. and United Steelworkers, Local 4906*, 1989 CLB 9308 (Little); *Canadian Pacific Forest Products Ltd. and Pulp, Paper & Woodworkers of Canada, Local 11*, 1992 CLB 10986 (Williams); *Union of Canadian Retail Employees and Loblaw Groceterias Co. Ltd.*, 1965 CLB 722 (Krever); *Thomas Built Buses of Canada Ltd. and United Automobile Workers, Local 636*, 1980 CLB 7006 (Weatherill); and *Communications, Energy and Paper Workers Union of Canada, Local 601 and Western Concord Manufacturing (New West) Ltd.*, 2003 CLB 14008 (Dorsey).

DECISION

There is no dispute before me regarding whether the one-day suspension was warranted. The sole issue is whether the grievor is entitled to the statutory holiday pay for the August 6, 2012 statutory holiday.

Having carefully considered the factual circumstances and the parties' respective submissions I determine the grievor is not entitled to the statutory holiday pay claimed. The relevant Collective Agreement provision contains clear and unambiguous conditions for entitlement to the statutory holiday benefit and also specifies precise exceptions. The grievor did not meet the conditions, nor does his situation fall within the bargained exceptions. The Union's claim on his behalf cannot therefore succeed.

In *International Woodworkers of America and Various Forest Products Industries*, *supra*, Mr. Justice Munroe, sitting as sole arbitrator, determined a similar grievance with identical language in the employer's favour. The grievor in that case did not work his regularly scheduled shifts on December 24 and December 26 due to a disciplinary suspension, and claimed payment for the Christmas statutory holiday. Munroe, J. stated:

> [The grievor's] regular shift schedule of work was not altered by the suspension. What was altered was his opportunity to be employed at all

> during the period of suspension. His absence from work was due to the suspension and was not due to any of the authorized reasons stated in s. 3 (Art. XII, Section 2(d) in the present case)

This approach was also taken in *Loblaw Groceterias*, *supra*, a case where an employee did not receive statutory holiday pay for New Year's Day because he did not work his regular scheduled shifts before and after the holiday due to a disciplinary suspension. In this case Arbitrator Krever responded to the Union's argument that the purpose of the conditions contained in the statutory holiday provision was to discourage absenteeism caused by employees taking additional time off adjacent to the paid stat:

> ...but the difficulty is that the possibility of giving effect to general purposes or "intentions" of the parties, when it is clear that the parties had no intention in fact of dealing with the actual and concrete situation, is very often circumscribed by the language which the parties have employed. This is such a case. As indicated earlier the language of article 6.04 would have to be ignored or distorted before the argument now being considered could succeed.

In *Thomas Built Buses of Canada*, *supra*, Arbitrator Weatherill had opportunity to consider a grievance wherein a number of employees were denied pay for the Thanksgiving Day Plant Holiday due to not having met the qualifying days because they were suspended. Arbitrator Weatherill denied the grievance, stating:

> Here it is not enough to say that it was the company which prevented the grievors from working on the qualifying days: what prevented their attendance was the natural consequence of their own serious misconduct. Had the company (as in some circumstances it might do) have waited before imposing discipline, and had deliberately chosen "qualifying days" as the days on which a suspension was to be served, then different considerations would arise. Here, however, the suspension was imposed promptly, and the losses which the grievors suffered were the natural consequence of that.

> In the *Dover Corp.* case reference is made to *Re U.A.W., Local 252 and Trailmobile Ltd.*…where it was suggested that the proper approach was to consider whether the "total monetary penalty" was just. We do not consider it apt in a case such as the present to consider the loss of holiday pay as part of the "penalty" in the same sense as was the loss of earnings on the days of suspension, although the point may be a fine one….

In *Canadian Timken*, *supra*, Arbitrator Little considered a grievance involving the denial of statutory holiday pay for Good Friday due to absence on the qualifying days because of a disciplinary suspension. He stated:

> It is accordingly my conclusion that the findings of Professor Krever (as he then was), in the *Loblaw* case, supra and those of Professor Weatherill in the *Thomas Built Buses* case, supra are applicable here. In both cases holiday pay was denied. The conduct of the grievor leading to the suspension was not grieved in either case. The grievors were the authors of their own difficulty and it was their misfortune that the timing of their offenses resulted in the suspensions being imposed when they were. Both arbitrators, correctly in my view, stated that if the suspensions had been unreasonably delayed to create the suspicion that the action was to deprive the grievors of holiday pay, the penalty might have been different. In those cases and in this grievance this did not occur. Here the misconduct was promptly investigated and the suspension immediately imposed at the conclusion of the investigation. It is unfortunate for the grievor that the suspension started on a qualifying day but that does not involve a failure by the company to observe the provisions of the collective agreement.

In *Canadian Pacific Forest Products*, *supra*, Arbitrator Williams denied a claim for statutory holiday pay for Easter Monday as the grievor did not work the Tuesday qualifying day as a result of a discharge that was reduced by the parties' agreement to a suspension. Arbitrator Williams stated:

> In our view, the language of the collective agreement in this case is clear. Unless the Grievor can fit under one of the specific exceptions in Article XII, Section 5(c)(i)-(Y), he has not met the qualifying conditions. We need not enter into the merits of the Employer's original decision to dismiss the

> Grievor. The fact of the matter is that the Employer and the Union reached a settlement of the original grievance and a ten working day suspension was imposed midway through April 21, 1992. That was the second qualifying day for payment of the Easter Monday holiday. We cannot question the merits of the parties' decision in this respect and must assume that the suspension was imposed for good reason. We do not consider the consequent failure to complete the second qualifying day as an added "penalty" in this case. It is simply the result of the Grievor's own misconduct....

I pause to note that in the relatively recent case involving *Cancoil Thermal Corp.*, *supra*, Arbitrator Weatherill upheld a claim for statutory holiday pay where the grievor "had worked a very substantial part of his shift on the qualifying day". In that case the grievor's shift on the qualifying day following the Labour Day statutory holiday was from 3:30pm until midnight and he was sent home at 10:30pm.

The prevailing arbitral approach supports a conclusion that the grievor's loss of statutory holiday pay in the present case is not a result of an act of discipline, but rather is due to the application of clear Collective Agreement language. There is no suggestion the Company acted improperly in any way in determining the day the suspension, which barred him from meeting the express conditions, was to be served.

The grievance is therefore dismissed. It is so awarded.

Dated at the City of Vancouver in the Province of British Columbia this 17th day of September, 2013.

Christopher Sullivan