IN THE MATTER OF AN ARBITRATION

BETWEEN:

COMMUNITY SOCIAL SERVICES BARGAINING ASSOCIATION OF UNIONS (CSSBA)

(the "Union")

AND:

COMMUNITY SOCIAL SERVICES EMPLOYERS' ASSOCIATION (CSSEA)

(the "Employer")

SUPPLEMENTARY AWARD

Arbitration Board:	**Joan M. Gordon**
For the Union:	Ken Curry
For the Employer:	Thomas Roper, Q.C.
Date and Place of Hearing:	January 26, 2006 Vancouver, British Columbia

Introduction

On June 23, 2005, this board issued an Award (the "Award") determining two issues arising out of a policy grievance relating to Articles 17 and 30 of the parties' recently-concluded community social services sector collective agreement.

The first issue was whether I should rectify the language of Article 30.6 so casual employees would be entitled to claim compensation under Article 17.5 at the rate of time and one-half for the hours worked on designated statutory holidays. I declined the Union's request to rectify Article 30.6.

The second issue was whether regular employees have the right to elect to work on statutory holidays or take a paid holiday consistent with past practice, and whether the Employer's use of casuals for work on statutory holidays contravened the collective agreement. My findings and conclusion in relation to this issue were these:

> … I do not agree that the Employer won the right to use or schedule casuals for work on statutory holidays. …
>
> … Article 30.1 expressly restricts the uses for which casuals can be called in to work; and, work on statutory holidays is not provided for. …
>
> The evidence establishes that Article 30.1 is the provision under which the practice of using casuals for work on statutory holidays developed. … But the evidence does not support a finding that the Employer won the right to expand the practice by using or scheduling casuals for work on statutory holidays. The Employer cannot, therefore, rely on any rights won in collective bargaining to support a change in practice.
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> … Absent proof that the Employer achieved the right it asserts during collective bargaining, and the evidence is to the contrary, the Employer's use of casuals on statutory holidays is limited to those specified in Article 30.1 and the practice that has developed thereunder. As I have already found, the current practice falls outside the scope of the established practice.

> … when [the Union] successfully resisted any amendment to the language of Article 30.1, the Employer's ability to use casuals for work on statutory holidays turned on the Union's willingness to continue to forebear from insisting on its strict legal rights under Article 30.1 which proscribes the use of casuals on statutory holidays. The Union is willing to maintain past practice (and may be estopped from not maintaining it), but the Union is not obliged to agree to an expansion of the practice under Article 30.1. The Employer is therefore not entitled to unilaterally change its practice as it has done; and in this sense, regular employees can expect to have the opportunity to elect to work on statutory holidays, in accordance with established practice, or take a paid holiday. It is only where regular employees elect the latter that management has the ability to call in casuals for absences due to statutory holidays.
>
> …
>
> I retain jurisdiction to assist the parties with all issues arising out of the implementation of this award.
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> (pp. 26-30)

Following the issuance of the Award, the Union wrote to the Employer seeking the remedy of one shift's pay at time and one-half for regular employees for each statutory holiday they were not given an election to work. The Union also requested production of scheduling records from each agency that operated on statutory holidays during the relevant period of time indicating which regular employees were scheduled to work on statutory holidays.

The Employer's response was that, as the dispute was presented and determined as a policy grievance, there is no entitlement to individual remedies. The Employer further contended that if individual remedies are properly awarded in this case, the particular remedy requested is not an appropriate exercise of this board's jurisdiction because the Employer has already paid casuals for working on the statutory holidays. Finally, the Employer cautioned that if the Union pursued its remedial claim and succeeded, notice of discontinuance of the practice under Article 30.1 would be given.

A hearing was convened to address these remedial issues and the parties' positions on the issues in dispute were further developed during counsel's submissions. The issues for determination are these:

1. Do I have jurisdiction to award a remedy, beyond the declarations in the Award, to individual employees affected by the Employer's contravention of the collective agreement?
2. If yes, should that remedial jurisdiction be exercised in this case?
3. If yes, should the remedy be an award of damages or an order for an in-kind opportunity to work an overtime shift?
4. If damages is the appropriate remedy, should a global amount be awarded?
5. Do I have jurisdiction to address breaches of the collective agreement subsequent to the issuance of the Award?

Jurisdictional Issues #1 and #5

Argument

The Union submits individual remedies flow from the policy grievance as a result of the parties' agreement as disclosed in their pre-arbitration correspondence. The Union further submits that, even without this agreement, arbitrators have the jurisdiction to award individual remedies flowing from policy grievances: Brown & Beatty, *Canadian Labour Arbitration*, Third Edition, at page 2-98.4.

As to my jurisdiction to determine disputes relating to breaches that have occurred subsequent to the Award, the Union again contends that, by agreement, the parties extended my jurisdiction to deal with those events. Considering section 2 of the *Labour Relations Code* (the "*Code*"), the Union maintains it would not promote conditions favourable to the orderly, constructive and expeditious resolution of disputes to require new grievances and arbitration proceedings to enforce regular employees' rights to have the opportunity to work on statutory holidays if they are normally scheduled to work those days.

The Employer submits the grievance was submitted to arbitration as a policy grievance as provided for under Article 9.13 of the collective agreement. That article permits the referral of disputes about the "general application, interpretation or alleged violation of the collective agreement" to arbitration. The Employer contends the Award provided declaratory relief, and it says remedial relief should end there. In the Employer's view, the parties' correspondence does not disclose an agreement that individual remedies would flow from the Award. Nor does it establish the Employer agreed to waive its right to argue that individual remedies were not a proper remedy even for the specific employees

named in the correspondence. The Employer says the parties' letters simply disclose an agreement to consolidate grievances filed at a number of employer agencies into one policy grievance.

The Employer argues I have no jurisdiction to address alleged breaches of the collective agreement occurring subsequent to the Award. The Employer says the parties did not agree to extend my jurisdiction in this manner, and the law clearly provides that arbitrators have no jurisdiction to look forward and provide remedies beyond the claims submitted to arbitration: *British Columbia School District No. 35 (Langley) and Langley Teachers' Assn.* (1996), 55 L.A.C. (4th) 1 (Bruce); *Re Province of Manitoba and Manitoba Government Employees' Union* (2003), 116 L.A.C. (4th) 351 (Spivak); and, *Re B.C. Rail Ltd. and United Association, Local 70, Metal Trades Division* (2004), 135 L.A.C. (4th) 399 (Hope).

Analysis

The modern approach to whether the remedial authority of an arbitrator pursuant to a policy grievance is limited to declaratory relief is summarized in Brown & Beatty, *Canadian Labour Arbitration*, *supra*, in this way:

> A further jurisdictional question may arise as to the remedial authority of the arbitrator in dealing with a policy grievance. At one time it was thought that when a grievance was brought as a policy grievance the remedy for a breach was limited to a declaration. But that is no longer the view of most arbitrators. Rather, when the grievance is cast as a policy grievance, arbitrators will assume that they enjoy unqualified remedial authority, including the power to order that monetary relief be given to individuals, unless the collective agreement provides otherwise.

I was not referred to language in the collective agreement providing otherwise. Article 9.13 provides for the "discussion" and referral to arbitration of policy grievances, but it does not limit the remedial authority of the arbitrator.

In addition to this general principle, I find the parties agreed that my jurisdiction includes authority to grant relief to individual employees. At the initial hearing, no grievance forms were tendered into evidence and the issues raised in this supplemental

award were not flagged. However, when the hearing re-convened to address these remedial issues, the Union provided the parties' correspondence discussing the submission to arbitration. The parties' intention regarding the scope of my remedial jurisdiction can be discerned from a review of their correspondence submitting this dispute to arbitration. The relevant excerpts from that correspondence are these:

- Letter from Chris Anderson (Union) to Lorne Rieder (Employer) dated May 19, 2004

… Rather than have every affected member file grievances on each occasion, be advised that the Union has asked members to simply keep a record in the event they do not receive overtime when working a [statutory holiday].

You should also be aware that we are receiving advice that certain employers have taken this violation of the agreement one step further and are now actually canceling shifts of regular employees who were scheduled to work on a stat holiday and are apparently relying on the casual call-in procedure for those days. This practice is a direct and flagrant violation of Article 30 where the parties have agreed to limit the use of casuals to back-fill for sick leave, vacation, special leave or to augment staff during peak periods. The Collective Agreement prohibits employers from laying off a regular employee for the purpose of calling in a casual employee at a lesser rate of pay. In the event, albeit unlikely, you support this practice, and since these two issues appear to be related, we propose that they be heard at the same time in front of the same arbitrator.

- Letter from Angela Davies (Employer) to Lisa Claxton (Union) dated November 4, 2004

It is our understanding that *all outstanding grievances related to* the payment of premium pay for casuals working on a statutory holiday, as well as *the scheduling of casual employees to work on statutory holidays will be resolved through this arbitration process. This includes, but is not limited to, the following grievances of* which we are currently aware:

Agency	**Union**	**Grievor**
Centaine Support Services Inc.	BCGEU	Fern Albany
MSA Society for Community Living	BCGEU	Simone Douglas
Pacific Coast Community Resources Inc.	BCGEU	Sue Scherf

Please confirm that *these outstanding grievances are all included in the matter being taken forward to arbitration*.

I look forward to hearing from you.

(emphasis added)

- Letter from Lisa Claxton (Union) to Angela Davies (Employer) dated November 30, 2004

Our understanding is consistent with yours with respect to the issues to be dealt with at the arbitration. The issues of 1) payment of premium pay to casuals working on a statutory holiday, and 2) the use of casuals to replace regular employees whose shifts are cancelled on a statutory holiday will be resolved through this arbitration process.

I am aware of the three grievances you have set out in your letter. However, there are likely other grievances being held in abeyance at the area offices awaiting determination of this issue at arbitration. I will try to obtain a complete list of all outstanding grievances related to this issue and provide it to you.

In the meantime, *I wish to confirm our common understanding that all affected employees will be covered by the outcome of the CSSBA policy grievance regarding this issue. As you know, we have advised employees to keep track of any shortfall in pay or cancelled shifts on statutory holidays until the issues are resolved at arbitration.*

If your understanding differs from any of the positions indicated above, please advise as soon as possible.

(emphasis added)

The above-quoted correspondence was the only evidence presented in relation to this issue.

If the only correspondence between the parties was the May 19, 2004 letter, the Employer's contention that the parties only agreed to consolidate grievances at various employer agencies into one policy grievance would have more force. When, however, the parties' intention is assessed in the context of the correspondence as a whole, I am

persuaded it reflects an agreement that all affected employees' claims would be resolved as part of the arbitration process.

In my view, the parties' correspondence reflects an intention to consolidate a policy grievance raising two issues, with a number of individual grievances and claims. The common understanding was that all of these matters would be submitted to arbitration and would be resolved through the arbitration process. Three specific grievors were identified in the November 4th letter, but other outstanding grievances were identified as well. Then, in the November 30th letter, the scope of the matters to be resolved during the arbitration process was expanded to include "all affected employees." I take this to mean those employees who had outstanding grievances and those employees who were keeping a record of their claims but had not yet filed grievances. In failing to respond to the November 30th letter with a different understanding, the Employer must be taken to have agreed that the individual claims of all affected employees would be resolved during the arbitration process if the outcome of one or both of the policy issues upheld the Union's position.

It is the case that my remedial jurisdiction is not expressly discussed in the parties' correspondence. I find, nonetheless, that the letters reflect the parties' agreement about the breadth of the issues to be resolved in the arbitration process, as well as an intention to employ a two-step process to first resolve the policy issues and then resolve the individual claims of all affected employees. I find that implicit in the parties' correspondence is an agreement that remedies would flow for all affected employees.

I have found the parties' correspondence reflects an agreement to proceed in an effective and reasonably commonplace two-stage process. Their correspondence reflects an agreement that, through the arbitration process, the claims of all employees affected by the Employer's breach of the collective agreement would be resolved. This includes the three specific employees named in the November 4th letter, employees who had filed grievances, and employees who were affected by the breach of the collective agreement and were keeping track of the cancelled shifts on statutory holidays until the policy issues were determined at arbitration, but had not filed grievances. Two-stage processes such as this often result in the parties being able to resolve individual remedial claims on their own following the issuance of an award determining a policy issue. The parties have been unable to do so here; hence, the necessity for the determinations in this supplementary award.

At the same time, the submission to arbitration does not disclose an agreement to expand my remedial jurisdiction to the resolution of alleged breaches occurring after the issuance of the Award. Absent such an agreement, and the reservation of jurisdiction on that basis, I find I have no authority to supervise the scheduling of casuals going forward from the Award. The applicable principle is discussed in the two awards: *Re Province of Manitoba*, and, *Re B.C. Rail Ltd.* The relevant principle is that, events occurring after the publication of an arbitration award constitute a fresh dispute. Arbitrators cannot expand their jurisdiction to such disputes under the guise of enforcing their awards. Parties are able to agree to expand the arbitrator's jurisdiction to the resolution of future breaches of the collective agreement, and the arbitrator can then reserve jurisdiction on that basis. Absent such circumstances, the arbitrator is *functus officio*.

I cannot find the submission to arbitration in this case reflects an agreement to expand my jurisdiction to future events, and my reserved jurisdiction does not authorize me to supervise the future scheduling of casual employees: *B.C. Rail*. The parties do refer to the resolution of claims by "all affected employees" in their correspondence. But absent some language reflecting an intention to include employees affected by post-award events, I find "all affected employees" are those who were affected by the contravention of the collective agreement prior to the issuance of the Award. It may be consistent with section 2 of the *Code*, encouraging the promotion of conditions favourable to the orderly, constructive and expeditious settlement of disputes, to hear and determine scheduling disputes going forward from the date of the Award. Nevertheless, I cannot conclude that section 2 of the *Code* should be construed to countenance an excess of jurisdiction by this board. I am also satisfied the policy captured in section 2 of the *Code* is given effect within the scope of my agreed-to jurisdiction.

Should a remedy beyond the declarations in the Award granted?

Argument

The Employer advances two arguments relating to this issue. Firstly, and referring to section 89(a) of the *Code*, the Employer submits I have an absolute discretion as to whether any monetary relief should be awarded in this particular case. The Employer says in exercising this discretion, I should consider the fact that the dispute was presented as a policy grievance and the Union characterized the scheduling issue as a "subsidiary issue." The Employer says that, as the parties' correspondence does not disclose an agreement to pursue individual remedies in the event the Union succeeded on the policy issues, remedial relief should be limited to the declarations in the Award: *SPI Marketing Group v. Saskatchewan Government Employees' Union*, [1997] S.J. No. 274 (Sask. Ct., Q.B.). Alternatively, relief beyond the declarations in the Award should only be granted to the three employees specifically named in the parties' correspondence.

Secondly, the Employer submits the Award does not constitute a foundation for individual relief in the absence of further evidence. The Employer notes the second issue giving rise to claims for individual remedies was argued on the basis of stipulated facts about past practice. The Employer says that, as some employer agencies did not participate in the stipulated practice, they may want to present evidence to support an estoppel argument. The Employer further argues that, if asked, regular employees will invariably state they would have worked on the statutory holidays they were normally scheduled to work. In the Employer's view, such responses would be insufficient and factual determinations would have to be made in respect of each regular employee who claims remedial relief. Thus, says the Employer, as evidence of facts independent of the disputed interpretation must be presented, the policy grievance is an inappropriate vehicle for granting monetary relief to individual employees: *British Columbia v. Union of Psychiatric Nurses*, [1994] B.C.C.A.A.A. No. 294, Award No. A-285/94 (Hope).

The Union submits that, in its May 19, 2004 letter, it gave the Employer a clear warning that scheduling casuals to work on statutory holidays without giving regular employees who were normally scheduled to work on those holidays an election to work or take a paid holiday constituted a "direct and flagrant" violation of Article 30.1. The Union says the Employer ignored that warning and breached the collective agreement in order to

save four hours pay. Hence, if no remedy is granted for the breach of Article 30.1, the Employer will improperly benefit from its clear violation of the collective agreement.

The Union further submits there is no legal basis for denying a remedy for the Employer's breach of the collective agreement. Relying on the principle of *ubi jus, ibi remedium* -- where there is a right there is a remedy -- the Union says the Employer's liability for the denial of a contractual benefit must be enforced in these proceedings. See *Machining Plant Waltec Components, a Division of EMCO Ltd. v. United Steelworkers of America, Local 9143 (Laliberte-Smith Grievance),* [1998] O.L.A.A. No. 7 (Brandt); and, *Vanscoy v. Ontario*, [1999] O.J. No. 1661 (Ont. S.Ct.).

The Union says it would be a proper exercise of this board's jurisdiction under sections 82(2) and 89 of the *Code* to grant the remedy sought because there is a rational connection between the Employer's breach of the collective agreement and a remedy for the lost opportunity to work a shift at premium pay: *Westfair Foods Ltd. and United Food and Commercial Workers' Union, Local No. 777*, [2003] B.C.L.R.B.D. No. 268, BCLRB No. B268/2003. As mentioned earlier, the remedy the Union seeks is an order that regular employees who were not given an election to work on a statutory holiday are entitled to one shift's pay at time and one-half for each statutory holiday they did not work. From the Union's perspective, this remedy is the only way to ensure regular employees will be put in the position they would have been in but for the Employer's breach of the collective agreement.

The Union maintains the Employer's reliance on Arbitrator Hope's reasoning in the *British Columbia v. United Psychiatric Nurses* award is misplaced where, as here, the parties agreed individual remedies would flow from the policy grievance. The Union also says the evidence required to establish a basis for individual remedies is not complex. And, contrary to the Employer's suggestion, the Union says it should be assumed regular employees will respond truthfully when asked if they would have worked on statutory holidays. As to the Employer's assertion that further practice evidence will be required, the Union emphasizes that, at the outset of the hearing, it had been prepared to present considerable evidence about the Employer's longstanding past practice. The Union says it did not present that evidence because the parties agreed to proceed on the basis of stipulated facts. Consequently, says the Union, it is now too late for the Employer to call further practice evidence from individual employer agencies.

Analysis

I accept the Employer's submission that I have a broad remedial discretion under section 89 (a) of the *Code*. At the same time, that discretion may be exercised in a manner consistent with sections 82 and 89. Those sections provide as follows:

> **82. Purpose of Part — (1)** It is the purpose of this Part to constitute methods and procedures for determining grievances and resolving disputes under the provisions of a collective agreement without resort to stoppages of work.
>
> **(2)** An arbitration board, to further the purpose expressed in subsection (1), *must have regard to the real substance of the matters in dispute* and the respective merit of the positions of the parties to it under the terms of the collective agreement, and must apply principles consistent with the industrial relations policy of this Code, and is not bound by a strict legal interpretation of the issue in dispute.
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> **89. Authority of arbitration board** — For the purpose set out in section 82, *an arbitration board has the authority necessary to provide a final and conclusive settlement of a dispute arising under a collective agreement*, and without limitation, may
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> > (a) make an order setting the monetary value of an injury or loss suffered by an employer, trade union or other person as a result of a contravention of a collective agreement, and directing a person to pay a person all or part of the amount of that monetary value.
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> (emphasis added)

At the hearing, the second policy issue was variously characterized as the "related subsidiary issue", the "subsidiary issue", the "related issue", the "other issue", and, the "second issue." In my view, these various short-hand terms describing the second of two policy issues for determination do not detract from the fact that, when the parties submitted the second policy issue to arbitration, they intended and agreed to use this arbitration process to resolve the consequential remedial claims of all employees affected by the breach of the collective agreement.

I find the real substance of the matter in dispute is, by agreement of the parties, broader than the policy issues argued at the initial stage of this proceeding and addressed in the declarations in the Award. By agreement, relief for the impact of the Employer's contravention of Article 30.1 on all affected employees, not just the three named employees, was a component of the real substance of the matter in dispute in the event I determined the collective agreement had been breached as alleged by the Union. Consequently, I find the Employer's position is inconsistent with my statutory mandate to provide a final and conclusive settlement of the dispute under the collective agreement.

A refusal by this board to grant any relief to employees affected by the breach of Article 30.1 would, as the Union argues, leave a contravened right without a remedy. Given the finding in the Award under Article 30.1 and the parties' agreement that all affected employees would be covered by the outcome of the grievance, I find a refusal to provide remedial relief to employees affected by the breach would surely generate further litigation. In my view, a final and conclusive settlement of this dispute requires individual remedies for the contravention of Article 30.1.

The *SPI Marketing* award is distinguishable from the case at hand. There, the arbitrator awarded the union a monetary penalty even though the real issue in dispute involved a specific employee. The Court viewed that award as patently unreasonable and beyond the arbitrator's powers because the union had not suffered any proven economic loss. In the unusual facts of that case, the Court found a declaration was the proper limit on the arbitrator's remedial authority. Here, the Union is not claiming for itself a monetary penalty for the breach of Article 30.1. The Union is pursuing monetary relief for its members who, the Union says, were affected by the breach of Article 30.1. Those employees' losses must, of course, be established in order to engage my jurisdiction to provide compensatory relief.

I also find the arguments relating to the stipulated facts issue to be unduly technical. The stipulated facts were intended to facilitate the hearing and resolution of the policy issues during the first stage of these proceedings. The stipulated facts were not intended to hamper the parties' resolution of any consequential issues. The stipulated facts were summarized on page 2 of the Award together with the agreed fact that "certain employer agencies" had stopped following past practice. Ideally, the existence of employer agencies falling outside the stipulated facts would have been disclosed at the outset of the hearing when, in light of the stipulated facts, the Union decided not to present "lots" of practice

evidence. It may be the case that this disclosure did not occur because it was viewed as unnecessary given the policy nature of the issues to be addressed at the initial stage of the proceedings. This oversight is not, however, fatal to the determination of the issues relating to individual remedies flowing from the Award. In order to obtain individual remedies, affected employees must establish their losses. Specific employer agencies may dispute such losses. If an employer agency intends to assert that it is not captured by the past practice facts stipulated at the outset of the hearing, particulars of that assertion must be disclosed to the Union so it can investigate and respond. A fair hearing of all issues in dispute must and will be provided.

Just as the *SPI Marketing* award is distinguishable from the case at hand, so too is the award of Arbitrator Hope in *British Columbia v. United Psychiatric Nurses*. In that award, Arbitrator Hope found the policy grievance submitted to him for determination did not emanate from or include individual grievances by specific employees. Here, as I have already found, the parties agreed to consolidate their policy grievance with individual grievances and claims by all affected employees.

For these reasons, I am not persuaded there is any proper basis to limit the exercise of my remedial authority to the declarations in the Award.

Should an in-kind remedy be awarded rather than monetary damages?

Argument

The Employer argues in the alternative that, if a remedy beyond declaratory relief is granted, the remedy should be an in-kind overtime work assignment. The Employer says as it has already paid casuals for work on statutory holidays, affected employees should not be paid a premium rate of pay for work they did not perform.

From the Employer's perspective, regular employees' losses under Article 30.1 should be viewed as lost overtime work opportunities. The Employer submits the law now provides that the presumptive remedy for lost overtime work opportunities is the offer of another overtime shift: *Canadian Pacific Forest Products and Pulp & Paper Workers of Canada, Local 11* (1990), 14 L.A.C. (4th) 371 (MacIntyre); *PLH Aviation Services Inc. and I.C.T.U., Local 1* (1994), 45 L.A.C. (4th) 335 (Hickling); and, *Good Humor-Breyers, Simcoe and U.F.C.W., Locals 175 &* 633 (2003), 120 L.A.C. (4th) 182 (Kirkwood). The

Employer maintains the facts of this case do not fit within the recognized exceptions to presumptive in-kind remedies for lost overtime work assignments.

The Employer proposes two scenarios for in-kind remedies. The first option is that missed shifts due to sick calls could be assigned to regular employees at overtime rates of pay rather than straight time rates. If no such shifts are available for assignment within a six-month period, the employer agency would "make up" a shift and assign it to affected regular employees. Alternatively, the design of the in-kind remedy should be referred back to the parties for resolution, and only circumstances where the parties cannot agree will be arbitrated.

The Union does not challenge the basic legal principles on which the Employer relies in advancing its argument that a presumption in favour of in-kind remedies for lost overtime work assignments has developed in the arbitral jurisprudence. However, the Union says the fundamental premise of the Employer's argument is faulty. Here, says the Union, the Employer did not breach the collective agreement by making an improper overtime work assignment. The Employer instead denied regular employees a substantially different right -- the right to elect to work on a statutory holiday on which they were regularly scheduled to work, and the right to claim payment for that work at a rate of time and one-half for all hours worked. The Union emphasizes an overtime shift is fundamentally different than scheduled work on a statutory holiday. It says the loss of the opportunity to work on the statutory holiday as scheduled differs from the loss of an opportunity to work an overtime shift during an evening or on a weekend. The Union submits that employees who are regularly scheduled to work Monday to Friday day shifts due to their family or other personal obligations are typically unable to perform evening or weekend shifts. As an in-kind overtime work opportunity would fall outside their regularly-scheduled shifts, it constitutes a remedy falling far short of replicating what they lost due to the Employer's contravention of the collective agreement; namely, the opportunity to work on a statutory holiday falling within her regular schedule. This difference, says the Union, also constitutes a "distinctive reason" to award damages rather than an in-kind remedy: *Re International Chemical Workers, Local 346 and Canadian Johns Manville Co. Ltd.* (1971), 22 L.A.C. 396 (Weiler).

The Union further says the Employer's proposals for in-kind remedies are too complex and uncertain, and would likely engender complaints by other employees. The precise method of offering overtime shifts during the six-month period would have to be

determined by this board, and if no overtime shift was available during that period, a supernumerary shift would have to be created. With respect to the offer of sick call shifts to regular employees on an overtime rather than a straight-time basis, the Union claims other employees may be entitled to those shifts on the basis of their seniority. Consequently, the Employer's proposal would generate competing claims.

In reply, the Employer says employees' difficulty working outside their regularly-scheduled shifts does not rebut the presumption in favour of in-kind remedies. The Employer notes that, under Article 14.2(e)(i), employees can claim additional straight-time paid hours by seniority up to full-time hours, but overtime is not assigned by seniority. Under Article 16.4 of this collective agreement, overtime is shared on an equitable basis.

Analysis

The Employer has properly traced the development of arbitral reasoning relating to the presumption in favour of in-kind remedies for lost overtime work opportunity grievances. However, I agree with the Union's submission that the loss to be remedied here is different in substance from a lost overtime work opportunity.

A practice developed under predecessor collective agreements whereby regular employees were scheduled for work on statutory holidays they were normally scheduled to work. Those employees were given the option to work on the statutory holiday at a premium rate of pay or take a paid holiday. If the regular employee chose the latter, and a casual was available to work on the statutory holiday, the casual was assigned the work and paid at the premium rate of pay. This practice developed under Article 30.1 even though the language of that provision proscribes the use or scheduling of casuals on statutory holidays. The violation of Article 30.1 occurred when, under the new collective agreement, certain employer agencies scheduled casuals to work on statutory holidays thereby effectively canceling regular employees' scheduled shifts and denying them the opportunity to elect to work on the statutory holiday at premium pay or take a paid holiday. This is the loss to be remedied.

I agree with the Union that in all cases this is a materially different loss from the loss of an opportunity to work an overtime shift. I accept the Union's assertion, and I am prepared to take notice of the fact, that employees will typically organize their personal lives around their regularly-scheduled hours of work. Knowing ahead of time that they are

scheduled for work on a particular statutory holiday enables employees to elect to work that day and organize their personal lives so as to celebrate the holiday on an alternate day. In contrast, overtime work falls outside the employee's regular schedule and may not constitute an opportunity to work at all because of other commitments, or, an opportunity replicating the opportunity lost by the breach of the collective agreement. Thus, an offer to earn overtime pay during an overtime shift that arises irregularly or suddenly due to sick calls or missed shifts, may not even be an option for employees whose rights under the collective agreement have been contravened.

Further, unless and until the collective agreement is amended or the past practice is altered, regular employees are entitled to be given the election to work on future statutory holidays for which they are normally scheduled or take a paid holiday. Hence, the loss cannot effectively be replicated by an in-kind remedy replicating the loss of opportunity at issue here. In this way, the loss in the case at hand is similar to the loss under consideration in the *Ontario (Ministry of Community and Social Services)* decision. There, the arbitration board found all classified employees had lost an opportunity to make an election under the collective agreement. They had lost the opportunity to have made a different choice in the past. The arbitration board determined as that loss could not be replicated, an award of damages was appropriate. The Employer relies on this decision to support its alternative argument that a global amount of damages should be awarded if I find damages, rather than an in-kind remedy, should be awarded. I will address that issue below. Suffice it to say, at this point, the reasoning in the Court's decision reinforces my conclusion that damages is the proper remedy for the particular loss occasioned by the breach of the collective agreement here.

This conclusion is buttressed by the complexity and uncertainty associated with the Employer's proposals, the potential for competing claims to the hours of work offered at overtime rates, and/or the unlikelihood that the parties would be able to agree on a mechanism to remedy all affected employees' claims. The advantage of the in-kind remedy is the avoidance of a double payroll for the statutory holiday shifts already worked by casuals. An in-kind remedy also ensures work is performed in exchange for pay. The arbitral preference for in-kind remedies for lost overtime work opportunities reflects these advantages. The Employer's submission urging an approach that ensures, in this particular industry, that work is performed for pay, certainly has merit. And, the Employer's proposals for alternate in-kind work opportunities have been carefully considered. Unfortunately, those proposals fall short of replicating the loss arising from the breach of the collective

agreement such that the advantages of an in-kind remedy cannot be achieved here. Additionally, it should be recalled that, immediately following the first statutory holiday under the new collective agreement, the Union notified the Employer it viewed the Employer's conduct as a "direct and flagrant" breach of the collective agreement. The Employer apparently believed it had an arguable case under Article 30.1, but its exposure to remedial claims by regular employees could nonetheless have been limited by following past practice pending the outcome of the policy issues.

In all of these circumstances, I find an award of damages to be more consistent with the mandate under the *Code* to provide a final and conclusive resolution of the dispute than is an in-kind remedy.

If damages is the appropriate remedy, should a global amount be awarded?

Argument

The Employer submits in the further alternative that, if an award of damages is in order, I should direct the parties to agree on an appropriate sum to be awarded to the Union as a global amount. The Employer says this innovative approach is suitable due to the complexity associated with granting individual remedies to affected employees. See *Ontario (Ministry of Community and Social Services).*

The Union disputes the propriety and efficacy of the Employer's approach to a monetary award. The Union says the proof of individual damages is not a complex matter and such damages provide a final and conclusive resolution of this dispute. The Union further says the form of order the Employer proposes would require the parties to agree on an amount. This, says the Union, is unlikely. The parties would then have to re-convene these proceedings and make submissions for significantly differing amounts. And in order to resolve that dispute, this board would have to be clothed with the jurisdiction of an interest arbitrator, a jurisdiction it does not possess.

Analysis

The judicial review decision in *Ontario (Ministry of Community and Social Services)* is most interesting. There, the arbitration board upheld the grievance finding employees had lost the opportunity to make an election under the collective agreement, and determining monetary damages were the only feasible remedy. In a second award, the arbitration board determined that difficulty quantifying the loss should not prevent an award of damages. A global remedy of damages was awarded to the Union for the loss of the employees' opportunity under the collective agreement. The arbitration board found the loss suffered by the employees was a loss of seniority. The quantum of damages was fixed by multiplying each employee's seniority by two week's salary, plus interest.

The arbitrator's remedial award was upheld on judicial review. The Court characterized the award as a "collective or blanket" remedy (at page 10). The Court approved the remedy as a reasonable one because the employer had breached the collective agreement in a manner affecting the collectivity. The Court went on to say this:

> … The employees have suffered what the Board found to be a real loss, yet the applicant contends, in effect, that mere difficulty in translating that loss into dollars enables it to avoid the consequences of its breach. *No one can predict whether any, and if so which, employees will ultimately suffer due to a loss of seniority*. Accordingly, a blanket remedy is called for, and that is what the Board fashioned. This a remedy well suited to the requirements of labour relations. The amount to be received is related to the individual employee's seniority, the very asset destroyed by the applicant's breach. It enhances respect for the [collective agreement], does not reward the applicant for its breach nor fail to compensate the employees. The compensation is imperfect: some will never suffer any monetary impact from the applicant's breach and others who do will likely be under-compensated. But it is a reasonable award to make in the circumstances.
>
> (at page 11; emphasis added)

This decision constitutes a strong statement in support of the expertise of labour arbitrators in fashioning appropriate remedial relief for collective agreement violations. The arbitrator's award was both innovative and reasonable in all of the circumstances of that case. Several factors were critical to the Court's determination that the remedy was reasonable: the collective agreement had been breached in a manner affecting the

collectivity; the employer's insistence on individual remedies would have led to "interminable individual hearings" and would have been harmful to management-employee relations; and, importantly, it was not possible to predict whether any, and if so which, employees would ultimately suffer due to the loss of their seniority. These factors distinguish that case from the case before me.

Here, the Employer's breach of the collective agreement only affected certain regular employees: i.e., those regular employees who were normally scheduled to work on statutory holidays and were given the option to elect to work on the statutory holiday or take a paid holiday. Hence, it is possible to determine from scheduling records and other evidence which employees suffered a loss. I am not persuaded that interminable individual hearings will be the result of the Union's approach. And, the Employer's concerns about issues relating to proof of loss can be addressed, if necessary, in a case management context. For these reasons, I decline the Employer's invitation to award a global remedy of damages to the Union for the loss of opportunity at issue here.

Conclusion

The precise form of the order the Union requests will not be granted at this stage. I have determined I have jurisdiction to grant individual remedies, and I have found damages are an appropriate form of remedial relief for the loss of opportunity at issue in this case. However, while the basic formulation of the order sought by the Union is appropriate, I find it is premature, without further evidence, to determine the quantum necessary to compensate specific employees. In the end, it may be established that an award in the form proposed by the Union will be appropriate for most or all affected employees; but proof of loss is a factual matter, and the quantum to be awarded to affected employees must await the appropriate factual determinations.

It is so awarded.

DATED this 9th day of March 2006 at Vancouver, British Columbia.

Joan M. Gordon
Arbitrator