**Date:** 20181016

**File:** 569-02-176

**Citation: 2018 FPSLREB 82**

*Federal Public Sector Labour Relations and Employment Board Act* and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

**PUBLIC SERVICE ALLIANCE OF CANADA**

Bargaining Agent

and

**TREASURY BOARD**
**(Canada Border Services Agency)**

Employer

Indexed as
*Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*

In the matter of a policy grievance referred to adjudication

**Before:** John G. Jaworski, a panel of the Federal Public Sector Labour Relations and Employment Board

**For the Bargaining Agent:** Lisa Greenspoon, Public Service Alliance of Canada

**For the Employer:** Karen Clifford, counsel

Heard at Ottawa, Ontario,
October 12, 2017.

## REASONS FOR DECISION

### I. Policy grievance referred to adjudication

**1** On September 19, 2014, the bargaining agent, the Public Service Alliance of Canada (PSAC), filed a policy grievance under s. 220 of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) stating as follows:

> *The PSAC grieves the Employer's contravention of Appendix J of the Border Services collective agreement, expiry June 20, 2014. The Employer has failed to compensate members who worked 75 hours in the month of June, 2013 in accordance with the provisions of Appendix J.*

**2** As relief, the PSAC requested an order

i. declaring that the Canada Border Services Agency ("the employer" or CBSA) breached the agreement between the PSAC and the Treasury Board for the Border Services Group (all employees) that was signed on March 17, 2014, and that expired on June 20, 2014 ("the BSO collective agreement");

ii. requiring the employer to pay all members who in the month of June 2013 received pay for at least 75 hours for performing dues to which the allowance at issue in the grievance applies; and

iii. providing any other relief that the grievor may request and that the Board deems just.

**3** On June 17, 2015, the employer partially allowed the grievance, stating that any member of the bargaining unit who worked 75 hours in the month of June 2013, between June 21 and 30, was entitled to the allowance for that month.

**4** On July 7, 2015, the grievor referred the grievance to the Public Service Labour Relations and Employment Board (PSLREB) for adjudication.

**5** On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the PSLREB and the title of the *PSLRA* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board") and the *Federal Public*

*Sector Labour Relations Act* ("the *Act*").

**6** The parties submitted an agreed statement of facts (ASF).

**7** At the outset of the hearing, the employer stated that it intended to call one witness to testify, about context. The grievor indicated that it felt that this evidence was not relevant; however, it did not oppose the intention and indicated that it would also call a witness to testify about context.

## II. Summary of the evidence

**8** The PSAC is the bargaining agent for all members of the Border Services Group bargaining unit, whose terms and conditions of employment are governed, in part, by the BSO collective agreement.

**9** At the time of the hearing, Morgan Gay was the national negotiator for the PSAC and had been for 11 years; he has participated in the negotiation of between 40 and 50 collective agreements. Also at the time of the hearing, Ted Leindecker was a senior negotiator with the employer and had been since 2009-2010. He stated that he had been involved in the negotiation of six or seven collective agreements and that as of the hearing, he was involved in negotiating another eight.

**10** Appendix J of the BSO collective agreement ("Appendix J") is titled "Memorandum of Understanding Between the Treasury Board of Canada and the PSAC with respect to Integrated Border Services Allowance" ("the BSO allowance"). It states as follows:

> 1. *The Employer recognizes the responsibilities associated with the integrated border services that support national security and public safety.*
>
> 2. *The Employer will provide an annual allowance to incumbents of FB positions for the performance of FB duties in the Border Services group effective as of June 21, 2013.*
>
> 3. *The Integrated Border Services Allowance shall be paid in accordance with the following table:*

| ***Annual Allowance*** |
|---|

| ***Border Services Group (FB)*** | |
|---|---|
| ***Positions*** | ***Annual Allowance*** |
| *Non-Uniformed Officers* | *$1,250* |
| *Uniformed Officers* | *$1,750* |

*4. This allowance shall be paid on the same basis as the employee's regular pay. An employee shall be entitled to receive the Allowance for each calendar month in which he or she receives pay for at least seventy-five (75) hours for the performance of FB duties to which the Allowance applies.*

*5. An employee will be entitled to receive the Border Services Allowance:*

*(i) during any period of **paid** leave up to a maximum of sixty (60) **consecutive** calendar days;*

*or*

*(ii) during the full period of paid leave where an employee is granted injury-on-duty leave with pay.*

*6. The Allowance does not form part of a [sic] FB's salary except for the calculation of the Maternity and Parental Allowances.*

*7. A part-time employee shall be entitled to the allowance on a pro rata basis.*

[Emphasis in the original]

**11** The BSO collective agreement also contained the following provisions:

. . .

***ARTICLE 34***

***VACATION LEAVE WITH PAY***

***34.01*** *The vacation year shall be from April 1 to March 31 inclusive of the following calendar year.*

***Accumulation of Vacation Leave Credits***

***34.02*** *For each calendar month in which an employee has earned at least seventy-five (75) hours' pay, the employee shall earn vacation leave credits at the rate of:*

*(a) nine decimal three seven five (9.375) hours until the month in which the anniversary of the employee's eighth (8th) year of service occurs;*

*(b) twelve decimal five (12.5) hours commencing with the month in which the employee's eighth (8th) anniversary of service occurs;*

*(c) thirteen decimal seven five (13.75) hours commencing with the month in which the employee's sixteenth (16th) anniversary of service occurs;*

*(d) fourteen decimal four (14.4) hours commencing with the month in which the employee's seventeenth (17th) anniversary of service occurs;*

*(e) fifteen decimal six two five (15.625) hours commencing with the month in which the employee's eighteenth (18th) anniversary of service occurs;*

*(f) sixteen decimal eight seven five (16.875) hours commencing with the month in which the employee's twenty-seventh (27th) anniversary of service occurs;*

*(g) eighteen decimal seven five (18.75) hours commencing with the month in which the employee's twenty-eighth (28h) anniversary of service occurs.*

. . .

***Scheduling of Vacation Leave With Pay***

***34.05***

. . .

*(b) Vacation scheduling:*

*(i) Employees will submit their annual leave requests for the summer leave period on or before April 15th, and on or before September 15th for the winter leave period. The Employer will respond to such requests no later than May 1st, for the summer leave period and no later than October 1st, for the winter holiday leave period.*

*Notwithstanding the preceding paragraph, with the agreement of the Alliance, the employer may alter the specified submission dates for the leave requests. If the submission dates are altered, the employer must respond to the leave request fifteen (15) days after such submission*

*dates;*

*(ii) The summer and winter holidays periods are:*

- *for the summer leave period, between June 1 and September 30,*
- *for the winter holiday season leave period, from December 1 to March 31.*

. . .

***Carry-Over and/or Liquidation of Vacation Leave***

***34.11***

*(a) Where, in any vacation year, an employee has not been granted all of the vacation leave credited to him or her, the unused portion of his or her vacation leave, to a maximum of two hundred and sixty-two decimal five (262.5) hours of credits, shall be carried over into the following vacation year. All vacation leave credits in excess of two hundred and sixty-two decimal five (262.5) hours shall be automatically paid in cash at his or her daily rate of pay, as calculated from the classification prescribed in his or her certificate of appointment of his or her substantive position on the last day of the vacation year.*

*(b) Notwithstanding paragraph (a), if, on March 31, 1999, or on the date an employee becomes subject to this Agreement after March 31, 1999, an employee has more than two hundred and sixty-two decimal five (262.5) hours of* unused *vacation leave credits, a minimum of seventy-five (75) hours per year shall be granted or paid in cash by March 31 of each year, commencing on March 31, 2000, until all vacation leave credits in excess of two hundred and sixty-two decimal five (262.5) hours have been liquidated. Payment shall be in one instalment per year and shall be at the employee's daily rate of pay, as calculated from the classification prescribed in his or her certificate of appointment of his or her substantive position on March 31 of the applicable previous vacation year.*

***34.12*** *During any vacation year, upon application by the employee and at the discretion of the Employer, earned but unused vacation leave credits in excess of one hundred and twelve decimal five (112.5) hours may be paid in cash at the employee's daily rate of pay, as calculated from the classification prescribed in the certificate of appointment of the employee's substantive position on March 31 of the*

*previous vacation year.*

. . .

***34.18***

*(a) An employee shall be credited a one-time entitlement of thirty-seven decimal five (37.5) hours of vacation leave with pay on the first (1st) day of the month following the employee's second (2nd) anniversary of service, as defined in clause 34.03.*

*(b) The vacation leave credits provided in paragraph 34.18(a) above shall be excluded from the application of clause 34.11, dealing with the Carry-Over and/or Liquidation of Vacation Leave.*

***ARTICLE 35***

***SICK LEAVE WITH PAY***

***Credits***

***35.01***

*(a) An employee shall earn sick leave credits at the rate of nine decimal three seven five (9.375) hours for each calendar month for which the employee receives pay for at least seventy-five (75) hours.*

. . .

***ARTICLE 62***

***PAY ADMINISTRATION***

***62.01*** *Except as provided in this Article, the terms and conditions governing the application of pay to employees are not affected by this Agreement.*

. . .

***62.03***

*(a) The rates of pay set forth in Appendix A shall become effective on the dates specified.*

*(b) Where the rates of pay set forth in Appendix A have an effective date prior to the date of signing of this Agreement, the following shall apply:*

*(i) "retroactive period" for the purpose of subparagraphs (ii) to (v) means the period from the effective date of the revision up to and*

> *including the day before the collective agreement is signed or when an arbitral award is rendered therefor;*
>
> *(ii) a retroactive upward revision in rates of pay shall apply to employees, former employees or, in the case of death, the estates of former employees who were employees in the groups identified in Article 9 of this Agreement during the retroactive period;*
>
> *(iii) for initial appointments made during the retroactive period, the rate of pay selected in the revised rates of pay is the rate which is shown immediately below the rate of pay being received prior to the revision;*
>
> **
>
> *(iv) for promotions, demotions, deployments, transfers or acting situations effective during the retroactive period, the rate of pay shall be recalculated, in accordance with the Directive on Terms and Conditions of Employment using the revised rates of pay. If the recalculated rate of pay is less than the rate of pay the employee was previously receiving, the revised rate of pay shall be the rate, which is nearest to, but not less than the rate of pay being received prior to the revision. However, where the recalculated rate is at a lower step in the range, the new rate shall be the rate of pay shown immediately below the rate of pay being received prior to the revision;*
>
> . . .
>
> ***ARTICLE 64***
>
> ***DURATION***
>
> **
>
> ***64.01*** *This Agreement shall expire on June 20, 2014.*
>
> ***64.02*** *Unless otherwise expressly stipulated, the provisions of this Agreement shall become effective on the date it is signed.*
>
> . . .

**12** Mr. Gay testified that Appendix J was negotiated near the end of bargaining, in fact at the final session. He stated that it was modelled on what

correctional officers had negotiated in the collective agreement between the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN that was signed on November 5, 2013, and that expired on May 31, 2014 ("the CX collective agreement").

**13** When Mr. Gay was asked how the threshold of 75 hours was reached in article 4 of Appendix J, he replied that it was modelled after the CX collective agreement. When he was asked how the effective date in article 2 of Appendix J was reached, he said that it was used because it would coincide with the same day and month for the pay increments found at Appendix A of the BSO collective agreement, which were effective on June 21 of each of 2011, 2012, and 2013.

**14** Mr. Gay was brought to articles 34 and 35 of the BSO collective agreement, which state that a leave benefit is earned and reference the threshold of 75 hours, and was asked if there was a discussion about modelling the 75-hour threshold in Appendix J on those articles. His answer was that a threshold had to be found, that it was consistent with other articles, and that it was modelled after the CX correctional agreement.

**15** Clause 43.07 of the CX collective agreement states as follows:

> ***43.07 Correctional Officer Allowance***
>
> *Employees who are eligible for the Penological Factor Allowance or the Offender Supervision Allowance are not covered by this Article.*
>
> *The employer will provide an allowance to incumbents of a CX position for the performance of duties in the Correctional Services group beginning June 1, 2013.*
>
> *(a) The Correctional Officer Allowance is used to recognize the working conditions of the correctional officer employment and to provide additional compensation to an incumbent who is employed and who, by reason of duties being performed, assumes the responsibilities associated with the Correctional Services Group.*
>
> *(b) The value of the Correctional Officer Allowance is one thousand seven hundred and fifty dollars ($1,750) per annum. This allowance shall be paid on the same basis as the employee's regular pay. An employee shall be entitled to receive the Allowance for any month in*

> *which he or she receives a minimum of eighty (80) hours' pay in a position to which the allowance applies.*
>
> *(c) An employee will be entitled to receive the Correctional Officer allowance:*
>
> *(i) during any period of paid leave up to a maximum of sixty (60) consecutive calendar days;*
>
> *or*
>
> *(ii) during the full period of paid leave where an employee is granted injury-on-duty leave with pay.*
>
> *(d) The Correctional Officer allowance does not form part of a CX's salary except for the calculation of the Maternity and Parental Allowance.*

**16** Mr. Leindecker stated that the employer presented the proposal with respect to Appendix J to the grievor during bargaining. When he was asked where it came from, he stated that it had been based on wording in the employer's compensation rules at section A.3.11 of the "Directive on Terms and Conditions of Employment" ("the Ts & Cs of employment"), in its Appendix , but then stated there were other formulas. He said that it also came from wording in the collective agreement for the Technical Services Group, which the Treasury Board and the grievor entered into and that was signed on October 18, 2013, and that expired on June 21, 2014 ("the TS collective agreement"), and, perhaps, the Ships' Officers Group collective agreement. No copy of the Ships' Officers Group collective agreement was entered into evidence.

**17** Section A.3.11 of the Ts & Cs of employment Appendix states as follows:

> ***A.3.11 Calculation of gross pay***
>
> *3.11.1 To calculate the gross pay for a biweekly period, the Treasury Board has authorized a four-week conversion factor of 13.044. This factor is used in determining the biweekly gross pay or other entitlements that are paid on the regular pay by diving 26.088 into the person's annual rate of pay or annual entitlement rate. The formula is as follows:*

*Four-week gross pay:*

*annual pay rate and other entitlements divided by 13.044*

*Two-week gross pay:*

*annual pay rate and other entitlements divided by 26.088*

*The gross pay is calculated to three decimal places.*

*If the third decimal place is 5 or more, the second decimal place is rounded upward. For example, $6.055 will be rounded to $6.06.*

*If the third decimal place is less than 5, the second decimal place is retained. For example, $6.064 will be $6.06.*

*3.11.2* *When the rate of pay is an hourly rate it is multiplied by the normal workweek multiplied by 52.176 to establish the annual pay rate. Other entitlements that are paid on the regular pay are also converted to an annual rate.*

*3.11.3* *Calculation for partial pay period*

*When a person works a partial week or when the rate payable is different for a portion of the pay period, the calculation is made using the days of entitlement exclusive of the normal days of rest. The formula is as follows:*

*(Days of entitlement multiplied by rate of pay) divided by Compensation days**

**A compensation day's pay is calculated by dividing the biweekly rate by the number of days of entitlement in the two-week period.*

*3.11.4* *Days of entitlement*

*3.11.4.1 Days of entitlement are any compensation days for which a person is entitled to be paid; in other words, one of the following:*

*a. any standard working day on which the person was on duty or was absent on authorized leave with pay; or*
*b. any day authorized as a designated holiday with pay.*

*3.11.4.2 A person is not entitled to be paid for a designated holiday under the following conditions:*

*a. when the person is on leave without pay on both the working day immediately preceding and the working day immediately following the designated holiday;*
*b. when the person is absent without leave (refer to the relevant collective agreement or terms and conditions of employment);*
*c. when the person is under suspension;*
*d. when the person is on Reserve Force training without pay or injury-on-duty leave without pay;*
*e. when the designated holiday, for a seasonal worker, falls within the period in which the person is not required to perform the duties of the position because of the seasonal nature of the duties;*

*f. when the designated holiday falls on a scheduled day of work for a person employed part-time;*
*g. when the designated holiday immediately precedes the first day of employment; and*
*h. when the designated holiday both follows and is contiguous to the last day of employment.*

*3.11.4.3 When two or more entitlements are authorized with the same effective date, the sequence for determining payments is as follows: first, pay increments; then salary revisions; then promotions, deployments and demotions.*

*3.11.5 Compensation days*

*3.11.5.1 The expression "compensation days" means the number of days in a pay period other than the designated days of rest.*

*3.11.5.2 When a person works an average of the hours in the normal workweek, within a specified period, the days of rest granted in lieu of Saturday and Sunday are excluded when calculating the number of compensation days.*

**18** The TS collective agreement states in part at Appendix P as follows:

***MEMORANDUM OF UNDERSTANDING***

***BETWEEN THE TREASURY BOARD***

***(HERINAFTER CALLED THE EMPLOYER)***

***AND***

***THE PUBLIC SERVICE ALLIANCE OF CANADA***

***(HERINAFTER CALLED THE ALLIANCE)***

***IN RESPECT OF EMPLOYEES IN THE***

***TECHNICAL INSPECTION (TI) GROUP***

. . .

*3. On the date of signing of this Memorandum of Understanding, the parties agree that incumbents of [sic] above listed positions shall be eligible to receive a "terminable allowance" in the following amounts and subject to the following conditions:*

*(i) An Allowance to be paid in accordance with the following grids:*

. . .

*(ii) The terminable allowance specified above does not form part of an employee's salary.*

*(iii) An employee in a position outlined above shall be paid the terminable allowance for each calendar month for which the employee receives at least seventy-five (75) hours' pay.*

*(iv) The terminable allowance shall not be paid to or in respect of a person who ceased to be a member of the bargaining unit prior to the date of signing of this Collective Agreement.*

. . .

*6. This Memorandum of Understanding expires on June 21, 2014.*

**19** When he was asked whether any discussion occurred specific to article 4 of Appendix J, Mr. Leindecker stated that he did not recall any taking place; he said that the discussion centred on the quantum of the allowance and on whether it was pensionable. When asked whether any discussion took place with respect to article 2 of Appendix J, Mr. Leindecker stated that there was none and that the employer presented the clause to the grievor in the form in which it appears in Appendix J.

**20** In cross-examination, Mr. Leindecker agreed that a calendar month starts on the first day of any given month and that it ends on the last day of the same month.

**21** Paragraph 6 of the ASF states that the employer originally began to pay the allowance effective only in July of 2013; however, after the grievance was filed, it determined that any employee covered by the BSO collective agreement who met the 75-hour threshold set out in Appendix J between June 21 and June 30, 2013, was

entitled to that portion of the allowance payable per month.

**22** Save and except for the month of June 2013, the parties agreed that the annual allowance amount of either $1250 or $1750 was paid monthly, pro rata, to those employees who were covered by the BSO collective agreement and who met the 75-hour threshold requirement per month, being 1/12 of either $1250 or $1750, depending on if they were uniformed or non-uniformed members of the bargaining unit.

## III. Summary of the arguments

### A. For the grievor

**23** The question at issue is whether the 75-hour minimum requirement set out in article 4 of Appendix J applies to the entire month of June 2013, as suggested by the grievor, or is limited somehow by the effective date (June 21, 2013), as applied by the employer, thus limiting the payment of a portion of the annual allowance for the month of June 2013 to only those employees who earned 75 hours of pay between June 21 and 30, 2013.

**24** The evidence disclosed that the negotiators did not consider how the annual allowance was to be calculated or applied for the month of June 2013.

**25** Absent any discussion of how the annual allowance was to be calculated or applied for the month of June 2013, the grievor submitted that the plain meaning of the language should be applied. In that respect, it referred me to *Construction and General Workers' Local 1111 v. PCL Construction Ltd.* (1982), 8 L.A.C. (3d) 49 ("*PCL*"), and to *Maple Leaf Consumer Foods v. U.F.C.W. Canada, Local 175* (2011), 205 L.A.C. (4th) 393 ("*Maple Leaf*").

**26** Paragraph 23 of *PCL* states that the well-established rules for construing written contracts are the following:

> *(a) All contracts must be interpreted according to the primary and natural meaning of the language used by the parties.*
>
> *(b) If the plain and ordinary language is unambiguous, is not excluded by the context and is sensible with reference to the extrinsic circumstances, then such meaning must be taken conclusively as being the intention of the*

*parties.*

**27** Paragraph 18 of *Maple Leaf* states as follows:

> *18. The fundamental rule of interpretation for collective agreements is the same as for commercial contracts and statutes: the words used must be given their plain and ordinary meaning unless it is apparent from the structure of the provision or the collective agreement read as a whole that a different or special meaning is intended. All words must be given meaning, and different words are presumed to have different meanings, unless this would lead to a result that is absurd or inconsistent with the overall scheme and structure of the agreement.*

**28** The only departure from this plain-meaning rule is set out in *Public Service Alliance of Canada v. Communications Security Establishment*, 2009 PSLRB 121, which states the following at paragraph 162:

> *[162] . . . It is trite to state that in doing so I must apply the words chosen by the parties to the agreement or, as in the present case, included as a result of an arbitral award. In applying the arbitral award, I must give the words their ordinary meaning and must avoid looking beyond the words to search for the parties' intent. Simply put, the parties' rights or obligations flow from the text of the agreement, unless its ordinary meaning leads to an incongruity or a truly absurd result.*

**29** The wording that the grievor submitted should be interpreted in the same manner as the wording in articles 34 and 35 of the BSO collective agreement. "Calendar month" means the entire specific month. If someone works (or otherwise earns pay while on paid leave that is not otherwise excluded by Appendix J) 75 hours in a given month, then he or she receives that month's portion of the annual allowance (or 1/12 of $1250 or $1750, whichever amount applies).

**30** The 75-hour minimum is not tied in any way to the effective date of June 21. Only the following two questions need to be asked:

i. Was the allowance in effect at the end of June 2013?

ii. Did the employee work 75 hours?

**31** If the allowance set out in Appendix J was in effect in June of 2013 and any given employee worked the minimum of 75 hours as set out in that appendix, then

that employee is entitled to be paid 1/12 of the annual amount of $1250 or $1750, as the case may be.

**32** Paragraph 35 of *Brisson v. Canadian Food Inspection Agency*, 2005 PSLRB 38, states as follows: "The adjudicator, when dealing with a clear clause, cannot add terms that might have the effect of expanding or diminishing the clause's scope." The grievor stated that to read Appendix J in the manner suggested by the employer, which is that to earn the annual allowance for the month of June 2013, an employee must have worked 75 hours between June 21 and 30, 2013, would in effect add terms that would either expand or diminish the scope of Appendix J.

**33** The grievor requested that the grievance be granted, that a declaration be made that the employer is in breach of Appendix J of the collective agreement, and that an order be made that the employer pay the appropriate 1/12 monthly amount of the annual allowance to each bargaining unit member who worked at least 75 hours in the month of June of 2013.

**B. <u>For the employer</u>**

**34** The burden of proof is on the grievor, which the employer submitted the grievor has not discharged.

**35** The grievance raised the following issue: "Should the allowance be paid on a going-forward basis from June 21, 2013?" The employer submitted that it should and that there has been no violation of the collective agreement

**36** *Delios v. Canada (Attorney General)*, 2015 FCA 117 at para. 20, states the following:

> *[20] . . . interpretations of collective agreement provisions involve elements of factual appreciation, specialization and expertise concerning collective agreements, the disputes that arise under them, the negotiations that lead up to them and, more broadly, how the management-labour dynamic swirling around them plays out in various circumstances. . . .*

**37** A number of rules of construction are used as aids to determining the parties' true intent when a dispute arises about the meaning and interpretation of a collective agreement provision.

**38** Section 229 of the *Act* provides that an adjudicator's decision may not

have the effect of requiring the amendment of a collective agreement or an arbitral award, which is supported by *Professional Institute of the Public Service v. National Research Council of Canada*, 2013 PSLRB 88 ("*PIPSC v. NRC*").

**39** An adjudicator is obligated to determine the parties' true intent when they entered into a collective agreement. He or she must use the ordinary meaning of the words that the parties used, unless that would lead to some absurdity. In this respect, the employer referred me to *Chafe v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112.

**40** The parties are presumed to have intended to mean what the agreement states. In this respect, the employer referred me to *PIPSC v. NRC* and to Brown & Beatty, *Canadian Labour Arbitration*, at para. 4:2100.

**41** *Wamboldt v. Canada Revenue Agency*, 2013 PSLRB 55 at para. 27 states that a benefit that has a monetary cost to the employer must be clearly and expressly granted under the terms of the collective agreement.

**42** The employer further submitted that it is appropriate to consider both the English and French versions of the BSO collective agreement and that the interpretation to be sought is the one coherent with both texts. In this respect, it referred me to *PIPSC v. NRC* and to *Lahnalampi v. Treasury Board (Department of Employment and Social Development)*, 2014 PSLRB 22.

**43** The context in which the words are located is critical to their meaning. An adjudicator must consider the whole of a collective agreement, as the overall agreement forms the context in which the words are to be interpreted. It is necessary to determine whether the interpretation of the words, read in their immediate context and in the context of the agreement as a whole, conflict with the other collective agreement provisions. In that respect, the employer referred me to *Chafe, Cooper v. Canada Revenue Agency*, 2009 PSLRB 160, *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.*, 2002 NBCA 30, *Burgess v. Treasury Board (Department of Fisheries and Oceans)*, 2017 FPSLREB 20, and Brown & Beatty, at para. 4:2150.

**44** *Chafe* also stands for the proposition that even if a particular provision may seem unfair, it is not a reason for an adjudicator to ignore it if it is otherwise

clear.

**45** The employer submitted that based on its plain and ordinary meaning, the phrase "effective as of June 21, 2013" is used to signify a beginning or start date of the allowance. The parties agreed to the date on which the allowance came into operation. This is consistent with the use of the word "effective" elsewhere in the collective agreement and its dictionary meaning.

**46** "Effective" is defined in the *Canadian Oxford Dictionary*, 2nd edition, as "coming into operation". In *Black's Law Dictionary*, 9th edition, it is defined as "in operation at a given time". These definitions are reinforced when the French version is considered. It uses *à compter du*, which denotes "from" (according to the *Collins French-English Dictionary* (online)) or "from that day on" (according to the *Grand Dictionnaire Larousse* from 1999).

**47** The grievor's proposal of the meaning is contrary to the notion of something being effective as of a specific date; instead, it suggests that the benefit ought to apply to time worked before the agreed-to effective date. This leads to an absurd result, which is recognizing a right that does not exist.

**48** The Board can consider whether there is an ordinary, generally accepted understanding or definition of what is meant by "effective as of."

**49** The employer submitted that the grievor's interpretation of the words in article 4 of Appendix J is misplaced. The grievor suggested that the reference to "calendar month" in that article ought to be read as a stand-alone provision that effectively trumps the meaning of "effective as of June 21, 2013" in article 2. The employer submitted that this ignores the overall wording of Appendix J in its entirety. Article 4 must be read in conjunction with the other provisions in that appendix, including article 5.

**50** Article 5 of Appendix J provides for the allowance to be paid to employees who are on paid leave or on injury-on-duty leave up to a maximum of 60 consecutive calendar days. It is essential to read this in conjunction with article 2 to understand the effective start date for the benefit to be paid to someone in those circumstances; otherwise, it would not be possible to determine the start date of the 60 days.

**51** Given that clause 64.02 of the BSO collective agreement states that the effective date of the collective agreement is the date on which it was signed (March 17, 2014) and that a different effective date was expressly stipulated (June 21, 2013), the grievor suggested an effective date of June 1, 2013. In effect, this interpretation of the collective agreement would rewrite it, which is contrary to the principles of collective agreement interpretation.

**52** As the allowance in Appendix J is an annual allowance, it is defined to cover the period of a year, or 365 days. The employer's interpretation is that this is consistent with the expressed effective date of June 21, 2013, and expiry date of June 2014 and with the annual period of 365 days as reflected in the time frame of June 21, 2013, to June 20, 2014. The grievor's suggestion, which effectively backdates the benefit to June 1, 2013, would in essence make the allowance more than an annual allowance, which would be inconsistent with the cycle expressed elsewhere in the collective agreement of the effective start date of June 21, 2013, and end date of June 20, 2014.

**53** Clause 35.01 of the BSO collective agreement has similar wording to article 4 of Appendix J. It states that for each calendar month for which the employee receives pay for at least 75 hours, he or she earns 9.375 hours of sick leave.

**54** Appendix A of the BSO collective agreement sets out the scales for the annual rates of pay. Each year has an effective date of June 21. The word "effective" in this portion of that agreement clearly signals a starting point for the benefit, which is a pay increment.

**55** There is no issue that the allowance is an annual allowance. A year is either 365 or 366 days. The employer's interpretation is consistent with an annual allowance covering a period of 365 days, which contrasts the grievor's interpretation, which is that the allowance is backdated to June 1, 2013, and covers more than 365 days.

**56** The employer submitted that the grievor's interpretation requires a retroactive effect when none was provided for under the BSO collective agreement and that the grievor's interpretation would require interpreting that agreement inconsistently.

**57** The BSO collective agreement states that it is to be effective as of the date it is signed except as otherwise stipulated. The allowance is otherwise stipulated to be effective as of June 21, 2013. Nothing in the BSO collective agreement allows it to be interpreted retroactively.

**58** An example of inconsistency would be those members of the bargaining unit who ceased to be members on or by June 20, 2013. No matter how many hours they worked in the month of June 2013, they would not be entitled to the allowance.

**59** Furthermore, the parties negotiated providing the allowance to employees on leave with pay. There is no analogous provision for employees on leave without pay. Accordingly, someone on leave without pay as of June 20, 2013, would not be entitled to the allowance. This would be the case regardless of what hours they might have worked in the calendar month of June before that date.

**60** The employer's position is that under the grievor's interpretation, the entitlement would be inconsistent among the bargaining unit members. It would not be logical to allow for the payment of the allowance only to the group of employees who were still members or on leave with pay by purporting to acknowledge hours worked between June 1 and 20, 2013, for those groups but recognizing the entitlement for others who might have worked between June 1 and 20 but who ceased to be members of the bargaining unit or who were on leave without pay as at June 21, 2013.

**61** The employer also referred me to *Maple Leaf*, *Public Service Alliance of Canada v. Treasury Board (Department of Veterans Affairs)*, 2013 PSLRB 165, *Stevens v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 34, *Tembec Industries Inc. v. Pulp, Paper and Woodworkers of Canada, Local 15*, [2010] B.C.C.A.A.A. No. 168 (QL), *Fehr v. Canada Revenue Agency*, 2017 FPSLREB 17, and *Professional Institute of the Public Service of Canada v. Canada Revenue Agency*, 2016 PSLREB 77 ("*PIPSC v. CRA*").

**62** The employer requests that the grievance be dismissed.

**C. <u>The grievor's reply</u>**

**63** At no point did the grievor suggest that for the month of June 2013 it was appropriate that the 75 hours be calculated only between June 21 and 30.

**64** The grievor's position is that if someone worked 75 hours in June of 2013 or had a combination of the hours of work or paid leave recognized in Appendix J totalling 75 hours, then he or she was entitled to the allowance.

## IV. Reasons

**65** The law in this area is well settled. It is summarized as follows in *Canadian Labour Arbitration* at paragraph 4:2100: ". . . in determining the intention of the parties, the cardinal presumption is that the parties are assumed to have intended what they have said, and that the meaning of the collective agreement is to be sought in its express provisions."

**66** When interpreting the collective agreement, s. 229 of the *Act* provides that an adjudicator or the Board's decision may not have the effect of requiring the amendment of a collective agreement or arbitral award.

**67** This grievance deals with the very narrow issue of whether employees covered by the BSO collective agreement who received pay for 75 hours for performing border officer ("FB") duties during the month of June 2013 and who were not paid a 1/12 portion of the annual allowance of either $1250 or $1750 were entitled to that payment.

**68** The parties agree that Appendix J provides for the payment of an annual allowance in the amount of $1250 or $1750, depending on whether the employee is uniformed or not. However, it is not an annual allowance in the true sense in that it is not paid only one time per year or in full to every border services officer (BSO) bargaining unit member over the course of a year or 12 months.

**69** The parties also agreed that save and except for the month of June of 2013, if an employee received pay for 75 hours for performing FB duties in a calendar month, then he or she is entitled to receive a payment for that month in the form of a sum equivalent to 1/12 of either $1250 or $1750 depending on if he or she is uniformed or not.

**70** The definition of "calendar month" is not in dispute; the parties agreed that the wording of article 4 of Appendix J is that 75 hours per "calendar month" meant each individual specific calendar month.

**71** One-twelfth of $1250 is roughly $104.17, and 1/12 of $1750 is roughly $148.83. For the time being, again leaving aside the month of June of 2013, the parties agree and Appendix J states that employees shall receive in each calendar month no more than (depending on whether they are uniformed) either $104.17 or $148.83, in addition to their other pay and benefits, as long as they have received pay in that calendar month for a minimum of 75 hours for performing FB duties. Simply put, if a hypothetical uniformed BSO earned pay in the month of July 2013 for performing FB duties for 75 hours or more, he or she was entitled under Appendix J to be paid $148.83.

**72** The 75 hours of FB duties can and does include paid leave but only up to a certain extent. Article 5 of Appendix J says that employees who are either on paid leave (to a maximum of 60 consecutive days) or on injury-on-duty leave with pay are still entitled to receive the BSO allowance.

**73** Therefore, not every employee who would otherwise be entitled to receive the BSO allowance will receive it for every calendar month. If an employee does not meet the threshold of 75 hours of pay for FB duties in a given specific calendar month, he or she will not receive the $104.17 or $148.83 for that given calendar month. This means that over the course of a 12-month period, some employees in the BSO bargaining unit may receive either the $1250 or $1750, while others will receive less.

**74** Again, leaving aside the month of June 2013, over the course of a year or 12-month period, for example from July 1, 2013, to June 30, 2014, an employee who met the 75-hour threshold in only 6 of those 12 months would receive only 6 payments of either $104.17 or $148.83 (as the case may be), totalling only half the annual allowance (either $625 or $875).

**75** The title or characterization of the BSO allowance as an annual allowance is a misnomer. Despite being identified as both annual and a fixed amount (of either $1250 or $1750), receiving the BSO allowance was wholly dependent upon receiving pay for a minimum of 75 hours for performing FB duties in a specific calendar month. The allowance is really a contingent benefit with a contingent amount payable monthly (as long as a qualified BSO bargaining unit member met certain criteria). The maximum amount over any given 12-month period shall not exceed either $1250 or $1750. In reality, it is a monthly allowance, payable monthly and dependent wholly on if the

criteria set out in Appendix J are met. The sums of $1250 and $1750 are simply dollar-value ceilings on what can be paid to qualified BSO bargaining unit members over a 1-year period.

**76** One of the employer's arguments in support of its position that the allowance is annual is the effective date set out in article 2 of Appendix J, being June 21, 2013, and the expiry date of the collective agreement, being June 20, 2014, which is exactly 1 year or 365 days later. I do not accept this argument.

**77** In its brief of authorities, the employer provided me with several definitions of "annual". The *Canadian Oxford Dictionary* defines it as "reckoned by the year; occurring every year; living or lasting for one year * *noun*: a book etc. published once a year; a yearbook; a plant that lives for a year or less."

**78** Immediately below that is the definition of "annual allowable cut", which is defined as "the volume of wood which may be cut each year in a specified area."

**79** Immediately below that definition is the definition of "annual general meeting", which is defined as "a yearly meeting of members or shareholders esp. for holding elections and reporting on the year's events."

**80** Below that definition is the definition of "annual report", which is defined as "a yearly report made by the directors of a company to its shareholders containing the financial statements and a summary of the year's activities."

**81** Finally, below that definition is the definition of "annual ring", which is defined as "a ring in the cross-section of a plant, esp. a tree, produced by one year's growth."

**82** It is obvious to me that the word "annual" means something that occurs more than once but only once per calendar year or during a 12 month period. An annual event, such as Christmas, happens every year but only once during a calendar year, therefore it can be said to be annual.

**83** The BSO allowance as specified in Appendix J however is not a once per year payment. Nor is the amount, be it the $1250 or $1750, an all or nothing payment; meaning it is contingent on each employee receiving pay for at least 75 hours for FB duties in each and every calendar month during the year (or over the course of a year)

to receive the full allowance amount, failing which they would get nothing. Simply put, while the word annual is used to modify the word allowance, a reading of the entire Appendix J signifies that it is really a monthly allowance, that is being calculated and paid monthly, which is not to exceed over the course of a year or twelve months, the amount of $1250 or $1750, depending on if the employee is non-uniformed or uniformed.

The employer's characterization of "annual" does not take into account employees who joined the BSO bargaining unit after June 21, 2013. For example, an employee who joined in August of 2013 would not be entitled to the full amount of $1250 or $1750 (as the case may be) between August 2013 and June 20, 2014. However, subject to meeting the threshold of receiving pay for 75 hours for performing FB duties in a calendar month, the employee would be entitled to be paid the maximum of $1250 or $1750 (as the case may be) over the course of the 1-year period starting in August 2013 and ending at the end of July 2014. However, over the period from August 1, 2013, to June 21, 2014, the employee would receive only 11/12 of the BSO allowance.

**84** The employer's argument disregards s. 107 of the *Act*, commonly referred to as the freeze provision, which states as follows:

> ***Duty to observe terms and conditions***
>
> ***107*** *Unless the parties otherwise agree, and subject to subsection 125(1), after the notice to bargain collectively is given, each term and condition of employment applicable to the employees in the bargaining unit to which the notice relates that may be included in a collective agreement, and that is in force on the day on which the notice is given, is continued in force and must be observed by the employer, the bargaining agent for the bargaining unit and the employees in the bargaining unit until a collective agreement is entered into in respect of that term or condition or*
>
> > ***(a)*** *if the process for the resolution of a dispute is arbitration, an arbitral award is rendered; or*
> >
> > ***(b)*** *if the process for the resolution of a dispute is conciliation, a strike could be declared or authorized without contravening subsection 194(1).*

**85** The recent history and reality of collective bargaining in the federal public sector discloses that significant time gaps are common between the expiry of one collective agreement and the signing of a new one for the same bargaining unit. In

the case of the BSO bargaining unit, almost three years passed between the expiry of the old agreement and the signing of the one currently subject to this grievance.

**86** It is also no secret that as of the date of the hearing of this grievance, the BSO collective agreement had not been replaced by a new one and that more than three years had passed since it expired. It was signed on March 17, 2014, and had an expiry date of June 20, 2014. In essence, without the freeze provisions, it was in force for 95 days. The BSO allowance agreed to in Appendix J did not end as at June 21, 2014. The practical application of s. 107 of the *Act* dictates that until such time as either the parties negotiate an end to Appendix J or Parliament legislates it out of existence, it will remain in place.

**87** Appendix A of the BSO collective agreement sets out pay increments, which for the most part are annual. It is not uncommon for pay increments set out in public-sector collective agreements, such as the BSO collective agreement, to arrive annually on the same day. According to Appendix A, employees were supposed to receive a pay increment annually on June 21 of 2011, 2012, and 2013. The collective agreement for the BSO bargaining unit before the one in question in this grievance was signed on January 29, 2009, and expired on June 20, 2011. It is obvious that what occurs in Appendix A is that the pay increments that were to be annually from 2011 through to and including 2013, on June 21 of each year, are effective the first day after the expiry of the previous collective agreement (June 20, 2011.) Article 2 of Appendix J stated that it was effective on June 21, 2013, coincidentally the same day that the final pay increment, set out in Appendix A, was effective.

**88** As set out in the ASF, initially, the employer was not prepared to pay any employee any amount attributable to the BSO allowance for the month of June of 2013. Only at the final level of the grievance process did the employer agree to pay the monthly portion of the relevant allowance to any employee who, between June 21 and 30, 2013, had satisfied the 75-hour threshold.

**89** This position taken by the employer does not correspond with its submissions. If an employee satisfied the 75-hour threshold for June of 2013 and for every other month from then to June 20, 2014, then he or she would have been paid for each calendar month — 13 months, not 12 months. It is conceivable that this could have happened because the employer agreed that it was prepared to pay the monthly

portion for June of 2013, if an employee satisfied the 75-hour threshold between June 21 and 30, 2013. This does not accord with its argument of the meaning of "annual".

**90** While not specifically argued by the employer, in that scenario, it could be said that the June 2014 allowance payment is in the next annual period. That argument could not be sustained because the issue would perpetually occur every following June.

**91** The employer argued that the 75-hour threshold per calendar month, as set out in article 4 of Appendix J, was circumscribed by the effective date set in article 2, being June 21, 2013. I disagree.

**92** The evidence disclosed by the two witnesses, who were the parties' respective negotiators, was that no discussion took place with respect to the following:

- the setting of the effective date;
- the meaning of the effective date in relation to the payment of the allowance; and
- the effective date in relation to the threshold of 75 hours.

**93** Mr. Gay testified that his recollection of the negotiation and agreement on Appendix J was that it was structured based on a similar clause, clause 43.07 of the CX collective agreement. Mr. Leindecker stated that it was based on clause A.3.11 of the Appendix of the Ts & Cs of employment, Appendix P of the TS collective agreement, and perhaps the Ships' Officers collective agreement.

**94** From a review of the references of both Messrs. Gay and Leindecker, it is clear to me that clause 43.07 of the CX collective agreement and Appendix P of the TS collective agreement, both dealing with allowances, are very similar to the Appendix J in dispute. Clause A.3.11 of the Appendix of the Ts & Cs of employment does not seem to resemble Appendix J in any way.

**95** When the parties wanted words or phrases to mean something that differed from their ordinary or plain meanings, they did so.

**96** When the parties wanted to be specific with respect to defining benefits

or the start and end dates for calculating benefits, they did so.

**97** Article 34 of the BSO collective agreement also specifies a 75-hour threshold. It deals with vacation leave with pay. Clause 34.01 states that the vacation year shall be from April 1 to March 31 inclusive of the following calendar year. Simply put, this means that the vacation year runs from April 1 of one year (say 2017) to March 31 of the next (2018). It is clear that when the parties wanted to be specific about a particular time frame, when there could be confusion, they defined the period.

**98** This is telling, because it is well known in the federal public sector that the employer's fiscal year is April 1 of any given year to March 31 of the next year. This is different from a calendar year (such as 2017), which is from January 1 to December 31.

**99** Clause 34.02 sets out that an employee who earns at least 75 hours of pay in each calendar month shall earn vacation leave credits at a specific rate, depending on years of service. Clauses 34.02(a) through (g) then set out the different rates of vacation leave credits earned per calendar month, depending on specific years of service and when any given employee moves from one rate to the next.

**100** Clause 34.02(a) sets out that employees who have 8 years of service or less earn in a calendar month 9.375 hours of vacation leave until the month in which the anniversary of the employee's 8th year of service occurs. Clause 34.02(b) states that an increase in the monthly rate occurs in the month in which the employee's eighth anniversary of service occurs. If an employee's eighth anniversary of service occurs on any given day in a particular month, then as of that month, the employee earns the higher amount of leave credits.

**101** Clause 34.05 addresses vacation leave scheduling.

**102** Clause 34.05(b)(ii) identifies specifically that the summer leave period is between June 1 and September 30 of any given year and that the winter leave period is between December 1 of one year and March 31 of the next year. Clause 34.05(b)(i) states that employees must submit their leave requests for the summer leave period on or before April 15 and for the winter leave period on or before September 15.

**103** Article 62 deals with pay administration. Again, a close look at clause

62.03 discloses that when the parties wanted to be more exact with respect to what certain terms mean, when there could be a dispute, they put detail into the specific clauses.

**104** The effective date, when read on its own, means that the benefit of the BSO allowance is to start as of June 21, 2013. However, it is modified by the inclusion of article 4, which sets the criteria for the payment of the benefit. It states that it is to be paid to those employees who meet the 75-hour threshold per calendar month. June is a calendar month. Nothing in Appendix J limits the meaning of that term to mean something different, such as the employer would have me accept it to mean only those days in the calendar month of June comprising June 21 through June 30.

**105** I was referred to the decisions in *Delios*, *PIPSC v. CRA*, and *Fehr*. It is also clear to me as set out in those decisions that when parties wish to deal with transitional issues involving a benefit, they specifically do so. This is also true in the BSO collective agreement, which has set out in article 34 almost the verbatim clauses found in the collective agreement in *PIPSC v. CRA*, in which I addressed the issue of transitional provisions.

**106** In *PIPSC v. CRA*, in which I followed the reasoning of the Board's predecessor in *Delios v. Canada Revenue Agency*, 2013 PSLRB 133 (upheld in 2015 FCA 117), I stated as follows:

. . .

> ***104*** *While the facts of this case are not exactly the same as those in* Delios*, as in that case, the employer suggests that a restriction be implied in the interpretation of clause 17.21, even though there is no explicit restriction. It is clear that the parties to the 2012 collective agreement have placed restrictions or clarifications on leave clauses. Leave in general is covered by article 14, vacation leave by article 15, sick leave by article 16, and other leave with or without pay by article 17.*
>
> ***105*** *As set out in* Delios*, in clauses 17.11 and 17.14, the parties have placed restrictions on leave by using the phrases ". . . during the employee's total period of employment in the public service" (clause 17.11) and ". . . during an employee's total period of employment in the public service" (clause 17.14). At clause 15.03, when dealing with vacation leave, the 2012 collective agreement uses the phrase ". . . all service within the public service, whether continuous or*

> *discontinuous, shall count toward vacation leave . . .".*
>
> ***106*** *Clause 15.17 is a one-time 37.5-hour vacation leave entitlement (that was subject to the decision in* PIPSC 2011*) that replaced the former marriage leave. At clause 15.17, a restriction on the restriction in clauses 15.07(a), (b), and (c) is set out, stating that this leave is* excluded *from the requirement in clauses 15.07(a), (b), and (c), which addresses the carry over and liquidation of certain excess vacation leave credits.*
>
> ***107*** *It is abundantly clear to me that when, in the 2012 collective agreement, the parties wanted to place restrictions or exclusions, or exclusions on restrictions, on leave, they did so.*
>
> ***108*** *It is also amply clear that when the parties wanted to provide a transitional provision to the 2012 collective agreement, they did so. Clause 15.07 contains clauses (c) and (d), which deal with transitional provisions about the carry-over of unused vacation leave credits and that treat certain subsets of employees of the AFS bargaining unit differently and that provide for a transition as of the date the collective agreement was signed. Clause 15.07(c) contains the following transitional provision: "Notwithstanding paragraph 15.07(a) and subject to paragraph 15.07(d),* if on the date of signing of this Agreement*. . ." [emphasis added]. And foundbetween* [*sic*] *clauses 15.07(c) and (d) of the 2012 collective agreement is the following transitional provision:*
>
> > **Paragraph 15.07(d) applies to employees classified as AU and MG-AFS (AU) (as outlined in Appendix E) who have a balance of earned but unused vacation leave credits in excess of two hundred and sixty-two decimal five (262.5) hours on the date of signing of this Collective Agreement only.**
> >
> > . . .
>
> [Emphasis in the original]

**107** The reasoning set out from *PIPSC v. CRA* is equally applicable in this case. Indeed, the provisions set out in the collective agreement at issue in *PIPSC v. CRA* dealing with the one-time one week of leave (to replace the former marriage leave clause) and the carry-over provisions with respect to vacation leave (clause 15.07) are virtually identical to clauses 34.18 (the clause to replace the former marriage leave clause) and clauses 34.11 and 34.12, the vacation carry-over clauses of the BSO collective agreement.

**108** If the parties can contemplate transitional provisions in the detail set out in those clauses (34.11, 34.12, and 34.18), then surely, if they meant that "calendar month" should have meant something different for the month of June 2013, they would have set it out in Appendix J or in the transitional provisions portion of the collective agreement.

**109** For all of the above reasons, the Board makes the following order:

*(The Order appears on the next page)*

## V. Order

**110** The grievance is allowed.

**111** The employer is in breach of Appendix J of the BSO collective agreement.

**112** The employer shall pay to every employee who earned pay for a minimum of 75 hours for performing FB duties at any time during the month of June of 2013 the monthly portion of the allowance, which is 1/12 of either $1250 or $1750, as the case may be.

October 16, 2018.

**John G. Jaworski,**
**a panel of the Federal Public Sector**
**Labour Relations and Employment Board**