

2023 CarswellBC 613
British Columbia Arbitration

Teck Highland Valley Copper Partnership and USW, Local 7619 (Anderson), Re

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**In the Matter of an Arbitration, Pursuant to the
Labour Relations Code, RSBC 1996 c. 244 (the "Code")**

Teck Highland Valley Copper Partnership (THVCP) ("the Employer") and United Steel Workers, Local 7619 ("the Union")

Cathy Knapp Member

Heard: February 9, 2023

Judgment: March 6, 2023

Docket: None given.

Counsel: Kyle Wolff, for Union

David T. McDonald, for Employer

Subject: Public; Employment; Labour

Headnote

Labour and employment law --- Employment standards legislation — Miscellaneous

Table of Authorities

Cases considered by Cathy Knapp Member:

Health Employers Assn. of British Columbia v. B.C.N.U. (2002), 114 L.A.C. (4th) 217, 2002 CarswellBC 3569 (B.C. Arb.)
Health Employers Assn. of British Columbia v. B.C.N.U. (2005), 2005 BCCA 343, 2005 CarswellBC 1504, 2005 C.L.L.C. 220-044, 256 D.L.R. (4th) 47, 214 B.C.A.C. 66, 353 W.A.C. 66, 141 L.A.C. (4th) 1, 45 B.C.L.R. (4th) 235 (B.C. C.A.)
Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 221 N.R. 241, (sub nom. *Adrien v. Ontario Ministry of Labour*) 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173 (S.C.C.)

Statutes considered:

Employment Standards Act, R.S.B.C. 1996, c. 113

Generally

s. 2(b)

s. 49.1 [en. 2020, c. 6, s. 1]

s. 49.1(4) [en. 2021, c. 12, s. 2(b)]

Employment Standards Amendment Act (No. 2), 2021, S.B.C. 2021, c. 12

Generally

Cathy Knapp Member:

Introduction:

1 The parties have agreed this Board has the jurisdiction to determine this matter. The matter before me is an interpretative one pertaining to the application of [Section 49.1 of the B.C. Employment Standards Act \(the Act\)](#) when an employee has worked a partial day before taking sick leave. Specifically at issue is whether the Grievor, Mr. Dyke Anderson is entitled to receive an

average day's pay for compensation on July 1, 2022, *OR* an average day's pay in addition to pay for hours he worked before taking leave. I note that neither the number of hours paid to the Grievor for his statutory holiday entitlement nor the amount of hours constituting an average day's pay are in dispute.

The Facts:

2 Neither Party called witnesses and relied upon the following jointly prepared Agreed Statement of Facts (ASF). The Union's book of documents was also relied upon by both Parties.

Agreed Statement of Facts:

3

1. [Section 49.1 of the BC Employment Standards Act](#) says

Illness or Injury Leave

49.1 (1) After 90 consecutive days of employment with an employer, an employee, for personal illness or injury, is entitled, in each calendar year, to

- a) paid leave for up to the number of days prescribed, and
- b) unpaid leave or up to 3 days

(2) If requested by the employer, the employee must, as soon as practicable, provide to the employer reasonably sufficient proof that the employee is entitled to leave under this section.

(3) Subject to subsection (4), an employer must pay an employee who takes leave under subsection (1)(a) an amount in money equal to at least the amount calculated by multiplying the period of the leave and the average day's pay, where the average day's pay is determined by the formula

Amount paid + days worked

Where

Amount paid is the amount paid or payable to the employee for work that is done during and wages that are earned within the 30 day calendar period preceding the leave, including vacation pay that is paid or payable for any days of vacation taken within that period, less an amounts paid or payable for overtime, and days worked is the number of days the employee worked or earned wages within that 30 calendar day period.

(4) An employer must pay an employee in a prescribed circumstance who takes leave under subsection (1)(a) an amount in money equal to at least the amount calculated in accordance with the regulations.

2. THVCP and USW 7619 worked together to determine the "average day's pay calculation", while the Company implemented a new pay code for a "paid sick day".

3. The Company communicated the Sick Day changes on April 8th, 2022 in an all staff memo

4. The Union provided their interpretation of "an average day's pay" to the Company on April 21st, 2022. Final agreement took place on May 2nd. This was represented by an email on May 5th from Candace Droder.

5. The Company and the Union continued to figure out an interim pay solution while coding the new sick day, coming to resolve on May 5th, with the Company doing a manual calculation until the new code was in place.

6. On May 20th, the Company provided more clarification around the newly implemented sick days, including a copy of the Illness or Injury Leave — Act Part 6, Section 49.1 Summary, the May 5th email chain, ESA — Paid sick leave FAQ's and the 3.01 Absence Reporting Policy.

7. On June 28th, the Company was successfully able to code Sick Days.

8. On July 1st, Mr. Dyke Anderson attended work for the first 6 hours of his shift before going home sick. The company paid him 6 hours of regular pay for the time worked, then 6 hours for the remainder of the day. Also paid was 12 hours of statutory holiday as it was July 1.

9. A grievance was filed on August 16th, received on August 17th, with a second stage grievance meeting taking place on September 26th, 2022.

10. A second stage grievance response was provided on October 17th.

11. The union proceeded with a section 104.

4 The Grievor works a rotation of 4 ?? 12-hour shifts followed by 4 days' off.

Grievance excerpts:

5

I have a grievance under the terms of the Collective Agreement and the BC Labor Code that I have been improperly paid for taking a sick day. [The Act](#) does not allow for "partial" sick days. [The Act](#) stipulates employees are entitled to "five paid days" to be paid based on an "average day's pay". Any time taken off on any day (even one hour) qualifies as one day for purposes of the section. (See definition of "day in [section 1 of the Act](#)). There are no provisions for prorating or subdividing the entitlement.

Remedy Sought:

I request that I be paid the proper rate of pay and made whole for any and all losses that have been incurred.

Positions of the Parties:

The Union:

6 The Union asserts the Grievor was incorrectly paid on July 1, 2022, by only being paid six hours for his time worked before going home and six hours for illness injury leave for a total of twelve hours, in addition to his twelve hours of statutory holiday pay. In their view he should have received twelve hours of pay for paid leave as his average day's pay, plus the six hours for the time he worked before going home, asserting [the Act](#) prohibits partial sick days, prorating, or subdividing the entitlement. This is in addition to the twelve hours of statutory holiday pay he received.

7 The Union relied upon the government's summary of the legislation found in the policy interpretation section of the Ministry of Labour's Guide to the Employment Standards Act and Regulation (the Guide) as follows:

Policy Interpretation

8 Illness or injury leave is an employee-initiated leave. This leave is a statutory entitlement, not something that may or may not be granted at the discretion of the employer. This paid leave is sometimes referred to as 'sick leave' with 'sick pay'.

...

Partial sick days

The Act does not allow for "partial" sick days. The Act stipulates employees are entitled to "five paid days" to be paid on an "average day's pay". Any time taken off on any day (even one hour) qualifies as one day for purposes of this section. (See definition of "day" in section 1 of the Act). There are no provisions for prorating or subdividing the entitlement.

The Act does not stipulate an arrangement in which the employees can take partial sick days and be paid in accordance with the average day's pay formula below. Employers must ensure payment of wages complies with the Act.

After 90 days of employment, full time, part time and casual employees are entitled to 5 paid sick days. The amount of wages paid to full time, part time or casual employees will vary based on the average day's pay formula set out in section 49.1 (3). Eligibility is based on employment status and crossing the 90 day employment threshold.

Example: An eligible employee works 4 hours every Monday, 8 hours on Tuesday and Thursdays, 3 hours on Friday and 6 hours on Saturday. On Saturday, the employee arrives to work and works 3 hours before they need to go home sick. The employee asks to take a paid sick day for Saturday. The employee is entitled to be paid their regular wages for the 3 hours worked and a paid sick day based on an average day's pay (as set out in section 49.1 (3)). The employer would not be in compliance with the Act if they only paid the employee 3 hours for work performed and 3 hours as sick pay. Regular wages and an average day's pay are two distinct entitlements and the amount of wages owed under the Act for a "paid sick day" is not based on the actual scheduled shift or hours for which the employee is sick.

9 In the above example, the Union's assessment is the employee would be entitled to a total of 8.8 hours of pay, breaking down 5.8 hours as the employee's weekly average in addition to the three hours worked by the employee before going home ill. In the instant case, the Union maintains the Employer "charged" the Grievor twelve hours by subtracting a full sick day from his allotment yet only provided him with six hours of paid leave. The Union states the Grievor should not incur any financial loss for taking a day off asserting the various types of pay for hours worked, paid sick leave, and statutory holiday pay do not work in tandem as are separate entitlements. The Union points to the Purposes of the Act highlighting the second bullet found at section 2 (b) *to promote the fair treatment of employees and employers*; and submits that the Act was put in place to protect employees stating they should not have to make the choice between working sick and going home without pay.

The Employer:

10 The Employer highlights that bullet point 2 (b) of the ESA being referenced by the Union is not a one-way protection for employees and asserts the Union's interpretation of the new legislation found at 49.1 of the Act is one that does not meet the statutory purpose of promoting fair treatment of employees and employers alike. It argues the Union's position of the Grievor receiving eighteen hours of pay (in addition to statutory holiday pay) for the six hours of work he performed on July 1st is not consistent with the intent of the legislation, particularly 49.1 (4) *an employer must pay an employee in a prescribed circumstance who takes leave under subsection (1)(a) an amount in money equal to at least the amount calculated in accordance with the regulations*.

11 The Employer submits the Union's entire argument is reliant upon the "erroneous" policy interpretation provided in the Guide which is neither a binding document nor a legal authority relying upon, *Vancouver Hospital & Health Sciences Centre v. British Columbia Nurses' Union*[2002] B.C.C.A.A. No. 420 (Gordon). Arbitrator Gordon states:

Turning to the Interpretation Guidelines Manual, the Employer relies on remarks which seem to support its position. I find those remarks to be inconsistent with the plain meaning of the language of section 21 (1) of the Act, particularly when viewed in the context of the purpose of the Act expressed in Section 2.

(at para 56)

12 It submits that the B.C. Court of Appeal upheld Arbitrator Gordon's award and analysis in this decision indicating that "the ESB guidelines are incorrect and not binding": [Health Employers Assn of B.C. v. B.C. Nurses' Union, \[2005\] BCCA 343](#) at paras. 59-60 (.

13 It contends the legislative intent for introducing the paid sick leave legislation was to indemnify employees against losing wages when they are off work due to illness or injury. It submits the legislature did not intend to provide a windfall to employees who work a partial day before going home sick.

14 The Employer asserts the legislative intent of [the Act](#) is clear from the record of parliamentary debates on Bill 13—Employment Standards Amendment Act (No.2), 2021 made evident by the comments of Honourable Harry Bains, Minister of Labour during the Second Reading, to describe the government's reasons for tabling the bill:

"Many workers wake up in the morning with a sore throat and a difficult choice. On the one hand, if they feel sick, they could stay home. This would be the right things to do for their own health and the health of their co-workers and could help stop the transmission of COVID-19 at the workplace.

Or they could push through and head into work because they just can't afford to stay home. They can't just stay. They just can't afford lose a day's pay. This, of course, puts their co-workers at risk and could lead to an outbreak. This is what we are discussing today with Bill 13.

...No workers should have to choose between going to work sick or staying home, losing pay. We're stepping up and providing what is needed now and for the future for the workers of British Columbia."

15 The Employer points to further comments by Minister Bains at the Committee Stage in response to a question from an opposition MLA about the meaning of the term "prescribed circumstance" in [section 49.1\(4\)](#):

"What this means is calculating an employee's wages...In that same section, it talks about how to calculate an employee's wages so they reflect the money that person would lose when they take that day off.

Now, we tried to capture every possibility that is there in order to ensure that every worker will receive the wages that they are entitled to for the day that they take...

...In the event we missed out any real situation where an employee, based on the formula, may not receive the full wages and there is a dispute, then the regulations can be drafted to address that issue..."

16 The Employer argues the Union's interpretation conflicts with the legislative intent for two reasons, first because it would improperly result in a financial windfall to employees who take paid sick leave after working for part of the day with a result in the form of pyramiding. Second, it asserts the Union's interpretation would incentivize employees to stay at work after becoming ill during the day because of the promise of receiving an "average day's pay" in addition to their pay for time worked — amounting to an absurd result not intended by the Legislature.

17 It submits the Grievor worked six hours of his twelve-hour shift on July 1st before going home sick and was compensated with twelve hours of pay which constitutes his average day's pay through the combination of pay for time worked and paid sick leave. This pay was in addition to his twelve hours of statutory holiday pay. The Employer maintains the Grievor was paid correctly with his statutory entitlements being met as the compensation provided kept the Grievor whole which is the purpose of the legislation. It maintains the Union's position of the Grievor being entitled to an average day's pay in addition to pay for hours worked would equate to the Grievor receiving 30 hours of pay rather than the 24 hours paid. This position it argues would result in a windfall for the Grievor which it says is an unreasonable interpretation and contrary to the intent of the legislation, requesting the Grievance be dismissed in its entirety.

The Union's Reply:

18 The Union disagreed with the notions advanced by the Employer that its position would constitute a windfall and pyramiding. It emphasized the entitlement is a statutory one providing for one day of leave regardless of the number of hours worked, highlighting the entitlement provides for up to five paid days and three unpaid days per calendar year. It submits there is no benefit for employees to go home early if they are only going to get a portion of their sick hours paid to them. Responding to the premise that compensating employees for time worked in addition to an average day's pay would create an absurd result the Union submits that the Employer would be entitled to make requests for reasonable sufficient proof or conduct an investigation in the event the validity of the leave is in question.

Analysis & Decision:

19 Both Parties rely on [Rizzo & Rizzo Shoes Ltd. \(Re\)](#), [1998] CarswellOnt 1, 1 S.C.R. 27 for the authority on statutory interpretation. The Supreme Court of Canada stated:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of [the Act](#), the object of [the Act](#), and the intention of Parliament.

(at para 21)

The Union also referenced the following:

...an interpretation of [the Act](#) which encourages employers to comply with the minimum requires of [the Act](#), and so extends its protection to as many employees as possible, is to be favoured over one that does not.

(at para 24)

20 The Employer also referenced the following:

...until recently the courts have balked at admitting evidence of legislative debates and speeches...The main criticism of such evidence has been that I cannot represent the "intent" of legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of the legislation.

(at para 35)

21 Contextually, I find it important to begin by highlighting the backdrop behind the new legislation now found at [Section 49.1](#) was a global pandemic that saw countless numbers of employees being faced with the difficult decision to go to work when not feeling well with the prospect of infecting their co-workers with COVID-19 or staying home and facing a financial loss for doing so. I have read the words of [the Act](#) in their entire context while considering the grammatical and ordinary sense of the language along with the object of [the Act](#) and the intention of the Legislature to arrive at the overall interpretation of [the Act](#). I have concluded the intent of [the Act](#) is to provide employees with wage replacement to take leave when ill, so they do not have to struggle financially with the decision to go to work ill while at the same time helping to minimize transmission of the virus. I find the legislative debates clearly illustrate this intent and nowhere indicates an intention to provide employees in this situation with a financial windfall when using the entitlement as to do so otherwise could indeed create an unintended incentive. In other words, the intent of [the Act](#) is to put employees in a make whole position by avoiding financial harm due to illness or injury.

22 The Parties do not disagree with the overarching intent behind the legislation and instead their dispute is limited to the policy interpretation for partial sick days resulting in the dispute of how to pay employees who work part of their shift before going home ill. It is evident that this particular scenario was not fully contemplated by the Legislature at the time the legislation was drafted and debated. The legislation is still relatively new and may require adjustments over time as these types of issues come to light, as Minister Bains himself indicated.

23 The text under the heading of partial sick days in the Guide states, "*The Act does not allow for "partial" sick days. The Act stipulates employees are entitled to "five paid days" to be paid based on an "average day's pay". Any time taken off on any day (even one hour) qualifies as one day for purposes of this section.*" The word "partial" is not defined in the definitions section of [the Act](#). I note the annual allocation of the illness/injury leave is stipulated in days rather than hours. In my view the use of the word partial in the context of the entitlement was configured in such a way that regardless of whether the time taken off on a given day amounts to a partial day or a full day, it will result in a full day of the allotment being considered used and deducted from the annual allotment. I find the sentence in the Guide stating, "*There are no provisions for prorating or subdividing the entitlement*" is consistent with this premise illustrating that the number of days provided for in the entitlement cannot be broken down into partial days. In the instant case this translates to the Grievor being considered having used a full day of his paid leave allotment despite only being off work for a portion of his scheduled shift, for six hours.

24 Subsection (3) of the Guide stipulates that employees are entitled to an "average day's pay" while on leave and states the number of hours the employee is scheduled to work on the actual sick day are not relevant to the amount of wages owed. The Parties are not in dispute that an average day's pay for the Grievor in the instant case is twelve hours and that he was paid for twelve hours through a combination of time worked and paid sick leave for a combined result equaling his average day's pay. The issue is whether the Grievor is entitled to receive pay for the time he worked in addition to an average day's pay or not. I have concluded that the interpretation advanced by the Employer is consistent with the intention of the Legislature as it ensures that employees are not financially harmed by absences for illness or injury. At the same time, it is fair to employers and does not operate so as to provide inconsistent protection to employees, providing consistency with the purposes of [the Act](#) outlined in Section 2 (b) *to promote the fair treatment of employees and employers.*

25 While my conclusion is contrary to the guide, as noted in *HEABC v. BCNU*, supra, the government's policy interpretation is neither binding nor a legal authority. Accepting the interpretation outlined in the Guide would be contrary to the intention of the Legislature and the object of [the Act](#) by creating an unintended result by providing greater compensation to an employee who works only a portion of their scheduled shift compared to an employee who works their full scheduled shift.

26 As the Grievor was made whole by receiving an average day's pay, I find the pay approach applied by the Employer is correct with the Grievor having no further entitlement. For the reasons above, the grievance is dismissed.