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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

FEDERAL GOVERNMENT DOCKYARDS TRADES AND LABOUR COUNCIL (ESQUIMALT, B.C.)

Bargaining Agent

and

TREASURY BOARD

Employer

Indexed as

Federal Government Dockyards Trades and Labour Council (Esquimalt, B.C.) v. Treasury Board

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: Robin J. Gage, counsel

For the Employer: Pierre Marc Champagne, counsel

Heard at Victoria, British Columbia,

January 23 to 25, 2018.

I. Policy grievance referred to adjudication

[1] On April 1, 2014, the Federal Government Dockyards Trades and Labour Council (Esquimalt, B.C.) ("the bargaining agent") filed a policy grievance pursuant to s. 220 of the *Public Service Labour Relations Act* (now named the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2; "the *Act*"). The grievance challenges the employer's application of the collective agreement, which expired on January 30, 2015, for the Ship Repair (West) Group ("the applicable collective agreement") at Appendix "A", Pay Group 9 (APC/APD) apprentice rates of pay, Column "Y". Specifically, the grievance is worded, in part, as follows:

> …
>
> *Apprentice rates of pay start at 50% of the journeyperson rate of pay. In the rates of pay table, this is set at the APC-1/APD-1 rate of pay and incremental increases continue throughout apprenticeship. Column "Y" does not reflect 50% of the journeyperson rate of pay in Pay Group 6 as of January 31, 2014. Column "Y" APC-1/APD-1 rate of pay is shown as $16.73 when in fact it should be set at $17.31, and all following increments are incorrect as well.*
>
> …

[2] The corrective action requested reads as follows:

> *Amend SRW Collective Agreement expiring January 30, 2015 Appendix "A" Pay Group 9, Column "Y" to reflect APC-1/APD-1 correct starting rates at 50% of the journeyperson rate found in Pay Group 6, that being the APC-1/APD-1 starting rate of $17.31, and amend all following rates of pay as appropriate. Retroactively compensate all affected employees to January 31, 2014.*

[3] On October 1, 2014, the employer denied the grievance at the final and only level of the policy grievance procedure, in the following terms:

> …
>
> *The collective agreement was signed on December 7, 2012. As per the grievance presentation form, Treasury Board was informed on March 3, 2014 of the situation. On that basis, I find the policy grievance was filed too late and is denied on that basis.*
>
> *In the alternative, I have also considered the merit of the case. In essence, it is your argument that the "apprentice" rate of pay should be at least 50% of the "journeyperson" rate, because this has been the case historically up to this collective agreement. The fact that it is not 50% now, is the result of an oversight or an error.*

> *While it may be true, that past negotiated rates for the apprentices have been approximately 50% or slightly higher, of those of the journeymen, there is nothing in the collective agreement – current or past – that makes this a requirement. There is nothing in the current agreement that supports this argument either. Furthermore, the Bargaining Agent did not raise the issue of the apprentice pay rate at the bargaining table.*
>
> *The Bargaining Agent now argues that the published rate of pay is in fact an error. Yet, the Bargaining Agent was provided an opportunity to review the draft collective agreement once the negotiations were over and before signing it. Your official used this opportunity to go over the document and did, in fact, raise three specific errors in Appendix A, which were corrected. The apprentices' rate of pay was not one of them.*
>
> *In these circumstances, I have no reason to believe that the Collective Agreement signed by both parties does not accurately reflect the settlement they had reached at the time of signing.*
>
> …

[4] The grievance was referred to adjudication on November 24, 2014, to the Public Service Labour Relations and Employment Board, which since June 19, 2017, has been named the Federal Public Sector Labour Relations and Employment Board ("the Board"). The timeliness argument that the employer raised in its grievance reply was not pursued at the adjudication stage, and its counsel withdrew it during the course of the hearing.

[5] The issue in the present matter is well set out in the statement of the grievance and the employer's reply, namely, whether a case has been made to justify the rectification of the pay rates applicable to apprentices (Appendix "A") to reflect what the bargaining agent claims is the true intent and actual agreement that the parties reached in their negotiations.

[6] For the reasons that follow, I conclude that the grievance should be dismissed.

II. Summary of the evidence

A. For the bargaining agent

[7] As counsel for the bargaining agent was to call her first witness, the employer objected to the admissibility of the evidence on the grounds that it constituted extrinsic evidence relating to the history of negotiations between the parties, including discussions and exchanges during the round of bargaining that led to the signing of

the applicable collective agreement. The employer submitted that there is no ambiguity in that agreement that would make such extrinsic evidence admissible, as it is clear on its face. The bargaining agent contended that the evidence of the parties' negotiations establishes the context and the foundation of its request to apply the remedy of rectification of the collective agreement to correct an error in the pay rates set out in Appendix "A" and reflect the actual agreement that the parties reached at the bargaining table.

[8] I took the objection under reserve and heard the evidence.

1. Dan Quigley

[9] The bargaining agent first called Dan Quigley to testify. Mr. Quigley was a member of the Public Service Labour Relations Board and before that the Public Service Staff Relations Board (both predecessors of the Board) for 11 years between 2000 and 2011 and before that was the bargaining agent's president. He introduced a document containing excerpts of collective agreements that the parties have negotiated since 1972, as well as a table showing the pay rates established in them over the years for apprentices. He was involved in negotiating them from 1990 to the agreement that expired on September 30, 2003.

[10] Mr. Quigley testified that the starting rate of pay for apprentices has always been established in a way that represents a percentage of the journeypersons' rate. He pointed out that the first two collective agreements (which expired on March 23, 1975, and June 28, 1978, respectively) specifically reflected the percentage of the journeypersons' pay for apprentices, at each increment. That way of setting out the apprentices' rates was changed in the late 1970s, when the parties inserted the hourly rate itself (e.g., $5.81, $6.29, and so forth) and no longer referred to a percentage.

[11] The apprentices' starting rate of pay represented 50% of the journeypersons' rate of pay under the collective agreement that expired on March 23, 1975; it represented 60% of the journeypersons' pay rate in the collective agreements that followed until the one that expired on September 30, 2000. An apprentice may move to the next pay-scale increment after periods of 6 months or 900 hours worked, depending on the collective agreement wording, until the apprentice reaches the regular journeypersons' pay rate.

[12] In the collective agreement that expired on September 30, 2003, the parties made a distinction between new hires and apprentices that were on strength at the time that agreement was signed in that the latter were "grandfathered" and maintained the 60% rate, while the rate for the former was established at 50% of the journeypersons' pay rate. In the collective agreement that expired on January 30, 2010, the percentage was 50% for all apprentices, without distinction.

[13] Mr. Quigley pointed out that for the applicable collective agreement, the wage rate set for apprentices represented 48.3% of the journeypersons' wage rate for the year starting on January 31, 2014.

2. Des Rogers

[14] Des Rogers is the bargaining agent's current national president and was in that position at the material times. He negotiated the applicable collective agreement on the bargaining agent's behalf along with other union officials comprising the bargaining team.

[15] Mr. Rogers reviewed the excerpts of relevant sections of the collective agreements between the parties over the last 40 years. He was involved in the negotiations that led to the collective agreement that expired on September 30, 2003, and all those that followed, including the applicable collective agreement. The employer's chief negotiator was John Park for that round of bargaining. Mr. Rogers introduced another document, which sets out the employer's comprehensive offer. It included wage increases effective January 31, 2012, (1.75%), January 31, 2013, (1.5%), and January 31, 2014 (2%). It also provided for merging Pay Groups 4 and 5 into Pay Group 6, "at the existing rate of pay". It does not specifically mention the apprentices' rates of pay.

[16] Mr. Rogers introduced a third document, which relates to the apprentices' increments within the pay scale. The negotiators initialed it, and it provides a simplified process to allow upper movement by increment in the apprentices' pay range without the need for reclassification.

[17] Mr. Rogers referred to a bulletin to bargaining unit members prepared on August 20, 2012. It presents the tentative agreement the parties reached at the table.

He stated that it reflects his understanding of the changes to the applicable collective agreement. He stated that if changes had been proposed to the apprentices' rates, i.e., had they not remained tied to the journeypersons' rate of pay, they would have been included in the bulletin. Another bulletin, prepared for the membership's ratification of the tentative settlement, includes a table setting out the adjusted hourly rates of pay for the journeypersons, as a result of the tentative agreement. The table does not show the apprentices' rates of pay. A majority of members ratified the tentative agreement.

[18] Mr. Rogers received a copy of a memorandum signed by Michael Holt, Treasury Board, to all heads of Human Resources and Labour Relations in user departments. The memo sets out the terms of the "Memorandum of Settlement" reached for the collective agreement renewal for the Ship Repair (West) Group. It reflects the terms of the applicable collective agreement and includes a comprehensive Appendix "A" setting out the revised hourly rates of pay for both journeypersons and apprentices. The starting point for establishing those rates was the expired rates under the former collective agreement, to which the percentage of the wage increase agreed upon was applied. The 1.75% increase is reflected in the figures for Year 1, effective January 31, 2012 (Column A); 1.5% for Year 2, effective January 31, 2013 (Column B); and 2% for Year 3, effective January 31, 2014 (Column C). The Appendix includes a fourth column (Y), which shows the revised rate further to the merger of Pay Groups 4 and 5 into Pay Group 6, which includes a lump sum provided for the merged groups to, in Mr. Rogers' words, "ease the impact of the transition". The pay rate for journeypersons having moved into Pay Group 6 reflected in Column "Y" shows a figure of $34.62 from $33.43 set out in Column "C" for Pay Group 6, i.e., after the 2% economic increase. However, the pay rate for apprentices is set to start at $16.73 under Column "C" and remains at $16.73 in Column "Y". Mr. Rogers explained that as a result, this figure no longer corresponds to 50% of the journeyperson's pay rate (i.e., 50% of $33.43, instead of $34.62) at the effective date of the merger, but only 48.3%.

[19] Mr. Rogers explained that the bargaining agent has limited resources. It represents 700 to 900 members at any given time, and only he and two vice-presidents fulfil that role. He stated that the employer gave him the opportunity to review the document, which he did. He had only a few days to review it and had been out of the

office for two weeks. He reviewed the changes to the language of certain provisions that had been agreed upon to ensure that they accurately reflected the agreed-to changes. His colleagues reviewed Appendix "A", and he was told that the figures were accurate. He did not pick up that the pay rates for apprentices had not been changed under Column "Y", which in his view was an error. He testified that he signed the collective agreement, which included Appendix "A" as set out in the employer's memorandum.

[20] On or about January 31, 2014, Mr. Rogers was informed of a complaint by an apprentice that he did not receive the proper rate in relation to the merged Pay Group 6. Mr. Rogers realized then that an error had been made in Column Y for apprentices. He contacted Mr. Park and informed him of it. He eventually met with Mr. Park and was informed that the employer was not willing to rectify the agreement, which prompted him to file the policy grievance.

[21] Mr. Rogers added that at no time did the parties intend to change how the rates of pay were set for the apprentices or the percentage of the journeypersons' hourly rate of pay applicable to the starting rate for apprentices. He does not believe that Column Y reflects the agreement reached at the bargaining table.

[22] Mr. Rogers referred to the Pay Notes of the subsequent collective agreement (which expired on January 30, 2019), in which language was added to reflect the "50% rule", which states that the apprentices' starting rates are 50% of the journeypersons' rate (Pay Group 6), and all increments and other rates of the apprentices Pay Group are adjusted accordingly. Mr. Rogers stated that this approach has been the same for pay proposals negotiated with the employer since the 1990s, and he never had any problem with it.

3. Stan Dzbik

[23] Stan Dzbik has played an executive role with the bargaining agent since 2007. He has been involved in collective bargaining since then. He described himself as the "numbers person" on the bargaining agent's bargaining team. He was involved in negotiating the collective agreements that expired in 2010 and 2012. He did not recall specifically negotiating the rates of pay for apprentices, which were simply based on the journeypersons' rate, at 50%.

[24] His understanding was that the starting rate for apprentices in the applicable collective agreement would remain at 50% of the journeyperson rate. Mr. Dzbik created the spreadsheet attached to the August 20, 2012, union bulletin to members describing the tentative agreement. He had not received the calculation from the Treasury Board at that time. He left the apprentices' rates out, since he knew that it was 50% of the journeypersons' rate.

[25] Mr. Dzbik prepared a spreadsheet, which sets out the apprentices' pay rates had the 50% proportion been applied. The starting rate should have been $17.31, rather than the $16.73 in Column Y. He was involved in the review of the tentative collective agreement provided by the employer, including the pay rates for apprentices. He did not recall the details of his review.

[26] Shortly after the restructuring took effect (January 31, 2014), an apprentice came to see him, claiming that he had not received the appropriate wage increase. He had received the 2% economic increase (Column C) but not the "restructured" wage. Mr. Dzbik reviewed the collective agreement and then realized that Column Y showed the same hourly rate as Column C. He stated that he could not believe that this error had been missed. He reiterated that in his experience, the apprentices' rates have always been calculated based on 50% of the trades' rates.

B. For the employer

1. Mr. Park

[27] At the material time, Mr. Park was employed as a negotiator with the Treasury Board, a position to which he had been appointed in 2010. He was responsible for negotiating the Ship Repair-West Group collective agreement. One was eventually signed in December 2012, with an expiry date of January 30, 2015.

[28] The employer's priority in that round of bargaining was eliminating severance pay. Mr. Park referred to the employer's offer, which he described as being in line with the "pattern of settlements" or "template deal": a 3-year deal at a 1.5% economic increase for each year plus an additional 0.25% and 0.50% in Years 1 and 3 in recognition of the elimination of severance pay. The employer's proposal for a wage increase was for all Pay Groups in the bargaining unit. From his perspective, the

economic increase applied to all the Pay Groups, including the apprentices (Pay Group 9).

[29] The bargaining agent did not accept the proposal and made a counterproposal, which Mr. Park introduced in evidence. It proposed the same economic increases as the employer had done plus an equalization payment to satisfy members of Pay Group 6 who thought that they were being short-changed as a result of the merger of Groups 4 and 5 into Group 6 at the existing rates of pay.

[30] Mr. Park considered the counterproposal fair and endeavoured to obtain a mandate from the Treasury Board to agree to it, with a few minor modifications, such as rounding up the equalization payment to $500 and $2500, depending on the classification. The only discussions about the apprentices in that round of negotiations centred on Pay Note 7, the movement by increment within the pay scale.

[31] Mr. Park explained that Column C in Appendix "A" for Pay Group 9 (apprentices) contained the figures after adjusting the previous rate by 2%, as agreed. As for Pay Groups 4, 5, 7, and 8, which disappeared as a result of the pay group restructuring, the pay rate was adjusted to the new Pay Group they were in (Pay Group 6) and reflected in Column Y. In Mr. Park's view, no language in the collective agreement authorized him to change the apprentices' rates (Pay Group 9) in Column Y over and above the economic increase of 2%, which was applied in Column C. No instruction to do so was sought by the bargaining agent, either orally or in a way that could be inferred from its written counterproposal.

[32] Mr. Park was involved in negotiating the previous collective agreement. The rates were determined in the same manner, i.e., by applying the agreed-upon economic increase to all Pay Groups (1.5% per year for a 2-year deal).

[33] Mr. Park testified that in 2014, the bargaining agent raised concerns about the apprentices' pay rates, as they were not at 50% of the restructured Pay Group 6. He was asked to consider whether adjusting Column Y was possible. He stated that he was not aware of such a practice, and nothing in the applicable collective agreement dealt with the calculation method. He testified that he was unaware that there might have been an implied agreement to ensure that the apprentices' starting rates would be 50% of

the journeypersons' rate at all times. He stated that only after hearing Mr. Quigley's testimony did he become aware of the history.

[34] He was very disappointed that there was an issue with the application of the collective agreement and a dispute with Mr. Rogers as to what had actually been agreed to. He inquired with senior management as to possible solutions. He was informed that he would need a Treasury-Board-approved amendment to add the funds needed for such a change and that it was unlikely to be accepted. Mr. Park stated that between the end of the negotiations of the applicable collective agreement and those discussions in 2014, no discussions took place about the apprentices' rates of pay as reflected in Appendix "A".

[35] Mr. Park introduced emails between him and Mr. Rogers from the months preceding the signing of the applicable collective agreement, which occurred in December 2012. In that exchange, Mr. Park stresses to Mr. Rogers the importance for the bargaining agent to carefully review the wording of the changes agreed to at the table, and he specifically mentions the rates of pay. He indicated that both parties have to be comfortable and approve an agreement before they sign it off. Mr. Rogers brings up three mistakes in the calculations of specific wage figures (for Pay Groups 7 and 8) related to them having been rounded down to the nearest penny, instead of up. Nothing was raised at that time about the rates of pay for Pay Group 9 (apprentices), and no problems were raised before the collective agreement was signed.

C. Bargaining agent's reply evidence

[36] The bargaining agent called John Smith to testify in reply. He is currently a Group 3 manager - Trades and was part of the employer's bargaining team for the 2012 bargaining round, primarily in a research capacity.

[37] Mr. Smith stated that he had been involved with apprentices as a work centre manager in 2007. In 2010, he was promoted to Group 2 manager, and he managed the apprentice program until 2014.

[38] He stated that he believed that when he began his employment in 1987, the apprentice rate was 60% of that of a journeyperson. When he was asked whether it was

his understanding that the apprentice rate was always calculated as a percentage of the journeyperson rate, Mr. Smith replied that he had never thought about it.

[39] Mr. Smith said that the apprentice rates were not discussed during the 2012 bargaining round. When the issue arose in 2014, no one spoke to him about it.

III. Summary of the arguments

A. For the bargaining agent

[40] The bargaining agent first addressed the question of my jurisdiction to correct the collective agreement to reflect the parties' actual agreement. It referred to the conditions under which an adjudicator may rectify a collective agreement, in spite of s. 229 of the *Act*, as an equitable remedy.

[41] The bargaining agent referred to the following cases that set out the circumstances that must be established to apply the rectification remedy: *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 ("*Sylvan Lake*"); *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56 ("*Fairmont Hotels*"); *and Canada (Attorney General) v. Canadian Merchant Service Guild*, 2009 FC 344. A party seeking rectification must establish that there was a prior agreement, that the written document does not correspond to the prior agreement, and that permitting the other party to take advantage of the mistake in the written document would be, as stated in *Sylvan Lake*, "fraud or the equivalent of fraud".

[42] The bargaining agent contended that the employer ought to have been aware of the mistake as described in the evidence based on their 45 years of collective bargaining history. That history reflects the existence of the implied term underlying the wage negotiations, which is that the apprentices' pay rates are intentionally tied to the journeypersons' pay rates as a percentage of those rates. That percentage has changed over the years from 60% to 50%, further to agreements reached at the bargaining table. This has been an implied term ever since the express term was removed in the collective agreement that expired in 1980. The employer's representative (Mr. Park) was negligent in failing to apprise himself of the parties' bargaining history.

[43] The bargaining agent further submitted that there was no need to address that issue at the table and state it aloud, as it was implicit in the discussions. Now explicit in the current collective agreement is what the bargaining agent stated has been implied throughout the history of negotiations, including those that led to the applicable collective agreement. In the 1970s, it was clearly expressed as the wages first starting at 50% and periodically increasing in increments, then at 60%, with corresponding wage increases. In the 1980s, it was changed to a specific dollar figure that nevertheless reflected the same proportion of starting rate for apprentices compared to journeypersons. When the percentage was changed in the early 2000s, it was by the parties' express agreement, to make a distinction for new hires or reduce the percentage from 60% to 50%. Otherwise, there was no need to address the question at the table, as the operating premise had remained the same as in the last 40 years of negotiations. Indeed, when one compares Year 3 of the applicable collective agreement to the past 40 years, the percentage of 48.3% between the apprentices' rates and the journeypersons' rates strikes as an anomaly, for which the employer has no plausible explanation.

[44] In the present case, it is a fairly simple exercise to correct this anomaly and rectify the mistake, as only numbers are involved, and the calculation is easy. The bargaining agent stressed that the lack of due diligence on the party seeking rectification is not a bar to rectification being applied. It cited *Public Service Alliance of Canada v. NAV Canada*, [2002] O.J. No. 1435 (QL), in which the doctrine of rectification was applied in a collective bargaining context to correct certain scheduled hourly wage rates, in spite of a clause in the collective agreement prohibiting an arbitrator from changing, altering, or amending it. The bargaining agent submitted that s. 229 of the *Act* does not preclude rectification when appropriate under the principles stated earlier in this decision.

[45] Finally, the bargaining agent submitted that the appropriate remedy is the rectification of the agreement, to reflect the real agreement reached at the table, and a retroactive pay award for all affected employees whose pay was calculated based on the wrong pay rates mistakenly set out in the written document (see *Canadian Merchant Service Guild*).

B. For the employer

[46] The employer argued that on its face, there is no breach of the collective agreement. The starting rate of $16.73 for apprentices is what was applied as of January 31, 2014. It simply applied the collective agreement as written in the document signed by the parties.

[47] The employer highlighted s. 229 of the *Act* as a prohibition that the Board cannot ignore. It disagrees with the bargaining agent that the theory of rectification can be used to circumvent s. 229. The word "amend" means "change", "modify", "alter", or "correct" (according to the *Merriam-Webster Dictionary*), which is precisely what the bargaining agent seeks as corrective action in this grievance. It is well established that the Board may not modify or alter a collective agreement or interpret one in such a way that would require its amendment. That principle is enshrined in s. 229 of the *Act* and was reiterated in *Delios v. Canada (Attorney General)*, 2015 FCA 117.

[48] The employer also distinguished the *NAV Canada* and *Canadian Merchant Service Guild* cases on the basis that the Board is a statutory tribunal that must act within the strict confines of the statute, including the limitations placed on its powers, such as s. 229. The employer cited *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, to support the distinction related to the statutory nature of the adjudication scheme under the *Act*. In the present case, a clear statutory provision, not a collective agreement provision, bars amending the collective agreement.

[49] Another factor distinguishing the present matter from *NAV Canada* is that the bargaining agent was aware of the figures set out in Appendix "A" when it signed the collective agreement. If there was an error, Mr. Park was unaware of it. Therefore, it cannot be said that he intentionally took advantage of an error to the bargaining agent's detriment, and there is no basis on which to apply the equitable remedy of rectification. There is no evidence of a different agreement reached at the bargaining table than that captured in the final instrument and in the bulletins that preceded it. There is no "discrepancy" or any wilful intention to deceive, as there was in *Fairmont Hotels* or *Sylvan Lake*.

[50] The employer further submitted that the conditions set out in *NAV Canada* to consider the doctrine of rectification are absent. Mr. Rogers might have assumed that the apprentices' starting rate of pay would be set at 50% of the journeypersons' rate at all times. However, there is no evidence that the employer's negotiator was aware of that expected outcome. Clearly, there was no meeting of the minds, as Mr. Park had no knowledge of it, and the parties had no clear and ascertainable prior agreement that would justify rectifying the collective agreement; see *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*, 2016 SCC 55 at paras. 23 to 25; *Seminole Management & Engineering Co. v. CAW-Canada, Local 195* (1989), 4 L.A.C. (4th) 380; and *Canadian Union of Public Employees, Local 408 v. Chinook Health Region*, [2007] A.G.A.A. No. 20 (QL).

[51] The employer pointed out that Appendix "A" deals with wage increases but that it also deals with the special issue of the pay groups merger. The bargaining agent asked for some groups to be merged and for equalization payments. The merger proposal was accepted, and Pay Groups 4 and 5 were merged into Pay Group 6, under terms set out in the parties' exchange of documents that was placed in evidence. The bargaining agent argued that the apprentices' rates were always linked to the journeypersons' rates; the point of comparison is and has always been Pay Group 4, not Pay Group 6. The rates were adjusted on January 31, 2014, by adding the 2% economic increase to the apprentices' rates, but after that, Pay Group 4 group ceased to exist. There is no agreement that the comparison ought to be made with Pay Group 6. As Mr. Quigley's evidence showed, when the bargaining agent wishes to address the impact of a change on apprentices, it negotiates a term, as it did in the negotiations that provided for a "grandfather clause" (from 2001 to 2003). If the bargaining agent had in mind any additional protection for apprentices as a result of the pay groups merger, it should have negotiated it. The wage increase was negotiated, agreed to at 2%, and properly reflected in the Appendix, and the employer applied it.

[52] The employer stressed that the parties' due diligence must also be assessed. Mr. Rogers is an experienced negotiator, and the bargaining agent had ample opportunity at the material time to flag to the employer what it considered an error. The evidence showed that the bargaining agent did flag a few calculation errors that were less significant than the subject of the present grievance. Mr. Park was less experienced and

was not present at the time of the negotiations involving Mr. Quigley. Mr. Rogers should have alerted Mr. Park to the history that forms the basis of the union's claim.

[53] Finally, on the admissibility of extrinsic evidence, the employer referred to Professional Institute of the Public Service of Canada v. Canada Revenue Agency, 2016 PSLREB 77 (PIPSC 2016), and Professional Institute of the Public Service of Canada v. National Research Council of Canada, 2013 PSLRB 88 (PIPSC 2013). It submitted that the collective agreement is clear and unambiguous on its face and that the test for admitting extrinsic evidence has not been met.

C. Bargaining agent's reply

[54] The bargaining agent submitted that the cases that the employer cited related to s. 229 of the *Act* do not deal with rectification. It further submitted that if it met the test for rectification, then it is clear from *NAV Canada* that the Board would have jurisdiction to grant the remedy sought.

[55] The bargaining agent advanced that rectification does not constitute modifying the collective agreement. The collective agreement is not only the written instrument but also what is agreed to at the bargaining table. The bargaining agent disagreed with the employer's argument that the parties' mutual intention at the bargaining table was captured in the written instrument. Mr. Rogers and Mr. Dzbik testified that the written instrument did not capture their intention.

[56] The bargaining agent suggested that it might have been prudent for the employer to have trained Mr. Park in the history of the parties' relationship.It questioned whether from an equity point of view, it was fair that the employer's failure to understand the bargaining history was imposed on the employees.

[57] The bargaining agent submitted that in the collective bargaining context, agreements are based on past agreements, and arbitrators and adjudicators rely on past practice to interpret collective agreements.

IV. Analysis

[58] In the present policy grievance, the bargaining agent requested that the applicable collective agreement be amended to reflect the parties' agreement at the

bargaining table. Specifically, the bargaining agent seeks a modification of the figures appearing in Column Y of Appendix "A" (Wage rates) for employees in Pay Group 9, i.e., apprentices. Consequently, the issue is not the interpretation or application of the collective agreement as worded but instead determining whether an error occurred in the Appendix that should be corrected by applying the remedy of rectification of the collective agreement.

[59] The theory underpinning the union's claim is that the employer has ignored an implied term of the agreement, which is that pay rates for apprentices have historically been determined by applying a percentage to the journeypersons' rate. It has varied between 60% and 50% over the years. It is not disputed that the starting pay rate in Column Y of Appendix "A" for apprentices (Pay Group 9 employees) is not 50% but 48.3%.

[60] In determining this matter, both parties addressed the effect of s. 229 of the *Act*, which reads as follows:

> ***229*** *An adjudicator's or the Board's decision may not have the effect of requiring the amendment of a collective agreement or an arbitral award.*

[61] The bargaining agent argued that s. 229 is not a bar to applying the remedy of rectification, which is an equitable remedy in common law designed to address situations in which a party inappropriately benefits from an error or omission in the wording of a contract. More to the point of the grievance, the bargaining agent submitted that the actual agreement between the parties was not properly reflected in Column Y for Pay Group 9 (apprentices), as there was an implicit assumption, or implied term, underlying the parties' agreement that the apprentices' starting pay rate would represent 50% of the journeypersons' rate.

[62] The bargaining agent's claim of the existence of such an assumption, implicit in the parties' negotiations, is founded on evidence of the historical retrospective of their negotiations. Counsel for the employer properly characterized that evidence as extrinsic evidence, and I admitted it under reserve. It is well established that extrinsic evidence is relevant and admissible when the disputed language is patently or latently ambiguous. As I have already stated, there is no latent or patent ambiguity in the applicable collective agreement language in the present case.

[63] It is common ground that there is no ambiguity, patent or latent, in the applicable collective agreement that could properly be addressed by extrinsic evidence. On that footing, according to the authorities, such evidence should not be admitted. I find the authorities cited by the adjudicator in *PIPSC 2016* at paragraphs 93 and 94 to be compelling and, in my view, they dictate the outcome of the question of admissibility in the employer's favour.

[64] Particularly, in Brown and Beatty, *Canadian Labour Arbitration*, 4th edition, paragraph 3:4400 on "Extrinsic Evidence" it states as follows:

> Parol or extrinsic evidence, in the form of either oral testimony or documents, is evidence which lies outside, or is separate from, the written document subject to interpretation and application by an adjudicative body. Although there are numerous exceptions, the general rule at common law is that extrinsic evidence is not admissible to contradict, vary, add to or subtract from the terms of an agreement reduced to writing. If the written agreement is ambiguous, however, such evidence is admissible as an aid to the interpretation of the agreement to explain the ambiguity but not to vary the terms of the agreement. The two most common forms of such evidence in labour arbitrations are the negotiating history of the parties leading up to the making of a collective agreement, and their practices before and after the making of the agreement. And in addition to its use as an aid to interpretation of a collective agreement or a settlement agreement, or to establish an estoppel, **it may be adduced in support of a claim for rectification. However, for such evidence to be relied upon it must be "consensual". That is, it must not represent the "unilateral hopes" of one party. Nor can it be equally vague or as unclear as the written agreement itself.**
>
> [Emphasis added]

[65] I am being asked to consider the evidence not to aid in the interpretation of unclear wording but to establish the parties' real agreement in the face of a figure in Column Y that is alleged to be incorrect and that does not represent their actual agreement. In spite of that, I have considered the evidence of the parties' collective bargaining history and previous collective agreements, as well as the discussions at the relevant round of bargaining, for the purpose sought by the union, namely, the creation of an error when the agreement was reduced to a written document. However, in my view, what matters and what is determinative of the outcome of this grievance

are the discussions in 2012 between the parties' spokespersons during the round leading up to the agreement's signature.

[66] The evidence is quite persuasive that the determination of the apprentices' pay over the years was made in the manner argued by the bargaining agent, i.e., by applying a percentage of the journeypersons' wage rate. That approach was reflected explicitly in the collective agreements signed in the 1970s, after which the explicit reference to a percentage was removed and replaced by the figure of the pay rate itself. It was discussed explicitly when changes were to be made to the apprentices' terms and conditions of pay.

[67] While unquestionably, there is a historical context to collective bargaining between parties with an established bargaining relationship, each round of bargaining is distinct and unique and must be considered on its own. The evidence established that the issue of pay rates for apprentices was not discussed at the bargaining table during the round that led to the signing of the applicable collective agreement. The only item that was discussed had to do with how movement within the pay range was effected, to avoid the need for a reclassification exercise every time the right to an increment was obtained, which led to Pay Note 7.

[68] The bargaining agent's counterproposal, which the employer substantially accepted, does not include any specific reference to the apprentices' salary, as set out under Pay Group 9. Mr. Smith testified that the apprentice rates were not discussed during the 2012 bargaining round. Mr. Rogers testified that he always operated under the assumption that the apprentices' pay rates would be adjusted, in any given case, by applying the 50% rule. Mr. Rogers did not suggest that the matter was even discussed, which is consistent with his belief that the rule would be applied automatically, as in previous collective agreements.

[69] The employer's chief negotiator for the round that led to the applicable collective agreement, Mr. Park, was adamant that he was unaware of that practice. Admittedly, he was familiar with the parties' previous collective agreement; however, the issue of 50% is not at all apparent in the calculation of the revised pay rates under that agreement. As Mr. Park explained, it was a mere matter of applying the percentage of the economic pay rates that the parties had agreed on to the existing rates, which

were reflected in the agreement in absolute numbers. There was no reason for the 50% rule to come up. On its face, setting the hourly rate of pay at $16.73 in Column Y for Pay Group 9 (apprentices) does not lead to an absurd or incongruous result.

[70] Consequently, I find that the parties had no meeting of the minds during the 2012 negotiations that would lead me to find a different agreement than the terms set out in the applicable collective agreement and that could form the basis for a rectification of it. The bargaining agent might have assumed that the pay rates would be adjusted after pay groups' restructuring took effect, but that was not at all the employer's understanding. As a result, it is not possible for me to conclude that the parties knew of an implied term in their discussions towards renewing the applicable collective agreement that would justify modifying Column Y of Appendix "A". The appendix does not fail to reflect the parties' true intention at the bargaining table that led to the conclusion of the applicable collective agreement. I am persuaded that the real agreement between the parties is correctly captured by the figures appearing in Column Y, as there is no evidence, consensual or otherwise, of a different agreement between their representatives at the bargaining table.

[71] Given that no discussion took place on the apprentices' rates of pay, it was not unreasonable for Mr. Park to take the position that the bargaining agent's counterproposal was the totality of the agreement, insofar as pay rates are concerned, for all Pay Groups under Appendix "A". Nothing in that counterproposal addressed the apprentices' rates once the merger of Groups 4 and 5 with Group 6 took place. The employer's negotiator gave effect to the terms of that agreement. Thus, the remedy sought by the bargaining agent would result in adding a term and condition that the parties' representatives did not agree to.

[72] I also considered the fact that the bargaining agent was apprised of the figures appearing in Appendix "A", including Column Y, shortly after the tentative agreement was reached and well before the applicable collective agreement was signed. The numbers are clearly set out. The economic increase of 2% for January 31, 2014, was applied to all Pay Groups, including Pay Group 9 (Column C), and the figure remained the same in Column Y for Pay Group 9, which was consistent with Mr. Park's understanding of the agreement that had been reached. The employer did not attempt to conceal or mislead, and the bargaining agent had an opportunity to review the

tables well before signing the revised collective agreement. If there was an error, as the bargaining agent claims, it was overt, plain, and obvious on the face of the Appendix. In fact, the evidence shows that the bargaining agent did point out three minor calculation issues, involving rounding down numbers to the closest penny, instead of rounding them up. It might have been an oversight on the bargaining agent's part in failing to detect the problem, but it was not a mistake or error inconsistent with the tentative agreement reached by the parties.

[73] In *Fairmont Hotels*, the Supreme Court of Canada stated as follows about the onus of proof that must be met to rectify a written contract, at paragraph 36:

> ***36.*** *… A party seeking rectification faces a difficult task in meeting this standard, because the evidence must satisfy a court that the true substance of its unilateral intention or agreement with another party was not accurately recorded in the instrument to which it nonetheless subscribed. A court will typically require evidence exhibiting a high degree of clarity, persuasiveness and cogency before substituting the terms of a written instrument with those said to form the party's true, if only orally expressed, intended course of action….*

[74] The authorities that counsel for the bargaining agent cited in support of the doctrine of rectification describe the nature of such a remedy. Rectification is meant to correct an inequitable situation in which a party would be allowed to rely on a mistake, and the written form of the agreement does not reflect the actual agreement between the parties' representatives. In *Sylvan Lake*, the Supreme Court described the remedy of rectification as follows, at paragraph 31:

> …
>
> ***31.*** *… Rectification is predicated on the existence of a prior oral contract whose terms are definite and ascertainable. The plaintiff must establish that the terms agreed to orally were not written down properly. The error may be fraudulent, or it may be innocent. What is essential is that at the time of execution of the written document the defendant knew or ought to have known of the error and the plaintiff did not. Moreover, the attempt of the defendant to rely on the erroneous written document must amount to "fraud or the equivalent of fraud". The court's task in a rectification case is corrective, not speculative. It is to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other ….*

[75] In my view, this essential ingredient is missing in the circumstances of this case in that there is no evidence that the actual agreement is any different from the basis upon which the numbers were drawn up in Column Y of Appendix "A".

[76] Furthermore, I am unable to conclude that, as did the Court of Appeal of Ontario in *NAV Canada*, both parties operated under a term that was clearly implied and that they both knowingly considered implicit in their discussions. In *PIPSC 2013*, I stated as follows at paragraph 78:

> *[78] Both parties referred to their respective intentions in respect of whether the one-time vacation leave entitlement was included in the vacation cap and carry-over provisions. It is well-recognized that extrinsic evidence may be used to aid in the interpretation of a collective agreement where such evidence indicates a clear mutual intention of the parties. The evidence of both negotiators and of Ms. Brosseau was that the issue was never addressed or discussed during the negotiations. The absence of explicit discussion on the vacation carryover does not necessarily mean that there was a common intention or that I should consider that failure to expressly discuss the clause as extrinsic evidence which I should take into account. The parties agreed to position the inclusion of the one-time leave in a section of the collective agreement that addressed vacation leave. They had an opportunity to discuss these matters, but did not do so….*

[77] As in *PIPSC 2013*, I find there is no evidence of any mutual intention between the parties that differs from the actual wording of the applicable collective agreement or that would justify rectifying it. Given my conclusion on the merits of the union's claim for a rectification of the applicable collective agreement, it is not necessary to address the issue of whether, as the employer argued, s. 229 of the *Act* constitutes an absolute bar to the application of such a remedy even when the circumstances may warrant it. The determination of that issue shall be left for another day.

[78] In summary, I find that the employer has properly applied the rates for apprentices as set out in Column Y of the applicable collective agreement and that there is no basis upon which to rectify the collective agreement.

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

(The Order appears on the next page)

V. Order

[80] The grievance is dismissed.

August 7, 2019.

Steven B. Katkin,

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