IN THE MATTER OF AN ARBITRATION
PURSUANT TO THE *LABOUR RELATIONS CODE RSBC 1996 C.244*

BETWEEN:

INSURANCE CORPORATION OF BRITISH COLUMBIA
[the "Employer", the "Corporation" or "ICBC"]

AND

CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES' UNION
LOCAL 378
[the "Union"]

(Statutory Holiday Pay Proration Grievance)

Counsel for the Union:	Cathy Hirani
Counsel for the Employer:	Jessica Fairburn
Dates of Hearing:	November 25, 2020
Location of Hearing:	Via Video Conferencing
Arbitrator:	Jessica Gregory
Date of Decision:	January 31, 2021

Introduction

1. The parties agree that I am properly constituted as an arbitration board with jurisdiction to determine the issues in dispute.

2. This matter involves the entitlement to statutory holiday pay on behalf of employees on graduated return to work ["GRTW"] plans and in particular, the Union's claim that statutory holiday entitlements cannot be prorated. The claim is advanced as a policy grievance based on the circumstances of the Grievor, Ms. Meena Boyal.

3. The parties proceeded by way of an agreed statement of facts and a number of documents that were admitted by consent. The Union also called a single witness, the Grievor.

Agreed Statement of Facts

4. ICBC is a provincial Crown Corporation responsible for providing universal auto insurance to residents of British Columbia. ICBC is also responsible for driver licensing, as well as vehicle licensing and registration. ICBC employs unionized and non-unionized staff.

5. The Canadian Union and Professional Employees' Union, Local 378, doing business as MoveUp (the "Union"), represents all Unionized employees who work at ICBC.

6. ICBC and the Union are subject to the terms of a Collective Agreement governing the terms and conditions of the Union members' employment.

7. The Grievor, Meena Boyal, has been an employee of ICBC since May 11, 1992.

8. The Grievor is a Full-time Regular Employee as defined by the Collective Agreement.

9. The position the Grievor currently holds is namely a *Sr. Vehicle Registration & Licensing Analyst.*

10. The Grievor went on medical leave on January 3, 2018.

11. The Grievor attempted an unsuccessful graduated return to work that lasted from October 7, 2019 to November 9, 2019, after which she went back on LTD.

12. On April 6, 2020, the Grievor began a second graduated return to work (the "GRTW") which currently continues to be in place.

13. The Grievor was not receiving LTD Benefit payments at the time of her return to work on April 6, 2020.

14. The Grievor's GRTW schedule from April 6, 2020 to date was generally as follows:|

GRTW 6 Apr 2020		
Week of:	**Shifts**	**Ttl Weekly Hrs**
April 5, 2020	4hr x 2d	8
April 12, 2020	6hr x 3d	18
April 19, 2020	7.5hr x 3d	22.5
April 26, 2020 to current	7.5hr x 3d + 4h x 2d	30.5

15. The Grievor deviated from this GRTW schedule in the following weeks:

Week of:	**Shifts:**	**Total Weekly Hrs.**
May 18, 2020	7.5h x 3d + 4h X 1d	26.5
June 29, 2020	7.5h x 2d + 4h x 2d	23.00
August 3, 2020	7.5h x 2d + 4h x 2d	23.00
August 13, 2020	7.5hr x 2d + 4h x 1d	19.00
August 18, 2020	7.5hr x 2d + 4h x 2d	23.00

September 7, 2020	7.5hr x 2d + 4h x 2d	23.00
September 21, 2020	7.5hr x 3d + 4h x 1d	26.5
September 28, 2020	7.5hr x2d + 4h x 2d + 5.5h x 1d	28.5
October 12, 2020	7.5hr x 2d + 4h x 2d	23.00
October 26, 2020	7.5hr x 2d + 4h x 2d + 5.5h x 1d	28.5
November 9, 2020	7.5hr x 2d + 4h x 2d	23.00

16. Since the date of her return on April 6, 2020, at no time has the Grievor worked full time hours of 7.5 hours per day, five days per week. At all relevant times she has remained on a GRTW schedule.

17. Since the date of the Grievor's return on April 6, 2020, the Employer has calculated the Grievor's normal straight time earnings for the purpose of Statutory Holiday Pay utilizing the formula set out in Section 45(1) of the Employment Standards Act, which provides:

    An employee who is given a day off on a statutory holiday, or is given a day off instead of the statutory holiday under section 48, must be paid an amount equal to at least an average day's pay 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 calendar day period preceding the statutory holiday, including vacation pay that is paid or payable for any days of vacation taken within that period, less any amounts paid or payable for overtime,
    and

    days worked

    is the number of days the employee worked or earned wages within that 30 days worked is the number of days the employee worked or earned wages within that 30 calendar day period.

18. The Employer has paid the Grievor Statutory Holiday Pay using this formula since her return from LTD.

19. Based on the Grievor's circumstances, the Union proceeded to file a Policy Grievance on May 21, 2020.

20. The grievance was denied by the Employer on September 2, 2020.

21. Article 6 of the Collective Agreement sets out, *inter alia*, the definition of a full-time regular employee, details as follows:

    6.02 Full-Time Regular Employees

    (a) Definition
    A full-time regular employee is one hired to fill an ongoing position vacated by a regular employee or to fill a new position or additional position which is of a continuing nature.

    (b) Benefit Limitations

    Full-time regular employees shall be entitled to all benefits of this Agreement except as limited during the probationary period. During the probationary period full-time regular employees shall not be eligible for coverage under the Dental Plan and the Long Term Disability Plan, but shall receive coverage under the B.C. Medical Plan, the Extended Health Benefits Plan and the Group Insurance Plan.

    Upon completion of the probationary period, a full-time regular employee will be credited with service back to the date of hire for the purpose of determining all the benefits under this Agreement.

    Except as provided for in 6.04(a)ii, by agreement with the Union, the Corporation may hire a temporary employee to fill a full-time regular position as defined above.

    A full-time regular employee who is successful in securing a regular position while a temporary employee shall have the term of employment since his/her last date of hire as a temporary employee applied towards the waiting period for all welfare benefit plans. Those who have served the required waiting periods will be immediately eligible for coverage under

those welfare benefit plans provided to full-time regular employees.

22. Article 16 of the Collective Agreement sets out, *inter alia*, Statutory Holiday Pay entitlements:

    16.03 Holiday Pay

    An employee will receive normal straight time earnings for any holiday described in this Article provided that on the day immediately before and on the working date immediately following the holiday she/he was at work, on annual vacation, or on approved leave of absence not exceeding ten (10) working days.

    An employee who is on sick leave either the day immediately before or the day immediately following the holiday will receive normal straight time earnings for the holiday. Employees who are on sick leave the day immediately before and the day immediately following the holiday will be paid for the holiday under the terms of the short-term disability plan.

Other Pertinent Documentation

23. The Grievor identified the following table entitled: *Meena Boyd Statutory Holiday Pay.*

Stat Holiday	Pay Period	Paid in Week Beginning	Hrs Paid (Paycheque)	Actual Hrs. Worked Timesheet	Time Paid for the Stat*	Shortfall
April 10	9	Apr 5 Apr 18	20.74	20	.74	6.76
April 13	9	Apr 5 Apr 18	20.74	20	See above combined total for both stats	7.5
May 18	12	May 17 May 24	62.26	57	5.26	2.24
July 1	14	Jun 28 Jul 5	59.66	53.5	6.16	1.34
Aug 3	17	Jun 26 Aug 2	57.11	53	4.11	3.39
Sept 6	-	-	-	-	**? not yet paid**	-

Notes: *Time Paid for the Stat = Hours paid less actual hours worked [Shortfall] = 7.5 hrs less time paid for the stat.

24. The Union also relied on a table entitled: *Meena Boyd Statutory Holiday Paid* which is being included in this section for completeness and clarity.

Stat Holiday	**Weekly Scheduled Hrs**	**Shortfall**	**Stat Holiday Pay Received**
April 10	8	Missing Stat Pay Would have worked 4 hrs	0
April 13	18	Missing Stat Pay Would have worked 6 hrs	.74
May 18	30.5	Missing Stat Pay (7.5)	6.24
July 1	30.5	Missing Stat Pay (7.5)	6.16
August 3	30.5	Missing Stat Pay (7.5)	3.61
Sept 6	30.5	Missing Stat Pay (7.5)	5.61
Oct 12	30.5	Missing Stat Pay (7.5)	5.45h
Nov 11	30.5	Missing Stat Pay (7.5)	5.82h

Evidence

25. Most of the evidence was not materially in dispute. However, where determinations were required, they were reached on the balance of probabilities based on the well-established legal principles such as expressed in *Faryna v Chorny* [1952] 2 D.L.R. 354 (B.C.C.A.).

Positions of the Union

26. The Union argues that full-time regular employees such as the Grievor, who are working under the terms of a GRTW plan are entitled to receive statutory holiday pay.

27. The Union submits that the broad entitlement for all full-time regular employees is definitively confirmed in the language of Article 6.02(b): "Full time regular employees are entitled to all benefits of this agreement except as limited during the probationary period.

28. The Union also relies on the language of Article 16.03 and, in particular, the commitment that all full-time regular employees will receive normal straight time earnings if they attend work the working day immediately before the holiday and the working day immediately after. The Grievor is a full-time regular employee and therefore, her entitlement is confirmed in that broad category if she worked the day before the statutory holiday and the day after the statutory holiday.

29. Further, the Grievor her entitlement to statutory holiday pay extends to when she is on sick leave and working under a GRTW plan. The Union submits that the entitlement of full-time regular employees working under similar circumstances to normal straight time earnings is further solidified under the additional language of Article 16.03. In particular, the Union points to the negotiated language that directly establishes the right to normal straight time earnings for employees on sick leave who work either the working day before or the working day after the statutory holiday. The Union submits that the parties' intentions are clear: employees on sick leave attempting to return to work under GRTW plans, such as the Grievor, are entitled to receive holiday pay at their full daily rate of pay (7.5 hours for the Grievor) if the employee works either the day before or after the holiday.

30. The Union also relies on Article 28 of the Collective Agreement which prohibits discrimination on the basis of physical or mental disability. The Union argues that pro-rating statutory holiday pay for employees on a GRTW plan, such as the Grievor, constitutes discrimination and is therefore, prohibited under the language of Article 28 of the Collective Agreement:

Neither the Union nor the Corporation, in carrying out its obligations under the Collective Agreement, will discriminate in matters of hiring, training, promotion, transfer, layoff, discharge, or otherwise,

because of race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age, criminal conviction for which a pardon has been granted. Definition of these protected grounds will be consistent with the definitions in the B.C. Human Rights Code.

31. The Union further submits that pro-rating the statutory holiday pay of employees on sick leave attempting to return to work under a GRTW plan, constitutes discrimination in employment contrary to the protections of section 13(1) of the *Human Rights Code RSBC 1996 c.210* [the *"HR Code"]* which reads:

    A person must not:…

    (b) discriminate against a person regarding employment or any term or condition of employment because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offense that is unrelated to the employment or to the intended employment of that person.

32. The Union relies on *Insurance Corporation of British Columbia v. Office & Professional Employees' International Union, Local 378 (Baus Grievance), [2003] BCCAAA No. 337 (Germaine)(B.C.) [the "ICBC Decision"]; and, Caressant Care Nursing Home of Canada Ltd., v. London & District Service Workers' Union, Local 220, 187 CarswellOnt 4147, [1987] 29 L.A.C. (3d) 347 (Watters).*

33. In particular, the Union relies on the conclusions in *Caressant Care, supra,* that, subject to the relevant collective agreement language, a sick or absent employee has earned holiday pay by prior service so if that employee is then absent with permission of management and for reasons outside the employee's control, the employee is entitled to

receive the earned benefits.

34. The Union submits that, similar to the grievor in *Caressant Care, supra,* the Grievor has earned her statutory holiday pay through her 28 years of service and her current absences are for reasons outside her control. She is part of a GRTW program undertaken with full knowledge and permission of management. The Union further submits that the Corporation cannot point to any language in the Collective Agreement that permits a reduction. Therefore, the Grievor must receive her full statutory holiday pay and not a pro-rated amount.

35. The Union highlights the *ICBC Decision*; a situation where the Corporation unilaterally changed the employee's status from full-time to part-time after the employee was unable to return to work on a full-time basis due to a disability. Although the Corporation is not attempting to change the Grievor's status in the current matter, counsel submits that the Corporation is attempting to achieve the same results.

36. The Union further highlights Arbitrator Germaine's conclusion in the *ICBC Decision* that:

> Absent undue hardship, the point of accommodation is to preserve the advantages of full-time status in order to protect her [the employee] from discrimination based on her disability. In my view, in this case, disruption to the status-related aspects of the collective agreement [Article 6.03] is not sufficient to cause the corporation undue hardship.

37. The Union submits that, in the *ICBC Decision,* Arbitrator Germaine's conclusion was based in part on his observation that full-time status would not provide the employee with compensation for work she did not perform because she was only being paid for the four days per week that she worked. The preservation and accumulation of seniority

prevented erosion of her rights but did not provide an unjust advantage. Permitting the change to part-time status would remove the employee's protection from lay off and deny her protection from adverse treatment based on her disability.

38. The Union argues that the current case is on point with the *ICBC Decision* because the Union is not seeking compensation for work the Grievor did not perform, but instead, seeks to protect her earned rights and entitlements as a full-time employee.

39. The Union also relies on the conclusions from *United Packinghouse, Food & Allied Workers, Local 469, and York Farms Division of Canadian Packers Ltd. (1970), 21 LAC 188 (Schiff)* quoted with approval in the *ICBC Decision*. In particular, the Union relies on the statement from *United Packinghouse, supra,* that labour arbitrators have seen monetary benefits not as gifts bestowed by an employer but as an employee's return for services rendered under contract provisions negotiated at the bargaining table.

40. The Union submits that collective agreement conditions requiring attendance at work before and after holidays are intended to curb unjustifiable absenteeism; a concern that does not arise if an employee is absent with permission of management and for reasons outside the employee's control (*Caressant Care, supra*). The Union argues that in the current matter, concerns behind such qualifying days clauses do not arise because the employees are absent for reasons beyond their control and are attempting to improve their attendance through a GRTW plan.

41. The Union seeks a declaration that the Employer has violated Articles 6, 16 and 28 of the Collective Agreement; a declaration that the Employer

has violated the *HR Code*; an Order that the Union and its members be made whole in all respects including, but not limited to, lost income, dues, benefits, other monetary and non-monetary entitlements; interest and any other Orders this arbitration board deems appropriate under the circumstances.

Positions of the Employer

42. The Employer argues that Article 16.03 contains a qualifying days provision that renders the Grievor ineligible for statutory holiday payment when she did not work on the working days preceding or following the statutory holiday.

43. The Employer submits that the language of Article 16.03 references normal straight time earnings and therefore, pro-ration based on the Grievor's actual hours worked is the appropriate measure of payment. The use of the formula in the *Employment Standards Act RSBC 1996 c.113* [the "ESA"] for pro-rating statutory holiday pay when the Collective Agreement is silent is a reasonable exercise of management rights.

44. The Corporation submits that the Union has not demonstrated an entitlement to 7.5 hours of statutory holiday pay, a service-driven benefit, (on behalf of the Grievor or any other employee working less than full time hours) and has not demonstrated any discrimination or any breach of any provision of the Collective Agreement.

45. In addition, the Corporation submits that treating statutory holiday pay as an earned benefit is consistent with the intention of the parties and as a result, it is not discriminatory to pay statutory holiday pay based on actual hours worked.

46. The Employer argues that the Union's positions are not supported by the Collective Agreement language and would require an arbitrator to ignore the context of Article 16.03 as a whole (as well as interpretation jurisprudence) to expand on the language to create a broader and fundamentally different meaning than was ever intended; conferring a significant monetary benefit without express language and in the face of language indicating a more limited scope was intended. In particular, the parties have used their language carefully and clear language would have been used if their mutual intention was to provide the benefits in an extremely broad and wide-ranging manner.

47. Counsel submits that, in contrast to the Union's positions, the Employer's interpretation would be consistent with the plain meaning of the language and results in a harmonious interpretation, consistent with the prevailing jurisprudence, that provides a monetary benefit in circumstances as specifically agreed by the parties.

48. The Employer relies on the following authorities: *Pacific Press v. Graphic Communications International Union, Local 25-C, [1995] B.C.C.A.A.A. No. 637 (Bird) (B.C.); New Westminster School District No. 40 v. BCTF, [1999] B.C.C.A.A.A. No. 221(Gordon)(B.C.); Health Employers Association of BC (Beacon Hill Lodge) and Hospital Employees' Union, [1998] B.C.C.A.A.A. No. 15 (Gordon, Chair)(B.C.); TBC Teletheatre British Columbia v. Office and Professional Employees' International Union, Local 378, [2002] B.C.C.A.A.A. No. 68 (Foley)(B.C.); C.H. Cates and Sons Ltd. v. OTEU Local 15, [1994] B.C.C.A.A.A. No. 157 (Germaine)(B.C.); Lakes District Maintenance Ltd. (LDM) v. British Columbia Government and Service Employees' Union (Olson Grievance), [2012] B.C.C.A.A.A No. 91(Keras)(B.C.); Catalyst Paper Corp. v. Communication, Energy and Paperworkers' Union, [2010] BCCAAA No. 49 (Germaine)(B.C.) [Interpretation]; Consumers Glass Company Ltd., BCLRB No. 49/76;*

*Nanaimo Regional General Hospital, BCLRB No. 67/78; Prince Rupert School District No. 52 v. International Union of Operating Engineers, Local 882-B, [2003] B.C.C.A.A.A. No.148 (Blasina)(B.C.); Re Northwest Community College and Canadian Union of Public Employees, Local 2409, [1984] B.C.C.A.A.A. No. 208 (Munroe); Re United Automobile Workers, Local 569 and Sealed Power Corp. (1971), 22 L.A.C. 371 (Shime)(Ont.); Vancouver Island Health Authority v. Health Sciences Assn. of British Columbia (Kuipers Grievance), [2017] B.C.C.A.A.A. No. 110 (McPhillips)(B.C.)[*the *"VIHA Decision" or VIHA]; B.C. Hydro and Power Authority v. International Brotherhood of Electrical Workers Local 258 (Remote Incentive Policy Grievance), [2016] B.C.C.A.A.A. No 113 (Fleming)(B.C.); Re Canadian Paperworkers' Union, Local 298 v. Eurocan Pulp and Paper Company, (Meal Ticket Grievance) (1991) 14 L.A.C. (4th) 103 (Hickling)(B.C.); University of British Columbia v. Assn. of University and College Employees, Local 1 (Statutory Holiday Pay Grievance), [1984] B.C.C.A.A.A. No. 262 (Chertkow)(B.C.); (Canadian Labour Arbitration (5th Edition), Brown and Beatty, Section 8:3110 Payment for Holidays Falling on Non-Working Days; United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO) v. Holmes Foundry Company Ltd. (Sarnia) 1952 CarswellOnt 422, 3 L.A.C. 1168 (Cross)(Ont.); Andres Wines [1977] BCLRB No. 73, 16 L.A.C. (2d) 422 (B.C.L.R.B.); Resolve Counselling Services Canada v. Ontario Public Service Employees Union, Local 489 (Grievance 2019-0489-0001, Public Holiday Pay), [2020] O.L.A.A. No. 56 (Goodfellow)(Ont.); Hydro Quebec v. Syndicate des employe-e-s de techniques professionnelles de bureau d'Hydro-Quebec, section locale 2000(SCFP-FTQ), [2008] 2 SCR 561; British Columbia Public School Employees' Assn. and British Columbia Teachers' Federation, [1998] B.C.C.A.A.A. No. 106 (Munroe)(B.C.); Insurance Corporation of British Columbia v. Office & Professional Employees' International Union, Local 378 (Baus Grievance), [2003] B.C.C.A.A.A. No. 337 (Germaine)(B.C.); Ontario Nurses' Assn. v. Orillia Soldiers Memorial*

Hospital, [1999] O.J. No. 44 (Ont. C.A.); Sleigh v. Stream Global Services Inc., [2010] B.C.H.R.T.D. No. 24; Catalyst Paper Corp. v. Unifor, Local 1 (Payment on Termination Grievance), [2020] BCCAAA No. 10 (Saunders)(B.C.).

49. The Employer argues that Article 16.03 contains an overarching threshold requirement; meaning that if an employee does not meet the criteria established then the employee is not entitled to the payment described in the balance of the Article. Counsel argues that the threshold established in Article 16.03, is the requirement for an employee to be at work on the working day prior to or following the statutory holiday.

50. The Corporation submits that the term working day must be interpreted to have its plain and ordinary meaning and it would not be accurate to interpret the phrase to mean calendar day or scheduled working day because the parties did not choose those terms and no extrinsic evidence was led to suggest those meanings reflected their intention. The Corporation points to Article 0.08 which reads: "[r]eferences to days means working days unless otherwise stated in context".

51. The Corporation submits that, as a result of the carefully chosen language used in other areas of the Collective Agreement, clear and express language would be required to rebut the conclusion that days meant working days. The Employer argues that the parties were intentional in their use of time period language and points to Article 6.03(c)(viii) which includes the words scheduled working days; Article 17.04 which refers to scheduled hours of work; and Article 19.04 which refers to a regularly scheduled work shift. The Corporation argues that if the benefits outlined in Article 16.03 were meant to flow to employees based on scheduled working days, the parties would simply have used

that phrase in Article 16.03 as they did in Article 6.03(c)(viii). However, instead, the parties chose to use the words day or working day.

52. According to the Corporation, since the working days for the *Senior Vehicle and Registration Analyst* position is Monday to Friday (as confirmed in the evidence of the Grievor), it was necessary for the Grievor to work on the weekday immediately prior to or following each statutory holiday. In other words, the term working day applied to the working days of the *Senior Vehicle and Registration Analyst* position not the scheduled working days of a specific individual. If the Grievor did not work on the weekday prior to and the weekday following the statutory holiday, she failed to meet the threshold for the entitlement to payment for that statutory holiday. Any of the Corporation's past payments to her were gratuitous and therefore, inarbitrable (*B.C. Hydro, supra; Eurocan Pulp and Paper, supra*) and do not impact the interpretation of the Article.

53. The Corporation further argues that the purpose of such clauses, known as qualifying days clauses, is to discourage absenteeism (relying on, for example, *Sealed Power Corp., supra,*). Therefore, the Employer submits that it would not make logical sense to conclude that the parties mutually intended for the benefits under Article 16.03 to apply in circumstances involving increased absence from work when the purpose of the clause was to provide a benefit in exchange for reduced absenteeism and increased attendance at work.

54. The Corporation relies on a number of decisions (such as *Northwest Community College, supra,* and *VIHA, supra*) to support its argument that holiday pay is not a way to compensate an employee for the loss of a day of wages but rather, compensation for work performed in the past. The right to such compensation must be considered, not in terms

of a single day, but in the context of the entire time period. Counsel submits that a qualifying days clause must be broadly interpreted and is really a penalty clause (*Sealed Power Corp., supra*) that can create disentitlement from a benefit (*Northwest Community College, supra).*

55. Furthermore, the Corporation argues that clauses involving benefits (such as those outlined in Article 16.03) cannot be considered to be providing a benefit otherwise payable by virtue of prior service. While qualifying days clause are intended to create disqualifications from a benefit, simply meeting the threshold is not determinative of the entitlement. In the current matter, counsel argues that even if the Grievor meet the threshold established by the qualifying days clause, she is not automatically entitled to 7.5 hours of pay. The Corporation further submits that in such service-driven benefits, there must be a reasonable nexus to the amount of work performed by the employee (*University of British Columbia, supra,* and *Canadian Labour Arbitration, Brown and Beatty, supra*) as well as a reasonable nexus in time between the benefit claimed and prior service rendered (*Andres Wines, supra*).

56. The Employer further submits that its actions are not discriminatory and do not violate either Article 28 of the Collective Agreement or section 13(1) of the *HR Code*. The Corporation argues that the loss of a service driven benefit available to all employees due to absence from work (even absences resulting from a disability) is not discriminatory (*BCPSEA, supra*).

57. The Employer argues that it is still entitled to receive the benefit of the bargain flowing from the employment relationship (i.e. the labour services of the employee) (*BCPSEA, supra*). The Corporation also points in particular to the conclusion in *Hydro Quebec, supra,* that "the duty to accommodate is perfectly compatible with labour law rules including

the rule that employers must respect employees' fundamental rights and the rule that employees must do their work". According to the Corporation, where labour is not provided, certain obligations are suspended such as the obligation to pay wages and provide service-driven benefits (*BCPSEA, supra*).

58. The Employer submits that the grievance should be dismissed.

Summary of General Positions

59. The Union challenges the Corporation's decision to pro-rate the holiday pay for statutory holidays paid to full-time regular employees on a GRTW plan such as the Grievor. The Union argues that the practice is contrary to the Collective Agreement and the *HR Code*.

60. In response, the Corporation has challenged the entitlement of those employees to receive any payment for statutory holidays if they do not meet the threshold requirement(s) outlined in Article 16.03. The Corporation further asserts that any past payment received by the Grievor from the Corporation where she failed to meet those conditions was gratuitous and, therefore, inarbitrable.

61. The Corporation raises a question of interpretation of the phrase "working days" found in Article 16.03. The Union submits that working days means the days that the Grievor was scheduled to attend work under her GRTW plan. The Corporation argues that working days must be the days scheduled for a specific position; in the Grievor's situation, Monday to Friday, the regular scheduled days of work for *the Senior Vehicle Registration and Licensing Analyst*.

62. Finally, the Corporation argues that pro-rating of statutory holiday payments to regular full-time employees on GRTW plans is an

appropriate reflection of their normal straight time earnings and is not discriminatory.

Decision

63. Having reviewed the arguments and evidence presented, I will now address the issues in this matter.

Entitlement to Payment for Statutory Holidays

64. Turning first to the question of entitlement raised by the Corporation, the language of Article 6.02 provides full-time regular employees (aside from probationary employees) with entitlement to all Collective Agreement benefits. Therefore, as a full-time regular employee who has worked for the Corporation for 28 years, the Grievor was entitled to receive all benefits of the Collective Agreement.

65. In order to address the Corporation's challenge to the Grievor's entitlement to payment for statutory holidays, it is necessary to review the specific entitlement outlined in the language of Article 16.03 of the Collective Agreement.

66. *Pacific Press, supra*, provides foundational guidance in interpretation matters and establishes criteria to be considered when interpreting collective agreement language, which read as follows:

    a) The object of interpretation is to discover the mutual intention of the parties.

    b) The primary resource for an interpretation is the collective agreement.

    c) Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is

only helpful when it reveals the mutual intention.

d) Extrinsic evidence may clarify but not contradict a collective agreement.

e) A very important promise is likely to be clearly and unequivocally expressed.

f) In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.

g) All clauses and words in a collective agreement should be given meaning, if possible.

h) Where an agreement uses different words, ones presumes that the parties intended different meanings.

i) Ordinarily words in a collective agreement should be given their plain meaning.

j) Parties are presumed to know about relevant jurisprudence.

67. The primary source in determining the mutual intention of the Corporation and Union is the Collective Agreement and specifically a focused review of the language of Article 16.03. It is presumed that important promises will be clearly and unequivocally expressed (*Pacific Press, supra*) and as such, presumed that commitments to provide benefits will be flow from clear language interpreted in context (*C.H. Cates, supra; Lakes District Maintenance, supra; Catalyst Paper 2010, supra; Prince Rupert School District, supra*). In my view, their mutual intention is expressed in the ordinary language of Article 16.03.

68. The plain meaning of the language of Article 16.03 reveals that the parties mutually intended for the entitlement threshold to be divided into sub-categories. Each category contains a qualifying days provision establishing a threshold for entitlement and providing payment for the

statutory holiday if the employee meets the qualifying days provision.

69. First, the broadest category provides normal straight time earnings to an employee provided the employee was at work on the working day immediately before and the working day immediately after the holiday. The entitlement is extended to an employee who is absent due to annual vacation or approved leave of absence not exceeding ten days. Therefore, on those occasions when the Grievor attended work on the working day before and after a statutory holiday (under both the Union and the Corporation's interpretations) there cannot be any reasonable doubt that her entitlement would have crystallized.

70. The next category relates to employees on sick leave. Sick leave is specifically addressed in both of the remaining two categories. Under the language of Article 16.03, the parties have agreed that entitlement for employees on absences due to sick leave absences are addressed in one of two ways. An employee who is absent on sick leave either the working day before or after the statutory holiday is entitled to normal straight time earnings whereas an employee who is absent on sick leave on both days is paid under the terms of the short term disability plan.

71. Under the provisions of Article 0.08 of the Collective Agreement, the parties have stated that "days" is to be interpreted as "working days". Therefore, the use of the term working day and day are synonymous in the three categories of Article 16.03. Therefore, the entitlement to holiday pay for statutory holidays crystallizes if an employee is absent on sick leave on either the working day prior to or the working day subsequent to the statutory holiday.

72. It was not disputed before me that the employee was on sick leave or that she was also participating in a GRTW plan that resulted in her

actually performing work for less than her regular hours and/or less than the regularly number of days that she performed prior to her sick leave. It is not clear on all of the evidence as to which of the hours she actually worked or the number of days.

Since the Grievor is returning to work on an increasing basis through an approved GRTW plan, she is entitled to the benefit of the less restrictive threshold in the second category outlined in Article 16.03: an employee is entitled to receive payment for the statutory holiday if absent on sick leave on either the day prior to or following the statutory holiday.

73. As stated above, the final category described in Article 16.03 addresses employees on sick leave who are on sick leave both the day prior to and following the statutory holiday. Payment for those employees is determined under the short term disability plan.

74. Therefore, it is apparent that the parties mutually intended to restrict entitlement for two categories of employees based on attendance-based thresholds outlined in the ordinary words of Article 16.03.

75. As outlined in *Pacific Press, supra,* and submitted by the Corporation, the parties are presumed to be sophisticated parties with full knowledge of the applicable jurisprudence and governing legislation. Therefore, based on their presumed knowledge of the jurisprudence, the parties must be presumed to be aware that qualifying days clauses are used to improve attendance and reduce unjustifiable absenteeism. Furthermore, the parties must be presumed to have selected the qualifying days language in Article 16.03 for the purpose outlined in the jurisprudence: to improve attendance and reduce unjustifiable

absenteeism.

76. Additionally, context is important in interpretation. Therefore, context must be considered when interpreting Article 16.03. The fact that the Employer and the Union have entered into a GRTW forms an important part of the context. It demonstrates a mutual agreement to modify the regular working days of the Grievor. Important promises will be outlined in clear and unequivocal language (*Pacific Press, supra*). It must be noted that in current workplaces, important promises can include accommodation arrangements such as GRTW agreements.

77. Ordinarily words in a collective agreement should be given their plain meaning unless extrinsic evidence supports a conclusion that something different was intended (*Pacific Press, supra; Prince Rupert School District, supra*). The Employer argues that it is necessary to determine the meaning of the term working days in order to establish those thresholds. However, I have concluded that the matter can be determined without this determination based on plain meaning of the language in other areas of Article 16.03 and the purpose of qualifying days clauses.

78. In other words, if I accept, for the purposes of analysis and without determining its merits, the Employer's narrow interpretation of the term working days, it becomes clear that the real substance of the dispute between the parties with respect to entitlement under Article 16.03 lies in determining whether the Grievor was <u>at work</u> the day before and/or the day after the statutory holiday.

79. The Corporation's definition of working days (the regularly scheduled work days of the Grievor's position) would mean that the Grievor's working days are Monday to Friday. Applying the threshold entitlements

of Article 16.03 and accepting, without deciding, that the Grievor had an obligation to be at work on the weekday prior to or after each statutory holiday, it is apparent that, unless the Grievor was absent from work for reasons unrelated to sickness, she would meet the threshold entitlements.

80. She would establish her entitlement either by being at work or if she was on a rest day under her GRTW, she would be on sick leave. Only a straightforward application of the language of Article 16.03 is required.

81. The Corporation accepts that the days when the Grievor was at work under the GRTW plan are qualifying days under the threshold requirement. The challenge between the parties with respect to the Corporation's entitlement argument, only arises on days the Grievor was not at work under the GRTW plan; either due to a planned absence under the GRTW plan or for some other reason.

82. The Union has argued that if the Grievor was absent from work on a qualifying day based on her agreed GRTW plan, she was on sick leave. I agree. The purpose of the GRTW is to permit the Grievor to return to work on an increasing basis from an approved sick leave. To conclude that she has lesser entitlement under a GRTW than she did when she was fully absent on full approved sick leave would be to undermine the entire purpose of qualifying days provisions of Article 16.03: to improve attendance and reduce absenteeism.
    Furthermore, it is logical to presume that the mutual intention of the parties seeking to improve attendance would be to support the use of and adherence to a GRTW plan. When the Grievor was fully absent on approved sick leave, the Corporation did not receive any of the core benefit under the labour agreement. Under the GRTW plan, the Grievor returned to work, providing her services to the Corporation on an

increasing basis, and as a result, it is reasonable to conclude that she may be in attendance on one of the two qualifying days described in the language of Article 16.03

83. Sick leave is specifically covered under the language of Article 16.03. The parties have agreed that entitlement for employees on absences due to sick leave absences are addressed in one of two ways. An employee absent on sick leave either the working day before or after the statutory holiday is entitled to normal straight time earnings whereas an employee who is absent on sick leave on both days is paid under the terms of the short term disability plan.
I have concluded that when the Grievor was absent on the weekdays preceding or following a statutory holiday as part of the GRTW plan, she was on sick leave and is entitled to normal straight time earnings as indicated in Article 16.03. Where she was absent on both weekdays, she is paid under the terms of the short term disability plan.

84. Moreover, the parties must be presumed to be aware of Arbitrator Germaine's conclusion in *ICBC, supra,* that absent undue hardship, the point of accommodation is to preserve the advantages of full time status in order to protect an employee from discrimination based on disability. In the current matter, the Corporation is not advancing claims of undue hardship with respect to the Grievor's entitlement.

85. Additionally, since the purpose of qualifying days clauses is to encourage attendance, penalizing employees who have returned to work under a GRTW arrangement is inconsistent with that purpose. For example, Article 16.03 permits an employee to be absent on both the day prior to and after a statutory holiday if the employee is on an approved leave of absence of less than ten days. I cannot accept that the parties would mutually intend to treat employees who are

attempting to return to work under a GRTW plan more harshly than other employees on other types of leaves of absence even those whose total absences span as many as ten days.

86. I have concluded that the Grievor's entitlement pursuant Article 16.03 has been established. It is trite to observe that on the working days in question, the Grievor was either at work, on sick leave (under the terms of her GRTW plan) or absent for a personal purpose (not pertinent to the current claim or application of Article 16.03). When she works on both the day preceding and the day following the statutory holiday, she is entitled to receive her normal straight time earnings. When she is absent on the weekdays preceding or following a statutory holiday as part of her GRTW plan, she is deemed to be on sick leave and is entitled to normal straight time earnings as indicated in Article 16.03. Where she is absent on both weekdays, she is also deemed to be on sick leave (under Article 16.03) and is paid under the terms of the short term disability plan. These conclusions flow regardless of the interpretation of the term working days so it is unnecessary to determine the accuracy of the Corporation's interpretation.

The Amount of Normal Straight Time Earnings

87. Article 16.03 requires the Corporation to pay an employee's normal straight time earnings to an employee if the employee attends work the working day before and after a statutory holiday or, if an employee is on sick leave on one of those qualifying days but attends on the other.

88. The Corporation argues that applying a pro-rated method of calculating the amount due to employees who meet the entitlement threshold it is appropriate exercise of managements rights. In particular, the Corporation has applied a pro-rated method based on the ESA. This calculation is based on the core assumption that payment for statutory

holidays is a service-driven benefit and the amount paid should relate to the amount of service currently provided by the employee. This assumption is based on the foundational agreement that labour is exchanged for wages and benefits.

89. The Union argues that the Grievor is entitled to payment for her regular hours of work – 7.5 hours per day – and submits that the pro-rated lesser payment is discriminatory.

90. First, it is necessary to address the commitment of the parties. As previously stated, in Article 16.03 the parties agreed that employees on sick leave (including a sick leave absence as part of a GRTW plan) on the working day prior to or the day following a statutory holiday are entitled to their normal straight time earnings. Therefore, in order to determine whether it is appropriate to pro-rate the amount paid to employees on a GRTW plan (who fall in the second Article 16.03 category) it is necessary to determine the meaning of normal straight time earnings. I note, for completeness that employees on sick leave both prior to and following the statutory holiday are paid under the terms of the short term disability plan and therefore, the amount of their payment is not in issue.

91. In the current matter, although the parties negotiated language limiting the scope of entitlement under Article 16.03, the parties did not include any language indicating that the amount to be paid to an employee on sick leave who meets the qualifying days provision in the second category of Article 16.03 is to be reduced. Instead, the parties chose to use the same language to describe payment to an employee who misses work on a qualifying day due to sick leave as they chose to describe the amount payable employees without any absences. In both cases, the parties have agreed that the Corporation will pay the employee's normal

straight time hours.

92. There is nothing in the language (of Article 16.03) chosen by the parties that supports a conclusion that normal straight time hours are to have a different meaning and nothing to suggest that the payment should be calculated differently for employees on sick leave who miss a single qualifying day. One would expect that sophisticated parties who have turned their mind to limiting entitlement through qualifying days language would similarly describe any reduction in monetary compensation that flowed through the second category of employees on sick leave who miss a single qualifying day.

93. Therefore, one must conclude if the parties wished to distinguish the amount paid to employees on sick leave who miss a single qualifying day, they would have used similarly specific language. Since the parties chose to describe the amount of payment for both the first and second categories in Article 16.03 by using exactly the same phrase "normal straight time hours", it must be presumed that the parties mutually intended that the amount of normal straight time earnings was to be based on the full amount of an employee's normal earnings not an amount reduced as a result of the sick leave. The Grievor must be entitled to be paid at her normal daily rate of 7.5 hours. Otherwise, her earnings would not be her *normal* straight time earnings (her earnings prior to the approved sick leave). They could only be described as her *current* straight time earnings. The parties had the opportunity to limit remuneration under the second category of Article 16.03 in that manner but did not do so.

94. This point is particularly persuasive because the parties do appear to have turned their mind to the amount of compensation for employees on sick leave who miss both qualifying days. The parties have clearly

and unequivocally directed that those employees are to receive payment under the terms of the short term disability plan.

95. In my view, this interpretive conclusion is determinative of the question of the appropriate amount to be paid to an employee on a GRTW such as the Grievor who meets the threshold entitlement under the categories outlined in Article 16.03. It is not necessary, for example, to determine whether the practice of reducing the amount of the normal straight time hours is discriminatory. However, I will briefly address the balance of the arguments presented.

96. In the current matter, the employee is providing services to the Corporation under the parties' jointly acceptable GRTW terms. Her absences under the GRTW plan are medically required as a result of her disability. The Corporation acknowledges her right to be absent on those occasions and similar to the facts and conclusion in *ICBC, supra,* the Corporation is not paying the Grievor for the days she is absent under the GRTW schedule. This situation distinguishes the current matter from the facts, collective agreement language and principles outlined in several of the decisions cited by the Employer such as *BCPSEA, supra*, where services were not being rendered; *Catalyst, supra,* where no services were rendered*;* or, Sleigh*, supra* where the question of entitlement to benefits was in issue. In *Catalyst, supra,* Arbitrator Saunders based his conclusions on the language of the collective agreement which he described as his primary resource. The ordinary language before me in Article 16.03 is clear and unequivocal in establishing categories of entitlement and prescribing the source for calculation of payments under those categories (either the employee's normal straight time earnings or the short term disability plan depending on whether the employee worked one or both

of the qualifying days).

97. To paraphrase from *BCPSEA, supra,* this is not a situation where something happened to the Grievor, and others on GRTW, which altogether prevented them from working that resulted in a logical suspension of wages and service-driven benefits. The Grievor is working, in fact she has been working an increasing amount under the terms of the GRTW. Unlike the factual context of many of the decisions cited by the Employer, the Grievor has not only been providing her labour to the Corporation but she has been providing an increasing amount of her labour services to the Corporation.

98. In addition, and notably, in *Sealed Power Corp., supra*, although Arbitrator Shime concluded that consideration must flow from the employee to the employer, he declined to determine the amount of consideration that was necessary. There is no doubt that by meeting the threshold entitlement for holiday pay, the Grievor has provided adequate consideration under the standard set by the parties. As stated, I also accept that Grievor has provided adequate consideration to the Corporation in her steadily increasing GRTW hours.

99. In addition, while I agree that there may be situations where an obligation to compensate employees for services not provided could create an undue hardship, in the current matter I have concluded that employees on a GRTW plan, such as the Grievor, who meet the negotiated thresholds outlined in Article 16.03, have provided services to the Corporation. Moreover, there is sufficient nexus between the service provided by the Grievor and her entitlement such that consideration (in an amount determined by the parties to be sufficient under their qualifying days language in Article 16.03) flows to the

Corporation from the Grievor while she is on her GRTW plan.

100. In *Sealed Power Corp., supra,* it was acknowledged that there is a point in time when an employee may reasonably expect and claim the enjoyment of a holiday and the relief from work that a holiday brings. In the current matter, the Grievor, a 28-year employee, has been providing a steadily increasing amount of labour to the Corporation under the GRTW plan and more generally, has met the attendance threshold for holiday pay established under Article 16.03. Therefore, one must conclude that the Grievor has reached the point in time where she is entitled to full compensation so she may reasonably claim both the enjoyment of the holiday and the relief it brings.

101. Paid statutory holidays are intended to provide time to restore employees from fatigue and to refresh them for further labour; both of which are beneficial to the employee and the employer (*Holmes Foundry, supra).* In the current matter, the restorative purpose of a holiday break is also beneficial to the Corporation and the employee on a GRTW plan because it restores that employee from fatigue and refreshes the employee for further labour. The holidays are not a bonus for not working but must be earned by a reasonable contribution of hours of work both before and after the statutory holiday (*Holmes Foundry, supra).* An employee who is following the GRTW plan and meets the entitlement for statutory holiday pay is not receiving a bonus for not working; the employee is attempting to return to work. Also, under the terms of Article 16.03, the parties specifically require the employee to be at work on one of the qualifying days.

102. Furthermore, there is no need to turn to management rights because mutual direction of the parties is provided through the wording of Article 16.03. This context distinguishes the current matter from

situations and conclusions such as those expressed in *Resolve Counselling, supra,* where the collective agreement is silent on the method of calculation of holiday pay. In such situations, reducing monetary benefits coincident with a reduction in hours worked under an accommodation scheme was held not to be discriminatory (*Sleigh, supra; Orillia Soldiers, supra; Catalyst Paper, supra*). Notably, the parties to the current matter also have the benefit of the direct guidance provided to them by Arbitrator Germaine in *ICBC, supra*, which must be given significant weight.

103. In the current matter, I have also concluded that the Collective Agreement is not silent on the method of calculation, the Grievor is entitled to her normal straight time earnings not her current straight time earnings. As previously noted, not only is the Collective Agreement directive on the calculation to be used in the first two categories of Article 16.03 but the parties specifically chose to use the same language to describe the entitlement of employees with full attendance and those who miss one qualifying day due to sick leave. They also turned their mind to employees on sick leave who miss both qualifying days and clearly stated that those employees are paid under the terms of the short term disability plan. Therefore, in my view, the Collective Agreement cannot be found to be silent or to invite unilateral reductions that differentiate between the calculation of normal straight time earnings for employees with full attendance and those who miss a single qualifying day on sick leave.

104. Denying statutory holiday pay to employees who are not at work one of the preceding or following working days due to the terms of their GRTW would penalize those employees. The GRTW employees would be treated adversely compared to employees who miss a qualifying day of work for other sick leave-related reasons. Employees absent from

work on other forms of leave including sick leave could receive greater entitlement than those who are the in the process of returning to productive work on a gradual basis. The arrangement would be contrary to the parties' mutual intention (as expressed for example through the qualifying days language) to improve attendance and reduce absenteeism. Their mutual objective would be undermined by such a result.

105. Furthermore, with reference to the preference for harmonious interpretations, it would be incongruous for the parties, engaged in joint efforts to improve attendance and reduce absenteeism while cognizant of the prohibitions against discrimination in Article 28 of their Collective Agreement and the protections of the *HR Code*, to create punitive and limiting compensation for employees with disabilities attempting to return to work under joint GRTW arrangements. Absent evidence to the contrary, which I do not have before me, I cannot conclude that the parties shared such a mutual intention.

106. Moreover, limiting the rights of employees on sick leave under a GRTW plan would also create a punitive result flowing solely from an employee's disability contrary to the parties' obligation as outlined by Arbitrator Germaine in *ICBC, supra*.

107. Therefore, for all of the reasons outlined above, I conclude that the Grievor is entitled to receive statutory holiday pay and should be paid the amount equal to her full pre-injury normal straight time earnings (7.5 hours daily) at times she was at work (working on the working days established under her GRTW plan) prior to and following the statutory holiday and, at times when she was on sick leave either the

day immediately before or after the statutory holiday.

108. In summary:

a) as a full-time regular employee, the Grievor is entitled to all benefits of the Collective Agreement (Article 6.02);

b) in the current matter, the facts demonstrate that, on the working days in question (regardless of how the term working days is defined), the Grievor was either at work or on sick leave;

c) if the Grievor was at work on the working day before and after a statutory holiday she is entitled to receive her normal straight time earnings for the statutory holiday (Article 16.03);

d) if the Grievor was absent from work under the terms of her GRTW plan, she was absent on sick leave. The language of Article 16.03 establishes two possible outcomes in that situation. In both situations the employee is entitled to payment. The only difference is in the source of the payment.
A sick leave absence on both days is paid under the terms of the short term disability plan. A sick leave absence on the working day before or after the statutory holiday entitles an employee to receive their normal straight time earnings. (Article 16.03);

e) when the Grievor was not at work on the day before or after a statutory holiday due to an absence under the GRTW plan, she was on sick leave and entitled to receive her normal straight time earnings for the statutory holiday because she met the threshold entitlement established in Article 16.03 by working on one or both of the

qualifying days.

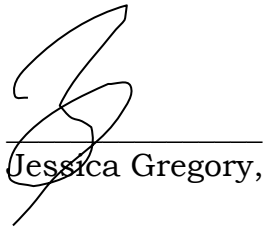
f) since the parties selected the descriptor term “normal” to define straight time earnings in the first two qualifying days categories of Article 16.03, the term must be given meaning. The Grievor’s normal straight time earnings are based on her earnings in a normal year when she was not on sick leave (including her GRTW plan). For example, her entitlement would be her normal daily hours of work, 7.5 hours; and,

g) since I have concluded that paying the Grievor anything other than her normal straight time earnings was a breach of Article 16.03 of the Collective Agreement, it is not necessary to address the balance of the arguments raised. Therefore, while paying a reduced amount to regular full-time employees on a GRTW plan who are entitled to receive statutory holiday pay may (or may not) also constitute a breach of Article 28 and/or *the HR Code,* it was not necessary to reach those determinations in order to dispose of the matter.

109. The grievance is allowed.

110. I will remain seized to determine any issues arising with respect to the interpretation or implementation of this Award including remedy.

It is so ordered.



Jessica Gregory,

Arbitrator