Date: 20200527

Files: 566-02-9608 to 9610

Citation: 2020 FPSLREB 60

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

LENARD IANSON

Grievor

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
Ianson v. Treasury Board (Department of National Defence)

In the matter of individual grievances referred to adjudication

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

For the Grievor: Aaron Lemkow, Public Service Alliance of Canada

For the Employer: Patrick Turcot, counsel

Heard at Victoria, British Columbia,
March 3 and 4, 2020.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] As of the hearing, Lenard Ianson ("the grievor") was employed by the Treasury Board (TB or "the employer") as a firefighter, classified at the FR-3 (platoon chief) group and level, with the Department of National Defence (DND). As of the filing of the grievances, he was a firefighter classified at the FR-1 group and level. At all material times, he lived in the vicinity of Victoria, British Columbia, and was stationed at and worked out of Canadian Forces Base Esquimalt ("the base"), in Victoria, for the DND fire service.

[2] At the relevant time, the grievor's terms and conditions of employment were governed, in part, by a collective agreement that was signed on February 6, 2009, and that expired on August 4, 2011, between the employer and the Public Service Alliance of Canada for the Operational Services Group ("the collective agreement").

[3] On April 23, 2010, the grievor filed a grievance (file 566-02-9609), which stated as follows:

> *Grievance Details:*
>
> *I GRIEVE MANAGMENTS [sic] DENIAL OF LIEU DAYS LEAVE REQUESTED.*
>
> *Corrective Action requested:*
>
> *Leave be granted as per 6.01 of the collective agreement.*
>
> *(FR. Specific).*

[4] On August 9, 2010, the grievor filed a grievance (file 566-02-9608), which stated as follows:

> *Grievance Details:*
>
> *I griev [sic] Managements [sic] denial of lieu leave requested for Sept 09-12/2010, as per operational services collective agreement. 6.01(f)(i) X*
>
> *Corrective Action requested:*
>
> *-Leave be granted as per operational services collective agreement 6.01(f)(i)*
>
> *-A Standardized leave policy of O. G. that reflects operational services collective agreement to be drafted that applies to all shifts*

> *-supervisor to be trained on application and interpretation of operational services collective agreement.*
>
> *-unused leave to be carried forward to fiscal 2011/2012*

[5] On November 9, 2010, the grievor filed a grievance (file 566-02-9610), which stated as follows:

> *Grievance Details:*
>
> *I Grieve managements [sic] denial of Lieu day leave requested.*
>
> *Leave request for Dec 25th –Dec 27, 2010* [this is handwritten and initialed "RM"]
>
> *Corrective action requested*
>
> *Leave be granted as per Operational Services Collective Agreement FR Specific*
>
> *and I be made whole* [this is handwritten]

[6] All three grievances were denied in the grievance process, and on April 1, 2014, all three were referred to the Public Service Labour Relations Board (PSLRB) for adjudication.

[7] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365: *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (PSLREB) to replace the PSLRB as well as 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; *EAP No. 2*) also came into force (SI/2014-84). Pursuant to s. 393 of the *EAP No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by ss. 365 to 470 of the *EAP No. 2*.

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

II. Summary of the evidence

A. Background

[9] The evidence was largely not in dispute. Two witnesses testified, the grievor and Stephen Mullen, who, at the time material to the grievances, was the fire chief for the base, which is the Royal Canadian Navy's base for its Pacific Fleet.

[10] The grievor commenced his employment as an FR-1 in September of 2003. He has worked his entire career at the base.

[11] At the time relevant to the grievances, the DND fire service located at the base employed roughly 80 firefighters designated in 4 platoons of roughly 20 persons each. Each platoon was made up of roughly 15 or 16 firefighters and 3 or 4 officers. The fire service was responsible for ensuring that there was a minimum of 16 firefighters (including officers) 24 hours a day, 7 days a week, every day of the year (termed "minimum manning"), spread between two separate firehouses on the base, which are the main firehouse at the dockyard and a second, smaller one at the munitions store at Rocky Point. The minimum manning required 11 firefighters (including officers) at the dockyard and 5 at Rocky Point.

[12] Minimum manning was described to me simply as the minimum personnel required to properly respond to a fire either at the dockyard or at Rocky Point.

[13] The fire service operated on a schedule system that rotated the 4 platoons on and off duty. The schedules were set and issued before the beginning of each fiscal year and were provided to all firefighters. In simple terms, each platoon followed the same schedule of being on-shift for 24 hours, followed by being off-shift for 24 hours, followed by being on shift for another 24 hours, finally followed by 5 days of rest, after which the process would repeat.

[14] Each 24-hour shift started at 08:00 and ended at 08:00 the following day. Each 24-hour shift was subdivided into 2 sub-shifts, one of 14 hours, and one of 10 hours. For the purposes of determining these grievances, the details of how these shifts operated is not relevant.

[15] During the period relevant to the facts that led to the grievances, until October of 2010, the grievor was a member of platoon no. 4, and after that day, he was a member of platoon no. 1.

B. The collective agreement

[16] The following provisions of the collective agreement are relevant to the issues before me:

. . .

ARTICLE 32

DESIGNATED PAID HOLIDAYS

32.01 *Subject to clause 32.02, the following days shall be designated paid holidays for employees:*

(a) New Year's Day,

(b) Good Friday,

(c) Easter Monday,

(d) the day fixed by proclamation of the Governor in Council for celebration of the Sovereign's Birthday,

(e) Canada Day,

(f) Labour Day,

(g) the day fixed by proclamation of the Governor in Council as a general day of Thanksgiving

(h) Remembrance Day,

(i) Christmas Day,

(j) Boxing Day,

(k) on additional day in each year that, in the opinion of the Employer, is recognised to be a provincial or civic holiday in the area in which the employee is employed or, in any area where, in the opinion of the Employer, no such additional day is recognised as a provincial or civic holiday, the first (1st) Monday in August,

(l) one additional day when proclaimed by an Act of Parliament as a national holiday.

Excluded Provisions

The remainder of this article does not apply to employees in the FR group

. . .

ARTICLE 35

VACATION LEAVE WITH PAY

Excluded Provisions

Clause 35.02 does not apply to employees in the FR Group.

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

. . .

Scheduling and Granting of Vacation Leave With Pay

35.05

(a) Employees are expected to take all their vacation leave during the vacation year in which it is earned.

(b) The Employer reserves the right to schedule an employee's vacation leave. In granting vacation leave with pay to an employee, the Employer shall make every reasonable effort to:

(i) grant an employee's vacation leave in an amount and at such time as the employee may request:

(ii) not recall an employee to duty after the employee has proceeded on vacation leave;

(iii) not cancel nor alter a period of vacation leave which has been previously approved in writing;

(iv) ensure that, at the request of employee, vacation leave periods of two (2) weeks or more are started following a scheduled period of rest days.

. . .

35.06 *The Employer shall give an employee as much notice as is practicable and reasonable of approval, denial, alteration or cancellation of a request for vacation or furlough leave. In the case of denial, alteration or cancellation of such leave, the Employer shall give the written reason therefore, upon written request from the employee.*

. . .

ARTICLE 41

VOLUNTEER LEAVE

41.01 *Subject to operational requirements as determined by the Employer and with an advance notice of at least five (5) working days, the employee shall be granted, in each fiscal year, a single period of up to eight (8) hours, or up to seven decimal five (7.5) hours, where the standard work-week is thirty-seven and decimal five (37.5) hours per week, of leave with pay to work as a volunteer for a charitable or community organisation or activity, other than for activities related to the Government of Canada Workplace Charitable Campaign.*

The leave will be scheduled at times convenient to both the employee and the Employer. Nevertheless, the Employer shall make every reasonable effort to grant the leave at such times as the employee may request.

. . .

APPENDIX A

FIREFIGHTERS GROUP -

SPECIFIC PROVISIONS AND

RATES OF PAY

2.08 Overtime Compensation

(a) Except as provided in sub-clause 2.08(b) and subject to clause 2.10, an employee is entitled to time and one-half (1 ½) compensation for each hour of overtime worked by the employee. When an employee is required to work overtime immediately following their scheduled shift, or on a day of rest, or designated paid holiday, which extends into his or her next scheduled shift, the employee will continue to be compensated at the applicable overtime rate until he or she has had a break of at least eight (8) hours.

. . .

2.09 *Subject to clause 2.10, an employee is entitled to double (2) time compensation for each hour of overtime worked by the employee on the employee's second (2nd) or subsequent day of rest, provided the days of rest are consecutive and contiguous.*

. . .

Designated Paid Holidays

6.01 Compensation for Designated Paid Holidays

(a) The designated paid holidays in a fiscal year shall be anticipated to the end of the year and "lieu day" credits established. Each fiscal year shall be deemed to include eleven (11) designated paid holidays.

(b) Each employee shall select the method of lieu day compensation, which he or she prefers. Such selection shall be made as of April 1, and shall remain valid for the following twelve-month (12) period.

(c) The employee shall select one of the following methods of lieu day compensation:

(i) cash payment;

(ii) compensatory leave;

or

(iii) combination of cash payment and compensatory leave.

(d) The employee shall make such selection known to the Employer and in the manner required by the Employer.

(e) In the event the employee fails to make the selection referred to above, the method of compensation shall be determined by the Employer.

(f) An employee who has elected the compensatory leave method shall have his lieu days scheduled in the fiscal year in which they are credited to him. In scheduling such lieu days the Employer shall, subject to the operational requirements of the service:

> *(i) schedule an employee's lieu days on the dates requested when such a request is made in writing thirty (30) days in advance;*
>
> *(ii) schedule any remaining lieu days after consulting with the employee, if as of October 1 the Employer has been unable to accommodate an employee's request or no request has been filed; such schedule shall be subject to at least twenty-eight (28) days' advance notice;*
>
> *(iii) provide by mutual agreement lieu days requested on shorter notice, notwithstanding the above.*
>
> *(g) Lieu days may be granted as an extension to vacation leave or as occasional days and shall be charged against the lieu day credits on the basis of one (1) shift for one (1) day.*
>
> *(g) At the end of each fiscal year, the employee shall be paid in cash for each unused lieu day at one and one-half (1 ½) times his daily rate of pay.*
>
> . . .

[17] There is no definition of "lieu day" or "lieu days" in the collective agreement.

C. Facts specific to the grievance

[18] The evidence disclosed that at some point after the schedule has been set but before the start of a new fiscal year, a process takes place in which each firefighter chooses his or her vacation leave for the upcoming fiscal year.

[19] Entered into evidence were copies of the administrative guideline for leave scheduling. The first was dated March of 2005 ("the 2005 leave guideline"), and the second, May 31, 2010. While neither one specifically states that it is just for scheduling vacation leave, the evidence before me indicated that both were for that purpose. Also set out in them was that the caveat to scheduling leave was the minimum manning. This meant that if a platoon consisted of 20 people, no more than 3 firefighters and 1 officer could be on leave at one time.

[20] In summary, the evidence indicated that once the schedule for the fiscal year is released, sometime between January and March of any given year, the firefighters and officers in each platoon choose their vacation leave, based on a predetermined roster process. The firefighters and officers have separate rosters. The evidence disclosed that the priority to choose changes each year, with the person having first pick in one year dropping to last pick the following year, and the person picking second moving

up to the first pick, and so on, down through the roster. As such, all firefighters and officers had chosen their vacations by the time the fiscal year started on April 1, 2010.

[21] The evidence also disclosed that if on any given day, a platoon was on duty and was scheduled to operate with minimum manning (with only 16 platoon members), and platoon members were sick or injured or otherwise could not fulfil their duties, other firefighters or officers would be brought in to cover their shifts and would be paid overtime, if necessary.

[22] Entered into evidence was a series of summaries for each month of fiscal year 2010-2011, which set out the firefighters and officers who were working, on leave, on a course, or working overtime on each day, in all the platoons. It was identified to me as the "Master Leave Tracking Document". It disclosed that over the course of fiscal 2010-2011, over all the platoons, 1366 individual firefighter or officer shifts were covered by another employee being paid overtime.

[23] At a date and time before March 25, 2010, the grievor requested that for 5 of the 11 designated paid holidays (DPHs), he be granted lieu days in fiscal 2010-2011. He requested lieu days for the following shift days: July 23 to 24 and 25 to 26, August 8 to 9 and 10 to 11, and December 24 to 25 ("the lieu day choices"). This request was also made in what was called a "round-trip memo" dated March 25, 2010.

[24] On March 26, 2010, at 14:27, Mr. Mullen emailed Kim Dunaway, an officer at the grievor's platoon, referencing the lieu day choices and instructing him as follows:

> . . .
>
> *. . . these requests should go through you. With that said, I need to see your platoon's vacation leave picks. The scheduling of these Lieu day [sic] must be in compliance with existing policies regarding rotational leave picks and manning requirements [minimum manning]. Once I have all the information I will provide guidance on the way ahead. I will be off until April 6, we can meet on April 9, please have the information I requested ready for that meeting.*
>
> . . .

[25] On March 27, 2010, at 22:03, Randy Morton, Assistant Fire Chief, emailed Mr. Mullen, stating as follows:

> *The dates FR1 Ianson has requested as compensation for lieu days conflicts with our platoon's scheduled leave picks. Our platoon*

> *already has 4 members scheduled for vacation leave on the following dates:*
>
> - *July 23-24, 2010 – 3 firefighters and 1 fire officer* [names omitted];
> - *July 25-26, 2010 – 3 firefighters and 1 fire officer* [names omitted]*;*
> - *August 8-9, 2010 – 3 firefighters* [names omitted] ***1 fire officer remaining open up to 14 days prior to the leave date IAW AG 11.01; and***
> - *August 10-11, 2010 – 3 firefighters* [names omitted] ***1 fire officer remaining open up to 14 days prior to the leave date IAW AG 11.01; and***
>
> *December 24-25, 2010 – 2 firefighters and 1 fire officer* [names omitted] *December 24-25 -1800-0800 -1 firefighter* [name omitted]*;*
>
> *The only leave available using the existing leave pick policy is December 24th – 0800-1800. My interpretation concerning FR1 Ianson's request permits this leave to be scheduled subject to operational requirements IAW collective agreement para 6.01(f).*

[26] On April 20, 2010, Mr. Morton emailed the grievor and copied Mr. Mullen. He advised the grievor that his lieu day choices conflicted with his platoon's scheduled leave choices and confirmed the information he had already confirmed to Mr. Mullen in the earlier March 27 email. He told the grievor that the only leave available using the 2005 leave guideline was December 24 between 08:00 and 18:00 and that all leave had to be administered according to the 2005 leave guideline.

[27] On April 23, 2010, the grievor filed his first grievance. Mr. Mullen issued the first-level grievance response on May 7, 2010, denying the grievance. The base commander, Captain Hallé, denied it in the second-level response, issued on May 21, 2010. The following two paragraphs of the second-level reply may be relevant to the matters before me:

> *A hearing was scheduled for Monday 17 May 2010 to allow you and your Union representative to present your arguments concerning this grievance. AS [sic] I have received no response to the request for the scheduled hearing or any written submission of your arguments regarding this grievance, I will respond based on your grievance submission and the first level response at reference B and other supporting documentation.*
>
> *I have carefully reviewed the first level response, your collective agreement at reference D and the Fire Hall leave policy at reference E which allows for only 4 staff to be on leave at one time.*

> *I find that in the instances that your leave was denied, there were already the maximum allowable Fire Hall personnel approved for leave. That being the case, there was no ability to grant leave for the shifts in question and maintain minimum manning without calling in overtime. In the current climate of fiscal restraint and my direction to managers to curtail the use of overtime, the Fire Chief had no other alternative except to deny your lieu days requested for those dates in question. Therefore, your grievance is denied at the second level.*
>
> . . .

[28] The grievor testified that he later requested September 9 and 11, 2010, as lieu days. The written request was not entered into evidence, although his email to Chief Mullen, copied to Mr. Morton, dated August 3, 2010, at 08:03, did contain the following:

> *I sent Mr. Morton an email requesting information as to why I am being denied lieu leave based on 3 persons being off Sept09-11. I sent the leave request at approx. 4:45 to notified him I had applied for the leave at that time Mr. Morton said the leave was not available due to 3 persons being off which I find confusing, so I sent an email at 4:55pm asking for clarification as to why the leave is being denied because his reason does not make sense. Mr Morton read receipt show that may email was read at 5:16pm at 7:19am, I sent another email asking for follow-up to my email which was read at 7:21am and said I would continue up the chain if I did not receive a response by 8:00an this morning. Mr Morton has not replied. As well Mr Morton has not denied the leave on oracle.*
>
> *It appears Mr Morton is either too busy to answer my request or does not want to. I will be on my days of for the next 5 days. So could you please respond to my home email to explain why my leave is being denied as I need to make arrangements in regards to denial* [email address omitted].
>
> *I have made this request for leave more than 30 days in advance of the dates required.*
>
> [*Sic* throughout]

[29] In October of 2010, the grievor moved to platoon no. 1.

[30] Entered into evidence was an email dated November 25, 2010, at 21:34, from Jeff Schwarzenberger to someone identified as "RA McClintock". From other documents entered on consent, it appears that Mr. Schwarzenberger was a bargaining agent representative. He represented the grievor at least once, at a grievance hearing for his grievances over the denial of his lieu days. RA McClintock appears to be

Ron McClintock, who worked in Human Resources for DND in its Pacific Region. The email stated as follows:

> *Yes, Len Ianson requested leave for the 25th and 27thf of December and was denied, he filed a grievance on November 9th, signed by a/c Crisp. I guess it has disappeared into the upper deck void in building 212, I copied the grievance and left it for the BFC.*
>
> [*Sic* throughout]

[31] Entered into evidence was a copy of the grievor's leave transactions that cover the period at issue in this hearing. His leave transactions disclose that his request for lieu days for December, which appears to have been made in November of 2010, is shown as having been denied on November 7, 2010.

III. Summary of the arguments

[32] The grievor requested that all three grievances be granted and that in addition to requesting a declaration that the employer breached the collective agreement, he receive compensation in the form of two additional vacation days credited to him, to be used at his discretion. In the alternative, he requested that he be paid the prevailing overtime rate for those days.

[33] The grievor submitted to me or referred me to the *Act*, the *Federal Public Sector Labour Relations and Employment Board Act*, the *Public Service Employment Act* (S.C. 2003, c. 22, s. 12, 13), the *Canada Labour Code* (R.S.C., 1985, c. L-2), *Beese v. Treasury Board (Canadian Grain Commission)*, 2012 PSLRB 99, *Bucholtz v. Treasury Board (Correctional Service of Canada)*, 2010 PSLRB 111, *Canada (Attorney General) v. Bucholtz*, 2011 FC 1259, *Campione v. Canada Revenue Agency*, 2013 PSLRB 161, *Canada Post Corporation v. Canadian Union of Postal Workers*, 1993 CarswellNat 3475, *Canada Post Corporation v. Canadian Union of Postal Workers*, 1993 CarswellNat 2946, *Canada Post Corporation v. Canadian Union of Postal Workers*, 1999 CarswellNat 2712, *Degaris v. Treasury Board (Transport Canada)*, 1993 CarswellNat 2712, *Canada (Attorney General) v. Degaris*, [1993] F.C.J. No. 1011 (QL), *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, *Dunsmuir v. New Brunswick*, 2008 SCC 9, *Edwards v. Treasury Board (Canada Border Services Agency)*, 2019 FPSLREB 62, *Ewen v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 113, *Federal Government Dockyard Chargehands Association v. Treasury Board (Department of National Defence)*, 2013 PSLRB 139, *Ferguson v. Treasury Board*

(Statistics Canada), 2009 PSLRB 21, *Journal Publishing Company of Ottawa v. Ottawa Newspaper Guild, Local 205*, [1977] 18 O.J. No. 8 (QL), *Power v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-17064 (19880225), [1988] C.P.S.S.R.B. No. 56 (QL), *Sturt-Smith v. Treasury Board (Solicitor General Canada)*, PSSRB File No. 166-02-15137 (19860731), [1986] C.P.S.S.R.B. No. 195 (QL), *Mailly v. Treasury Board (National Defence)*, 1988 CarswellNat 1675, *Boone v. Treasury Board (Revenue Canada - Customs and Excise)*, 1989 CarswellNat 1607, *Evans v. Treasury Board (Solicitor General Canada - Correctional Service)*, 1988 CarswellNat 1880, *Walcott v. Turmel*, 2001 PSSRB 86, *Brown v. Treasury Board (Fisheries & Oceans Canada)*, 2002 PSSRB 59, *Dillon v. Treasury Board (Transport Canada)*, 1992 CarswellNat 1640, *International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board (Department of National Defence)*, 2009 PSLRB 2, *Faryna v. Chorny*, [1951] B.C.J. No. 152 (QL), and George W. Adams, *Canadian Labour Law*, 2nd Edition, Part II, Chapter 4, paragraph 4.3(iii), "Natural Justice".

[34] The employer submitted that the grievances be dismissed and referred me, in addition to the *Act*, to *Chafe v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112, *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Limited*, 2002 NBCA 30, *Delios v. Canada Revenue Agency*, 2013 PSLRB 133, *Delios v. Canada (Attorney General)*, 2015 FCA 117, *Doherty v. Treasury Board (Department of National Defence)*, 2014 PSLRB 77, *Jenks v. Canada Revenue Agency*, 2010 PSLRB 27, *Lahnalampi v. Treasury Board (Department of Human Resources and Social Development)*, 2015 PSLREB 96, *Ontario Power Generation v. Society of Energy Professionals*, 2013 CarswellOnt 17912, *Professional Institute of the Public Service of Canada v. Treasury Board (Department of Human Resources and Skills Development)*, 2014 PSLRB 18, and *Wamboldt v. Canada Revenue Agency*, 2013 PSLRB 55.

IV. Reasons

[35] For the reasons that follow, I find that the employer breached the collective agreement.

[36] At Appendix A, the collective agreement contains certain specific provisions that are exclusive to the firefighter group. Included is clause 6.01, which falls under the heading "Designated Paid Holidays" and the sub-heading "Compensation for

Designated Paid Holidays". It deals with how firefighters receive compensation for DPHs over the course of a fiscal year. There are three methods, as follows:

- they receive a cash payment for all 11 DPHs;
- they take compensatory leave; and
- they take a combination of cash payment and compensatory leave.

[37] The DPH compensation, when it is taken as leave, is referred to in the collective agreement as a "lieu day", although it has no definition of that term. It means, quite simply, the day in lieu of a particular DPH. The process to effect the choice of lieu days is set out in clause 6.01(f) and provides that an employee who has elected to take some or all of his or her compensation for the DPHs as lieu days **shall** have his or her lieu days scheduled in the fiscal year in which they are credited. Clause 6.01(f) goes on to state as follows:

> *(f) . . . In scheduling such lieu days the Employer **shall**, subject to the operational requirements of the service:*
>
> *(i) schedule an employee's lieu days on the dates requested when such a request is made in writing thirty (30) days in advance;*
>
> *(ii) schedule any remaining lieu days after consulting with the employee, if as of October 1 the Employer has been unable to accommodate an employee's request or no request has been filed; such schedule shall be subject to at least twenty-eight (28) days' advance notice;*
>
> *(iii) provide by mutual agreement lieu days requested on shorter notice, notwithstanding the above.*
>
> [Emphasis added]

[38] Clause 6.01(h) of Appendix A provides that when a cash payment is made as compensation for a DPH or instead of a lieu day, it shall be at time-and-a-half.

[39] Article 35 of the collective agreement sets out the vacation leave provisions. Clause 35.05 falls under the sub-heading "Scheduling and Granting of Vacation Leave with Pay". Clauses 35.05(b) and 35.06 state as follows:

> ***35.05***
>
> *. . .*
>
> *(b) The Employer reserves the right to schedule an employee's vacation leave. In granting vacation leave with pay to an employee, the Employer shall make every reasonable effort to:*

> *(i) grant an employee's vacation leave in an amount and at such time as the employee may request;*
>
> *(ii) not recall an employee to duty after the employee has proceeded on vacation leave;*
>
> *(iii) not cancel nor alter a period of vacation leave which has been previously approved in writing;*
>
> *(iv) ensure that, at the request of employee, vacation leave periods of two (2) weeks or more are started following a scheduled period of rest days.*
>
> . . .
>
> ***35.06*** *The Employer shall give an employee as much notice as is practicable and reasonable of approval, denial, alteration or cancellation of a request for vacation or furlough leave. In the case of denial, alteration or cancellation of such leave, the Employer shall give the written reason therefore, upon written request from the employee.*
>
> . . .

[40] The collective agreement makes a clear distinction between vacation leave and the DPH leave set out in Appendix A. In article 35, the parties agreed that the employer shall have the right to schedule an employee's vacation leave. So, when an employee takes leave under article 35, his or her leave is scheduled by the employer. The employees request leave, which the employer approves. The employer has control over scheduling leave; it can grant or refuse it. Clauses 35.05(b)(ii) and (iii) talk about recalling an employee back to work from vacation and cancelling an approved vacation leave request. These powers negotiated in the collective agreement are in the employer's favour and allow it to control its workforce.

[41] The wording in article 35 is in stark contrast to that of clause 6.01 of Appendix A, which uses "shall" in conjunction with the employer granting an employee's leave; it is the complete opposite of article 35. The employer does not have a prerogative.

[42] "Shall" is commonly used to express a mandatory instruction. In other words, the employer is required to schedule grievors the lieu days they requested unless certain preconditions, articulated in clause 6.01(f), limit scheduling them. Clause 6.01(f) provides only the following 2 pre-conditions that would allow the employer to not schedule requested lieu days:

- the request was not made in writing and more than 30 days in advance of the days being requested; and
- operational requirements.

[43] In the grievor's case, the first precondition was met as the request for the 5 lieu days was made in writing and more than 30 days before the first set of lieu days, which were his scheduled shift days of July 23 to 24 and 25 to 26.

[44] That leaves the second precondition as the sole reason for the refusal. The fact behind it is not in dispute — the grievor's platoon was already at its minimum manning requirement due to the approved vacation leave for the maximum number of firefighters.

[45] The collective agreement does not define "operational requirements"; however, the Board and its predecessors have interpreted that term. The best description of it is found in *Power* at paragraphs 44 to 46 and 50, which state as follows:

> *44 "Operational requirements" is not a magic wand which the employer can wave in order to deny employees their due under a collective agreement. Ms. Gobeil, on behalf of the employer, developed an ingenious argument in this respect. She began by saying that an operational requirement is, in effect, anything the employer says it is including a desire to make allowance for an unknown possibility which may, or may not, come to pass. Then basing herself upon the decision of the Adjudicator and of the Federal Court of Appeal in the case of* ***Tremblay*** *(****supra****) she argued that once the employer has established the existence of an operational requirement it is no longer subject to the duty to "make every reasonable effort" to accommodate an employee.*
>
> *45 This line of argument is not acceptable. It would have the effect of converting certain rights of employees under the collective agreement to matters of simple employer discretion.…*
>
> . . .
>
> *46 It would be unwise to attempt to provide a universally valid definition of* ***bona fide*** *operational requirements. For present purposes it will suffice to say that policies established unilaterally by the employer solely for financial reasons cannot be accepted as valid operational requirements if they have the effect of denying employees their rights under a collective agreement.…*
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> . . .
>
> *50 If a collective agreement mandates increased benefits for employees, the cost of those benefits must be borne by someone. If the employer refuses to allocate additional resources to provide for those increased benefits, it must follow that the cost will fall, in one way or another, upon the employees.…*

. . .

[Emphasis in the original]

[46] Minimum manning does not equate to operational requirements; however, the two terms may potentially intersect significantly. Minimum manning is a requirement that no one disputed. It is defined as the minimum number of firefighting personnel (firefighters and officers) who are on duty and available to respond to a fire. It may or may not be that on any given day, enough employees are available to ensure that the platoon on duty has enough firefighters and officers who show up for duty to maintain the minimum manning requirement.

[47] The evidence disclosed that to maintain a firefighter presence with minimum manning capability, DND at the base had on staff approximately 80 firefighters (including officers) assigned into 4 platoons of roughly 20 personnel per platoon. Given that minimum manning was 16 employees per shift, each platoon, depending on its exact number, had a buffer of about 4 personnel that could be away on any given shift.

[48] However, like in any other workplace and for any other employee, firefighters may be required to be off work and on a form of leave that does not equate to vacation. In the federal public sector, this could mean being off sick, tending to a sick child, or dealing with a death in the family, just to name a few. Of course, neither an employee nor the employer has control over those situations. In them, employees are away from work, and depending on the circumstances of any given day, including the platoon's staffing level, minimum manning may be an issue.

[49] In fact, it is clear from the evidence that at many different times over the course of fiscal 2010-2011, when a platoon was on duty, there were often more than 4 firefighters off work on any given shift. It is also clear that when the minimum manning number went below the required 16 personnel, firefighters or officers, as the situation required, were called in to work from other platoons and were paid overtime. The documentary evidence submitted disclosed that during fiscal 2010-2011, overtime was used to cover a total of 403 shifts for the platoon that the grievor was a member of, while over that same time, it was used to cover 1366 shifts in total.

[50] While I have not tried to count how many of the 1366 overtime shifts were recorded as going against personnel using vacation leave, it is enough to state that the

evidence disclosed that overtime was used an average of 113.83 shifts per month to ensure minimum manning and that some was certainly used to replace personnel on vacation.

[51] It appears that the employer uses overtime quite freely to ensure that minimum manning is maintained. Given these facts, I fail to see how it could state that for operational requirements, it could not grant the grievor his requested lieu days. Other than saying that he was denied his lieu days for operational requirements, there was no actual evidence that no other firefighters were available to replace him, via overtime or not.

[52] As the employer failed to establish that operational requirements necessitated denying the lieu days, it breached the collective agreement.

V. Remedy

[53] The grievor asked that the Board order that the employer breached the collective agreement. It shall be ordered.

[54] The grievor also asked that he be granted two additional days of paid vacation leave for the upcoming fiscal year (2020-2021) or that in the alternative, he be paid the prevailing overtime rate for the lieu days he did not receive.

[55] Section 228(2) of the *Act* states that after considering a grievance, the Board must render a decision and make an order that it considers appropriate in the circumstances. The grievor referred me to three cases in which arbitrators fashioned awards in which leave was not granted.

[56] The employer argued that s. 229 of the *Act* is a defence to the Board granting the extra leave day as it would have the effect of requiring the amendment of a collective agreement or an arbitral award. I agree.

[57] While the Board has the power to remedy a breach, the remedy is not without its limitations. The collective agreement specifically fixes how DPHs will be compensated, and failure to grant those DPHs requires the employer to pay an affected employee at 1.5 times his or her normal rate of pay. The grievor was paid this amount. Therefore, he has already been compensated for that loss.

[58] This is not a situation in which an employee was refused leave and was not compensated for it. Were I to grant the grievor's request, I would amend the collective agreement by awarding him leave days that he is not entitled to receive as compensation for something he has already received compensation for.

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

(The Order appears on the next page)

VI. Order

[60] The grievances are allowed.

[61] I declare that the employer breached the collective agreement.

May 27, 2020.

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