

In the Matter of an Arbitration

Between:

Temiskaming Lodge Limited

and

Canadian Union of Public Employees, Local 3866

In the Matter of the Grievance of Claire Uttley

AWARD

Before: Dana Randall

For the Employer: Paula M. Rusak, Counsel
Elizabeth Brownlee

For the Union: Jo Ann Breton, Union Representative
Claire Uttley
Marlene Welsh

A hearing in this matter was held in North Bay on March 23, 2006.

AWARD

I

The Grievor protests that, in November, 2005, she sought a personal leave of absence to care for her critically ill sister, that the Employer unreasonably denied that request; and that, as a result, she was forced into resigning her employment in order to provide her sister's care.

The Union requests that the Employer's denial of the leave be overturned as unreasonable; that the period of her absence: December 8, 2005 to the present, be characterized as a unpaid leave of absence (I understand her sister no longer needs her care) and that her employment be reinstated, immediately, with no loss of seniority.

The Employer challenges this characterization. In its view, the Grievor never properly sought a leave of absence; certainly, she did not meet the Collective Agreement requirements for seeking one. Rather, while preliminary discussions were being held between the Grievor and the Employer, respecting both the process for applying for a leave and the prospects of being granted one, the Grievor precipitously resigned her employment.

The Employer argues that, because the resignation manifests all the classic elements of a quit, it cannot be deemed as anything but one, which renders the issue of the leave moot. An inquiry into the reasonableness of the denial would be improper and premature, because the Grievor quit before she had formally made the request and before, therefore, the Employer had a full opportunity to consider it. In fact, the Employer candidly admits that it did not fully weigh the Grievor's interests against its own operational concerns because the Grievor refused to properly trigger that Employer obligation.

The case is further complicated by the Emergency Leave provisions of the *Employment Standards Act, 2000*. Section 50 provides for 10 days of emergency leave each year. As will become clear below, the Grievor's circumstances not only fall within the terms of the section, but, had those 10 days been 'granted' pursuant to the Act, there can be no doubt that the Grievor's decision-making in this matter would have been different. However, neither she nor her Union raised the applicability of the Act or the Emergency Leave provisions prior to the hearing before me. Section 50 provides:

50.(1) **Emergency leave** - An employee whose employer regularly employs 50 or more employees is entitled to a leave of absence without pay because of any of the following:

1. A personal illness, injury or medical emergency.
2. The death, illness, injury or medical emergency of an individual described in subsection (2).
3. An urgent matter that concerns an individual described in subsection (2).

50.(2) **Same** - paragraphs 2 and 3 of subsection (1) apply with respect to the following individuals:

1. The employee's spouse.
2. A parent, step-parent or foster parent of the employee or the employee's spouse.
3. A child, step-child or foster child of the employee or the employee's spouse.
4. A grandparent, step-grandparent, grandchild or step-grandchild of the the *Employment Standards Act, 2000*. employee or of the employee's spouse.
5. The spouse of a child of the employee.
6. The employee's brother or sister.
7. A relative of the employee who is dependent on the employee for care or assistance.

50.(3) **Advising employer** - An employee who wishes to take leave under this section shall advise his or her employer that he or she will be doing so.

50.(4) **Same** - If the employee must begin the leave before advising the employer, the employee shall advise the employer of the leave as soon as possible after beginning it.

50.(5) **Limit** - An employee is entitled to take a total of 10 days' leave under this section in each calendar year.

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II

The collective agreement provides:

17.03 Personal Leaves of Absence

The Administrator may grant a request for leave of absence for

personal reasons provided that she receives at least one (1) month's clear notice, in writing, unless impossible, and further provided that such leave may be arranged without undue inconvenience to the normal operations of the Nursing Home.

All accumulated paid holidays and vacation leave must be taken before a personal leave of absence will be granted. Employees will not be granted personal leave in order to receive extended vacation time or for the purpose of extra vacation time. It is understood that personal leaves of absence will not be granted during the prime summer vacation periods of June, July and August.

Employees when applying for such leave shall indicate the proposed date of departure and return and the reason for the leave. Such leave shall not be unreasonably withheld.

III

The following facts are undisputed.

The Home is a long term care facility with approximately 70 residents. The Grievor was, at the time of her 'resignation', a part-time health care aide and had been for over 15 years. Her hours were pre-scheduled, though subject to changes arising from sickness and other short notice absences, as follows. Every two weeks, she worked 7 four hour shifts (3-7 p.m.): 3 in week one, 4 in week two. There appear to be 20 to 25 other part-time HCA's, who work similar, though not identical, schedules.

The Grievor, who is middle aged, has an older sister who lives locally and who became critically ill in the Fall, 2005 and was hospitalized. The Grievor has 2 other sisters: one of whom resides in Ottawa, the other in Vancouver. She also has brothers, whose residence was not established.

The basic facts underlying her request for the leave are these. The 2 out of town sisters, who had come to be with their ill sister, needed to return to their respective cities by December 8, 2005. In the Grievor's view, none of the brothers could be approached or relied upon. The ill sister had no real prognosis for recovery. At the time of these events, it was not known whether her medical

treatment would lead to recovery or not. What seemed clear was that someone had to be with her to provide home care as she needed assistance with all the tasks of everyday living. Like the prognosis, the period of time that this care would be necessary was undetermined.

The Grievor, in addition to being the only sister in the area, felt a particular obligation to her elder sister. The latter had been 'like a mother to her and she felt it was time to give something back'.

As of November 24, 2005 the Grievor had a second part-time job with Temiskaming Home Care. Although she'd only had that job for three months, its hours were, in her view, more flexible: shifts were shorter and she had the right to turn down assignments. She concluded, after weighing her options, that her Lodge hours, which were always 3-7 p.m.(a high need time for her sister) would create difficulties for her in providing care to her sister. She decided that she would ask the Lodge for a leave of absence.

On November 24, 2005 she spoke to Elizabeth Brownlee, the Lodge Administrator. This was a brief, impromptu exchange. The Grievor discussed her circumstances and her desire to be granted a leave of absence commencing December 8, 2005. The Grievor described Ms. Brownlee as "kind and compassionate". The thrust of the discussion was, to use the Grievor's language, "what I'd need to do to get one". Amongst other things, Ms. Brownlee advised the Grievor that she would have to reduce her request to writing.

On November 28, she provided Ms. Brownlee with the following hand written note:

Elizabeth,

I would need some information on how to go about taking a Leave of Absence.

I have a sister who is very ill. The Doctors have told her and us, her family, that if all goes well, that, possibly after 6 months, her condition could improve. As my sister lives alone, she finds herself in a position to need her family's help. Therefore, in order for me to step into that role, as her caregiver, I need to get organized and see what is available for me, to do this.

At this moment, I have a sister from Ottawa staying with her, but on or

about December 8th, 2005, she will be going back to her family. That is the moment I would have to step into my role.

At this time, I need to know what the requirements are, in order to take this Leave.

Thank you for your concern Elizabeth and for your part in helping me, help my sister.

There would ultimately be two more meetings: one on November 28 and another on December 1. It appears that both were also attended by Francine Gosselin, the Director of Care, though there was dispute about that, and the December 1 meeting was also attended by Marlene Welsh, a Union representative. At the end of the December 1 meeting, the Grievor formally tendered her resignation by providing Ms. Brownlee with a type-written letter, which she had prepared the night before.

I heard from three witnesses: the Grievor, Ms. Brownlee, and the aforementioned Ms. Welsh. Unfortunately, their evidence does not paint a very clear picture. The Grievor, who was understandably agitated throughout, and who took no notes, had only a vague recollection of the meetings. While she adamantly denied the Employer's version of events, her own recollection was spotty at best. She appears to have concluded from the discussions on the 28th that the Employer had made up its mind that, while it could grant the leave commencing on January 1, 2006, it could not accommodate her request from December 8th to the 1st because of the difficulty in covering shifts during the Christmas holiday period. That also appears to have been Ms. Welsh's understanding of the Employer's position in the December 1 meeting.

Aside from that, the Grievor recalled only that they talked about leaves under the federal Employment Insurance scheme, under which she did not qualify. No one raised then, or throughout the piece, the use of the emergency leave provisions of the *Employment Standards Act, 2000*, under which she would have qualified. The Grievor also recalled the Employer raising the prospect of her working day shifts instead of afternoons over the holidays; she acknowledged that she rejected that idea before it could be fully pursued because a four hour shift, at any time of the day, was too long; it also would not work out with her other part-time job.

By the end of the November 28th meeting, the Grievor had concluded: "I knew there was going to be no leave of absence; it was clear and I had to go home and

make a decision...it was not a hard decision to make, I had no alternative, I had to quit”.

The Employer version, supported at least in part by Ms. Brownlee’s notes of the November 28th meeting, is quite different. Ms. Brownlee acknowledges saying that the collective agreement required one month’s notice in writing, which would mean a January 1, 2006 start for the leave and that this “could be necessary” because of the difficulties associated with holiday shift coverage. But she testified that no final decision had been made or communicated to the Grievor regarding the possibility of the leave commencing on December 8th; however, the Employer concedes, and this accords with the Grievor’s account, that it did communicate that a leave commencing January 1 would be granted.

The thrust of Ms. Brownlee’s evidence was that the November 28th note was not a written request for a leave; it was a note inquiring about the requirements for making such a request. And the thrust of the meeting, arising as it did out of the note, was going over the collective agreement requirements, including the need for the Grievor to reduce her request to writing with a start and end date and the need to use up her vacation time first. In Ms. Brownlee’s version, the collective agreement was open in front of them during the discussion. She testified that the Grievor resisted providing an end date even after Ms. Brownlee advised that it could be a notional one only, extended if necessary at a later time; and she resisted the notion of taking her vacation, indicating that she wanted to keep her vacation until after the leave. The Grievor acknowledges telling Ms. Brownlee that she could not provide a return date because none was known, but denies that a notional end date was suggested and adamantly denies that the issue of vacations was ever raised, let alone the suggestion that she resisted the requirement to use up vacation days before qualifying for a leave.

As noted, they met again on December 1. That meeting commenced with Ms. Welsh expressing concern that the Grievor might resign if the leave was not granted and ended with the Grievor tendering her resignation. The evidence respecting exactly what was said between those two events is unclear. The discussion was so similar to the one on November 28th, that both the Grievor and Ms. Brownlee tended to merge the two meetings in their minds.

Again, it appears that the Employer raised the issue of potential scheduling options for the Grievor, but again such options were not pursued because the Grievor maintained her view that shift changes would not help. The Grievor’s other part-time job was also discussed, with the Grievor restating her intention, undoubtedly to the chagrin of the Employer, not to make any changes to her

hours in that job. There is no clear evidence that the Employer reiterated the difficulties of accommodating the Grievor's short notice request, though that finding can be implied from the rest of the evidence. Nor is there clear evidence that the Employer explicitly denied the request. Ms. Brownlee is adamant that she did not. While the Grievor had concluded that it would be denied (she had prepared her resignation letter the night before) there is no evidence from the Grievor that Ms. Brownlee said that at either meeting and none from Ms. Welsh to that effect during the December 1 meeting. Rather, the best evidence I have about the latter meeting comes from Ms. Welsh in cross-examination where she conceded that Ms. Brownlee continued to insist that no clear request for a leave had been made, though Ms. Welsh considered that position unreasonable. Ms. Welsh agreed that Ms. Brownlee said words to the effect 'that she had a duty to consider covering the shifts, but she couldn't do that until she had received a clear request'.

At the end of the meeting, the Grievor submitted the following type-written resignation.

Please accept the present as my notice of resignation from the position of Health Care Aid with you organization.

I have recently been put in the situation where due to unfortunate events beyond my control, I must care for a sick family member for an undetermined amount of time.

I have previously contacted your representative in order to secure a leave of absence in order to fulfill my family obligations, but was turned down with the reason that immediate accommodation of a leave of absence was impossible due to the holiday scheduling.

Unfortunately I do not have the luxury of postponing my request for leave of absence and am therefore forced to tender my resignation after 15 years service.

I do not enter into this decision lightheartedly, but my situation is such that no other option seems to be possible at this time.

If for some reason a leave of absence can be arranged on the basis of my extenuating circumstances, I would welcome it rather than leave the employment I've enjoyed over these many years.

The Employer relies on the following actions by the Grievor as confirming that the resignation was not tendered in the heat of the moment. The letter was carefully drafted the night before and then formally tendered to Ms. Brownlee after the

December 1 meeting. It was accepted by Ms. Brownlee. The Grievor was aware that the very next day the Lodge posted her position and that her name was removed from the work schedule for the period after December 8th, at that time. The Grievor worked her scheduled shifts until December 8th and none after that. She received a letter from Ms. Gosselin on December 7 referencing her resignation and last day of work and asking her to complete and hand in an exit interview questionnaire and to participate in an exit interview, which I understand she did. The Grievor, after her last shift, took all her personal belongings from her locker and never returned to the Lodge again in any employment capacity. However, she was at the Lodge for an event in her other job and was given a farewell gift of earrings by one of the CUPE stewards. Ms. Brownlee participated by putting one of the earrings on the Grievor. Ms. Uttley sent a thank you note on January 11, 2006. Ms. Uttley also received the monies invested in her pension plan with the Lodge and turned those over into an RRSP.

Two grievances were filed. The first, dated December 2, 2005, alleges that the leave was denied and the resignation forced. It requests that a leave be granted "for as long as she is needed". The second, dated December 19, alleges that a verbal leave request was made, that a return date is not possible, that a leave "for as long as possible" be granted and that her job be reinstated.

It is worth noting, as well, that Ms. Brownlee wrote the National Representative for CUPE on December 5:

Please be advised that I have not received a written request for a personal leave of absence from Claire Uttley.

It is unclear if this was a response to the first grievance and it is equally unclear if the second grievance was a response to Ms. Brownlee's note.

Finally, the evidence establishes that the holiday period is a challenging staffing one for the Lodge. In fact, the Employer has a blanket policy denying staff vacations during that period, although Ms. Brownlee testified that would not have been conclusive respecting the leave request.

The thrust of Ms. Breton's submission is that the Employer acted unreasonably. The Grievor, a long term employee, under great stress, with no sophistication in such matters, came to Ms. Brownlee for advice and information on how she could qualify for a leave. She was advised to reduce her request to writing, which she did. The Union submits that the November 28 note should have been treated as a written request and that the technical quibbling about it is unreasonable and that any of its formal short-comings, which really amount to the absence of a return date (the evidence establishes that there are no forms) are understandable given the Grievor's state of mind.

The Union asks me to find that the Employer clearly denied the Grievor's request for a leave commencing on December 8 on the basis of the written note. While the Employer made clear that it could grant it effective January 1, it was no less clear that commencing after December 8 was not possible. That was the message received by the Grievor on both November 28 and December 1. Ms. Breton says that the Employer's blanket policy preventing the taking of vacations between December 15 and January 15 is compelling evidence that the leave was being denied and casts suspicion on the Employer's assertion that it had raised the issue of the Grievor using up her vacations prior to qualifying for a leave.

Finally, Ms. Breton raises the applicability of the Emergency Leave provisions in section 50 of the ESA. While the Union acknowledges that the scheme is predicated on the employee advising the Employer of an intent to use the statutory leave days, Ms. Breton submits that in circumstances where the Grievor has specifically sought the Employer's assistance in arranging the leave, the Employer had a duty to be aware of the provision, to raise them in the discussions and to provide same.

The Employer argues that this is a clear case of an employee voluntarily quitting. All of the subjective and objective elements for finding an effective quit are manifest in the Grievor's conduct; the subjective intention expressed in a carefully crafted letter, 'not entered into lightheartedly'; the objective behaviour manifest in the tendering of the letter and the many subsequent steps, set out in detail above, over the course of many weeks and without ever a mention of a desire to withdraw the resignation. Ms. Rusak argues that all of that renders the grievance respecting the alleged denied leave request, which was filed after her resignation, moot and inarbitrable, whether I accept the November 28 as a written request for a leave or not.

On the issue of alleged duress, the Employer submits that none has been proven. While acknowledging that the Grievor was 'stressed', there is no evidence of

'incapacity'. Rather, the Grievor has to be found to have been someone who was aware of what she was doing, who formulated a clear intent to quit and who held to it. Moreover, hers was not a case without options. She chose to forego an employer of 15 years for one of 3 months; she didn't investigate Homecare coverage for the brief period in question, though she worked for such an agency; she didn't pursue getting a leave from her new employer; she was offered, but wouldn't consider, flexible shifts with the Lodge; she could have tried switching shifts with colleagues, but did not. In the Employer's view, the Grievor simply 'wanted what she wanted when she wanted it'.

Additionally or alternatively, the Employer argues that the Grievor never properly requested the leave because she never brought herself within the terms of the language of 17.03. The alleged written request dated November 28 is not a request for a leave; it is an inquiry respecting 'the requirements' for taking such a leave. Ms. Brownlee responded to that during the meeting of November 28 by telling the Grievor what was needed: 'give me a letter with a start and finish date, even if the latter is not a fixed date, and you'll have to take your vacation days first'. But, the Employer submits, the Grievor refused to do that which the collective agreement required.

Counsel suggests that it would be ironic if the Grievor could win the case in circumstances where she asked what she had to do, is told, and then does not do it. She and the Union are asking that the clear requirements of the collective agreement be ignored. Even the language of the grievance underscores the fact because it continues to seek a leave for "as long as she is needed".

If her request had properly been put in writing, this would be a different case. But here, where the quit pre-empts even the perfection of the request, the Employer did not have the opportunity to turn its mind to the merits of the leave request.

Counsel characterizes the case as one where the Grievor and Union seek to ignore the clear language of the collective agreement, where the Grievor effectively quits, but thinks an arbitrator will render her quit null and void and will grant her the months off while allowing her to ignore the collective agreement conditions for same. In Ms. Rusak's words: "the Grievor wants it all". With respect to the ESA Emergency Leave provisions, the Employer submits that there was no onus on the Employer to trigger these provisions. Ss. 50(3) specifically contemplates the employee 'advising the employer'. As importantly, the issue of the applicability of these provisions was not raised before the hearing day. Ms. Rusak submits that that is an expansion of the grievance and should not be allowed. Because not raised, the Employer never had an opportunity to

turn its mind to the issue.

V

This is a difficult case, both on the facts and the law. As I've indicated above, the evidence respecting the discussions between the parties was far from satisfying. I'm neither satisfied to find that the Employer clearly denied the request for the portion of leave commencing December 8th, as alleged by the Union, nor convinced that the Grievor was as obstreperous about meeting the conditions, especially respecting the taking of her vacations, as the Employer would have me believe. The truth falls somewhere in between and is marked by miscommunication more than anything else, though by unsatisfactory conduct by both parties, as well. In my view, the Employer's conduct fell short of what reasonably could have been expected of them given how significant the issue was for the Grievor, how imminent the need to make her decision appeared to be, the open-ended nature of her request for assistance and, as importantly, her long service. The Grievor fares no better; her decision-making - a precipitous and premature quit - while made under stress, has to be characterized, if not as unreasonable, as a gambit that has a legally binding effect.

To complicate matters, there can be little doubt that the Grievor's circumstances evince significant compassion. I consider her resignation a tragic response to her dilemma, especially given that the 10 statutory leave days would have covered all her shifts between December 8 and January 1, thereby creating a bridge to the leave commencing January 1, 2006, which the Employer acknowledged it would grant.

In my view, if this matter were to be decided on the terms of the collective agreement alone and on the basis of the law respecting quits, which is how it was argued, in the main, the grievance would be dismissed. However, it is also my view that section 50 changes the law with respect to emergency leaves in Ontario and that, in the circumstances of this case, those provisions were, by operation of law, invoked with the Grievor's written note of November 28, 2005. On that basis, and for the reasons which will follow shortly, I am allowing the grievance.

First, however, I will set out why I would have dismissed it on the terms of the collective agreement and the law respecting quits, given the parties' detailed positions respecting same.

Simply put, by quitting when she did, in circumstances where the decision to deny her the leave had not been finalized, her action becomes the dispositive legal feature under the collective agreement; it trumps a further inquiry. On that basis, I could only find that she jumped and was not pushed.

The law respecting quits is well established. It requires a subjective and an objective element. A quit is effective when the employee has first resolved to quit (the subjective element) and then has done something (objectively) to carry this resolution into effect. The underlying rationale for the two-fold test has been clearly set out: see *Meadow Park Nursing Home and S.E.I.U., Local 210* (1993), 36 L.A.C. (4th) 283 (Brandt) and *Wellesley General hospital and S.E.I.U., Local 204* (1996), 61 L.A.C. (4th) 433 (O. V. Gray) and see discussion in *Leading Cases*, (Mitchnick & Etherington), vol. 2, p.15-1. The subsequent steps to carry the intention to resign into effect are evidence that the intention to resign is continuing and real.

On the facts of this case, there can be no doubt that the Grievor's intention to resign was thought out and effectuated over the course of a series of steps associated with the severing of her employment. Frankly, she never retracted her resignation. Her grievances are not retractions of her intent to resign; they are assertions that the Employer was required to grant her a leave of absence; because the Employer did not, she was forced to resign.

The law is clear that an employee can prove that an otherwise apparently effective resignation was nonetheless not voluntary because he or she was unable, because of duress, anxiety, depression or other mental disorder, to form the requisite conscious intent. But the standard of proof needed to vitiate an otherwise clearly articulated and carried out intent is high. It is not mere poor judgment; it is genuine cognitive dysfunction. As Arbitrator Brandt puts it in *Meadow Park Nursing Home supra*: "...the law expects people to live with their decisions, however ill-considered they may be".

No medical evidence of cognitive dysfunction or diminished mental capacity was tendered by the Union because that is not the assertion before me. Rather, it amounts to this: the Employer forced her to resign because they denied her leave request and she had no other options. In other words the Union suggests that this is a case of duress or coercion. Dictionaries define duress, generally, as an 'unlawful constraint which tends to coerce the will of another to the point of inducing someone to do an act contrary to her free will'.

The only case filed by the parties similar on its facts, which was provided by the

Employer, is *London Health Sciences Centre v. OPSEU* [1999] O.L.A.A. No. 699 (M. G. Picher). There the Grievor filed a request for a one year career development leave. In the body of the request, she indicated that failure to grant the leave would lead to her resignation. The leave was denied and she resigned and pursued her opportunity. She grieved the denial. The Board found that the issue of the denied leave was moot. Given that the Grievor's ultimatum and intention to resign were not dependent upon the reasonableness or legitimacy of the employer's decision - she was going to resign if her leave was declined whether legitimate or otherwise - she could not allege that she was constructively dismissed. By incorporating her ultimatum into her letter of request for the leave, and by admitting during the hearing that the reasonableness of the Employer's denial was not relevant to her decision to quit, the grievor could not show that the Health Sciences Centre forced events (and the quit); nor was it open to her to argue that the quit was caused by a breach of the collective agreement: "the unlawful constraint" in the definition of duress above.

The Grievor in the present case, placed herself in a similar situation. By issuing her ultimatum and acting upon it at the meeting of December 1, 2005, she, in law, effectively jumped before she was pushed. Her act was both precipitous and premature because, on the evidence I have, I cannot find that she showed that the request had ever been denied by the Employer. While the Union submits that the signal had been sent and that the Employer was, by December 1, just stonewalling, I am not satisfied to make that finding, especially given the language of the Article in question. While arbitrators have traditionally restricted the kinds of inquiries employers can make and given short shrift to the kinds of considerations they can place on the employer's side of the scale, this Employer had the right to satisfy itself, as part of its decision on the reasonableness of the request, that "one month's clear notice" for the leave had been given. Since it had not been given by the Grievor, it had the right to satisfy itself that one month's written notice had been "impossible".

On this analysis, while I would have no difficulty finding that the Grievor's dilemma was highly stressful, I am not satisfied that she had made out a case of duress. Put simply, in order to make that case, she had to show that her decision was forced upon her by the Employer and resulted from the Employer's breach of the collective agreement. In the circumstances of this case, the Grievor's premature quit compels me to find that it was neither forced nor the result of a breach of the collective agreement.

Having said all of that, it seems to me that the analysis is wholly different under the terms of the *Employment Standards Act, 2000*. The move from contract law to statutory interpretation is dramatic. I also note that neither party provided me with any authorities on the application of section 50 and I have seen none. While I would be surprised if this was a matter of first instance, my analysis is necessarily one of first principles.

The first issue to be decided is whether, as the Employer argues, the late pleading of the Emergency Leave provisions is an expansion of the grievance, and one, moreover, which I should not entertain. While I agree it is an expansion, and one for which an adjournment might well have been granted (had it been requested) in my view, because the substantive rights and obligations of the ESA, like those of the *Human Rights Code*, are incorporated into the collective agreement (see *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324* (2003), 230 D.L.R. (4th) 257 (S.C.C.)), the expansion amounts to no more than a new legal argument under the agreement, and arguably, given the baseline or minimum standards nature of the Act, something less than that; certainly, it raises no new factual issues which prejudice the Employer. In those circumstances and given that the 10 leave days allowed under the statutory scheme bear directly on both the issues in dispute and their disposition, it would be improper not to entertain the claim.

Once entertained, the applicability of the Act is compelling. The 10 days are directly germane to the outcome of this case because the Employer has conceded that it was willing to grant the Grievor her leave request commencing January 1, 2006 despite the fact that she had not perfected her request. Given that and that she only had a maximum of 10 shifts to cover between December 8 and January 1, the Emergency Leave provisions would have completely bridged the gap and her decision to resign in order to care for her sister would not have arisen.

There can be no doubt that the scheme applies to the Grievor's circumstances. The Employer "employs 50 or more employees"; the Grievor is therefore entitled to a leave of absence without pay if her sister (ss. 50(2)6.) is ill (ss. 50(1)2.). End of analysis. The only issue before me is whether the applicability of the scheme was triggered in the circumstances of this case. The Employer submits that it was not; that ss.50(3) contemplates the employee's initiative. The Union argues that the November 28th note invokes the Act.

In my view, and without dilating on the broad purpose and intent of the Act (see,

for instance, *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27 (S.C.C.) the contest is barely joined. Like the right to refuse unsafe work under the Ontario *Occupational Health and Safety Act*, no 'magic words' need be uttered to invoke the entitlement. As the Provincial minimum, it is not one that can be avoided on the basis of ignorance of the law. The 10 days are simply the minimum entitlement and the qualifying employer is denied any discretion to refuse. While the scheme in ss. (3) contemplates the employee advising the employer of her intent to take the leave days, ss. (4) points to the broad entitlement contemplated; it sanctions the taking of the leave without any notice whatsoever. In keeping with that broad purpose, the Ministry's Employment Standards Branch enforces the provision on the basis that some claimants will advise of the leave and others, without knowing their entitlement, will simply not attend at work. The Ministry protects the employment of the latter group, whether they have 'advised' the employer of their need for a leave or not, as long as they can retrospectively justify the absence in accordance with the scheme.

Leaving aside the Branch's view, which undoubtedly is not binding on me, the Grievor's circumstances clearly bring her within the scope of entitlement. On the facts of this case, where the Grievor placed herself in the hands of the employer and specifically pleaded the requirements of section 50 in her note of November 28, 2005 it does not lie with the Employer to argue that the provisions have not been invoked and I so find.

VII

In sum, the Grievor was entitled to 10 emergency leave days commencing December 8, 2005. Those 10 days would have covered all of her scheduled shifts between that date and January 1, 2006. The Employer conceded that it was willing to grant an unpaid leave of absence commencing on that date and without a specified return date. In my view, had the Employer recognized its duty to provide the 10 days of emergency leave, the events would not have unfolded as they did. The Grievor would not have resigned her employment. The Employer's breach of the Act renders the Grievor's resignation null and void.

I have no doubt that the Legislature, in its wisdom, has seen fit to simplify the issue of unpaid emergency leaves of absence. The scheme in section 50 is in place to avoid the kinds of tortured decision-making and confusion that the facts of this matter and the applicable jurisprudence underscore. In my view, I have given effect to that intention.

VIII

For these reasons, this grievance is allowed. The Grievor is to be reinstated to her employment without loss of seniority. I remain seised of any and all issues of implementation.

DATED AT BARRIE, ONTARIO THIS 25TH DAY OF APRIL, 2006.

Dana Randall, Arbitrator