IN THE MATTER OF AN ARBITRATION

BETWEEN:

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 115
(the "union")

AND:

PEACE RIVER COAL INC.
(the "employer")

Re: Family Day Grievance

AWARD

ARBITRATOR:	Nicholas Glass
COUNSEL:	Andrea Zwack for the Employer
	John MacTavish for the Union
DATE OF WRITTEN SUBMISSIONS:	February 5, 17, and 25, 2014
DATE OF AWARD:	March 12, 2014

AWARD

I. Issue

The union alleges that the Employer breached Section1 of the *Family Day Act*, S.B.C. 2012, c.24 ("FDA") by refusing to recognize "Family Day" as a statutory holiday under its collective agreement with the union. In the alternative the union alleges that the employer breached 3(3) of the *Employment Standards Act,* R.S.B.C. 1996 c.113 ("ESA")by failing to acknowledge that Part V of ESA is incorporated into the collective agreement. These complaints or allegations are both implicitly alleged by the union to be grievable under the collective agreement and the employer does not take issue with this.

II. Relevant Facts

Article 8 of the collective agreement provides in part as follows:

> 8.01 The Company shall recognize the following ten (10) statutory holidays each year:
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> New Year's Day
> Good Friday
> Victoria Day
> Canada Day
> Labour Day
> Thanksgiving Day
> Remembrance Day
> Christmas Day
> Boxing Day
> BC Day
>
> 8.02 Statutory Holiday Pay
>
> (a) Statutory Holiday Pay will be paid for the hours an employee normally works in a day at their regular rate.
> (b) An employee required to work a regularly scheduled shift on a statutory holiday will be paid one and one half (1.5) for such hours worked. Lieu days will not apply.

On May 31, 2012, the Government of British Columbia enacted the FDA , establishing Family Day as a public holiday by regulation on June 25, 2012.

The new *Act* included a consequential amendment to Section 1 of the ESA. It changed the definition of statutory holiday, adding Family Day to the list of holidays included in the definition.

The employer has refused to recognize Family Day as a statutory holiday under the collective agreement. It did not give employees Family Day off work and did not pay statutory holiday pay to its employees for Family Day.

The union filed a policy grievance on March 5, 2013.

The union characterizes the issues in this grievance as follows:

(i) Is section 1 of the FDA incorporated into the collective agreement as an employment related statute?

(ii) Does the change in the definition of statutory holiday under section 1 of the ESA entitle employees at Peace River Coal to the protection of Part V of the ESA?

III. Positions of the Parties and Discussion

There were some preliminary submissions of the union regarding the appropriate interpretation and application of employment related legislation. There was no issue between the parties about these basic principles. Arbitrators have the power and also the responsibility to implement and enforce the substantive rights and obligations of human rights and other employment related statutes as if they were part of the collective agreement. See *Parry Sound (District) Social Services Administration Board. V. Ontario Public Service Employees Union, Local 324 (OPSEU),* 2003 S.C.C. 42; Section 89 of the *Labour Relations Code* provides that an arbitration board may interpret and apply any act

which regulates the employment relationship of the persons bound by a collective agreement for the purposes of providing a final and conclusive settlement of any dispute arising under a collective agreement; An arbitration board maintains the sole authority to interpret and apply any Act, even if the Act's provisions conflict with the terms of the collective agreement; Section 8 of the *Interpretation Act*, R.S.B.C. 1996 c.238 provides:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

The Supreme Court of Canada recognized in *Rizzo & Rizzo Shoes Ltd (Re)* [1998] 1 S.C.R. 27, that employment standards legislation is benefits conferring legislation and stated:

> … as such according to several decisions of this Court it ought to be interpreted in a broad and generous manner. Any doubts arising from difficulties around it should be resolved in favour of the claimant.

Other interpretive decisions were quoted by counsel for the union, with respect to which no exception is taken by counsel for the employer. These include *Daryl Evans, Mechanical Ltd. v. (British Columbia Director of Employment Standards)*, 2 B.C.S.C. 48:

> Exceptions to benefits conferring legislation must be narrowly interpreted.

Also *Machtinger v. HOJ Industries Ltd.,* 1992 1 S.C.R. 986 states:

> An interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, should be favoured over one that does not.

Both the *Rizzo* and the *Machtinger, supra* decisions were adopted in British Columbia in *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd.*, [1996] 21 B.C.L.R. (3d) 91.

The union's first argument is that the FDA is employment related legislation as it proclaims a public holiday, and therefore, it modifies the terms of all employment relationships within the province, including those that are governed by a collective agreement.

Mr. MacTavish for the union refers to part of the speech of the Honourable MacDiarmid, then Minister of Labour and points out that there is a long stretch between New Year's Day and the Easter break without a long weekend and it is part of the policy underlying the creation of Family Day that "a special day be set aside especially for families". He refers specifically to the passage in the speech where Ms. MacDiarmid states:

> Bill 53 creates a public holiday in British Columbia called Family Day, a day set aside so that families can celebrate together, and that will be recognized as a statutory holiday under the Employment Standards Act …

The union argues that this portion of the speech and the Act itself draw a distinction between Bill 53 creating a public holiday and Bill 53 being recognized as a statutory holiday under the ESA and states that these reflect and confirm two goals expressed in the legislature which are separate from each other. Mr. MacTavish argues that "as such, the prescription of Family Day as a public holiday to be observed on a day in February can be recognized independently from the *ESA*".

The union says that the FDA should apply to modify the collective agreement and the employer should be required to recognize Family Day as a statutory holiday under Article 8.01. The union states that the FDA is benefits conferring legislation and as such must be given a broad and generous interpretation. Further, an interpretation of the FDA which does not require all employers to recognize Family Day as a new statutory holiday independently of the ESA leaves the result that was not intended by the legislature. The unintended result is that Peace River Coal's families will have Family Day off from work or school but none of these families will be able to enjoy Family Day together.

The union submits that such an interpretation defeats the purpose of the FDA entirely. The union's interpretation of the FDA extends its protections to as many employees as possible, and as such it should be the preferred interpretation.

Finally, Mr. MacTavish argues that if the legislature intended that unionized employees who were already bound by a collective agreement at the time of the enactment of the FDA, be excluded from its application, it would have expressly provided so.

I have to say that I disagree with these propositions of the union.

In the first place the FDA specifically includes consequential amendments to the ESA. If a parallel and independent status was to be created for the FDA itself, independently of the ESA, this could and would have been provided for in the Act at that point, but it was not. It would have needed some clear mechanics and definitions to allow and provide for its implementation separately from the ESA but the Act is silent in this respect.

The second and main reason why this position is unpersuasive is Section 3(2) of the ESA. Sections 3(1) and (2) provide as follows:

> **Scope of this Act**
>
> **3** (1) Subject to this section, this Act applies to all employees other than those excluded by regulation.
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> (2) If a collective agreement contains any provision respecting a matter set out in Column 1 of the following table, the Part or provision of this Act specified opposite that matter in Column 2 does not apply in respect of employees covered by the collective agreement:

Column 1 Matter	Column 2 Part or Provision
Hours of work or overtime	Part 4

Statutory holidays	Part 5
Annual vacation or vacation pay	Part 7
Seniority retention, recall, termination of employment or layoff	section 63

I agree with the employer that under the terms of the collective agreement and Section 3(2) of the ESA, the introduction of Family Day in British Columbia has no bearing on the statutory holidays to be provided by the employer to the employees covered by the collective agreement. There is no separate and independent implementation process for Family Day beyond that specifically set out in the Act as a consequential amendment to the ESA.

Family Day was implemented in British Columbia as a statutory holiday by virtue of an amendment to the definition of "statutory holidays" in the ESA. This increased the number of statutory holidays in British Columbia from nine to ten. The list is similar to what is contained in the collective agreement with the exception that before the amendment to the ESA to include Family Day, the statutory holidays listed in the *Act* did not include Boxing Day. The consequential amendment to the ESA as specified in the FDA was the inclusion of Family Day in the statutory list.

However, this did not result in the inclusion of Family Day in the list of statutory holidays negotiated as between the employer and the union under this collective agreement. The mechanics of this are that the collective agreement contains provisions respecting statutory holidays. Therefore pursuant to section 3(2) of the ESA, the provisions of the collective agreement apply and not the provisions of the ESA.

This is the meaning of Section 3(2) of the ESA. The legislative intent of this provision is that the parties to a collective agreement are free to negotiate terms and conditions

applicable to their workplaces and if they choose to do so, the subject provisions listed in 3(2) of the ESA (Part 5) will not apply.

Accordingly I reject the union's first argument.

The union's alternative argument is that the provisions of Section 3(2) of the ESA do not apply in this case because the definition (list) of statutory holidays in the collective agreement is different from the definition (list) of statutory holidays set out in Section 1 of the ESA, therefore the collective agreement has no provision respecting "statutory holidays" as that term is used in Section 3(2) of the ESA. Counsel for the union argues that the term "statutory holidays" as used in the ESA refers only to the statutory holidays defined in the ESA. Any list or collection of statutory holidays which are not exactly the same as per that definition are not "statutory holidays" within the meaning of the ESA and particularly Section 3(2).

I do not accept this argument. Section 3 (2) when it addresses statutory holidays should be read and construed as follows:

> If a collective agreement contains no provision respecting statutory holidays then Part 5 of the *Act* applies.

Counsel for the union asks me to find that because the collective agreement list of statutory holidays includes Boxing Day, and Part 5 of the ESA does not, then Section 3(2) should be read as if the collective agreement contained no provision with respect to statutory holidays at all. This is simply not a persuasive proposition.

Section 3(2) is quite clearly intended to operate so that if a collective agreement contains any provisions whatsoever with respect to statutory holidays, then Part 5 does not apply. The list of statutory holidays in the collective agreement does not have to match exactly the list of statutory holidays in the ESA in order for Section 3(2) to apply. If it did, the statutory provision would be rendered utterly redundant. The workings of this interpretation would be as follows:

If the list is the same as Part 5, Part 5 does not apply. If the list is different Part 5 does apply. Net result: All collective agreement provisions have to be the same as Part 5. This is so ineffective as to render the section meaningless.

The appropriate interpretation and application of 3(2) of the ESA was discussed by arbitrator Munroe in *Doman Forest Products,* 1984 B.C.C.A.A.A. No. 289, with reference to the equivalent provision of Section 2(2) then in effect under the *Employment Standards Act* at the time. At paragraph 28 – 33 of that decision Arbitrator Munroe dealt with the question of whether the notice of termination provisions in the employment standards legislation applied to employees covered by the Master Agreement between Forest Industrial Relations and the IWA:

> 28 The fact is that the Master Agreement contains a host of provisions which deal in elaborate fashion with a variety of circumstances in which employees may be exposed to termination or layoff, and be entitled or dis-entitled to severance pay. True as a product of collective bargaining, some employees may be treated more generously than others. Some employees may even be disqualified from a particular benefit. But I cannot conscientiously escape the conclusion that the Master Agreement "contains any provision expecting the matter" here in dispute.
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> 29 The word "any" occupied much attention during the hearing. I have concluded that Counsel for the Employer is correct in his submission that so long as there is something of substance in the collective agreement "respecting the matter" in dispute, the ESA simply does not apply.
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> 30 My conclusion to that effect is influenced by these considerations. First, there is the word "any" itself. At the very least the selection of that formulation point in the direction of such a conclusion.
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> 31 Second any ambiguities begin to evaporate upon encountering the phrase "no provision" in Section 2(3). According to that legislative statement, it is only where there is "no provision respecting the matter" in dispute that the statutory scheme is incorporated into a collective agreement. That language is quite clear and unyielding.
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> 32 Third, there is the manifest intention of Section 2 generally. Evidently the legislature is of the view that in some areas, the negotiators of collective agreements should be free to make value

> judgments and trade-offs uninhibited by statutory minimum standards. Provided that the parties' agreement addresses itself in some fashion to the matters listed in the so-called table, the belief appears to be that the legitimate demands of public policy are fully satisfied.
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> 33 While an argument can be mounted that minimum employment standards are too important for such a detached legislative stance, the Master Agreement contains an interesting example of the kind of balancing or trading which can and does occur at the bargaining table. As we have seen, only employees working in "manufacturing plants" (loggers) are entitled to severance pay, in the circumstances contemplated by Article XXXII(a). At the same time, only loggers (not employees in "manufacturing plants") are entitled to travel time payments – see Article XVI of the Master Agreement.

I agree with this analysis of the purpose, interpretation and application of the equivalent section of the ESA as it now stands. The question is whether the collective agreement contains *any* provision dealing with the subject matter set out in the table. If so the designated sections of the ESA do not apply. See also *Securitas Canada Ltd. v CAW Canada Local 3000*, [2004] B.C.C.A.A.A. No. 80; *Canadian Woodworks Ltd. v USW Local 1-424* [2005] B.C.C.A.A.A. No. 231.

IV. Conclusion

For the reasons set out above, the grievance is dismissed.

IT IS SO AWARDED.

Nicholas Glass

Nicholas Glass, Arbitrator. March 12, 2014