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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

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

and

TREASURY BOARD
(Department of Employment and Social Development)

Employer

Indexed as
Public Service Alliance of Canada v. Treasury Board (Department of Employment and Social Development)

In the matter of a group grievance referred to adjudication

Before: Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Bargaining Agent: Zachary Rodgers, counsel

For the Employer: Alexandre Toso, counsel

Decided on the basis of written submissions, filed March 18 and May 3 and 13, 2022.

REASONS FOR DECISION

I. Group grievance referred to adjudication

[1] On January 15, 2015, the Public Service Alliance of Canada ("the union") filed a grievance on behalf of 36 grievors employed in the Employment Insurance Contact Centre in Toronto, Ontario ("the Toronto call centre") of the Department of Employment and Social Development ("the employer"). The Toronto call centre is the largest Employment Insurance ("EI") contact centre in Canada offering telephone-based EI services to Canadians.

[2] The grievance alleges that the employer did not make every reasonable effort to equitably offer overtime work to readily available and qualified employees, as required by clause 28.04 of the collective agreement between the Treasury Board and the Public Service Alliance of Canada, the bargaining agent for the Program and Administrative Services group (expiry date June 20, 2014) ("the collective agreement").

[3] Payment service officers ("PSOs") act as points of contact to resolve EI claimants' inquiries. They do not process EI claims; this is the responsibility of the EI processing staff who work outside call centres. There are two groups of agents within the PSO classification, namely, core call-centre agents ("core agents") and Tier 2XP agents. Core agents can become Tier 2XP agents if they are offered and complete an additional three weeks of training on the calculation skills required for some of the more complex files.

[4] To reduce a backlog that arose from the 2008 economic downturn when many Canadians sought to access EI, the employer initiated an inventory reduction strategy. It involved offering employees a good deal of overtime work, the focus of which was work that only the Tier 2XP agents could do. Core agents could have done some of the work, but it was bundled with the bulk of the overtime tasks that they could not do. The employer did not include them in the overtime canvasses, and they were denied the opportunity to do any of the offered overtime work.

[5] I find that the employer did not make every reasonable effort to offer overtime on an equitable basis. It must ensure that overtime work is organized such that it can be distributed to as many employees as are qualified to do it, in the absence of a cogent reason that it cannot be so organized.

II. The bargaining agent's evidence and submissions

[6] The PSO position is classified at the PM-01 group and level. The employer further divided the PSOs into two groups, core agents and Tier 2XP agents. Tier 2XP agents are a subgroup of core agents. They have the same classification and job description. The opportunity to work as a Tier 2XP PSO was given to core agents who met certain productivity and call-quality thresholds.

[7] The collective agreement's only requirements for distributing overtime were that the employees be readily available and qualified. The employer is responsible for canvassing its employees to distribute overtime equitably. By canvassing only Tier 2XP agents, it imposed productivity requirements on overtime distribution, in violation of the collective agreement.

[8] The work assigned to PSOs is distributed through the largely automated National Workload System ("NWS"), which is populated with "work items" that are created when clients contact Service Canada about EI claims. The work items are categorized by complexity, user specialization, language requirements, and workload limits, and the NWS assigns them to the first available agent, regardless of physical location.

[9] Employees can also manually assign work items to themselves, to ensure the rational and efficient completion of work. For example, when a PSO is dealing with a client with multiple open work items, they would seek other open work items for that individual, to address the situation fulsomely. Some work items do not receive immediate attention and must be addressed by employees later, which creates system backlogs that result in delays.

[10] In fiscal year 2014-2015, the employer implemented an inventory reduction strategy, which was a large-scale attempt to reduce backlogs that stressed the system and prevented the employer from meeting its performance goals. After the strategy was completed, employer representatives in its Ontario Region prepared a presentation to laud its successes. The presentation shows that 288 PSOs were trained and that from October 2014 - October 2016, overtime was regularly used to deal with backlogged work items. As well, regular overtime began to be distributed in the Ontario Region in June 2014, involving call-centre employees assigned to clear

backlogged work items. No overtime was distributed to Ontario Region core agents; it was all distributed only to Tier 2XP agents.

[11] At the Toronto call centre, the process for administering overtime was for a director of the EI Processing Branch ("EI Processing") to email all other directors whose staff would assist with the overtime and ask them to conduct an overtime canvass for certain days. The emails set out the parameters of who was to be canvassed for overtime, the number of hours expected each day, and brief descriptions of the work to be performed by each group of employees. Overtime work queues were populated for the available employees based on those descriptions. The overtime canvass and direction emails show that one Saturday and three weeknight overtime opportunities were offered most weeks from June 7, 2014, to March 30, 2015.

[12] One of the most common work item descriptions for Tier 2XP agents in the overtime directions was a "Level 1 Claims Assessment", which was a catch-all category that included several kinds of work items, some involving calculations, some not. It included "Claims Assessment Renewals" and other tasks that core agents could have performed, but none of them were included in the overtime canvasses. Detailed records show that most of the overtime tasks that Tier 2XP agents completed were categorized as either "claims assessment" or "claims review - BPNE ['Benefit Period Not Established'] recalculation".

[13] The grievors were sometimes called upon during the regular workday to action work items noted as "completed in overtime" or "to be completed in overtime".

[14] A Tier 2XP agent who worked the overtime hours provided a statement to the effect that core agents were qualified to do some of the overtime work he did, such as Claims Assessment Renewals.

[15] From November to December 2014, overtime planning emails were also sent to team leaders in the Western Region. They showed that in that region, overtime opportunities were provided to all PSOs. Core agents were assigned Claims Assessment Renewals.

[16] By limiting overtime canvasses to only Tier 2XP agents in the Ontario Region, the employer effectively distinguished between employee groups based on an ability to meet performance metrics. Tier 2XP agents are selected from among the core-agent

group based on productivity metrics and are then provided with additional training to allow them to perform calculations and other operations while on the phone with clients. They and the core agents share the same classification, job description, and basic duties.

[17] The grievors' evidence, including the witness statement of a Tier 2XP agent who performed the overtime work, showed that the overtime assignments included Claims Assessment Renewals, which core agents could have done. It also showed that in the Western Region, overtime duties were bundled so as to allow core agents to complete Claims Assessment Renewals while their Tier 2XP colleagues completed the more complex calculation tasks.

[18] The grievors were qualified to perform at least some of the work that was offered as overtime between June 2014 and April 2015 — at a minimum, the Claims Assessment Renewals that formed part of the broader category of Level 1 Claims Assessment.

[19] The system of distributing overtime to employees in this workplace is similar, if not identical, to the system in *Public Service Alliance of Canada v. Treasury Board (Department of Employment and Social Development)*, 2014 PSLRB 11 ("*PSAC 2014*"). The employer decides which employees are to be canvassed, canvasses them, and then divides the overtime equally among those who are interested, available, and qualified. This should achieve an equitable distribution of overtime unless employees are arbitrarily excluded from the canvasses. The equitability of overtime distribution in this case must be determined by looking at the canvasses as well as their results.

[20] The grievors' availability for overtime must be assumed since they were given no opportunity to indicate it. The fact that they filed a grievance indicates that they believe that they would have been available for some of the overtime work offered over the course of the year.

[21] The evidence showed that the grievors were qualified for some, but not all, of the available work. The same could be said about any group of employees. The Tier 2XP employees were not necessarily qualified to perform all the duties. And employees classified CR-03 likely performed different work than those classified PM-01 or PM-03.

[22] The employer uses a national automated system to assign work. Therefore, the Claims Assessment Renewals being assigned to core agents in the Western Region shows that this could have, and should have, been done in the Ontario Region. Allowing Western Region core agents to do Claims Assessment Renewals, but not those in the Ontario Region, was arbitrary and unrelated to any operational reason.

[23] The collective agreement requires the employer to make "every reasonable effort" to equitably distribute overtime duties. This includes organizing the distribution of available work to allow all employees to work overtime and not restricting overtime opportunities to only high-performing employees. The employer had only to create work queues that would have allowed agents other than Tier 2XPs to work the overtime. In this case, the employer was content to leave the renewals in the larger Claims Assessment pile and assign all the work only to Tier 2XP agents. By not making any effort to include the core agents, the employer acted arbitrarily and breached the collective agreement.

[24] Decades of Board jurisprudence on article 28 of the collective agreement has established that distributing overtime opportunities based on the productivity of one group of employees as opposed to another is prohibited. The controlling test for determining whether overtime has been distributed equitably was confirmed in *Canada (Attorney General) v. Bucholtz*, 2011 FC 1259, a Federal Court decision that put forward three factors to consider:

> 1) the equity of the distribution must be measured over a reasonable period;
> 2) the equity of the distribution is assessed by comparing the hours allocated to the grievor or grievors to the hours allocated to similarly situated employees over that period; and
> 3) the Board must examine whether any other factor may explain the discrepancy between the hours worked.

[25] *PSAC 2014* is a more recent decision involving the same parties and similar facts. In it, the Board held that when overtime is allocated among canvassed employees who have expressed interest, the scope of the canvass must comply with the collective agreement's equitable-distribution requirements. This means that all available and qualified employees that can do the work must be included in the canvass. At paragraph 53, the Board specifically found that restricting overtime canvasses to only those employees within the EI processing operation who usually did the type of work for which overtime was required, while excluding those in another unit who were capable of performing the work, violated the collective agreement:

> ***53*** *The evidence demonstrated that, on several occasions, the employer restricted Level 2 processing work to employees who normally performed such work. This is similar to the circumstances in* Bretzel, Conrad and Johnston*. In* Bretzel*, the adjudicator determined that in order to do so, the collective agreement would have to state that overtime was to be allocated among "… readily available qualified employees who are normally assigned work that necessitates the overtime …," and rejected such an approach as a construction that the collective agreement would not bear. This determination was subsequently applied in* Conrad *and* Johnston*.*

[26] In *Dewit v. Canada Revenue Agency*, 2016 PSLREB 40, the Board held that restricting overtime offerings to employees' usual lines of work and excluding those otherwise qualified to perform it was a violation of the collective agreement. The Board relied on the fact that the job description and classification of the employees assigned the work was identical to that of the grievors. *Dewit* stands for the proposition that restricting overtime offerings to one unit within the employer's operation, without an operational reason, will be found arbitrary.

[27] The Board must determine whether the grievors were qualified and available to perform the work. If they were and were not given the opportunity to participate in the overtime, then the employer can provide operational reasons to explain why they were not included. If those reasons are found arbitrary, then the grievance should be allowed. *Casper v. Treasury Board (Department of Citizenship and Immigration)*, 2011 PSLRB 27, confirms that when the employer seeks to rely on the provision of a training program to argue that the grievors were not qualified, it must identify what aspect of the overtime work they were not able to perform. And it must make a fair effort to assess their qualifications against the work to be performed.

III. The employer's evidence and submissions

[28] The employer argued that the union misconstrued the collective agreement requirements with respect to the equitable distribution of overtime and attempted to impermissibly expand the issues before the Board by referring to the availability of training and to alleged comments made during the grievance process. The employer offered overtime opportunities on an equitable basis to employees who were available and qualified to perform the work. The grievance must fail since the union did not show that the grievors were readily available or qualified to work the overtime.

[29] At the time the group grievance was filed, all the grievors were core agents. Training for newly hired PSOs is a nine-week in-class program focused on a broad understanding of EI legislation and a client service and experience model. New hires are introduced to the Common Reference Tool, which contains all procedures and updates associated with EI claims and benefits and is one of the main tools used during live calls. Once training is completed, the PSO is considered a core agent; however, their calls and transactions continue to be monitored.

[30] Due to the 2008 economic downturn many Canadians sought to access EI. This created massive workload backlogs that reached all-time-high levels. With that workload pressure, both the EI Processing staff and the Toronto call centre faced unprecedented demands. As a strategic response, the Tier 2XP pilot program was launched in each region, in Bathurst, New Brunswick (Atlantic Region); Regina, Saskatchewan (Western Region); Shawinigan, Quebec (Quebec Region); and Toronto, Ontario (Ontario Region).

[31] Tier 2XP agents were introduced to the Toronto call centre in November, 2010. They had taken three weeks of additional training, to improve first-contact resolution rates, and they had a greater level of authority. Like core agents, they work on the phone and with the procedures in the Common Reference Tool, but they are trained to deal with different and more complex inquiries.

[32] Tier 2XP agents can issue payments and finalize and adjudicate initial claims and all types of claims renewals, including maternity, parental, and sickness benefits. They can perform claims reviews, including recalculations and BPNE recalculations. They can deal with record-of-employment issues, including determining a non-contentious reason for a separation. They also have access to additional systems, such as the “System Support for Agents”, a program that enables agents to calculate initial claims and recalculations.

[33] The Tier 2XP training is an additional three weeks during which the trainees do not perform their regular work answering live calls. The training focuses on claims adjudication and processing transactions. It is divided into three phases focusing on claims calculations and recalculations, self-employment, and special benefits. Core agents are trained to process only renewals of regular and sickness benefits. Moreover, these two specific work items could be automated without the need for any PSO input, under certain circumstances.

[34] While in an ideal world, all PSOs would have been trained to Tier 2XP capabilities, they initially had to meet the performance criteria expected of a core agent before being trained to become a Tier 2XP agent. For their training to be approved, core agents had to show a strong knowledge of the EI program and legislation and to demonstrate the ability to fact-find, provide accurate and up-to-date information, and support EI claimants with more complex inquiries.

[35] This additional training was not offered immediately to all PSOs because, at the time, they had an annual attrition rate of up to 25%. The factors taken into account to identify Tier 2XP candidates were equitable and transparent and were applied in the same manner to all core agents in the Toronto call centre. These factors were discussed in the grievors' performance agreements.

[36] In fiscal year 2014-2015, EI Processing faced increased workload pressures due to high inventories of EI applications and revision and recalculation work pressures. EI Processing established a 2-phase, 24-month inventory reduction strategy from October 2014 to September 2016.

[37] Interest in working overtime was solicited through weekly canvass emails. Once overtime approval was confirmed, the NWS assigned it to all readily available and qualified employees. As part of the inventory reduction strategy, the NWS automatically grouped work items based on several factors and assigned them to PSOs with matching profiles. All employees have an NWS profile to allow assigning work to them based on the profile match. As core agents in the Toronto call centre were not qualified to complete the work items that EI Processing identified for overtime, they were not included in the canvass.

[38] As part of the inventory reduction strategy, EI Processing in the Ontario Region started to solicit overtime, weekly, from EI Processing and Toronto call centre employees. The overtime-direction emails between June 2014 and March 2015 show that the areas of work that EI Processing identified required calculation training. They consisted mainly of Level 1 Claims Review - BPNE, Level 1 Claims Review - Regular Recalculation, and Level 1 Claims Assessment work items. It is uncontested that all the areas of work identified for overtime, except Claims Assessment, required Tier 2XP training.

[39] The changes to the NWS that resulted in the bundling of work items occurred after regional representatives and stakeholders were consulted. There is no evidence that individual, group, or policy grievances were filed to challenge the changes. While before then, one work item could contain multiple issues or actions to be taken on a file, the new system ensured that each work item contained only one issue or action to be taken. However, two or more work items would be "bundled" and assigned to the next available agent with a matching profile who was able to action all the work items as a group.

[40] These changes were introduced for operational reasons. Assigning multiple work items on the same client file reduced the need to manually reassign them to other agents. It enabled agents to process EI files more quickly and efficiently and EI clients to receive quicker payments. While the overtime work items that EI Processing identified required Tier 2XP knowledge and experience, due to the bundling of work items starting in the fall of 2014, a work item that was within the authority of a core agent might occasionally have been actioned during overtime by a Tier 2XP agent. However, the vast majority of the overtime work items were at the Tier 2XP level of authority.

[41] The overtime reports reveal that almost all the work items actioned in the Toronto call centre over the course of fiscal year 2014-2015 fell within the categories of Claims Review and Claims Assessment and thus required Tier 2XP training. These reports contain no indication that the overtime work consisted of renewals actionable by core agents. There is no evidence that any significant inventory of work items was completed during overtime that core agents were qualified to action.

[42] Throughout fiscal year 2014-2015, no areas of focus for overtime that EI Processing identified could be completed by core agents in the Toronto call centre. The union relied on the overtime direction dated November 14, 2014, for the proposition that Claims Assessments made on November 15, 2014, included renewals and therefore would have been within the core agents' authority. However, the overtime direction refers to renewals of "Specialized Applications", which were actioned exclusively by Tier 2XP agents in the Western Region. No other overtime-direction emails identify renewals as the area of focus of Claims Assessments. As well, core agents could process only certain types of renewals, a portion of which was automated without any PSO input.

[43] The employer submitted that the case law on overtime distribution has consistently held that the onus is on the union to establish a claim of inequitable distribution. The difficulty to prove its case does not reduce or reverse the onus, and in this case, the union did not meet its onus. The union did not show that the grievors were qualified to perform overtime work. They were not qualified because none of them, at the time, had received the Tier 2XP calculation training required to do the overtime work that EI Processing had identified. Tier 2XP agents receive additional training to be able to process work items that core agents are not qualified to action, such as Initial Claims Assessments, Claims Reviews, and all types of Special Benefits. Their training materials cover subjects that are not addressed in the core training materials, such as:

1) the calculation of initial claims, including how to calculate the benefit period commencement date, and establishing insurability;
2) the recalculation of claims and adjudication of antedates; and
3) the calculation of special benefits, including sickness, maternity, and parental benefits.

[44] Clause 28.04 of the collective agreement does not oblige the employer to provide training to an employee to perform work offered on overtime or to notify them of overtime opportunities. It requires the employer, on a plain reading, to make every reasonable effort to offer overtime to employees who are already qualified to work it. The union's focus on whether the grievors should have received Tier 2XP training is an attempt to sidestep the fact that they were not qualified to perform overtime within the meaning of clause 28.04.

[45] The collective agreement does not cover the availability of training. Therefore, it falls under residual management rights, over which the Board has no jurisdiction. The Board cannot effectively read into the collective agreement an obligation for the employer to provide training to certain employees retroactively. Determining the learning, training, and development of employees is firmly within the employer's exclusive purview (see s. 12(1)(a) of the *Financial Administration Act* (R.S.C., 1985, c. F-11)).

[46] Even were the Board to take into account the availability of training, the union did not establish any unfairness in it for core agents. The employer set out clear expectations and monitored its employees individually to select some for Tier 2XP training. It was entitled to do this before expending resources on three additional

weeks of training and losing three weeks of an agent doing their regular work, especially considering the high attrition rate of core agents at the time.

[47] Moreover, it set employees up for success as Tier 2XP agents, since the selected employees would have demonstrated their proficiency at applying EI legislation as core agents before being introduced to additional EI concepts. The employer also made every reasonable effort to offer support to employees who had the goal of joining the Tier 2XP program, and many of the grievors went on to eventually receive the training and become Tier 2XP agents.

[48] The union relied on a witness statement for the proposition that Tier 2XP agents completed renewals during the overtime. This statement was unsworn and provides no indication of the frequency, quantity, or dates on which the witness actioned renewals. It provides no details about the type of renewals that were involved. The union did not establish that renewals actionable by core agents were anything more than occasional. The documentary evidence in the record is consistent with this type of work being occasional, as the work items actionable by core agents, namely, the renewals of regular or sickness benefits, were automated under certain circumstances.

[49] Moreover, the changes to the NWS and the inventory reduction strategy introduced an operational requirement that explains why these work items could have occasionally been assigned to a Tier 2XP agent during overtime. The NWS bundled work items so that outstanding ones could be actioned by the same agent, for EI claims to be processed more efficiently. These changes, coupled with the Tier 2XP agents' additional training, minimized the possibility that a work item would have to be manually reassigned and thus shortened the processing time.

[50] As a result, even though EI Processing identified work items that required calculation training as the focus of overtime, a Tier 2XP agent might occasionally have completed bundled work items that were not the focus of overtime. The work items actioned in those circumstances would not have been completed during overtime had they not been bundled with another work item requiring Tier 2XP training. There is no evidence of any significant inventory of work items that Tier 2XP agents actioned during overtime that core agents could have actioned. The areas of focus identified for the overtime required calculation training, which the core agents did not have.

[51] The Tier 2XP agents cannot be considered similarly situated employees under the *Bucholtz* test. The question of equitability under that test does not arise, and the grievance must fail, as the union did not identify similarly situated employees but instead Tier 2XP employees who had received training that core agents had not.

[52] That Tier 2XP employees had the same classification and job description is not determinative because, unlike the *Dewit* case, core agents had never previously performed the calculation duties of Tier 2XP agents. The employer provided ample evidence of the specialized training required before a core agent is able to complete Tier 2XP calculation duties.

[53] The union's submissions were premised on the fact that all the grievors would have been available to work all the overtime opportunities during fiscal year 2014-2015. However, the union did not show that any of the grievors were readily available to work overtime on any of the dates on which overtime was offered. The sole fact that they filed a grievance is insufficient to prove that they were readily available.

IV. The union's reply

[54] Without evidence, the employer stated that no areas of focus that EI Processing identified for overtime could have been completed by core agents in the Toronto call centre. It did not deny that work items were completed during the overtime that core agents could have performed but characterized them as "occasional" without evidence as to the actual quantity of renewals that were included in the Claims Assessment tasks.

[55] It did not address a key piece of the union's evidence, which showed that in other parts of its operation, the employer was able to organize EI Processing overtime to include core agents in the overtime distribution.

[56] As for the automation of certain claims renewals, although it was possible, it was relatively new and far from common at the time the grievance was filed. This was demonstrated by the employer's admission that Tier 2XP agents were assigned these tasks and its contention that bundling them with others created efficiencies.

[57] The employer suggests that a grievor must show that they missed out on a "significant" amount of overtime. This is not part of the test that the Federal Court

accepted in *Bucholtz*; indeed, the Board has awarded remedies to grievors who were inequitably excluded from as little as one shift of overtime (see *Casper*, at para. 21).

[58] The employer's argument that the grievors were not similarly situated to the Tier 2XP agents is simply the dispute over the grievors' qualifications clothed differently. The real issue is whether the collective agreement requirement that the employer make every reasonable effort to distribute overtime equitably applies at the stage when the employer organizes the tasks that will be assigned as overtime. If it does, then the grievors were similarly situated to their Tier 2XP colleagues.

V. Unfair-labour-practice allegation – the parties' submissions

[59] The union alleged that at the first-level grievance hearing, Manager Steven Halfyard suggested that if the grievance was pursued, there was a possibility that overtime could stop being assigned to the Toronto call centre. At a later meeting, Director Indira Persaud acknowledged this comment, indicated that it was inappropriate, and assured the grievors that there would be no retaliation for pursuing the grievance. The union submitted several sworn statements to this effect from individuals who were present when one or both of these statements were made.

[60] The union submitted that Mr. Halfyard's threat amounted to an admission that the employer considers irrelevant things (such as whether a group of employees has grieved an overtime assignment) when making decisions about overtime. Had the employer acted on this comment, it would have been a clear case of bad faith. The comment that filing a grievance could affect overtime assignments left the grievors to question whether other improper considerations, such as productivity standards, had entered the employer's decision-making process. The employer's apparent willingness to hold overtime assignments hostage to pressure the grievors to withdraw their grievance should lead the Board to question the employer's stated justifications for excluding them from the overtime work.

[61] The employer stated that if Mr. Halfyard had the opportunity to testify, he would deny having said that if the grievance were pursued, overtime could stop being assigned to the Toronto call centre. Mr. Halfyard does not have the authority to make that type of decision, and in any event, the allegation was not relevant to this matter. For the Board to consider it, a grievance under clause 18.06 of the collective agreement or an unfair-labour-practice complaint under ss. 190(1)(g) and 186(2) of the *Federal*

Public Sector Labour Relations Act (S.C. 2003, c. 22, s. 2) would have had to have been filed. The employer further argued that even if it could be considered part of this grievance, the union admitted that Mr. Halfyard's superior, Ms. Persaud, provided assurances that there would be no retaliation for pursuing the grievance.

VI. Reasons for decision

[62] Clause 28.04 of the collective agreement requires the following:

(a) Subject to operational requirements, the Employer shall make every reasonable effort to avoid excessive overtime and to offer overtime work on an equitable basis among readily available qualified employees.	*a) Sous réserve des nécessités du service, l'Employeur s'efforce autant que possible de ne pas prescrire un nombre excessif d'heures supplémentaires et d'offrir le travail supplémentaire de façon équitable entre les employé-e-s qualifiés qui sont facilement disponibles.*
…	…

A. Were productivity requirements imposed on the assignment of overtime in violation of the collective agreement?

[63] The union argued that in using productivity requirements as a basis for providing core agents with Tier 2XP training, and by distributing overtime tasks only to Tier 2XP agents, the employer effectively imposed productivity requirements on the assignment of overtime. I do not accept this argument. While the employer did make productivity a requirement for Tier 2XP training, there was no evidence that it assigned overtime work based on productivity. The evidence indicates that the employer assigned the overtime based on what it assessed to be the work that needed to be done. This case is only about the assignment of overtime. It is not about how the employer created the Tier 2XP category of PSOs or how it selected employees for training to become Tier 2XP agents.

B. The employer's obligation to organize the work to effect an equitable distribution of overtime

[64] The union argued that some work was assigned as overtime that the grievors were qualified to perform, that the employer made no effort to canvass them for the overtime assignments despite having done so in the Western Region, and that the

grievors performed no overtime work over the relevant period while their Tier 2XP colleagues were given many opportunities to work overtime.

[65] It is not contested that the core agents had not been trained, as the Tier 2XP agents had been, and therefore were not qualified to do much of the work that was the focus of the overtime during the relevant period. However, it is also not contested that the grievors (all core agents) were qualified to do some of the overtime work.

[66] The issue is whether the collective agreement requirement that the employer make every reasonable effort to distribute overtime equitably applies at the stage when it organizes the tasks that will be assigned as overtime. I believe that it does. In the absence of a cogent reason not to proceed this way, clause 28.04 of the collective agreement required the employer to make every reasonable effort to organize its overtime work so that all the PSOs (both core and Tier 2XP agents) could be included in its distribution.

[67] The employer acknowledged in its submission that the grievors were qualified to perform some of the work. However, it stressed that that work was not the "focus" of the overtime assignments, that it was a small portion of the work, and that it was included only because it was automatically bundled with the work that was the focus of the overtime:

> …
>
> *39. … due to the bundling of work items starting in the Fall of 2014, a work item that was within the authority of a Core agent* ***may have occasionally been actioned*** *during overtime by a Tier 2XP agent. However, the vast majority of work items actioned during overtime by Tier 2XP agents were at the Tier 2XP level of authority.*
>
> *40. … there is no evidence that there was any* ***significant inventory of work items*** *completed during overtime that Core agents were qualified to action….*
>
> …
>
> *53. … It is uncontested that all the areas of work identified for overtime* ***except Claims Assessment*** *required Tier 2XP training.*
>
> …
>
> *55. Moreover, the changes to the NWS and the IRS introduced an operational requirement that explains why these work items* ***could have occasionally been assigned*** *to a Tier 2XP agent during overtime. The NWS bundled work items together so that outstanding work items could be actioned by the same PSO, in*

> *order for EI claims to be processed more efficiently as part of the IRS… As a result, even though EI Processing identified work items which required calculation training as the focus of overtime, a Tier 2XP agent* ***may have occasionally completed bundled work items*** *during overtime that were not the focus of overtime. The work items actioned in those circumstances* ***would not have been completed during overtime had they not been bundled*** *with another work item requiring Tier 2XP training.*
>
> …
>
> [Emphasis added]

[68] It is uncontested that the work for which the grievors were qualified was a smaller portion of the overtime work. It is not clear from the evidence if it was as minimal as the employer described. However, even if so, it would not determine the issue (see *Casper*). The requirement in clause 28.04 is not restricted to scenarios in which a significant amount of overtime is to be offered.

[69] The employer did not provide a cogent reason that the core agents could not have been included in the overtime canvasses to perform the overtime work that they were qualified to do. It did not deny that they were included in the Western Region canvasses or explain why, given that, they could not have been included in the Ontario Region canvasses.

[70] It may well have been easier and more expedient to let the automated NWS bundle tasks and assign overtime work accordingly, but by doing so, the employer cannot be said to have made every reasonable effort to distribute overtime equitably. Rather, it appears that no effort was made to assign overtime work so that core agents could be included, as they were in the Western Region. This does not meet the standard imposed by the collective agreement.

[71] The union met its onus. It demonstrated that the employer assigned overtime that the grievors were qualified to perform without considering including them in its overtime canvasses or offerings. It was not open to the employer to simply bundle work that core agents were qualified to do with work that they could not do, and then exclude them from the overtime canvasses because they were not qualified. This offends both the letter and the spirit of the collective agreement provision that requires an equitable distribution of overtime.

C. Were the grievors readily available?

[72] The employer argued that the union failed to show that any of the grievors were readily available to work overtime on any of the dates for which it was offered and that simply filing a grievance could not establish their availability. The union noted that the issue of availability was addressed in *PSAC 2014* on identical facts with respect to availability, as follows:

> …
>
> ***49*** *Concerning employees' availability to work overtime, the employer's practice was to seek volunteers for overtime work through its canvasses… as the grievors were excluded by the employer from certain canvasses for Level 2 processing overtime work although they were qualified, they were precluded from indicating their availability for such work. Their interest in and availability for work could only therefore be indicated by them in the manner in which it was – by filing a grievance. I note that the employer did not adduce any evidence to the effect that the grievors were not readily available or had not really intended to work the overtime had it been offered.*
>
> …

[73] The union submitted that in the context of a group grievance, involving 36 grievors who claim that they were denied access to over 130 overtime opportunities as a result of an employer policy decision, the Board should not require direct evidence from each grievor as to what they did instead of working overtime that was not offered to them. The approach outlined in *PSAC 2014* is entirely appropriate for this type of grievance. By contrast, the decision that the employer relied on for the proposition that direct evidence is needed, dealt with a single overtime opportunity that was not offered.

[74] I agree with the union's submission in this respect and adopt the approach taken in *PSAC 2014*. In this case too, the employer adduced no evidence to the effect that the grievors were not readily available. It organized its overtime work such that the grievors, albeit qualified for some of the work, were excluded. It could not then argue that they should be required to prove their availability for overtime for which they were not canvassed.

D. Unfair-labour-practice allegation

[75] In the face of several sworn statements from witnesses who were present for either Mr. Halfyard's comment or for Ms. Persaud's acknowledgement of it, the employer simply stated that if Mr. Halfyard had the opportunity to testify, he would deny having said it. I find on the balance of probabilities that Mr. Halfyard did make a comment to the effect that the Toronto call centre might stop receiving overtime offers were the grievance pursued. That he did not have authority to make such decisions, as the employer argued, is irrelevant. He was a manager and making such a statement could not but be received as anything other than a warning.

[76] The union suggested that this comment showed that the employer took irrelevant matters into account when making decisions about overtime and that, had it been acted on, it would have been a clear case of bad faith. It also argued that the Employer's apparent willingness to hold overtime assignments hostage to pressure the grievors to withdraw their grievance should lead the Board to approach the employer's stated justifications with suspicion.

[77] Without hearing evidence, I can draw no such conclusions. There was no evidence that Mr. Halfyard spoke for the employer and Ms. Persaud's response indicates that he did not. I agree with the employer that this issue could have been made the subject of an unfair-labour-practice complaint or a separate grievance and was not. Accordingly, this issue is not germane to the grievance at hand and I simply note that a statement of this kind, delivered by a manager at the first level of the grievance process, is a very regrettable example of poor labour relations practice.

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

(The Order appears on the next page)

VII. Order

[79] I declare that the employer breached clause 28.04 of the collective agreement.

[80] I order that the grievors be compensated for the lost opportunity to perform any overtime work offered for which they were qualified during the period June 2014 to April 2015.

[81] I remit the matter to the parties to jointly determine the best way to calculate the amount of compensation due.

[82] I will remain seized for 180 days from the date of this decision in the event that the parties encounter any difficulties implementing this order.

June 23, 2023.

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