

Crown Employees
**Grievance Settlement
Board**

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GSB# 2002-1510
UNION# 2002-0999-0021

IN THE MATTER OF AN ARBITRATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE GRIEVANCE SETTLEMENT BOARD

BETWEEN

Ontario Public Service Employees Union
(Union Grievance)

Grievor

- and -

The Crown in Right of Ontario
(Management Board Secretariat)

Employer

BEFORE

Richard Brown

Vice-Chair

FOR THE UNION

Richard Blair
Ryder Wright Blair & Doyle
Barristers and Solicitors

FOR THE EMPLOYER

Kelly Burke
Senior Counsel
Management Board Secretariat

HEARING

By written submissions.

Decision

This is the third in series of decisions about the entitlement of essential and emergency workers to holiday pay for Good Friday and Easter Monday which fell during the strike in 2002. The issued addressed in this decision was framed by the last paragraph of the most recent decision, dated October 20, 2003:

The decision in *Andres Wines* would seem to indicate the issue to be determined here is whether there exists a “reasonable nexus” between the holiday pay claimed and the performance of work, in the case of employees covered by the collective agreement on Good Friday or Easter Monday. A final ruling on whether the existence of such a nexus should be the determining factor, and on whether this sort of nexus does exist in the circumstances, would be premature until the parties have had an opportunity to make submissions on these two questions. (page 7)

I

In a letter dated December 5, 2003, union counsel commented on the outstanding issue:

The issue is not merely the subsistence of the employment relationship ... but the terms and conditions of employment for employees whose relationship during the strike remains one of being subject to the performance of work at the employer’s behest. In this admittedly peculiar circumstance, the bargain struck by the parties is a simple one – the cost allocation of the right to maintain such services favours payment under the terms and conditions of the Collective Agreement in favour of employees whose legal right to refrain from working has been fettered to permit the Employer to operate its business.

In our submission, there is no “gap” in the collective agreement created by this situation, but rather an agreed upon allocation of cost and benefit. To the extent a “nexus” is required, it is found in the employer-mandated maintenance of the right to call upon essential and emergency workers who, by virtue of the Conditions document, are then entitled to the benefit of the collective agreement without interruption. (page 2)

Counsel for the employer responded in a letter dated January 30, 2004, contending that entitlement to holiday pay should not turn upon a nexus between work performed and benefit claimed and that any such nexus was lacking in the case at hand. Counsel argued that the granting of holiday pay would “result in effects that are inconsistent with the reasonable expectations of the parties” (page 2). Two such effects were cited:

- emergency/essential services workers working less than full-time hours will receive the same benefits received by essential and emergency services employees working full-time hours;
- emergency/essential services workers working less than full-time hours will receive a greater benefit than all employees working less than full-time hours during non-strike periods because, pursuant to the Manual of Administration, employees working less than full-time hours during non-strike periods would be considered on authorized leave and would not have access to statutory holiday pay. (page 2)

Counsel went on to urge me to resolve any ambiguity in the collective agreement by reference to the Manual of Administration.

In a reply dated Feb 26, 2004, union counsel submitted the employer’s reliance upon its Manual of Administration “in essence amounts to a request for reconsideration of your ruling on this point which we respectfully request that you reject.”

II

In the decision dated October 20, 2003, I summarized the employer’s initial argument about the Manual of Administration and concluded it lacked merit:

The employer also relies upon the passage in its Manual of Administration stating holiday pay is not owing “where a statutory holiday occurs during a leave-of-absence without pay unless the leave is due to sickness or injury.”

No evidence was led as to how this policy has been consistently applied and, if so, whether union officials acquiesced in such consistent application. As suggested by union counsel, in the absence of evidence relating to these matters, management's policy is of no assistance in interpreting the collective agreement. (page 5)

For the reason stated in my earlier decision, the Manual of Administration does not assist the employer.

Employer counsel urges me not to award holiday pay to employees who worked reduced hours because the parties could not reasonably have expected these employees to receive the same benefit as those whose hours were not reduced. This argument implicitly rejects the reasoning underlying *Andres Wines* which assumes inactive employees are entitled to the same benefits as those actively employed, so long as there is a reasonable nexus between work performed and the benefit claimed by those not actively employed.


Having reviewed the submissions of counsel, I conclude entitlement to holiday pay should be determined by considering whether there is a sufficient nexus between the work performed and the benefit claimed.

In deciding whether such a nexus exists in the case at hand, I begin with emergency workers. I already have ruled they were covered by the collective agreement on the day of a holiday only if it fell in the interval between work being assigned and the completion of that work. For a holiday falling in this period, there is a reasonable nexus between the work performed and the benefit claimed. Employees designated as essential were covered by the collective agreement throughout the strike, so long as they actually performed some essential duties. Such employees may have worked fewer hours per week, or fewer weeks per month, than they did before the work stoppage, but they typically had scheduled hours throughout the strike. Based upon the shifts scheduled for them, I conclude there is a reasonable nexus between the performance of work and the benefit claimed. Indeed, for both emergency and essential workers, the nexus between

work performed and benefit claimed is much stronger than it was in *Andres Wines* where holiday pay was awarded to employees laid off for months.

The foregoing analysis leads me to conclude any employee covered by the collective agreement on Good Friday or Easter Monday is entitled to pay in recognition of the holiday.

Dated at Toronto this 8th day of March 2004.

A handwritten signature in cursive script, appearing to read "Richard M. Brown", is written over a horizontal line.

Richard Brown
Vice-Chair