IN THE MATTER OF AN ARBITRATION

BETWEEN:

The Toronto Police

and

The Toronto Police Association

(G20 Summit Vacation Schedule Grievance)

Before:	William Kaplan Sole Arbitrator
Appearances	
For the Employer:	Michael Hines Hicks Morley Barristers & Solicitors
For the TPA:	Michael Mitchell Sack Goldblatt Mitchell Barristers & Solicitors

The matters in dispute proceeded to a hearing in Toronto on November 7, 2011, February 29, 2012, January 18 and February 28, 2013.

Introduction

This case involves a July 19, 2010 grievance filed by the Toronto Police Association (hereafter "the Association"). The background facts can be summarily stated. As a result of events that transpired during the G20, command at the Toronto Police (hereafter "the employer") made a decision on June 27, 2010 to suspend annual leaves beginning on June 28th. The Association takes no issue with that decision. Put another way, the Association agrees that the employer was fully entitled to cancel scheduled vacations in order to the deal with the policing emergency. What the Association objects to is how members were compensated for their cancelled vacations. When the suspension was announced, it was not clear how long it would last. As it turned out, the vacation suspension effectively only lasted a single day. In order to accommodate members who had made particular vacation plans that could not be changed, or to assist those facing personal hardship, the employer did not require individuals so situated to report for duty. Members who reported for duty were paid their vacation day plus time-and-a-half for all hours worked. This premium payment could be taken later, if the member wished, as lieu time.

In the Association's view, members who were called in to work from their vacation should have been paid time-and-a-half for all hours worked and their vacation bank should have been credited for the day worked. Stated somewhat differently, the Association takes the position that members should not have been forced to take one of their vacation days on a day they were actually compelled to work; they should not have received their vacation pay for the day worked, instead, they should have been credited

with the day they were called in so that the missed vacation day could be taken with no loss of compensation on some future occasion. Approximately 500 members were affected on June 28th, and 33 on June 29th.

Many members, it is fair to say, objected, although not to being called in for the emergency, but to the loss of a vacation day. Moreover, there was some attendant confusion arising out of an incorrect, albeit quickly corrected June 28, 2010, bulletin to the membership explaining how the callback was to be paid. It is fair to say, however, given the time of day that these bulletins were issued, that no one relied on them for anything. The same can be said with respect to an email exchange between Aileen Ashman, the Director of Human Resources for the employer, and an official of the Association, Rob Correa.

In that exchange, dated June 27, 2010, Ms. Ashman wrote, under the subject heading "Callback/vacation": "Call me…if you need clarification of the payment for members on callback on a scheduled vacation day." Mr. Correa then wrote: "I just want to make sure we are on the same page on this. Members will receive their leave pay of 8 hrs per day plus time and one half pay for their assigned hours each day worked. Is that correct?" Ms. Ashman replied, "Correct." Ms. Ashman did not testify and, at the time of these proceedings, Mr. Correa was deceased. Neither party argued that this email exchange represented an agreement between the parties about how compensation was to be paid.

The Collective Agreement

ARTICLE 5 – HOURS OF WORK AND PREMIUM PAY

5.04 (a) For the purpose of this clause "callback" is defined as the callback of a member after he/she has reported off duty and before his/her next following tour of duty, and shall include the attendance of a member:

...

(2) (ii) performing duty on regularly scheduled days off.

Such member shall be granted lieu time, as provided in clause 5.05, or pay calculated at the rate of one and one-half times the member's rate of pay for all hours of duty in such callback with a minimum of 4 hours' pay or time off in lieu thereof at the time and one-half rate for each such callback.

...

(d) (i) A member who is required to attend court during his/her vacation shall be granted two days off for each day or part thereof spent in Court. This Article shall apply only if the member's Unit Commander has approved, in advance, the member's attendance at court.

ARTICLE 7 – VACATIONS

7.01 (a) A member shall be eligible for vacation on the following basis:
[provision then sets out weeks of entitlement following service milestones]

Association Argument

In the Association's submission, the collective agreement had been breached. Article 7 provided members with specific vacation entitlements. A member entitled to three weeks vacation is entitled to his or her regular pay together with three weeks off work. That is what the parties bargained. As a result of the events arising out of the G20, members did not receive their negotiated entitlements. For example, a member who was entitled to three weeks of vacation, and who was called in from vacation to work on one day, only received two weeks and four days of vacation. It was correct that the individual in question received his or her vacation pay for all three weeks, but the entitlement was to time off with pay, not just to pay.

While the Association acknowledged that there were instances in the past where members worked on their vacations, and received vacation pay along with their callback pay, those instances stood in marked contrast to the present case. In many, if not most, of those instances, the Association argued, the member volunteered to work. In that situation it would hardly be appropriate for a member to claim a vacation day having volunteered to work on vacation and having been paid for that day. In the present case, more than five hundred members had their vacation cancelled. They were not volunteers: their vacation was taken away. The Association, therefore, took issue with any reliance by the employer on past practice arguing that it did not apply to the mass vacation cancellation and requirement to work present in this case.

This was, Association counsel argued, a case where equitable principles were appropriately applied. It would not be fair, for instance, to now provide members with a unpaid day off. After all, members had been forced to work on a vacation day and it would be improper, in these circumstances, years later, to reduce their pay by awarding an unpaid day off. Likewise, it was, the Association suggested, no answer to suggest that the affected members could have taken their callback pay in lieu time. To be sure, that was an entitlement under the collective agreement, but there was a more specific entitlement that applied in this case: the entitlement to specified vacation days off with pay in relation to member service. The importance of vacation was illustrated, the Association submitted, by the provisions of the collective agreement that compensated members who were called to court to testify during their vacations. The conclusion that could, and should be drawn, in the Association's view, was that actual time off was what

was paramount. Vacations were to be taken with pay. A number of authorities were advanced in support of these submissions.

As a remedy, the Association sought a declaration of breach, a further declaration, should similar events transpire in the future, that vacation banks not be diminished and, given the loss that had been suffered, compensation for affected members. The Association asked that eight hours be deposited in each affected members' non-cashable lieu bank providing that member, in effect, with their missing paid vacation day. Only a remedy of this kind, Association counsel concluded, could even come close to putting the affected members in the position they would have been in but for the breach. Any other remedy would not compensate for the actual loss of a day's vacation.

Employer Argument

In the employer's view, no one had his or her vacation cancelled. What happened here was that some members – and the legitimacy of this was not contested – were required to work on a vacation day. It was quite common, under this collective agreement, for employees to work on statutory holidays and on scheduled days off. That was the essential nature of police work. When, for example, an employee was called in to work on a scheduled day off, he or she did not have that day restored. Instead, he or she was paid in accordance with specific provisions in the collective agreement. In situations such as this, the employee does not get a new scheduled day off; all that is received is compensation for working on what would otherwise have been a day off. In the case at hand, employees were paid for their vacation day but could, if they wish, take future time

off by banking the hours they worked at time-and-a-half and later taking those hours as lieu time. There was, accordingly, no need to restore the worked vacation day.

In the employer's submission, nothing out of the ordinary, or novel, had taken place. Members received an annual salary and were paid bi-weekly. That pay could change because of overtime etc. Scheduled days off were, like vacation, promised days off. A member could be called in to work on a scheduled day off. Moreover, it was not unusual for members to be called back from days off or, on occasion, from vacation. Earlier in the proceedings, employer counsel had observed that this practice extended far back into the past. Documents introduced into evidence demonstrated not only was this past practice commonplace, but had applied to countless members including union stewards.

Employer counsel carefully reviewed a number of provisions in the collective agreement in support of his submissions. The treatment of members called to testify in court during their vacations had, employer counsel argued for example, nothing to do with the facts of this case. Simply put, Article 5.04(d) required a member to receive permission from his or her Unit Commander to attend court during a vacation, and then provided for additional time off. It was inapplicable to the circumstances now under review. Other provisions of the collective agreement were also canvassed.

In the case of scheduled days off, or callbacks between shifts, the collective agreement specified the compensation treatment. In the case of vacations, it did not. The situation was, the employer argued, unregulated by the collective agreement. Arbitral remedial

powers were limited to breaches of the collective agreement. Absent a governing provision, it was axiomatic that there could be no collective agreement breach. Moreover, in management's view, given that members could be called back from scheduled days off, which like vacations came in blocks, and were known far in advance, there was no reason to conclude that the compensation treatment of members called back from vacation should be any different.

Indeed, there was nothing, the employer submitted, in the collective agreement that grounded any entitlement to receive vacation pay plus another paid day off which was the remedy the Association sought. This conclusion was, employer counsel argued, reinforced by the case law which made it clear that where a party asserts a monetary benefit under a collective agreement, they must demonstrate it with clear, specific and unequivocal terms (*Cardinal Transport & CUPE* 62 LAC 230 (Devine) at 236. In addition, the law was settled, and a number of the leading cases on point were reviewed, that the job of the arbitrator was not to determine what he or she thought was a correct or fair outcome in a particular case, but to interpret and apply the terms of the collective agreement.

In this case, there was no provision that specified the compensation treatment of an employee who worked on his or her vacation day. Collective agreements cannot, and do not, anticipate every eventuality. Absent a governing collective agreement provision, there was no basis, in management's view, for arbitral intervention and substitution of one outcome – the arbitrator's preferred outcome – for that earlier imposed by

management, especially when the employer's decision to pay the vacation day and callback pay was completely consistent with past practice and related provisions of the collective agreement considered more generally.

In the employer's view, there were a number of other reasons for denying the grievance or, assuming a breach, for providing only declaratory relief. Years had passed since the day in question. Given that the affected employees had received pay for that day as well as premium pay for the hours worked – pay that could have been taken in lieu – it would be excessive, years later, to provide employees with another paid vacation day. Any member who had lost a vacation day could have readily regained it by using the lieu time they accumulated by virtue of working callback.

In conclusion, employer counsel argued, this was not a case that called out for relief, especially the excessive compensation being sought by the Association. It was noteworthy that some of the affected individuals, the employer observed, were no longer even employed. Other practical difficulties in recreating what should have happened – reassembling the broken egg – again assuming a breach, were obvious. The collective agreement did not deal with this situation, but the employer dealt with it fairly and equitably and in accordance with the overall approach in that collective agreement to compensation for work on a day off. Accordingly, and for all of these reasons and others, the employer argued that the grievance should be dismissed.

Decision

Having carefully considered the evidence and arguments of the parties, I am of the view, for the reasons that follow, that the grievance should be allowed,

There is no question but that the employer acted in good faith in exigent circumstances. There was a *bona fide* need to cancel vacations. Where members had fixed plans, or where there would be financial hardship, the employer was accommodating. There was no complaint raised about any of that. Undoubtedly, some members took the money they earned on the callback in lieu time instead of cash. Conceivably, some members would have taken that lieu time and added it to other scheduled vacation, or to scheduled days off, to increase paid time away from work. It is quite likely that some members were not inconvenienced by the callback and benefited from it. Others, of course, were adversely affected and claimed prejudice as was illustrated by various documents introduced into evidence.

The email exchange between Ms. Ashman and Mr. Correa clearly sets out how the employer believed members should be compensated for working on a vacation day. However, there is nothing in that exchange that elevates it to an enforceable agreement. As is evident by the bulletins that were issued the following day, there was even confusion in management ranks about how members called in from work should be compensated. However, those bulletins, like the email exchange, are not legally determinative of anything.

In addition, the collective provisions relating to callback to work on a scheduled day off or work during a statutory holiday, or sickness during vacation, or the treatment of members who receive approval to testify during vacation, to name just a few of the specific entitlements spelled out in the collective agreement, and reviewed by counsel for both parties, are immaterial to the ultimate decision in this case. By definition, vacations are different: under this collective agreement they are paid time away from work. The email exchange between Ms. Ashman and Mr. Correa, not to mention both bulletins, indicate that employees called back from vacation were to receive callback pay. The absence of any collective agreement provision for callback pay for employees directed to return to work during vacation was raised by employer counsel in argument. That issue, whether employees required to work on vacation should receive callback pay, was not adjudicated in these proceedings and is a different matter for another day. The parties may wish to turn their attention to it in collective bargaining.

In the meantime, the collective agreement makes it clear that members are entitled, based on service, to defined vacation periods. That, obviously, means days away from work in receipt of regular compensation. The issue is not whether the employer was entitled to cancel vacations – it was – nor is there any dispute about the manner it did so since the evidence is undisputed that individuals who could demonstrate firm commitments or hardship were relieved of the obligation to report for duty. The only outstanding question is whether there has been a collective agreement breach in the manner in which members were paid?

There is a clear promise in the collective agreement for specified number of vacation days. Vacation days are an earned benefit to days off with pay. While the employer can, as it did here, require employees to work on their vacation, it cannot reduce their vacation days. In the same way that clear and categorical language is required in a collective agreement to confer a financial benefit, equally clear and categorical language is required to eliminate one. There is nothing in the collective agreement that allows the employer to permanently cancel vacation days that are promised to employees even if it pays them those cancelled days as it did here. Clearly, vacation can be cancelled for legitimate police business. But it cannot be permanently eliminated. That is the collective agreement breach, and that is the breach that requires an appropriate remedy. The decision in this case is based on the conclusion that the collective agreement requires that members receive a specific number of paid vacation days. Having determined that there was a breach, the case turns to the determination of an appropriate remedy.

The purposes of a remedy in labour relations, where a breach of the collective agreement has been established, as it is in contract law more generally, is to put a person in the position they would have been in but for the breach. There does not appear to be any directly applicable authority on point (and those advanced by both parties are largely distinguishable), but some of the observations in the cases about the purposes of vacation are helpful. For example, as Arbitrator Albertyn noted in *Sifto Canada & CEP* 46 CLAS 102 (199&) at para. 128: "Another way of approaching the matter is to consider the harm that was done to the grievors...They lost time off from work ... They were considerably inconvenienced and that inconvenience is worth something." (It is noteworthy that, in

that case, some employees were actually better off by the unilateral vacation scheduling change.) In the *Sifto* case, unlike this one, affected individuals were forced to take time off not of their choosing and received their vacation pay during that time off. They did not lose money but, to quote Arbitrator Albertyn, "...their holiday plans were foiled..." (at para. 123). That, to a much more limited extent, is what happened here.

More than two years after the events took place, it is extremely difficult to remedy the breach. There is also a real question about what remedy is appropriate. There is initial appeal to the suggestion that affected individuals could have ensured additional paid time off by converting the callback pay into lieu time. However, upon careful examination, that approach is not satisfactory. Given the purposes of vacation, its benefits are only realized if the vacation is taken with pay in a timely way. See *Assiniboine Regional Health Authority & CUPE* 189 LAC (4^{th}) 137:

> The purpose of vacation is not simply to provide employees with time off with pay. The purpose of a vacation is to provide employees with time off with pay at regular intervals in order that they will be periodically relieved from the stresses and strains of the workplace for a reasonable period, and to afford them the opportunity to organize their vacation time so that they may engage in special activities, such as travel and recreation with their families and friends. Employee vacations are also beneficial to employers because they improve morale and refresh the workforce.
>
> Depriving the Grievors of the full amount of vacation time to which they are entitled for a period of three or more years, decreases the benefits associated with the vacation time. Substantially delaying a vacation diminishes the beneficial effects of the vacation. (at 147-8).

What should have happened, given the collective agreement obligation to provide specific number of paid vacation days – days off with pay – and there being no dispute that this was a *bona fide* emergency, was that affected members should have been given a choice: not about the call-back pay, which is not the focus of the current dispute, but

about whether they wished to be paid for the worked vacation day or whether they wished it to be restored to their vacation bank.

It is self-evidently impossible to turn the clock back and put members in the exact position they would have been in but for the breach: the restoration of their collective agreement entitlement to a paid vacation day. In the same way that it would be completely unfair now, years later, to provide a remedy of an unpaid day off, it would also be unfair to compensate employees with another paid day off since they have had the benefit of that day's pay for quite some time. Still, affected individuals did lose something that they were entitled to under the collective agreement: a vacation day with pay. The authorities recognize that declaratory relief alone in cases of this kind is hollow. Overcompensation would be equally wrong.

Under the collective agreement, vacations, by and large, are scheduled in weeklong periods. They can, however, be taken, in some circumstances, as individual days. But, for the reasons already given, a day's vacation would, in my view, constitute overcompensation given the passage of time and the fact that the day has already been paid. What is appropriate is a non-punitive and modest monetary award that recognizes the collective agreement breach and provides some compensation for the members who were deprived of their negotiated entitlement. The determination of an amount is difficult and, admittedly, somewhat arbitrary.

The difficulty in accurately assessing the value of a particular loss – in this case, the loss of a vacation day with pay, is not a proper basis for not providing *any* compensation having found a breach. Moreover, it is worth noting that this case presents the exact opposite of a situation where an employer has acted with impunity and in clear breach of the provisions of the collective agreement. Any award must, of necessity, given the factual circumstances outlined above, be considered in context, be tied to the breach, be compensatory of it, and be extremely modest. Accordingly, and consistent with the authorities, I direct that the employer pay each affected individual $100 as damages for each day of cancelled vacation. Payment to be made within thirty days. I remain seized with the implementation of this award.

DATED at Toronto this 8th day of March 2013.

"William Kaplan"

William Kaplan, Sole Arbitrator