

Cited as:

**Paintplas Inc. v. International Assn. of Machinists and
Aerospace Workers, Local 2524 (Vacation Pay Grievance)**

**IN THE MATTER OF a policy grievance and a group grievance
AND IN THE MATTER OF the arbitration of the grievances
Between
Paintplas Inc., and
International Association of Machinists and Aerospace Workers,
Toronto Lodge 2524**

[2000] O.L.A.A. No. 723

File No. AY001539, A/Y001540

Ontario
Labour Arbitration

S. Schiff, Arbitrator

Heard: Toronto, Ontario, September 20, 2000
Award: October 2, 2000

(20 paras.)

Appearances:

Philip Woldenden, counsel and Mario Chartrand, for the employer.

Peter **Shklanka**, counsel, John Janicas, union president, Tim Jackson, union vice-president and Colin Cherry, directing business representative, for the union.

1 The Paintplas payroll department always calculates vacation pay on the base of employees' previous twelve months earnings without adding in the vacation pay they got during that or any other period. The department followed this practice in June 2000 for the vacation pay calculated on earnings during the period July 1, 1999 through June 30, 2000. The union put in both a policy grievance on its own behalf and a group grievance on behalf of a dozen employees. The union says that previous vacation pay ought to have been included as part of earnings in the calculation base.

2 In his opening, union counsel asked for payment of the extra amount of vacation pay back to 1997, the year the current collective agreement came into effect. I note that the formal grievances are worded broadly enough to cover the whole time. In argument Paintplas did not oppose a retroactive order, instead targeting other issues.

3 Counsel outlined the relevant facts during their opening statements and argument. They offered no evidence other than the formal grievances and the collective agreement filed as exhibits.

4 Paintplas raises two objections to my deciding the grievances: they were launched out of time and, in any event, the union is now estopped from complaining. The union says the grievances are timely; but, if not, the time limit should be extended under the authority that s. 48(16) of the Labour Relations Act gives. Anyway, by waiting until the hearing to object to timeliness, Paintplas has waived the objection. Estoppel does not apply In the circumstances.

5 The timelines objection comes under ss. 8.14 and 8.15 of the collective agreement. Section 8.15 says that the union may file either a policy or a group grievance "within seven (7) calendar days of the event or circumstances giving rise to the grievance having occurred or ought to have reasonably come to the attention of" the union (in the case of a policy grievance) or "the employees affected" (in the case of a group grievance). Section 8.14 makes the seven day limit mandatory: "time limits ... must be strictly complied with ... and failure to comply shall result in the grievance being deemed to have been abandoned."

6 "[T]he event or circumstances giving rise to" the grievances were the payroll department's using a method of calculating vacation pay that omitted from the earnings base any amount for previously paid vacation pay. The "event or circumstances ... occurred" in late June of 2000 and, during the currency of the present collective agreement, in late June of each earlier year beginning in 1997. They "occurred" more than seven days before the union filed the grievances on July 12th. But the point of time when their "having occurred ... ought to have reasonably come to the [union's or the employees'] attention" was not more than seven days before the 12th. The grievances were therefore filed in time.

7 I explain. The union did not know that the payroll people were calculating vacation pay that way until early July. Counsel did not tell me specifically whether or not any employee knew before then, but I infer from what they said that none did. Certainly Paintplas had not told the employees or the union before. The union first learned what the payroll people were doing when the president asked them about the matter and was told that previous vacation pay was excluded from the base. The grievances went in within seven days.

8 At the hearing I expressed some scepticism about the proposition that no employees would have accumulated pay cheque stubs over the previous twelve months and examined them to see if what they ultimately got for vacation pay was adequate. I now think I was wrong. Expecting that the employees would have kept all the stubs for a year and then done the necessary calculations would go against what is normal practice of industrial workers. They would not even have had help from T4 income tax slips: while those show the total for the calendar year, the time period for vacation pay calculation under this collective agreement runs from July 1st to the succeeding June 30th. Beyond that, since I was not shown any pay stubs, I cannot know whether the information they set out beyond the demands of the Employment Standards Act would have helped employees make the calculations. As for the union, there was no reason it should have monitored how Paintplas did the calculation each year. Local unions do not work that way: except for matters involving their own

institutional interests, they await - and must await - complaints about an employer's conduct from employees in the bargaining unit. Cf. *Re Georgian College and OPSEU* (1997), 59 L.A.C. (4th) 129, 138-39 (Schiff, chairman). Here I adopt what the board chaired by Harry Arthurs said in *Re Pilkington Bros. (Canada) Ltd. and United Glass & Ceramic Workers* (1966), 17 L.A.C. 146, 155, which I have just largely paraphrased. Richard McLaren also explicitly agreed with Arthurs' board in *Re Pure Metal Galvanizing Ltd. and Steelworkers* (1990), 11 L.A.C. (4th) 71, 77, quoting part of the passage I adopt. And so did Greg Brandt in *Re Ipex Ltd. and Glass, Molders, Pottery, Plastics & Allied Workers* (1995), 52 L.A.C. (4th) 198, 203. Indeed, in *Ipex*, although the employer had given each employee a form entitled "Vacation Pay" setting out in some detail data from which employees might figure out whether previous vacation pay had been included in the earnings base of the calculation and inviting them to consult a named management person if they believed the amounts were wrong, Greg Brandt did not think that enough to put the union on notice. I agree with my three arbitrator colleagues.

9 Because I find that the grievances were filed within the seven day limit, I do not consider whether, had they not been, I could or should have extended the time under s. 48(16) of the Labour Relations Act nor whether Paintplas waived the objection.

10 Here are the collective agreement provisions relevant to the merits of the grievances:

15.01 All employees ... shall be required to take vacations with pay as follows:

- a) employees who have completed less than one (1) year of continuous service as of July 1st in any year shall be entitled to one (1) day for each completed calendar month of service up to July 1st to a maximum of two (2) weeks, four (4) percent of earnings.
- b) employees who have completed one (1) year but less than five (5) years of continuous service as of July 1st in any year shall be entitled to two (2) weeks at four (4) percent of earnings.
- c) employees who have completed five (5) years but less than nine (9) years of continuous service as of July 1st in any year shall be entitled to three (3) weeks at six (6) percent of earnings.
- d) ...

15.02

- a) ...
- b) Earnings shall be calculated from July 1st of the previous year.
- c) ...

15.03

Vacations shall be taken during the plant shutdown or by mutual arrangements between the Company and the employee...

15.06 The Company shall pay 5/6 of the vacation pay owing to each employee at the earlier of the last pay prior to the commencement of the summer shutdown or the 2nd pay following July 1. The balance of the vacation pay shall be paid on the second pay following July 1.

11 The "shutdown" referred to in ss. 15.03 and 15.06 takes place during the first two weeks of July. In 1997, 1998 and 1999, following what the first sentence of s. 15.06 says, Paintplas paid 5/6th of vacation pay before the shutdown on the last pay day in June. As the second sentence directs, the remaining 1/6th was paid on the second pay day after July 1st. In 2000, under a special agreement with the union, Paintplas paid the whole of vacation pay before the shutdown.

12 A line of awards going back forty-five years says that, for the purpose of calculating vacation pay as a percentage of "earnings" or "gross earnings" or "total wages" during a previous stated time period, vacation pay the employee got during that period must be added in as part of the total. A board chaired by Bora Laskin so decided about if "earnings" in *Re Falconbridge Nickel Mines Ltd. and Sudbury Mine, Mill & Smelter Workers (1955)*, 6 L.A.C. 56, 59, and almost all arbitrators writing on the subject have agreed ever since. A recent instance is *Greg Brandt in 1995 deciding Ipx at 199*. Paintplas does not quarrel with the proposition as a general matter but argues that s. 15.02b) and s. 15.06 make it inapplicable under this collective agreement. I disagree. Section 15.02b) makes extra clear what is already set out in the clauses of s. 15.01: the twelve months after July 1st of the previous year comprise the particular time period during which the earnings are accruing upon which the percentage calculation directed by s. 15.01 is made. It is similar to provisions doing the same thing in collective agreements involved in the many awards. But s. 15.06 is different. It is unique in collective agreements dealt with in the awards I have seen and indeed, as far as I can recall, unique in agreements I have dealt with myself. While it does not exclude the usual way the calculation should be done, it modifies it. Present the shutdown during the first two weeks of July, s. 15.06 directs Paintplas to calculate the vacation pay and then pay out 5/6th before the end of the time period that s. 15.01 and s. 15.02b) define as the base for the calculation.

13 From what I was told by Paintplas' counsel, it appears that the payroll people make an estimate near the end of June of what each employee's earnings would be during the few days remaining in the month and use the estimated amount as part of the twelve month total. That is what they did in 1997, 1998 and 1999. They then made the vacation pay calculations before the end of June and paid out 5/6th of the vacation pay so calculated on the last pay day of the month. The other 1/6th they "paid on the second pay following July 1." In 2000 they made the calculations as before but, under the special agreement, the whole vacation pay was paid out on June 29th, the last pay day before the shutdown.

14 Paintplas argues that, if ss. 15.02b) and 15.06 do not exclude the meaning of "earnings" adopted in the long line of awards, s. 15.06 at least makes only the 1/6th of vacation pay coming in July subject to it. That is right.

15 In all of the many awards I have seen the vacation pay calculated on employees' earnings in, say, year 1 had been paid to them in year 2. Then, for the purpose of calculating vacation pay based on earnings during year 2, the dollar amount of that vacation pay so paid in year 2 was held to be included. That makes sense. Arbitrators have not created a rule directing the pyramiding of vacation pay that is beyond what the particular collective agreements before them say. Applying the ordinary

understanding of the labour relations community, arbitrators have recognized that vacation pay is part of the wage package the parties negotiate and is thereby part of "earnings" employees get for their work within the meaning of the word in vacation pay provisions. As an example, see Pilkington at 150. From then on, the matter is one of seeing, and adding up, the amounts of money that the employees got as a matter of fact - as hourly wages and as vacation pay - during the particular time period the collective agreement sets out for calculating vacation pay.

16 Under s. 15.06 of the collective agreement here, since the plant shutdown has come at the beginning of July, Paintplas must pay 5/6th of vacation pay in June of year 1, thus excluding that 5/6th from the earnings base when the addition of the "earnings" in year 2 is done. Paintplas paid the 5/6th in June each year from 1997 through 1999. Looking only at 1999 as a sample, 5/6th of vacation pay calculated on earnings from July 1st 1998 to June 30th 1999, as s. 15.01 and s. 15.02b) require, was paid in June of the year and the remaining 1/6th in July. The result is that that the base for calculation in 1998, 1999 and 2000 included only the 1/6th of vacation pay employees got in July of the previous year.

17 1997 is different. Section 15.06 appeared for the first time in the current agreement effective as of January 1st 1997. That agreement succeeded another containing no s. 15.06 but, I am led to believe, substantially everything else in what are now ss. 15.01, 15.02 and 15.03. I therefore have no reason to think that any part of the vacation pay employees got in 1996 under the previous agreement was paid before July 1st. Since the whole was paid after, the whole formed part of the earnings base for the calculation in 1997 according to the meaning of "earnings" the awards direct.

18 Paintplas argues that, even if it might otherwise owe back vacation pay, the grievances are barred by an estoppel. Not so. Representations from the union to Paintplas that it acquiesced in what the payroll department was doing would be necessary to bottom an estoppel. There could be such a representation if the union people had actually known what was going on. For the purpose of this arbitration I may also agree that their deliberately ignoring what reasonably they should have known would be enough. But, the parties agree, the union did not know until early July of 2000. And, in deciding the timeliness objection, I have already found that the union was not unreasonable in failing to know earlier. Here I will elaborate the point a little bit. The facts in Ipex, outlined when I was considering the objection, pushed more strongly than those before me to show that the union should have known. Greg Brandt nonetheless denied an estoppel. 52 L.A.C. (4th) at 203-04. The union had not known what the employer was doing nor, he concluded, had it impliedly acquiesced. He was right on the facts there. It follows that the facts here are not enough.

19 The grievances are allowed. I order that Paintplas shall pay to each affected employee the extra vacation pay owing for the years 1997 through 2000 calculated by adding to the base earnings an amount equal to the vacation pay, or that portion of it, paid to that employee in July of 1996, 1997, 1998 and 1999 respectively.

20 I retain jurisdiction over these grievances to determine any matter about which the parties cannot agree arising during implementation of my order.

qp/s/qlsld/qlahp

---- End of Request ----

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