IN THE MATTER OF AN ARBITRATION

BETWEEN

THE UNIVERSITY OF BRITISH COLUMBIA

(the "Employer")

AND

CANADIAN UNION OF PUBLIC EMPLOYEES , LOCAL 2950

(the "Union")

(Flexible Hours Grievance)

APPEARANCES:	Maynard Witvoet, for the Employer Frans Van de Ven, for the Union
ARBITRATOR:	Mark J. Brown
DATE OF HEARING:	April 26, 2007
DATE OF DECISION:	May 2, 2007

I. ISSUE

The Union filed a grievance on December 14, 2006, which asserted that the Employer violated the Collective Agreement by requiring employees working a flexible schedule to make up time. The grievance was filed as a policy grievance and related to the Library department.

Initially I was appointed to mediate the dispute. At a meeting on April 16, 2007, the parties were unable to resolve the entire grievance. The parties requested that I arbitrate the outstanding issue in dispute.

At the hearing the parties did not call *viva voce* evidence. The parties agreed to rely on documents, including bargaining notes, and stipulated statements made by Counsel.

II. COLLECTIVE AGREEMENT PROVISIONS

There are two provisions that have a bearing on this dispute.

Article 26 Statutory Holidays

26.06 Effect of Modified Work Week

The University and the Union agree that the number of hours worked by an employee during a year should be unaffected by the type of work week chosen under Article 28.

If the total number of statutory and Special Holidays exceeds eleven (11) per year, employees working the three-day week shall schedule an extra 4 2/3 hours work for each such holiday taken in excess of eleven (11), to compensate for the extra time off. This make-up time shall be scheduled by advance arrangement with the Department Head. Alternatively, the employee may elect to have an equivalent pay deduction based on her/his rate of pay excluding shift differential.

Article 28 Hours of Work

28.02 Work Day and Work Week

(C) The **five** basic forms of work week shall be:
(i) Seven (7) hours per day, five (5) days per week;
(ii) Eight and three-quarters (8 ¾) hours per day, four (4) days per week;

(iii) Seven and three-quarters (7 ¾) hours per day, nine (9) days per two-week period;

(iv) **Seven and one-half (7 ½) hours per day, fourteen (14) days per three-week period.**

(v) Eleven and two-thirds (11 2/3) hours per day, three (3) days per week. This form shall be available only for shift workers on a twenty-four (24) hour per day operation.

In accordance with Article 26.06 and in relation to other provisions such as 26.05 Special Holidays and 30.08 Paid Leave (Christmas) the parties agree employees will be required to make-up the difference in annual hours of their approved form of work week to that of the Standard Work Week schedule (1820 hours per annum).

The portions of the above noted provisions in bold are the changes negotiated by the parties in collective bargaining in March of 2006 for the new Collective Agreement that has a term of April 1, 2006 to March 31, 2010. The grievance involves the basic form of workweek (iii), what I will refer to as the nine-day fortnight; and, the last paragraph.

III. COLLECTIVE AGREEMENT NEGOTIATIONS

The Employer tabled collective bargaining proposals in October of 2005. The proposals were not formal language but rather were concepts or topics for discussion. One of the proposals stated:

10. Article 28 – Hours of Work
The University wishes to discuss the four basic forms of work week and, in particular, proposes to add language that will reflect how pay for statutory holidays will be calculated for each of these forms of work week.

The Employer's bargaining notes of a session on December 14, 2005 show that the above noted issue was raised. The Employer's speaking notes reflect that flexible schedules were discussed. In particular, the nine-day fortnight schedule was noted as requiring make-up hours as follows:

Christmas make-up = 2.25
Stat make-up = 8.25
Day in lieu of stat " = 3.25
14.00 [error in addition]
Built in difference 6.5
20.5

The Employer's issue was that all employees work schedules should equate to 1820 hours per year. The basic forms of workweek all equate to 70 hours every two weeks and 1820 hours per year with the exception of the nine-day fortnight. The nine-day fortnight is 69.75 hours every two weeks and 1813.5 hours per year. I will refer to the .25 hour difference every two weeks as the "built in difference" as it is built in to the basic form of schedule.

The Union conceded at the hearing that one of the adjustments that the Employer was seeking was the built in difference.

On February 8, 2006, the Employer tabled its first written proposal. It included the previous four basic forms of workweek plus a fifth option, which is set out as (iv) above. Following the basic forms of workweek, the Employer's proposal stated:

> Based on mutual agreement a manager and employee(s) may create a form of work week not referenced above. It is understood that no such schedule can create a scenario where the total annual hours are less than 1820 hours.
>
> Employees working a form of work week other than the Standard Work Week, will have their hours adjusted for statutory holidays, special holidays, paid leave between Boxing Day and New Year's Day or any other applicable holidays. Therefore, an employee will be required to make-up the difference in annual hours of their approved form of work week to that of the Standard Work Week schedule. Employees may work these additional hours or utilize accrued vacation or banked time.

The Employer stated at the hearing that the above proposal sought to achieve two objectives. The first paragraph created more flexibility as it allowed the parties to create additional options for work schedules not specifically referenced in the article as long as the annual hours were not less than 1820 hours. The second paragraph ensured that all employees worked the same number of annual hours per year.

The Union agreed to the addition of the fifth option in the basic forms of workweek, but did not agree to the first paragraph allowing the manager and employee to create other alternatives. The Union thought that such a provision might lead to abuse. In response to the balance of the Employer's proposal, the Union asserted that Article 26.06 "already had it".

On February 22, 2006, the Employer amended its proposal to reflect what was eventually agreed to by the parties.

A Union proposal dated February 24, 2006, does not include any additional language to Article 28.02(c), other than the fifth option in the basic forms of workweek.

On March 30, 2006, the parties signed off on the agreed language, which was the same as the Employer's February 22nd proposal.

IV. GRIEVANCE

In December of 2006, the Library Human Resources Department issued a policy titled "UBC Library Guidelines – Managing Flex Week Schedules For CUPE 2950 Employees". It sets out the five basic forms of workweek. It then stated in part:

> Hours worked by employees on flex schedules need to be managed. For instance, when the three days paid leave at Christmas was introduced, it was recognized that employees who work a flex schedule take the Christmas closure day at their regular work hours per day in a flex schedule, thereby taking greater hours of paid leave than an employee working a standard work week. Therefore, divisions who had employees on flex schedules were asked to implement a practice to equalize the hours taken by employees who worked flex schedules with employees who worked standard work weeks. Some common practices included: designating time where the flex schedule is lifted or deducting time owing from vacation hours. We ask that these practices of addressing the Christmas deficit hours continue for 2006.
>
> With the acknowledgement of the inequity that would result if equalization of hours was not practiced over the paid Christmas leave, the University and Union examined the impact of statutory holidays on flex week schedules during the last round of collective bargaining.
>
> Similar to the paid Christmas leave, it was found that employees on flex schedules were taking their statutory holidays at their regular work hours per day in a flex schedule. As a result, though it was never the intention, employees working flex schedules work less hours in total during the calendar year than their counterparts who work a standard workweek. Therefore, in order to address the inequity of hours worked, new language was added to Article 28 – Hours of Work. Essentially, employees on flex schedules will be required to make up the difference in work hours to be equal to their counterparts working a standard work week. The number of hours to be made up by employees working a flex schedule is summarized on the attached table. How these hours are made up will be at the discretion of the unit manager or branch head to determine.

As previously mentioned, the number of hours to be made up by employees working a flex schedule are a result of the three days paid leave at Christmas as well as the statutory holidays. In addition, as referenced in the attached table, employees who work nine days over two weeks must also make up the shortfall of hours during the two week period. I.e. A shortfall of 0.25 hours per 2 week period.

This policy directive is the basis for the grievance. The basic form of workweek that generates the dispute is the nine-day fortnight.

The Union initially took issue with the Employer's calculation of make up hours in three areas.

First, the Union asserted that someone working a nine-day fortnight had twenty-six more days off per year and therefore thirteen hours less of paid break time compared to a standard workweek. The Union argued that those thirteen hours should be subtracted from the make up hours.

Second, the Union asserted that the eleven statutory holidays should be calculated according to the employee's regular workday of 7 ¾ hours not 7 hours.

Third, the Union asserted that the employee should not be required to make up the .25 hours every two weeks.

At mediation, I convinced the Union that the first two arguments did not have merit for reasons set out below. Accordingly, the only issue for me to decide is whether the Collective Agreement language agreed upon by the parties allows the Employer to require employees to make up the .25 hours every two weeks.

V. DECISION

Under normal circumstances, collective agreements contain hours of work language that sets out the normal or standard hours of work. When parties agree to flexible work schedules, which most often involve compressed work weeks resulting in longer hours per day and fewer days of work per week, some collective agreement benefit provisions are amended by converting "days" to "hours"; so that employees on compressed work weeks are not receiving a greater benefit compared to those employees working the standard work week.

For example, in the case at hand Article 30.06 (E) (i) of the parties' Collective Agreement states that sick leave entitlement is "one and one-quarter (1 ¼) days (8 ¾ hours) per month sick leave with full pay up to 152 days (1064 hours) maximum". If only "days" were referenced, an employee working a longer workday compared to the standard workday would accrue more sick leave.

As another example, the parties agreed how to handle the Christmas Leave provisions with respect to those employees who work a longer than standard work day.

As noted above, in the mediation I advised the Union that its argument relating to the missed breaks on the twenty-six flex days per year did not have merit. The hours related to breaks could not be included in the hours of work calculation as the breaks are provided to an employee who is actually working, not one who is on a day off.

Furthermore, in relation to the Union's argument regarding the statutory holidays calculation, the parties agreed in mediation that the compressed workweek should be cost neutral. The Union's argument results in an employee earning statutory holiday pay at a rate of 11 days times 7 ¾ hours; compared to employees working the standard workweek earning statutory holiday pay at a rate of 11 days times 7 hours. This position is not cost neutral nor is it equitable. Nor is it consistent with the manner in which the parties are handling the Christmas Leave provisions. Accordingly, I advised the Union that its argument did not have merit.

The Union is not pursuing the two arguments noted above. The Employer will continue to recover the hours related to Christmas Leave and Statutory Holidays; and will not consider the missed breaks as hours to be considered in the calculations. The only issue before me is whether the Employer can recover the .25 hours every two weeks.

The parties did not put any case law before me. However, they acknowledged that there is no dispute over the legal principles that guide my analysis and decision with respect to the interpretive exercise and the use of extrinsic evidence (i.e. bargaining notes). For that principle I refer to *Health Employers Association of British Columbia v. Hospital Employees' Union* [2002] B.C.A.A.A. No. 130 (Gordon):

> Where extrinsic evidence shedding light on the parties' mutual intention is proffered, arbitrators consider both the language of the disputed provision and the extrinsic evidence when determining whether there is any bona fide doubt or ambiguity about the meaning of the language in the agreement. If, after considering the language and the extrinsic evidence, the arbitrator finds there is no doubt about the proper meaning of the provision, the arbitrator will reach an interpretive judgment without regard to the extrinsic evidence. On the other hand, if the arbitrator finds there is some doubt about the proper meaning of the disputed provision, the arbitrator is entitled to, but need not, use the extrinsic evidence to resolve the ambiguity: See Nanaimo Times Ltd. – and – Graphic Communications International Union, Local 525-M, [1996] BCLRB No. B40/96 (upheld on reconsideration BCLRB No. B151/96). (paragraph 15 Quicklaw)

The Employer argues that the Union is seeking a benefit and therefore the onus is on the Union to prove that it achieved that benefit in collective bargaining. In general I agree with the proposition that a benefit should be set out expressly in a collective agreement. However, in the case at hand the nine-day fortnight schedule was in the Collective Agreement. The Employer was not recovering the built in difference, nor was there a consistent practice across the campus with respect to the payment of statutory holidays. Some employees were receiving payment for 11 days times 7 ¾ hours, not 7 hours. Therefore, the Employer was seeking clarification in how to apply the Collective Agreement language; the Union was not seeking a benefit.

The initial Employer proposal stated that it wished to discuss the method for payment of statutory holidays. This was because some employees were receiving more than the employees working the standard workweek. The discussion at negotiations evolved to include other paid benefits and the built in difference.

While the Union concedes that one of the adjustments sought by the Employer was the built in difference, those discussions occurred in December of 2005, before formal contract language was tabled by the Employer. I conclude that when formal contract language was tabled, the parties were at cross purposes in some of the discussions and did not have a meeting of the minds with respect to the proposed contract language.

The first formal written proposal tabled by the Employer had three components to it.

The first component was the five basic forms of workweek. The five forms of workweek include the standard workweek, plus four other compressed workweek options. The only option that has a built in difference is the nine-day fortnight. The nine-day fortnight option language was in the previous Collective Agreement. The Employer could have eliminated the built in difference by proposing a very slight increase in the 7 ¾ hours of work per day.

The second component was the option of a manager and the employee agreeing to an alternative, as long as the annual hours of work were not less than 1820 hours.

The third component was to ensure that for paid leaves, employees working a compressed workweek did not receive a greater benefit compared to those employees working a standard workweek.

In negotiations, the Union agreed to the five basic forms of workweek, did not agree to the manager and employee exploring other options, and asserted that the Employer already had what it wanted in Article 26.06.

Article 26.06, which addresses statutory holidays, states that the parties agree "that the number of hours worked by an employee during a year should be unaffected by the type of workweek chosen under Article 28". The parties agreed at the hearing that this provision refers to the concept of cost neutrality (i.e. employees working a compressed workweek receive the same benefit as the employee working the standard workweek). The parties had a practice, although not applied consistently across the campus, that cost neutrality was achieved by employees working make up hours because they received statutory holiday pay based on their normal hours of work rather than adjusting the statutory holiday pay to 7 hours pay regardless of their normal hours of work.

The third component of the Employer's proposal clarified that the cost neutrality concept, and the make up hour system, was to be applied to other paid leaves as well, not just the statutory holiday provision. It did not reference the built in difference.

The Employer's second formal proposal, which was eventually signed off, maintained the five basic forms of workweek, eliminated the manager and employee agreeing to alternatives, and amended the paragraph relating to the paid leave cost neutrality concept.

By referencing Article 26.06, with the Union's assertion that the Collective Agreement already provided for what the Employer was seeking, I conclude that the parties were concentrating on the cost neutrality of paid leaves for employees working a compressed workweek. There was no meeting of the minds on the built in difference. Accordingly, I do not find the extrinsic evidence to be helpful.

In any event, I conclude that the language of the Collective Agreement is unambiguous. There are five basic forms of workweek set out. If the Employer wanted to amend the hours of work for any of those options it could have proposed a change to the language. By continuing to accept the nine-day fortnight language as one of the "basic forms of workweek" the Employer is agreeing to absorb the minor built in difference. The paragraph after the five basic forms of workweek, sets out the concept of cost neutrality, "in accordance with Article 26.06" so that the "number of hours worked by an employee during a year should be unaffected by the type of workweek chosen under Article 28.02". If an employee is working a basic form of workweek other than the standard workweek, the employee must make up hours to achieve cost neutrality. The provisions referenced in this paragraph are paid leaves. The paragraph does not reference the built in difference.

I conclude that the nine-day fortnight is an agreed upon basic form of workweek. Based on that, the Employer cannot recover the .25 hour built in difference.

Mark J. Brown

Dated this 2nd day of May, 2007.