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Citation: 2020 FPSLREB 47

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

ALICE CLARK, ALICE VALLÉE, CHANTAL MÉNARD, TANYA SMELTZER, LOUISE GENDRON, MARIE AUDET, ROBERTO BONFIGLIO, GILLES CASTONGUAY, MARIE-PHILIPPE CHOUINARD, BERNARD DESPAROIS, ZELJKO FRZOVIC, POE KAYAN FUNG, JACQUES INKEL, LOIC KABAMBA, DIANE LABRECQUE, GINETTE LAJEUNESSE, NANCY LAPLANTE, JESSICA LEBLANC DISTEFANO, ESTELLE LEPAGE, JEAN-FIDÈLE MAHORO BUCYANAYAN, PATRICIE NYIRAHABINKA, LUDWIG ORTIZ GAGNÉ, MARIJANA SAKIC, CHRISTIAN SAURIOL, AND JEAN-MARC TÉTREAULT

Grievors

and

STATISTICAL SURVEY OPERATIONS

Employer

Indexed as
Clark v. Statistical Survey Operations

In the matter of individual grievances referred to adjudication

Before: Linda Gobeil, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievors: Guido Miguel Delgadillo, Public Service Alliance of Canada

For the Employer: Cristina St-Amant-Roy, counsel

Heard at Sherbrooke, Quebec,
May 2 and 3, 2019.
(FPSLREB Translation)

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Individual grievances referred to adjudication

[1] Twenty-five grievors ("the grievors") filed grievances alleging that Statistical Survey Operations ("the employer") breached clause 23.20 of the arbitral award rendered with respect to the Public Service Alliance of Canada ("the bargaining agent") and the employer for the Interviewers and Senior Interviewers group (Exhibit BA-1, Tab G). That arbitral award is part of the collective agreement between those parties, the expiry date of which was November 30, 2014 ("the collective agreement"; Exhibit BA-2). The grievors' positions are indeterminate or term (Exhibit BA-1, Tab B).

[2] The grievances were filed in English and French on July 15, 2015. The employer's response was issued at the final level of the grievance process in English on January 4, 2016, and in French on January 13, 2016. The bargaining agent referred the English grievances to the Federal Public Sector Labour Relations and Employment Board ("the Board") on February 12, 2016. The French grievances were referred on March 9, 2016. At the hearing, the parties asked that the original decision be rendered in French.

II. Summary of the evidence

[3] The parties submitted an agreed statement of facts, which reads essentially as follows (Exhibit BA-1):

> [Translation]
>
> *Statement of facts*
>
> *1. The parties are bound by the collective agreement between the Public Service Alliance of Canada and Statistical Survey Operations for the Interviewers and Senior Interviewers group, which works on surveys primarily at Statistics Canada's regional offices – expiry date: November 30, 2014.*
>
> *2. The grievors filed their grievances on July 15, 2015.*
>
> *3. When the grievance was filed, the grievors were working as indeterminate or term interviewers or senior interviewers at the employer's Sherbrooke office. The applicable job description is included in Appendix A. A list containing each grievor's position as of when the grievances were filed is found in Appendix B.*
>
> *4. Each grievor's hours can vary from quarter to quarter based on the employer's operational requirements. All the grievors are part-time employees and do not have work hours guaranteed beyond clause 23.07 of the collective agreement.*

> *5. The quarters consist of three months, from January 1 to March 31, April 1 to June 30, July 1 to September 30, and October 1 to December 31.*
>
> *6. In the April to June 2015 quarter, the employer informed the grievors that it would hire 18 new interviewers for the July to September 2015 quarter. That decision was confirmed to the local at the Consultation Committee meeting on June 10, 2015. The minutes of the June 10, 2015, local Labour-Management Consultation Committee meeting are found in Appendix C.*
>
> *7. The new interviewers were initially hired to work on the National Apprenticeship Survey, which was delayed until September 2015. As a result, the new employees worked on the Labour Force Survey and replaced regular employees on vacation over the summer.*

A. The bargaining agent's evidence

[4] The bargaining agent called two witnesses.

[5] Alice Vallée testified that she works as an interviewer for the employer. During her employment, she held several positions with the bargaining agent, including as a local representative. As such, she was a member of the Labour-Management Consultation Committee (LMCC).

[6] She explained that she worked part-time and that from April 1 to June 30, 2015, her quarterly schedule was 35 hours per week. Her work as an interviewer consists of gathering data for the employer by conducting telephone surveys (Exhibit BA-3). She explained that she is trained to conduct many types of social and business surveys, which is not the case for all interviewers. However, they are all qualified to conduct the Labour Force Survey (LFS), which is carried out every month; its data are considered essential information for the employer. She explained that for each type of survey, there is an ideal time to call the interviewees, which an interviewer must consider before making a call. For instance, for surveys related to farmers, it is better to call in the morning or the evening, and for social surveys, like the LFS, it is better to call in the evening. For business surveys, it is better to call during the day, but not before 9:00 a.m.

[7] Ms. Vallée indicated that in the summer of 2015, she was available to work full days, even weekends, starting at 8:00 a.m., but that for medical reasons, she could not work the evening shift that began at 5:00 p.m. As well, since she did not live in Sherbrooke, she could not work split shifts, such as working from 9:00 a.m. to noon

and then working another shift later that day. That way of doing things would not have been convenient or practical for her.

[8] In her testimony, Ms. Vallée acknowledged that interviewers are informed three months in advance of their assigned workweeks, including their work hours, and that there is no guaranteed minimum or maximum number of hours (Exhibits BA-1, E-1, and E-2).

[9] Ms. Vallée stated that she attended the LMCC meeting on June 10, 2015, at which management informed the participants that some scheduled surveys were delayed, that the employer was hiring new interviewers, and that the grievors' work hours would be reduced (Exhibit BA-1, Tab C, Element 21). Two days later, as it normally did every 3 months, the employer sent letters to her and her colleagues indicating their work hours for the next quarter. She noticed that her hours had been reduced. Although the reduction in hours was different for each employee, Ms. Vallée indicated that hers were reduced from 35 to 32 hours for July to September 2015 (Exhibits BA-3 and BA-4). In light of these facts, Ms. Vallée and the other grievors decided to challenge the employer's decision to reduce their work hours.

[10] Although her weekly hours from July 1 to September 30, 2015, were reduced to 32, Ms. Vallée acknowledged that they were 35 for the previous quarter and for the next one, which was from September to December 2015 (Exhibits BA-3, BA-4, and E-2).

[11] Under cross-examination, Ms. Vallée acknowledged that of the 30 qualified candidates, 18 new interviewers had been hired, as indicated at the June LMCC meeting. She also acknowledged that scheduled surveys were sometimes postponed.

[12] Ms. Vallée testified that she did not know how the schedule was determined, but she acknowledged that when presenting an upcoming schedule, the employer considers the experience of each employee, the nature of the survey, and the employee's restrictions, as applicable. She acknowledged that as she did not work evening shifts, she could not have worked them between July 19 and 22, 2015, and that the work had been assigned to one of the 18 new employees (Exhibit E-3, Tab 2, page 4).

[13] Diane Labrecque also testified. She indicated that she has been an interviewer with the employer since 2008. She stated that she is also a part-time employee.

[14] In her testimony, Ms. Labrecque indicated that an interviewer's duties involve carrying out telephone interviews with different respondents in several fields. She stated that in 2015, she worked primarily on business surveys but that sometimes, she was required to take part in other surveys on the same day.

[15] Ms. Labrecque indicated that in June 2015, she was president of the local. At the LMCC meeting on June 10, 2015, management informed them of its intent to hire additional people while reducing the number of hours of current interviewers in July and August 2015. According to Ms. Labrecque, this approach by the employer was inconsistent; on one hand, the grievors' hours were reduced, and on the other hand, 18 new employees were being hired. When 2 days later she realized that like Ms. Vallée, her work hours had been reduced from 35 to 32 hours per week for the next quarter, she decided to file a grievance (Exhibits BA-5 and BA-6).

[16] Ms. Labrecque testified that she had been available from both April 2015 to June 2015 and July to September 2015 to work from 9:00 a.m., or even earlier, to 5:00 p.m. She stated that nevertheless, a medical condition prevented her from working after 5:00 p.m.

[17] Under cross-examination, as had Ms. Vallée, Ms. Labrecque acknowledged that the employer had never guaranteed a minimum or maximum number of work hours per week (Exhibits E-4, BA-5, and BA-6). When she was asked if she had been informed that the new employees would work on the LFS during the June to September 2015 quarter and that they would replace people on vacation, Ms. Labrecque stated that she "[translation] had never really been made aware". She acknowledged that her work at that time related primarily to the survey of manufacturing and that as such, none of the 18 new employees worked on that survey. Finally, she also acknowledged that given her medical restrictions, which prevented her from working past 5:00 p.m., she would not have been able to work the shifts that started at 5:00 p.m. and finished at 9:00 p.m. on July 19, 20, and 21, 2015. The new employees worked those shifts (Exhibits E-7 and E-3, Tab 15; letters of November 4, 2015, and January 13, 2016).

B. The employer's evidence

[18] Christina Philbrick testified for the employer. She is the district administrator for the Montreal and Sherbrooke offices (Exhibit E-6). Before that, she was a senior interviewer. In 2015, she was a data collection manager. Her role primarily involves

planning survey activities, training interviewers and setting their schedules, and recruiting new interviewers.

[19] Ms. Philbrick explained that she had planned the workload in 2015. She testified that the employer had reduced the work hours that summer because the workload had decreased. She explained that reducing work hours in the summer was a very common practice for the employer, except in census years, of which 2015 was not one.

[20] Ms. Philbrick testified that there are many types of surveys, that some are about social topics, and that others are about business or farming topics. Their frequency varies. Some are conducted each month, while others are done every year or every five or six years. Others are carried out only once.

[21] Ms. Philbrick explained that management examines several factors when assigning a survey to an interviewer. For instance, new employees will usually be assigned the specific survey for which they were hired. For experienced employees, the employer looks at their availability, experience, and preferences and, as applicable, whether there are any medical or other restrictions.

[22] Ms. Philbrick explained that a new employee takes two-and-a-half days of training on the basic skills in interview techniques and an overview of the rules. A senior interviewer provides training on surveys, using reference documents created at the employer's head office in Ottawa, Ontario.

[23] She examined how surveys are assigned. She indicated that not all employees are trained to conduct all surveys. Ms. Philbrick said that the LFS is considered a social survey and that almost all employees are trained to conduct it. Management tries to assign as many employees as possible to that survey, which comes up in the middle of each month (Exhibit E-7).

[24] Ms. Philbrick explained that the ideal time to call interviewees varies depending on the type of survey. For instance, it is best to carry out business surveys between 9:00 a.m. and 5:00 p.m., while farm surveys should be conducted early in the morning or in the evening, after 6:30 p.m. Since the LFS is a social survey, it is best to conduct it in the evening or on the weekend, when people are at home.

[25] As a result, according to Ms. Philbrick, when management decides to assign a type of survey to an interviewer, in addition to considering the employee's experience,

preferences, and restrictions, she also considers the best time to call people, based on the survey type. For example, if an employee can work only during the day, he or she will be primarily assigned business surveys.

[26] Ms. Philbrick testified that management considers employees' requests and, when possible, tries to make accommodations accordingly. As an example, she mentioned the case of Nancy Laplante. Immediately after learning that her work hours would be reduced from 35 to 32 in June 2015, she asked to work split shifts to retain her 35 hours. Her manager agreed, and her hours returned to 35 for the July to September 2015 quarter (Exhibit BA-1, Tab E).

[27] Ms. Philbrick explained that all data collection managers are responsible for their employees' schedules, taking into account such factors as the type of survey, whether an employee is indeterminate, and the employee's experience and availability.

[28] Although the best time to call people varies depending on the survey type, Ms. Philbrick explained that it would not be efficient or practical to ask an employee who just finished a shift to work 30 minutes more on another survey. She explained that doing so could confuse the interviewer.

[29] Ms. Philbrick stated that the schedules cover three months and that it is very rare for work hours to be reduced during those three months. She also stressed that there is no guaranteed minimum or maximum number of work hours during a workweek (Exhibits E-2, E-5, BA-3, and BA-4).

[30] Ms. Philbrick explained that in 2015, management decided to hire new employees and that the hiring process began in late April or early May. The objective was to recruit 18 new employees to work primarily on the National Apprenticeship Survey (NAS), which was to begin in July, but also on the LFS, and to replace employees taking their summer vacations.

[31] However, management found out only in June that the NAS had been postponed by the employer's head office in Ottawa for all offices in the country. Ms. Philbrick testified that since the new employees had already been hired, the employer wanted to assign them work, to retain them. Ms. Philbrick stressed that the hiring process had been long and that significant time and effort had been required to recruit the new

employees. The employer did not want to have to restart the hiring process almost immediately.

[32] The 18 new employees were assigned to the LFS for July and August; they also replaced employees on vacation.

[33] Ms. Philbrick testified that the new employees took basic skills training in July, which was equivalent to 17 work hours. They then took LFS training for 3 days or for the equivalent of 21 hours. They then worked 3 or 4 days on the LFS, for the equivalent of 16 to 20 hours. In August, they worked on the LFS solely as replacements for employees on vacation and for only 16 to 18 hours. In September 2015, they began working on the NAS. At that time, the grievors' work hours largely returned to what they had been before July 2015 (Exhibits E-2 and E-5).

[34] Ms. Philbrick stressed that in April and May 2015, management had no choice but to hire the 18 new employees because the NAS was scheduled for July and that she had received no indication that it would be postponed.

[35] When she was asked why Ms. Laplante's work hours had not been reduced from July to September 2015, Ms. Philbrick explained that in Ms. Laplante's case, after learning that her work hours would be reduced, as for other employees, she told her manager that she wanted to work split shifts and that since her request met operational requirements, management accepted it.

[36] Claudette Baillargeon also testified for the employer. She began as an interviewer with the employer over 25 years ago. In 2015, she was a district manager, which included the Sherbrooke office. Among other things, her work included receiving requests from the Ottawa office about the types and number of surveys to be conducted. She then met with her data collection managers, such as Ms. Philbrick, who shared their needs with respect to the number of employees and the number of hours required to complete the surveys requested by the Ottawa office.

[37] Ms. Baillargeon then coordinated survey requests from the Ottawa office with the resource requests from her managers and decided if she needed to hire staff. Therefore, the survey requests come from the employer's Ottawa office, which, after consulting the client departments, decides the types of surveys and the dates on which they will take place. However, those dates are not firm and may change.

[38] Ms. Baillargeon explained that in 2015, she decided to hire 18 new employees following a request from the Ottawa office to conduct a NAS, originally scheduled for July 2015, due to the additional workload involved. The profile for the employees sought at the time was people with considerable flexibility in terms of work hours, who were bilingual, and who were prepared to work evenings and weekends.

[39] Ms. Baillargeon explained that hiring staff takes significant time. Several factors must be considered, such as assessments of the applicants' skills, their language profiles, and their security clearances. She stated that often only 1 in 4 qualifies for a position. It is often necessary to meet with 60 to 70 candidates to select 20.

[40] In her testimony, Ms. Baillargeon returned to the types of surveys conducted by interviewers and the best times to conduct them. For example, the LFS, which helps measure the Canadian unemployment rate, is conducted every month in the evening and on weekends. Therefore, it is important that interviewers be available in the evening and on weekends. Canadian Community Health Surveys are conducted once per year, also in the evening and on weekends. Business surveys are also conducted each month, during the day and only during the week. Surveys on agricultural topics are conducted throughout a year, at noon or in the evening.

[41] Ms. Baillargeon explained that data collection managers determine employees' schedules. In that sense, indeterminate employees have more work hours than do part-time employees. Once the schedules for indeterminate employees are determined, the manager then considers the availability of part-time employees and their experience, preferences, and restrictions, as applicable. According to Ms. Baillargeon, the summer is always quieter, and work hours are generally reduced during that period. For part-time employees, those hours always increase beginning in September (Exhibit BA-1, Tab E).

[42] Ms. Baillargeon explained that beginning in September 2015, the 18 new employees were assigned primarily to the NAS, which was an important survey that had required hiring the additional interviewers. According to her, the survey was initially scheduled for the summer of 2015. However, in early June 2015, the Ottawa office informed her that the survey was postponed until September, across the country. She stressed that when she was notified of the delay, the hiring of the 18

employees was already well underway, but that she did not know if the hiring had completed in full.

[43] According to Ms. Baillargeon, hiring the 18 interviewers had no impact on part-time employees, as people take their vacations in the summer, and the 18 new employees worked on the LFS, replaced employees on vacation, worked on shifts on which part-time employees were already working, or worked when part-time employees had indicated that they were not available, such as evening shifts. Ms. Baillargeon testified that the fact that the 18 new interviewers were assigned among other things to replace employees on vacation allowed her to approve the vacation requests of all her employees in that summer of 2015.

III. Summary of the arguments

A. For the bargaining agent

[44] The representative argued that the employer hired 18 new interviewers, which led to the grievors' work hours being reduced for the July to September 2015 quarter. The reduction varied by employee. However, Ms. Vallée's and Ms. Labrecque's work hours were reduced from 35 to 32, which in both cases, according to the bargaining agent, was a breach of clause 23.20 of the collective agreement (Exhibit BA-1, Tabs C and E).

[45] According to the representative, the evidence shows that Ms. Vallée and Ms. Labrecque have extensive experience and are able to work on different surveys. The evidence also shows that their availability did not change; they were still prepared to continue working 35 hours per week from July to September 2015.

[46] According to the representative, the employer decided to postpone the NAS, meaning that it had to assign the 18 new employees to existing surveys, including the LFS, which led to the employees' work hours being reduced during the July to September 2015 quarter.

[47] The representative added that nothing in the employer's evidence shows that it was in the practice of hiring new staff to fill absences during summer vacations.

[48] According to the representative, the employer already knew as of the LMCC meeting in June 2015 that the NAS would be postponed. The evidence shows that the

day after the LMCC meeting, on June 11, 2015, the employees were already notified of the work hours reduction (Exhibits BA-4 and BA-6).

[49] The representative argued that the employer made no effort to offer the grievors the opportunity to work more hours, which breached clause 23.20 of the collective agreement.

[50] The representative stressed that the first part of the clause is clear as to the employer's obligation to first allocate the work to the grievors before offering it to new employees. Moreover, the employer never consulted the incumbent employees as to whether they were interested in maintaining the same number of work hours per week. Had the incumbent employees been consulted, they might have asked to change surveys or might have changed their choice of work schedule to be able to work 35 hours per week during the July to September 2015 quarter.

[51] According to the representative, the employer instead decided to divide the time to be allocated to the LFS among all employees, regardless of the fact that that decision would reduce the grievors' hours.

[52] The representative asked me to declare that clause 23.20 of the collective agreement was breached and to reserve on the calculation of the compensation that may result.

B. For the employer

[53] Counsel first stressed that a new NAS was to be effected in July 2015. Since it involved a significant workload, Ms. Baillargeon decided to hire additional staff. Counsel stressed that hiring staff is a long, costly, and laborious process.

[54] Counsel recalled that in June 2015, the Ottawa office decided to postpone the NAS at all offices in the country and that to not lose the new employees, the employer first trained them. They then worked on the LFS and replaced incumbent employees on vacation for about 16 to 20 hours in July and 16 to 18 hours in August 2015. The additional employees also worked shifts for which the bargaining agent's witnesses had indicated they were not available.

[55] In that respect, counsel highlighted Ms. Vallée's and Ms. Labrecque's work schedules from July 19 to 21, 2015, as detailed in the letter dated November 4, 2015.

According to counsel, the tables reproduced in those letters show that the new employees either worked the same hours that Ms. Vallée and Ms. Labrecque were already working or worked the evening shift, for which Ms. Vallée and Ms. Labrecque had indicated that they were not available.

[56] Counsel stressed the fact that work schedules are carefully planned and that data collection managers consider many factors, such as the type of survey to be conducted, along with employee seniority, experience, preferences, medical or other restrictions as applicable, and availability and whether the employee wishes to work split shifts.

[57] According to counsel, the data collection manager carries out a full and ongoing analysis. Thus, if an employee's availability changes or restrictions to work hours are lifted or added, the employee need simply inform his or her manager, who will try to take accommodate measures, subject to operational requirements. Counsel again cited the example of Ms. Laplante, who notified her manager that she was prepared to work split shifts and was so accommodated. According to counsel, contrary to the submission that the bargaining agent's representative made, clause 23.20 of the collective agreement does not require that the employer offer additional work hours to employees every time.

[58] Counsel noted that the employees' offer letters stated that there was no guarantee of a minimum or maximum number of work hours. That notice was repeated in the quarterly letters to the employees and is found in clause 23.02 of the collective agreement. According to counsel, the only restriction imposed on the employer with respect to work hours is found in clause 23.07, which states that the employer must attempt to provide 15 work hours. That obligation is not at issue in this case (Exhibits E-1, E-2, BA-2, BA-3, BA-4, BA-5, and BA-6).

[59] According to counsel, the employer took the necessary steps when preparing the schedules for the July to September 2015 quarter to provide the maximum number of hours to the grievors.

[60] According to her, clause 23.20 of the collective agreement must be read as a whole. Counsel stressed the choice of the words "endeavour to offer" in clause 23.20 to support that the employer has an obligation as to means, not results. Thus,

according to counsel, to satisfy its obligation, the employer need simply show the attempts made to satisfy both the grievors' demands and operational requirements.

[61] Counsel referred me to the following decisions: *Burgess v. Treasury Board (Department of Indian Affairs and Northern Development)*, 2004 PSSRB 164; *Burgess v. Canada (Attorney General)*, 2006 FCA 159; *Chafe v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112; *Marine v. Ontario Nurses' Association*, 2013 CanLII 84904 (ON LA); *Syndicat des chauffeurs d'autocars de la Rive sud v. Autocars Des Chutes Inc.*, 2015 CanLII 27472 (QC SAT); and *Wamboldt v. Canada Revenue Agency*, 2013 PSLRB 55.

C. Rebuttal

[62] The bargaining agent's representative argued that the comparisons between the grievors' work hours and those of the 18 new employees over 3 days in July in the responses at the final level of the grievance process were made after the fact and related only to 3 days (Exhibit E-3). According to the representative, the employer had an obligation to offer the grievors the opportunity to continue working 35 hours per week before hiring the 18 new employees.

IV. Reasons

[63] Before deciding whether the employer breached clause 23.20 of the collective agreement, some evidence must be reconsidered.

[64] The grievors who filed grievances work part-time. Their weekly work hours are, on average, less than 37.5 under the collective agreement (Exhibits BA-1 and BA-2 and clause 2.01 of the collective agreement).

[65] The evidence shows that in April or May 2015, Ms. Baillargeon was notified that the Sherbrooke office would participate in a new NAS, to be conducted in July 2015. In early June 2015, the Ottawa office notified her that the survey was postponed until September. As to whether the 18 new employees had been hired when Ms. Baillargeon and Ms. Philbrick were notified of the postponement, I must emphasize that the employer's evidence on this point is inconclusive. On one hand, Ms. Philbrick argued that the hiring was complete when the NAS was postponed, while Ms. Baillargeon did not know. For its part, the bargaining agent also did not demonstrate that the hiring had not concluded. Nevertheless, Ms. Baillargeon and Ms. Philbrick indicated that the

hiring process was lengthy and tedious and that they did not want to lose their new resources, whom they had just hired. Therefore, they had to assign them work.

[66] At the LMCC meeting on June 10, 2015, the bargaining agent was notified that the NAS was postponed, that work hours for the July to September 2015 quarter had been reduced, and that there were new employees. On the next day, June 11, 2015, the grievors were informed that their work hours would be reduced. For the bargaining agent's two witnesses, their hours were reduced from 35 to 32 for the next quarter (Exhibits BA-1, Tab C, BA-3, BA-4, BA-5, and BA-6).

[67] Ms. Philbrick and Ms. Baillargeon testified that during the summer, activities slowed, and the grievors' work hours were reduced. Those claims were not contradicted.

[68] The evidence also revealed that the data collection manager responsible for determining work hours considers several factors, such as the type of survey to be conducted, the best time to contact survey respondents, and the interviewers' experience, preferences, availability, and restrictions, as applicable.

[69] The uncontradicted evidence also revealed that in the summer of 2015, an agreement could be reached with the employer to continue working the same number of hours per week for the July to September 2015 quarter. Thus, Ms. Laplante was able to keep the same number of work hours per week, 35, by choosing to work split shifts (Exhibit BA-1, Tab G).

[70] Ms. Baillargeon and Ms. Philbrick testified that the arrival of the new employees had no impact on the reduction of the grievors' work hours, as the new employees were assigned essentially either to training or to the LFS during the hours in which their incumbent colleagues were already working; they were also replacements during the summer holidays. The new employees also worked shifts for which both of the employer's witnesses had already indicated that they were not available (Exhibit E-3, Tabs 2 and 15, which are the responses from the third level of the grievance process).

[71] Specifically, with respect to Ms. Vallée and Ms. Labrecque, for July 19 to 21, 2015, the evidence shows that the hours that the additional employees worked coincided with the hours that the two grievors worked or during the hours in which they had indicated that they could not work, i.e., the evening shifts. Therefore, based

on this information, I find that these two grievors did not lose work hours on those days to the new employees. Either they were already working or they had indicated that they were not available (Exhibit E-3, Tabs 2 and 15).

[72] The bargaining agent's representative challenged the relevance of this evidence on the grounds that it was only a sample based on 3 workdays for 2 employees and that the data had been provided after the grievances were filed, at the third and fourth levels of the grievance process. I do not agree with these arguments. On one hand, the validity of this information was not challenged. It was up to the bargaining agent, which bore the burden of proof in this case, to demonstrate that this sample did not reflect the situation. Moreover, this information was provided to the bargaining agent as part of the grievance process in 2015. Therefore, the bargaining agent had ample time to verify this information and prepare its evidence for the hearing, accounting for that information. Thus, I find that it has not been shown that the 18 new employees worked hours that the grievors could normally have worked. Either they already worked during those shifts or they were not available.

[73] As for clause 23.20 of the collective agreement, I must ask myself whether, in light of the evidence, the employer breached it. It is part of an arbitral award and therefore is an integral part of the collective agreement. It reads as follows:

> ***23.20*** *Notwithstanding clause 23.18, where operational requirements permit, the Employer will endeavour to offer additional work available at a work site to readily available qualified employees at that work site, irrespective of the nature of the survey, prior to hiring additional staff. Subject to the foregoing, the Employer may hire additional staff and is not precluded from hiring additional staff prior to providing employees with full-time hours.*

[74] The representative essentially argued that clause 23.20 of the collective agreement required the employer to offer the grievors the opportunity to work additional hours before hiring 18 new employees.

[75] The decision to postpone that survey until September was made only in early June 2015. Ms. Philbrick and Ms. Baillargeon explained that the hiring process was lengthy and laborious and that in June 2015, it was completed, according to Ms. Philbrick, while Ms. Baillargeon was not able to say that it had actually ended at that time. Nevertheless, they testified that given the investment made in hiring the 18 new people, they decided to train them, have them work on the LFS, and have them

replace employees during the summer holidays. Ms. Philbrick and Ms. Baillargeon argued that hiring the 18 people had no impact on the decision to reduce work hours (from 35 to 32).

[76] Looking again at the parts of clause 23.20 of the collective agreement, I note that the first part of it states, "… where operational requirements permit, the Employer will endeavour to offer additional work available … to readily available qualified employees … prior to hiring additional staff." Among others, it sets out two things, namely, operational requirements and the fact that the employees must be available to work those additional hours.

[77] As for the concept of "operational requirements", in this case, it seems to me that if effectively, hiring the additional staff was completed when the decision was made to postpone the NAS to September 2015, operational requirements allowed the employer to determine what those new employees could work on, if only minimally. However, as I have already mentioned, the evidence on this is not clear. Ms. Baillargeon testified that she did not know whether the staffing of these positions was actually completed. If hiring the new employees was in fact not completed, I find it hard to see how the employer, knowing that the NAS would be postponed, could have been justified hiring new employees before offering the work to the grievors. In that sense, the employer would not be justified in citing operational requirements to justify hiring additional employees.

[78] Clause 23.20 of the collective agreement also states that "… the Employer will endeavour to offer additional work available … to readily available qualified employees …". Indeed, clause 23.20 requires that incumbent employees be available to work those extra hours. As mentioned, in light of the evidence, I do not see how Ms. Vallée and Ms. Labrecque could have claimed to be "[translation] available" within the meaning of clause 23.20 from July 19 to 21, 2015. Indeed, it seems that the new employees either worked while those two were already working or worked the evening shift, which they had indicated that they were not available to work. Was the situation different for the other days from July to September 2015 for Ms. Vallée and Ms. Labrecque or for other employees? I cannot say, as the evidence was limited to those two witnesses, and no other evidence was submitted. Therefore, I find that the evidence shows that the grievors were not available, within the meaning of clause 23.20, to work extra hours (Exhibit E-3, Tabs 2 and 15).

[79] As indicated, the employer's evidence is unclear as to whether effectively, the new employees were already hired when the NAS was postponed. Nor did the bargaining agent prove otherwise; that is, hiring the new employees had not completed as of the postponement and that therefore, the employer had to offer the grievors the additional hours. Subject to the following paragraph, had in fact the evidence revealed that hiring the new employees had not completed when the NAS was postponed, as I have already indicated, I find it hard to see how the employer could have cited operational requirements to not offer the additional hours to the grievors.

[80] That said, remember that clause 23.20 of the collective agreement must be read as a whole and that it includes another requirement. The clause states in effect that it must be shown that the grievors were available to work those additional hours. There is no ambiguity in this respect. The evidence is clear that the bargaining agent's two witnesses were not available to work the additional hours within the meaning of clause 23.20. As I have already mentioned, no further evidence was submitted to the contrary.

[81] As this is a matter of interpreting the collective agreement, the grievors bore the burden of proving that the employer breached clause 23.20 of the collective agreement.

[82] Therefore, I find that the evidence did not establish that the employer breached the terms of clause 23.20 of the collective agreement.

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

(The Order appears on the next page)

V. Order

[84] The grievances are dismissed.

May 6, 2020.

FPSLREB Translation

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