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April 20, 2007

Mr. J. McLuckie
Legal Counsel,
Jewitt Morrison and Assoc.
1505 Carling Ave. 2nd Floor
Ottawa, Ontario
K1Z 7L9

Ms. Margaret-Marie Steele
Legal Counsel,
City of Ottawa
110 Laurier Ave. West,
3rd Floor
Ottawa, Ontario
K1P 1J1

Dear Mr. McLuckie and Ms. Steele:

Re: Policy Grievance. CUPE Local 503. Eating Periods for Paramedics.

Enclosed please find my decision pertaining to the issue of damages pursuant to the submissions each of you made on this issue.

I am also enclosing my account in this matter, which I trust you will find in order.

Yours truly

J.W. Potter

cc. Mr. R. Pearson. Your file A/Y 501252

THE OTTAWA-CARLETON PUBLIC EMPLOYEES' UNION,
LOCAL 503

(the Union)

AND

THE CORPORATION OF THE CITY OF OTTAWA

(the Employer)

Before:	Joseph W. Potter, Arbitrator
For the Union:	John McLuckie, Counsel
For the Employer:	Margaret-Marie Steele, Counsel

HEARD AT OTTAWA, ONTARIO, SEPTEMBER 21, 2006.
(WRITTEN SUBMISSIONS RECEIVCED JANUARY 15 AND FEBRUARY 28, 2007.)

Introduction

[1] On May 16, 2006, I rendered a decision between these two parties with respect to the issue of provision of meal breaks for paramedics (The Ottawa-Carleton Public Employees' Union, Local 503, and The Corporation of the City of Ottawa, decision dated May 16, 2006 (unreported); upheld upon judicial review (SCJ 06-DV-1242) dated April 12, 2007).

[2] At paragraph 2 of the decision, I wrote:

> ... the grievance alleges that section 20 of the *ESA* [*Employment Standards Act, 2000*] "...requires the City to ensure that no employee works more than five consecutive hours without receiving an uninterrupted eating period of at least one-half hour in duration".

[3] The Union sought declaratory relief, stating that the Employer breached the *ESA* as well as the collective agreement. Additionally, the Union sought the issuance of an order directing that the Employer ensure paramedics receive uninterrupted eating periods of one-half hour for each five consecutive hour work period.

[4] Damages were also sought by the Union in the amount of 2.5 times the employee's hourly rate of pay for all eating periods that were either missed or interrupted.

[5] After considering all of the evidence, I wrote, at paragraph 95 of my decision:

> In summary, my findings in this matter are as follows:
>
> 1. The Union's contention that the Employer has violated clause 31(2)(c)(iii) by failing to use "best efforts" as required, is dismissed.
>
> 2. The Union's contention that the Employer has breached its obligation pursuant to section 20 of the *ESA* is sustained, and it is so declared. The Employer is obligated to adhere to the provisions of section 20 of the *ESA*.
>
> 3. The issue of damages is returned to the parties for further discussion and resolution. I remain seized of this issue for a period of four months from the date of issue of this award should the parties not be able to resolve it.

[6] On July 14, 2006, I received a letter from the Union's counsel stating, in part:

> I must regrettably advise that no element of your award has been implemented by the City....
>
> On behalf of Local 503 I would ask that you take immediate steps to convene a hearing of some nature into this issue prior to your loss of jurisdiction over this issue on August 16th....

[7] The City and Union continued discussions on the award and the issue of damages. On July 18, 2006, counsel for the City sent me an email, copied to Union counsel, which stated, in part, that meetings in the near future were to occur between City and Union representatives. The email then stated:

> Should these discussions fail to produce a resolution, then the parties can reconvene for a more formal hearing. However, I must advise that getting all of the players together may be difficult at this time of the year. If it is necessary, the City will agree to an extension of your jurisdiction over the issue of damages should we have to reconvene after August 16th....

[8] The parties were not able to resolve the issue of damages themselves, and a hearing was scheduled for September 21, 2006, to hear submissions. No objection to my retaining jurisdiction on the issue of damages was raised.

[9] In order to expedite the process, the parties agreed that it was not necessary to call witnesses; the hearing would be limited to argument. The City reserved the right to submit written argument, which ultimately it chose to do on January 15, 2007. The Union submitted its written reply on February 28, 2007.

[10] This decision pertains to the issue of damages pursuant to my findings in the original award (*supra*).

Arguments (extracted, in part, from written submissions)

For the Employer

[11] The issue is about damages, and the purpose of damages is to put the aggrieved party in the same position as it would have been had there been no breach of the collective agreement.

[12] Paragraph 2 of the City's written submission states:

> In his May 16, 2006 decision Arbitrator Potter found no breach of the collective agreement. The Arbitrator found a breach of Part VII, s. 20 of the *Employment Standards Act 2000* s.o. 2000, c. 41 (*ESA*).

[13] Paragraph 8 of the City's written submission states:

> Given that the Arbitrator failed to find a breach of the *Labour Relations Act*, the City submits that the Arbitrator is functus in this regard.

[14] Paragraphs 9 and 10 of the City's written submission state:

> Any entitlement to monetary compensation must be derived under the *ESA*.
>
> There are no powers to award general damages under the *ESA*.

[15] Paragraph 18 of the City's written submission states:

> All paramedics have been paid regular wages for the work they've performed. Damages under the *ESA* can award wages for monetary loss, but there has been no monetary loss in this instance. Any compensation must be derived from statutory power.

[16] Paragraphs 19 and 20 of the City's written submission state:

> The loss must be certain and not speculative. Arbitrator Larson confirmed that the real test of whether damages are appropriate is not whether a party has been denied a benefit but whether they have suffered a real loss. *School District No. 75 (Mission)* (1997), 61 L.A.C. (4th) (Larson).
>
> No proof of loss has been demonstrated by the Union.

[17] The City went on to state, in paragraph 23 of its written submission, in part:

> ... the Employer submits that it is impossible to award damages with any degree of certainty, and the City suggest caution in attempting to award damages in the abstract, with no evidence of actual loss presented by the Union.

[18] At paragraphs 28 and 30, the City wrote:

> Despite this, what remains in dispute is whether paramedics are entitled to an overtime premium for a missed meal period. This compensation would be for the period of time

> between the filing of the grievance and the introduction of *Ontario Regulation 491/06.*
>
> The lack of evidence presented at the hearing should not be held against the Employer. It is up to the Union to establish its losses. Without this evidence, the Employer should not have to pay any damages.

[19] The City closed its written submission stating that there was no basis to award damages.

For the Union

[20] Based on the evidence at the original hearing in 2006, if we assume the City complies with the *ESA* about 25% of the time, this means 3 out of every 4 shifts worked by a paramedic are interrupted insofar as meal breaks are concerned. The City benefits from this added service. For each 30-minute break missed the paramedics should receive 1 ½ times this hourly rate of pay. It is necessary to make this estimate because no statistics exist with respect to the number of actual times meal breaks are missed.

[21] Compensation should commence the date the grievance was filed, which is July 2005.

[22] The purpose of a remedy in an arbitration hearing is to make the employees whole with respect to the damages that they have suffered. Paramedics were never able to obtain the uninterrupted breaks required by the *ESA*. This opportunity to rest, relax and recover over the course of one's shift has now been lost and individual paramedics have suffered as a result.

[23] This loss is something of value and paramedics must be compensated for these missed break opportunities.

[24] An appropriate remedy is either an award of money paid to the affected individuals or alternately an award of time in lieu that can later be used to achieve the type of relaxation and downtime contemplated by the *ESA*.

[25] With respect to the jurisdictional issue raised by the Employer, if this were accepted it would render it impossible for any employee in Ontario to enforce the provisions of section 20(1) of the *ESA*. The Employer argues there is no provision

under the *ESA* to award general damages which, according to the Employer, is the only head that payment for missed meal breaks could fall under.

[26] The Union submits that the correct view of damages for the failure to provide meal breaks is more properly that adopted by the Labour Relations Board.

[27] In *Filet of Sole Seagrill Limited* for example, the restaurant was found to have established a system whereby employees were entitled to take a number of short breaks over the course of their shift during which they remained available to serve the restaurant's clientele. The Employer then deducted one half hour from the paycheques of each of these employees to compensate for these various shorter breaks. As was the case in your decision, the Labour Board found that as the employees remained available for work during these shorter breaks, they have not properly been accorded their eating period rights under the *ESA*. In light of this failure to comply with the *Act*, the Employer was ordered to pay monies characterized as wages to each of the employees involved.

[28] Having gained the benefit of the employee's labour during the time in question, the City must now compensate those employees at the appropriate hourly rate. This compensation can either be money or the equivalent time should the City so chose.

[29] A payment to employees will not amount to paying them for time spent on breaks but rather compensate them for time spent working when they should not have been.

[30] The Employer admitted that paramedics who are on shift must constantly be available to respond to emergency calls. It is therefore submitted that no paramedic received a single eating period within the meaning of the *ESA*. Thus, the Union seeks compensation for all shifts worked by paramedics since the date of the filing of the grievance.

[31] Alternatively, there has been sufficient evidence to show that paramedics have routinely gone without meal beaks. The evidence suggests paramedics would have missed their required eating period some 80 to 85 percent of the time. A calculation can easily be made as to what number of hours 80 percent missed breaks would have resulted in.

Reasons for Decision

[32] I will deal firstly with the jurisdictional objection raised by the Employer that the Arbitrator is functus. At paragraph 18 of the Employer's written submission, it states:

> All paramedics have been paid regular wages for the work they've performed. Damages under the *ESA* can award wages for monetary loss, but there has been no monetary loss in this instance. Any compensation must be derived from statutory power.

[33] The Union replied, in its written submission, at page 3:

> To accept this theory will effectively result in a right without an enforceable remedy which given the remedial nature of the *ESA* cannot possibly be viewed as the legislative intent.

[34] At paragraph 72 of my original decision (*supra*), I wrote:

> The issue of arbitrators having jurisdiction to decide matters concerning other employment related statutes, such as the ESA in this case, has been canvassed by other arbitrators, as seen in Toronto Transit Commission v. Amalgamated Transit Union, Local 113 (Scheduling Grievance) (supra). At paragraph 20, Arbitrator Springate wrote:
>
> > Ever since the judgement of the Supreme Court of Canada in McLeod v. Egan (1974), 46 D.L.R. (3d) 150 it has been settled law that an arbitrator must interpret and apply a collective agreement in light of the general law. The Employment Standards Act takes this one step farther and provides that the Act is enforceable against an employer as if it were part of a collective agreement. It also provides that, subject to certain exceptions, upon making a finding that the employer has contravened the Act an arbitrator may make any order that an employment standards officer could have made. The relevant provisions of the Act read as follows:
> >
> > 99(1) If an employer is or has been bound by a collective agreement, this Act is enforceable against the employer as if it were part of the collective agreement with respect to an alleged contravention of this Act that occurs,

> (a) when the collective agreement is or was in force;
>
> (b) when its operation is or was continued under subsection 58(2) of the Labour Relations Act, 1995; or
>
> (c) during the period that the parties to the collective agreement are or were prohibited by subsection 86(1) of the Labour Relations Act, 1995 from unilaterally changing the terms and conditions of employment.
>
> . . .
>
> 100(1) If an arbitrator finds that an employer has contravened this Act, the arbitrator may make any order against the employer that an employment standards officer could have made with respect to that contravention but the arbitrator may not issue a notice of contradiction.

[35] At the hearing into the initial grievance, the parties introduced a document entitled "Order/Notice Under the *Employment Standards Act, 2000*" (original exhibit U-15). This was an order issued by the Ministry of Labour with respect to the Frontenac Paramedic Service. It was an order made pursuant to a contravention of section 20 of the *ESA*. It states, in part:

> The following is the penalty: Section 20 of the *Act* contravened.
>
> Prescribed penalty is $250.00 per contravention, as per Section 1.4 of *Regulation 289* to the *Act*.

[36] Given the above, there can be no doubt, in my view, that I have the requisite jurisdiction to make an order, or award, with respect to my findings for a violation of section 20 by the Employer.

[37] The next issue I will deal with concerns the Union's request that damages should accrue to each shift worked since the filing of the grievance. The Union submits this request is valid because paramedics had to be constantly available to respond to emergency calls.

[38] As the Employer stated at paragraph 22 of its written submission:

Paragraph 69 of the May 16, 2006 decision states:

> The data provided by the Union (U-14) indicates that about 60 percent of the time the paramedic crews are given a break within the first five hours of the commencement of their shift. No evidence was led as to whether these breaks were interrupted or not. If they were interrupted, I simply do not know what efforts were made to avoid the interruption, if any. With respect to the remaining 40 percent that did not get a break within the first five hours of their shift, I have no evidence in front of me as to what, if any efforts were made to provide them with a break.

[39] As can be seen, at the hearing into the initial grievance no evidence was presented to show whether the breaks taken were interrupted or not.

[40] The Union asks that all shifts be compensated or, in the alternative, that 80 percent of the shifts should be compensated, based on the evidence at the initial hearing.

[41] The Employer stated, at paragraphs 23 and 30 of its written submission:

> Given the forgoing finding, the Employer submits that it is impossible to award damages with any degree of certainty, and the City suggest caution in attempting to award damages in the abstract, with no evidence of actual loss presented by the Union.
>
> The lack of evidence presented at the hearing should not be held against the Employer. It is up to the Union to establish its losses. Without this evidence, the Employer should not have to pay any damages.

[42] I do not believe it would be appropriate for me to award damages in this case in the abstract without firstly seeing if evidence exists that would indicate whether breaks were actually taken or not. This evidence could come from the Employer's own records of what actually transpired on each shift with respect to the issue of breaks, or from any notes kept by the paramedics themselves concerning the events of their shift, or other related evidence. In fashioning a remedy I believe an arbitrator should use the best evidence available, and no evidence was led on this issue at the hearing. That does not mean that evidence is not available. I will leave it up to the parries to meet and determine what best evidence exists to show whether or not a paramedic received a break as required by the *ESA*.

[43] With respect to the issue of compensation, at page 4 of the Union's written submission it states, in part:

> ... the City must now compensate those employees at the appropriate hourly rate. This compensation can either be money or the equivalent time should the City so choose.

[44] The City wrote, at paragraph 18, in part:

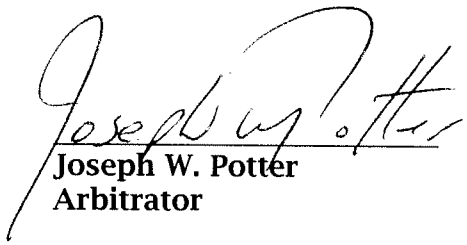
> All paramedics have been paid regular wages for the work they've performed.

[45] I agree with the Union's position (stated earlier) that there has to be some enforceable remedy for breaching the *ESA*. I therefore find as follows:

> Commencing on the date the grievance was filed, on each occasion where there was a violation of section 20 of the *ESA*, namely, where the employee did not receive an uninterrupted 30-minute meal break for every five hours of work, the employee is entitled to receive time and one-half their applicable hourly rate of pay for the meal break that was missed. Given the fact the employee has already been compensated at straight time for this meal break, the employee is entitled to an additional one-half time their applicable hourly rate for any missed meal break(s). If the City so chooses, this compensation can be in the form of time off in the amount of 30 minutes for each violation of the *ESA*.

[46] I will retain jurisdiction with respect to any issue of this award should either of the parties request I do so, and providing such a request is made within three months following the issuance of this award.

DATED AT OTTAWA, ONTARIO, APRIL 20, 2007.



Joseph W. Potter
Arbitrator