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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

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

Bargaining Agent

and

TREASURY BOARD (Correctional Service of Canada)

Employer

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

In the matter of a policy grievance referred to adjudication

Before: Steven B. Katkin, a panel of the Federal Public Sector Labour Relations and Employment Board

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

For the Employer: Zorica Guzina, counsel

Heard at Montreal, Quebec,
October 24 and 25, 2016.
(FPSRLEB Translation)

I. Policy grievance referred to adjudication

[1] On August 28, 2014, the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the union") filed a policy grievance, which reads as follows:

> [Translation]
>
> *I contest that the employer excludes worked time compensated at a rate higher than the straight-time rate from the count of hours used to determine the entitlements provided in clauses 29.02 and 31.01(a) and (b) and article 35 of the collective agreement.*

[2] The applicable collective agreement was concluded between the union and the Treasury Board ("the employer") for the Correctional Services group and expired on May 31, 2014 ("the collective agreement"). The entitlements provided in clauses 29.02 and 31.01 of the collective agreement concern the accumulation of vacation and sick leave credits. Article 35 deals with part-time employees, including their accumulation of vacation and sick leave credits.

[3] Leave credits are accumulated under clauses 29.02 and 31.01 of the collective agreement based on the hours an employee works each month. Specifically, an employee who receives at least 80 hours' pay during a month accumulates credits. The employer's practice is to exclude overtime when calculating the 80 hours. The union maintained that overtime should be included in the calculation.

[4] On November 7, 2014, the union referred the grievance to adjudication.

[5] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) came into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board to replace the former Public Service Labour Relations Board and the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to s. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) before November 1, 2014, is to be taken up and continued under and in conformity with the *Public Service Labour Relations Act* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[6] 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 Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act* and the *Public Service Labour Relations Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* ("the *Act*").

[7] For the reasons that follow, I conclude that overtime is excluded from the calculation of hours that determines the accumulation of vacation and sick leave credits provided in clauses 29.02 and 31.01 and article 35 of the collective agreement.

II. Summary of the evidence

[8] It is useful to reproduce the main clauses of the collective agreement in question, in both official languages:

Acquisition des crédits de congé annuel	***Accumulation of Vacation Leave Credits***
29.02 *L'employé-e qui a touché au moins quatre-vingt* [sic] *(80) heures de rémunération au cours d'un mois civil d'une année de congé acquiert des crédits de congé annuel aux taux suivants, à condition qu'il n'ait pas acquis de crédits dans une autre unité de négociation pendant le même mois* […]	***29.02*** *An employee who has earned at least eighty (80) hours' full pay during any calendar month of a vacation year shall earn vacation leave credits at the following rates provided the employee has not earned credits in another bargaining unit with respect to the same month …*
[…]	…
CONGÉ DE MALADIE PAYÉ	***SICK LEAVE WITH PAY***
Crédits	***Credits***
31.01	***31.01***
a. L'employé-e acquiert des crédits de congé de maladie à raison de dix (10) heures pour chaque mois civil pendant lequel il touche la rémunération d'au moins quatre-vingt [sic] *(80) heures.*	*a. An employee shall earn sick leave credits at the rate of ten (10) hours for each calendar month for which the employee receives pay for at least eighty (80) hours.*
b. L'employé-e qui travaille par poste acquiert des crédits additionnels de congé de maladie à raison de un	*b. A shift worker shall earn additional sick leave credits at the rate of one decimal three three (1.33)*

virgule trois trois (1,33) heures pour chaque mois civil pendant lequel il ou elle travaille des postes et touche la rémunération d'au moins quatre-vingt [sic] *(80) heures. De tels crédits ne peuvent être reportés à la nouvelle année financière et sont accessibles seulement si l'employé-e a déjà utilisé cent-vingt (120) heures de congé de maladie durant l'exercice en cours.*	*hours for each calendar month during which he or she works shifts and he or she receives pay for at least eighty (80) hours. Such credits shall not be carried over in the next fiscal year and are available only if the employee has already used one hundred and twenty (120) hours of sick leave credits during the current fiscal year.*

[9] The union adduced no evidence in chief. In rebuttal, it called to testify Marc Montpetit, a correctional officer whose position is classified CX-02. He spoke of his schedule for the month of July 2017.

[10] The employer called John Kearney, the director of labour relations at the Correctional Service of Canada (CSC). It informed me that he would not testify on the collective agreement's negotiation but instead would refer to past practice to establish the interpretation of the clauses in question. However, it would not advance an estoppel argument.

[11] Mr. Kearney has worked for the CSC since 2004 and has been in his current position since 2013. In addition to supporting collective bargaining, his duties include managing systems for those collective agreement clauses that refer to systems. He first became aware of the current issue in 2005. He explained that the CSC's Scheduling and Deployment System (SDS) manages the schedules of all correctional officers in institutions across the country and that it monitors the use of vacation and sick leave. Vacation and sick leave credits are uploaded to SDS from the CSC's Human Resources Management System (HRMS).

[12] The two systems have rules configured to earned leave and for managing its use. When a vacation leave credit is earned, it appears in the employee's bank in HRMS and SDS. As the employee uses leave, it is recorded in SDS, with parallel updates in HRMS. The two systems control granting credits and leave use based on the rules in the collective agreement. Before the current system, known as Phoenix, compensation advisors administered leave credits and monitored their use. Phoenix now verifies credits and their appropriate use.

[13] According to Mr. Kearney, the employer applies the vacation and sick leave rules consistently with the approach adopted in the federal public sector and in the collective agreement; that is, a threshold of straight-time hours. Overtime has never

been accounted for in SDS or HRMS to credit vacation or sick leave. The rule for accumulating leave under the previous pay system and now under Phoenix is still based on the straight-time rate.

[14] When he was asked about the impact on Phoenix were the union's interpretation accepted, Mr. Kearney stated that the system's rules would have to be amended to take overtime into account. That would require a new coding system or modifying the coding in HRMS, SDS, and Phoenix, which would require three to six months to develop and harmonize the code.

[15] In cross-examination, the union presented Mr. Kearney with some hypothetical situations involving the treatment of other collective agreement clauses, including leave without pay and shift changes, to show some potential consequences if overtime is not included in the calculation of hours for the accumulation of vacation and sick leave credits.

III. Summary of the arguments

A. For the union

[16] The union argued that the parties have no common interpretation and that it does not agree with the employer's practice. Every hour worked should be included in the calculation of the 80 hours.

[17] The union maintained that the text leaves room for interpretation. It argued that the correct interpretation is based on clauses 29.02 and 31.01 of the collective agreement, as written. According to the union, the word "pay" should always include overtime unless the parties exclude it, as that word has a general meaning. It adds that the collective agreement has only one definition of pay. In the English version, there is a certain logic between "pay" and "compensation", while in the French version, the word *rémunération* is used indiscriminately. That said, even the terms "pay" and "compensation" in the English version are not always used specifically or consistently.

[18] Although the collective agreement does not specify that the *Interpretation Act* (R.S.C., 1985, c. I-21) applies, it is mentioned in clause 2.02. According to the union, s. 15(2)(b) of the *Interpretation Act* allows it to use its interpretation of the collective agreement and provides that the definition or interpretation provisions of an enactment apply, unless a contrary intention appears, to other enactments relating to the same subject matter. In that respect, the decision in *Finlay v. Deputy Head*

(Correctional Service of Canada), 2013 PSLRB 59, indicates at paragraph 123, "The *Treasury Board Secretariat Glossary of Terms and Definitions* defines 'remuneration' as pay and allowances. Allowances include shift premiums and the payment of overtime."

B. For the employer

[19] According to the employer, the parties are presumed to agree with what is written in the collective agreement. Article 21 of the collective agreement does not specify that overtime is included when calculating vacation or sick leave credits. In addition, the practice of excluding overtime from the calculation of vacation and sick leave has not changed since the text of article 21 was written.

[20] The employer stated that no grievance has been filed on this point since at least 2005, when Mr. Kearney was made aware of the issue, which means that the parties have agreed with the employer's application of the collective agreement clauses in question. The employer's practice is in line with the collective agreement's clauses and scheme as a whole. The uncontested duration of the practice indicates the union's agreement. According to the employer, it would be unjust to change the practice, and in support of that argument, it referred me to *Bakery & Confectionery Workers, Local 264 v. Canada Bread Co. Ltd* (1965), 15 L.A.C. 385, and *Steel Co. of Canada Ltd. v. United Steelworkers, Local 3749* (1975), 8 L.A.C. (2d) 312.

[21] The employer argued that it should not be presumed that it accounts for overtime when calculating vacation or sick leave, since that would confer a benefit that the collective agreement does not provide. Article 21 of the collective agreement already provides compensation for overtime as either cash or compensatory leave with pay. The employer submitted that that shows that the parties took the trouble to specify how overtime would be compensated. If the parties intended to include overtime in the pay to reach the 80-hour threshold, they would have inserted it into the collective agreement. Were overtime counted for that purpose, it would add another leave for employees, which would give rise to a payment that the collective agreement does not provide. Therefore, it would constitute an amendment to the collective agreement, which s. 229 of the *Act* prohibits.

IV. Reasons

[22] First, I note that the grievance wording is that the employer "[translation] … excludes worked time compensated at a rate higher than the straight-time rate …" from the calculation of the hours used to determine entitlement to vacation and sick

leave. However, the evidence and the parties' arguments dealt mainly with the issue of excluding overtime from the calculation, which is consistent with the employer's response at the final level of the grievance process on November 4, 2015, as follows:

> [Translation]
>
> …
>
> *In my view, including overtime in the calculation of the entitlement to sick and vacation leave would require amending the collective agreement, which can be achieved only at the bargaining table.*
>
> …

[23] Second, the evidence also demonstrated that worked time paid at a rate higher than the straight-time rate was included in the calculation of the hours used to determine the entitlement to vacation and sick leave (for example, see clause 21.03(d) of the collective agreement). In addition, I understand that the real issue is whether overtime should be included in the calculation of the hours used to determine the entitlements provided in clauses 29.02 and 31.01 and article 35 of the collective agreement.

[24] In this respect, as mentioned in paragraphs 23 and 24 of *Beese v. Treasury Board (Canadian Grain Commission)*, 2012 PSLRB 99, based on modern principles of interpretation, the words in a collective agreement must be read by considering the entire context of the agreement, reading them in their entire context and in their grammatical and ordinary meaning, harmoniously with the general scheme and object of the agreement and the parties' intention.

[25] As indicated earlier in this decision, the accumulation of leave credits under clauses 29.02 and 31.01 of the collective agreement is based on the hours for which an employee "receives pay".

[26] Article 2 of the collective agreement, entitled "Interpretation and Definitions", does not include a definition of "pay". In the English version of clauses 29.02 and 31.01, the words "full pay" or "pay" are used but are also not defined.

[27] As the union argued, the modern meaning of the word "remuneration" may include "pay and allowances", according to the definition in the *Treasury Board Secretariat Glossary of Terms and Definitions* (December 2004), and "… all forms of pay, benefits and perquisites paid or provided, directly or indirectly, by or on behalf of an employer …", as defined by the *Public Sector Compensation Act* (S.C. 1991, c. 30), at s. 2(1). Similarly, in *Finlay*, the adjudicator indicated, "Allowances include shift

premiums and the payment of overtime." However, I note that the context of the remarks in *Finlay* concern a matter of a remedy for a grievor who had filed a grievance contesting his transfer and, among other things, the employer's refusal to reimburse him for the overtime shifts he missed when he was suspended with pay during a disciplinary investigation. That decision did not include an exhaustive interpretation of the collective agreement and did not target clauses 29.02 and 31.01. Thus, that decision does not help me decide this matter.

[28] Additionally, as the union argued, the collective agreement has only one definition of pay. The word "pay" is used indiscriminately, and there is room for interpretation. Therefore, although the union argued that the correct interpretation is based on clauses 29.02 and 31.01 of the collective agreement as written, the text in those clauses does not help determine whether overtime is included or excluded from the hours used to determine leave. In the circumstances, to decide this issue, it is essential to consider the whole of the collective agreement.

[29] In that respect, although article 2 of the collective agreement does not define the word "pay", Appendix "B", which deals with workforce adjustment, defines it as follows: "… has the same meaning as 'rate of pay' in this Agreement." There is no definition of "rate of pay" as such in the collective agreement, but article 2 defines the phrases "daily rate of pay", "hourly rate of pay", "straight-time rate", and "weekly rate of pay" as follows:

*« **taux de rémunération journalier** » désigne le taux de rémunération hebdomadaire d'un-e employé-e divisé par cinq (5) (daily rate of pay);*	*"**daily rate of pay**" means an employee's weekly rate of pay divided by five (5) (taux de rémunération journalier);*
*« **taux de rémunération horaire** » désigne le taux de rémunération hebdomadaire de l'employé-e à temps plein divisé par quarante (40) (hourly rate of pay);*	*"**hourly rate of pay**" means a full-time employee's weekly rate of pay divided by forty (40) (taux de rémunération);*
*« **tarif normal** » désigne le taux de rémunération horaire de l'employé-e (straight-time rate);*	*"**straight-time rate**" means the employee's hourly rate of pay (tarif normal);*
*« **taux de rémunération hebdomadaire** » désigne le taux de rémunération annuel de l'employé-e divisé par cinquante-deux virgule cent soixante-seize (52,176) (weekly rate of pay);*	*"**weekly rate of pay**" means an employee's annual rate of pay divided by fifty-two point one seventy-six (52.176) (taux de rémunération hebdomadaire).*

[30] In addition, Appendix "A" of the collective agreement, entitled "Annual Rates of Pay", establishes the annual rates of pay, to which refers the definition "weekly rate of pay".

[31] The correlation between the different definitions of rate of pay and their connection with the "straight-time rate" indicates to me that the use of the word "pay" in the collective agreement does not always include overtime or pay for those hours, as the union argued. In fact, in clauses 21.12, 21.13, and 21.14 of the collective agreement, as follows, overtime compensation is treated separately from the other rates of pay cited earlier in this decision:

21.12 Rémunération du travail supplémentaire	***21.12 Overtime Compensation***
L'employé-e a droit à une rémunération à tarif et trois-quarts (1 3/4) sous réserve du paragraphe 21.13 pour chaque heure supplémentaire de travail supplémentaire exécutée par lui.	*An employee is entitled to time and three-quarters (1 3/4) compensation for each hour of overtime worked by the employee.*
21.13 *L'employé-e recevra une indemnité pour chaque période complète de quinze (15) minutes de travail qu'il exécute en temps supplémentaire.*	***21.13*** *An employee is entitled to overtime compensation for each completed fifteen (15) minute period of overtime worked by him or her.*
21.14 Rémunération en argent ou sous forme de congé compensatoire payé	***21.14 Compensation in Cash or Leave with Pay***
a. Les heures supplémentaires donnent droit à une rémunération en argent sauf dans les cas où, à la demande de l'employé-e et avec l'approbation de l'Employeur, ces heures supplémentaires peuvent être compensées au moyen d'une période équivalente de congé payé	*a. Overtime shall be compensated in cash, except that, upon request of an employee and with the approval of the Employer, overtime may be compensated in equivalent leave with pay.*

[32] The distinction between pay for straight-time hours and overtime becomes clearer when the way overtime is defined and treated in the collective agreement is examined. Article 2 defines "overtime" as follows:

*« **heures supplémentaires** » (overtime) désigne :*	***"overtime"*** *means (heures supplémentaires):*

i. dans le cas d'un-e employé-e à temps plein, les heures de travail qu'il est autorisé à effectuer en sus de son horaire normal de travail;	*i. in the case of a full-time employee, authorized work in excess of the employee's scheduled hours of work;*
ou	*or*
ii. dans le cas d'un-e employé-e à temps partiel, les heures de travail qu'il est autorisé à effectuer en sus de la durée normale journalière ou hebdomadaire de travail d'un-e employé-e à temps plein prévue dans la présente convention collective, mais ne comprend pas les heures effectuées un jour férié;	*ii. in the case of a part-time employee, authorized work in excess of the normal daily or weekly hours of work of a full-time employee specified by this collective agreement but does not include time worked on a holiday;*

[33] As with the definitions of the different rates of pay cited earlier in this decision, the definition of "overtime" refers to "scheduled hours of work" or the "… normal daily or weekly hours of work …". The hours of work are set out in clauses 21.01 and 21.02 of the collective agreement. According to clause 21.01, when the work schedule is established regularly, an employee works 40 hours over 5 days per week, so 8 hours per day. For the shift work provided in clause 21.02, when a shift is scheduled for an employee irregularly or on a rotation, it shall be scheduled so that the employee works an average of 40 hours per week and 8.5 hours per day.

[34] Clauses 21.01 and 21.02 of the collective agreement are relevant to the question at issue given their connection to part-time employees' accumulation of vacation and sick leave. Clause 35.01 indicates that a part-time employee means "… a person whose normal hours of work are less than those established in Article 21 …". Furthermore, clause 35.02 provides that part-time employees are entitled to benefits "… in the same proportion as their normal weekly hours of work compare with the normal weekly hours of work, unless otherwise specified in this agreement." It seems to me that this clause indicates an intention to treat part-time employees similarly to full-time employees when it comes to benefits. In that respect, based on clauses 35.14 and 35.15, it is clear as follows that part-time employees' accumulation of vacation and sick leave is based on hours worked in the "normal work week [*sic*]":

Congés annuels	***Vacation Leave***
35.14 *L'employé-e à temps partiel acquiert des crédits de congés annuels pour chaque mois au cours duquel il touche la rémunération d'au moins deux (2) fois le nombre*	***35.14*** *A part-time employee shall earn vacation leave credits for each month in which the employee receives pay for at least twice (2) the number of hours in the employee's*

d'heures qu'il effectue pendant sa semaine de travail normale […]	*normal work week …*
Congés de maladie	***Sick Leave***
35.15 *L'employé-e à temps partiel acquiert des crédits de congés de maladie à raison d'un quart (1/4) du nombre d'heures qu'il effectue pendant sa semaine de travail normale, pour chaque mois civil au cours duquel il touche la rémunération d'au moins deux (2) fois le nombre d'heures de sa semaine de travail normale.*	***35.15*** *A part-time employee shall earn sick leave credits at the rate of one-quarter (1/4) of the number of hours in an employee's normal work week for each calendar month in which the employee has received pay for at least twice (2) the number of hours in the employee's normal work week.*

[35] Similarly, according to clause 35.16 of the collective agreement, the administration of vacation and sick leave for part-time employees who do not work the same number of hours each week is based on the "normal work week [*sic*]" and refers to the "straight-time rate", as follows:

Administration des congés annuels et des congés de maladie	***Vacation and Sick Leave Administration***
35.16	***35.16***
a. Aux fins de l'application des paragraphes 35.14 et 35.15, lorsque l'employé-e n'effectue pas le même nombre d'heures de travail chaque semaine, sa semaine de travail normale correspond à la moyenne hebdomadaire des heures de travail mensuelles effectuées au taux des heures normales.	*a. For the purposes of administration of clauses 35.14 and 35.15, where an employee does not work the same number of hours each week, the normal work week shall be the weekly average of the hours worked at the straight-time rate calculated on a monthly basis.*

[36] In summary, clauses 29.02 and 31.01 of the collective agreement do not explicitly specify whether overtime must be included in the calculation of hours for the accumulation of vacation and sick leave credits for full-time employees, and they leave room for interpretation. Furthermore, clauses 35.14 to 35.16 clearly indicate that overtime is not included in the calculation of hours for part-time employees' accumulation of vacation and sick leave credits. Since the parties' intention, as expressed in clause 35.02, was that full- and part-time employees would be treated similarly with respect to benefits unless otherwise indicated, I deem that similarly, the parties did not intend that overtime be included in the calculation of hours for full-time employees' accumulation of leave credits. Considering the whole of the collective agreement, nothing indicates to me an intention on one hand to include overtime in

the calculation of hours for full-time employees' accumulation of leave credits and on the other hand to exclude it for part-time employees. Therefore, I deem that overtime is also excluded from the calculation of the hours used to determine the entitlements set out in clauses 29.02 and 31.01.

[37] This interpretation is reinforced by the parties' past practice since at least 2005 of not including overtime in the calculation of vacation and sick leave. Additionally, it is well established that a benefit that entails a monetary cost to the employer must be clearly and expressly stipulated in the collective agreement (see *Wamboldt v. Canada Revenue Agency*, 2013 PSLRB 55 at para. 27). In this case, the union had the burden of proof of showing that on a balance of probabilities, its interpretation should be preferred. It did not convince me that overtime is clearly and expressly included for the purposes of clauses 29.02 and 31.01.

[38] The union's arguments rested primarily on the text of clauses 29.02 and 31.01 of the collective agreement and the modern meaning of the word "pay". However, as I have already indicated, those arguments do not consider the collective agreement as a whole, including the fact that the word "pay" is not defined in article 2 but is used for several purposes. In addition, with respect to the hypothetical situations the union put forward during Mr. Kearney's cross-examination and in its arguments, given the clarity of the interpretive analysis of the clauses in dispute as expressed in this decision, it is not appropriate to address those hypothetical situations, some of which, as Mr. Kearney noted, were rather rare, and others had never been presented to him.

[39] Having considered the evidence and the parties' arguments, I conclude that overtime is excluded from the calculation of hours used to determine the entitlements provided in clauses 29.02 and 31.01 and article 35 of the collective agreement.

[40] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[41] The grievance is dismissed.

May 27, 2019.

FPSLREB Translation

Steven B. Katkin,
a panel of the Federal Public Sector
Labour Relations and Employment Board