IN THE MATTER OF AN ARBITRATION
UNDER THE *LABOUR RELATIONS CODE*, RSBC 1996 c. 244

Between

CITY OF VANCOUVER
(FIRE AND RESCUE SERVICES)

(the "Employer")

-and-

VANCOUVER FIREFIGHTERS' UNION, LOCAL 18

(the "Union")

( HUSAR Overtime Grievance - Calgary Floods 2013 )

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| ARBITRATOR: | John B. Hall |
| APPEARANCES: | J. Najeeb Hassan, for the Employer<br>Allan E. Black QC, for the Union |
| SUBMISSIONS: | July 18, and August 2 & 11, 2016 |
| AWARD: | August 29, 2016 |

# SUPPLEMENTAL AWARD

## I. OVERVIEW

I issued an award on April 6, 2016 which addressed four interpretive issues arising from the 2013 deployment to the Calgary Floods of firefighters who are members of the Vancouver HUSAR Team (the "Initial Award"). One of the issues arose from the Employer's decision to unilaterally reschedule the vacations of some firefighters upon their return to Vancouver. Those employees were not consulted about the new vacation dates.

Beginning at page 38 of the Initial Award, I found that employees "have a say in the matter" when it comes to vacation rescheduling due to the Employer's operational requirements, and that the failure to consult with returning members of the HUSAR Team was an unreasonable exercise of the Employer's scheduling rights. I accepted the Union's argument that vacation time is important to its members, and found the Employer's actions had negatively impacted two employees in particular. They were unable to plan ahead and make arrangements for how their unexpected time off work would be utilized.

In terms of remedy, I agreed with the Employer's submission that directing monetary compensation as claimed by the Union would go beyond the normal principle for awarding damages in comparable circumstances. More specifically, arbitrators have not granted additional vacation time or vacation pay following a breach of vacation scheduling provisions where that would result in a "double payment" (see the authorities cited at p. 39). But nor was I satisfied that an arbitral declaration alone, as advocated by the Employer, would fully recognize the loss incurred by the affected members of the HUSAR Team. I accordingly granted relief under the "lost opportunity" principle.

As awarding damages under the foregoing heading had not been raised by either party at arbitration, I remitted the subject for discussion and reserved jurisdiction to fix an amount if necessary. I also directed the Employer to extend to all affected employees the option it had offered in final argument of rescheduling the applicable vacation entitlement to another time but without vacation pay. In a subsequent clarification issued at the Union's request, I reiterated that additional time off with full pay had been sought at arbitration and had been denied.

The parties have been unable to agree on the amount of "lost opportunity" compensation for the affected HUSAR Team members. There is apparently some disagreement as well over the number of actual vacation days that should be attributed to this principle. However, the submissions disclose a common ground that the Employer rescheduled the number of days listed below for each of the following employees:

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| Scott Morrison | 4 shifts |
| Kevin Main | 4 shifts |
| Shawn Dighton | 3 shifts |
| Daryl Van Horn | 2 shifts |
| John Dennis | 1 shift |
| Richard Fuller (retired) | 1 shift |

Having regard to various awards, the Union submits that every employee who had vacation days rescheduled due to the Employer's unilateral action should be entitled to 100% of the value associated with those days. It advises that each of the above employees earns a minimum of $500 per day plus benefits. The Employer has proposed a schedule of payments ranging from $144.48 to $530.64 for the employees "before statutory deductions and union dues". It advises that the global amount is roughly equal to 25% of the value of the wages (at 2013 rates) for the vacation days that were rescheduled. It submits the global amount results in an appropriate remedy for the employees and would be "in keeping with previous awards and the principles underlying them".

## II. DECISION

A frequent starting point for any application of the "lost opportunity" principle in this jurisdiction is *Burrard Yarrows Corporation (Vancouver Division) and International Brotherhood or Painters, Local 138* (1981), 30 LAC (2d) 331 (Christie). The collective agreement there did not preclude contracting out to a unionized contractor, but provided: "Time permitting, prior to contracting in or out, the appropriate Unions will be contacted to see if they can come up with a better arrangement or solution". The company contracted out the application of a new non-skid exterior deck coating on a vessel, mainly to obtain the contractor's warranty. The arbitration board found there had been "ample time" for the appropriate unions to be contacted in respect of the contracting, and held the company had breached its obligation to see if the grieving union could "come up with a better arrangement or solution".

In considering damages for the breach, the arbitration board emphasized that it was concerned with "an undertaking by the company to consult" and the union did not have a veto. Nonetheless, "… the loss of opportunity is real, [and] we must quantify it for the purposes of a damage award" (QL para. 37). One of the questions addressed by the board was: "What chance would the union and its members have had if the Company had fulfilled its obligations under the Collective Agreement?" In the end, and "judging broadly as a jury would judge", the board concluded that the union and its employees who were not working and were eligible for the work in question should be awarded $750 in damages.

More generally, in deciding whether loss of opportunity damages are payable and, if so, quantifying the amount, arbitrators have taken the following approach. First, it must be determined whether there has been a breach which results in a loss of opportunity. If so, the complainant must demonstrate a reasonable probability that the benefit could have been obtained absent the breach. If this inquiry is answered in the affirmative, damages will be awarded for the value of the loss, although "the quantification of damages is readily little more than a guess" having regard to the value

of the benefit and the likelihood it would have been obtained: *Burrard Yarrows*, at para. 45. Where the second inquiry is answered in the negative, only a nominal amount of damages will be awarded. Finally, in cases where there has been a failure to comply with notice provisions, arbitrators have accepted the proposition that damages should be sufficient to give the employer a "meaningful incentive" to comply with the provisions in the future.

Both parties refer in their submissions to *Hertz Canada Ltd. -and- Canadian Office and Professional Employees' Union, Local 378*, [2011] BCCAAA No. 65 (McDonald). The award dealt with the remedy that should flow to two grievors whose vacation requests had been improperly denied by the employer. The first grievor had submitted her request for the period November 1 - 30, 2010 while the second grievor had submitted his request for August 13 to September 11 of the same year. Arbitrator McDonald found neither grievor had suffered a loss as a result of the collective agreement breach because they had been able to carry over their 2010 vacation time to the following year (para. 12). He rejected the union's request for an "in kind" remedy, and turned to ". . . the possible remedy to the Grievors of the monetary value of their losses" (para. 20). It was noted that a lost opportunity may be compensable without proof of actual monetary loss (para. 22), and an exposition of the case law was followed by these conclusions:

> Grievor Raith lodged her vacation request on February 1, 2010 expecting that it would be given due consideration on July 1, 2010 according to the current practice of the Employer. I find as a fact that her vacation request was in place on July 1, 2010 prior to a request of any other employee. It is likely that her request would have been granted, but for the mistake of Area Manager Safiq in not realizing that Ms. Raith's vacation request had been lodged on February 1, 2010. There was a reasonable probability of Ms. Raith securing the benefit and advantage which she sought. Ms. Safiq erroneously deemed that Ms. Raith's vacation request was received on July 5, 6 or 7, 2010 when time off request approvals had been given to two other employees which fell within the vacation period that Ms. Raith had requested. Her opportunity for the specific vacation she sought to travel with her family to India was then indeed lost. The Employer's suggestion that she could have mitigated her loss by submitting a further vacation request is an idle one. I therefore set

> the monetary value of Grievor Raith's loss of opportunity at $1,000.00 damages. This will also serve as a meaningful incentive to the Employer in the administration of vacation requests. …
>
> Grievor Mahdi's loss of opportunity in his vacation request falls into a different category. In his circumstances, I am unable to find that there was a reasonable probability of his securing the benefit and advantage which he sought. … I therefore conclude that for his loss of opportunity to have his vacation request properly determined he is entitled to nominal damages which I set at $350.00. . . . (paras. 23-24)

Turning to the immediate facts, I find that all members of the HUSAR Team who had their vacation entitlement unilaterally rescheduled by the Employer suffered a loss of opportunity. Regardless of whether they were "annoyed" or "fine" with the situation (see the Initial Award at p. 35), they lost the opportunity to plan how their vacation time would be enjoyed when the Employer gave only one day's notice of the change. This loss can be reasonably inferred, and there is no need for additional evidence beyond what is already on the record. Nor would it be a constructive and expeditious use of the parties' resources to put the Union to further proof of its members' detriment beyond my findings to date. I am additionally satisfied that there was a reasonable probability that the Employer would have allowed the HUSAR Team members to take their remaining days of vacation at another time, if desired, but for its improper dictate. The uncontested testimony of President Weeks was that the Employer "always worked in concert with employees when rescheduling vacation" (p. 36). In this case, the Employer failed to follow its usual practice of consulting with employees, and they had no input into when their remaining vacation time would be taken.

I reject the Union's position that the amount of damages should be 100% of the value associated with the rescheduled vacation days. That would be entirely inconsistent with the determination in the Initial Award -- supported amply by a consistent line of arbitral case law -- that granting additional vacation time or pay results in double compensation. On the other hand, the Employer's quantification approaches the "nominal" category and erroneously ties the payment to wages. Damages for loss of

opportunity in the present circumstances are not income, and should not be subject to statutory or other deductions.

Monetary damages ". . . are, by their nature, inexact and imprecise": *Open Learning Agency -and- British Columbia Government Employees and Service Employees' Union*, [2005] BCCAAA No. 31 (Steeves), at para. 26. That said, after considering all of the relevant circumstances, I have determined that a sliding scale is appropriate based on the number of vacation days involved. More specifically, I award: damages of $250* for employees who had one vacation day unilaterally rescheduled; damages of $500 for employees who had two or three days rescheduled; and, damages of $750 for employees who had four days rescheduled. These amounts are to be paid to employees individually, and I am satisfied that the global amount represents a sufficient incentive for the Employer to consult in the future -- *assuming* this is an applicable and necessary consideration given, among other ameliorating factors, the Memorandum of Agreement subsequently concluded by the parties.

I continue to retain jurisdiction under the Initial Award in the unlikely event that any remaining question of implementation cannot be resolved by counsel.

DATED and effective at Vancouver, British Columbia on August 29, 2016.

JOHN B. HALL
Arbitrator

* This figure is obviously less than the $350 characterized as "nominal" in the *Hertz* award; however, it is being awarded in respect of one day as opposed to the one month vacation period in issue there.