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File: 566-34-2168

Citation: 2011 PSLRB 73



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

NATALIE McCALLUM

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
McCallum v. Canada Revenue Agency

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: [Paul Love, adjudicator](#)

For the Grievor: [Harinder Mahil, Professional Institute of the Public Service of Canada](#)

For the Employer: [Ward Bansley, counsel](#)

Heard at Vancouver, British Columbia,
April 13 and 14, 2010.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] At the time relevant to this grievance, Natalie McCallum (“the grievor”), was employed by the Canada Revenue Agency (“the employer”), in its Pacific Region, as an information technology officer, classified at the CS-01 group and level, at the Pacific Regional Help Desk (“the help desk”). She was also a member of the After Hours Support Team (“the team”).

[2] In a grievance filed on December 15, 2006, the grievor stated the following: “The employer is in violation of Article 9.03(b) of the AFS Collective Agreement by not providing me with an equal opportunity to work available overtime.” Clause 9.03(b) of the collective agreement provides as follows: “Subject to the operational requirements, the Employer shall make every reasonable effort to avoid excessive overtime and to offer overtime work on an equitable basis among readily available qualified employees.”

[3] The grievor seeks an equal opportunity to work available overtime, compensation for overtime lost because of the employer’s alleged violation of the collective agreement, any other relief that the adjudicator feels is appropriate and to be made whole. The collective agreement at issue in this decision is the agreement between the Professional Institute of the Public Service of Canada and the employer for the Audit, Financial and Scientific Group bargaining unit, expiry date December 21, 2007 (“the collective agreement”).

II. Summary of the evidence

[4] At this hearing, I heard testimony from the grievor and from Phillip Dodd, Team Leader of the help desk (classified CS-03) and the team, and I considered the exhibits, authorities and arguments presented. The parties have some common ground, which is set out later in this decision. In the course of testimony the grievor and Mr. Dodd often referred to a team member who worked close to the grievor’s desk and who was also on the standby team. As this team member was not present at this hearing and had no opportunity to reply to the evidence relating to him, I will be referring to him as “the other senior team member.”

[5] This grievance is about the grievor’s scheduling as a team member in 2006. The help desk provides support to the employer and to the Canada Border Services Agency (CBSA) employees from 06:00 to 18:00, Monday to Friday. The team provides support

on a schedule that runs from Tuesday to Tuesday, including from 18:00 to 06:00 each day of that week and all day Saturday, Sunday and statutory (stat) holidays. Two weeks each year have a double-stat holiday — the weeks that include Christmas and Boxing Day and Good Friday and Easter Monday.

[6] Mr. Dodd testified that after-hours technical support is provided to clients by a team member on standby. A help desk line directs calls to a cell phone or pager that the member is required to carry. The member answers calls and provides technical support. Those on standby are required to respond to technical problems reported by employees at tax or customs sites. Members on standby are expected to call the client back within a period of 20 minutes. Team members receive standby pay to ensure their availability. In a normal standby week, they receive 13.5 hours of standby pay, accumulated at 0.5 hours per 4-hour period. A member is on standby for 108 hours in a normal standby week, which is the total of 12 hours of standby on Tuesday, Wednesday, Thursday, Friday and Monday and 24 hours on each of Saturday and Sunday. At Christmas 2006, 144 standby hours were incurred or 12 hours for each of December 19 to 22 and 24 hours for each of Saturday December 23 to Tuesday December 26, as the 26th was assigned to the member scheduled for the week commencing Tuesday December 19, 2006. Members are considered working only when they log on to the corporate computer to provide service. They are paid at overtime rates for that work.

A. For the grievor

[7] The grievor started working for the employer during the 1990 tax season. In April 1999, she was successful in her application for a CS-01 position and worked in Information Technology Services (“IT Services”). Between September 1999 and March 2007, she worked on the help desk and was a team member. She had regularly scheduled site support duties at the Pacific Border Crossing or Surrey Tax Centre locations and acting team leader assignments at the Vancouver International Airport. She was successful in a CS-02 competition and relocated to Victoria with the CBSA. She was deployed to the Department of National Defence in November 2008.

[8] From 2003 to 2005, Darlene Jensen was the manager responsible for scheduling standby. The grievor testified that the number of team members was in constant flux. Employees deployed or seconded to other positions were ineligible for the team. Only employees classified CS-01 were eligible. Employees on acting assignments at higher

levels were ineligible while acting. From time to time, management would canvass for additional members. Standby weeks were rotated among the members to ensure that everyone participated. Some members worked a flexible schedule (“flex schedule”), meaning that they worked longer hours each day to have one usual workday off (their “flex day”). The week on which the flex day occurs is called a “flex week.” If a call arrived on a member’s flex day, it meant that he or she was paid overtime at the double-time rate, so standby work was not offered to members on their flex days. Occasionally, a member would give up or “drop” a week on short notice. Ms. Jensen kept a list of members eligible to “pick up” dropped weeks and stat holidays. The rotation meant that the equitable distribution of standby weeks was visible for any 12-month period.

[9] The grievor prepared calculations showing how much a team member could make on standby and by handling calls, using an assumption of one call per four hours of standby (Exhibit G-3).

[10] The grievor explained that the employer provides a document in which team members record calls handled during standby. Employees who are required to answer calls are called back to work under clause 10.01 (Call-Back) of the collective agreement. This clause reads as follows:

10.01 When an employee, after having completed his normal hours of work, has left his place of work and, prior to reporting for his next regular scheduled work period, is called back to work for a period of non-contiguous overtime, he shall be entitled to the greater of:

...

Alternate provision

Clause 10.01 (a) (ii) applies to employees classified as CS only.

(ii) compensation equivalent to three (3) hours’ pay at the applicable rate for overtime;

or

(b) compensation at the applicable overtime rate for each hour worked.

[11] For each eight-hour standby period with a call, three hours of overtime are paid at the applicable overtime rate of time-and-a-half. A 12-hour span encompasses two standby periods. A 24-hour span has three standby periods. On Sundays, overtime is

paid at double time, as it is the member's second day of rest. For stat holidays and Christmas, overtime worked in the second, third and fourth 24-hour spans is paid at double time.

[12] The grievor testified that a normal standby week, assuming at least one call per eight-hour period, would result in 76.5 "expanded hours" compensated at \$29.00 per hour, for a total of \$2218.50. According to her calculations, a team member on standby for the week of Christmas 2006 would have had 103.5 expanded hours compensated at \$29.00 per hour, or \$3001.50. The grievor defined an expanded hour as the first call paid at time-and-a-half, or the equivalent of 4.5 hours' pay for one hour of overtime worked per eight-hour period, plus standby paid.

[13] The grievor provided three emails that Ms. Jensen sent the team members showing the assignments of standby work, the members assigned stat holidays, the member next in line for a stat-holiday week and the members next in line to pick up weeks if a member was unable to work his or her scheduled week. The send dates of the emails and the periods they covered are as follows:

- February 5, 2003, for February 18 to June 3, 2003 (Exhibit G-4);
- August 14, 2003, for July 29 to November 4, 2003 (Exhibit G-5); and
- November 24, 2004, for November 30, 2004 to March 1, 2005 (Exhibit G-6).

[14] If a team member was unable to work the scheduled week, it was scheduled for the next member in line.

[15] The grievor testified that, as of August 14, 2003, Ms. Jensen published the history of standby assignments on the employer's regional server, which was available for anyone to review. The grievor stated that the list of employees eligible for standby expanded drastically. Documents show that it expanded from 8 to 15 employees. By the November 24, 2004 email, 14 employees were eligible for standby.

[16] In September 2005, Mr. Dodd resumed his role of scheduling standby, a role that he performed prior to Ms. Jensen. He did not continue with the method of assigning work that his predecessor had employed. On November 18, 2005, he emailed employees in the Pacific Region, notifying them of an opportunity to join the team. The standby work was described as follows: "1 Week. Starts Tuesday Evening at 6:00 PM

ends the following Tuesday Morning at 06:00 AM. (Schedule adjusted for stat. holidays; one week usually equals 108 hours of standby)” (Exhibit G-7). The week was described as 108 hours of standby and as rotating every 8 to 12 weeks.

[17] Mr. Dodd sent an email on December 13, 2005, listing 14 members of the team and providing the standby schedule for December 20, 2005 to March 31, 2006 (Exhibit G-7). The email provides as follows:

...

All existing flex schedules and work arrangements submitted to me have been incorporated into this schedule. Due to the flex days and how they impact on call scheduling, I am unable to accomdate [sic] the previous practice of swapping weeks. If you are unable to perform the week assigned to you as per below, please advise and it will be re-assigned.

...

[18] The grievor stated that the difference in Mr. Dodd’s scheduling email was that the stat holidays were not marked and that no indication was given of how he had assigned extra earning opportunities, such as stat-holiday and pick-up weeks.

[19] On November 10, 2006, Mr. Dodd issued the schedule for November 21, 2006 to February 6, 2007 (Exhibit G-9). He allocated the week of November 21 to the other senior team member, the week of December 19 containing a stat holiday, again to the other senior team member and the week of December 27, 2006, containing a stat holiday, to Darryl Sturmeay.

[20] In her testimony, the grievor testified that Mr. Dodd had also assigned the other senior team member the Easter stat-holiday standby week in 2006.

[21] After speaking to Mr. Dodd, the grievor emailed him her concerns on November 10, 2006. He answered that same day. The grievor wrote again on November 22, 2006, and Mr. Dodd again replied on that same day. This email correspondence was marked as Exhibit G-9. The grievor felt that Mr. Dodd’s explanation was not satisfactory. She asked why the other senior team member had been assigned two standby weeks within the same scheduling cycle. Mr. Dodd replied that two team members had been assigned two weeks because the scheduling cycle was 12 weeks long and 10 members were available. The grievor pointed out in her email of November 22, 2006 that Mr. Dodd had given the other senior team member

six weeks plus the Easter double-stat-holiday week. The grievor pointed out that the other senior team member had been assigned three weeks of standby duty over a seven-week period. On November 22, 2006, Mr. Dodd replied in part as follows: “Natalie, as mentioned in our phone conversation, I have endeavoured to allocate weeks as fairly and equitably as possible – given the flex schedules, leave and other requests for time off and unavailability of some on call [*sic*] staff.”

[22] The grievor filed a grievance on December 15, 2006, as she felt that the transparency of the scheduling had been lost and that the employer was not allocating the standby equitably. She said that, at the beginning of January 2006, the rotation appeared equitable but that it was seriously lacking by the end of 2006, when certain team members were given opportunities to work more hours than others. The grievor testified that she has not worked a stat holiday since the week starting Tuesday, December 28, 2004.

[23] The grievor stated that the other senior team member removed himself from the standby list for 2005. She stated that that fact appears in the data provided by the employer. Mr. Dodd assigned the other senior team member the first available week when he rejoined the team in 2006. The grievor prepared a summary of the standby weeks worked in the 2006 calendar year from data provided to her by the employer (Exhibit G-10). Her summary shows that the other senior team member was assigned seven weeks and worked eight as he was assigned a pick-up week. The grievor was assigned seven weeks and worked six. The summary shows that the other senior team member was assigned the standby weeks of January 3, 2006, April 11, 2006 and December 19, 2006. The standby weeks of April 11, 2006 and December 19, 2006 contained a double-stat holiday.

[24] The grievor stated that, until September 26, 2006, standby weeks were distributed equitably.

[25] The grievor testified that the week of Christmas 2006 was not her flex week and that she was available to work that week.

[26] In 2006, the other senior team member was assigned six standby weeks, including both double-stat-holiday weeks (Christmas and Easter), and the grievor was assigned four weeks.

[27] In 2007, Mr. Dodd reassigned the week of April 17, which had been assigned to the other senior team member, and the week of April 24, which had been assigned to the grievor, to other team members.

[28] The grievor calculated the number of standby hours offered to each team member from January 2006 to January 2007 (Exhibit G-11). The other senior team member was offered 816 hours, she was offered 432, and the average was 580. The grievor's offer also included a week that she gave up due to an acting assignment.

[29] The grievor presented a document titled "On-Call Analysis" that the employer supplied during the internal grievance process (Exhibit G-12). Mr. Dodd testified that he had authored it. It was supplied to the grievor by Paul Cultum, a human resources officer. The document purports to set out the standby hours worked by team members for the 2006-2007 fiscal year. The grievor does not agree with its analysis. The document states that she was available only for 44 weeks. She stated that it did not accurately portray the weeks of availability of certain members because of annual leave and other commitments. For example, she testified that it states that Audrey Brown worked 81 standby hours; in reality, she did not work any standby hours in the 2006-2007 fiscal year. The document states that the other senior team member worked the same number of hours as Mr. Sturmeay, Ms. Brown and Judy Whitton, when he actually worked three weeks containing statutory holidays, and the others worked only one stat-holiday week each.

[30] Furthermore, the grievor stated that 108 standby hours are incurred in a week and not 81 as shown in the employer's documents. She said that a note indicates that "[t]here was [*sic*] approximately 10 employees on call during this fiscal year," when the reality is that it is impossible to know how many employees will actually be on the team at the beginning of the fiscal year, as it changes. She said that the document makes no sense.

[31] The grievor testified that she was a team member from 1999 to 2006. The practice was that the team support leader would send out a letter asking when members would not be available and would incorporate that information into the schedule. Members were never deemed unavailable because they were on leave. The grievor disputed that the practice in reality was as set out in the analysis in the "On-Call Analysis" (Exhibit G-12), which states that, "If an employee is not available

100% there [sic] expected weeks is [sic] pro-rated.” She said that that was the first time that she had seen that statement from the employer.

[32] The grievor disputes the assertion that the “On-Call Analysis” (Exhibit G-12) shows a fair or equitable distribution of the stat-holiday weeks over a five-year period. It shows that she worked four stat-holiday weeks and that the other senior team member worked five. She said that she was the only team member that participated over the full five-year period. For example, Deborah Beaulieu takes 7 to 10 weeks of income-averaged leave in the summer each year, which explains why she had only two stat-holiday weeks over the five-year period since she missed three stat-holiday weeks each year. Mr. Sturmeay, who worked the second highest number of hours in the team, over the last five fiscal years with 1844, although he joined the team in September 2005.

[33] The grievor stated that the “On-Call Analysis” (Exhibit G-12) inaccurately portrayed the other senior team member as available to work 52 weeks per year. The grievor sits right beside the other senior team member in an open office setting. She has known him for 18 years, and they have acquaintances in common. She communicates her availability by email. The other senior team member is friends with Mr. Dodd outside work. The other senior team member is a competitive hockey player and golfer and he communicates his availability by telephone. She recalled that he once went on a weeklong golf trip and that, since he plays hockey, he would not be able to meet the standard of connecting to the client within 15 minutes of a call.

[34] The grievor filed the other senior team member’s 2006 personal leave status report (Exhibit G-13). It was edited to black out the reasons for which he took the leave. The grievor stated that it shows his partial- and full-day leave. Using that leave information, she created a calendar and used yellow highlighting to show his partial days of leave and pink highlighting to show his full days of leave (Exhibit G-14). There were many partial days. The grievor stated that, because his hockey games were late, he had a pattern of taking the next mornings off. Given that pattern, it is her view that he could not have been providing standby services while playing hockey.

[35] The grievor testified that the other senior team member played hockey for the Vancouver Vipers and the Kennedy Clippers teams. She supplied a Vancouver Vipers team roster, printed from the Internet, for the week before the hearing (Exhibit G-15). The records show only the dates on which the other senior team member scored or

was assessed a penalty. The second page of what she adduced shows that he played hockey on February 19, 2006, as he received a penalty at 16:21 of the third period. His leave form shows that he took a partial day off on February 20. The third page of the report shows that he played hockey on October 7, 2006 and on December 2, 2006. The grievor testified that the other senior team member also plays for the Kennedy Clippers. She printed a Kennedy Clippers schedule from the Internet showing 11 games in 2006 in which the other senior team member received a penalty or scored (Exhibit G-16), indicating that he played hockey on those occasions.

[36] In addition to the other senior team member's vacation time, the Vancouver Vipers team roster (Exhibit G-15) and the Kennedy Clippers Schedule (Exhibit G-16) demonstrate other dates on which he was not available for standby. Therefore, his 52 weeks of availability in the employer's analysis is inaccurate.

[37] At the beginning of every scheduling cycle, the employer requested dates on which team members would not be available. Some members responded orally. The grievor sent an email on October 30, 2006 (Exhibit G-17), showing the dates on which she was not available for standby. Her email shows that she was available to work the Christmas 2006 double-stat-holiday standby week. She was not available to work three weekends or three weeks due to voluntary activities or her flex week. She said that that unavailability should not have affected the weeks assigned to her, as it had not in the past.

[38] The grievor filed a copy of the help desk standby scheduling procedures, which she obtained from the employer through her bargaining agent (Exhibit G-18). She testified that the employer had not provided her with a copy of the procedure and that she had not seen it before filing her grievance. The document is dated August 31, 2007, and therefore was created after the grievor filed her grievance. The grievor believes that, if the employer actually used those procedures during the period in question, the employer should have provided it to the team members, as it would have affected how they reported their unavailability.

[39] The grievor stated that she received another analysis on February 20, 2007 from Mr. Cultum, similar to the "On-Call Analysis" (Exhibit G-12), without the analysis in the top right-hand corner in the "On-Call Analysis" (Exhibit G-12), with some different numbers and with the source information (Exhibit G-19). The upper right hand of the "On-Call Analysis" (Exhibit G-12) contains a number of notes or an analysis of the data.

Exhibit G-19 states the following: “Only 7 people have been involved in on-call throughout the full 4 years.” However, the grievor testified that she was the only one involved during that entire period. In an email dated February 21, 2007 (Exhibit G-19), she pointed out that the other senior team member did not participate on the team for the 2005 calendar year. This is also supported by pages 13 to 17 of Exhibit G-19, which contains the raw data from the employer’s printout. She pointed out that the other senior team member, Ms. Beaulieu and Mr. Sturmey had been assigned more hours than she had been.

[40] The grievor disputed the assertion in Exhibit G-19 that “Employees not on flex ([the other senior team member], Judy, Sukh) are more readily available and therefore more open to stat assignments.” The grievor testified that some people on a flex schedule were able to work standby weeks. The grievor testified that Ms. Brown was on a “super-flex schedule,” meaning that she took every Friday off, yet she was assigned more standby than the grievor. The document reports that Ms. Brown was available 52 weeks of the year, yet, since she worked a super-flex schedule, she should have been ineligible for the team. The grievor said that, when she questioned Mr. Dodd about it, she was told that, because Ms. Brown worked directly with him, he was able to manage her time more easily, which meant that she was more available for standby.

[41] The grievor was concerned and contacted a Mr. Elliot, an assistant director of IT Services, about the assignment of standby to Ms. Brown. The schedule indicated that Ms. Brown was “flexing,” or taking a day off during her standby weeks. Mr. Elliot’s response was that it did not result in a cost to the employer, so he did not care what Mr. Dodd did. The grievor testified that Ms. Brown was off every Friday. The grievor phoned on four Fridays and was told each time that Ms. Brown was off. Ms. Brown did not respond to any service calls on dates on which she was off but on standby.

[42] The “On-Call Analysis” (Exhibit G-12) confused the grievor, especially the part where the employer states that team members are not able to work standby on their flex weeks. If that is the base rule, given that all members working flex schedules have a flex week every second week, it does not make sense that the employer stated that she was available for 44 weeks. Furthermore, she does not recall making herself unavailable for eight weeks. She submitted an email on October 30, 2006 (Exhibit G-17), indicating that she was unavailable for two weeks and that she went on

holiday to Nova Scotia for three weeks in May 2006, but one or two weeks of that time would have been flex weeks.

[43] In cross-examination, the grievor said that she went on a flex schedule in the late 1990s. In 2006-2007, she worked a flex schedule, with every second Friday off. The employer suggested that she would be ineligible for standby work every second week because of that schedule. The grievor stated that she raised the issue with the employer because it did not seem to be aware (or did not care) that the flex schedule meant that it would incur double-time pay rates on flex days. As a result, the employer scheduled around team members' flex schedules. The grievor believes that that change was made in 2004 or 2005. The grievor said that she had assisted Ms. Jensen with some of the scheduling. At the time of Ms. Jensen's email of February 5, 2003 (Exhibit G-4) or August 14, 2003 (Exhibit G-5), members were eligible for standby on flex days. The grievor could not recall whether that was an issue in 2004. The grievor was aware that the other senior team member was not on a flex schedule. She agreed that he would have been available twice as often as she, considering her flex schedule, if the employer could not assign standby during a flex week.

[44] In cross-examination, the grievor admitted that Mr. Dodd assigned six weeks of standby to her, the other senior team member, Sukh Jassar and Mr. Sturmey in the 2006-2007 fiscal year, as noted in the grievor's summary (Exhibit G-10). Under questioning about her overtime calculations (Exhibit G-3), the grievor explained that, for the first call during standby, a team member receives three hours of pay. The member then is paid for the time worked for other calls. Her experience was that the more consecutive days a member was on standby, the more calls that member would receive. The grievor testified that her calculations were a minimal estimate of lost earnings. The grievor testified that, although it was possible that no calls would occur on standby, it was never the case. On some standby weeks, she earned over 100 hours of overtime. Her lowest was about 70 hours. The grievor testified that it was possible to earn less than \$2200 for a standby week, but that was not usually the case. Standby work provides an earning potential and not a guarantee.

[45] The grievor indicated that, although Exhibit G-7 did not indicate the stat-holiday weeks, it is possible to figure them out. The grievor admitted that stat holidays were noted with an asterisk on Mr. Dodd's schedule for November 21, 2006 to February 6, 2007 (Exhibit G-9). She admitted that, with more than 13 team members, it was

possible that a member would not be assigned standby during the 12-week scheduling cycle. She agreed that a member might work more than a year without being assigned a stat-holiday standby week.

[46] In cross-examination, the grievor agreed that one week of standby had 108 hours of paid work. Exhibit G-19 shows that the difference between her and Mr. Sturmev is 43 hours, or less than one standby week from April 1, 2001 to January 30, 2007. The difference between her and Ms. Beaulieu is 121 hours, just over one standby week. The difference between her and the other senior team member is 168 hours, or about a week-and-a-half of standby.

[47] The grievor agreed that, in September 2006, she dropped a week of standby because an opportunity arose for her to act as a team leader. She felt that the experience would be good for her career. The grievor admitted that she had other acting assignments between 2001 and 2007.

[48] The grievor was presented with an overview of her salary from March 16, 2001 to April 30, 2007 (Exhibit E-1). It shows that she accepted eight acting assignments between January 25, 2002 and April 30, 2007. Counsel for the employer suggested to the grievor that, for each acting pay period, she would have been ineligible to participate in the standby schedule. In response, the grievor noted that, by April 30, 2007, she had withdrawn from the team. She noted that she accepted an acting assignment from February 12 to 17, 2007, after the standby schedule was completed, and that it did not affect her standby hours. She said that the only time that she ever dropped a week was in September 2006. She had been on her way to meeting the competencies for a CS-03 position and had felt that it was more important to take an assignment that she had been offered. Counsel for the employer suggested to the grievor that she had been ineligible for standby hours five times in 2002 or 2003, when she was acting at the CS-02 level. In reply, the grievor stated the employer felt it important to promote staff and that the view at that time was that employees should not lose standby hours when accepting acting assignments. She testified that the previous manager had scheduled standby around acting assignments.

[49] The grievor admitted that she would have been unable to accept standby hours while on leave for three weeks. She also admitted that she had been unavailable for three weeks in November and December 2006. She admitted that she was ineligible for

standby for three weeks because of an acting assignment in September 2006. She notified the employer of that fact by email on August 30, 2006 (Exhibit E-2).

[50] The grievor admitted that it appears that the other senior team member was not assigned and did not pick up a stat-holiday standby week for Thanksgiving 2006, as the calendar shows that October 9, 2006 was a Monday (Exhibit E-3) and that the other senior team member actually picked up the week of October 24, 2006.

[51] The grievor admitted that the help desk standby scheduling procedures (Exhibit G-18) appears to have been created after her grievance was filed. The grievor's calculation of standby hours offered to each team member (Exhibit G-11) shows January 2006 to January 2007. It states that she worked 432 hours and does not include the week she dropped.

[52] In re-examination, the grievor testified that, while she was on a flex schedule in 2006, the employer never indicated to her that her flex days meant that she would be eligible for standby only half the time.

B. For the employer

[53] Mr. Dodd testified that he has worked for the employer as a team leader classified CS-03 in the help desk and the team since 1998.

[54] The only team member that reported directly to him was Ms. Brown, who is now retired. Mr. Dodd said that he was responsible for scheduling duties. He was also available if clients needed to speak with him directly or if a technical problem came up that prevented the first point of contact from solving the problem.

[55] The team has fluctuated in size over the years from 4 to 5 to as many as 17 or 18 members. The team does not report to Mr. Dodd directly, but through 5 or 6 team leaders.

[56] Mr. Dodd testified that there was a difference between standby and overtime. A team member on standby must carry a pager and be readily available to call back within 20 minutes. Members are paid 0.5 hour's standby pay for every four standby hours or 1 hour's standby pay for every 8 hours on standby. Members are compensated for 13.5 hours' standby pay for each standby week.

[57] A team member receives overtime pay if he or she answers a call while on standby. That comes from article 11 of the collective agreement, the standby clause.

[58] Mr. Dodd described the process he used to establish the number of team members and to schedule them for the available work. He said that a number of steps and procedures are followed to build the team. There were a number of legacy members, including the grievor, the other senior team member and Ms. Brown, who were part of the core team. Members of the core team generally work at the Port of Pacific Highway location. The employer sends a call letter each calendar year to CS-01 employees, soliciting their interest in joining the team. An employee expressing an interest takes an exam dealing with technical and other matters. Those who pass the exam go through orientation and further training, such as in Integrated Primary Inspection Lanes. Once Mr. Dodd knows the number of members, he can then begin scheduling. Some members are experienced, and some are new. That experience can be from either the customs or the tax side. The number of standby weeks assigned to an employee is directly related to the number of days or weeks of the fiscal year and the number of members on the team.

[59] Once the team members are established, Mr. Dodd does the scheduling. He schedules a quarter of the year at a time by issuing a quarterly call letter (an email) to establish each member's availability. The call letter links to the flex cycle, which is 12 weeks long. An example was the request made April 23, 2007 for the May 1 to July 30 cycle (Exhibit E-4). Members are expected to obtain pre-approval from their team leaders, and they have to be available and working. They submit their schedules to their team leaders, who endorse them and forward them to Mr. Dodd. Some members opt out of a given scheduling cycle. Based on the number of responses, he tries to balance the assignments over 12 weeks. If he receives 12 schedules, he considers individual flex schedules, availability, leave and team leaders' requests for unavailability due to overtime. He then slots the members into the 12-week schedule. Sometimes the information he receives from members is incomplete, and he has to contact them for more information. He also has to consider the availability of the laptop computer, pager and documentation ("package"). There are two packages. Some members work out of Vancouver, which affects scheduling. For example, a number of members are located at the Port of Pacific Highway, making it easier to transport a package between desks.

[60] In the summer, the team member must have solid expertise in customs because that is the busy season. In tax season, members must have tax experience.

[61] Mr. Dodd stated that a team member on a flex schedule is available only 6 out of 12 weeks. He stated that members on leave with income averaging, on leave without pay or on sick leave, who are not performing well, or who are less experienced, or employees classified or acting above CS-01 are not eligible.

[62] Mr. Dodd balances those factors, draws up a draft schedule and sends it to the team. Sometimes he receives immediate responses and has an immediate need to redraft it. He attempts to issue the schedule two to four weeks before the cycle starts.

[63] Mr. Dodd attempts to align the standby schedule with the fiscal year. Sometimes a 12-week flex cycle runs over the fiscal year boundary, and he defers the scheduling into the next fiscal year. He indicated that the draft schedule goes through a number of iterations as team members do not always respond with complete information. Once Mr. Dodd finalizes the schedule, he emails it, and the schedule begins. At that point, each member is supposed to be committed. If a member is no longer available after the schedule is set out — for example, due to acting assignments, other overtime or sick leave — a week can be cancelled at the last minute. It happens in the operation of every schedule, and the week (from Tuesday to Tuesday) has to be picked up. Sometimes the member working the current week is extended by a day or two. Sometimes it is reassigned.

[64] A number of issues are considered when assigning cancelled standby weeks, such as a team member's availability and timing. If it is a same-day cancellation, the location of the package is important. Mr. Dodd first examines a member's flex schedule. If it coincides with the cancellation, that member is excluded from picking up the week. If the member has just worked a standby week or picked one up in the last schedule, a different member is considered. Mr. Dodd then emails the target group of perhaps three or four members. He solicits their interest in picking up the week. Once he gets responses — usually two or three — he examines them and assigns the week.

[65] Mr. Dodd submitted an email demonstrating how he backfills standby weeks (Exhibit E-5). Mr. Dodd said that this email was typical. I gave it little weight as it was

sent on June 20, 2007, outside the period of this grievance. In particular, the email includes the following:

...

Factoring in to this schedule is our commitment to balance the oncall distribution of weeks equitably to all employees against the last 4 quarters (calendar year). All existing flex schedules, leave and work arrangements submitted to me have been incorporated into this schedule.

...

That wording differs from that used in Exhibit G-9, which contains the scheduling of the other senior team member for a double-stat-holiday standby week. That scheduling caused the grievor to file her grievance.

[66] Mr. Dodd testified that in addition a team member needs the proper permissions to access the employer's computer system. Some members do not have all the necessary permissions. They have to submit a "perm form," which needs to be signed by an assistant director and then submitted to a "perm coordinator group" for account maintenance. This might be a factor for new members but this would not be a factor for legacy members of the team.

[67] Mr. Dodd explained why a team member on a flex week was ineligible to work a standby week. He stated that in early years it did not matter. The employer became aware in 2005 that it had been incurring unnecessary expenses. He received a directive ("the flex directive") stating that members could no longer be on flex schedules because the employer had been paying them at the double-time rate for days scheduled as their second day of rest. He testified that a member not on a flex schedule would receive overtime pay at time-and-a-half on the first day of rest and at double time on the second day of rest. He said that most members take their flex day on Friday, which therefore becomes the first day of rest. Those members would then be paid for Saturday and Sunday at the double-time rate. He said that the flex directive came down in late 2005. From December 2005 onward, he said that it became more complicated to create the schedule. Before then, he had been able to schedule 12 members via a top-down list by cycling through them. After the flex directive, he was no longer able to do that cycling. The flex directive introduced complexities to scheduling that did not exist before and made it difficult to apply a cookie-cutter

approach. It was difficult to balance distributing the standby work to the members as some worked a flex schedule and some did not.

[68] Mr. Dodd said that he could not penalize team members for working a flex schedule. Nevertheless, he was required to consider flex schedules when scheduling standby hours.

[69] Mr. Dodd said that he was directed that standby hours could be performed only by a CS-01, as standby duties were considered the same as those of the help desk, meaning first level “Tier 1” support typically provided by a CS-01. In the past, the employer had CS-02 team members, but that practice was no longer in effect at the relevant time because of an adjudicative decision.

[70] Mr. Dodd said that team members responded generally by email but sometimes by telephone to his availability requests. Mr. Dodd said that, if a member stated that he or she was available, he generally accepted it without verifying. Mr. Dodd said that he had the flex schedules, the emails from members and some historical material with which to build the schedule.

[71] Mr. Dodd was asked to comment on the Vancouver Vipers team roster (Exhibit G-15) and on the information from the grievor that the other senior team member was not available because he played hockey. Mr. Dodd said that he was not aware that the other senior team member was on a hockey team. He said that the other senior team member never worked a flex schedule. He said that he did not recall the other senior team member ever communicating that he was not available for standby hours. Mr. Dodd said that he would not be privy to information about what the other senior team member did outside of work.

[72] Mr. Dodd has the ability to verify the timing of calls, when a team member works and what transpires. He stated that there have been times when a page has been left unanswered on the system by the member on standby. That triggers him to create an inquiry. In the past, some members have not responded to pages. They were reprimanded and told that, if it happened again, they would not be assigned standby duty. Mr. Dodd said that he has never had a complaint or concern about the other senior team member not responding to inquiries. Mr. Dodd said that, to his recollection, the other senior team member had always been available. Toward the end

of 2007 and 2008, the other senior team member opted out of the team because he was acting as a CS-02.

[73] Mr. Dodd said that a team member could not take leave and still be on standby. He was asked to consider the other senior team member's leave record. He said that his type of leave record was possible because, at the beginning of the fiscal year, members submit their leave requests. It is possible for a member to submit a document indicating his or her availability for standby hours, to wait for Mr. Dodd to issue the schedule and to then take leave on short notice.

[74] Mr. Dodd testified about making changes to the schedule after he issues it. He said that he has to backfill a week if the scheduled team member is unable to work it. The missing member drops the week. The member to whom he assigns the week picks it up and "we carry on." Mr. Dodd said that he examines dropped and picked-up weeks over the fiscal year. For fairness and equitable distribution, the employer tracks the fiscal year as it progresses. If one member drops a week and another picks it up, the employer might consider that when balancing the schedule at fiscal year end. The employer stated that it looks at its needs and requirements. The balancing factor becomes more important as the fiscal year progresses into October, November, December and January.

[75] Mr. Dodd was asked about team members swapping weeks. He indicated that, at one time, before the flex directive, swapping was permitted. Mr. Dodd also said that the "swapping of weeks" might also affect team leaders, which is why he disallowed the practice.

[76] Mr. Dodd was questioned about Ms. Brown's scheduling. He indicated that she was a member of the help desk and the team and that she reported to him. She was on a super-flex schedule; she worked Monday to Thursday from 6:00 to 17:00 and took every Friday off. Before she began that schedule, Mr. Dodd had to consult his managers, as no one was available to work a 06:00 shift. He had no money to pay anyone to work extra time. He approached Ms. Brown to work a super-flex schedule. She had initially been unwilling. If she had a flex day every Friday, she would be excluded from the standby schedule. Mr. Dodd said that "we collectively, management and PIPSC union agreed she would be on a super flex but if she was scheduled to work on a standby week she would change her super-flex day from Friday to Thursday." That avoided a double-time pay penalty for a team member working his or her second

day of rest. Ms. Brown appears to have worked the super-flex schedule, at Mr. Dodd's request, on the condition that he assign her standby work.

[77] The employer questioned Mr. Dodd as to why Ms. Brown was permitted to work standby while on a flex schedule. He said that only two or three team members were also on his team and under his direct supervision. He managed Ms. Brown directly, which meant that he had more scheduling flexibility as he knew her schedule.

[78] Mr. Dodd indicated that stat holidays were a nuisance in scheduling. There are 11 stat holidays in a calendar year, but not necessarily in a fiscal year. Mr. Dodd testified that scheduling from Tuesday to Tuesday covers effectively nine days, because Christmas and Boxing Day fall within the same week, as do Good Friday and Easter Monday. Mr. Dodd said that experience is a factor when scheduling a team member for a standby week with two stat holidays. He said that he narrows down the list of people who can work long weekends. Mr. Dodd draws up the schedule without considering who is scheduled for the stat holidays. He said that he then considers who worked the stat-holiday weeks and that he goes from there. I note that his explanation made little sense to me.

[79] Mr. Dodd was asked to comment on Ms. Jensen's approach to scheduling, as shown in Ms. Jensen's email of February 5, 2003 (Exhibit G-4). Mr. Dodd testified that, when Ms. Jensen was in charge of scheduling, team members' flex schedules did not affect standby assignments. He said that he was unable to follow a typical pattern. It was impossible to publish a schedule like Ms. Jensen's after he resumed scheduling the team, as most of the members were on flex schedules and he could not follow a next-in-line system. He did not follow Ms. Jensen's scheduling system because of the flex directive.

[80] Mr. Dodd said that he might have occasionally forgotten to identify stat holidays on the schedule. He now does it with an asterisk. He said that it is easier for staff to consult a calendar. He said that it is not a critical part of the schedule.

[81] Mr. Dodd provided a portion of a spreadsheet (Exhibit E-6) that he used for tracking purposes. Initially, he was unclear as to what fiscal year the document represented. It appeared to show the scheduling for fiscal year 2006-2007. He creates his spreadsheets after the schedule is created and after the time is worked. The

document shows that Ms. Brown, the other senior team member and the grievor were scheduled for six weeks each during that fiscal year.

[82] November 21, 2006 to February 6, 2007 was one scheduling cycle, based on an HR CAS reporting cycle for the flex cycle. Mr. Dodd was unfamiliar with the full name of that acronym.

[83] Mr. Dodd reviewed the grievor's calculations of overtime potential (Exhibit G-3). He said that the call periods and standby hours were accurate. He said that standby was compensated at the applicable rate and not at time-and-a-half. He said that it was an assumption that a first call would come in and that often no calls come in. He said that 76.5 hours of overtime pay for a standby week was far above average and that 50 hours is more the average. He thought this was a maximum. He said that, once an 8-hour block starts, a team member is entitled to a minimum of 3 hours' overtime pay. Members are paid for 3.5 hours if a call takes 3.5 hours. He said that the grievor's calculations (Exhibit G-3) demonstrate a maximum and not an average. He said that a range of \$1000 to \$2500 in overtime pay is possible for a very busy long weekend. A better ballpark figure would be less than \$2000.

[84] Mr. Dodd was familiar with the "On Call Analysis" (Exhibit G-12), since he created it. It encompasses the grievance and the fiscal years from 2003-2004 to 2007-2008. Every standby week results in 13.5 hours of standby pay on average. In a standby week of 7 days from Tuesday to Tuesday from 18:00 to 06:00, a team member receives 0.5 hours of standby pay for every 4-hour period, or 1.5 hours per day. On Saturday and Sunday, there are 24 hours of standby. A member is on standby for 108 hours per standby week and is compensated for 13.5 hours of standby pay on average. A member can take compensation for the standby in cash ("1640" time code) or in leave (code "1641").

[85] The "On Call Analysis" (Exhibit G-12) shows that Mr. Dodd determined that Mr. Sturmev was available for 52 weeks per year based on input from the team leader and Mr. Sturmev in reply to the call letter. Mr. Dodd believes that Mr. Sturmev was scheduled for five weeks and that he picked up a week. Mr. Sturmev received 81 hours of standby pay, as recorded in the HR CAS system.

[86] In cross-examination, the grievor's representative asked Mr. Dodd whether, since the other senior team member worked some stat holidays, it would have

increased his hours of standby pay past the 81 shown in the “On Call Analysis” (Exhibit G-12). Mr. Dodd admitted that the “On Call Analysis” (Exhibit G-12) was based on total weeks worked and that it did not include stat holidays. He said that he did the same for everyone. The other senior team member’s hours of standby pay should have been higher. Each day could be 1.5 hours, more or less, of standby pay. He said that it is a balance or median. In my view, that exhibit does not accurately state each team member’s hours of standby pay.

[87] The “On Call Analysis” (Exhibit G-12) contains a note that the team had 10 members. Mr. Dodd said that that total was based on the expressions of interest received and that, on average, during fiscal year 2006-2007, the team had about 10 members. He said that that number was compiled after the end of that fiscal year. The standby weeks that an employee could expect to receive would be the weeks divided by the number of members on the team. He said that a member on an acting assignment would have been available less often for standby and that the total of that member’s standby weeks should have been lower than a member constantly available.

[88] In direct examination, the employer’s counsel questioned Mr. Dodd about a rotation pattern referred to by the grievor in Exhibit G-9 when she raised her concerns about the scheduling of the double-stat-holiday standby week of Christmas 2006. Mr. Dodd believed that the grievor was referring to Ms. Jensen’s past practice of cycling the picked-up and stat-holiday weeks, but after the flex directive, that practice was discontinued.

[89] Mr. Dodd does not recall why the other senior team member was assigned the double-stat-holiday standby week of December 19, 2006. He said that it would have been easier to assign that week to the other senior team member given that he was not on a flex schedule. Mr. Dodd could not recall why the grievor was not assigned that week. Mr. Dodd had no explanation of why the other senior team member was assigned both the Easter and the Christmas standby weeks. He said that team members are not penalized for dropping or picking up weeks. A member that picks up a week generally continues to follow the schedule. He believes that a member dropped that Easter standby week, which is why the other senior team member picked it up. Mr. Dodd was not sure whether he recalled considering that the other senior team member had worked the Easter stat-holiday standby week since that week had been in the first quarter. Mr. Dodd said that the schedule balances in the last schedule cycle of

the fiscal year in terms of fairness and equity. He has no recollection as to whether or why the other senior team member picked up the week of October 24, 2006. He said that that pick up could have been done before the schedule was finalized and published. He has no memory of that specific week or of how it was scheduled.

[90] In cross-examination, Mr. Dodd agreed that standby time and overtime were separate issues. When on standby, a team member is compensated 0.5 hour's standby pay for each 4-hour period, for a total of 1.5 hours' standby pay each day. If the member receives a call, he or she is considered at work. If that member has to respond, he or she receives, in addition to standby pay, the greater of the applicable overtime pay rate for the time worked or a minimum of three hours' overtime pay, except that that minimum applies only once.

[91] In his direct testimony, Mr. Dodd was unclear about the overtime pay rate at which a team member is paid while working standby. However, in cross-examination, he admitted that a member working standby is paid at the applicable overtime pay rate.

[92] Mr. Dodd agreed that a team member on standby could receive two calls, one in the first part of a day and one later. He agreed that the overtime pay rate was governed by article 9 (Overtime) of the collective agreement. He agreed that one week of being on standby usually equated to 108 hours of standby. If a member has to respond, he or she is entitled to overtime pay, unless the call is abandoned or hang up occurs or no work is required. If the member responds, he or she receives overtime pay in addition to the standby pay. Mr. Dodd said that, in the Pacific Region, there is no need to report into the office; the clause assumes that it takes three hours to drive in and back and to action the call. Members perform their functions from their homes using the laptop and call. A member on standby can potentially earn more money during a week of stat holiday or during a week of double-stat holiday. There are only two weeks of double-stat holiday — those containing Good Friday and Easter Monday and Christmas Day and Boxing Day. However, all weeks are treated the same for scheduling purposes. He agreed that the grievor and the other senior team member were part of the core team when they were available.

[93] Mr. Dodd said that he used a list of factors when drafting a schedule, including a team member's flex schedule, ability, availability and vacation, and whether that member was acting in another position. He said that he never had concerns with the

grievor's skill set. He said that, toward the end of the fiscal year, he attempts to balance the standby assignments. He said that he might consider whether a member worked other stat-holiday weeks when assigning them. He said that that consideration is not a driving factor.

[94] Mr. Dodd said that the other senior team member ended up working both double-stat-holiday standby weeks in 2006, but Mr. Dodd was unable to give any cogent explanation as to why the other senior team member did so.

[95] On March 21, 2006, Mr. Dodd sent an email assigning the other senior team member the standby week of April 11, 2006 (Exhibit G-20).

[96] On November 10, 2006, Mr. Dodd scheduled the other senior team member for the Christmas Day - Boxing Day double stat-holiday standby week (Exhibit G-9). Mr. Dodd agreed that the grievor was possibly not assigned any stat holidays in fiscal year 2006-2007.

[97] Before becoming the help desk team leader, Mr. Dodd was a team leader at the Port of Pacific Highway location from 2003 to 2005. In that position, he supervised the other senior team member. However, he does not recall whether he did so for his entire time at that location. He thought that he supervised the other senior team member from late 2002 to mid-2005. He was asked whether it was still his evidence that he did not know that the other senior team member played for two hockey teams. Mr. Dodd said that he knew that the other senior team member actively played sports, such as hockey or golf. Mr. Dodd said that he knew that the other senior team member played for the customs hockey team but that he did not know about his private life.

[98] Mr. Dodd said that he had had to stop the practice of swapping standby weeks after the schedule was finalized; that practice had previously been allowed. He said that he sometimes adjusted the schedule before publishing it. The grievor's representative asked Mr. Dodd to consider and comment on the standby weeks noted in the grievor's summary (Exhibit G-10). It appears to show that, for the week of March 28, 2006, he scheduled Mr. Hollet to work and that Ms. Brown actually worked and that, for the week of April 4, 2006, he scheduled Ms. Brown to work and that Mr. Hollet actually worked. The grievor's representative suggested that a swap had occurred. Mr. Dodd was unable to comment, as he did not have his schedule with him. Mr. Dodd said that his spreadsheet (Exhibit E-6) shows a swap between Mr. Hollet and

Ms. Brown, but he cannot say when it happened, whether he initiated it or whether the team members had requested it.

[99] Mr. Dodd was questioned about the “On-Call Analysis” (Exhibit G-12), in which he represented that four team members (Mr. Sturmeay, Ms. Brown, Ms. Whitton and the other senior team member) worked six weeks and in which the total standby pay were noted as 81 hours. His answer made it clear that he assumed that each member received 13.5 hours’ standby pay per week for each of 6 weeks and that he did not extract the information from the HR CAS system about the amount of time actually worked. The grievor’s representative suggested that the hours worked were incorrect, as the other senior team member clearly worked some stat-holiday weeks in which he would have worked more time. Mr. Dodd said that the “bottom information” on the “On Call Analysis” is accurate and that it was extracted from the HR CAS system. He said that the “top information” is an estimate within 5% of accurate. He said that, to “make all things be equal,” he treated the members the same, regardless of whether they worked a week with a stat holiday.

[100] The grievor’s representative asked Mr. Dodd to consider the “On Call Analysis” (Exhibit G-12) and Exhibit G-19, a document produced by Mr. Elliot during the internal grievance process. Mr. Dodd agreed that the “On Call Analysis” shows that the other senior team member worked 1957 hours of standby and that he worked five stat holidays and that the grievor worked 1897 hours of standby and that she worked four stat holidays over the last five fiscal years. Mr. Dodd said that the difference between them was 60 hours of standby and 5 hours of standby pay.

[101] Mr. Dodd was asked whether the other senior team member worked any standby in calendar year 2005. Mr. Dodd eventually confirmed that the other senior team member did not after the grievor’s representative directed his attention to the raw data in Exhibit G-19, which states that the other senior team member started on April 22, 2003 and shows a last entry of December 29, 2004.

[102] The grievor’s representative asked Mr. Dodd to consider whether the 1957 hours of standby worked by the other senior team member (set out in the “On-Call Analysis” (Exhibit G-12)) were significant since he worked them over 4 years while the grievor worked her 1897 hours of standby over 5 years. Mr. Dodd replied in the negative and stated that the grievor’s standby hours cover five years because she had significant acting assignments at Vancouver International Airport and at other

locations. He also believed that, when he analyzed the five fiscal years, he included the first quarters of each. He said that it is difficult to know whether many team members are available.

[103] Mr. Dodd agreed that, if the grievor's salary overview (Exhibit E-1) was a HR CAS system report (as he had previously stated in his testimony), then it should list all the grievor's acting assignments.

[104] Comparing his spreadsheet (Exhibit E-6) and a calendar (Exhibit E-3), Mr. Dodd agreed that it is clear that the grievor was not assigned a stat-holiday standby week in fiscal year 2006-2007.

[105] Mr. Dodd was asked whether a team member on standby was prohibited from taking leave during that week. Mr. Dodd said that that was not entirely correct. A member could not take leave to the detriment of the employer, meaning a situation such that the employer would incur the double-time pay rate on the member's third day of rest. During a scheduled standby week, the member could ask for time off, as it did not affect the standby schedule. Mr. Dodd said that he was responsible for the standby scheduling of employees and not the scheduling of their regular work schedules. Most of the members were not his direct reports during their regular working days. He said that, theoretically, members could take time off during a standby week but that, practically, if a team leader knows that a member is on standby, the employer should not grant that member's requested time off when it touches a weekend.

[106] The grievor's representative said that, during four standby weeks, the other senior team member took leave. Mr. Dodd said that he had no knowledge of it but that it was possible.

[107] The grievor's representative questioned Mr. Dodd about his statement that at the end of the fiscal year 2005 - 2006, he examined the distribution of standby weeks so that he could balance it. Mr. Dodd's spreadsheet (Exhibit E-6) shows that the grievor was scheduled for the week of September 12, 2005, and that she was next assigned standby in January 16, 2006, a gap of 18 weeks. The other senior team member was scheduled standby for the weeks of September 26, November 21 and December 19. In a 12-week period, he was scheduled to work three standby weeks. Mr. Dodd said that if a longer period is examined, the distribution of standby weeks balances. He said that the

grievor advised him that she was unavailable for standby work and that she was not available half the time due to her flex schedule. Mr Dodd said that that might have something to do with the apparent inequity.

[108] Mr. Dodd was asked whether any of the three standby weeks assigned to the other senior team member coincided with a flex week for the grievor. Mr. Dodd did not know. The grievor's email of October 30, 2006, (Exhibit G-17) shows that the week of December 12, 2006, was a flex week for the grievor.

[109] Mr. Dodd's email of April 11, 2006 (Exhibit G-20) shows that the other senior team member was scheduled for the standby week of April 11, 2006 containing the Easter stat. Mr. Dodd stated in his re-examination that it was a pick-up week. Mr. Dodd said that iterations are made to the schedule, as a result of change requests made by phone calls and emails. He often has to change the schedule. If a week is changed before the start of the schedule, it is not considered a pick-up week. Mr. Dodd's email of April 11, 2006, is a guideline or schedule for team members to follow, but it is subject to change based on operational requirements.

[110] Mr. Dodd was asked to clarify his evidence about swapping standby weeks. The particular example used was that of Mr. Hollet and Ms. Brown in the grievor's summary (Exhibit G-10). Mr. Dodd said that that swap had occurred before the schedule's publication and that it had been under his control. He said that he might have made an error in the initial schedule. If a swap occurred, then he made it. He said that it sometimes occurs that team members bring him a desired swap but that they usually do so before the specific standby week. Swaps are not completely disallowed. The employer does not permit members to swap standby weeks without its knowledge or consent once Mr. Dodd publishes the schedule.

[111] The employer's counsel directed Mr. Dodd to the schedule cycle for the fiscal year of 2005 - 2006, from week 34 (November 21, 2005) to 45 (February 6, 2006) and to the schedule cycle after week 45 shown in Mr. Dodd's spreadsheet (Exhibit E-6). The other senior team member is not shown as scheduled after week 45 (the week of December 19, 2005), but the grievor is shown as scheduled. Mr. Dodd said that that resulted from trying to make the schedule balance. As a year progresses, he tries to balance the standby hours so that the schedule is fair and equitable. In his review, he found that the other senior team member had reached his cap and that the grievor had

not. Therefore, she was assigned an extra standby week to make the distribution balance over the fiscal year.

III. Summary of the arguments

A. For the grievor

[112] The grievor submitted that clause 11.02, 11.04 and article 9 (Overtime) of the collective agreement are relevant. Clauses 11.02, 11.04 and article 9 read as follows:

11.02 An employee designated by letter or by list for stand-by duty shall be readily available during his period of stand-by at a known telephone number and be able to return for duty as quickly as possible and within a reasonable timeframe, if called. In designating employees for stand-by duty the Employer will endeavour to provide for the equitable distribution of stand-by duties.

. . .

11.04 An employee on stand-by duty who is required to report for work shall be paid, in addition to the stand-by pay, the greater of:

(a) the applicable overtime rate for the time worked;

or

(b) the minimum of three (3) hours' pay at the applicable rate for overtime; except that this minimum shall only apply once during a single period of eight (8) hours' stand by duty.

Article 9 applies because article 11 (Standby) refers to the “. . . applicable overtime rate for the time worked . . .”, which is outlined in article 9. When a team member logs in to his or her computer to deal with a call, he or she is working overtime, and article 9 applies.

[113] It was clear in the grievance that the grievor wished to challenge the allocation of standby weeks made to her. Only in the final-level grievance decision did the employer raise the issue of the application of article 9 (Overtime) of the collective agreement versus article 11 (Standby).

[114] The key provision to interpret is clause 11.02 of the collective agreement, which states as follows: “. . . In designating employees for standby duty the employer will endeavour to provide for the equitable distribution of standby duties.” Although the employer has the right to designate whom gets assigned standby duty, it is required to equitably distribute the duties.

[115] The grievor referred to *Black's Law Dictionary*, Fifth Edition (1979), at page 473, where "endeavour" is defined as meaning ". . . to exert physical or intellectual strength toward the attainment of an object. A systematic or continuous effort." *Webster's Ninth New Collegiate Dictionary* defines it as "serious determined effort" or ". . . activity directed towards a goal."

[116] The grievor relied on dictionary definitions of "equitable," a word that appears in both articles 9 (Overtime) and 11 (Standby) of the collective agreement.

[117] The grievor says that, to comply with clause 9.03(b) of the collective agreement, the employer is required to consider operational requirements, to make a reasonable effort, to consider equitableness and to offer opportunities to readily available and qualified employees. The grievor submitted that the employer never raised with her any issue of operational requirements preventing her from working standby. It also never raised such an issue during the internal grievance process.

[118] The grievor submitted that the employer did not make a reasonable effort when assigning standby duties. Ms. Jensen's email of February 5, 2003 (Exhibit G-4), August 14, 2003 (Exhibit G-5) and November 24, 2004 (Exhibit G-6) show that, before 2006, the employer transparently assigned standby weeks. The assignment emails showed the standby schedule for the next 12-week period, who was next in line for stat-holiday weeks and who was next in line for pick-up weeks. A rotation of the team members was used. That all changed when Mr. Dodd assumed responsibility for scheduling in September 2005.

[119] The grievor stated that the employer should have used a longer period, such as 12 months, rather than quarters, when considering whether standby assignments were equitable. The grievor stated that, regardless of whether the period is a fiscal or a calendar year, a number of concerns exist. Mr. Dodd's assignment system was not transparent with respect to the standby assignments.

[120] In a challenge as to whether the distribution of overtime was done equitably, the employer should be able to explain and prove that it acted reasonably and not arbitrarily: see *Cardinal and Leclerc v. Treasury Board (Public Works and Government Services Canada)*, 2001 PSSRB 133.

[121] The grievor stated that the employer has not explained why it assigned the other senior team member two double stat-holiday standby weeks, at Easter and at Christmas 2006. Mr. Dodd did not assign the grievor any stat-holiday standby weeks.

[122] The grievor presented the Vancouver Vipers team roster (Exhibit G-15) and the Kennedy Clippers schedule (Exhibit G-16) indicating that the other senior team member played hockey. That information, together with the pattern of the other senior team member's leave after hockey games, suggests that the employer's assertion in the "On Call Analysis" (Exhibit G-12) that he was available 52 weeks per year is incorrect and that it should not be relied upon when deciding the issues in this case.

[123] The grievor seeks that the grievance be upheld and that she be compensated for lost overtime pay because of the employer's violation of the collective agreement. The grievor asks that I retain jurisdiction over the implementation of the decision and that I refer the matter back to the parties, so that they can determine a remedy figure.

B. For the employer

[124] The employer argued that the parties' definitions of "equitable" and "endeavour" are very similar.

[125] The employer stated that it is not correct to consider both articles 9 (Overtime) and 11 (Standby) of the collective agreement, as both do not come into play. The grievor refers to article 9 only, which is the wrong one, and thus article 9 only should be considered.

[126] All the evidence is about the scheduling of standby week opportunities. There is no evidence about the time worked. Article 11 (Standby) of the collective agreement sets out the employer's obligation to schedule standby. Overtime never becomes an issue until standby is scheduled.

[127] The employer relied on *Scanlon and Christianson v. Canada Revenue Agency*, 2009 PSLRB 42. It dealt with whether CS-02 employees were eligible to continue to work on the standby team. The adjudicator in that case decided that there were genuine reasons for removing the grievors from the standby help desk based on economic pressures, which was reasonable. The clauses in the collective agreement were similar to the ones at issue in the present grievance. The adjudicator held that the clause of the collective agreement in that case that was identical to clause 11.02 of the

collective agreement was the more specific provision and the one requiring primary consideration.

[128] The employer argued that Mr. Dodd's evidence showed that intellectual strength and effort were involved in scheduling the team members' standby weeks. The employer must attempt to distribute the standby weeks equitably. There is no evidence that Mr. Dodd scheduled the standby weeks in an arbitrary or a discriminatory manner.

[129] An adjudicator should not inquire into the correctness of the employer's approach. If it was reasonable, it should be upheld: see *Scanlon and Christianson*, at paragraph 36. *Cardinal and Leclerc* should not be interpreted as placing the burden of proof on the employer. The grievor did not demonstrate that the assignment of standby weeks was based on unreasonable or illegitimate factors.

[130] The employer relied on *Boone v. Treasury Board (Revenue Canada - Customs & Excise)*, PSSRB File No. 166-02-18894 (19891130), in which the adjudicator referred to *Sumanik v. Treasury Board (Ministry of Transport)*, PSSRB File No. 166-02-395 (19710927), and the word "equitable" which was referred to as meaning "approximately equal." In particular, in *Boone*, the adjudicator considered that the focus must be on the equitable distribution of overtime over a reasonable time. The decision referred to not subjecting the grievor to "hardship" or "unfairness" and to whether assignments were approximately equal when considered over a reasonable period — perhaps a year. Counsel for the employer submitted that "equitable" does not mean equality in the number of assignments, but instead, it means considering whether unfairness occurred in those assignments. As for Ms. Brown, the employer asked her to work a specific standby week. To be fair to her and to not rob her of standby duties, the employer continued her standby assignments. That is an example of equitable scheduling by the employer.

[131] The employer stated that the proper review period is one of a reasonable length. The evidence in this case covered either fiscal year 2006-2007 or five fiscal years. The employer suggested that, if everyone is offered almost the same number of standby weeks, the length of the review period does not matter. The employer stated that, over the course of a fiscal year, standby week assignments balance.

[132] Mr. Dodd stated that he determines the members of the team, sends a request on a 12-month cycle and receives information back from members and team leaders.

He considers who is on a flex schedule, where they are located, where the package is and whether the members have the right access permissions. A schedule is created and revised, sometimes with very little notice. Effort is made at the end of the fiscal year to balance assignments. Evidence of that balance attempt in the year at issue was that the grievor was given another day and that the other senior team member was not. The only issue is a difference of one week of standby assignment between them.

[133] The numbers show that both the grievor and the other senior team member were scheduled for five standby weeks. The other senior team member picked up a shift, and the grievor dropped one. The assignments are the important element, not the standby weeks worked.

[134] The evidence demonstrated that the employer met its requirement of “endeavouring” to equitably distribute overtime and standby hours.

[135] The employer submitted that the distribution of standby weeks was equitable. A team member’s availability can explain subtle differences. It is possible that the other senior team member was more available. Whenever Mr. Dodd heard back from the other senior team member and other team members, Mr. Dodd was told that they were available. He does not go beyond that in his scheduling. Mr. Dodd has no way of knowing if the other senior team member is playing hockey when another team member should be near the phone, as Mr. Dodd does not delve into members’ personal lives. In this case, there were no complaints about the other senior team member’s availability.

[136] The grievor’s summary (Exhibit G-10), which covers an 18-month period, demonstrates that she was scheduled for six standby weeks and that she worked five weeks because she dropped one. The other senior team member was scheduled for six weeks and worked seven because he picked one up. Ms. Brown was scheduled for six weeks and picked up two. Mr. Jassar was scheduled for six weeks and picked up one. Ms. Whitten was scheduled for seven weeks and worked eight. Mr. Sturmeay was scheduled for five weeks and worked seven. Mr. Gurpreet Khera was scheduled for six weeks and worked six. The employer scheduled many of the team members for approximately the same number of weeks. The grievor cannot make a case for inequitable standby distribution, particularly when she was not as available as other members.

[137] The employer submitted that its assignment of standby weeks to the other senior team member on his return to the team after a one-year absence should not be held against him. As for the stat-holiday standby weeks, he picked one up. Questioning how a double-stat-holiday standby week was assigned is reading a lot into that assignment when it is not known whether other team members wanted to work that week, as many might not have wished to work a stat holiday.

[138] The fact that the grievor was not assigned the Christmas double-stat-holiday standby week resulted in a difference of just a few hours of standby between her and the other senior team member. The original grievance does not raise the issue that she should have been assigned that Christmas week. The focus should be on examining the total number of assigned standby weeks and not particular standby weeks, which would have the effect of amending the grievance.

[139] The employer stated that, when examining a given period, the focus should not be on an individual team member's schedule, such as the other senior team member's; the focus instead should be on all members. In this case, the assignment of standby weeks was approximately equal.

[140] The grievor filed Exhibit G-19, which shows that the other senior team member worked the most standby hours and the grievor was the fourth highest worker of standby hours. The difference of standby hours worked between the grievor and the other senior team member is 168, which is just over a week of standby. It is not a large difference.

[141] The employer argued that it is possible that the other senior team member worked more standby weeks than the grievor, even though he was absent from the team for calendar year 2005. The number of team members can fully account for that issue. If there were 17 members of the team, it would mean that the other senior team member would have missed three standby weeks in the year in which he was not on the team. It would not have taken much for him to catch up if he were picking up dropped weeks. Given the size of the team, he would not have missed many opportunities, and picking up one week can make a difference.

[142] The employer submitted that, although Ms. Jensen's scheduling process was more transparent, showing the pick-up and stat-holiday schedule is not evidence of significant effort to distribute standby equitably. The employer submitted that

Mr. Dodd put in more effort because flex days were not a factor when Ms. Jensen did the scheduling. Mr. Dodd testified that he did not show pick ups and stat holidays on his schedule because of difficulty managing flex days and because it would have raised false expectations and would have often required changes. That information reveals nothing about the inequitable result or whether the process used was transparent. Instead, the data must be consulted.

[143] As an example, if the grievor were one of 13 team members, and there were nine stat holidays, a real possibility would exist that she would not be assigned a stat-holiday standby week over 18 months of scheduling. That is not an inequity. Were she working a flex schedule, it would mean that, in all likelihood, she would be assigned less stat holidays, since a flex day could fall on a stat holiday. That might explain why the other senior team member received more standby on stat holidays, as he was not working a flex schedule.

[144] The employer suggested that the matter not be remitted to the parties and that I decide the appropriate remedy based on the evidence. The employer stated that 13.5 hours of standby pay is appropriate, which is the only pay guarantee for a team member on a standby week. The adjudicator should reject the Christmas 2006 double-stat-holiday standby week argument, as it is not specified in the grievance.

[145] The employer's list of authorities also contained *Anstruther et al. v. Treasury Board (Department of Human Resources and Skills Development)*, 2004 PSSRB 132, which counsel for the employer did not refer to in argument.

C. Grievor's rebuttal

[146] The grievance was filed before Christmas 2006 and claimed that overtime and standby hours were not equitably distributed. The documents demonstrated that the employer assigned more standby hours to the other senior team member. The employer persisted with its arbitrary distribution approach after the grievance was filed.

[147] It is significant that the other senior team member was not available for standby hours for one year, yet he worked more weeks overall than others.

[148] Both article 9 (Overtime) and article 11 (Standby) of the collective agreement are before the adjudicator.

[149] The grievor stated that standby scheduling is not made complex just by considering the flex schedule. An example is Ms. Brown, who was working a super-flex schedule, yet the employer was still able to find a way to schedule her for standby duties. The grievor stated that the schedule at issue did not balance because the other senior team member was assigned two double-stat-holiday standby weeks. The grievor and the other senior team member worked at the same location. Therefore, the package availability issue is irrelevant. It is not fair to limit the remedy to 13.5 hours' standby pay when both parties agreed that 108 hours are worked on a standby week.

IV. Reasons

[150] The major point at issue is overtime pay, which accrues on standby assignments. A team member is paid for being on standby but also has the opportunity to work overtime when called. Overtime is paid as per clause 11.04 of the collective agreement at a minimum of three hours' pay at the applicable overtime rate, which applies only once during a period of eight hours of standby duty, or at the applicable overtime rate for time worked. Clause reads as follows:

11.04 An employee on stand-by duty who is required to report for work shall be paid, in addition to the stand-by pay, the greater of:

(a) the applicable overtime rate for the time worked;

or

(b) the minimum of three (3) hours' pay at the applicable rate for overtime; except that this minimum shall only apply once during a single period of eight (8) hours' of standby duty.

That amount is not insignificant. The grievor's calculations (Exhibit G-3) showed that the normal standby and overtime week earning potential was \$2218.50 and that the stat-holiday week standby and overtime earning potential was \$3001.50. That evidence was not challenged in cross-examination. The employer produced no documentary evidence showing that those calculations were incorrect. Mr. Dodd thought that those amounts were maximums and that, on some days, no calls would be received and the team member would simply be paid standby pay. I accept that there is a range of overtime that a member could earn while on standby. As the grievor pointed out, the parties would not be at adjudication if this case were simply about 13.5 hours of standby pay for a discrepancy in the assignment of a week of standby work.

[151] Clause 9.03(b) of the collective agreement provides as follows: “Subject to the operational requirements, the Employer shall make every reasonable effort to avoid excessive overtime and to offer overtime work on an equitable basis among readily available qualified employees.” Overtime can occur while a team member works on standby. There is no guarantee that overtime will occur, but standby work provides that opportunity.

[152] Clause 11.02 of the collective agreement provides as follows:

An employee designated by letter or by list for stand-by duty shall be available during his period of standby at a known telephone number and be able to return for duty as quickly as possible if called. In designating employees for stand-by duty the Employer will endeavour to provide for the equitable distribution of stand-by duties.

[Emphasis added]

[153] Recently, in *Scanlon and Christianson*, an adjudicator interpreted as follows clause 11.02 of the collective agreement in the context of a grievance about the employer removing standby duties from CS-02 employees whom the employer had previously designated to work standby:

...

[31] . . . This is somewhat indirect language, but it is nonetheless clear that the employer has the contractual right to designate or select employees for the standby list. However, that right is fettered by the requirement that the employer “. . . will endeavour to provide for the equitable distribution of standby duties. [emphasis added]”. The word “endeavour” is defined as meaning “to exert physical and intellectual strength toward the attainment of an object. A systematic or continuous effort” (Black’s Law Dictionary, Fifth Edition (1979), at page 473). A similar meaning is “an undertaking or effort directed to attain an object” or “an earnest or strenuous attempt” (The Canadian Oxford Dictionary, Oxford University Press (1998), at page 460).

[32] An important element in these definitions is the idea of “attempt” or “toward attainment.” I say this because clause 11.02 does not require the employer to provide for the equitable distribution of standby duties. Rather, in order to satisfy this provision, the employer must exert a significant effort to attain the object of equitable distribution of standby duties. Further, there may be reasons that prevent the employer from attaining this objective. However, as long as

those reasons are not arbitrary (i.e. they are rationally connected to a legitimate business objective), discriminatory or made in bad faith, and significant effort was made to overcome the reasons not to distribute standby duties equitably, there may still be compliance with clause 11.02. Turning to the reference to “equitable distribution” of standby duties this is obviously intended to distribute the benefit of the time-and-one-half rate while on standby equitably among employees. Therefore, the employer must also apply the opportunity for employees to work on the standby list equitably.

...

[Emphasis in the original]

Scanlon and Christianson was about the exercise of discretion to remove an employee from the standby help desk list. In that case, the adjudicator found that, in the absence of a provision in the collective agreement about removing employees from that list, the employer’s discretion had to be exercised reasonably and for a business purpose. In that context, the adjudicator wrote the following, at paragraph 36:

[36] . . . Implicit in this standard of reasonableness is that my inquiry, as an adjudicator of the grievances in this case, is not into the correctness of the employer’s decision. There may be more than one result that is a reasonable exercise of management rights and the fact that I might have made a different decision is not the test.

[154] It is important that the employer endeavour or seriously attempt to ensure that the available standby and any resultant overtime is equitably distributed among “readily available qualified employees,” as specified in clause 9.03(b) of the collective agreement.

[155] Before Mr. Dodd took charge of standby scheduling, it was done equitably. The team members were able to see what was assigned and who was next in line to pick up weeks and stat holidays. There was a defined rotation of weeks among the qualified members. Ms. Jensen was able to work around members’ vacation schedules. The system was equitable on its face.

[156] The employer argued that, just because Ms. Jensen’s standby schedules contained more information, it did not mean that it was the result of a considered process. Anyone scheduling employees has to take into account and balance a number of different factors. Once the size of the team is known, it is relatively easy to

determine what constitutes an equitable distribution of standby. A base assumption is that equal is equitable. That was the starting point, even with Mr. Dodd's system. What becomes difficult is determining how to allocate dropped standby weeks. It is even more difficult to distribute the more lucrative stat-holiday standby weeks. An employer must consider those issues when distributing standby equitably. Under Ms. Jensen, a clear system was used in which the weeks important to team members — reassigned and stat-holiday weeks — were tracked. In my view, it requires effort to overcome the problem of inequitable standby distribution, which can occur depending on how the reassigned and stat-holiday weeks are distributed. The older system demonstrated effort on the part of the employer and that it endeavoured to equitably distribute the standby and any resulting overtime.

[157] The grievor raised a number of concerns, which together suggest that the assignment of overtime was inequitable. I note that, here, there is no burden of proof on the employer, contrary to what was the case in *Cardinal and Leclerc*. However, the grievor's evidence is sufficient to require an answer or a reasonable explanation from the employer, as she gave clear and cogent evidence of the following:

- There was a change to the transparency of the system so that a team member could no longer ascertain who was getting the picked-up or the stat-holiday standby weeks.
- Mr. Dodd failed to provide any meaningful response to the grievor when she alerted him to the problem immediately after he issued the standby schedule.
- The grievor had fewer standby weeks than the other senior team member, who was not on the team in 2005.
- The grievor was the only member who participated in the team consistently over a five-year period; other members came and went from the team.
- One member working a super-flex schedule and taking Friday as a flex day was still assigned standby, in an apparent violation of a policy of no standby during a flex week.
- In its documents, particular the "On Call Analysis" (Exhibit G-12), the employer represented the other senior team member, who played hockey in the evening, who frequently took a half-day of leave following his hockey games and who

took essentially the same eight weeks off as the grievor, as being available for standby 100% of the time.

- The employer was unable to provide any rational response when questioned why the other senior team member was assigned more stat-holiday standby weeks than anyone else.

In the absence of a reasonable and credible explanation from the employer, the grievor's testimony was sufficient to prove that the grievor received less standby than other team members and, on a balance of probabilities, that standby weeks were distributed inequitably. In particular, the unexplained assignment of the Christmas 2006 double-stat-holiday standby week to the other senior team member appears inequitable on its face since he had already been assigned the Easter double-stat-holiday standby week that year.

[158] If a grievor challenges the distribution of standby at adjudication, the employer should be able to show that it was distributed equitably, particularly when the grievor is able to demonstrate problems that suggest inequities. In particular, the employer must be able to demonstrate that it allocated dropped or stat-holiday weeks equitably.

[159] The employer presented some evidence at this hearing that I reject as not credible or reliable. For example, the "On-Call Analysis" (Exhibit G-12), prepared by Mr. Dodd, contains raw data at the end and an analysis section at the beginning. I reject the analysis portion as not credible or reliable. For example, the employer stated that the grievor was available only for 44 weeks of the year and that the team members who were assigned more standby hours were available 52 weeks per year. Mr. Dodd speculated that that might have arisen because the members might have chosen their holidays around the schedule. I note that those members were not called as witnesses. The employer did not produce any documents substantiating that the members working the most hours were all available 52 weeks per year.

[160] Further, in my view it is extremely unlikely that, with annual leave, any team member was available for all 52 weeks of the year. For example, the personal leave status report for the other senior team member (Exhibit G-13) shows that he took 40 full days and some partial days of leave in 2006. That equates to at least eight weeks of leave. The grievor is shown as available for 44 weeks in the "On-Call Analysis" (Exhibit G-12), the same as the other senior team member due to his leave, yet the

other senior team member is represented as being available for 52 weeks. I am concerned that the “On-Call Analysis”, a document prepared by the employer and used in the internal grievance process, does not contain an analysis of leave actually taken. The records demonstrate that the other senior team member took as much leave as the grievor.

[161] The employer stated that the other senior team member arranged his leave around the standby that the employer allocated to him. That explanation was offered for why the employer characterized him as being more available and therefore why he was scheduled more standby. I note that this is simply speculation because the other senior team member did not give evidence.

[162] An employer attempting to allocate standby equitably should be aware that an employee might be motivated to obtain more weeks than others and might manipulate his or her apparent availability. I doubt very much whether the minimal standby pay would motivate schedule manipulation, but the chance of working overtime might. One wonders why the employer did not consider that possibility. A system such as Ms. Jensen’s avoids the problem of employees manipulating their schedules in an attempt to obtain a more-than-equitable share of standby and overtime.

[163] In my view, standby is an opportunity to earn overtime. It is abundantly clear that a team member assigned a standby week with a double-stat holiday is being given a more lucrative earning opportunity. An employer that endeavours to provide for the equitable distribution of standby and the equitable distribution of overtime would apply a system that ensures an equitable distribution of more lucrative earning opportunities.

[164] Furthermore, the analysis in the “On Call Analysis” (Exhibit G-12) assumes that all team members who worked six standby weeks earned 81 hours of standby pay, when it is clear that, for some weeks, particularly with stat holidays, the assigned member worked more standby hours. Those standby weeks are more valuable. Mr. Dodd’s analysis in the “On-Call Analysis” does not refer to those more valuable weeks. The grievor clearly raised this issue in her email of November 10, 2006 (Exhibit G-9), which resulted in her filing this grievance when the employer did not provide a meaningful response. Those weeks are not considered in the “On-Call Analysis.” In his oral testimony, Mr. Dodd stated that he considered those weeks a “nuisance.” It is clear when considering Mr. Dodd’s testimony as a whole that he did

not consider the assignment of the stat-holiday standby weeks of any importance in an equitable distribution of standby. Mr. Dodd had no system to handle assigning the more valuable standby weeks.

[165] The employer argued that the number of team members qualified for standby affects the number of weeks available to each. In reviewing Exhibit G-19, I noted that 13 members were assigned standby during calendar year 2005 and fiscal year 2005-2006. That means that the other senior team member lost four possible weeks, were they distributed equally. However, the other senior team member should have been four weeks behind the grievor at the start of the 2006 calendar year. The “On Call Analysis” (Exhibit G-12) sets out the hours for the last five years for each member. The other senior team member worked 60 more standby hours than the grievor. However, he was not available for 20% of that period because he was not available during calendar year 2005. In and of itself, this suggests an inequitable distribution of standby.

[166] I accept the employer’s argument that it is possible that a team member will not be assigned standby on a stat holiday during a year because there are more members than available stat-holiday standby weeks. Furthermore, given the number of members, it should be unusual for a person to be assigned more than one stat-holiday standby week in a calendar or fiscal year. It would be particularly unusual were a member assigned more than one double-stat-holiday standby week. The employer submitted that the other senior team member may have picked up the stat-holiday standby week of December 19, 2006, as another member, did not work it. I think that that is not probable. The standby scheduling memo issued by Mr. Dodd on November 10, 2006 (Exhibit G-9), assigns that week to the other senior team member. I note that the grievor brought that discrepancy to Mr. Dodd’s attention in her email of November 22, 2006 (Exhibit G-4), as follows:

...

You have given [the other senior team member] 6 weeks plus the double stat at Christmas. I understand that someone may get an extra week because of pickup weeks but do you think it is fair and equitable to give the same person the double stat? You had other options, the fact remains that you have given [the other senior team member] four weeks of oncall between my two, you purposely left the rotation pattern to give [him] Christmas. [He] has three weeks of oncall in a seven week period.

...

Mr. Dodd wrote the following in his reply email reply of November 22, 2006 (Exhibit G-9): “Natalie, as mentioned in our phone conversation, I have endeavoured to allocate weeks as fairly and equitably as possible – given the flex schedules, leave and other requests for time off and unavailability of some on call staff.”

[167] Mr. Dodd’s reply provided no explanation as to why he assigned the double-stat-holiday standby week of Christmas 2006 to the other senior team member, as opposed to assigning it to any other team member, including the grievor. Mr. Dodd did not explain that assignment in his testimony.

[168] The employer suggested and Mr. Dodd testified that the grievor was assigned less standby because of her many acting assignments. That suggestion was not proven by the documentary evidence, particularly the grievor’s salary overview (Exhibit E-1), which is a printout from the employer’s system showing her acting assignments. The grievor had lengthy acting assignments in 2007. However, they did not affect the standby scheduling as the acting assignment commencing February 12, 2007, was taken on after the schedule was issued, and the acting assignment commencing April 3, 2007, was taken on when she was no longer on the team. Mr. Dodd further suggested that she worked less standby weeks because of her flex schedule. However, in other parts of his testimony, he said that he did not penalize the grievor for working a flex schedule and he said that he had to take the flex schedule into account. Given the number of team members and available standby in 2005, one would have expected the other senior team member to have been assigned three or four less standby weeks than the grievor, given that he was not on the team during 2005.

[169] In particular, factors such as access permissions, the location of the package, and the experience of team members and their locations does not explain why the other senior team member was assigned more standby or stat-holiday standby in preference over the grievor. Both were long-term members who sat across from each other in the same office and who had been on the team for some time. There is no evidence before me that the other senior team member was more skilled or that he had a broader range of experience than the grievor. Although the grievor was working a flex schedule and the other senior team member was not, the grievor’s very clear evidence was that Christmas 2006 was not a flex week for her and that she had been available for standby. There is no evidence before me that any other member had been

available, other than the grievor or the other senior team member. The employer has not provided any of the background information, much of which is in emails, which Mr. Dodd stated he considered when he made the schedule that assigned Christmas 2006 to the other senior team member. It was open to the employer to produce documents in its possession to establish the availability of other members to work standby that Christmas, as Mr. Dodd said that generally all members respond to his request about availability before he fixes the schedule.

[170] Mr. Dodd abandoned Ms. Jensen's approach because in his words flex schedules affected standby scheduling. I accept that flex schedules would affect standby scheduling, particularly given that Mr. Dodd was under the flex directive not to allow it to impose additional costs on the employer. The employer has elected to consider that variable when assigning standby. However, I note that Ms. Brown's super-flex schedule was not a barrier to her receiving standby. The fact that she was easier to schedule because she worked directly for Mr. Dodd in my view is no answer to the issue of an equitable distribution of standby. In my view, since Mr. Dodd was required to endeavour to distribute standby or overtime equitably, he was not permitted to favour team members that he supervised directly because he perceived them easier to schedule and because he could "control their other work because they work for him." He was required to distribute standby equitably to all members and not just to those that were more convenient for him to schedule. Since he was able to work around Ms. Brown's super-flex schedule, it seems reasonable that he should have been able to work around the flex schedules of other members, including the grievor.

[171] No evidence was adduced of bad faith or animosity in the distribution of standby and overtime opportunities. It is clear that, with 52 weeks in a year and only a limited number of stat holidays, an employer will not be able to distribute the standby overtime opportunities equally. The question is whether the employer endeavoured to make the distribution equitable.

[172] Mr. Dodd substituted an approach that made it impossible for any team member to understand how they were treated in terms of the assignment of pick-up standby weeks and stat-holiday standby weeks. An employer is not required to justify the distribution of standby to employees by having a transparent system, but it must be able to demonstrate to an adjudicator that it endeavoured to distribute standby

equitably. Mr. Dodd raised a number of factors. They were a melange and did not explain the outcome of his scheduling.

[173] It is difficult to understand what system Mr. Dodd used other than that he considered a “melange” of factors and then sought to “balance” everything in the last quarter. However, by then almost all the stat holidays of a given fiscal year have already been assigned — there were only two stat holidays in the last quarter. Thus, for stat holidays, there is nothing left to balance if it is left to the last quarter. He had no explanation for why he assigned the standby weeks with stat holidays the way he did.

[174] After hearing evidence for two days on Mr. Dodd’s system, I do not understand why the other senior team member was given more standby than the grievor over five years and how he could have worked more standby weeks than her, given that he started at least four weeks behind the grievor since he accepted no standby weeks in 2005. Furthermore, I do not understand why Mr. Dodd assigned Ms. Brown more weeks than the grievor, particularly since she was on a super-flex schedule and the grievor was on a flex schedule.

[175] I accept the employer’s suggestion that Mr. Dodd could not discriminate against the other senior team member by offering him less standby in 2006 because he was not on the standby list in 2005. Articles 9 (Overtime) and 11 (Standby) of the collective agreement require the employer to allocate the overtime and standby equitably among the group of eligible employees. The clauses do not require the employer to allocate a standby week to the member who has been on the team the longest. I cannot discern any rationale or method for the assignment of stat-holiday and pick-up standby weeks. In my view, it appears that Mr. Dodd used a purely arbitrary approach when assigning stat-holiday and pick-up standby weeks. It cannot be said that he endeavoured to equitably assign those weeks.

[176] I accept the grievor’s argument and find that it would have been more transparent to continue the practice of listing who was next up for the next stat-holiday standby week and who was next up for the next picked-up standby week. The employer could have added a note to the schedule stating that it would not assign a team member to the pick-up or the next stat-holiday list if that member was on a flex schedule those weeks. If the member was on a flex week and was next on the list, the employer could simply have skipped to the next member on the list. The employer

would then have been able to track those assignments and to make necessary adjustments.

[177] Additionally, although it makes sense to examine a standby schedule over a given period, it also makes sense to examine it during smaller parts of that period, which would give an employer a sense of where the possible inequities lie. In this case, leaving the adjustments to the last quarter could result in an inability to act equitably because there are few stat-holiday standby weeks in the last quarter, and almost all stat-holiday standby weeks have been assigned by then. Failing to track picked-up standby weeks and stat-holiday standby weeks can lead to inequities.

[178] Based on the evidence before me, I accept that the grievor was available to work the Christmas standby week in question. No evidence before me demonstrated that any other team member, other than the other senior team member, was available to work that Christmas week. Thus, its assignment to the other senior team member rather than to the grievor is clearly questionable. No cogent evidence explained why the other senior team member was assigned that week instead of the grievor, who had been assigned fewer standby weeks and who had not been assigned a stat-holiday standby week since 2004. Given the number of team members, nothing explained why Mr. Dodd assigned both the Easter and Christmas double-stat-holiday standby weeks to the other senior team member in one 12-month period. As the employer has provided neither a cogent, good nor rational reason as to why the December 19 to 26, 2006 standby week was assigned to the other senior team member, I conclude that the assignment was arbitrary and that the employer did not endeavour to assign that standby week equitably. In my view, the assignment breached the collective agreement.

[179] In my view, the grievor should have been assigned the standby week containing the Christmas stat holidays — December 19 to 26, 2006. As remedy, the employer suggested that the grievor should be entitled only to standby pay of 13.5 hours for that week. Standby pay of 13.5 hours alone would not put the grievor in the position that she would have been in had the week been assigned to her. Assigning the nominal amount suggested by the employer would not properly reflect the grievor's loss of opportunity to earn overtime. Double-stat-holiday standby weeks are a unique opportunity to earn overtime. The proper measure of the grievor's loss is the other senior team member's standby and overtime earnings for that week.

[180] It is unclear from the evidence what overtime the other senior team member actually earned during the Christmas week of 2006. Presumably, the employer has the records. Those earnings should form the basis of the remedy. I refer this issue to the parties, with the liberty to bring the issue of what overtime the other senior team member actually earned back before me, if necessary. I expect that the parties should be able to agree on the amount.

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

(The Order appears on the next page)

V. Order

[182] The grievance is upheld.

[183] I order the employer to pay the grievor, at the applicable rates, the standby and overtime hours paid to the other senior team member for the standby week of December 19 to 26, 2006, minus any applicable deductions.

[184] I will remain seized of this matter for 90 days to resolve any issues relating to the calculation of the amount ordered paid to the grievor.

May 27, 2011.

**Paul Love,
adjudicator**