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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

ALEXANDRE GARAULT

Grievor

and

**TREASURY BOARD
(Royal Canadian Mounted Police)**

Employer

Indexed as

Garault v. Treasury Board (Royal Canadian Mounted Police)

In the matter of an individual grievance referred to adjudication

Before: Patricia H. Harewood, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Adrienne Fanjoy, counsel

For the Employer: Isabelle Tremblay, representative

Decided on the basis of written submissions,
filed April 13 and 26, May 31, and June 16 and 23, 2023.

REASONS FOR DECISION

I. Individual grievance before the Board

[1] On April 4, 2023, Alexandre Garault (“the grievor”) referred a grievance to adjudication. When the grievance was filed, he was working in Moncton, New Brunswick as a constable with the Royal Canadian Mounted Police (RCMP) on its Crisis Negotiation Team (CNT). The grievor was represented by the National Police Federation. The language on the original grievance form read as follows:

...

I grieve that on June 21st, 2022 I was denied compensation for Operational Response (OR) from the 6th of August 2021 to the 29th of June 2022 despite a requirement to be available for an immediate operational policing response as a member of the Crisis Negotiator Team (CNT). This violates Articles 22, 6.03 and all other relevant articles of the Collective Agreement.

...

[2] As corrective action, the grievor sought what follows: “I request full redress for this breach of the collective agreement, in particular payment for the time spent on OR from the 6th of August 2021 to the 29th of June, and any and all remedies deemed just under the circumstances ...”.

[3] On April 13, 2023, the Treasury Board (“the employer”) responded with a timeliness objection. It submitted that the grievance was untimely because the alleged events initially occurred in August 2021, and the grievance was not filed until July 2022. The employer submitted its grievance replies and noted that it raised a timeliness objection at each level of the grievance process. Therefore, it argued, the Federal Public Sector Labour Relations and Employment Board (“the Board”) was without jurisdiction to hear the grievance.

[4] Counsel for the bargaining agent replied with submissions on April 26. Counsel argued that the grievance was timely. Counsel submitted that it is a continuing grievance and that the employer had a continuing obligation to pay the grievor at the appropriate rate for each period he was required to be available in operational readiness (OR). It violated its collective agreement with the National Police Federation for RCMP regular members (below the rank of inspector) and reservists (RM) that

expired on March 31, 2023 (“the collective agreement”), each time it failed to pay him at that rate.

[5] On May 1, 2023, the employer’s representative wrote to the Board to advise that it did not wish to add any more comments and that it would “... defer to the Board on the decision.”

II. Procedural history

[6] On May 17, 2023, the grievance was assigned to a panel of the Board to determine if the preliminary objection could be decided on the basis of written submissions.

[7] On May 26, 2023, the panel of the Board assigned to make the determination wrote to the parties to advise them that after reviewing all the documentation on file, the Board had determined that the preliminary issues should be addressed first on the basis of written submissions. Since the parties had already made initial submissions, the Board provided a schedule for final supplementary submissions. It also requested additional documentation, notably the following:

...

The bargaining agent representative is asked to provide the following documents to the Board:

1) A copy of the extra pay claims submitted by the grievor on June 15, 2022

The employer representative is asked to provide the following documents to the Board:

2) A copy of the employer’s response to the extra pay claims submitted by the grievor on June 15, 2022 for activity between Aug 6, 2021 - June 29, 2022.

3) A copy of chapter 3 of the Tactical Operations Manual that is referred to in the employer’s final level response or a description of the relevant parts of this chapter.

4) A description of the role of the Crisis Response Team and the grievor’s role on this team at the time the grievance was filed in July 2022.

...

[8] On May 31, 2023, the employer provided the documentation requested and noted that it did not wish to provide supplementary submissions.

[9] On June 16, 2023, counsel for the bargaining agent wrote to the Board, to correct a factual detail from their submissions of April 26, 2023. Counsel noted that in the process of obtaining the requested copies of the duty pay claims submitted, they became aware of a miscommunication between them and the grievor. Counsel noted that the grievor had not yet submitted pay duty claims for the period from November 18, 2021, to June 29, 2022, but the grievor maintained that as per the grievance, he was entitled to payment for all days within that period when he was in operational readiness mode.

[10] On June 26, 2023, the grievor responded to the documents filed with the Board by the employer on May 31, 2023, and its characterization of the designation of the grievor on the CNT team. These submissions largely dealt with the merits of the grievance.

III. The issues

[11] The issues in this grievance are as follows:

- 1) Is the grievance a continuing grievance?
- 2) Was the grievance filed on time?

[12] After fully reviewing all the submissions, I must conclude that the grievance is timely. Under article 22 of the collective agreement, the employer has a continuing obligation to pay employees in OR at the appropriate rate of pay. The grievor alleged that there is a continuing obligation under the collective agreement to pay employees who are in an OR mode at the appropriate rate of pay.

[13] Determining what constitutes a continuing obligation is highly factual and requires that a decision maker examine the allegations, the grievance, and the law. In this case, the very language of the grievance as well as the continuing obligation in clause 22.05 of the collective agreement highlight that this grievance targets a series of events that the grievor alleged were subject to the continuing obligation to pay an employee allegedly in OR mode at the appropriate rate.

IV. Summary of the facts, and the parties' submissions

[14] The parties did not submit a joint book of documents.

[15] However, the following facts are not at issue:

- The grievor was working as a member of the RCMP's CNT when he presented his grievance.
- The CNT is responsible for responding to high-conflict and potentially dangerous situations.
- The grievor submitted an extra pay claim on June 15, 2022, about his pay for the period from August 6 to November 17, 2021.
- The grievor did not submit extra pay claims for the period from November 18, 2021, to June 29, 2022.
- On June 21, 2022, the employer denied the extra pay claim.
- The grievor presented his grievance in July 2022.
- The grievance was referred to adjudication with the Board in April 2023.

A. For the employer

[16] The employer's submissions of April 13, 2023, were succinct. It noted the deadline for filing a grievance under the collective agreement.

[17] Clause 15.16 of the collective agreement states as follows:

15.16 A grievor may present a grievance to the first level of the procedure in the manner prescribed in clause 15.08, not later than the thirty-fifth (35th) calendar day after the date on which the grievor is notified or on which the grievor first becomes aware of the action or circumstances giving rise to the grievance....

15.16 Le Membre s'estimant lésé peut présenter un grief au premier palier de la procédure de la manière prescrite au paragraphe 15.08, au plus tard le trente-cinquième (35e) jour civil après la date à laquelle il est notifié ou à laquelle il prend connaissance de la mesure ou des circonstances donnant lieu au grief [...]

[18] The employer submitted that the grievance was filed in an untimely manner. It was filed on July 18, 2022, but the alleged events initially took place in August 2021. The employer raised the timeliness objection at all levels of the grievance process.

[19] Since the grievance was not filed on time, an adjudicator has no jurisdiction to hear it under s. 209 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; *FPSLRA*).

[20] The employer further submitted that it reserved the right to make further submissions.

B. For the grievor

[21] The grievor provided an initial response to the employer's objection on April 26, 2023.

[22] The grievor noted that the grievance was timely. It was filed on July 13, 2022, in response to the employer's recurring breach of the collective agreement. He cited this definition of a continuing grievance from Gorsky's *Evidence and Procedure in Canadian Labour Arbitration*:

...

The appropriate rule for deciding the isolated or continuing nature of the grievance is the rule developed in contract law. The recurrence of damage will not make a grievance a continuing grievance. It is necessary that the party in breach violate a recurring duty. When a duty arises at intervals and is breached each time, a "continuing" violation occurs, and the agreement's limitation period does not run until the final breach. When no regular duty exists and the harm merely continues or increases without any further breach, the grievance is isolated, and the period runs from the breach, irrespective of damage.

...

[23] Clause 22.05 of the collective agreement states that "An off-duty Member of the bargaining unit will be compensated one hour at the straight-time rate for **each** four-hour period they are on Operational Readiness (OR)" [emphasis added].

[24] The grievor alleged that the employer violated the collective agreement every time it paid him at either an operational availability (OA) rate or with no on-call compensation, despite expecting him to provide an OR response. Its failure to pay him at the appropriate rate was a recurring breach of an obligation of the employer.

[25] The grievor cited *Galarneau v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 1, and *Bowden v. Treasury Board (Canada Border Services Agency)*, 2021 FPSLRB 93, to support his position that certain collective agreement provisions give rise to recurring rights. In *Galarneau*, the adjudicator determined that an occupational health-and-safety provision in the relevant collective agreement gave rise to a recurring obligation. In *Bowden*, the Board found that an overtime provision in the relevant collective agreement gave rise to a recurring obligation.

[26] The grievance was timely because the grievor submitted an extra duty pay claim for the first time on June 15, 2022, for the period from August 6, 2021, to June 29, 2022, when he worked in an OR mode. The employer rejected it on June 21, 2022, and he filed his grievance on July 13, 2022 — well within the 35-day period to file it. He was called back on June 13, 2022, and was not appropriately paid. He was not called back from June 14 to 29, 2022, but was expected to be ready to provide an immediate operational response.

[27] Alternatively, the grievor seeks an extension of time to file his grievance, per s. 61 of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; “the *Regulations*”).

[28] The grievor argued that he meets the five criteria of the analysis in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1. Further, it is not determinative if he does not meet all five criteria.

1. There is a clear, compelling, and cogent reason for the delay

[29] The grievor submitted that he realized that he was entitled to OR pay only after reading the *Buckingham v. Canada (Attorney General)*, 2022 FC 652, decision due to the expectation that members of the CNT be immediately available to deploy to high-risk and potentially high-conflict situations.

2. The length of the delay

[30] The length of the delay is 11 months, which is similar to the 9-month delay in *Fortier v. Department of National Defence*, 2021 FPSLRB 41, in which the Board granted an extension.

3. The due diligence of the grievor

[31] The grievor submitted that he filed his extra duty pay claim as soon as he realized that he might be entitled to OR pay. After the employer denied it, he filed his grievance within the 35-day period.

4. There would be no prejudice to the respondent in granting the extension

[32] The grievor submitted that no evidence has been lost and that no witnesses have become unavailable due to the passage of time. Were his grievance denied, he

would lose the opportunity to be paid at the level commensurate with the level of service that the employer required and that he provided.

5. Chances of success of grievance

[33] Finally, the grievor submitted that this factor bears the least weight and is met once an arguable case is established. This is more than an arguable case. His job as part of the CNT requires a heightened level of responsiveness given the possibility that he may have to be deployed to a high-risk and high-conflict situation. The nature of his job probably required that he be paid at the OR rate.

[34] For all these reasons, the Board should reject the employer's timeliness objection and grant the extension of time.

V. Supplementary submissions

[35] The Board gave the parties an opportunity to provide supplementary submissions, but the employer noted that it did not wish to make any further submissions. The Board also requested additional documentation from the parties.

A. For the employer

[36] In response to the Board's request for additional documentation, the employer provided the extra pay claims, Chapter 3 of the tactical guide, and a description of the CNT's work. No further submissions were provided.

B. For the grievor

[37] The grievor provided supplementary submissions in response to the Board's decision that the parties could choose to provide them.

[38] On June 16, 2023, the grievor's representative wrote to the Board **to correct a factual matter in its submissions of April 2023** and to submit the extra duty pay claims he had filed. The representative noted that due to a miscommunication, they had not communicated that the grievor had filed pay claims only for the period from August 12 to November 17, 2021. He did not file extra duty pay claims for the period from November 18, 2021, to June 29, 2022.

[39] However, the grievor maintained his position that he was still entitled to payment for this period (November 18, 2021, to June 29, 2022) and for all the periods in which he "... acted according to an operational response standard".

[40] In a follow-up communication to the Board, dated June 23, 2023, the grievor responded to the information that the employer provided on the duties of the CNT.

[41] The grievor did not agree with the characterization of his role on the CNT. He agreed that the CNT's role is to negotiate the safe release of victims and the surrender of offenders without death or injury to anyone.

[42] The grievor alleged that contrary to the employer's position, he submitted that the entire CNT had to be immediately available to be deployed for critical incident callouts.

VI. Reasons

[43] The timeline for filing a grievance under clause 15.16 of the collective agreement is 35 calendar days after the incident or circumstances that gave rise to it. Clause 15.16 reads as follows:

15.16 A grievor may present a grievance to the first level of the procedure in the manner prescribed in clause 15.08, not later than the thirty-fifth (35th) calendar day after the date on which the grievor is notified or on which the grievor first becomes aware of the action or circumstances giving rise to the grievance....

15.16 Le Membre s'estimant lésé peut présenter un grief au premier palier de la procédure de la manière prescrite au paragraphe 15.08, au plus tard le trente-cinquième (35e) jour civil après la date à laquelle il est notifié ou à laquelle il prend connaissance de la mesure ou des circonstances donnant lieu au grief [...]

[44] The parties agree with the timeline. However, they disagree as to whether the grievance was filed on time.

[45] Further, the grievor characterized the grievance as continuing. Although the employer was given an opportunity to provide supplementary submissions, it chose not to and did not respond to his allegation that this is a continuing grievance.

[46] Nonetheless, the issue of whether the grievance should be characterized as a continuing grievance is central to the preliminary matter at hand. The notion of what

constitutes a continuing grievance is defined in Brown and Beatty, *Canadian Labour Arbitration*, 4th edition, as follows (from *Galarneau*, at para. 17):

Where the violation of the agreement is of a continuing nature, compliance with the time-limits for initiating a grievance may not be as significant unless, of course, the collective agreement specifically provides that in those circumstances the grievance must be launched within a fixed period of time. Continuing violations consist of repetitive breaches of the collective agreement rather than simply a single or isolated breach... In any event, the test most commonly used in determining whether there is a continuing violation is the one derived from contract law, namely, that there must be a recurring breach of duty, and not merely recurring damages.

Where it is established that the breach is a continuing one permitting the time period for launching the grievance to be measured from the latest occurrence, it has been held that **the failure to initiate it within the stipulated time from the date of its first occurrence will not render it inarbitrable**. However, the relief or damages awarded retroactively in such circumstances **may be limited by the time-limit**. Thus, for example, where a grievance claimed improper payment of wages and the grievance was allowed, the award limited the damages recoverable to five full working days prior to the filing of the grievance, which was the time-limit for initiating the grievance.

[Sic throughout]

[Emphasis added]

[47] From this definition, it is clear that the recurrence of damage does not make a grievance continuing. A decision maker must look at whether the grievance targets an isolated incident or a recurring obligation under the collective agreement that has been repeatedly breached over time. If the conclusion is that the grievance targets a continuing breach of an obligation, then the clock starts to run from the time the last breach occurs.

[48] The former Board's decision in *Galarneau* vividly illustrates and applies the concept of a continuing grievance. In that decision, the Board was required to determine whether the notion of a continuing grievance applied to 58 grievances that alleged ongoing exposure to second-hand smoke in the workplace as a violation of the employer's collective agreement obligation (clause 18.01 of the relevant collective agreement) to make reasonable efforts to ensure its employees' health and safety. The Board found that the concept of a continuing grievance applied and explained why as follows:

...

*21 Without determining at this stage whether clause 18.01 of the collective agreement confers substantive rights on the employees, I am of the opinion that the obligation cited by the grievors is of a continuing nature. If, in accordance with that provision, the employer has an obligation to take every reasonable measure for the occupational safety and health of employees, in my opinion, what is involved is a **continuing obligation that is repeated each time the employees are called on to render services. If clause 18.01 confers on the grievors the substantive right to reasonable measures by the employer for their occupational safety and health, that right exists at all times, and its violation may occur each time the employer fails to take reasonable measures for employees' occupational safety and health.***

...

[Emphasis added]

[49] In *Bowden*, the Board determined that the only aspect of the grievance that was continuing involved allegations about an ongoing breach of the overtime provision in the relevant collective agreement. The panel of the Board carefully examined the grievance's wording, including the corrective measures as well as the overall factual context, to make this determination. Other aspects of the grievance related to allegations of a human rights violation were deemed punctual and not ongoing and therefore untimely. The panel's analysis follows:

...

[50] The only requested corrective action that relates to an alleged ongoing breach of the collective agreement is the grievor's request that she be compensated for the lost income that she alleged is the result of her being unable to take any overtime shifts since November 2016.

[51] The collective agreement provision relating to overtime opportunities is a recurring right to the equitable distribution of overtime. It is a recurring right because overtime is allocated by the employer on an ongoing and regular basis. Under this article, the employer is (subject to operational requirements) required to "make every reasonable effort" to offer work on an equitable basis among "readily available qualified employees." This is a continuing obligation of the employer in that it applies every time the employer offers overtime opportunities.

[52] The employer argued that if this is a continuing grievance, the grievor would not be entitled to any damages since she remains unqualified for overtime. This is an argument on the merits of the grievance, and it can be raised at the hearing on the merits.

[53] Accordingly, I find that the part of the grievance relating to overtime opportunities comprises a continuing grievance and is therefore timely. The remainder of the grievance is untimely. I will now address whether an extension of time for the untimely aspects of the grievance is justified.

...

[50] I would agree with the grievor that both *Bowden* and *Galarneau* are helpful in this case. *Bowden* is particularly relevant since it involves the denial of overtime opportunities and pay. Applying the notion of a continuing grievance to this case, I find that the wording of the grievance, as follows, is illuminating:

...

I grieve that on June 21st, 2022 I was denied compensation for Operational Response (OR) from the 6th of August 2021 to the 29th of June 2022 despite a requirement to be available for an immediate operational policing response as a member of the Crisis Negotiator Team (CNT). This violates Articles 22, 6.03 and all other relevant articles of the Collective Agreement.

...

[Emphasis added]

[51] The wording of the grievance underlines the denial of compensation for an interval of time from August 6, 2021, to June 29, 2022. There is no single incident but several alleged incidents of a breach of article 22 and clause 6.03 of the collective agreement. The corrective action requested is compensation for time spent in an OR mode during the interval and any other remedies deemed just.

[52] In terms of the applicable collective agreement provisions, article 6 is a standard provision on managerial responsibilities. It includes the parties' obligation to administer the collective agreement reasonably and in good faith but does not confer any substantive right or obligation. Article 22 reads as follows:

Article 22: operational response

22.01 A Member of the bargaining unit who is designated for Operational Readiness (OR) or Operational Availability (OA) will:

Article 22: intervention opérationnelle

22.01 Tout Membre de l'unité de négociation qui est désigné pour l'état de capacité d'intervention opérationnelle immédiate (CIOI) ou la disponibilité opérationnelle (DO) :

- | | |
|---|---|
| <p><i>a. remain deployable,</i></p> <p><i>b. abstain from consuming any substance, illegal or legal, including alcohol and cannabis, that has the potential to adversely affect or inhibit a Member of the bargaining unit's ability to perform their job safely and competently,</i></p> <p><i>c. be reachable via telecommunications device, and</i></p> <p><i>d. be readily available to return for duty when contacted.</i></p> | <p><i>a. doit rester déployable;</i></p> <p><i>b. doit s'abstenir de consommer toute substance, illégale ou légale, y compris de l'alcool et du cannabis, susceptible de nuire ou d'inhiber sa capacité à accomplir son travail de manière sûre et compétente;</i></p> <p><i>c. doit pouvoir être joint par le biais d'un dispositif de télécommunications; et</i></p> <p><i>d. doit être facilement disponible pour reprendre le service lorsqu'il est contacté.</i></p> |
|---|---|

Operational readiness

Capacité d'intervention opérationnelle immédiate

22.02 *As determined by the Employer, a Member of the bargaining unit can be designated for Operational Readiness (OR) on a workday, when an immediate operational policing response is required.*

22.02 *Selon ce que détermine l'employeur, un Membre de l'unité de négociation peut être désigné comme étant en état de capacité d'intervention opérationnelle immédiate (CIOI) un jour de travail, lorsqu'une intervention policière opérationnelle immédiate est requise.*

22.03 *With their consent, a Member of the bargaining unit can be designated for Operational Readiness (OR) while on non-medical leave (for example, lieu time off (LTO), regular time off (RTO), or annual leave).*

22.03 *Avec son consentement, un Membre de l'unité de négociation peut être désigné étant en état de capacité d'intervention opérationnelle immédiate (CIOI) pendant un congé non médical (par exemple congé compensatoire, absence régulière permise [ARP] ou congé annuel).*

22.04 *Members cannot be designated for Operational Readiness (OR) while on medical leave.*

22.04 *Un Membre ne peut pas être désigné pour la capacité d'intervention opérationnelle immédiate (CIOI) pendant un arrêt de travail pour cause de maladie.*

22.05 *An off-duty Member of the bargaining unit will be compensated one hour at the straight-time rate for each four-hour period they are on Operational Readiness (OR).*

22.05 *Un Membre de l'unité de négociation qui n'est pas de service doit être rémunéré une (1) heure au tarif normal pour chaque période de quatre (4) heures où il est en état de*

la capacité d'intervention
opérationnelle immédiate (CIOI).

Operational availability

22.06 As determined by the Employer, a Member of the bargaining unit can be designated for Operational Availability (OA) on a workday, when an operational policing response is required within a reasonable time frame.

22.07 With their consent, a Member of the bargaining unit can be designated for Operational Availability (OA) while on non-medical leave (for example, lieu time off (LTO), regular time off (RTO), or annual leave).

22.08 Members cannot be designated for Operational Availability (OA) while on medical leave.

22.09 An off-duty Member of the bargaining unit will be compensated one hour at the straight-time rate for each eight-hour period they are on Operational Availability (OA).

22.10 No Operational Readiness (OR) or Operational Availability (OA) payment shall be granted if a Member of the bargaining unit is unable to report for duty when required.

22.11 A Member of the bargaining unit on Operational Readiness (OR) or Operational Availability (OA) who is required to report for work and reports shall be compensated in accordance with Article 26 (Callback).

Disponibilité opérationnelle

22.06 Selon ce que détermine l'employeur, un Membre de l'unité de négociation peut être désigné pour une disponibilité opérationnelle (DO) un jour de travail, lorsqu'une intervention policière opérationnelle est nécessaire dans un délai raisonnable.

22.07 Avec son consentement, un Membre de l'unité de négociation peut être désigné pour une disponibilité opérationnelle (DO) pendant un congé non médical (par exemple, un congé compensatoire, absence régulière permise (ARP) ou un congé annuel).

22.08 Un Membre ne peut pas être désigné pour la disponibilité opérationnelle (DO) pendant un arrêt de travail pour cause de maladie.

22.09 Un Membre de l'unité de négociation qui n'est pas de service doit être rémunéré une heure au tarif normal pour chaque période de huit (8) heures où il est en disponibilité opérationnelle (DO).

22.10 Aucun paiement au titre de l'état de capacité d'intervention opérationnelle immédiate (CIOI) ou de la disponibilité opérationnelle (DO) n'est accordé si un Membre de l'unité de négociation n'est pas en mesure de se présenter au travail lorsque sa présence est requise.

22.11 Un Membre de l'unité de négociation en état de capacité d'intervention opérationnelle immédiate (CIOI) ou en disponibilité opérationnelle (DO) qui est tenu de se présenter au travail et se présente

	<i>est rémunéré conformément à l'article 26 : rappel</i>
<i>22.12 Members of the bargaining unit must claim Operational Readiness (OR) or Operational Availability (OA) hours at the end of each twenty-eight (28) day work schedule and each pay period for reservists.</i>	<i>22.12 Les Membres de l'unité de négociation doivent réclamer des heures en état de capacité d'intervention opérationnelle immédiate (CIOI) ou en disponibilité opérationnelle (DO) à la fin de chaque période de travail de vingt-huit (28) jours et de chaque période de paye pour les réservistes.</i>
<i>22.13 A Member of the bargaining unit who submits a claim for callback pursuant to clause 22.11, is not permitted to claim the same hours as Operational Readiness (OR) or Operational Availability (OA).</i>	<i>22.13 Un Membre de l'unité de négociation qui présente une demande de rappel au travail conformément au paragraphe 22.11 n'est pas autorisé à demander les mêmes heures en tant qu'état de capacité d'intervention opérationnelle immédiate (CIOI) ou disponibilité opérationnelle (DO)</i>

[53] The article sets out obligations for employees designated in OR or OA, such as the fact that employees designated for OR or OA must refrain from consuming alcohol, be deployable, and be readily available for duty when contacted.

[54] It also imposes on the employer an obligation to compensate employees for each four- or eight-hour interval that they are designated in OR or OA (see clauses 22.05 and 22.09). Employees designated in OR are compensated one hour at straight time for each four hour interval whereas employees in OA are compensated one hour at straight time for each eight hour interval. This means that if you are designated in OR for eight hours, you would be paid twice as much than if you were designated in OA for the same time period.

[55] This is not a one-time obligation but an ongoing or continuing obligation on the employer each time an employee is designated as in either OR or OA. Thus, for the employee, it is a continuing right to be compensated as prescribed by the collective agreement each time they are designated in OR or OA. The continuing obligation is similar to that in *Bowden*, in which the employer had an ongoing collective agreement obligation to equitably distribute overtime.

[56] I agree with the employer's submissions that the alleged events that are the subject of the grievance initially started in August 2021. However, the employer fails to address the grievor's allegation that the alleged events and the employer's obligation under article 22 of the collective agreement continued.

[57] In response to the Board's request for documentation, the employer submitted an email, dated June 21, 2022, from management with an Excel attachment of all of the dates from August to November 2021 on which the grievor requested pay at the OR rate.

[58] The employer refused the extra duty claim report that had been submitted by the grievor. It acknowledged that it had made an error by paying the grievor at the OR rate in August 2021. It also asked the grievor whether he had obtained approval from his CNT team lead to submit retroactive on-call at the OR rate, thus confirming that the claim was not restricted to how the grievor was paid initially in August 2021 but included subsequent dates.

[59] I find that in light of the grievance's clear wording, the nature of the obligation at article 22, as well as the employer's acknowledgement that the grievor's extra duty pay claim involved several dates, the grievance eventually filed was a continuing grievance. The grievance targets a series of alleged breaches of the collective agreement about the grievor's pay based on his allegation that he was in OR but was being paid as being in OA, which was 50% less. The allegations of a breach started with incidents of allegedly being inappropriately paid in August 2021 and ended with the last alleged breach on June 29, 2022. Therefore, even after the employer issued a refusal to pay him at the OR rate in its June 21, 2022, email for extra duty pay claims submitted for the August to November 2021 period, the wording of the grievance filed targets the employer's alleged ongoing breach from August 6, 2021, up until June 29, 2022, to compensate him at the OR rate for the intervals that he claimed he was designated in OR.

[60] The employer alleges that the grievance was signed and presented on July 18, 2022, whereas the grievor alleges it was presented on July 13, 2022. I find that it was presented on July 13, 2022, in light of what is explicitly stated on the grievance form.

[61] Given that I find that the grievance was presented on July 13, 2022, and that it is continuing, I agree with the grievor that he was well within the 35-day time limit

since June 29 was the date of the alleged final breach, as stated in the grievance's wording. The grievance would have also been timely if I had found that it was presented on July 18, 2023.

[62] Therefore, I find that the grievance is timely and that the Board has jurisdiction to hear it under section 238.25(1) of the *FP SLRA*. The issue of whether the grievance is founded and, if so, to what extent a remedy may be constrained by the limitation period in the collective agreement for filing retroactive claims, are matters that may be determined once the matter is heard on the merits.

[63] I find no reason to address the grievor's request for an extension of time under s. 61 of the *Regulations* or the employer's response to this request since the grievance is timely.

[64] I also find no reason to address the divergent allegations from the grievor and the employer on the CNT's role and the grievor's particular designation on the team. These allegations may also be addressed through documentary or oral evidence when the matter is heard on the merits.

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

(The Order appears on the next page)

VII. Order

[66] The employer's timeliness objection is dismissed.

[67] The matter will be scheduled for a hearing in due course.

December 8, 2023.

**Patricia H. Harewood,
a panel of the Federal Public Sector
Labour Relations and Employment Board**