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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

VICKIE BESSETTE

Grievor

and

PARKS CANADA AGENCY

Employer

Indexed as
Bessette v. Parks Canada Agency

In the matter of an individual grievance referred to adjudication

Before: Adrian Bieniasiewicz, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Marie-Pier Dupont, counsel

For the Employer: David Perron, counsel

Decided on the basis of written submissions, filed November 10 and December 1 and 8, 2023.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Individual grievance referred to adjudication

A. Overview

[1] Vickie Bessette ("the grievor") works for the Parks Canada Agency ("the employer" or "the Agency") as a lock-bridge operator on the Chambly Canal in the province of Quebec. She holds a GL-MOC-05 position, which is classified in the General Labour & Trades (GL) Group and in the Machine Operating-Controlling Sub-Group (MOC).

[2] This grievance raises an issue about a federal employee's compensation for an injury on duty under the collective agreement between the Agency and the Public Service Alliance of Canada ("the Alliance") that expired on August 4, 2018 ("the collective agreement"). Specifically, the grievor challenges the employer's refusal to compensate her for the overtime hours scheduled for July 29, 30, and 31, 2015, which were days on which she was absent due to an accident while on duty. As corrective measures, she asks that the employer compensate her for those overtime hours and that it credit them to her compensatory leave account.

[3] For the following reasons, I find that under article 36 (Injury-on-duty leave) of the collective agreement, interpreted in light of the applicable statutory and case law framework, the employer was required to compensate the grievor for the hour-and-a-half of overtime scheduled for July 29, 30, and 31, 2015. By refusing, it contravened clause 36.01 of the collective agreement.

[4] However, I reject the grievor's arguments that the employer was required to credit that overtime, which totals four-and-a-half hours, to her compensatory leave account under clause 2.2 of Appendix "E" of the collective agreement.

[5] 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 former Public Service Labour Relations Board and 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; *EAP2*) also came into force (SI/2014-84). Pursuant to s. 393 of the *EAP2*, 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 continued under and in conformity with the *PSLRA* as it is amended by ss. 365 to 470 of the *EAP2*.

[6] 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*, the *PSLRA*, and the *Public Service Labour Relations Regulations* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, the *Federal Public Sector Labour Relations Act* ("the *Act*"), and the *Federal Public Sector Labour Relations Regulations*.

II. Summary of the facts

[7] The parties filed a joint statement of facts. The grievor is a lock-bridge operator on the Chambly Canal in the province of Quebec. She holds a GL-MOC-05 position. Her main task is to guide authorized craft safely through the lock and into the canal.

[8] The Agency is a separate employer under Schedule V to the *Financial Administration Act* (R.S.C., 1985, c. F-11). Its mandate is to protect and showcase representative examples of Canada's natural and cultural heritage. The Alliance is the bargaining agent that represents the Agency's employees.

A. The lock-bridge operators' working hours

[9] Appendix "E" of the collective agreement provides specific conditions for "canal operating employees", of which the grievor is one. It provides in particular that the collective agreement provisions apply to those employees, except these provisions:

1. Hours of Work and Overtime;

2. Wash-up Time;

3. Call back and Reporting Pay; and

4. Standby.

[10] Clause 2.1 of Appendix "E" of the agreement specifies that canal operating employees are entitled to receive straight-time compensation at the rate specified for

all hours worked or for which the employee is granted authorized leave with pay, up to a maximum of 2080 hours in any fiscal year.

[11] Clause 2.2(a) of Appendix "E" of the collective agreement provides an equalization of earnings for these employees by which all hours worked in excess of 80 hours in a 2-week period are credited to their compensatory leave accounts. Hours worked in excess of 8 hours per day are credited to the compensatory leave account.

[12] Normally, the grievor works an additional 1.5 hours per day, for a total of 15 hours per 2-week period credited to her compensatory leave account at the straight-time rate. During the relevant period, her scheduled hours of work were 9.5 hours per day, with 8 hours per day being paid regularly to her every 2 weeks, and the remaining hours being put, at the straight-time rate, into a compensatory leave account. As do other lock-bridge operators, she uses the compensatory leave account for income at the end of the navigation season.

B. The grievance

[13] On July 28, 2015, the grievor suffered an injury on duty. She left work at 17:15, which was one hour before her shift was to end. On July 29, 2015, she returned to work at her scheduled time but left at 9:45 a.m. for a medical appointment. She was absent on July 30 and 31, 2015. On August 1, 2015, she reported the injury on duty to the employer. On August 6, 2015, the injury was reported to the Commission de la santé et de la sécurité du travail (CSST).

[14] Pending the decision by the CSST, which is now the Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST), the employer granted the grievor sick leave with pay for her absences. When confirmation was received that the CSST had approved the claim for an injury on duty on July 29, 30, and 31, 2015, the sick leave for those three days was changed to injury-on-duty leave.

[15] At the end of the navigation season, the grievor found that she had not been compensated for all her scheduled work hours for the navigation season. She was compensated at eight hours a day for the three days of injury-on-duty leave, but the hour-and-a-half of overtime she worked had not been added to her compensatory leave account. The employer informed her that she was not entitled to it.

[16] On October 28, 2015, the grievor filed a grievance at the first level of the grievance process that read as follows: "[translation] On or about September 30, 2015, I was aggrieved by a decision of my employer after an injury on duty of which I was a victim." As corrective measures, she requested to be made whole, including, but not limited to, the payment of all scheduled work hours for the period in which she was on injury-on-duty leave (July 30 and 31, 2015). The employer then also agreed to consider July 29, 2015.

C. The employer's reply

[17] On February 2, 2016, the employer denied the grievance at the first level of the grievance process. Its position was that only hours worked may be credited to the compensatory leave account, not hours for which authorized paid leave was granted. It relied particularly on clause 2.2 of Appendix "E" of the collective agreement.

[18] When it filed the grievance at the second level, the Alliance relied particularly on the provisions of the *Government Employees Compensation Act* (R.S.C., 1985, c. G-5; *GECA*), as well as the "Guide de calcul de l'indemnité de remplacement du revenu pour les 14 premiers jours" ("the CSST Guide"). On May 13, 2016, the employer denied the grievance on the grounds that the grievor had been approved for injury-on-duty leave from July 29 to 31, 2015, so she was compensated for 90% of her "[translation] regular net pay for each day … normally worked, the standard salary for 80 hours of work per pay period". Furthermore, it reiterated that she was ineligible for compensatory time, given that she did not work from July 29 to 31. It concluded its response by stating that it had paid her under the provisions of Appendix "E" and clauses 36.01 and 31.01(b) of the collective agreement, respecting the *GECA*'s provisions.

III. Summary of the arguments

A. For the grievor

[19] According to the grievor, federal public servants' compensation for an injury on duty is governed first by the *GECA*, which provides for a workers' compensation regime, and then by the relevant collective agreement.

[20] Clause 36.01 of the collective agreement incorporates the *GECA* by reference and provides that employees are entitled to leave with pay for an injury on duty, instead of an income-replacement indemnity, once the provincial workers'

compensation board certifies an incapacity to work that was caused by an injury on duty.

[21] Under s. 4(2) of the *GECA*, employees are entitled to receive compensation at the same rate and under the same conditions as are provided under the law of the province in which the employee is usually paid. Thus, the grievor's compensation for her injury on duty was subject to the rules applicable in the province in which she carried out her professional activities, meaning the province of Quebec. According to her, when the employer is obligated to replace workers' compensation benefits with income security, in accordance with the collective agreement, the obligation must fall within the scope of the *GECA* (see *Vaughan v. Canadian Food Inspection Agency*, 2010 PSLRB 74 at para. 61).

[22] The compensation rate for employees who have suffered an injury on duty in the province of Quebec is governed by the *Act respecting industrial accidents and occupational diseases* (CQLR c A-3.001; *AIAOD*). Section 59 of the *AIAOD* requires the employer to pay the employee their net salary for the portion of the workday during which the worker becomes unable to carry on their employment due to an injury on duty. Section 60 provides that for the full 14 days after the disability's onset, the employer must pay 90% of the employee's net salary.

[23] Sections 61 to 76 of the *AIAOD* set out rules for determining the amount of the income replacement indemnity. The employee's net salary is calculated from the annual gross salary as declared or provided in the employee's contract. The employee has the possibility of demonstrating a higher salary within the 12 months preceding an injury on duty and may include in the calculation bonuses, premiums, gratuities, commissions, overtime pay, vacations if their cash value is not included in the salary, etc. (see s. 67). Finally, s. 75 provides that an employee's gross income may be determined in a manner other than that provided in ss. 67 to 74 if it is more equitable because of the particular nature of the employee's work. According to the grievor, the principle that emerges from those sections is that the most advantageous calculation method for the work is always favoured.

[24] According to the CSST Guide, the calculation of the employee's net salary will include "[translation] … all forms of compensation, such as bonuses, gratuities, premiums, and overtime … on condition that they are provided or have been paid

regularly before". The CSST Guide also sets out that the calculation of the compensation to be paid to seasonal and federal government employees is made according to the following formula:

> [Translation]
>
> …
>
> *Gross salary provided in their employment contract (expected work performance x hourly rate), adding all other forms of compensation (overtime, gratuities, bonuses, premiums, commissions, etc.) related to the work that would have been performed during the period of incapacity.*
>
> …

[25] The words "would normally have worked" and "had he not been disabled" in s. 60 of the *AIAOD* cannot be dissociated (see *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles*, [1993] 2 S.C.R. 756 at page 767). According to the grievor, the intent of this application is to compensate the employee for a position that they would have occupied had they not been injured.

[26] The employer admits that the grievor's scheduled hours would have been nine-and-a-half hours had she not been injured. Therefore, according to her, it is obligated to compensate her for all the hours that she would have worked, being nine-and-a-half hours. According to the *AIAOD*, an employee in the grievor's situation would have been entitled to compensation equivalent to 90% of the nine-and-a-half-hour salary for the two days of full absence and to a proportional rate for the day of the injury. In this case, she was granted leave with pay for only eight hours of work.

[27] The grievor points out that the employer should have granted her injury-on-duty leave for all her scheduled work hours, including the additional hour-and-a-half per day. Article 36 of the collective agreement cannot be interpreted as granting her less protection than the *AIAOD* provides.

[28] According to the grievor, the employer's refusal to compensate her for the scheduled hours in the navigation schedule, which was her normal work schedule for July 29, 30, and 31, 2015, violates article 36 of the collective agreement and the *GECA*.

[29] Appendix "E" of the collective agreement must be interpreted in accordance with the injury-on-duty leave legislation. This interpretation implies that the normally scheduled work hours, in this case the navigation schedule, must be credited to the

compensatory leave account of an employee who has been granted paid injury-on-duty leave.

[30] Clause 2.2 of Appendix "E" of the collective agreement cannot be interpreted as indicating that only hours worked may be credited to the compensatory leave account. It must be interpreted in the overall collective agreement context, in the grammatical and ordinary sense of the words, in harmony with the rest of the collective agreement and its purpose, and the parties' intention.

[31] According to the grievor, article 8 of Appendix "E" of the collective agreement, which allows crediting the leave hours of an employee who is unable to work due to "illness" to their compensatory leave account, should be interpreted as also applying to paid injury-on-duty leave. Thus, the normally scheduled hours of an employee who has been on injury-on-duty leave must be compensated, as must employees who take sick leave. The parties to the collective agreement could not have wished to distinguish between employees with an illness not related to work and the victims of an occupational disease or injury on duty. The grievor refers me to *Lessard v. Treasury Board (Department of Transport)*, 2009 PSLRB 34 at para. 32, with respect to the interpretation principles that allow determining the parties' intention.

[32] According to the grievor, the term "illness" in article 8 of the collective agreement's Appendix "E" is not specific to paid sick leave, since article 33, which deals with paid sick leave, refers to an employee's eligibility due to "illness or injury". And, clause 31.01 states particularly that the number of hours debited for each day of leave corresponds to the number of hours normally scheduled for the employee on the day in question. Finally, clause 33.05 states that if an employee takes paid sick leave, and injury-on-duty leave is approved for the same period, then for the calculation of sick leave credits, the employee will be considered as not having taken paid sick leave.

[33] Therefore, in light of the foregoing, the grievor points out that the collective agreement has no limitation that suggests that the parties wished to limit injury-on-duty leave to eight hours per day, which would be lesser compensation than for other "illnesses". On that point, she refers me to *Public Service Alliance of Canada v. Parks Canada Agency*, 2013 PSLRB 16 at para. 46, in which the adjudicator found that employees were to be paid for all the scheduled hours worked, not just eight hours per day. In her view, the same principle applies in this case.

[34] In conclusion, the grievor points out that under the *GECA*, the *AIAOD*, and the collective agreement, injury-on-duty leave is to be granted for eight hours of work with an additional hour-and-a-half to be credited to her compensatory leave account. Therefore, she requests that the employer credit four-and-a-half hours to her compensatory leave account.

B. For the employer

[35] According to the employer, the grievor is not entitled to four-and-a-half hours in her compensatory leave account during the period in question because Appendix "E" of the collective agreement is silent on injury-on-duty leave.

[36] The employer points out that the Alliance's preferred interpretation "[translation] … would produce an absurd result or lead to inconsistency with other collective agreement provisions and would require the Board… to amend the collective agreement by adding rights to employees, which it cannot do". The Board's authority is limited to the terms expressly provided in the collective agreement.

[37] When interpreting a collective agreement's provisions, the Board must determine the parties' intent. To do it, the collective agreement's wording must be read in its normal or ordinary sense, unless it gives rise to an absurd result or inconsistency with other collective agreement provisions. If there is no ambiguity, the terms of the collective agreement must be given effect, even if the result may appear unfair or inequitable. A provision's meaning may be correctly understood only if one understands its relationship to the collective agreement as a whole. Finally, it is presumed that the parties intended to say what is written in the collective agreement.

[38] The employer points out that the Alliance did not demonstrate clear, specific, and unequivocal language in the collective agreement that obligates it to credit the requested hours to the grievor's compensatory leave account.

[39] Appendix "E" of the collective agreement has a limited function and applies to a particular group of employees. According to the employer, for the purposes of the issue in dispute, articles 2, 7, and 8 of Appendix "E" are relevant. Clauses 31.01, 36.01, and 44.02 help interpret Appendix "E."

[40] According to the employer, nothing in Appendix "E" of the collective agreement derogates from the application of clause 36.01. The term "hours worked" used in

Appendix "E" cannot be ignored. There is no ambiguity. The parties intended to provide compensatory leave hours for hours worked, or in other words, hours worked in excess of 80 hours per 2-week period. Had the parties to the collective agreement intended to credit the employee's normally scheduled overtime hours to the compensatory leave account, they would have used the words "employee's normally scheduled work hours" (see, for example, clauses 31.01 and 44.02). Article 7 of Appendix "E" refers to statutory holidays.

[41] Article 8 of Appendix "E" of the collective agreement provides a specific exception to the term "hours worked" in the sick leave context. According to the employer, it does not constitute a derogation from article 33, which governs the rights and obligations with respect to paid sick leave. Only hours worked may be credited to the compensatory leave account under clause 2.2(a) of Appendix "E" (see *Guérette v. Parks Canada Agency*, 2004 PSSRB 142 at paras. 59 to 61).

[42] The employer notes that the 90% compensation rate set out in the *GECA* is different from sick leave under article 33 of the collective agreement, by which an employee accumulates sick leave hours. Injury-on-duty leave and sick leave are two distinct types of leave and are treated differently.

[43] The scope of clause 31.01 of the collective agreement is limited by clause 36.01, which deals with employer obligations and employee rights in the injury-on-duty leave context. When a provincial authority takes charge of injury-on-duty leave, the *GECA* and *AIAOD* govern the conditions and compensation rates.

[44] The grievor's cited *Public Service Alliance of Canada* decision is distinguished from the facts and issues raised in this grievance. Specifically, it addresses the issue of hours worked or completed in the context of statutory holidays set out in article 7 of Appendix "E" of the collective agreement. In addition, the Board based its decision on an estoppel that arose from a long-standing practice in which the employer paid all hours worked on a statutory holiday.

[45] The parties' obligations and rights with respect to injury-on-duty leave are set out in clause 36.01 of the collective agreement. If the employer does not keep an employee on the payroll during a paid injury-on-duty leave, the employee may turn to the *GECA* (see s. 4(1) of the *GECA*). According to the employer, the rates and conditions applicable to compensation are set out in s. 4(2) of the *GECA* and in the

AIAOD. According to s. 60 of the *AIAOD*, an employee would be entitled to "… 90% of his net salary or wages for each day or part of a day the worker would normally have worked had he not been disabled, for 14 full days following the beginning of his disability."

[46] In this case, the employer continued to pay the grievor for the three days in question, but because no hours were worked, it did not compensate her in her compensatory leave account for the overtime.

[47] In the employer's view, the *GECA* and *AIAOD* do not apply in this case because the grievor was granted paid injury-on-duty leave of a reasonable length under clause 36.01 of the collective agreement, not under the *GECA* or *AIAOD*. Neither the CNESST documents nor the *GECA* nor the *AIAOD* change the collective agreement or even Appendix "E".

[48] The employer points out that both the *GECA* and *AIAOD* provide compensation for employees injured on duty who are not paid by the employer, while Appendix "E" of the collective agreement refers to the compensatory leave account. In addition, allowing 90% of the grievor's scheduled 9.5 hours to be paid by adding 1.5 hours per day to the compensatory leave account (totalling 10.05 hours per day on injury-on-duty leave, as the Alliance suggested), would put the grievor in an overpayment situation. That was not the parties' intention. The employer requests that the Board deny the grievance.

C. The grievor's reply

[49] The grievor maintains that the *GECA* and *AIAOD* apply in this case. According to her, those two Acts do not change the collective agreement. However, if the collective agreement provides protection that is less than what the applicable law provides, the law must prevail.

[50] The grievor's central argument is that she should not be penalized for having sustained an injury while performing her duties at work.

IV. Reasons

[51] The facts in this case are not in dispute. However, the parties disagree on the compensation that the grievor is entitled to receive under the collective agreement with respect to her injury on duty. Specifically, she requests that the employer

compensate her for all her scheduled hours during the period when she was on injury-on-duty leave, not only for the eight hours for which it has already compensated her.

[52] As for the employer, it contends that the grievor is not entitled to the overtime hours that were in her schedule from July 29 to 31, 2015, as only overtime hours "worked" may be credited to the compensatory leave account (see clause 2.2 of the collective agreement's Appendix "E"). However, it appears that it did not consider whether it was required to compensate her for the overtime hours in question under clause 36.01.

[53] In my opinion, two issues must be decided in this referral to adjudication. The first is whether the employer had to include the overtime hours in question in the calculation of paid injury-on-duty leave under clause 36.01 of the collective agreement. Second, it must be determined whether, under clause 2.2 of Appendix "E", it was required to credit overtime hours not worked to the grievor's compensatory leave account.

A. Analysis

1. Paid injury-on-duty leave

[54] Clause 36.01 of the collective agreement provides that an employee who is the victim of an injury on duty shall be entitled to leave with pay, provided that a workers' compensation board of the province in which they normally perform their duties approves their claim filed under the *GECA*. For ease of reference, I have reproduced as follows the relevant excerpt from clause 36.01:

36.01 *An employee shall be granted injury-on-duty leave with pay for such period as may be reasonably determined by the Agency when a claim has been made pursuant to the* Government Employees' Compensation Act*, and a Workers' Compensation authority has notified the Agency that it has certified that the employee is unable to work because of:*	***36.01*** *L'employé-e bénéficie d'un congé payé pour accident de travail d'une durée fixée raisonnablement par l'Agence lorsqu'une réclamation a été déposée en vertu de la* Loi sur l'indemnisation des agents de l'État *et qu'une commission des accidents du travail a informé l'Agence qu'elle a certifié que l'employé-e était incapable d'exercer ses fonctions en raison :*
(a) personal injury accidentally received in the performance of his	*a) d'une blessure corporelle subie accidentellement dans l'exercice de ses fonctions et ne résultant pas d'un*

or her duties and not caused by the employee's willful misconduct, or	*acte délibéré d'inconduite de la part de l'employé-e,*
	ou
(b) an industrial illness or a disease arising out of and in the course of the employee's employment ….	*b) d'une maladie ou d'une affection professionnelle résultant de la nature de son emploi et intervenant en cours d'emploi,* […]

[55] An employee with a claim that the provincial authority has approved shall be entitled to their full salary, in the form of leave with pay, for "… such period as may be reasonably determined by [the employer] …". According to the Treasury Board's *Injury-On-Duty Leave* policy ("the policy"), the period is set at 130 working days, as follows:

…

3.4 Termination of injury-on-duty leave

…

Should the total period of injury-on-duty leave granted to an employee with respect to an injury or illness reach 130 working days, a special departmental review of the case should be carried out and a decision made as to whether or not the continued provision of such leave beyond this period is warranted.

…

[56] In short, the request under clause 36.01 of the collective agreement begins with filing a claim under the *GECA*. That is the first step.

2. The *GECA* framework

[57] The *GECA*'s primary purpose is to provide compensation to employees who have suffered an injury on duty or became disabled as a result of an industrial disease attributable to the nature of their work (see s. 4(1)(a) of the *GECA*). For the purpose of this referral to adjudication, the parties agree that the grievor is an employee within the meaning of s. 2 of the *GECA*.

[58] That said, the *GECA* is silent about the eligibility requirements for injury-on-duty compensation and the compensation rates. On those issues, it refers as follows to the legislation of the province in which the federal government employee normally performs their duties:

…	[…]
Rate of compensation and conditions	***Taux et conditions***
4 (2) *The employee or the dependants referred to in subsection (1) are, notwithstanding the nature or class of the employment, entitled to receive compensation at the same rate and under the same conditions as are provided under the* ***law of the province where the employee is usually employed*** *respecting compensation for workmen and the dependants of deceased workmen, employed by persons other than Her Majesty, who*	***4 (2)*** *Les agents de l'État visés au paragraphe (1), quelle que soit la nature de leur travail ou la catégorie de leur emploi, et les personnes à leur charge ont droit à l'indemnité prévue par la* ***législation*** *— aux taux et conditions qu'elle fixe — **de la province où les agents exercent habituellement leurs fonctions** en matière d'indemnisation des travailleurs non employés par Sa Majesté — et de leurs personnes à charge, en cas de décès — et qui sont :*
(a) *are caused personal injuries in that province by accidents arising out of and in the course of their employment; or*	***a)*** *soit blessés dans la province dans des accidents survenus par le fait ou à l'occasion de leur travail;*
(b) *are disabled in that province by reason of industrial diseases due to the nature of their employment.*	***b)*** *soit devenus invalides dans la province par suite de maladies professionnelles attribuables à la nature de leur travail.*
Determination of compensation	***Compétence***
(3) *Compensation under subsection (1) shall be determined by*	***(3)*** *L'indemnité est déterminée :*
(a) *the same board, officers or authority as is or are established by the law of the province for determining compensation for workmen and dependants of deceased workmen employed by persons other than Her Majesty; or*	***a)*** *soit par l'autorité — personne ou organisme — compétente en la matière, pour les travailleurs non employés par Sa Majesté et leurs personnes à charge, en cas de décès, dans la province où l'agent de l'État exerce habituellement ses fonctions;*
(b) *such other board, officers or authority, or such court, as the Governor in Council may direct.*	***b)*** *soit par l'autorité, judiciaire ou autre, que désigne le gouverneur en conseil.*
…	[…]

[Emphasis added]

[59] In *Martin v. Alberta (Workers' Compensation Board)*, 2014 SCC 25, the Supreme Court of Canada examined the relationship between the *GECA* and provincial injury-on-duty legislation. According to the Court, the legislator's intent was that both eligibility for the compensation and the compensation rate be determined in accordance with the applicable provincial legislation, unless there is a conflict with the *GECA*'s provisions, in which case those provisions prevail, as follows:

> …
>
> *[27] … According to s. 4(2),* ***federal workers are entitled to the rates and conditions of compensation determined according to provincial law.*** *And in s. 4(3), the* GECA *clearly delegates to the provincial boards the actual* determination *of compensation under s. 4(1).* ***Provincial institutions and laws thus provide the structure and boundaries necessary to determine whether and how much compensation is to be paid to federal employees.***
>
> …
>
> *[35] In short, the legislative history of the* GECA *and statements of parliamentary purpose demonstrate that the intent has remained consistent since 1918:* ***both eligibility for and the rate of compensation are to be determined according to provincial law.***
>
> …
>
> *[39] … Where a direct conflict between the provincial law and the* GECA *exists, the* GECA *will prevail, rendering that aspect of the provincial law or policy inapplicable to federal workers.* ***Otherwise, the provincial workers' compensation scheme prevails. In either case, provincial boards and authorities will be responsible for adjudicating the claim.***
>
> …
>
> [Emphasis added]

[60] There is no ambiguity in the cited excerpts. Federal government employees' eligibility for injury-on-duty compensation and its amount are determined by the applicable provincial legislation, in accordance with ss. 4(2) and (3) of the *GECA*. It is a basic workers' compensation system available to all federal employees subject to the *GECA*.

3. Clause 36.01 of the collective agreement operates within the framework established by the *GECA*

[61] Certainly, the federal employer can provide a more advantageous workers' compensation system than what exists under the *GECA*. The Agency did exactly that by agreeing to incorporate article 36 (Injury-on-duty leave) into the collective agreement.

Under it, an employee subject to clause 36.01 is entitled to receive their full salary, for a period reasonably determined by the Agency, in lieu of compensation, and the rate is determined by the legislation of the province in which they normally perform their duties. However, this does not mean that clause 36.01 can act alone. In effect, the right to leave with pay in the event of an injury on duty is subject to a clearly defined set of rules that exist outside the collective agreement.

[62] To be entitled to paid injury-on-duty leave, clause 36.01 of the collective agreement requires that the employee make a claim under the *GECA*. After that, under ss. 4(2) and (3) of the *GECA*, the appropriate provincial authority must determine, under its rules, whether the federal government employee was the victim of an injury on duty (see *Martin*). If it rejects the claim, the employee will not be entitled to the income security provided in clause 36.01 of the collective agreement. Thus, to fully understand the scope of clause 36.01, it is necessary to take into account the legislative framework within which it operates; it cannot be read in isolation. With this in mind, I will share as follows the adjudicator's observations in *Vaughan*, at paras. 60 and 61:

> *[60] Clause 40.01 of the collective agreement operates within the statutory framework established by the* Government Employees Compensation Act*, R.S.C. 1985, c. G-5 (*GECA*), to which the clause refers….*
>
> *[61] While the case before me does not require that I directly interpret or apply any provision of the* GECA*, I must recognize as context that the legislator intended that employees in the public service who are injured while on duty have access to, and benefit from, the regime of income security provided under provincial workers' compensation systems. In that sense, there is nothing inherently problematic when an injured employee receives workers' compensation benefits as opposed to income directly from the employer. The extent to which the employer has an obligation to displace workers' compensation benefits by providing income security directly to an employee is an issue governed by the collective agreement.* ***In interpreting that agreement, there is no presumption that it replaces what the legislator has put in place through the* GECA*, but rather that the collective agreement functions within the framework established by the* GECA.**
>
> [Emphasis added]

[63] I do not agree with the employer's argument that neither the *GECA* nor *AIAOD* apply in this case because the grievor was compensated under clause 36.01 of the

collective agreement. First, I note that the employer contradicts itself on this point. In its written submissions, it argues that "[translation] … clause 36.01 of the collective agreement … refers to the applicable provincial legislation. It is a particular system that includes a provincial authority's participation." On the other hand, later in its written submissions, it claims the opposite: "[translation] The GECA and AIAOD do not apply in this case because Ms. Bessette was granted leave with pay … under clause 36.01, not under the GECA or the AIAOD." I find it difficult to reconcile these contradictory positions. For the reasons set out earlier, I determine that clause 36.01 of the collective agreement operates within the legislative framework of the *GECA*, which incorporates by reference the relevant provisions of provincial injury-on-duty legislation (see ss. 4(2) and (3) of the *GECA*). Thus, the *GECA*'s legislative framework still applies for interpretation purposes.

4. The protections afforded by article 36 of the collective agreement cannot be less advantageous than those provided by the *AIAOD*

[64] This brings me to the following question: Should the employer include the overtime hours in the calculation of the paid injury-on-duty leave under clause 36.01 of the collective agreement? To answer this, I must refer to the context of the *GECA* in which this clause is included.

[65] It is not disputed that at the relevant time, the grievor performed her duties as a lock-bridge operator at the Chambly Canal in the province of Quebec. Therefore, under ss. 4(2) and (3) of the *GECA*, the CSST was the appropriate provincial authority to deal with her claim, filed under the *GECA*.

[66] The grievor's eligibility for the compensation is not disputed. The CSST certified that she was unable to carry out her duties on July 29, 30, and 31, 2015, because of an injury on duty. Rather, in dispute is the amount of compensation that the employer should have paid her during the disability period under clause 36.01 of the collective agreement.

[67] According to the *GECA*, the amount of compensation to be paid to a federal government employee who has suffered an injury on duty is determined at the rate established by the legislation of the province in which the employee normally performs their duties. In this case, considering the relatively limited duration of the grievor's

disability, the compensation would have been calculated according to the formula set out in ss. 59 and 60 of the *AIAOD*, which read as follows:

59. *The employer of a worker at the time he suffers an employment injury shall pay him his net salary or wages for that part of the work day [sic] during which the worker becomes unable to carry on his employment by reason of his injury,* ***where the worker would normally have worked during that part of the day had he not been disabled.***	***59.*** *L'employeur au service duquel se trouve le travailleur lorsqu'il est victime d'une lésion professionnelle lui verse son salaire net pour la partie de la journée de travail au cours de laquelle ce travailleur devient incapable d'exercer son emploi en raison de sa lésion,* ***lorsque celui-ci aurait normalement travaillé pendant cette partie de journée, n'eût été de son incapacité.***
…	[…]
60. *The employer of a worker at the time he suffers an employment injury shall pay him, if he becomes unable to carry on his employment by reason of his injury, 90% of his net salary or wages for each day or part of a day the* ***worker would normally have worked had he not been disabled****, for 14 full days following the beginning of his disability.*	***60.*** *L'employeur au service duquel se trouve le travailleur lorsqu'il est victime d'une lésion professionnelle lui verse, si celui-ci devient incapable d'exercer son emploi en raison de sa lésion, 90% de son salaire net pour chaque jour ou partie de jour où ce* ***travailleur aurait normalement travaillé, n'eût été de son incapacité****, pendant les 14 jours complets suivant le début de cette incapacité.*
…	[…]

[Emphasis added]

[68] According to s. 59 of the *AIAOD*, the compensation that an employer must pay to an employee who suffers an injury on duty is equivalent to the employee's net salary for the part of the day during which the employee did not work due to the incapacity. The use of the words "… would normally have worked during that part of the day had he not been disabled …" suggests that **all** the employee's scheduled hours on the day of the injury should be considered when calculating the indemnity.

[69] With respect to s. 60 of the *AIAOD*, it applies for a period of 14 days, from the day following the injury. Again, the words "… would normally have worked had he not been disabled …" require that in my view, the calculation of the compensation

consider all the scheduled hours that the employee would have worked had it not been for their accident. This includes overtime.

[70] The case law of the Commission des lésions professionnelles and its predecessor, the Commission d'appel en matière de lésions professionnelles du Québec, supports this interpretation. Any overtime that the employee would have worked, had it not been for their accident, must be considered in the calculation of the indemnity under s. 60 of the *AIAOD*, if it is set out that the employee would have truly worked them had it not been for their incapacity. In *Corbec Inc. v. Laberge*, 2002 CanLII 70045 (QC CLP), the Commission des lésions professionnelles reiterated the following at paragraph 20:

> [Translation]
>
> *… the Commission des lésions professionnelles' jurisprudence in this area has established that the worker is entitled to receive the income replacement indemnity for the overtime that they could have worked during the first 14 days after their incapacity began, if the evidence sets out that they would have done so had it not been for the employment injury of which they were a victim.*

See also *Goodyear Canada Inc. v. Cadieux*, 2001 CanLII 45000 (QC CLP); *Komatsu International Inc. v. Girard*, 1999 CanLII 25978 (QC CLP); *Simard v. Sico Inc.*, 1995 CanLII 13985 (QC CALP); and *Collins v. Dansereau*, 1986 CanLII 4189 (QC CALP).

[71] It is not disputed that the grievor would have worked the overtime had she not been the victim of an injury on duty. The parties confirm in the joint statement of facts that according to her work schedule, she was required to work nine-and-a-half hours per day on July 29, 30, and 31, 2015. Nothing suggests otherwise.

[72] Finally, the CSST Guide agrees. The gross salary used to calculate the compensation under the *AIAOD* is determined by taking into account the total compensation to which the worker would have been entitled had they not been the victim of an injury on duty, including overtime. The relevant excerpt from the CSST Guide is found at section 2, page 23, and reads as follows:

> [Translation]
>
> …
>
> ***Determination of gross income***

> *Gross salary provided in the employment contract (expected work performance x hourly rate),* ***adding all other forms of compensation*** *(****overtime****, gratuities, bonuses, premiums, commissions, etc.) related to the work* ***that would have been performed*** *during this period.*
>
> …
>
> [Emphasis added]

[73] That leaves little doubt that the overtime that the grievor would have worked on July 29, 30, and 31, 2015, had it not been for her injury on duty, would have been taken into account in the calculation of the indemnity under ss. 59 and 60 of the *AIAOD*. However, what about those overtime hours under clause 36.01 of the collective agreement? Was the employer required to consider them in the calculation of the paid injury-on-duty leave? I would like to reiterate that under clause 36.01, the employer committed to pay full salaries to employees who are victims of injuries on duty, rather than an indemnity established under provincial legislation. That is the context in which what comes next must be understood.

[74] According to the documents on file, the employer compensated the grievor by paying her the equivalent of her full salary for eight hours of work per day under clause 36.01 of the collective agreement. In accordance with the *Hours of Work Code* of the GL group, to which the grievor belongs (see Appendix "B" of the collective agreement), those eight hours per day correspond to the regular hours of the group in question. On the other hand, the employer refuses to compensate her for the extra hours. It relies on clause 2.2 of Appendix "E", which states that only hours "worked" may be credited to the employee's compensatory leave account. As the grievor did not "work" them, because of her injury on duty, she cannot be compensated for them.

[75] The employer appears to confuse the right to paid injury-on-duty leave under clause 36.01 of the collective agreement with the right to have overtime hours credited to the compensatory leave account per the wording of clause 2.2 of Appendix "E". It should have begun by asking itself whether the overtime hours in question should have been included in the calculation of leave with pay under clause 36.01, interpreted in light of the *GECA* framework, which it did not do. Its written submissions filed in this referral focus once again on the application of clause 2.2 of Appendix "E", while being relatively silent on how clause 36.01 should be interpreted.

[76] As I noted earlier, clause 36.01 of the collective agreement guarantees employees who have suffered an injury on duty the maintenance of their full salary for "… such period as may be reasonably determined by [the employer] …". It appears that the parties intended to provide employees with protections that are more advantageous than those found in provincial injury-on-duty legislation, in this case the *AIAOD*. Moreover, there is a presumption that the parties were aware of the minimum protections provided by the *AIAOD* when they negotiated article 36 (see *Grand River Foods Ltd. v. UFCW, Local 1518 (Atwal)*, 2023 CarswellBC 500 at paras. 64 and 65; *Ontario English Catholic Teachers' Association v. Ontario Catholic School Trustees' Association*, 2022 CanLII 24927 (ON LA) at para. 79; and *Pacific Press v. G.C.I.U., Local 25-C*, 1995 CarswellBC 3177 at para. 27). Furthermore, the employer admits in its written submissions that clause 36.01, which is a particular system, refers to the applicable provincial legislation.

[77] I cannot accept that the parties intended to negotiate article 36 of the collective agreement to provide less advantageous protections than those set out in the *AIAOD*. Accordingly, I find that clause 36.01 cannot be interpreted as providing less protection than what ss. 59 and 60 of the *AIAOD* provide, excluding from the calculation of the paid injury-on-duty leave the overtime hours that the grievor would have worked had it not been for her injury on duty that the CSST certified.

[78] In light of the foregoing, I find that in accordance with clause 36.01 of the collective agreement, interpreted in light of the framework established by the *GECA*, the employer was required to add to the calculation of the paid leave the overtime hours that the grievor was scheduled to work on July 29, 30, and 31, 2015, which she would have worked had it not been for her injury on duty. By refusing, the employer contravened clause 36.01.

5. Clause 2.2 of Appendix "E" of the collective agreement is not a workers' compensation plan

[79] The grievor points out that under clause 2.2 of Appendix "E" of the collective agreement, the employer was required to credit the overtime hours that she would have worked on July 29, 30, and 31, 2015, had it not been for her injury on duty, to her compensatory leave account. Although, for the reasons set out earlier, I have found that the employer had to include in the calculation of the paid leave the overtime

hours in question under clause 36.01, I do not believe that it was required to credit them to the account in question.

[80] I agree with the employer that clause 2.2 of Appendix "E" of the collective agreement does not concern an employee's compensation for an injury on duty. Rather, it establishes a formula for equalizing earnings over a year with respect to canal workers. In summary, this clause provides that "hours worked" in excess of 80 hours in a 2-week period are credited to the employee's compensatory leave account. The relevant excerpt from this clause reads as follows:

2.2 *(a) In order to equalize earnings over the year, an employee shall be paid eighty (80) hours for each two (2)-week period when the employee is at work, or on approved leave with pay, subject to such adjustments as may be necessary during the last three (3) months of the fiscal year. All* ***hours worked*** *which are in excess of eighty (80) in a two (2)-week period, shall be credited to the employee's compensatory leave account.*	***2.2*** *a) En vue d'étaler les gains sur l'année, l'employé-e touche quatre-vingts (80) heures de rémunération pour chaque période de deux (2) semaines lorsqu'il ou elle est au travail ou en congé payé approuvé, sous réserve des rajustements jugés nécessaires au cours des trois (3) derniers mois de l'année financière. Toutes les* ***heures effectuées*** *en sus de quatre-vingts (80) dans une période de deux (2) semaines sont portées au crédit du compte de congé compensateur de l'employé-e.*
…	[…]

[Emphasis added]

[81] In short, to be credited to the compensatory leave account, the overtime hours must be worked. However, the grievor does not dispute that although she was scheduled to work these hours, she did not.

[82] I agree with the employer that the words "hours worked" in clause 2.2 of Appendix "E" of the collective agreement are clear and unambiguous and that they leave little room for interpretation. If the parties did not intend that only hours worked could be credited to the compensatory leave account, they would not have opted for such restrictive language. As the employer suggested, the parties had the opportunity to choose less-restrictive wording when they negotiated clause 2.2 of Appendix "E". For example, they could have used the wording "normally scheduled", as they did in clauses 31.01 and 44.02 of the collective agreement, but they did not. Therefore, I can

conclude only that by inserting the word “worked” after “hours”, the parties intended to limit the scope of the wording of clause 2.2(a) to the hours actually worked (see *Guérette*, at paras. 59 to 61).

[83] According to the rules applicable to collective agreement interpretation, I must assume that the parties intended to say what is written in the collective agreement (see Brown and Beatty, *Canadian Labour Arbitration*, Chapter 4 - The Collective Agreement, 5th edition, section 4:20). The grievor failed to rebut this presumption.

[84] The exception in article 8 of Appendix “E” of the collective agreement confirms the parties’ intention to limit the scope of clause 2.2 of Appendix “E” only to hours worked, for the purpose of the compensatory leave account. In summary, this article provides an express derogation from clause 2.2(a) by specifying that the equivalent of the scheduled overtime hours of an employee who cannot work them due to illness shall be deducted from their sick leave credits and transferred to their compensatory leave account. For convenience, I will reproduce as follows the wording of article 8, Appendix “E”, in its entirety:

8. *During canal navigation season, employees unable to work because of illness, will be granted sick leave for compensatory leave purposes from their accumulated sick leave credits on an hour-for-hour basis of extra time scheduled to be worked; such sick leave will be transferred from accumulated sick leave credits to accumulated compensatory leave credits and is not subject to expansion or cash payment.*	***8.*** *Pendant la saison de navigation dans les canaux, les employé-e-s incapables de travailler en raison d’une maladie bénéficient, aux fins de leur congé compensatoire, d’un congé de maladie imputé sur leurs crédits accumulés de congé de maladie calculé heure pour heure du temps supplémentaire prévu comme devant être effectué; ce congé de maladie est transféré des crédits de congé de maladie accumulés aux crédits de congé compensatoire accumulés et ne peut donner lieu à une extension ou à un paiement en espèces.*

[85] The parties did not include an exception similar to clause 2.2 in Appendix “E” of the collective agreement with respect to injuries on duty. This could be explained by the fact that compensation for employees who are victims of injuries on duty is subject to the distinct terms and conditions provided under article 36.

[86] I do not agree with the grievor that the term “illness” in article 8 of Appendix “E” of the collective agreement can be interpreted as including “injury on duty”. First, in the collective agreement, the parties clearly distinguish “illness” and “injury on duty”. Article 36 of the collective agreement specifically refers to paid leave for “injury-on-duty” rather than “illness”. “Injury-on-duty” leave is governed by rules completely different from those applicable to “sick” leave, as detailed earlier in this decision. Furthermore, assuming that during the negotiations, the parties had in mind the different terms used in the collective agreement, they could have added to article 8 of Appendix “E” the words “or an injury on duty” immediately after the words “because of illness”. However, they did not. They could have added a separate article to create an exception to the application of clause 2.2 of Appendix “E”, as they did by inserting article 8 of Appendix “E”, but they chose not to.

[87] Finally, accepting the grievor’s position that the term “illness” in the context of article 8 of Appendix “E” of the collective agreement includes “injury on duty” would result in an overpayment situation, as the employer alleged. Specifically, she would be entitled to full compensation for overtime hours under article 36 and, in addition, would be credited overtime hours not worked to the compensatory leave account, according to the formula set out in article 8 of Appendix “E”. I do not believe that that was the parties’ intention. Finally, article 33 of the collective agreement, which the grievor referred to, does not change the meaning of the term “illness” in article 8 of Appendix “E”. Read as a whole, article 33 merely confirms that the parties intended to distinguish the terms “illness” and “injury on duty” and to subject them to distinct compensation systems. The policy confirms that the terms “illness” and “injury on duty” are considered distinct, and each is governed by specific rules.

[88] I also reject the grievor’s argument that employees on sick leave apparently receive greater compensation than employees on injury-on-duty leave. In my opinion, those two categories of employees benefit from similar protections under separate systems. According to clause 36.01 of the collective agreement, for the reasons set out earlier, an employee in the same situation as the grievor would be entitled to compensation for the overtime hours that they would have worked had it not been for their injury on duty, in the form of paid leave. No credit would be debited from their sick leave bank. However, an employee who is unable to work overtime hours due to illness would be entitled to have those hours credited to the compensatory leave account, provided that they have sufficient sick leave credits. If they do not have

enough, those overtime hours cannot be credited. In such a context, this employee would be in a less-advantageous situation than would be an employee compensated under clause 36.01. In short, they are two different compensation systems that operate according to their own rules.

[89] I cannot amend clause 2.2 of Appendix "E" of the collective agreement by adding a right that the parties did not include in the negotiations (see s. 229 of the *Act* and *Delios v. Canada (Attorney General)*, 2015 FCA 117 at para. 34). However, this is exactly what the grievor has asked me to do. The wording of clause 2.2(a) of Appendix "E" is clear and unambiguous and consistent with other collective agreement provisions (see *Guérette*). Employees who are victims of injuries on duty are compensated under clause 36.01. As for clause 2.2(a) of Appendix "E", it allows canal employees to equalize their earnings over the year, according to the formula and the conditions that it sets out.

[90] Considering that the grievor did not persuade me that the employer was required to credit her overtime hours to her compensatory leave account under clause 2.2(a) of Appendix "E" of the collective agreement, I deny this part of the grievance.

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

(The Order appears on the next page)

V. Order

[92] The grievance is allowed in part.

[93] The employer must fully compensate the grievor for the overtime hours that she would have worked on July 29, 30, and 31, 2015, had it not been for her injury on duty.

[94] The part of the grievance is denied that requests that the employer credit the overtime hours in question to the grievor's compensatory leave account under clause 2.2(a) of Appendix "E" of the collective agreement.

May 10, 2024.

FPSLREB Translation

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