

*Case Name:*  
**Essex (County) v. Canadian Union of Public Employees,  
Local 2974.01 (Policy Grievance)**

**IN THE MATTER OF an arbitration  
Between  
The Corporation of the County of Essex (The Employer),  
and  
Canadian Union of Public Employees, Local 2974.1  
(The Union)  
AND IN THE MATTER OF a Union/Policy Grievance  
#2004-12-12-B**

[2007] O.L.A.A. No. 454

91 C.L.A.S. 26

LAX/2007-452

File No. A/Y402795

Ontario  
Labour Arbitration

**K.A. Hinnegan (Arbitrator)**

Heard: Windsor, Ontario, April 22, August 29, 2005;  
January 31, August 10, December 8, 2006; March 20 and  
May 24, 2007.

Award: August 31, 2007.

(17 paras.)

**Appearances:**

For the Employer - L.P. Kavanaugh and Others.

For the Union - J.A. Renaud and Others.

AWARD

1 This grievance, dated December 12, 2004, and filed on behalf of Paramedics in the EMS Department claims that;

"The Employer has denied all Employees, past and present, who were or currently are in receipt of WSIB benefits, additional holiday pay entitlement as required by article 17.04(b)(iii) of the Collective Agreement."

2 The relevant parts of Article 17 of the collective agreement are as follows;

"ARTICLE 17 PAID HOLIDAYS

...

Sub-articles 17.01 to 17.03, inclusive, do not apply to Paramedics.

(i) All Paramedics shall be entitled to the following holidays or any other day proclaimed to be a holiday by the Federal or Provincial or County Government:

	New Year's Day	Labour Day	
	Good Friday	Thanksgiving Day	
	Easter Monday	Remembrance Day	
	Victoria Day	Christmas Day	
	Canada Day	Boxing Day	
	Civic Holiday	2 Floating Days	

The Floating Holidays shall be granted on a first come first serve basis upon a request being submitted two (2) weeks prior to the requested date, but otherwise may be taken at any time throughout the year upon mutual agreement between the Supervisor and/or Department Head and the employee concerned.

A Paramedic who works on a paid holiday will:

- be paid for all hours worked on the paid holiday at the rate of 2 1/2 (two and one-half) times his/her regular straight hourly rate of pay; or
- be paid for all hours worked on the paid holiday at the rate of 1 1/2 (one and one-half) times his/her regular straight time hourly rate of pay and bank the number of hours worked on the paid holiday to be taken of later at a time mutually agreed upon by

the Paramedic and the Corporation, with pay at the Paramedics straight time hourly rate of pay.

A full-time Paramedic who does not work on a paid holiday will:

be paid eight (8) hours of pay at his/her regular straight time hourly rate of pay for the paid holiday; or  
receive a lieu day off with eight (8) hours of pay at his/her regular straight time hourly rate of pay to be taken at a time mutually agreed upon the Paramedic and the Corporation.

A part-time paramedic who does not work on a paid holiday as listed in sub-article 17.04(b)(i) above will be paid public holiday pay in accordance with the Employment Standards Act."

**3** The position of the Union is that, according to that article, all Paramedics are entitled to the listed holidays and a full-time Paramedic on WSIB is a "Paramedic who does not work on a paid holiday" within sub-article (iii), and is, therefore, entitled to the benefit provided therein.

**4** The position of the Employer is that, while there is nothing in article 17.04 expressly excluding paramedics on WSIB from paid holidays, that simply begs the question as to whether those paramedics were intended to be included in the first place. It was submitted that there is no need for an express exclusion from a provision in the collective agreement for something not included in that provision in the first instance. The addition of such exclusionary language would obviously be unnecessary in those circumstances.

**5** In that regard, the Employer submitted that reading the first sentence of subarticle (iii) alone and in isolation from the rest of the article in which it is contained is too simplistic an approach to the interpretation of that provision and is not dispositive of the issue here of whether these parties ever contemplated that Paramedics off work and receiving WSIB benefits would be paid for holidays occurring during those periods of absence from the workplace. The position of the Employer is that reading article 17.04 as a whole and in context leads to the logical conclusion that it was meant to encompass only those Paramedics who were capable of working on a paid holiday, but were not required by the Employer to do so.

**6** The debate among arbitrators as to whether an employee may simultaneously claim both holiday pay and sick pay or weekly indemnity or W.S.I.B. benefits, the latter being the only issue before me, is canvassed fully in Brown and Beatty, Canadian Labour Arbitration (4th ed. at para. 8:3000 and following. The resolve of that issue, as with every collective agreement issue of interpretation, turns on the particular language of the agreement under consideration, the focus tending to be on the view taken by the arbitrator of the perceived purpose of payment for statutory holidays based on that language.

**7** In the earlier awards, most arbitrators saw the purpose of holiday pay as simply to guarantee that an employee would not lose a day's pay on a forced day off called a holiday. As an employee already off work and being paid sickness or accident benefits for that day is already being indemni-

fied (or the loss of that day's wages, he/she was deemed not to be entitled to holiday pay as well. More recently, a number of arbitrators have seen holiday pay as much more complex an issue than simply a guarantee of pay on a forced day off work. Their view is that holiday pay must be regarded as part of the total monetary package along with wages and other fringe benefits. It is seen as an earned benefit and an additional form of remuneration for work already performed, a different purpose than indemnifying an employee for his lost wages due to the holiday. Regarding those two benefits as separate and independent of each other in the purpose to which they are directed permits the view that there is nothing inconsistent or absurd about the employee being entitled to both payments for the same day off work, a day on which the employee could not have worked in any event due to sickness or accident. The fact that an able employee on the daily work schedule receives only holiday pay for the same day not worked by either employee is deemed to be of no consequence in that those two benefits are considered to be independent and mutually exclusive and for separate purposes.

**8** A difficulty with the latter perception of the purpose of holiday pay lies in its practical application universally in all situations of absences due to sickness or accident, regardless of the length of employment or the extent of the absence. Most of the "earned benefit" arbitrators have dealt with relatively short periods of absence and one or two paid holidays during that period and either have not had to, or have simply declined to, address the anomalous consequence of that view with respect to an extended period of absence following a relatively short period of employment. For example, here, a Paramedic employed for two months and who injures his/her back at work and goes off work on W.S.I.B for two years, an entirely plausible situation given the strenuous type of work involved, would be deemed to have "earned" the twenty-six paid holidays occurring during the absence by his/her two months of work. While some arbitrators would, seemingly, have no difficulty with that, either conceptually or logically, and would, apparently, be quite comfortable with entitlement to pay for all holidays occurring during an absence on W.S.I.B. regardless of the length of the prior employment or the extent of the absence, others do. In Mitchnick and Etherington, *Labour Arbitration in Canada*, Lancaster House, 2006, the authors note, at pg. 375, that:

"The consequence of characterizing holiday pay as an earned benefit, one that continues during a period of involuntary absence from work, is that the employee's entitlement is exhausted at some point after the commencement of the absence. In other words, the required nexus between the benefit and work performed - for which the benefit represents additional compensation - will have disappeared. Most arbitrators have declined to define exactly when entitlement to holiday pay will be depleted, and some have suggested that an employee remains entitled to pay for all holidays which take place during an absence. In *T.C.F. of Canada Ltd. and Textile Workers' Union of America, Local 1332* (1972), 1 L.A.C. (2d) 382, though, Arbitrator Adell proposed a test whereby an employee must have worked at least one shift since the paid holiday prior to the one which he or she is now claiming.

**9** That is one of the problems with arbitrator-created industrial relations concepts. When the anomalies inevitably arise, the arbitrator must their attempt to invent a creative way around them, which, then, usually creates more problems for everyone.

**10** In any event, aside from the different perceptions with respect to the purpose of holiday pay, ultimately, entitlement to holiday pay falls to be determined on the language of the agreement. The issue here is whether, on the language of article 17.04, these parties intended during negotiations that a Paramedic already off work on W.S.I.B. would also be entitled to holiday pay for every holiday occurring during his/her absence, notwithstanding that he/she was unable to work on those days in any event. On my reading of article 17.04 in its totality and in context, I must conclude that they could not have contemplated that and must have intended holiday pay simply as a means of indemnifying employees against losing a day's wages as a result of a holiday.

**11** The substantive benefit to which a Paramedic is entitled is succinctly set out in subsection (b) (i). It is the "following holidays" and the normal or ordinary meaning of the word "holiday" in a work sense is a "day off work" or a "day on which work is suspended" (Webster's Dictionary), or "a day of exemption from labour" (Black's Law Dictionary). It seems obvious, almost to the point of triteness, that in order to enjoy a day off work or a day of exemption from labour, one must be working or engaged in labour at the time the holiday from work occurs. Quite clearly, in my view, that cannot include an employee already off work due to injury or illness and receiving W.S.I.B. There is nothing in the collective agreement to indicate that giving the word "holiday" its normal or ordinary meaning would lead to some absurdity or inconsistency within the article itself or with the rest of the collective agreement. See generally, Brown and Beatty, *Canadian Labour Arbitration* (4th ed., vol. 1, at para. 4:2110).

**12** If any further confirmation is needed that what the parties were addressing in article 17.04 is holidays, meaning days off work for working Paramedics, it is found in the following paragraph dealing with the two floating holidays added to the statutory holidays listed:

"The Floating Holidays shall be granted on a first come first serve basis upon a request being submitted two (2) weeks prior to the requested date, but otherwise may be taken at any time throughout the year upon mutual agreement between the Supervisor and/or Department Head and the employee concerned

There can be no real argument on that plain language that it is directed towards working Paramedics and cannot apply to a non-working Paramedic off on W.S.I.B. The two floating holidays can be taken "at any time throughout the year", which can only mean the calendar year as defined by the statutory holidays listed. Therefore, if a Paramedic has not taken his/her two floating holidays before going off work on W.S.I.B. for the remainder of that year, he/she would, necessarily, lose them. Unlike art. 14.01 in *Re Atlantic Packaging Products Ltd. and C.E.P., Local 333*, 96 L.A.C. (4th) 64, (Goodfellow), art. 17.04 here does not provide that "any unused portion of these hours [ie. 48 floating holiday hours] will be paid out at the end of the calendar year." Had the Union negotiators intended Paramedics off work on W.S.I.B. to have paid holidays during their absence, they would surely have included similar language so as not to leave those particular employees in a "use it or lose it" situation with respect to the floating holidays, knowing that he/she could not, in fact, use them and that there is no provision for payment in lieu of using them. Being unattainable by those employees, either in kind or in money, hardly fits the definition of a negotiated, earned benefit.

**13** Also, the other requirements set out in that paragraph that a request for a floating day must be

submitted two weeks in advance and will be granted on a first come first serve basis and must have the mutual agreement of the Supervisor and the employee make sense only in the case of a working Paramedic and make no sense whatsoever when applied to an employee off work on W.S.I.B. Those requirements are clearly directed at giving the Supervisor adequate notice of a prospective day off work by the requesting Paramedic in order to allow management to decide, based on operational requirements, whether that Paramedic can be permitted that particular day off. Attempting to apply any of the floating holiday provision to an employee already off work on W.S.I.B. results in the dreaded arbitral absurdity and leads to the natural inference that these parties never contemplated that those employees would be entitled to the paid holidays occurring during their period of absence from the workplace on compensation.

**14** That being the case, it follows that subsections (ii) and (iii) go on to deal with the question of payment for the holidays listed in subsection (i) depending on which working Paramedics are required to work on a particular holiday and which are not. The juxtaposition and context of subsections (ii) and (iii) indicate to me that they are the opposite sides of the same coin. Unlike an industrial plant that closes down completely on a paid holiday giving every employee the day off, Paramedics being a 24/7 function year round, some Paramedics will be required to work on every holiday and some will not. Which Paramedics work and which do not work on a given holiday, one being the corollary of the other, assumes that all are on the working roster and capable of working, if needed.

**15** Also, subsection (iii) provides that a Paramedic who does not work on a paid Holiday will, (a) be paid, or (b) receive a lieu day off at a time mutually agreed upon by the Paramedic and the Employer. Again, for the same reasons applied to the floating holidays, that just doesn't work in the case of an employee off work on W.S.I.B. How can an employee who is not working take a mutually agreed lieu day off?

**16** Even attempting to apply the pay portion of that subsection to an employee on W.S.I.B. raises a further potential problem. How can the measure of payment of "his/her regular straight time hourly rate of pay" be applied to an employee who is not receiving any regular straight time hourly rate of pay at the relevant time?

**17** At virtually every turn within the parameters of article 17.04, I find Paramedics off work and on W.S.I.B. to be effectively precluded by the language of that provision, and by logic, from inclusion therein. That being so, I cannot find this Employer in violation of the collective agreement by excluding them from the paid holidays listed therein and the grievance is, therefore, denied.

qp/s/qlala