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Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

UNION OF CANADIAN CORRECTIONAL OFFICERS - SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA - CSN

Bargaining Agent

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board (Correctional Service of Canada)

In the matter of group grievances referred to adjudication

REASONS FOR DECISION

Before: Ian R. Mackenzie, adjudicator

For the Bargaining Agent: Corrine Blanchette, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

For the Employer: Caroline Engmann, counsel

Heard at Abbotsford, British Columbia,
August 26 and 27, 2008.

Group grievances referred to adjudication

[1] Two group grievances were filed separately by correctional officers (''the grievors'') at Matsqui Institution and Fraser Valley Institution in 2006. The grievors alleged that they had not been paid various premiums within a reasonable time. As corrective action, the grievors requested the payment of amounts owing within ten working days and the payment of interest. All employees have now been paid the outstanding amounts. I issued an interim decision dismissing the employer's objection to my jurisdiction (*Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board (Correctional Service of Canada),* 2007 PSLRB 120) and an oral hearing was scheduled.

[2] In the interim decision, I concluded that it was an implied term in the collective agreement that payments for premiums such as overtime (also known as "extra-duty payments") would be paid in a reasonable time. I determined that an oral hearing was required to determine what a reasonable time would be in the circumstances:

. . .

> *[34] In the absence of deadlines for payment for compensation in either the collective agreement or in statute, the determination of what is a reasonable time for payment remains to be determined on a case-by-case basis. Relevant considerations include, but are not limited to: past practice, the specific circumstances at the time, the number of transactions to process, and the capacity to process the volume of transactions. The parties have made allegations in their submissions about both the reasons for the delay in payment, and on past and present practice of the employer. These allegations, of course, are not evidence and I cannot rely on those allegations in coming to any determination on whether the delay in payment was reasonable or not. An assessment of these considerations will require a hearing to allow the parties to adduce evidence.*

. . .

[3] The Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the bargaining agent" or "the union") requested a postponement of the hearing in a letter to the Public Service Labour Relations Board on July 30, 2008, on the basis that the issue of the payment of interest as a corrective action was then before the Federal Court of Appeal (*Nantel v. Treasury Board (Correctional Service of Canada)*, 2007 PSLRB 66, Court File No. A-75-08). The Treasury

Board ("the employer") consented to the request for postponement. I denied the postponement. In a letter dated August 1, 2008, the parties were advised that the hearing would proceed and if that the grievances were allowed, the request for an award of interest as a remedy would be deferred until after the Federal Court of Appeal issued its reasons in *Nantel*.

[4] Six witnesses testified on behalf of the grievors, and two witnesses testified on behalf of the employer. An order excluding witnesses was requested and granted.

[5] Paycheque stubs for one grievor were introduced as evidence. On consent, I ordered that these exhibits (Exhibits G-2 to G-6, inclusive) to be sealed as they contain personal financial information and personal identifiers.

[6] Counsel for the employer made a request for the disclosure of the paycheque stubs of one of the witnesses. I reserved on this request until later in the hearing when I had heard more evidence. I then concluded that the rate of pay for the grievors was evidence that was in the employer's possession, and the employer could introduce that evidence if it wished. For that purpose, I stated that I would allow the employer to recall any witnesses for the grievors for cross-examination on the rate of pay. There was no objection on the part of the bargaining agent on the rate of pay being introduced as evidence (although there was disagreement between the parties on its relevance).

Summary of the evidence

[7] The Pacific Region includes nine correctional facilities as well as community parole offices. There are 2400 employees within the Pacific Region, and approximately 46 percent of the employees are in the Correctional Officer (CX) category (this percentage includes excluded correctional officers).

[8] Employees of the Correctional Service of Canada (CSC) receive their base pay every second Wednesday by direct deposit to their bank accounts. Until recently, pay for overtime, shift premiums, statutory holidays and meals ("extra-duty pay") were paid by cheque. As of May 2008, extra-duty pay is now paid by direct deposit.

[9] The witnesses for the bargaining agent testified that the normal practice at the institutions at which they worked was that extra-duty pay was paid on a monthly basis around the 20th of the month following the month in which it was earned. This date

could vary between the 17th and the 21st of the month, depending on where the weekend fell and on statutory holidays. This practice dated back to 1976. Denis Richardson, a correctional officer who retired in 2007, testified that the practice was communicated to the union by management, but nothing was ever put in writing. Susan McKenzie, Regional Administrator, Human Resources, Pacific Region, testified that, for many years, there was an understanding that payment would be made by the 20th of the month and that the CSC tried to maintain that practice but in some cases it was not able to do so because of resource issues and other priorities.

[10] The CSC prepared a guide to compensation services for employees that is undated (Exhibit G-17) ("the guide"). The guide states that compensation advisors will "action" overtime forms within four weeks of receipt of the form. According to the guide, the processing and the release of the cheques will take approximately one week, for a total of five weeks before the employee receives the cheque.

[11] The witnesses testified that when payments were not made by the 20th of the month, bargaining unit members would get upset. Donna Collins, Correctional Officer, Fraser Institution, testified that on occasion, the clerk responsible for inputting the overtime hours and details for other payments had been "bullied" by employees anxious to receive their money. John Williams was President, Pacific Region, of the bargaining agent in 2006. He testified that his email inbox was full of emails from members upset with the delay in payment. He did not retain copies of these emails. He also testified that members were reluctant to work overtime because they were not being paid for it in a timely manner. He testified that the frustration level of the members slowly escalated.

[12] Gaelen Joe was a grievance officer for the union local at Matsqui Institution in the summer of 2006. He testified that a lot of overtime is worked in the summer months at Matsqui Institution due to annual leave being taken by employees. He testified that the delay in payment was definitely a concern for those who "live and die" by the timely payment of overtime. Lona Vedder, Correctional Officer, Matsqui Institution, testified that she relied on the timely payment of these amounts because of her financial needs as a recently separated mother of three children. In particular, she relied on the August payment for back-to-school supplies and preparation.

[13] The employer and the bargaining agent had been in negotiations for a new collective agreement for approximately four years and reached a tentative agreement on June 1, 2006 (Exhibit G-7).

[14] The collective agreement was ratified on June 24, 2006 (Exhibit G-8), and was signed on June 26, 2006 (Exhibit G-1). The implementation period for the collective agreement was 90 days from the date of signing.

[15] A memorandum was sent to all heads of Human Resources directorates by the Treasury Board Secretariat on June 28, 2006 (Exhibit E-2). The memorandum stated that the tentative rates of pay provided on June 9, 2006, should be implemented. It also advised that Public Works and Government Services Canada (PWGSC) Regional Pay Offices would communicate the date that the pay system would contain the revised rates of pay. The memorandum also reminded the heads of Human Resources that all the necessary input for the pay system had to be provided to the PWGSC "as expeditiously as possible to ensure compliance" with the 90-day implementation deadline.

[16] On July 14, 2006, Rick Oakes, Compensation Manager, Pacific Region, sent an email to the Pacific Region Management Committee:

> . . .
>
> *. . . any overtime worked after June 25th must be paid at their new rate of pay and until the pay system is updated with these new rates, we can not pay the overtime. Any overtime worked for the period of June 26th to June 30th will be held and will be processed with the July overtime in August.*
>
> . . .
>
> *Please share this with your staff accordingly.*

[17] Ms. McKenzie testified that this approach was discussed by regional senior management, and it was decided that it was an efficient way to proceed, given other priorities. She testified that she had no specific information on whether employees were advised of this approach and did not know if management made any attempt to share this information with the union. The expectation on the part of management was that this information would "trickle down" to the employees. Ms. Collins testified that

it was her understanding that the employer stopped paying overtime in order to process retroactive payments.

[18] Ms. McKenzie testified that staff resources were an issue in dealing with these payments. There was a skills shortage in compensation, and, on average, it takes two years to train a new compensation advisor. She testified that she would have hired a casual employee if one had been available.

[19] Cheryl Fraser, Assistant Commissioner, sent a message to all employees on July 21, 2006, through the department's InfoNet (Exhibit E-5). In the message, she stated that the new pay rates would be reflected in the pay of September 6, 2006, and that all retroactive payments would be issued "no later than" September 23, 2006. She also requested that compensation advisors not be contacted to obtain specific information to allow them to proceed with verification and related duties "on a timely basis."

[20] A broadcast email was sent to all CX employees by Ms. Fraser on August 31, 2006 (Exhibit G-14), on the issuance of salary revision cheques. In the email, she stated that compensation advisors were working on salary revision cheques as a priority, to meet the 90-day implementation deadline of September 23, 2006. She also stated:

. . .

> *We are requesting cooperation from each employee to not contact their Compensation Advisor on the retroactive payments in order to allow them to proceed with the verifications and the related duties which are required to meet the designated time frame.*

. . .

[21] Samantha Tamra is currently a compensation coordinator with the Pacific Region. In 2006, she was a compensation advisor. She testified that each compensation advisor was responsible for 150 to 220 individual "accounts" (each employee is one account). Although the numbers fluctuated, Fraser Valley Institution had one assigned compensation advisor, and Matsqui Institution had two. Ms. Tamra reviewed the process for processing overtime or extra-duty cheques that is set out in the "Creation of an Overtime Cheque" document (Exhibit E-8, set out at paragraph 32 of this decision).

[22] Ms. Tamra testified that she was on leave for the month of August 2006 and that she returned on September 5, 2006. In addition to processing regular paycheques, she testified that there are other priorities in pay and benefits: new employees, retiring or resigning employees, leave without pay, leave with income averaging, disability leave, maternity and parental leave, and pay for those casual and term employees paid on the basis of time worked (i.e., not automatically). She testified that to deal with the heavy workload at that time, a number of steps were taken. Overtime for compensation advisors was approved, commencing at some point in August. The office was closed as of August 8, 2006 on Tuesdays, Wednesdays and Thursdays to allow compensation advisors to focus on the workload. During this time, they were not expected to answer the phone or to reply to email enquiries.

[23] Ms. Tamra testified that the new rates of pay were put in the pay system by the PWGSC on August 21, 2006 (Exhibit E-10).

[24] In a notice sent to all members in the Pacific Region in September 2006 (Exhibit G-10), the union stated:

. . .

> *Pay and benefits department said it* [overtime cheques] *will be paid by the end of October! 4 months without pay is unreasonable. . . . For 30 years now, there has been a well-established practice to pay overtime by the 20th day of the following month.*
>
> *. . . Why is it just in the Pacific Region? Correctional officers in the Prairie, Ontario, Quebec or Atlantic regions have received their overtime cheques.*
>
> *The problem with the late overtime payment and payment of the lump sum has been raised to the new Regional Deputy Commissioner, Ms. Anne Kelly, by Regional Union Representatives. The Union requested payments before the date set by the regional pay and benefits department. End of October is not acceptable! With the representations made by the Regional President and National President, the Union obtained the following:*
>
> > *-Authorisation for pay and benefits advisors to work overtime to accelerate the payment and verification of cheques;*

> *-Deployment of pay and benefits advisors from other regions for two weeks to help out.*
>
> . . .

The notice invited members to sign a group grievance requesting the payment of interest.

[25] On October 2, 2006, the union met with the new regional deputy commissioner, Anne Kelly. The union prepared a summary of the meeting (Exhibit G-11). The union raised the issue of delays in the payment of overtime cheques. The meeting summary states that Ms. Kelly informed the union that two compensation advisors from the Atlantic Region would be coming to the Pacific Region on October 9, 2006, to assist in completing the overtime cheques. She also stated that the cheques would be processed by the end of October. The union expressed its disappointment. Mr. Williams attended the meeting and testified that the explanation given for the delay in payments was the shortage of staff and the work involved related to the collective agreement being settled.

[26] Ms. Tamra testified that one compensation advisor was brought in from the Atlantic Region in October for two weeks. She worked on the struck-off-strength employees. One compensation advisor was brought in from another department to replace an advisor who was on sick leave.

[27] Mr. Joe testified that he was paid overtime and extra-duty pay earned in July and August on October 6, 2006 (Exhibit G-2). His payments for September were received on October 20, 2006 (Exhibit G-3). He testified that recent payments in 2008 have been made by the 20th of the following month (Exhibits G-4, G-5 and G-6).

[28] Gordon Robertson, Regional Vice-President, of the bargaining agent, contacted other regional vice-presidents and confirmed that it was only the Pacific Region that had delays in payments. Just before October 7, 2006, Mr. Robertson was interviewed by a reporter from the Globe and Mail newspaper (Exhibit G-15). Mr. Robertson and a spokesperson for the CSC were quoted in the article:

> . . .
>
> *The union says the correctional officers are demoralized by the delays in payment, as well as staffing shortages.*

"This is the federal government. It should have its act together," said Gord Robertson, vice-president (Pacific region) of the Union of Canadian Correctional Officers.

"A manager can order you to stay and you don't have a choice," Mr. Robertson said about a provision in the collective agreement that says in a "penitentiary emergency," guards can be required to work overtime.

While his members are not opposed to overtime, they should not have to wait three months to be paid for the extra work, Mr. Robertson said.

. . .

Federal correctional officers in B.C. are the only ones in the country who have not received overtime pay since the new agreement took effect, Mr. Robertson noted. "The other regions managed to get their cheques out in time."

The delay in issuing overtime cheques is a result of the resources required to calculate retroactive pay after the collective agreement was finalized, said Dennis Finlay, a spokesman for the Correctional Service of Canada.

"It was very time-consuming. We explained there would be a delay. This was an extraordinary circumstance."

Additional benefits staff were brought into the region temporarily to try to deal with the retroactive pay backlog.

The correctional officers received their retroactive pay last month and now staff are calculating the overtime compensation, Mr. Finlay said.

The delays in the Pacific region also stem from the overtime being calculated differently in B.C., to include the new pay scales, he said. Correctional officers in B.C. should receive their overtime pay for June, July and August by the end of this month, Mr. Finlay said.

Mr. Robertson said the pay issue was supposed to be resolved by August. The delays are an ongoing concern to his members because there are staffing shortages at the prisons that require correctional officers to work increasing overtime hours for which they have not been paid.

. . .

"We are not aware of any significant shortage of staff," Mr. Finlay responded. "We have two corrections training programs for new officers."

. . .

[29] Mr. Robertson agreed in cross-examination that calculating retroactive paycheques after the signing of the collective agreement was a time-consuming operation.

[30] There was a labour-management meeting on November 6, 2006, and the employer prepared a summary of the meeting (Exhibit E-6). The employer's summary states that the union requested "consistency in the delivery of cheques" and asked whether additional staff would be hired to assist in the processing of payments. Management's response was that there were four additional employees in the Compensation section, "and more are needed." The summary also stated:

. . .

> *. . . Management informed the Union that they can not commit to getting overtime cheques out by the 20th of the month. They will hire more staff once they get the funds to do so.*

. . .

[31] The union was also advised that there was a new "spreadsheet" for extra-duty pay that would require the signature of the employee making the claim. There was a discussion about the necessity of the employees signing every overtime and extra-duty sheet. At the meeting, Judy Croft, Assistant Deputy Commissioner, Corporate Services, committed to looking into the issue and discussing it with the deputy wardens. Ms. Croft advised the union on December 6, 2006 that signatures would not be required on the overtime sheets until new spreadsheets were available (Exhibit G-12).

[32] At the November 6, 2006 meeting, a document entitled "The Creation of an Overtime Cheque - Pacific Region" was distributed (Exhibit E-8). Management is recorded in the summary of the meeting as saying that it takes two weeks to process an overtime cheque after the information is received from the institution. The document set out the following sequence of events required to produce an overtime cheque:

. . .

> 1. *The extra Duty Pay/Shift work Report and Authorization form is completed by the sites and sent to Compensation Services at RHQ.*

2. *The Compensation Advisor enters the overtime information into the on-line pay system. This transaction is verified by a co-worker.*

3. *Finance at each site logs into the pay system to authorize the transaction. This occurs on a daily basis.*

4. *Authorized transactions remain in the system until the next scheduled system generated update, which normally occurs every second day. (Tuesday and Thursday during non-pay weeks; Monday, Wednesday and Friday during pay weeks).*

5. *After the system updates the transaction, the transaction information is automatically forwarded to the pay office (Public Works and Government Services (PWGSC) in Vancouver and to the PWGSC cheque printing plant located in Winnipeg, where the overtime cheque is printed. The cheque is dated seven days after the transaction is done.*

6. *The cheques are mailed, priority post. . . .*

. . .

Cheques are retained by the site Finance office until they are 'released'.

7. *A cheque register (showing details of each OT cheques) is now available on line for Compensation Services to verify the correct amount paid. The register is available the same day the transaction updates however the cheques are dated seven days later.*

8. *The Compensation Advisor checks the register for accuracy. If accurate, the Advisor notifies each site Finance to release the cheques. If the register indicates an error to any cheque, that check is not released and may be returned to Compensation where the transaction is rectified and re-processed.*

9. *Unless grandfathered, all supplementary cheques will be direct deposited. This account may be a different account from the employee's regular direct deposit.*

The process, from initial input of data into the online-pay system to the employee receiving the cheque, takes approximately 2 weeks but can be extended as a result of statutory holidays affecting on-line pay updates, mailing and pick up/delivery schedules as well as temporary shut downs of the pay system.

[33] Ms. McKenzie testified that there were 14.5 compensation advisor positions in the summer and fall of 2006 (one of the positions was part-time). As of 2008, there are three compensation coordinators who each head a team, as well as performing casework and there are 19.5 compensation advisors, including the three coordinators. Ms. Tamra testified that overtime is always treated as a priority and is processed as soon as possible. She testified that the CSC had problems with staffing levels, and there is no backup plan if an advisor is on planned or unplanned leave. She testified that the ideal number of accounts for each compensation advisor would be 125, whereas the level currently remains at 150 to 220 accounts.

Summary of the arguments

[34] The bargaining agent representative submitted that there were two questions to be determined: a reasonable time for the payment of extra-duty pay, given the circumstances at the time, and whether the employer had a reasonable explanation for its failure to make payments within a reasonable time. The employer has no discretion to withhold payments. Remuneration is at the foundation of the employment relationship.

[35] She submitted that the evidence on the consequences of the delay in making payments was clear. There was unrest, frustration and tension within the workplace. Ms. Collins testified that she and others were ordered to work overtime, making it non-voluntary. This is not in the interests of harmonious labour-management relations.

[36] The bargaining agent representative submitted that past practice was clearly established through the evidence of the employees and the witnesses for the employer. The past practice was that payment would be received by the 20th of the month following the month in which the pay was earned. This had been the practice for close to 30 years. This was reinforced by the guide (Exhibit G-17). Payment at the same time every month was expected by the grievors, and they budgeted for it.

[37] The employer did not challenge this practice until November 2006 (Exhibit E-6). Now, in the summer of 2008, the employer has the same practice of payment by the 20th of the month. The actions of the employer are now consistent with past practice. In her testimony, Ms. McKenzie stated that this was when “we normally pay them.” This practice is also consistent with the timelines set out in the guide (Exhibit G-17). There was also evidence that this was the practice in other regions.

[38] The bargaining agent representative referred me to Brown and Beatty, *Canadian Labour Arbitration*, 4th ed., at para 3:4430, and submitted that all the criteria set out in that paragraph were met in this case. She also noted that a past practice does not need to be in writing.

[39] She reviewed the length of the delay in making payments. Payments for June 26 to June 30 were paid on October 13 — a delay of three-and-a-half months. The payment for July was made in October also, for a delay of two months. The payment for August was made in October, for a delay of one month. Payment for September was made on October 27, a delay of seven days.

[40] She noted that the collective agreement was signed on June 26, 2006, and there was a lot of work to be done to calculate the retroactive payments. The parties negotiated a 90-day implementation period. However, there was no agreement to delay the payment of extra-duty pay until October. She submitted that the evidence of the employer showed that no work was done on the retroactive payments under the new collective agreement until July. The tentative agreement was announced on June 1, 2006, and the new rates of pay were announced to the heads of Human Resources on June 28, 2006 (Exhibit E-2). A good month of work was lost. The employer did not use all of its available resources to process the extra-duty pay. Overtime for compensation advisors was authorized only in late August. The compensation office was closed to calls and emails to allow advisors to concentrate on their workload only on August 8, 2006.

[41] The bargaining agent representative noted that the Pacific Region was understaffed but did not develop a plan to address this issue before August. It was only then that overtime for compensation advisors was authorized and that extra resources were brought in. The Pacific Region was the only region not capable of paying extra-duty pay in a timely fashion. The plan of the Pacific Region did not have the approval of national headquarters. Under the circumstances, it was not reasonable to delay payments. There was clearly a lack of diligence on the part of the employer.

[42] In addition to the jurisprudence relied on for the interim decision, she referred me to *General Electric Canada Inc. v. United Steelworkers of America, Local 8912* (1988), 3 L.A.C. (4th) 217, on the application of past practice.

[43] The bargaining agent representative asked that I allow the grievances and order the employer to revert to its past practice. She asked for a declaratory order.

[44] Counsel for the employer drew my attention to the previous written representations on file (August 17, 2007), which provide the employer's explanation for the delay:

. . .

> *. . . When the Correctional Services collective agreement was signed in June 2006, CSC Compensation staff was required by the PSLRA to implement the terms of the new agreement within 90 days of the date of signing. The retroactive period covered seven years and required extensive calculations for each CX employee by the Regional Compensation Advisors. In order to ensure that its legal obligations regarding the implementation of the new collective agreement were met, CSC had to give priority to the processing of the retroactive payments rather than to the processing of the overtime cheques. This was regrettable, but necessary under these unusual circumstances.*

. . .

Counsel for the employer submitted that the employer's stated reasons were supported by the evidence.

[45] In terms of the past practice, she noted that the parties have a long history of collective bargaining and have agreed to letters of understanding in the past. It is of note that this alleged past practice was never reduced to writing.

[46] She submitted that the employer considers remuneration very seriously and gives priority to extra-duty payments. The summer of 2006 was an extraordinary circumstance, as demonstrated by the fact that the payments were generally made on the 20th of the month before then, and are now being paid at that time.

[47] It was an extraordinary circumstance because the Pacific Region had a capacity issue. Mr. Oakes, the compensation manager, suggested a way of using existing resources and capacity to address the gargantuan task facing the Pacific Region. His recommendation was that the processing of overtime cheques would be deferred until such time as the pay system was updated with the new rates of pay. There was no withholding of payment. Employees were receiving cheques for retroactive pay during

that time. The new pay rates were not loaded into the pay system until August 21, 2006 (Exhibit E-10). Consistent with management's decision to wait until the new rates were available, the processing of overtime commenced as of August 21. This decision to defer the processing of payments was entirely within management's rights under section 6 of the *Public Service Labour Relations Act* and paragraphs 7(1)(*a*) and (*e*) of the *Financial Administration Act*.

[48] Counsel for the employer suggested that employees were informed of management's decision in the middle of July (Exhibit E-4), although none of the witnesses for the grievors acknowledged this fact. Ms. Collins did allude to the fact that the processing of overtime cheques was stopped in order to issue retroactive cheques. Counsel for the employer suggested that the credibility of the witnesses should be questioned, given that they could not recall conversations about this issue with anyone other than Ms. Croft or Ms. Kelly. Counsel for the employer questioned why the witnesses could not recall talking to deputy wardens at the work sites about this issue. She suggested that the witnesses ought to have known in July of management's decision to wait for the new rates before processing the payments. She referred me to *Faryna v. Chorney*, [1952] 2 D.L.R. 354.

[49] Counsel for the employer referred me to paragraph 2:2221 of Brown and Beatty, for the proposition that past practice cannot be considered unless there is an ambiguity in the term in the collective agreement. She also referred me to *Rook et al. v. Treasury Board (Correctional Service of Canada)*, 2004 PSSRB 146. She submitted that there was no ambiguity so I could not consider past practice. The only applicable application for past practice would be if the bargaining agent had argued estoppel. In that case, management's communication in the email from Mr. Oakes (Exhibit E-4) constituted the necessary notice.

[50] In terms of what constitutes a reasonable time, counsel for the employer referred me to *Hickling v. Canadian Food Inspection Agency*, 2006 PSLRB 39, where the parties turned their minds to the payment of overtime and agreed to a six-week time limit.

[51] Counsel for the employer submitted that the delay in payment should be measured from August 21, the date on which the new rates were placed in the pay system. This means that the length of the processing period was in the four-to-six-week range. This is not an inordinate delay in the circumstances.

[52] The burden of proof rests on the bargaining agent in this case, and counsel for the employer submitted that the bargaining agent had not met its burden. She referred me to *Health Employers' Association of British Columbia (Summerland General Hospital) v. Health Sciences' Association of British Columbia*, [1996] B.C.C.A.A.A. No. 14 (QL), and to *British Columbia Hydro & Power Authority v. International Brotherhood of Electrical Workers Local Union 258*, 6 C.L.A.S. 44.

[53] In the alternative, the employer argued that it was not appropriate to issue a declaratory order in this case. There was no live issue between the parties, and the situation in the summer of 2006 was an aberration. The issue is largely academic. She referred me to *Remedies in Labour Employment and Human Rights Law*, at 2-39, Field Atkinson Perraton, 2000. Also, as of this year, payments for extra-duty pay were done by direct deposit, reducing the timelines further.

[54] In reply to the bargaining agent's submissions, counsel for the employer pointed out that the four-week period specified in the guide (Exhibit G-17) did not include the time it takes for the forms to be sent from the institution to regional headquarters. In fact, it is a total of five weeks, if you include this step.

[55] Counsel for the employer submitted that the employer did keep the employees apprised of its efforts to get the cheques out by way of a broadcast email message (Exhibit E-5).

[56] The approach that the Pacific Region took was appropriate and reasonable in the circumstances.

[57] Counsel for the employer submitted that there was no violation of the implied term in the collective agreement, and the grievances should accordingly be dismissed.

[58] The representative for the grievors noted that Ms. Tamra was not actually responsible for any CX accounts since she was responsible for community parole offices.

[59] She noted that Exhibit E-4 was an email that was sent to the regional management committee and not either to employees or to the union. In the email, Mr. Oakes states that employees should be informed. There is no reference to the bargaining agent. There was also no evidence that employees were informed. Ms. McKenzie testified that she had no specific information on whether employees

were informed. Mr. Oakes was not an employer representative. In terms of the credibility of the witnesses, she stated that counsel for the employer could have asked specific questions to test their knowledge and credibility but failed to do so. The evidence showed that no one knew about the decision to defer processing payments until the end of September or early October. In any event, no notice was provided to the bargaining agent. Notice should be provided to the party to the collective agreement, not to employees. The employer had the opportunity to call Mr. Oakes or other managers, but chose not to.

[60] In terms of remedy, counsel for the grievors stated that the mootness issue has already been argued and decided in the interim decision. A declaratory order would be appropriate.

Reasons

[61] In the interim decision, I set out some factors that might be considered in determining whether the payments of extra-duty pay were made in a reasonable time:

- past practice;
- specific circumstances at the time;
- number of transactions to process; and
- capacity to process the volume of transactions.

[62] The employer has submitted that past practice is not relevant, as there is no ambiguity in the collective agreement. By its very nature, an implied term will have some ambiguity, since it is not written in the collective agreement. “Reasonable” is a word that can mean different things to different people, and it almost always depends on the circumstances at the time. In this case, the past practice of the employer in processing extra-duty payments is one of a number of factors to consider in assessing what is “reasonable.” In this way, it is different from the typical “past practice” case where the past practice is one of the key factors in interpreting a collective agreement provision.

[63] The past practice for payments of extra-duty pay was sometime around the 20th of the month following the month in which the pay was earned. In fact, the current practice appears to be the same. The move to a direct deposit for these payments has also made this timeline easier to achieve.

[64] The failure of the employer to meet this usual time frame for payments during the summer of 2006 is explained by the circumstances at that time and by a management decision on how to address those circumstances. A new collective agreement was ratified on June 24 and signed on June 26, 2006. The parties had been without an agreement for four years, and the bargaining agent has admitted that the processing of retroactive payments under the collective agreement was a challenging task. There was evidence that the Pacific Region was understaffed in the pay and benefits area at that time and that recruiting sufficiently trained staff was difficult. By August 2006, the Pacific Region had brought in one extra employee from another region to assist, was authorizing overtime for pay and benefits advisors and had given the work a higher priority by not requiring pay and benefits advisors to answer the phone or emails during certain periods of the day.

[65] Unlike other regions, however, Pacific Region management decided to delay the processing of extra-duty pay until the new rates of pay were available in the pay system. The establishment of the new pay rates in the pay system was the responsibility of the PWGSC. From the evidence at the hearing, this management decision was the major contributing factor to the delay in payments. The rationale for the decision was that it meant that there would not need to be any adjustments to the payments, as there would be if the pay were processed before the new rates were available.

[66] There was no evidence that this management decision was communicated to employees or to the bargaining agent at the time the decision was made. It was suggested by Mr. Oakes that this information be conveyed to employees. The witnesses for the grievors did not give any evidence that they had been provided with this information, and the employer called no witnesses to testify that the information had been provided to employees or to the bargaining agent. Ms. McKenzie did not have any information as to whether this information had been conveyed to employees or to the bargaining agent. I see no reason to question the credibility of the witnesses for the grievors on this issue. The only clear statement from the employer on the reasons for the delay that was communicated publicly was the statement by the CSC spokesperson in the Globe and Mail article in October (Exhibit G-15).

[67] Although the failure of the employer to communicate its planned approach to payments was unfortunate and no doubt contributed to the frustration of the

employees, it is not a relevant consideration in determining whether payment was made within a reasonable time, in the circumstances.

[68] The length of time taken to process payments must be determined on the basis of all the circumstances, including the reason(s) for that delay. The reason, or reasons, for the delay must also not be unreasonable in the circumstances of each case.

[69] I find that, given the overall length of time to process payments (less than four months, at the maximum), the decision of the employer to wait until August to process the payments was not unreasonable.

[70] There was evidence that the employer has recognized, in part, the need for additional resources for pay and benefits. The resources have been increased, although there was evidence from one employer witness that the resources need to be increased further.

[71] Based on the evidence provided, I am satisfied that the delay in the summer and fall of 2006 was an aberration. The high volume of work relating to the implementation of the new collective agreement is not a regular occurrence, and there is a reasonable expectation that a temporary workload of this magnitude will result in some delays in the processing of payments.

[72] For these reasons, I find that the implied term of the collective agreement that extra-duty payments be made in a reasonable time was not breached.

[73] In view of the fact that I have dismissed the grievances, I do not need to retain jurisdiction to address the issue of the payment of interest.

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

(The Order appears on the next page)

Order

[75] The group grievance for Matsqui Institution (567-02-09) is dismissed.

[76] The group grievance for Fraser Institution (567-02-13) is dismissed.

October 29, 2008.

Ian R. Mackenzie,
adjudicator