IN THE MATTER OF AN ARBITRATION

BETWEEN

ROYAL OTTAWA HEALTH CARE GROUP

("the Hospital" / "The Royal" / "the Employer")

- AND -

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 942

("the Union")

CONCERNING A UNION POLICY GRIEVANCE (2017-RP10) AND THE INDIVIDUAL GRIEVANCE OF JEAN-LOUIS HÉBERT ("the Grievor") (2017-R9)

Board of Arbitration:
Christopher Albertyn, Chair
Joe Herbert, Union Nominee
Kathryn Butler-Malette, Employer Nominee

APPEARANCES
For the Union:
Peter Engelmann, Counsel
Erin Moores, Counsel
Louis Rodrigues, First Vice-President, OCHU
Amir Sigarchi, President, CUPE Local 942
Lisa Riasyk, Secretary, CUPE Local 942
Graeme Reniers, National Representative, CUPE
Jean-Louis Hébert, Grievor
For the Employer:
Porter Heffernan, Counsel
Sébastien Huard, Counsel
Marie-Pierre Pilon, In-House Counsel
Alicia Bouchard, Manager, Labour Relations & Conflict Resolution
Jean-Laurent Domingue, Acting Director, Forensic Program

Hearing held in OTTAWA on May 24, 2019
Executive meeting held in OTTAWA on July 24, 2019.
Further consultations with the Executive Board.
Award issued on January 9, 2020.

AWARD

1. At issue is how the Hospital grants vacation time off for part-time employees. There is a policy grievance (2017-PR10) and an individual grievance, that of Jean-Louis Hébert, the Grievor.

2. The relevant facts are set out in an Agreed Statement of Facts:

AGREED STATEMENT OF FACTS

Between

CUPE, Local 942
(the "Union")

and

Royal Ottawa Health Care Group
(the "Employer")

Grievance 2017-R9 (Jean-Louis Hébert) and 2017-RP10 (Policy)

WHEREAS the parties wish to agree on certain facts which may be admitted into evidence in the hearing of the above Grievances;

AND WHEREAS the parties agree that these facts are admitted only for the purpose of the hearing of the above Grievances, and are not admitted for any other purpose;

NOW THEREFORE the parties agree as follows:

General

1. CUPE, Local 942 and the Royal Ottawa Health Care Group are parties to the following two Collective Agreements, both of which incorporate Central and Local provisions

    - Collective Agreement (Full-time), expiry date September 28, 2017, Tab 1, Joint Book of Documents
    - Collective Agreement (Part Time), expiry date September 28, 2017, Tab 2, Joint Book of Documents
    - Collective Agreement (Part Time Local Issues), expiry date September 28, 2017, Tab 2, Joint Book of Documents

2. The Part Time Collective Agreement covers both regular part-time employees and casual employees.

3. Regular part-time employees are pre-scheduled for a specific number of shifts. This regular part time commitment is expressed as a "full time equivalent" (FTE) or in other words, a fraction of a full-time position. For example, an employee who regularly works two (2) days per week would be described as holding a 0.4 FTE regular part time position.

4. Casual employees are not regularly pre-scheduled in the manner of regular part-time employees. Casual employees are encouraged to provide availability 6 weeks or more in advance, but they may change this statement of availability on 24 hours' notice. The Employer then relies on this statement of availability and their seniority to call casual employees as needed on a relief basis. Casual employees who have provided sufficient availability may be called for shifts as much as 6 weeks in advance, or as little as the day of the shift in question. Once the employee accepts the shift(s), it is attributed to them and they are expected to work it. Casual employees cover absences of regular part-time and full-time employees including for example due to illness, vacation or other leaves.

5. In addition to their FTE, regular part time employees can also provide a statement of availability and the Employer will offer them additional shifts on a relief basis in accordance with this statement of availability and their seniority, in a similar manner to casual employees. Once a regular part time

employee accepts a relief shift, it is attributed to them and they are expected to work.

The Issue

6. The central issue in both the Individual Grievance and the Policy Grievance is the entitlement of regular part time employees and casual employees to unpaid vacation time under Art. 17.01. This is the first time the issue has arisen between the parties.

   Article 17.01 reads as follows:

   Article 17 – Vacations

   17.01 – Vacation entitlement, Qualifiers and Calculation of Payment

   Effective September 29, 2012, the vacation entitlement will be as follows:

   Subject to superior conditions:

An employee who has completed the following number of continuous hours of service:	But less than the following number of continuous hours of service:	is entitled to the following percentage of vacation pay, plus the equivalent time off:
Less than 3,450		4%
3,450	8,625	6%
8,625	20,700	8%
20,700	34,500	10%
34,500	48,300	12%
48,300		14%

   Progression on Vacation Schedule

   Part-time employees, including casual employees, shall accumulate service for the purpose of progression on the vacation scale, on the

basis of one year for each 1,725 hours worked.

7. Having reviewed all of the background data provided as disclosure and noting inconsistencies, neither party will argue that the Employer's past practice with respect to accrual of unpaid vacation time under the Part Time Collective Agreement can be admitted as an aid to interpretation, nor that it gives rise to an estoppel.

8. This case is not about the calculation of vacation pay for regular part time or casual employees. There is no dispute that the Grievor has received the vacation pay to which he was entitled.

Individual Grievance

9. The Grievor, Jean-Louis Hébert, began working for the Employer on June 2, 2008, as a casual orderly.

10. As of January 30, 2018, he had 13,574.20 hours of seniority.

    - CUPE, Local 942 Seniority List, printed January 30, 2018, Tab 8, Joint Book of Documents

11. Since January 10, 2016, the Grievor has held a regular 0.4 FTE position as an orderly. Between January 10-14, 2017, the Grievor worked five shifts in a temporary 1.0 FTE position.

12. Prior to January 10, 2016, the Grievor held the following positions:

    June 29, 2014 to January 9, 2016: Temporary 1.0 FTE
    June 1, 2014 to June 28, 2014: Temporary 0.4 FTE
    February 18, 2014 to May 31, 2014: Casual
    February 25, 2013 to February 17, 2014: Regular 1.0 FTE
    April 5, 2011 to February 24, 2013: Casual
    February 28, 2010 to April 4, 2011: Regular 1.0 FTE
    February 1, 2009 to February 28, 2010: Regular 0.4 FTE
    June 2, 2008 to January 31, 2009: Casual

- Part-Time and Casual Employees – Status Change Summary, January 1, 2014-December 31, 2016, Tab 9, Joint Book of Documents

13. During the time periods that he occupied a casual or 0.4 FTE position, with the exception of the period from April 5, 2011 to February 25, 2013, the Grievor regularly declared his availability for, agreed and currently agrees to work casual shifts in addition to his regular part-time scheduled shifts.

14. From January 1 to December 31, 2016, the Grievor worked approximately 2,600 hours including training, orientation, and overtime.

    - Employee Attendance Calendar 2016 for Jean-Louis Hébert, Tab 5, Joint Book of Documents

15. From January 1 to December 31, 2017, the Grievor worked approximately 2,400 hours, including training, orientation, and overtime.

    - Employee Attendance Calendar 2017 for Jean-Louis Hébert, Tab 4, Joint Book of Documents

16. On March 21, 2017, the Grievor sent an email to his manager, Jean-Laurent Domingue, to request April 7, 2017 and April 10, 2017 as vacation days.

    - Email from Jean-Louis Hébert to Jean-Laurent Domingue, March 21, 2017, Tab 6, Joint Book of Documents

17. On March 23, 2017, Mr. Domingue responded by email to the Grievor, indicating he needed to consult with labour relations about the Grievor's vacation entitlement before approving the two days. Mr. Domingue noted that the grievor had already taken 7 vacation days in 2017, and that as an 0.4 FTE employee, he was "only really… allotted 8 days of vacation per year."

    - Email from Jean-Laurent Domingue to Jean-Louis Hébert, March 23, 2017, Tab 6, Joint Book of Documents

18. On March 24, 2017, Mr. Domingue wrote another email to the Grievor, confirming that he could only approve one of the two vacation days the Grievor had requested, for the following reason:

"Based on Article 17.01 of the Central CUPE collective agreement, I can only approve 8.32 days of vacation/year consideration your position is a 0.4 RPT position. You've already used 7 days since the beginning of 2017. So, I can either approve April 7th or April 10th."

- Email from Jean-Laurent Domingue to the Grievor, March 24, 2017, Tab 6, Joint Book of Documents

19. After discussion with the Grievor, Mr. Domingue subsequently approved April 7th as a vacation day and April 10th as a personal day.

- Email from Jean-Laurent Domingue to the Grievor, March 28, 2017, Tab 6, Joint Book of Documents

20. From January 1, 2016 to December 31, 2016, the Grievor took approximately 18 vacation days, with approval of the Employer.

- Emails exchanged between Jean-Louis Hébert and Jean-Laurent Domingue re: vacation, 2016, Tab 7, Joint Book of Documents Employee Attendance Calendar 2016 for Jean-Louis Hébert, Tab 5, Joint Book of Documents

21. On March 23, 2017, the Grievor had approximately 12,300 hours of seniority.

- CUPE, Local 942 Seniority List, printed April 4, 2017, Tab 8, Joint Book of Documents

22. As of April 24, 2018, the Grievor had approximately 14,091.20 hours of seniority.

- CUPE, Local 942 Seniority List, printed April 24, 2018, Tab 8, Joint Book of Documents

23. The Grievor filed an individual grievance, number 2017-942-R6, on April 3, 2017. By agreement with the Employer, the Union withdrew the grievance and filed an amended version dated May 4, 2017. The grievance number subsequently became 2017-R9.

- Step 1 and Step 2 grievance forms for grievance number 2017-R9, dated May 4, 2017, Tab 3, Joint Book of Documents

24. The Grievance alleges, *inter alia*, that the Employer denied the Grievor unpaid vacation time in violation of the applicable provisions of the collective agreement as applied to his service.

25. The Employer denied this grievance at the first and second levels. The Employer indicated on May 8, 2017 that the responses below are also its responses to the amended version of the grievance filed on May 4, 2017:

- Employer grievance response signed by Jean-Laurent Domingue, April 7, 2017, Tab 3, Joint Book of Documents
- Employer grievance response signed by Cal Crocker, April 26, 2017, Tab 3, Joint Book of Documents

26. From January 1, 2017 to until December 31, 2017, the Grievor ultimately took 10 vacation days, according to the Employer's records (Employee Attendance Calendar 2017 for the Grievor, Tab 4 of Union's Book of Documents):

- January 9
- February 4, 5, 10, and 13
- March 10, 13, and 20
- April 7
- For July 31, 2017, the Grievor requested and was approved for a personal day. According to the Employer's records, this day off was coded as vacation.

27. The Grievor also used compensatory leave/banked time on the following dates in 2017 (Employee Attendance Calendar 2017 for the Grievor, Tab 4, Joint Book of Documents):

- June 2
- July 28
- August 25
- September 22
- October 20
- November 17
- December 15

Policy Grievance

28. The Union filed policy grievance number 2017-942-RP7 on April 3, 2017. By agreement with the Employer, the Union withdrew this grievance and filed an amended version on May 4, 2017. The grievance number subsequently became 2017-RP10.

- Grievance 2017-RP10, dated May 4, 2017, Tab 3, Joint Book of Documents

29. The Grievance alleges, *inter alia*, that the Employer refused to allow members to take unpaid vacation time in accordance with their service and the applicable provisions of the Collective Agreement.

30. The Employer denied this grievance at the final level. The Employer indicated on May 8, 2017 that its response below is also its response to the amended version of the grievance filed on May 4, 2017:

- Employer grievance response signed by Cal Crocker, April 26, 2017, Tab 3, Joint Book of Documents

31. The number of hours worked by part-time and casual employees varies across the bargaining unit. Some part time and casual employees of the Employer work close to, at, or over 37.5 total hours per week by accepting

relief shifts. The amount of approved vacation time taken by part-time employees varies across the bargaining unit and varies by year.

- Hours Worked and Vacation Taken Summary Document, Tab 10, Joint Book of Documents

32. Vacation time for casual employees with no regular part-time FTE is not tracked by the Employer.

33. Casual employees are required under Art. V of the Part Time Collective Agreement to provide a minimum availability of eight (8) calendar days per month, which must include one (1) full weekend. Article V provides that the Hospital may terminate a casual employee who fails to do so for two (2) consecutive calendar months.

    Article V.2 reads as follows:

    ARTICLE V – CASUAL HOURS
    …
    V.2 Casual Hours

    a) Casual employees are required to be available for work a minimum of eight (8) days in each calendar month, which must include one (1) full weekend. A 'weekend' for the purpose of this clause is defined as midnight Friday (12:00am) to Sunday (11:59pm).

    b) Where a casual employee fails to meet the requirements in (a) above for two (2) consecutive months he or she may be terminated by the Hospital.

    c) Where a casual employee has made him or herself available and:

        i) Refuses an offer of work when availability has been declared; or
        ii) Cancels a pre-booked shift except for illness or emergency for five (5) consecutive shifts [in] a calendar year, he or she may be terminated by the Hospital. This clause also applies to

casual employees who have provided availability in excess of the minimum requirements set out in (a) above.

d) This Article would not prevent such an employee from requesting a leave of absence as set out in Article 12.01 [Personal Leave]

- Collective Agreement (Part Time Local Issues), expiry date September 28, 2017, Tab 2, Joint Book of Documents

3. Article 17.02 is relevant to a submission made by the Union:

17.02 – Work During Vacation

> Should an employee who has commenced his scheduled vacation and agrees upon [a] request by the Hospital to return to perform work during the vacation period, the employee shall be paid at the rate of 1½ times his basic straight time rate for all hours so worked. To replace the originally scheduled days on which such work was performed, the employee will receive 1 vacation lieu day for each day on which he has so worked.

4. Although described in the Agreed Statement of Facts, the collective agreement defines the distinction between regular part-time employees and casual employees:

2.03 Regular Part-Time Employee

> Regular part-time employee shall be defined as those part-time employees who make a commitment to the Hospital to be available for work on a pre-determined basis and in respect of whom there is a pre-determined schedule.

2.04 Casual Employees

> A casual part-time employee is one who is employed as a relief or on a replacement basis and is available for call-ins as circumstances demand.

5. We heard oral evidence from Alicia Bouchard, the Hospital's Labour Relations and Conflict Resolution Manager. She explained how the Employer actually applies Article V.2. Every three months a check is done of casual employees' communication of their availability. If, within the expired quarter, they provided no availability, or if, having made themselves available, they did not accept any of the shifts offered to them, they receive a letter of notice from the Hospital. The notice requests that they communicate with the Hospital within two weeks to discuss their availability. Any reasonable explanation by the employee is sufficient to enable them to remain on the casual list. But, if there is no response from the casual employee during that two-week period, their employment is terminated by written notice to them. This means in practice that an employee must last work, or last provide availability to work, longer than 4 months beforehand for them to be terminated under Article V.2.

6. Typically, in the examples provided during Ms. Bouchard's evidence, a casual employee was terminated when they had not worked, nor offered to work a shift, in the 7 or 8 months prior to their termination.

7. There is no issue between the parties regarding a regular part-time employee who only works their regular part-time assignment. So, say, they have an assignment of .4 FTE, they are paid vacation pay for that assignment at the percentage level for their own accumulated service entitlement, and they receive the equivalent time off work, being their vacation time.

8. The first problem, says the Union, arises for those regular part-time employees, like the Grievor, who work in excess of their regular assignment by

picking up extra shifts. They get vacation pay on all their time worked (i.e. for their regular shift assignment work and for the additional shifts they pick up), but, for the hours worked beyond their regular shift assignment, they don't get any additional time off as scheduled vacation that they can take during their regular commitment. This, the Union says, is a violation of the collective agreement. The Grievor was in this situation. He worked almost the equivalent hours of a full-time employee, sometimes more, yet received scheduled vacation time off only at the level of his regular part-time assignment.

9. The second problem, the Union says, is that no actual provision is made by the Hospital for casual employees to take scheduled vacation time, despite Article 17.01 applying to all part-time employees.

10. The Employer applies Article 17.01 as follows. Its stance is that the equivalent time off of a part-time employee is equivalence with a full-time employee. The Employer says that the part-time employee's vacation entitlement should be equivalent to that of a full-time employee of the same category of service. So, taking the case of the Grievor, who has the service equivalent of a full-time employee getting 4 weeks of paid vacation time off annually, the Grievor gets 8%. That means, with a .4 FTE assignment working two days a week, the Grievor gets the equivalent vacation time off, i.e. he is off for the 2 days he would otherwise work, for a period of 4 weeks. That is 8 days of vacation time off per annum, so 4 weeks off, like the equivalent full-time employee. This the Employer sees as "equivalent time off" for the vacation pay the Grievor receives on the regularly scheduled hours he works.

11. As regards the hours the Grievor works beyond his regular assignment, the Employer says those hours are wholly within the Grievor's control. The part-timer can take as many such days as they wish as their vacation time off.

12. So, applying the Employer's stance, the Grievor can use as many non-regularly scheduled work days as he chooses as time off for the days he volunteers to work beyond his regularly scheduled work days. The time the Grievor has beyond his regularly scheduled work days is his own to allocate between his vacation time equivalent and such other time off as he wishes to take. If the Grievor chooses to work beyond his required regular work days, that is his own choice, and it does not impact upon the vacation time that the Employer must schedule for him.

13. In summary, the Hospital says that it needs to schedule vacation time off for the Grievor only to the extent of his regular work assignment as a regular part-time employee. Beyond that, for work beyond his regular assignment, the Grievor can take for himself, as time off, as much time as he likes, subject only to his own choice of how many extra hours he wishes to make himself available to work.

14. As regards casual employees, the Hospital says they can choose how much they want to work, subject only to their minimum availability for work (in practice at least a shift every three months or having some reasonable explanation for not doing so in response to the Employer's letter inquiring whether they wish to remain on the casual list). By being able to choose when they work, they can allocate any of the days when they choose not to work as their vacation time off.

15. The Hospital explains that to start scheduling vacation time to casual employees (and for regular part-time employee beyond what it now does for them), from the time when the casual employees choose not to work, would be a huge, unnecessary, impractical administrative burden.

The Union's submissions

16. The Union points out that the Employer's obligation under Article 17.01 is

not just to pay the stipulated percentage of vacation pay, but also to provide "the equivalent time off", which the Union says is vacation time off. Vacation pay and vacation time off are two distinct concepts: *Complex Services Inc. v. O.P.S.E.U., Local 278*, 2011 CarswellOnt 5935 (Surdykowski).

17. Applying Article 17.01 to the Grievor, he is entitled to 8% of vacation pay, and the equivalent time off. The Union says that the 8% must apply to the total hours of work performed by the Grievor each year, not just to the hours for which he is regularly scheduled. The hours he works beyond his regular schedule also generate 8% vacation pay, and the equivalent time off as vacation time must be granted to him.

18. The Union says that to do as the Employer does, with respect to the Grievor, attributing him vacation time based only on his regular part-time commitment, .4, does not give him what Article 17.01 requires, which is "equivalent time off" to what he is paid in vacation pay. He should be given vacation time off in direct proportion to the total number of hours he works each year, not just to his part-time commitment of .4 FTE. Otherwise, he is not getting equivalent time off.

19. The Union says the Grievor was therefore entitled to additional assigned vacation days, beyond what he was actually attributed by the Employer.

20. The Union argues that the key question is one of quantity: how much vacation time off is the Grievor entitled to on the basis of the actual hours he worked? Eight days, which he was allocated by the Employer is wholly insufficient for the number of hours he actually worked. The actual hours worked warranted approximately 25 days of vacation in the relevant year, rather than 8, as he received.

21. The Union emphasises the need for giving collective agreement provisions their plain and ordinary meaning, in the context of the whole agreement, unless to do so results in an absurdity or the context clearly intends a different meaning: *The International Union United Automobile, Aircraft and Agricultural Implement Workers of America, Local 439, in Re Massey-Harris Company Ltd.*, 1947 CarswellOnt 455, 1 L.A.C. 68 (Roach).

22. The Union's position is that no regard should be had to the full-time collective agreement between the Union and the Employer, and that Article 17.01 should be read within the context of its own collective agreement.

23. The Union points out that Article 17.01 expressly refers to casual employees. Under the Employer's method of applying the provision, the Union argues that, casual employees effectively have no vacation time off. At least for the regular part-timers, they get the equivalent time off for their regular commitment. But for the casual part-time employees, like for regular part-time employees working beyond their regular commitment, they get no recognition of their vacation time off.

24. The Union submits that, on the Employer's interpretation of the part-time employee's time off, beyond the scheduled vacation time off for the hours for which they are regularly scheduled, Article 17.02 becomes impossible to apply beyond the scheduled vacation time off based on the regular schedule. The Hospital accepts, if an employee works more than their regular scheduled FTE hours, that some portion of the part-time employee's own time must be treated as vacation time off under Article 17.01. If that is the case, the Union asks, other than during the scheduled vacation time off (the 8 days in the Grievor's case), when can an employee claim they are called in during their vacation time for the purposes of Article 17.02? Since the only scheduled vacation for such employees is that related to their FTE position (the .4 or 8 days of the Grievor), he cannot

effectively claim the premium under Article 17.02 if called in to work during his own time, even though some of that own time includes vacation time, on the Employer's case. Alternatively, the Grievor could claim, if called in to work during a period of his own time off, that that particular occasion of work was part of his vacation time off under Article 17.01 and he should be paid the Article 17.02 premium. Since the Employer accepts that the individual part-time employee self-schedules their time off under Article 17.01 (beyond their scheduled time off from their regular commitment), then the individual employee can presumably self-schedule their vacation time from the period of their own time, and apply that self-scheduling for the purposes of Article 17.02.

25. The Union relies also on section 33 of the *Employment Standards Act, 2000*, SO 2000, c 41 (the ESA). The provision requires 2 weeks' vacation time off per year for employees with less than 5 years' service, and 3 weeks for employees with more than 5 years' service. (These periods are extended under the 2018 amendments). The Union argues that that entitlement is effectively abrogated for the casual employees, and with respect to hours worked beyond those regularly scheduled for other part-time employees.

26. The Union asks for a declaration of a violation of Article 17.01 because the Employer did not give equivalent time off. The Union asks for a finding that the Grievor's rights were violated by not being given vacation time off equivalent to his vacation pay. The Union seeks only these declarations and asks that we retain jurisdiction to deal with any issues of implementation and remedy.

The Employer's submissions

27. Firstly, the Employer says that the equivalent time off is relative to what full-time employees receive. The part-time agreement must be understood in the context of the full-time employees' collective agreement concluded between the

same parties.

28. So, in the example provided above, a full-time employee, who works five days a week, with equivalent service to the Grievor, gets 4 weeks' time off. The equivalent for the Grievor is also 4 weeks off, which, with respect to his regular part-time commitment, means he gets his 2 days of work per week off over 4 weeks, making a total of 8 days off, but also 4 weeks off. Were he to get 20 days off, like the full-timer, that would amount to 10 weeks off a year, considerably more. The same time off is not the equivalent time off. The base of calculation, argues the Employer, must be the number of regular hours worked by the employee concerned, full-time or part-time.

29. The Employer submits that all hours worked by a regular part-time employee beyond their commitment is wholly within the employee's control. They can choose to work as little or as much as they want. To the extent they decide to work they take from the time off they have from the Hospital. The Hospital suggests that the part-time employee's time, when not regularly scheduled, is their own time to be used as they choose, including to provide for the time off stipulated in Article 17.01.

30. For casual part-time employees, who have no regular shifts, all of their time is their own, but for the minimum commitment, which in practice is to work at least one shift every three months (even though the collective agreement requires that they be available for 8 shifts per month). The Hospital argues that casual employees can therefore schedule their time off for vacation whenever they choose.

31. The Employer submits that the Union's position is not that employees must have time off (which Article 17.01 requires), but that it must be a specific description of time off, as vacation time. That is not what the provision says. It

says, “plus the equivalent time off”. That is what the Hospital gives to the part-time employees. Equivalent time off means that employees must be entitled to take time off along with their vacation pay, which is what the Hospital’s arrangements provide for. Nothing in Article 17.01 requires that the time off be accrued in a particular way or be coded as vacation. It is simply time off.

32. The Employer submits that the Union’s argument makes sense only if the word “vacation” is added to the provision in Article 17.01, as “plus the equivalent vacation time off”. That is not what the provision says and therefore, argues the Employer, what the Hospital does is permit the part-time employees to take as much time off as they choose (for which they are paid vacation pay) beyond their regular commitment. With respect to the regular commitment, that is taken care of with the guarantee of vacation time applied within the regular work days.

33. The Employer explains the purpose of the vacation provision: to give employees a period of time away from work without loss of income: *Revera Inc. and SEIU, Local 1 (100-213-546)*, Re, 2015 CarswellOnt 8080, [2015] O.L.A.A. No. 210, 123 C.L.A.S. 119, 257 L.A.C. (4th) 247 (Goodfellow); *U.S.W.A. v. International Nickel Co. of Canada Ltd.*, 1971 CarswellOnt 877, 22 L.A.C. 298 (Rayner). The Employer says the part-time employees exercise this entitlement by saying they are not available. In that way they have time off for which they are paid.

34. The Employer submits that the context in which the part-time collective agreement is to be understood is that the parties intend the same terms to apply to full-time and part-time employees of equivalent service. That is why the full-time and part-time vacation provisions mirror each other. With increased accumulated service, in both the part-time and full-time collective agreements, employees acquire more vacation pay and vacation time. The amount of such accrual is the same in both part-time and full-time collective agreements.

35. The Employer points out that the origin of the part-time vacation entitlement is the 1990 *Participating Hospitals and CUPE* interest award (Gorsky) ("the Gorsky award"). In that award, and ever since, the ratio of part-time vacation pay and leave has been directly associated with the equivalent in the full-time agreement: "The Award of this Board is that part-time employees are to receive "time off", as well as pay, **according to our formulation described above for full-time employees**." (p.16) [emphasis added].

36. The Employer explains how the equivalency works as between the full-time and part-time employees. The full-time agreement describes the vacation entitlement in weeks. Although a week consists of 7 days, typically employees work only 5 days a week. So, for a full-time employee in the equivalent position to the Grievor, they get 4 weeks of vacation a year. That is effectively 20 days when they are not required to work but are paid: that is their paid vacation time off. The equivalent for the Grievor, whose regular commitment is 2 days a week, is to get the same 4 weeks, being 8 days, when he is not required to work but is paid for his time off.

37. The Employer points out what, it says, is the absurdity of the Union's position. Based on the Grievor's actual work hours he was entitled to 25 days of vacation time. That is more than a full-time employee of equivalent service, who gets only 20 days of vacation a year. That aside, if it were applied to his regular part-time commitment of 2 days a week, at 8 days a month, he would be off work on paid vacation for over 3 months. That would bear no relation whatever to his full-time equivalents, when the very purpose of the part-time vacation entitlement is to align it to the full-time entitlement. The Employer submits, that cannot have been the intention of the parties when agreeing upon Article 17.01.

38. The Grievor needs approval for time off from his regularly scheduled

work commitment of .4 FTE. He does not need approval for any additional time off arising from his extra shifts because he can take that time off from his own time, simply by not making himself available to work. In that way, the Employer says it satisfies its obligation to give the Grievor equivalent time off for which he is paid vacation pay under Article 17.01.

39. The Employer reiterates that casual employees can cancel any commitment they make up to 24 hours before their shift. They therefore have virtually complete control over their own schedules as to when they choose to work, and when they choose to be off work, subject only to their minimum commitment, which, effectively, means they need work only one shift every three months (in spite of the collective agreement requirement to be available for up to 8 shifts a month).

40. The Employer points out that, for it to keep a record of vacation time off for part-time employees, would be both enormously cumbersome (inquiring of each part-time employee what portion of their non-working time they want to be treated as vacation time off for the purposes of Article 17.01, and then recording that time for no useful purpose), and administratively costly for no good reason. For casual employees, they don't have to work, so practically speaking they are not going to seek approval not to work. Hence, recording their planned absences from work, makes no sense at all.

41. The Employer points out the absurdity of keeping a record of casual employees' vacation. If a casual employee asked the Employer to reserve a particular week for vacation and the Employer refused, that would amount to the Employer requiring a casual employee to work in that week, which is contrary to the entitlement of casual employees to work when they choose to.

42. The current system ensures that the employee gets vacation time off from

their regular commitment, and they can themselves choose to treat any portion of their time not working for the Employer as being their vacation time off for any work beyond their regular commitment.

43. The Employer answers the Union's *Employment Standards Act, 2000* argument as it does the Union's other arguments, by saying that the part-time employees have as much vacation time as they want beyond the regular commitment of the regular part-time employees. For those with a regular part-time commitment, such as the Grievor, they receive actual vacation time equivalent to their commitment. So, the Grievor gets 4 weeks' vacation time each year (2 days per week for 4 weeks) which is in excess of the requirements of the ESA.

Decision

44. The issue between the parties concerns how the grid contained in Article 17.01 concerning vacation is to be applied.

45. As both parties submit, in the interpretation of collective agreements, their words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object, and the intention of the parties. Also, when faced with a choice between two linguistically permissible interpretations, one must be guided by the purpose of the particular provision, the reasonableness of each possible interpretation, administrative feasibility, and whether one of the possible interpretations would give rise to anomalies or absurdity. (See Brown & Beatty, Canadian Labour Arbitration, 4:2100 — The Object of Construction: Intention of the Parties; *C.E.P., Local 777 v. Imperial Oil Strathcona Refinery*, 2004 CarswellAlta 1855, [2004] A.G.A.A. No. 44, [2005] A.W.L.D. 899 (Elliott)).

46. The primary issue dividing the parties is the meaning of the phrase "equivalent time off". The union submits that the phrase intends that the time off granted to a part-time employee is "equivalent" to the hours worked in that year times the percentage of vacation pay to which the employee is entitled, expressed as a number of hours off. The employer submits that the phrase "equivalent time off" refers to time off equivalent to that which would be received by a full-time employee at the same service level.

47. It is clear from the Gorsky interest arbitration award, from which the provision derives, that the phrase "equivalent time off" refers to the time off received by a full-time employee. In other words, full-time and part-time employees who have attained the same service threshold are entitled to the same time off for vacation.

48. While the Gorsky award is not referenced in the Agreed Statement of Fact, there was no dispute from the Union in the course of the hearing that the current provision derives from this award, nor did the Union suggest that we should not rely upon this assertion. Moreover, it is apparent from the face of the Gorsky interest award that this was precisely the issue being addressed in that award.

49. Full-time employees get vacation with pay in accordance with Article 17.01 of the full-time collective agreement. That means they continue to be paid while they are on vacation. Their vacation entitlement is measured by the total of their continuous years of service. The equivalent provision for part-time employees, also Article 17.01, is paid vacation time calculated as a percentage on every hour worked. The percentage increases with increases in the number of years of continuous service (each year being calculated on the basis of 1,725 hours worked). The increases in the percentages for part-time employees are equivalent to the increases in the number of weeks off for the full-time employees

as employees in both categories have greater continuous service with the Employer.

50. Therefore, the Employer's calculation of hours equivalency is correct. For the reasons advanced by the Employer, the proper comparison for equivalency is between the full-timer with the same service as the part-timer. So, 8 days a year time off per year for a .4 FTE (2 days a week) part-time employee is the same as 4 weeks off for the full-timer working 5 days a week. That is the correct proration, done by comparing the part-timer to the full-timer when they have the same service, because each then has 4 weeks a year when they are not required to work. The full-time employee is paid during those 4 weeks of vacation; the part-time employee is paid for their vacation time off through the in-lieu percentage payments on the hours they work.

51. The collective agreement distinguishes, at Article 2 – Definitions, between regular part-time employees and casual employees. Regular part-time employees are those "part-time employees who make a commitment to the Hospital to be available for work on a pre-determined basis and in respect of whom there is a pre-determined schedule". A casual part-time employee is defined as "one who is employed as a relief or on a replacement basis and is available with call-ins as circumstances demand".

52. So, as explained in Ms. Bouchard's evidence, the Hospital schedules the work of the regular part-time employees according to their regular commitment. In the case of the Grievor, he is scheduled to work 0.4 FTE, that is two shifts every week. In the case of casual employees, they must just make themselves available as required under Article V.2 of the local appendix. There it says they must hold themselves available for a minimum of 8 days each calendar month. In practice, as Ms. Bouchard explained, the Hospital requires no more than one shift's availability every 3 months. If the casual employee meets that

commitment, they remain on the casuals' list.

53. Vacation entitlement for regular part-time employees applies necessarily to their part-time commitment – the time they are required to be scheduled. For a .4 FTE regular part-time employee, they work 2 days a week. So, if they are entitled to 4 weeks' vacation time off (like the equivalent full-time employee), their 4 weeks of vacation means, in effect, 8 days when they would have worked and got paid for working, as vacation time off.

54. Article 17.01 applies also to casual employees. That is explicitly stated in the phrase describing how service is accumulated for the purpose of progression on the vacation scale: "Part-time employees, including casual employees, shall accumulate …". So casual part-time employees are entitled to the equivalent vacation time off to what full-time employees of equivalent service receive.

55. The question then is, how is that vacation time off to be exercised? The Employer says that the casual employee can work as much or as little as they want (subject to the commitment in Article V.2), and that the casual employee can allot any portion of their non-working time to their vacation time off. The Employer also says that there is an absurdity in the Employer having to schedule vacation time for a casual part-time employee, when, in practice, they can work as little as one shift every three months to retain their position as a casual employee.

56. A casual employee may, in fact, want a specific period of time off. Let us say, for example, the casual employee has the continuous service equivalent of the Grievor. They would be entitled to a month off of no work. That would mean, were Article V.2 applied strictly by the Hospital (which it is not), and if the casual employee were to want to take their vacation as a block of a month away, the casual employee would not be able to be available for 8 days during that month. How, then, are the provisions of Article 17.1 to be reconciled with Article V.2 in

the local appendix?

57. The manner in which a casual employee can exercise their right to equivalent vacation time off is determined by what the parties agree in their local issues' appendix. As mentioned, under Article V.2, a casual employee has a limited availability commitment. If, in practice, that commitment infringes on the casual employee's vacation time-off entitlement under Article 17.1 of the central portion of the collective agreement, then the employee would be entitled to avail themself of their vacation time-off entitlement by informing the Employer of their non-availability during the period of planned vacation. They would do this by not making themself available during that period. To the extent that the effect of their using that vacation time meant that they could not meet their 8-day commitment in any month, they would be entitled to explain that to the Employer in the event of their being required to show an availability commitment to remain on the casuals list. This means that the Employer is not required to retain a vacation record for casual employees, nor to keep a schedule for vacation time-off for casual employees. But, if the cause of non-availability below the Article V.2 commitment is vacation time-off, the employee concerned is entitled to explain that as a basis for retaining their place on the casuals' list.

58. The Union raises two concerns with the Employer's approach. The first is with respect to any regular part-time employee who is working significantly beyond their commitment, like the Grievor. They must be able to take their vacation-earned time off during the year in which it accrues. The Union and the Grievor would like the time off (for the hours worked beyond the regular commitment) to apply within the Grievor's regular commitment (above the vacation time off scheduled on his regular commitment), rather than beyond that regular commitment, as the Hospital applies it. In other words, the Union and the Grievor would like him to be able to have more than 8 days a year of vacation from within the work period of his regular commitment.

59. A problem in doing so is that it would distort the Grievor's equivalency with full-time employees of the same service. Instead of his having 4 weeks' paid vacation, he would be getting more than 4 weeks' paid vacation. That would offend the basic equivalency prescribed in Article 17.01 by the words, "the equivalent time off". His 8% equivalent time off is the same as a full-time employee entitled to 4 weeks of paid vacation each year. His additional hours of work beyond his regular schedule entitle him to the accumulation of hours for the purposes of seniority and service, they entitle him to additional vacation pay, but the equivalent time off is that which pertains to his level of service.

60. Another problem, of perhaps greater concern, is that the Union's interpretation runs contrary to the ordinary and sensible operation of Article 17. On the basis of the relevant collective agreement provisions, a full-time employee is able to predict and plan the amount of vacation time available each year. That amount of vacation time is driven by the amount of service the employee has accumulated. The Union contention would, however, have the effect that no such predictability would apply to the "equivalent time off" provisions for part-time employees, as that would be driven, not simply by the employee's continuous service, but instead by an amalgam of the number of hours worked in any year (including additional hours) and service. Were such a scheme to apply, not only would an employee be unable to predict the amount of their time-off from one year to the next (as these would be driven by varying hours worked from year to year), but the service-based progression of vacation entitlement would be severely undermined. Were the Union's argument applied, an employee whose classification in any year offered a greater number of additional hours might then be entitled to greater time off than more senior employees. Plainly, this would not conform to the service-based progression scheme of Article 17.

61. The Union's second concern regarding the Employer's method of

applying Article 17.01 is its impact on Article 17.02. The Union says that Article 17.02 is largely rendered meaningless for the regular part-time employee working more than their regular schedule, with respect to those additional shifts, and for the casual employee. The Union says that, because regular part-time employees get time off during their own time for the work beyond their regular commitment, like the casual employees, it is never clear when they are just not choosing to be scheduled and when they are enjoying their time off as vacation.

62. So, the Union asks, if such an employee is called in during their time off (which is not expressly during their vacation), how can they benefit from the premium that is payable under Article 17.02? How is the distinction to be drawn between time off and vacation time off, because one must be drawn if Article 17.02 is to be given effect to?

63. Article 17.02 applies to regular part-time employees with respect to their scheduled vacation. So, in the Grievor's case, when off on his annual vacation (his 4 weeks off), if he is requested by the Hospital to return to work, and he agrees, he would be entitled to the premium; not otherwise.

64. The Union's misapprehension of Article 17.01 is that a regular part-time employee is entitled to longer vacation time-off if they work more than their regular schedule in any year. That is not correct. They do not earn more vacation time off for working more hours than their part-time commitment. The equivalency described in Article 17.01 is only with respect to their entitlement vis-à-vis full-time employees, calculated on their continuous service.

65. As regards the ESA, the vacation benefit of the part-time employees is superior to that provided for in the ESA. They are paid a minimum of 4% vacation pay (increasing with increased service up to 14%), and they are entitled to the equivalent time off as are full-time employees for their regular work

commitment, which is a superior benefit to what is required by the ESA.

66. To answer the question of what is meant by "plus equivalent time off", we find the phrase refers to the service equivalency entitlement of the part-time employee concerned (including casual employees) relative to full-time employees. It must be read not only in the third column, but from the first column of Article 17.01. Applied to the Grievor, the provision reads as follows:

> An employee who has completed 8,625 continuous hours of service, but less than 20,700 continuous hours of service, is entitled to 8% percentage of vacation pay, plus the equivalent time off.

67. The equivalency described is to the same service among full-time employees; in the Grievor's case, to those who receive 4 weeks of paid vacation. The equivalency in time off applies with respect to the regular part-time commitment. The amount of vacation is set as being the equivalent vacation time as the full-time employee has with equivalent service.

68. In the circumstances, we find that the Hospital's method of applying Article 17.01 with respect to the Grievor complies with the collective agreement. His grievance is therefore dismissed. With respect to the policy grievance, our comments with respect to casual part-time vacation time off are set out above.

DATED at TORONTO on January 9, 2020.

Christopher J. Albertyn
Chair: Board of Arbitration

I concur.

"Kathryn Butler-Malette"

_____

Kathryn Butler-Malette
Employer Nominee

I concur.

"Joe Herbert"

_____

Joe Herbert
Union Nominee