

ARBITRATION AWARD

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA
UNDE LOCAL 90120
(hereinafter called the "Union")

AND:

I.M.P. GROUP LIMITED
Aerospace Division
Gander, Newfoundland and Labrador
(hereinafter called the "Employer")

GRIEVOR: Lloyd Parrott

COUNSEL: For the Union
Amarkai Laryea

For the Employer
Kate A. Hopfner

ARBITRATOR: James C. Oakley

The arbitration hearing was held at Gander on October 15, 2009. The parties agreed as follows:

1. The Arbitrator was acceptable.
2. There were no preliminary objections going to jurisdiction to hear the grievance.
3. The grievance procedure was properly followed or any requirements waived.
4. The Arbitrator would remain seized of the matter in the event there is a question of interpretation or compensation arising from the Award.

The following exhibits were entered at the hearing:

- Consent 1 - Collective Agreement between I.M.P. Group Limited, Aerospace Division, Gander, Newfoundland and Labrador and the Public Service Alliance of Canada, UNDE, Local 90120, dated July 1, 2006 to June 30, 2011
- Consent 2 - Collective Agreement between I.M.P. Group Limited, Aerospace Division, Gander, Newfoundland and Labrador and the Public Service Alliance of Canada, UNDE, Local 90120, dated December 1, 2004 to June 30, 2006
- Consent 3 - Grievance form dated December 5, 2008 with attached statement of the Grievor, Lloyd Parrott
- Consent 4 - Email dated September 28, 2007 from Lora Wyman to Bill Ricketts and Barry Wadman
- Consent 5 - Letter dated September 12, 2007 from Lora Wyman, Director of Human Resources, I.M.P. Group, Aerospace Division to Lloyd Parrott
- Consent 6 - Letter dated November 28, 2008 from Lora Wyman, Director of Human Resources, I.M.P. Group, Aerospace Division to Lloyd Parrott
- Consent 7 - Email dated September 25, 2007 from Lora Wyman to Lloyd Parrott and related emails
- Consent 8 - Email dated November 25, 2008 from Lora Wyman to Lloyd Parrott and related emails

Nature of the Grievance

The Union grieves that Lloyd Parrott did not receive the correct amount of retroactive pay upon implementation of the current Collective Agreement. The Union submits that when the Grievor was accommodated into a new position, the Employer had agreed that the Grievor would maintain the rate of pay of his former position, including pay adjustments, until the pay rate of his new position caught up. The Employer submitted that it had agreed to pay the Grievor his pre-disability rate of pay until the rate of the new position caught up, and that it had paid the correct amount of retroactive pay.

Collective Agreement

The relevant Articles of the Collective Agreement are as follows:

Article 4 Human Rights

...

4.02 The Employer recognises that it has a duty to accommodate employees who become disabled in accordance with applicable legislation.

...

Article 19 Pay

19.01 Classifications and rates of pay are as detailed in Appendix "A" to this agreement.

...

Article 36 Re-Opener of Agreement

36.01 This Agreement may be amended by mutual consent of the parties.

Evidence

The witnesses called by the Union were Lloyd Parrott, the Grievor and Eugene Stone, local Union president. The witnesses called by the Employer were Barry Wadman, site manager and Lora Wyman, human resources director.

The Employer provides maintenance and support for search and rescue aircraft for the Canadian Forces at Gander. The Grievor, Lloyd Parrott, was employed in the position of storesperson

commencing in July, 2003. His duties in that position included shipping and receiving, operating a forklift, and lifting materials by hand. Commencing in January, 2006, he was absent from work due to illness. He had several surgeries for his illness, but unfortunately had to have his leg amputated in January, 2007. Following a rehabilitation program, he was able to return to work effective September 4, 2007. At that time his medical restrictions prevented him from returning to the job of storeperson. There was an opening in the classification of maintenance planner and the Employer accommodated the Grievor by placing him in that position. Barry Wadman, site manager, testified that the Grievor did not have the prior aircraft maintenance documentation experience required for the position. However, the Employer placed him in the position, and he learned by on-the-job training. Eugene Stone, local Union president, testified that the Union approved the Employer placing the Grievor into the maintenance planner position without a job posting.

When the Grievor returned to work, an issue arose concerning the Grievor's rate of pay. He was placed in the maintenance planner position at Level C. Pursuant to the Rates of Pay in Appendix "A" of the Collective Agreement, Level C applies at "date of hire", Level B applies "after 6 months" and Level A applies "after 12 months". Prior to his disability the Grievor was paid at the rate for storeperson, Level A. The rate for storeperson, Level A, in effect January 1, 2006, was \$18.22 per hour. The rate for maintenance planner, Level A was \$18.40, a higher rate of pay. However, the rate for maintenance planner, Level C, at that time was \$17.31, a lower rate of pay. At the time of the Grievor's return to work, the prior Collective Agreement had expired on June 30, 2006. The parties had not agreed on the terms of a new Collective Agreement. Lloyd Parrott was offered the maintenance planner position at the rate of \$17.31 per hour.

By letter dated September 12, 2007, Lora Wyman, director of human resources, informed the Grievor about his new position, as follows:

This is to confirm that you have returned to work in the position of Maintenance Planner effective September 4th, 2007 at the rate of \$17.31 per hour as outlined in the collective agreement. During the period September 3rd to September 7th you worked 4 hours per day. On September 10th you began working a full 8 hour day.

As I indicated to you in my letter dated August 8th, 2007 IMP is accommodating your return to work in the position of Maintenance Planner. Based on the medical information we have available, we have not determined that your restrictions/limitations prevent you from working in the classification you occupied immediately prior to your absence due to this medical condition. However, based on your

expressed interest and the current availability of a position in the classification of Maintenance Planner, we are of the opinion that this position represents a potentially viable means of accommodating your return to work.

...

Mr. Parrott made a request to Barry Wadman, site manager, that he be paid at the maintenance planner, Level A rate, but the Employer felt that Level C was appropriate, considering that the Grievor had no prior experience as a maintenance planner. Mr. Wadman testified that the Grievor requested that he be paid at the same rate of pay as he was paid in his former position, namely the rate of storeperson at \$18.22 per hour. Mr. Wadman testified that he made a request to the human resources department that the Grievor be paid at the rate of \$18.22.

Lloyd Parrott testified that at the time he commenced the new position he asked Lora Wyman, human resources director for a copy of the Employer's policy on accommodation. She informed him that the Employer did not have a written policy. Mr. Parrott testified that he and Ms. Wyman agreed verbally that he would receive the storeperson rate of pay until the maintenance planner rate caught up. Eugene Stone, local Union president, testified that there was a discussion about the Grievor's rate of pay and the Employer agreed to pay the Grievor's former storeperson rate. Mr. Stone did not recall any discussion at that time about future increases in rates of pay. Barry Wadman testified that he understood the Grievor's rate of pay would remain at \$18.22 per hour until the maintenance planner rate caught up. Mr. Wadman said that he agreed that Mr. Parrott should not suffer a loss of income as a result of the fact that the starting rate of pay for his new position was less than his previous rate of pay.

Lora Wyman testified that she reviewed the issue of the Grievor's rate of pay in September, 2007. She said there was no obligation on the Employer under the Collective Agreement to pay a rate higher than \$17.31 per hour. However, the Employer agreed that it was reasonable to allow the Grievor to maintain his former rate of \$18.22. There was no discussion with the Grievor about receiving any salary adjustment based on future increases in the storeperson rate. Her understanding at the time was that the Grievor would be "red circled" at the rate of \$18.22, until the maintenance planner rate caught up. Based on the rates of pay in the old collective agreement, the Grievor would catch up and pass the rate of \$18.22 after 12 months, when he would be paid at the maintenance planner Level A rate of \$18.40. There was no written document signed by the parties about the arrangement. Ms. Wyman said that she explained the arrangement to the Union.

Lora Wyman testified about an email dated September 28, 2007 that she sent to Barry Wadman. The email recommended that the Employer pay the Grievor his pre-disability rate of pay at \$18.22 until the maintenance planner rate caught up. The email stated that after 12 months in the maintenance planner position, the Grievor would be paid the maintenance planner Level A rate at \$18.40 per hour and the Grievor would continue to be paid on the maintenance planner wage schedule. The email also stated that the Employer was under no legal obligation to pay any rate other than \$17.31 per hour. The email was not sent to the Grievor or to the Union.

Ms. Wyman also testified that upon the Grievor's return to work in September, 2007, he was supposed to be paid at the rate of \$17.31. However, the Grievor was initially paid at the rate of \$18.22 in error, because that was the rate of pay for the Grievor's former position that was still on file in the payroll records. Therefore, there was no need to pay any adjustment to the Grievor after the parties agreed on the rate of \$18.22.

The parties negotiated a new Collective Agreement in 2008. The Collective Agreement was signed on October 27, 2008. The Collective Agreement was in effect from July 1, 2006 to June 30, 2011. It provided for adjustments to rates of pay annually commencing July 1, 2006. The rates of pay in Appendix "A", state in part, for the maintenance planner and storesperson position, as follows:

Maintenance Planner	<u>Level</u>	<u>Base</u>	<u>1-Jul-06</u>	<u>1-Jul-07</u>	<u>1-Jul-08</u>
After 12 Months	A	18.40	18.86	19.38	22.00
After 6 months	B	17.86	18.31	18.81	21.35
Date of Hire	C	17.31	17.74	18.23	20.69
Storesperson	<u>Level</u>	<u>Base</u>	<u>1-Jul-06</u>	<u>1-Jul-07</u>	<u>1-Jul-08</u>
After 12 Months	A	18.22	18.68	19.19	19.77
After 6 months	B	17.86	18.31	18.81	19.37
Date of Hire	C	17.31	17.74	18.23	18.78

Following the settlement of the new Collective Agreement in 2008, the employees were paid retroactive pay. The Employer paid the Grievor retroactive pay calculated according to the maintenance planner rates of pay. The rate for maintenance planner, Level C, in effect from July 1, 2007 was \$18.23 per hour. The rate for maintenance planner increased after 6 months to Level

B, at \$18.81. The rate of pay for storeperson Level A, effective July 1, 2007 was \$19.19. The Employer did not pay the Grievor retroactive pay at the higher storeperson rate of pay. The Grievor claimed that he should have received retroactive pay calculated at the storeperson Level A rate of pay until his maintenance planner rate, at the applicable level, caught up and passed the storeperson Level A rate. The Employer informed the Grievor that, under the new Collective Agreement, the maintenance planner Level C rate, in effect in September, 2007, when he returned to work, was \$18.23, a higher rate than his pre-disability storeperson rate of \$18.22. The Employer's position was that the maintenance planner rate had caught up to the storeperson rate at that time.

Eugene Stone testified that he was surprised when retroactive pay was paid to employees and the Grievor did not receive retroactive pay based on the storeperson rate. Mr. Stone said that, when the Collective Agreement was signed, there was no agreement made to exclude any employee from retroactive payments.

Lora Wyman testified that retroactive wage adjustments were paid to employees. The retroactive payment to the Grievor was based on increases to the maintenance planner rate of pay. Effective from July 1, 2007, when the maintenance planner Level C rate was \$18.23, the maintenance planner rate caught up to the rate of \$18.22.

After the Grievor claimed that his retroactive pay was not correct, Lora Wyman, by letter dated November 28, 2008, responded to the Grievor as follows:

In September of 2007 you were provided with the opportunity to occupy the position of Maintenance Planner. This was done in an effort to accommodate your return to work. We recognized there was a difference in rate of pay from Storeperson Level A (\$18.22/hr) and Maintenance Planner Level C (\$17.31/hr). Without prejudice or precedent we agreed to maintain the rate of pay you were earning in the role of Storeperson until such time as the Maintenance Planner rate caught up to the rate of pay you were earning at the time.

On July 1, 2007 the rate of pay for Maintenance Planner increased to \$18.23 per hour. This exceeded the rate of pay you were earning in the role of Storeperson (\$18.22/hour). Your retroactive pay is calculated on this basis.

The grievance was filed on December 5, 2008.

Union Submission

The Union submitted that the Employer did not pay the Grievor the correct amount of retroactive pay. When the Grievor was accommodated in the maintenance planner position, there was an agreement made with respect to the Grievor's rate of pay. At issue was the interpretation of the agreement. The Union submitted that the agreement was that the Grievor would be paid at the storesperson Level A rate until his maintenance planner rate caught up. It was not agreed that the Grievor's rate of pay would be "frozen" at \$18.22 or that the Grievor would not receive increases in the storesperson Level A rate. The Employer's position that the Grievor was "red circled" at \$18.22 was never communicated to the Grievor or to the Union. The purpose of the accommodation agreement was to protect the Grievor against loss of income. The Grievor was entitled to the retroactive pay adjustment. The presumption of retroactivity can only be rebutted by clear evidence to the contrary, based on arbitral case authority. There was no evidence of any agreement to the contrary in the Collective Agreement. The Grievor did not agree to contract out of his right to receive retroactive pay. The Grievor was denied the right available to other employees, which amounted to discrimination against the Grievor on the basis of disability. The Union requested that the grievance be allowed and the Grievor paid a retroactive pay adjustment at the storesperson A rate.

Employer Submission

The Employer submitted that when the Grievor was placed in the maintenance planner Level C position, he was initially paid at the rate of \$17.31. When the Grievor objected to that rate, the Employer agreed to pay him at his pre-disability storesperson Level A rate of \$18.22 until his maintenance planner rate caught up. The Employer's understanding of the agreement was consistent with the Employer's letter to the Grievor dated September 12, 2007 and the September, 2007 email from Lora Wyman, human resources director, to Barry Wadman, site manager. The Grievor was placed in the position of maintenance planner and "red circled" at \$18.22 until the maintenance planner rate caught up. Based on the rates of pay in effect under the old collective agreement, the Grievor's rate would catch up after 12 months, when he would be paid at the maintenance planner Level A rate of \$18.40. There was no discussion between the Employer and the Grievor or the Union about paying retroactive pay to the Grievor at the storesperson rate. The Grievor was correctly paid retroactive pay in the maintenance planner position. The Employer submitted, in the alternative, that if there was no common understanding or mutual consent as to an agreement on pay

rates, then the agreement was void for uncertainty. An agreement to amend the Collective Agreement could only be made by mutual consent pursuant to Article 36. In the absence of mutual consent, the maintenance planner rate applies. The Employer requested that the grievance be denied.

Considerations

Lloyd Parrott, the Grievor, returned to work in September, 2007. As a result of a disability, he was unable to return to his previous position of storeperson. He was accommodated in the position of maintenance planner. The rate of pay for maintenance planner Level A is higher than the rate for storeperson Level A. However, the Grievor had no prior experience as a maintenance planner and he was placed in the position at Level C. The rate of pay for maintenance planner Level C is less than the rate for storeperson Level A. At that time, the rate of pay for maintenance planner Level C was \$17.31 per hour, and the rate of pay for storeperson Level A was \$18.22 per hour. Following discussions between the Grievor, the Employer and the Union, it was agreed that the Grievor's rate of pay would be \$18.22 per hour, with the effect that his pay would not be reduced.

The parties do not dispute the placement of the Grievor in the maintenance planner position, starting at Level C. According to the wage schedule in the Collective Agreement, the Grievor would move to Level B after 6 months and to Level A after 12 months. The placement of the Grievor was an accommodation of his disability, and was done with the approval of the Grievor and the Union. There is no issue of discrimination against the Grievor in these circumstances.

The parties dispute the calculation of the Grievor's retroactive pay. The Employer paid retroactive pay to employees following the signing of the Collective Agreement in October, 2008. The Union submits that the Grievor should have received retroactive pay calculated according to increases in the storeperson Level A rate of pay. The Employer submits that the correct calculation of retroactive pay was made according to increases in the maintenance planner rates. The issue concerns interpretation of the agreement made between the Grievor, the Employer and the Union with respect to the rate of pay in the accommodated position of maintenance planner. The issue also concerns the interpretation and application of the Collective Agreement.

When the parties negotiated the current Collective Agreement, there was no specific provision addressing the issue of retroactivity. Article 36.01 of the Collective Agreement states that the effective date of the Agreement is from July 1, 2006 to June 30, 2011. The Rates of Pay in

Appendix "A" lists the rates in effect on July 1, 2006 and July 1 in subsequent years up to 2011. Appendix "A" also lists percentage increases effective on July 1 each year. It is evident from these provisions that the parties intended that the new rates of pay would come into effect on July 1, 2006 and on July 1 each year. It follows that retroactive pay would be paid according to the rates of pay in Appendix "A". The parties do not dispute that employees are entitled to retroactive pay. The Employer paid retroactive pay to employees, including Lloyd Parrott. The issue in dispute is what rate of pay applies to Mr. Parrott.

The Employer calculated the Grievor's retroactive pay on the basis of the maintenance planner rate of pay. The rate of pay for maintenance planner Level C, effective July 1, 2007, under the new Collective Agreement was \$18.23. The rate of \$18.23 was higher than the rate of \$18.22 that the Grievor was being paid. The payment of retroactive pay to the Grievor was based on scheduled increases in the maintenance planner rates of pay, which exceeded the rate of \$18.22. However, the Grievor would have received a greater amount of retroactive pay, had his retroactive pay been calculated according to the scheduled increases in pay of the storeperson Level A.

When the Grievor was placed in the accommodated position, the Employer sent him a letter stating that he had returned to work in the maintenance planner position effective September 4, 2007, at the rate of \$17.31 per hour. Following discussions by the parties, the Grievor's rate of pay was adjusted to \$18.22 per hour. The Grievor remained in the maintenance planner position, starting at Level C, and subsequently moving to Level B, after 6 months and to Level A, after 12 months. The Collective Agreement provided for payment of retroactive pay to the Grievor at the maintenance planner rate, having regard to the fact that he was placed in the maintenance planner position. Had the Grievor returned to work in the storeperson position, then he would have been entitled to retroactive pay at the storeperson rate of pay. Having been placed in the maintenance planner position, there would need to be evidence of an agreement to pay retroactive pay on terms that did not follow the Collective Agreement, in order to require the Employer to calculate retroactive pay at the storeperson rate. In this regard, the Arbitrator will consider the evidence with respect to the existence of an agreement to pay retroactive pay at the storeperson rate, as alleged by the Union.

There was no agreement made in writing between the Employer, the Union and the Grievor about rates of pay when the Grievor returned to work in 2007. It is necessary to consider the evidence of discussions and communications between the parties and the related documents. The Employer sent a letter to the Grievor in November, 2008, after the retroactive pay dispute arose, outlining its

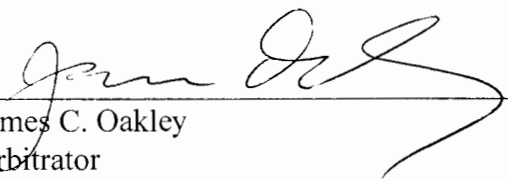
understanding of the agreement. That letter is consistent with an email sent in September, 2007 from Lora Wyman, human resources director, to Barry Wadman, site manager, stating her understanding about the agreement and seeking approval to pay \$18.22 per hour. Approval was granted to pay \$18.22. The Employer's understanding of the agreement was that the Grievor would be paid \$18.22 per hour, and continue to be paid at \$18.22, until the maintenance planner rate caught up to that rate. The communications were consistent with that understanding. The purpose of the agreement, according to the testimony of Barry Wadman, site manager, was that the Grievor not suffer any reduction in income upon his return to work. In other words, the Grievor would retain his pre-disability rate of \$18.22. The evidence does not establish an agreement at that time that the Grievor would receive future negotiated increases to the storesperson Level A rate of pay. The parties agreed that the Grievor's rate of pay would be adjusted when the maintenance planner rate caught up to his pre-disability rate, which was \$18.22 per hour. The Grievor was correctly paid at the rate of \$18.22 per hour until such time as the maintenance planner rate caught up to that rate. The maintenance planner rate caught up to \$18.22 following the signing of the new Collective Agreement, when the maintenance planner Level C rate was increased to \$18.23 per hour, effective July 1, 2007.

The calculation of retroactive pay was made on the correct basis, consistent with the Collective Agreement and the maintenance planner rate of pay. The evidence does not establish any agreement by the parties that retroactive pay to the Grievor would be calculated on the basis of the storesperson rate of pay. The Grievor is not entitled to any adjustment in retroactive pay.

Decision

The grievance is denied for the reasons stated in the Award.

DATED this 25th day of January, 2010.


James C. Oakley
Arbitrator