Date: 20140405

File: 166-32-33934

Citation: **2006 PSLRB 39**

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

GRAHAM HICKLING

Grievor

and

CANADIAN FOOD INSPECTION AGENCY

Employer

Indexed as
Hickling v. Canadian Food Inspection Agency

In the matter of a grievance referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Paul E. Love, adjudicator

For the Grievor: Harinder Mahil, Professional Institute of the Public Service of Canada

For the Employer: Renée Roy, counsel

Heard at Vancouver, B.C.,
October 12, 2005.

Grievance referred to adjudication

[1] Dr. Graham Hickling filed a grievance with the Canadian Food Inspection Agency (the "employer") alleging that it had failed to permit him to liquidate his compensatory leave credits when he requested that these leave credits be paid to him. He sought payment of the amount of his compensatory leave credits, plus interest. At all relevant times, Dr. Hickling was governed by the collective agreement signed on May 27, 2002, by the employer and the Professional Institute of the Public Service of Canada (the "bargaining agent") with respect to the Veterinary Medicine Group bargaining unit (the "collective agreement").

[2] Article B3 of the collective agreement deals with payment of overtime and compensatory leave. The language at issue in the collective agreement is set out in clauses B3.04, and B3.05:

ARTICLE B3 - OVERTIME

. . .

B3.04 *Upon application by the employee and at the discretion of the Employer, compensation earned under this Article may be taken in the form of compensatory leave, which will be calculated at the applicable premium rate laid down in this Article. Compensatory leave earned in a fiscal year and outstanding on September 30th of the next following fiscal year shall be paid at the employee's daily rate of pay on September 30th.*

B3.05 *When a payment is being made as a result of the application of the Article, the employer will endeavour to make such a payment within six (6) weeks following the end of the pay period for which the employee requests payment, or, if payment is required to liquidate compensatory leave outstanding at the expiry of the fiscal year, the Employer will endeavour to make such payment within six (6) weeks of the commencement of the first pay period after September 30th of the next following fiscal year.*

. . .

[3] Dr. Hickling referred his grievance to adjudication on April 2, 2004. The hearing originally scheduled for March 30, 2005, was postponed at Dr. Hickling's request.

[4] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the "former *Act*").

[5] At the commencement of the hearing, Dr. Hickling informed me that he was abandoning his claim for interest on the payment of compensatory leave credits.

Summary of the evidence

[6] Dr. Hickling is a district veterinarian employed by the employer in Victoria, British Columbia. During the fiscal year of 2002 – 2003, he worked overtime and banked 178.95 hours of compensatory leave credits. At the time that he banked those credits, he intended to leave them in his leave bank until such time as he chose to liquidate them.

[7] On June 2, 2003, Dr. Hickling requested the employer to pay him his accumulated compensatory leave credits. He received a response by e-mail on July 25, 2003, from Mae Cyr, Director of Compensation and Benefits for the Western Region. She indicated that the employer had erroneously paid out such credits in the past, but would now be paying out these credits only after September 30, 2003.

[8] Dr. Hickling attempted to resolve his grievance with the employer. The employer's view was that he could receive overtime wages after he had worked the overtime. However, if he elected to bank compensatory leave credits, he was entitled to payment for this banked time only on September 30, following the end of the fiscal year in which the overtime leave credits had been banked.

[9] In an e-mail from Stuart Wilson, Regional Director for British Columbia Mainland/Interior, dated July 30, 2003, the employer indicated that it was of the view that the past erroneous practice constituted a violation of the collective agreement. Mr. Wilson said that Dr. Hickling could claim payment of overtime at the time at which it was worked but, if the compensatory leave was not taken, a payout would be made only once a year, on September 30 of the year following that in which the overtime had been worked.

[10] On August 6, 2003, Harinder Mahil, a representative of the bargaining agent, brought to the employer's attention that the bargaining agent understood the collective agreement as requiring the employer to pay out compensatory leave credits within six weeks of the pay period in which the request was made.

[11] Dr. Hickling received an e-mail, dated August 21, 2005, from Glenda Buyan, an administrative assistant to Mr. Wilson, stating that the initial request had been approved by Mr. Wilson, and that Dr. Hickling would receive a cheque in a couple of weeks.

[12] On earlier occasions Dr. Hickling requested the liquidation of his compensatory leave bank and the employer did liquidate the bank on dates other than September 30, following the end of a fiscal year. For example, Dr. Hickling filed documentary evidence that on May 21, 1999, he had requested liquidation of his compensatory leave bank, and that an employer's director, Rick Czuba, issued a cheque in payment on June 9, 1999.

[13] The employer did not pay the compensatory leave credits within a couple of weeks. Dr. Hickling filed a grievance on September 25, 2003, alleging that the employer had breached clause B3.05 of the collective agreement by failing to pay the amount within six weeks of the date of the request and by refusing to pay, as per the e-mail from Ms. Cyr, dated July 25, 2003. The employer issued a cheque to Dr. Hickling on November 19, 2003, which he received on December 2, 2003.

[14] At the second level of the grievance process, the employer appears to have accepted that Dr. Hickling had a right to receive payment of the compensatory leave credits. In a letter dated November 21, 2003, Dr. W. Lanterman, Acting Associate Executive Director wrote:

. . .

> *. . . Based on the lack of notification that the past practice had ceased and the fact that the Manager approved the payment of this pay out of compensatory leave, I find that your request for compensation should have been processed at that time. . . .*

. . .

[15] The employer did not cross-examine Dr. Hickling and his evidence is therefore uncontested. The employer conceded that other managers in the Western Region had made a "similar mistake" when they paid compensatory leave credits at the request of their employees.

[16] Dr. Hickling called his bargaining agent's chief negotiator, Michel Gingras, to give evidence concerning the bargaining for the current collective agreement. Mr. Gingras has negotiated collective agreements for 29 years and has negotiated collective agreements for the bargaining agent since 1998. He is familiar with and has negotiated the collective agreement at hand in the past.

[17] The latest round of negotiations commenced in October 2003, and the employer and the bargaining agent reached a settlement in June 2005, which was ratified by the bargaining agent. The employer is in the process of ratifying the new collective agreement. The contractual language of clauses B3.04 and 3.05 of the collective agreement has been in earlier collective agreements, since 1984, and perhaps earlier, according to the research of Mr. Gingras.

[18] Dr. Hickling tendered as Exhibit G-3 the bargaining agent's comprehensive demands which were tabled during the negotiations for the renewal of the collective agreement. The bargaining agent's demands with regard to clauses B3.04 and B3.05 were as follows:

> *B3.04 (add) Should an employee be denied compensatory leave, once per year the employee may ask, and the employer will grant, the payment of the total of denied compensatory leave as per the employee's request.*
>
> *B3.05 Modify last subjunctive: the employer ~~will endeavour to make such payment within six weeks~~* ***the employer shall endeavour to make cash payment for overtime in the pay period following that in which the credits were earned.***
>
> [Emphasis in the original]

The note beside those clauses above indicates that the bargaining agent's demands were withdrawn on March 3, 2005.

[19] Mr. Gingras indicated that the bargaining agent had tendered additional language with regard to clauses B3.04 and B3.05, because, although the language was

clear, it was not being applied uniformly across Canada. The bargaining agent sought to address during the renewal negotiations what it perceived to be a potential problem.

[20] Mr. Gingras testified that the employer's chief spokesperson, Line Caissie, had indicated that the employer was already doing what the bargaining agent wanted and that there was no need to clutter up the collective agreement with additional language. Ms. Caissie said that the employer could issue a bulletin on this point. Mr. Gingras indicated that the bargaining agent did not like the employer's response but that collective bargaining is a matter of give and take, and the bargaining agent removed these demands from the bargaining table.

[21] During cross-examination, Mr. Gingras indicated that he considered the employer to be honest in its negotiations and that the employer did not appear to ". . . be willing to budge on our wording; it was not the most significant issue, we accepted the assurance and moved on."

[22] The employer sought an adjournment at several junctures claiming that it had been taken by surprise by Dr. Hickling's intention to call Mr. Gingras. When it became apparent to the employer that an adjournment was not going to be granted, the employer applied to have the evidence of Ms. Caissie heard by a telephone conference call. Dr. Hickling would have preferred the evidence to be heard by a video conference call. Video conferencing was not readily available and Dr. Hickling consented to hearing Ms. Caissie's evidence by a telephone conference call.

[23] Under the former *Act*, adjudicators have not had many applications to hear evidence by telephone conference call. I set out the following conditions for the receipt of evidence in this adjudication proceeding:

a) The evidence was to be given by affirmation, as it was not possible to administer an oath in a telephone conference call.

b) The identity of the person giving evidence must be confirmed. In this case, Ms. Caissie was personally known to Mr. Gingras, and Mr. Gingras confirmed the identity of Ms. Caissie based on his recognition of her voice.

c) I must be satisfied that the answers given by the witness were her own answers and were given without prompting by any other person or from documents of which the parties were unaware. This condition was satisfied by Ms. Caissie's

confirming on affirmation that she was in a room by herself, with the door closed, with certain named documents before her and no other documents, and that the documents were also supplied to the adjudicator and Dr. Hickling.

[24] Having then heard from Ms. Caissie on these preliminary points and from Mr. Gingras, I permitted Ms. Caissie to testify by conference call. Ms. Caissie is the Manager of Collective Bargaining and Compensation for the employer. Ms. Caissie's evidence was that the only situation when the compensatory leave bank would be paid out immediately was if the employee requested leave and, for operational reasons, the leave could not be given at the time it was requested.

[25] The questions to Ms. Caissie in examination-in-chief were asked using a hypothetical form of questioning. The use of hypothetical questioning leaves me with the impression that Ms. Caissie was asked what her response would be rather than what her response actually was during negotiations. The hypothetical form of questions, together with the answers given, denotes a lack of specific recollection about the event. The employer did not put to her Mr. Gingras' specific evidence and presumably she was called in order to contradict his evidence. I therefore prefer the evidence of Mr. Gingras. In doing so, I note that I did not reject Ms. Caissie's evidence on the basis of credibility. Simply, the employer had the opportunity to deal directly with the point and did not do so in a satisfactory manner. I also note that the bargaining history, as related by Mr. Gingras, tends to reinforce the fact that there was a past practice with regard to the liquidation of compensatory leave credits at any time, at the request of the employee, but that this application of the collective agreement was not uniformly applied across Canada.

[26] I also heard from Ms. Cyr, who is the employer's Director of Compensation and Benefits for the Western Region. Her role with the employer is to ensure that her eight compensation employees deal with compensation and benefits in a timely manner. She took up her position in 2002. One of the first things at which she looked was the practice of paying out compensatory leave credits. It was her view that, in the Western Region, requests were being made and paid out on an irregular basis, on dates other than after September 30. She consulted with Corporate Headquarters concerning her reading of the collective agreement. The response that she received was that each employee has an option at the time that overtime is worked to have the compensation paid, with payment being made within six weeks, or the employee could have the

overtime converted to compensatory leave credits and take time off in lieu of a cash payment.

[27] After Ms. Cyr received this information, she communicated it to her manager, Patricia Henderson, and Ms. Henderson told her to direct her staff not to process any request for payment of compensatory leave credits outside of September 30.

[28] Ms. Cyr noted that when the employee works overtime, he or she must complete a leave and attendance overtime form, CFIA 4300 (Exhibit G-2, tab 2). This is generally done electronically. The employee submits the leave form electronically to the leave clerk, who then submits it to Ms. Cyr's section for processing by compensation specialists.

[29] Ms. Cyr reviewed Dr. Hickling's request for payment and determined that it was outside of the September 30 time period. She responded to Dr. Hickling in an e-mail dated July 25, 2003, denying his request. She also copied the e-mail to other persons, including the two Planning and Resource officers who supervise the leave clerks and Mr. Wilson, then the Regional Director for British Columbia Mainland/Interior. The purpose of doing this was to ensure that all areas in the Western Region complied with Corporate Headquarters' interpretation of the collective agreement.

[30] In cross-examination, Ms. Cyr admitted that the bargaining agent was never consulted about this interpretation of the collective agreement and that Ms. Cyr was applying her interpretation of the collective agreement and the interpretation of Corporate Headquarters. There was no complaint from the bargaining agent relating to the practice in the Western Region which had prompted her to act.

[31] It was Ms. Cyr's understanding that the practice in the Western Region was not in accordance with the employer's practice throughout Canada. I accept that this is her belief or understanding. I do not, however, accept her belief as evidence of the employer's practice throughout Canada. I note that the reply given to the grievance at the second level of the grievance process seems to indicate that there had been a change in the employer's practice:

. . .

> *During the course of the grievance hearing, there was an agreement that you had not been notified that the practice of*

> *paying out compensatory leave at any time upon request of an employee had been stopped. . . .*
>
> . . .

Further, I accept the evidence of Mr. Gingras that the employer's practice was not uniform across Canada, and that is why the bargaining agent tendered a proposal during the last round of collective bargaining.

Summary of the arguments

[32] Dr. Hickling argues that an employee has the right to request payment of the banked compensatory leave credits at any time pursuant to clauses B3.04 and B3.05 of the collective agreement: *Nikiforuk v. Treasury Board (Canada Employment and Immigration Commission)*, Board File No. 166-02-14774 (1985) (QL). The overtime amounts are wages that are earned by the employee and therefore an employer cannot unilaterally withhold payment of the wages once they are requested by the employee. Dr. Hickling argues that the payment of the amounts in November, pursuant to a June request, is a violation of the collective agreement. It is not a fair and reasonable exercise of discretion: *Re York University and York University Faculty Association* (1980), 26 L.A.C. (2d) 17.

[33] Further, the employer is estopped from changing past practice during the term of a collective agreement without negotiation. The employer's past practice was to liquidate the compensatory leave credits when requested to do so by the employee. Dr. Hickling says that the bargaining agent raised this issue during negotiations and withdrew its proposal as a result of representations by the employer that there was no need to clarify the practice of the parties with regard to the payment of leave credits upon request. The adjudicator should attach great importance to promises made during collective bargaining to renew a collective agreement: *Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada*, 2001 PSSRB 98. There was detrimental reliance by the bargaining agent on the employer's representations, and all conditions necessary for an estoppel are present in the facts of this case: Brown and Beatty, *Canadian Labour Arbitration* (Third Edition), 2:2200-2:2223.

[34] The employer argues that Dr. Hickling sought payment of his compensatory leave bank, plus interest. To the extent that Dr. Hickling's grievance concerned payment of his compensatory leave bank, it was granted at the second level of the grievance process. Given that Dr. Hickling withdrew his claim for interest in his

opening statement at the hearing, the dispute is settled and the matter is now moot. The employer says that I am without jurisdiction to address the arguments raised, because the matter is moot. On the merits, the employer says that, once an employee has elected to accumulate compensatory leave credits, the employee cannot re-elect to receive payment of those credits. The case of *Canada (Treasury Board) v. Horth*, [1987] F.C.J. No. 1031 (C.A.) (QL), is determinative of this issue. Furthermore, the elements required to establish an estoppel in this case are not present: Brown and Beatty, *Canadian Labour Arbitration* (Third Edition), 2:2211. There was no established practice and there was no detrimental reliance by Dr. Hickling or the bargaining agent. The evidence of the negotiators is not relevant to the issues that must be decided.

[35] In reply, Dr. Hickling says that this grievance is a policy grievance. The fact that the employer paid compensation for the compensatory leave credits after the filing of the grievance is not determinative of whether Dr. Hickling can proceed with the grievance. Dr. Hickling says that this issue is not moot. He submits that there is no binding authority that deals with the language of the collective agreement and the issue before me, and he seeks an interpretation of the collective agreement and his rights.

Reasons

[36] The grievance before me is an individual grievance that Dr. Hickling presented to the employer pursuant to section 91 of the former *Act*, and that he referred to adjudication pursuant to section 92 of that *Act*. It is not a "policy grievance" referred to the Board by the bargaining agent pursuant to section 99 of the former *Act*. This matter has been referred to me as an adjudicator and I am required to decide the issues raised by the grievance in that capacity.

[37] The employer raises the issue of mootness. The employer says that the grievance is moot as it has paid Dr. Hickling's compensatory leave credits and Dr. Hickling abandoned his claim for interest in his opening statement at the hearing. Notwithstanding the payment by the employer and the abandonment of the claim for interest at the hearing, there is still an outstanding dispute between the parties concerning the interpretation of the collective agreement. This is apparent from the employer's reply at the second level of the grievance process, which upheld the grievance on the following basis on November 21, 2003:

. . .

> *During the course of the grievance hearing, there was an agreement that you had not been notified that the practice of paying out compensatory leave at any time upon request of an employee had been stopped. On July 25, 2003 you were advised by Compensation that this payment could not be made, however, Mr. S. Wilson, Regional Director, approved the payment via e-mail from G. Buyan on August 21, 2003. Based on the lack of notification that the past practice had ceased and the fact that the Manager approved the payment of this pay out of compensatory leave, I find that your request for compensation should have been processed at that time. To that extent, your grievance is sustained. . . .*
>
> *With respect to the interpretation of Clause* [*sic*] *B3.04 and B3.05 of the Veterinary Medicine Collective agreement, I concur with the response received at the first level. There is no provision to cash out compensatory leave earned in a fiscal year and outstanding on September 30th of the following fiscal year at any time other than September 30th. Your grievance is therefore denied.*
>
> [Emphasis added]

[38] Dr. Hickling's argument, essentially, is that an employee can elect at any time to receive the cashed out value of the banked compensatory leave credits, and if the employee elects to receive a payment, the employer must pay the amount within six weeks. The employer says that, once the compensatory leave is banked, it cannot be paid out until after September 30 in the fiscal year following the year in which the leave credit was accrued. The employer's decision to grant the grievance did not touch on the merits of Dr. Hickling's interpretation of the collective agreement. It is clear that the proper interpretation of clauses B3.04 and B3.05 of the collective agreement remains a live issue between the parties. Therefore, I reject the employer's argument that the issue is moot: *Nikiforuk* (*supra*).

[39] At issue in this case is whether the decision in *Horth* (FCA) (*supra*) applies to this matter. In *Horth* (FCA), the Federal Court of Appeal considered the language of the collective agreement set out below:

> *20.06 Where an employee who is employed in a continuous operation which does not shut down on a designated paid holiday works on that holiday:*
>
> *(a) he shall be paid compensation in accordance with the provisions of clause 20.05,*

> *or*
>
> *(b) upon request, and with the approval of the Employer he, shall be granted:*
>
> *(i) a day of leave with pay at a later date in lieu of the holiday,*
>
> . . .

[40] The Court held as follows:

> . . .
>
> *This clause gives an employee the right to elect how he will be paid, but only after he has done the work. The general rule stated in sub-clause (a) is that he will be paid in cash. However, under sub-clause (b) he may "upon request, and with the approval of the Employer" take compensatory leave.*
>
> *Conversely, therefore, an employee can only withdraw from option (b) with the employer's approval.*
>
> . . .

[41] I have reviewed the adjudication decision in *Horth v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-16424 (July 2, 1987) (QL), and the Federal Court of Appeal's decision. I decline to follow the Court's decision. The language in the collective agreement in this case is substantially different from that in the collective agreement that was reviewed by the Court. In particular, in *Horth* (FCA) there is no language equivalent to clause B3.05 of the collective agreement at hand. As there is a difference in language, I find that the Court's decision is not binding authority.

[42] Nevertheless, I must consider whether the reasoning in *Horth* (FCA) (*supra*) persuades me that the language of the collective agreement is captured by the principles expressed by the Federal Court of Appeal. The Court gave no reasons in support of its conclusion that:

> . . .
>
> *Conversely, therefore, an employee can only withdraw from option (b) with the employer's approval.*
>
> . . .

[43] I further decline to follow *Horth* (FCA) (*supra*) because the application to the present matter of the principle applied by the Federal Court of Appeal would render nugatory the very clear language of the collective agreement in clause B3.05.

[44] Article B3 in the collective agreement deals with overtime. The language at issue is set out in clauses B3.04 and B3.05 of the collective agreement.

[45] I presume that the employer issued a separate cheque or made a direct deposit for compensatory leave credits' payments as Dr. Hickling's earlier requests to liquidate his compensatory leave bank were granted, with separate cheques issued for these amounts. There was no evidence before me of the nature of the employer's pay system. The collective agreement contains no pay notes to assist me in determining how the wage payments are administered or the pay periods are determined. For example, I was not advised whether a separate cheque is issued for overtime, direct deposit is used, or whether overtime is paid along with other wages as part of regularly earned wages in the same cheque.

[46] One must keep in mind that overtime pay is a wage or remuneration earned by an employee. Generally, wages earned in a pay period must be paid within a certain time after the pay period ends. In the absence of language in the collective agreement dealing with the timing of wage payments, the presumption is that the wages must be paid by the employer within a reasonable time. Unless there is a specific right given to the employer to withhold wages, wages have to be paid within a reasonable time.

[47] In the absence of language in the collective agreement, there would be no right for an employee to accumulate compensatory leave credits in lieu of overtime wages. In the ordinary course, an employee who did not elect to receive compensatory leave credits would receive the overtime pay for the pay period within a reasonable time from the end of the pay period in which the overtime was worked.

[48] Clause B3.04 creates an exception to the scheme for the payment of overtime wages. It is an exception which gives an employee the option to choose compensation for working overtime: the employee can choose between overtime pay and compensatory leave credits. If the employee chooses compensatory leave credits, the employee must apply for it. The employer has the discretion to accept the employee's choice of compensatory leave credits. Once the employer accepts the option, the employee's choice must be administered by the employer. The employee is permitted

only to accumulate compensatory leave credits until the end of the fiscal year and then the amount banked must be paid out after September 30 of the following fiscal year, using the rate prevailing on September 30.

[49] In my view, the interpretation argued by the employer that, once the employee has elected to bank compensatory leave credits, the employee can take payment only after September 30 would render nugatory the language in clause B3.05 of the collective agreement, particularly the following one:

> *. . . the employer will endeavour to make such a payment within six (6) weeks following the end of the pay period for which the employee requests payment. . . .*

[50] Reading together clauses B3.04 and B3.05, there are three options to compensate an employee who works overtime. From a reading of clause B3.04, it is clear that an employee may choose to be paid for the overtime worked or that the employer may deny the request to accumulate the leave. This is implicit in the words ". . . compensation earned under this Article may be taken in the form of compensatory leave. . . ." If compensatory leave is not requested, payment must be made in accordance with the employer's pay system.

[51] The second situation arises by virtue of clause B3.05 and the words "When a payment is being made as a result of the application of the Article, the employer will endeavour to make such a payment within six (6) weeks following the end of the pay period for which the employee requests payment. . . .", which allow an employee to request the liquidation of his or her compensatory leave bank. If an employer had the right to retain the payment of compensatory leave credits until September 30 of the following fiscal year, those words would be unnecessary. Those words give no discretion to the employer, and this interpretation is consistent with the notion that the parties are dealing with wages earned. There is nothing in either clauses B3.04 and B3.05 which provide for a right, requirement or discretion on the part of the employer to deny an employee's request to liquidate his or her compensatory leave bank.

[52] The third situation is where the employee has made no request to liquidate his or her compensatory leave bank and there are outstanding leave credits at March 31 of a fiscal year. The employee is not required to make any request to liquidate any compensatory leave credit outstanding at that time. The employer must ensure that

the compensatory leave bank is liquidated as of ". . . the commencement of the first pay period after September 30th of the next following fiscal year." Again, there is no discretion given to the employer not to pay outstanding compensatory leave credits. An employer has no right to withhold payment of wages in the absence of language specifically granting such right.

[53] Clause B3.04 gives the employee an option, exercisable upon the request of the employee and at the discretion of the employer, to bank compensatory leave credits; however, the employer must calculate as at September 30 the value of compensatory leave credits outstanding from the previous fiscal year, and pay these amounts to the employee. The employee is prohibited in effect from banking those leave credits for more than six months after the end of the fiscal year. The language in clause B3.05, however, gives the employee the right to apply to the employer for liquidation of the compensatory leave bank, and if the employee applies it must be paid within six weeks following the end of the pay period for which the employee requests payment.

[54] An adjudicator considered similar language in the collective agreement in *Nikiforuk* (*supra*), at page 11:

. . .

> *60. In summary, then, Article 26.10(1) establishes, as a major premise, that an employee is entitled to be compensated in cash for overtime work. It also provides that with the approval of the employer overtime credits may be accumulated for the purpose of providing paid leave at some future date. I can find nothing in Article 26.10(1) which would bar a change of mind on the part of an employee who had opted to accumulate overtime credits nor can I find anything there which would bar a change of mind on the part of an employee who had opted to accumulate overtime credits nor can I find anything that would empower the employer to withhold payment for such accumulated credits until the end of the 12 month period specified in Article 26.10 (3).*

. . .

[55] I find the reasoning in *Nikiforuk* (*supra*) persuasive, as there is nothing contained in the collective agreement before me which bars an employee from changing his or her mind in respect of the form of compensation for overtime or that empowers the employer to withhold payment of wages. One would expect, that, if the employer was empowered to do so, language to this effect would be clearly expressed

in the collective agreement, given the presumption that wages earned must be paid within a reasonable time.

[56] The employer argues that *Nikiforuk* (*supra*) has been implicitly overruled in *Horth* (FCA) (*supra*). I reject this argument as neither *Nikiforuk* (*supra*) nor the principles applied in that case were referred to in *Horth* (FCA) (*supra*).

[57] An estoppel argument in this grievance is problematic. While the bargaining agent is Dr. Hickling's representative, I am dealing with an individual grievance filed by Dr. Hickling, and the bargaining agent is not a party to the grievance before me, although it represents Dr. Hickling. This is not a case where a representation was made to Dr. Hickling; rather a case where Dr. Hickling argues that the employer made the representation to his bargaining agent during the renewal negotiations. While the estoppel argument, in my view, fails due to the status of the parties before me, in considering the evidence, I am not satisfied that any clear representation was made by the employer during collective bargaining. Mr. Gingras forthrightly indicated that the employer appeared to be unwilling to change the language of the collective agreement, which the bargaining agent had hoped to improve. The bargaining agent withdrew this item as part of the give and take of collective bargaining, which is a fluid and creative process.

[58] Furthermore, I am not satisfied that this is a case where it can be said that Dr. Hickling knew of representations made to the bargaining agent, or relied to his detriment on anything said or done by the employer at the bargaining table. While the bargaining history was interesting evidence, in the end, it is not determinative of the issues before me. I prefer to rest my decision entirely on the interpretation of the clear and unambiguous language of clauses B3.04 and B3.05.

[59] In summary, it appears that the proper characterization is that, after Ms. Cyr took over the position of Director, Compensation and Benefits for the Western Region, she noticed that the collective agreement was being applied differently in the Western Region than in other parts of Canada. She received advice from Corporate Headquarters and initiated a change in the Western Region. Dr. Hickling was not given any notice of this change and, therefore, the employer decided to pay him out at the second level of the grievance process. It did not pay him out within six weeks of its decision, but rather left it for a lengthy period of time until November or December of 2003. In some respects, the employer acted as if it were entitled to withhold the

overtime wages until six weeks after September 30, based on the date when the cheque was issued. In my view, the advice that Ms. Cyr received was erroneous and the collective agreement was being properly administered in this respect in the Western Region.

[60] The employer erred in its application of clauses B3.04 and B3.05 of the collective agreement and breached the collective agreement by failing to pay (within six weeks of the date of the request) to Dr. Hickling the value of his compensatory leave credits that he had requested.

[61] An employee has the right to request the employer to pay compensatory leave credits on dates other than September 30. If an employee requests it, the employer must endeavour to make payment within six weeks of the request. If the employee does not make a request for payment or does not exhaust the compensatory leave credits during a fiscal year, the employer must pay the employee the value of the compensatory leave credits within six weeks after September 30 of the following fiscal year at the rate prevailing on September 30.

[62] The grievance is upheld. However, as the employer has paid Dr. Hickling's compensatory leave credits, and as Dr. Hickling has abandoned his claim for interest, I need not exercise any of the remedial powers available to an adjudicator other than to declare that the employer has misinterpreted and misapplied in respect of Dr. Hickling clauses B3.04 and B3.05 of the collective agreement.

[63] For all of the above reasons, I make the following order:

(The Order appears on the next page)

Order

[64] I declare that the employer erred in its application of clauses B3.04 and B3.05 of the collective agreement and breached the collective agreement by failing to pay (within six weeks of the date of the request) to Dr. Hickling the value of his compensatory leave credits that he had requested.

April 5, 2006.

Paul Love,
adjudicator