Citation: Yearwood v. A.G. (Canada) et al 2003 BCSC 177

20030131
Docket: C996065
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CHARLES WILLIAM YEARWOOD

PLAINTIFF

AND:

ATTORNEY GENERAL OF CANADA, MINISTER OF TRANSPORT CANADA, PRESIDENT OF THE TREASURY BOARD

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE W. G. PARRETT

Counsel for the plaintiff: S. Rush, Q.C.

Counsel for the defendants: J. L. Wright

Date and Place of Trial: November 22, 23, & 24, 2000
And November 13, 2002
Vancouver, BC

INTRODUCTION

[1] The plaintiff, Charles William Yearwood, seeks in this action to recover $67,584.78 in compensation for standby duty performed by him between July 24, 1995 and March 31, 1998.

[2] This matter originally came before me on November 22, 23 and 24 of 2000. My reasons were released on September 6, 2001[1]. On July 12, 2002, the Court of Appeal allowed the plaintiff's appeal, set aside the order dismissing the action and remitted " . . . the remaining issues raised in the pleadings to the trial judge." On November 13, 2002, counsel, at their request, made further submissions in light of the decision in the Court of Appeal. After reviewing those submissions, including the transcripts of the original trial, I repeat the factual findings made in my original decision. The facts on which this claim is advanced are not significantly in dispute, indeed, the defences advanced go primarily to the issue of entitlement. The defence submits that –

a) the plaintiff's claim is time-barred by the conditions of employment contained within the relevant Collective Agreement;

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b) the plaintiff's claim is specifically time-barred by Article 19.04 of the Collective Agreement;

c) the plaintiff's claim is barred by application of the doctrine of *laches*.

BACKGROUND

[3] The plaintiff began his employment with Transport Canada as a Civil Aviation Inspector in what was then the Air Carrier Branch of the Pacific Region on September 3, 1991.

[4] At the time, he was a member of the Aircraft Operations Group Association and was covered by the Aircraft Operations Collective Agreement with the Treasury Board.

[5] On July 24, 1995, the plaintiff was appointed as Acting Regional Director, System Safety, Civil Aviation, Pacific Region. This position was covered by employment terms and conditions set out in the Collective Agreement. The position was classified under the Collective Agreement as an AO-CAI-05.

[6] Mr. Yearwood performed the duties of Acting Regional Director until January 21, 1997, when he was appointed permanently to the position as Regional Manager.

[7] While in the position of Acting Regional Director from July 24, 1995 to January 21, 1997, and subsequently as

Regional Manager, Mr. Yearwood was required by his employer to perform, and did perform, standby duty as outlined in Article 44 of the Collective Agreement.

[8] Mr. Yearwood's supervisors were not only aware that he was performing these standby duties, they designated him as the person responsible and required him to perform those duties. Beyond that immediate level of knowledge, his employer had in place a documented Occurrence Response Plan which named Mr. Yearwood as the person on standby.

[9] David James Nowzek was called on behalf of the defendants. Mr. Nowzek is the Regional Director, Civil Aviation, for the Pacific Region. Mr. Nowzek testified that when he arrived on the scene (in a different capacity) in October or November of 1989 the standby function was performed by employees on a rotating schedule. He went on to testify that because of the magnitude of the overtime bill, this duty was eventually assigned to managers who generally did not present claims for compensation.

[10] In 1993, an informal policy was established which permitted managers to take time off in lieu of overtime. This situation continued until late 1996 when Mr. Nowzek took the matter to his national board for clarification. By sometime

in early 1997 the clarification was made that managers were to claim overtime for performing this duty.

[11] Throughout his time in this position, Mr. Nowzek knew that under the terms of the Collective Agreement a person performing standby duty was entitled to compensatory leave.

[12] As a part of the duties required of him, Mr. Yearwood had staff under him including an administrative officer. Mr. Yearwood, as part of his duties, produced a budget for his unit. Over the period of the claim the budgets he generated included no allowance for standby duty, he provided no time sheets or notices to his administrative officer reflecting his claims and, on the occasions when he was absent and a staff member filled in for him, he took no steps to advise them they should submit a claim for standby duty.

[13] On July 16, 1998, Mr. Yearwood submitted a claim for compensation for standby duty he had performed for the previous three years dating back to July 24, 1995. No previous claim had been submitted nor had Mr. Yearwood ever indicated he would be making such a claim.

[14] On October 27, 1998, the plaintiff’s immediate supervisor, David J. Nowzek, advised the plaintiff that although he was entitled to standby duty compensation he was

only entitled to it for 25 working days prior to the date on which he had submitted his Extra Duty Report.

[15] Despite the position he communicated to the plaintiff, Mr. Nowzek authorized what he characterized as a gratuitous payment covering the period from April 1, 1998 until March 31, 1999. The claims submitted by the plaintiff for standby duty after July 16, 1998 were authorized by Mr. Nowzek and paid.

[16] The claim submitted on July 16, 1998, sought compensation for 2,147 hours of standby duty. Of these he was compensated for 212 hours by cost payment or credited time. The balance represents the present claim.

[17] On October 27, 1998, the plaintiff grieved the decision refusing to pay the balance of the compensation he sought under Article 35 of the Collective Agreement. On November 18, 1998, Mr. Nowzek denied the plaintiff's grievance as untimely on the basis it was submitted for a claim more than 25 days old.

[18] Two days later, on November 20, 1998, the plaintiff appealed Mr. Nowzek's decision to level 2 of the grievance process. On January 7, 1999, Mark Duncan, Regional Director General, Pacific Region, Transport Canada, denied the plaintiff's grievance, again finding it to be untimely.

[19] On January 8, 1999, the plaintiff appealed this decision to the Deputy Minister of Transport Canada, taking the matter to the third level of the grievance process. The Deputy Minister's representative denied this grievance on April 1, 1999.

[20] The plaintiff remitted his grievance to the Public Service Staff Relations Board where the defendants took the position the Board was without jurisdiction as the plaintiff was an excluded management person. After consulting counsel, the plaintiff withdrew his grievance and commenced the present action.

THE COLLECTIVE AGREEMENT

[21] Article 44.01 of the Collective Agreement provides, in part, that:

> a) Where the employer requires an employee to be available on standby during off-duty hours he or she shall be credited with one hour of compensatory leave for each eight (8) consecutive hours or portion thereof that the employee has been designated as being on standby duty.

Article 35.09 provides:

> 35.09 An employee may present a grievance to the first step of the procedure in the manner prescribed in clause 35.03, not later than the twenty-fifth

(25th) day after the date on which the employee is notified orally or in writing or on which the employee first becomes aware of the action or circumstances giving rise to grievance.

[22] The ***Public Service Staff Relations Act***, R.S.C. 1985, c. P-35, provides, *inter alia*:

2(1) In this Act

"employee" means a person employed in the Public Service, other than

. . .

(*j*) a person who occupies a managerial or confidential position,

. . .

"grievance" means a complaint in writing presented in accordance with this Act by an employee on his own behalf or on behalf of the employee and one or more other employees, except that

(*a*) for the purposes of any of the provisions of this Act respecting grievances, a reference to an "employee" includes a person who would be an employee but for the fact that the person is a person described in paragraph (*f*) or (*j*) of the definition "employee", . . .

. . .

92.(1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to

(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award, ...

and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.

(2) Where a grievance that may be presented by an employee to adjudication is a grievance described in paragraph (1)(a), the employee is not entitled to refer the grievance to adjudication unless the bargaining agent for the bargaining unit, to which the collective agreement or arbitral award referred to in that paragraph applies, signifies in the prescribed manner its approval of the reference of the grievance to adjudication and its willingness to represent the employee in the adjudication proceedings.

. . .

96.(1) Subject to any regulation made by the Board under paragraph 100(1)(*d*), no grievance shall be referred to adjudication and no adjudicator shall hear or render a decision on a grievance until all procedures established for the presenting of the grievance up to and including the final level in the grievance process have been complied with.

(2) No adjudicator shall, in respect of any grievance, render any decision thereon the effect of which would be to require the amendment of a collective agreement or an arbitral award.

(3) Where a grievance has been presented up to and including the final level in the grievance process and it is not one that under section 92 may be referred to adjudication, the decision on the grievance taken at the final level in the grievance process is final and binding for all purposes of

> this Act and no further action under this Act may be taken thereon.

SUBMISSIONS

[23] The plaintiff, in essence, submits that there is no requirement for the plaintiff to formally submit his claim for credited standby hours at any particular time. Article 35.09 of the Collective Agreement, he submits, establishes time limits for the commencement of a grievance, not for submitting a claim for a contractual entitlement.

[24] The plaintiff submits that as there is no time limit for submitting the claim, no dispute or violation of a legal right arose until October 27, 1998 when his claim was denied. He goes on to submit that the required elements for application of either the defence of *laches* or *estoppel* cannot be met.

[25] He submits that he is entitled to compensation duty from July 24, 1995 to March 31, 1998, a total of 1,935 hours; equivalent to $67,584.78 plus prejudgment interest and costs.

[26] The defendants made three submissions in opposition to the plaintiff’s claim. Firstly, they submit that the claim is barred by Article 35.09 of the Collective Agreement. Secondly, they submit that the claim is time-barred by *laches* and, finally, that, in any event, there is an implied

provision of the contract of employment which requires a timely requisition of entitlements.

DISCUSSION

The Employment Relationship

[27] It is clear in the present proceeding that, at the material times, the plaintiff was an “employee” to whom the grievance procedure within the ***Public Service Staff Relations Act (PSSRA)*** applied. This was so despite the fact he was an excluded employee under the provisions of s-s. (*j*) of the definition of “employee” found in s. 2 of the ***Act***.

[28] The parties agree for the purposes of the present action that the terms and conditions of the plaintiff’s employment at the material times were governed by the Collective Agreement, indeed, it is the plaintiff’s position that Article 44.01 of the Collective Agreement casts a mandatory duty and obligation upon the employer to compensate the plaintiff for the standby duty he was required to perform.

[29] These findings are consistent with the decision of the Court of Appeal[2] which held at paras. 23-28:

> **(1) *The Provisions Governing Mr. Yearwood's Employment***
>
> [23] As earlier stated, the relevant terms and conditions of Mr. Yearwood's employment with Transport Canada are governed by the PSSRA and by the Terms and Conditions of Employment Policy of Transport Canada, which incorporates the terms of the relevant collective agreement.
>
> [24] I note that counsel for Mr. Yearwood was at pains in oral argument to avoid referring to Mr. Yearwood's employment with Transport Canada as one based in contract, or to his claim for compensation as being, in substance, a claim in contract. In that regard, counsel emphasized that Mr. Yearwood did not consent to the terms and conditions of his employment, but, rather, that they were imposed on him.
>
> [25] While I do not find it in any way determinative of this appeal, I have no hesitation in finding that Mr. Yearwood's employment relationship with Transport Canada is contractual in nature and that his claim for compensation is based in contract. (See, for example, *Wells v. Newfoundland*, [1999] 3 S.C.R. 199.) The real question, however, is not whether his relationship with his employer is contractual, but whether, by virtue of the terms of his employment and/or the provisions of the PSSRA, he is precluded from pursuing his contractual remedies in court.
>
> [26] The Terms and Conditions of Employment Policy which form part of Mr. Yearwood's contract of employment with Transport Canada includes the following provision:

[2] (2002), 4 B.C.L.R. 4th) 264 (C.A.)

> **Policy statement**
>
> The terms and conditions of employment of employees, including casuals, terms, part-time workers and excluded and unrepresented employees, are as set out in the relevant collective agreement and as supplemented in the *Public Service Terms and Conditions of Employment Regulations* (Appendix A) and other relevant policies.

[27] Appendix A, in turn, contains the following definition:

> ***relevant collective agreement*** means the collective agreement for the bargaining unit to which the employee is assigned or would be assigned were the employee not excluded.

[28] The grievance procedures under the relevant collective agreement (incorporated by reference into Mr. Yearwood's terms and conditions of employment) are contained in Article 35, headed "Grievance Procedure":

> 35.03 An employee who wishes to present a grievance at any prescribed step in the grievance procedure, shall transmit this grievance to his or her immediate supervisor or local officer-in-charge who shall forthwith:
>
> (a) forward the grievance to the representative of the Employer authorized to deal with grievances at the appropriate step, . . .
>
> 35.05 Subject to and as provided in Section 90 [now s. 91] of the Public Service Staff Relations Act, an employee who feels that he or she has been treated unjustly or considers himself or herself aggrieved by an action or lack of action by the Employer in matters other than those arising from the classification process is entitled to present a grievance in the manner prescribed in clause 35.03, except that:
>
> . . .

> 35.06 There shall be no more than a maximum of four (4) steps in the grievance procedure. These steps shall be as follows:
>
> (a) Step 1 - first level of management;
>
> (b) Step 2 - (and 3 in departments or agencies where such a step is established) - intermediate step(s);
>
> (c) Final Step - Chief Executive or authorized representative.
>
> . . .
>
> 35.09 An employee may present a grievance to the first step of the procedure in the manner prescribed in clause 35.03, not later than the twenty-fifth (25th) day after the date on which the employee is notified orally or in writing or on which the employee first becomes aware of the action or circumstances giving rise to grievance.
>
> 35.10 An employee may present a grievance at each succeeding step in the grievance procedure beyond the first step either:
>
> (a) where the decision or settlement is not satisfactory to the employee, within ten (10) days after that decision or settlement has been conveyed in writing to the employee by the Employer, . . .
>
> 35.13 The decision given by the Employer at the final step in the grievance shall be final and binding upon the employee for all purposes of the Public Service Staff Relations Act, unless the grievance is one which may be referred to adjudication.
>
> [Emphasis added by Court of Appeal]

[30] The Court of Appeal went on to state at para. 43:

> [43] In ***Weber***, the employee was covered by the collective agreement. He had the right to grieve

> under the collective agreement and the full panoply of remedies under the agreement was available to him. By contrast, Mr. Yearwood is an excluded management employee who is neither covered by, nor bound by, the terms of the collective agreement. Although the terms of that collective agreement are incorporated into the terms and conditions of his employment with Transport Canada, there are certain provisions of the agreement which cannot apply to him, such as those provisions permitting, or requiring, him to seek the approval and assistance of the union in proceeding with his grievance. Further, unlike most of the employees who are bound by the collective agreement, Mr. Yearwood has no possible recourse to arbitration or adjudication for the resolution of his grievance. This is the case under both the terms of the relevant collective agreement and under the grievance procedures set forth in the PSSRA.

THE PLAINTIFF'S ENTITLEMENT

[31] The relevant provision of the Collective Agreement is, in this case, Article 44.01 which provides:

> (a) Where the Employer requires an employee to be available on standby during off-duty hours he or she shall be credited with one hour of compensatory leave for each eight (8) consecutive hours or portion thereof that the employee has been designated as being on standby duty.

[32] There is no question in the present case that the plaintiff was required to be available on standby during off-duty hours, that the requirement came from his superiors or that they were well aware that he was providing that service.

Indeed, manuals and notices were prepared and printed which included his name and telephone number advising those who needed to know that he was providing that service.

[33] The language of Article 44.01 is cast in mandatory terms creating in the employee performing the service a credit and in the employer an obligation. It is the plaintiff's position that the employer, in this case, violated the terms of the contract and specifically that of Article 44.01 by not paying standby duty compensation.

[34] In ***Wells v. Newfoundland***, [1999] 3 S.C.R. 199, at paras. 46 and 47, the Supreme Court of Canada had this to say about government obligations in the context of an action in which the plaintiff's senior position in the civil service was eliminated:

> 46 In a nation governed by the rule of law, we assume that the government will honour its obligations unless it explicitly exercises its power not to. In the absence of a clear express intent to abrogate rights and obligations -- rights of the highest importance to the individual -- those rights remain in force. To argue the opposite is to say that the government is bound only by its whim, not its word. In Canada this is unacceptable, and does not accord with the nation's understanding of the relationship between the state and its citizens.
>
> 47 *Reilly* should be taken as turning on the interpretation given to the specific statute of abolition. To the extent it is relied upon for the proposition that the Crown can implicitly avoid its contractual obligations by indirectly legislating a

> breach, it is no longer the law in Canada. A contract of employment with the Crown remains binding unless and until it is explicitly displaced by statute. This follows *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101, which held that a statute is not to be construed so as to take away a person's property without compensation unless its wording clearly demand it.

[35] It is not disputed in the present case that the plaintiff performed the standby duty giving rise to the present claim. The unpaid portion of that standby duty is agreed to be 1,953 hours, amounting to $67,584.78.

IS THE TIME LIMIT IN ARTICLE 35.09 A BAR TO THE PLAINTIFF'S CLAIM?

[36] Article 35.09 requires an employee to initiate a grievance "not later than the twenty-fifth (25^{th}) day after the date on which the employee is notified orally or in writing or on which the employee first becomes aware of the action or circumstances giving rise to grievance."

[37] The defendants submit that having elected to initiate and participate in the grievance procedure the plaintiff is bound by that procedure, including the 25-day time limit. The defendants submit that in a large, complex labour relations setting the purpose of this time limit is to impose a requirement on employees to vigilantly pursue their rights and

to apply for benefits and entitlements in a timely and expeditious manner.

[38] The plaintiff, in response, submits that there is no provision in the employment contract which requires him to submit his claim under Article 44.01 at any time and that his right to compensation under the terms of his employment contract is subject to no express or implied time limit.

[39] The plaintiff also submits that the proper interpretation of the 25-day time limit in Article 35.09 is that, in this case, it was triggered only when the plaintiff's claim was denied and he was advised of that decision. This, he submits, took place on October 27, 1998 and he immediately initiated the grievance.

[40] The defendants base their position on a series of decisions on continuing grievance claims. The essence of those decisions is that continuing grievance claims cannot be maintained for periods of time outside the time limit stipulated for bringing the grievance itself. The authorities in this area begin with ***Canada (National Film Board) v. Coallier***, [1983] F.C.J. No. 813 (C.A.), which is subsequently applied in ***Hatton and Treasury Board (Public Works Canada)*** (1988), unreported, November 17, 1988. At p. 13 of ***Hatton***,

the following passage summarized the principle on which the defendants rely in the case at bar:

> However, being timely in filing one's grievance is one matter: being able to retroactively claim a remedy is quite another. The decision of the Federal Court of Appeal in *Coallier (supra)* has the effect of limiting the retroactive application of an award to the period 25 days prior to the grievance being presented. A grievor, thus, is not allowed to sit on his rights and then catch management unaware with a huge claim for retroactive pay or benefits stretching over a lengthy and previously undisclosed period of claim.
>
> (emphasis in original)

[41] The defendants also rely on, as being directly analogous to the present case, decisions made in similar continuing grievance systems under provincial labour regimes. Specific examples of this application may be found in ***Re Atlantic Packaging Products Ltd. and C.P.U., Loc. 333*** (1993), 34 L.A.C. (4^{th}) 59 at 63-66:

> The company argued that damages should not be awarded retroactively and referred to *Re St. Raphael's Nursing Homes Ltd. and L.D.S.W.U., Loc. 220* (1985), 18 L.A.C. (3d) 430 (Roberts) at p. 433:
>
> > Limiting the recovery of relief in this way where the violation of the agreement is of a continuing nature, seems to be in line with the acknowledged policies underlying the application in a similar manner of statutes of limitations in civil actions. Their policies
> >
> > > ". . . are designed to safeguard the interests of the defendant in two ways.

> Firstly, they seek to protect his interest in at some time being able to rely on the fact that he no longer will have to preserve or seek out evidence to defend the claims against him. Secondly, they grant him protection 'from insecurity, which may be economic or psychological, or both'; at some point in time he ought to be made secure in his reasonable expectation that contingent liabilities will no longer be asserted by legal action to disrupt his finances and affect his business and social relations."
>
> G.D. Watson, "Amendment of Proceedings After Limitations Periods," 53 Can. Bar Rev. 237 (1975), at pp. 272-3.
>
> . . .

The grievances in this case were filed in a timely fashion in the sense that they were filed when the union became aware of a potential violation of the collective agreement as to the calculation of vacation pay. They were nevertheless filed some five months after the company made the calculation for the 1992 vacation year. The narrow question then becomes whether the grievances were brought within a reasonable period of time.

In considering this question I am aware that it often can be the case in circumstances of recurring grievances for individual employees to file grievances alleging that their pay has been incorrectly calculated for considerable periods of time and to endeavour to recover moneys for such miscalculation. From the perspective of employees making a claim for improper calculation of wages or vacation pay, provided that the grievance is filed when they become aware of the miscalculation, it is no doubt reasonable for retroactive adjustments to be made if a violation of the collective agreement is demonstrated. On the other hand, from the perspective of an employer, there is a desire for certainty in its decision-making, and for certainty concerning its labour costs during any particular time period and the assertion of a claim some five months after the vacation pay calculation was made

> would not seem to be a claim made within an objectively reasonable time frame.
>
> In the circumstances of this case, there was no suggestion that the employer endeavoured to conceal from the employees or the union the manner in which it calculated vacation pay. There was also evidence that the employer had been calculating the vacation pay without including the previous year's vacation pay in the calculation for a considerable number of years. The collective agreement provides that grievances should be initiated within a few days after the alleged infraction of the collective agreement. The decisions in *Re U.A.W., Loc. 673 and York Gears Ltd.* (1968), 19 L.A.C. 252 (Weatherill), and *Re U.S.W., Loc. 7105 and Automatic Screw Machine Products Ltd.* (1972), 23 L.A.C. 396 (Johnston), both support the proposition that, in situations of continuing grievances, the grievor is only entitled to claim relief for violations of the agreement from the date of the most recent violation and is not entitled to retroactive relief for violations which occurred over a period of many months or years.
>
> In all of the circumstances of this case, I have concluded that there is not to be any retroactive calculation of vacation pay entitlements for prior years.
>
> (emphasis added)

[42] A second example of similar reasoning is found in ***Re Parking Authority of Toronto and C.U.P.E., Loc. 43*** (1974), 5 L.A.C. (2d) 150 at 153:

> Canadian arbitrators and Courts have often asserted the importance of holding the parties to strict compliance with mandatory time limits. See, for example, *Re U.E.W. and Canadian General Electric Co. (Davenport Works)* (1952), 3 L.A.C. 980 (Laskin). Equally well recognized, however, is the undesirability of precluding recourse to the grievance procedure and arbitration for the redress

> of alleged agreement violations that are constantly repeated and that may constantly have an unsettling effect on the parties to the agreement or on individual employees. With these competing considerations in mind, arbitrators have generally held that for the purpose of applying a time-limit provision in the case of a continuing grievance, time runs from the last recurrence of the alleged violations before the bringing of the grievance. To avoid the building up of heavy back liability, however, damages or other forms of redress will not be granted for any period before the bringing of the grievance except the period of the time limit specified in the collective agreement.
>
> (emphasis added)

[43] The rationale behind this approach in the continuing grievance situation is clear. With a large workforce, coupled with a complex range of benefits, there is a substantial possibility of enormous liabilities accruing in very short time periods. These factors highlight the need for a short time limitation a continuing grievance situation.

[44] Another underlying principle emerges from the decision in ***Re Nelson & Area Health Council and U.F.C.W., Loc. 1518*** (2001), 93 L.A.C. (4th) 1 at 8-9:

> . . . it is equally established that employees cannot use ignorance of their rights to secure retroactivity or acceptance of an otherwise timely grievance. See *Famous Players Ltd. and I.A.T.S.E., Loc B-72*, at page 19:
>
> > The implicit complaint of the Union was that the grievor was unaware of her rights under the agreement. But there is a well established principle of arbitral jurisprudence that each

> party is expected to understand and enforce its rights under the agreement. In the absence of conduct on the part of an employer which misleads an employee as to his or her rights, an employee is expected to pursue alleged breaches of the collective agreement in a timely fashion by grievance.
>
> ...
>
> To find otherwise would require an obligation on the employer's part to review employees' previous choices, gauge the correctness of the choice, and discuss it with the employee, all of which is far and beyond an employer's obligation in a case such as this. . .
>
> . . . At the end of the day, and in the circumstances of this case, the onus was on the grievor as employee, to apply and consider the material facts in her possession and act on them.
>
> (emphasis added)

[45] Two points emerge from this passage; the first is that the employee is effectively presumed to have knowledge of his or her rights under the agreement and the second is that he or she must act promptly to enforce those rights by grieving breaches promptly.

[46] The difficulty in applying this line of authority to the present case, in my view at least, is that this is not a continuing grievance situation. This is not a situation in which each time the employee received his paycheque he would see that he was being paid at a lower rate than the position he occupied. This is not a situation where the defendants'

breach would have, or should have, been readily apparent to the plaintiff. In this case, the language of Article 44.01(a) is cast in mandatory terms. The plaintiff, by application of the same principle quoted from the ***Nelson & Area Health Council*** decision, is surely entitled to assume that his employer is acting in compliance with the agreement and crediting him in compliance with Article 44.01(a). It is only when he was told, on October 27, 1998, that he would not be credited that he was, or could have been, aware of the difficulty.

[47] In my view, the situation in the case at bar is more analogous to that in ***Phelan and Treasury Board (Solicitor General)***, [1982] C.P.S.S.R.B. No. 174, para. 13:

> Article 30.09 of the collective agreement clearly refers to the time an employee first becomes aware of circumstances that make a grievance necessary. This occurs when a claim is denied. If it [w]ere not so *an employee would have to grieve before his claim is denied.*
>
> (emphasis in original)

[48] I find that there is no express term of the employment contract requiring the plaintiff to file a claim for standby compensation in a specific time frame. Indeed, in the present case, the employer had full knowledge that it was requiring the plaintiff to provide those services and, with respect, it

must be taken to have full knowledge of its obligation under Article 44.01(a) to credit him for that service. The first occasion on which the plaintiff was aware his claim would be denied was when Mr. Nowzek advised him on October 27, 1998. He then filed his grievance within the time limit provided in Article 35.09.

[49] If s. 71(3) of the regulation under the ***Public Service Staff Relations Act***, R.S.C. 1985, c. P-35, is applicable to the plaintiff's employment agreement it does no more than impose the same time limit as that contained in Article 35.09. For the reasons already expressed, neither section operates as a bar to the plaintiff's claim on the circumstances of this case.

LACHES* AND *ESTOPPEL

[50] The defendants' reliance on these equitable doctrines serves to highlight one of the central difficulties in this case. In seeking to apply these doctrines in the circumstances before the Court, the defendants ask the Court to examine the plaintiff's conduct and, in essence, ignore their own.

[51] This approach is readily apparent from the language of para. 57 of the defendants' written submissions:

> 57 The term “laches” is sometimes used to denote acquiescence. But in a narrower sense, the essence of the doctrine of laches is that if a claimant has not been relatively diligent in seeking relief, and in consequence the position of the defendant has been prejudiced or it would be unjust or unreasonable to grant the relief, the claimant will be debarred from pursuing his remedy on the ground of laches. What amounts to reasonable diligence and what circumstances will render it inequitable to grant the relief will vary with the type of relief sought and the facts of the particular case.

[52] In examining the “facts of the particular case” it is the task of the court not simply to focus on the conduct of one side but to examine the whole of the circumstances and to measure the equities existing between the parties.

[53] The most authoritative statement on the doctrine of *laches* is found in the speech of Lord Selborne in ***Lindsay Petroleum Co. v. Hurd*** (1874), L.R. 5 P.C. 221 at 239-240:

> Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in

> such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

[54] Lord Blackburn quoted this statement with approval in ***Erlanger v. New Sombrero Phosphate Co.*** (1878), 3 App. Cas. 1218 at 1279 (H.L.), before adding the following:

> I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry.

[55] The defendants submit that the decision in ***Re Brantford (City) and C.U.P.E., Loc. 181*** (2001), 93 L.A.C. (4th) 14, is on all fours with the present case. The Board in that case said at p. 30:

> A further substantial reason for limiting recovery relates to the legal doctrine of *laches*, or delay. Under that principle, any claimant, to succeed, must assert his rights without undue or prejudicial delay: see *Brown & Beatty, supra*, ¶2:3210; *Chitty on Contracts, General Principles,* 28th ed. (London: Sweet & Maxwell, 1999), ¶29-140 through 29-145; and Fridman, G.H.L., *The Law of Contract in Canada*, 4th

ed. (Scarborough, Ont.: Carswell, 1999) p. 840*ff*. For an authoritative statement of the doctrine, see *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221, in particular at 239 *per* Lord Selborne:

> Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interim, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as it relates to the remedy.

In this case, the grievor failed to include *any* reference on his weekly attendance sheets to his accumulated hours for off-site monitoring until some 20 months had elapsed after the arrangement with Cheevers was concluded. Thereafter, until May 3, 1997, his attendance record notations, while somewhat more fulsome, were footnoted on his attendance sheets in ambiguous coding and without any reference to accumulation of credits. Thus there was inadequate indication that the grievor was asserting entitlement to a very substantial bank of accumulated hours until his report of May 3, 1997. Had this been made clear from the outset, or had he claimed some incremental lieu time over this period in respect to this separate off-site monitoring bank, the City would have had an opportunity to register its objection. Courts and administrative tribunals apply the doctrine of *laches* on a discretionary basis, employing it where it is appropriate, denying it where to allow it would perpetuate a greater inequity or injustice than to reject it: see Fridman*, supra,* at p. 841. Applying this discretion, the Chair concludes that it would be inequitable for the grievor to be permitted to assert his claim retrospectively beyond the period ending May 3, 1997, the first time that the claim crystallized in such a way that the City should have been aware precisely what was being claimed.

(emphasis added)

[56] In my view, the facts in ***Brantford*** are completely distinguishable. The grievor was required to provide weekly attendance sheets. He did so but in a manner that obscured rather than revealed the details of the claim he subsequently advanced. In the end the Board concluded he prejudiced the City by depriving it of the opportunity to object at an early stage to the claim.

[57] This set of facts would appear to fall within the dishonest or unconscionable category discussed by our Court of Appeal in ***Cadbury Schweppes Inc. v. FBI Foods Ltd.*** (1996), 23 B.C.L.R. (3d) 325 (C.A.). The proper question to be asked in addressing equitable remedies can be seen in the following passage from pp. 347-348:

> Should the equities between the parties, however, deprive the plaintiffs of their remedy? The trial judge appears to have felt that the equities against recovery by the plaintiffs came close to balancing the equities in favour of recovery. Notwithstanding that this "balancing" was largely discretionary, I believe she erred in doing so. The evidence is that Mr. Nicklason of Caesar Canning developed Caesar Cocktail using the Clamato recipe in circumstances of secrecy; that Mr. Glassner (whose company was then in a joint enterprise with FBI Foods) in fact told customers (that is, persons to whom he had previously sold Clamato juice after 1983) that he was going to be selling the "same product" but without having to pay a royalty on it; and that Mr. Kurlender of FBI Foods did not consider any duty of confidence his company might have owed to Duffy-Mott. The trial judge's findings, moreover, that Mr. Glassner was "alive to the peril of what his

> company was doing under his direction" and that having learned of the breach of confidence in 1983, FBI Brands, a corporation controlled by FBI Foods, chose "to defend the action rather than change", do not sit comfortably with the suggestions elsewhere in the Reasons that the corporate defendants were unaware of their obligation not to appropriate the Clamato recipe to their own use. When these factors are considered, the equities between the parties do not come close to a balance.
>
> Nor do I think the plaintiffs can be said to have been guilty of laches or other acquiescence sufficiently serious to deprive them of a remedy. The delay was by all accounts due to the plaintiffs' ignorance that they had a right to complain, not to any conscious delaying on their part. It is trite law that before one can be said to acquiesce in the breach of one's rights, one must be aware that one *has* such rights: see *Halsbury* (4th ed., 1992), v. 16 at para. 927. Moreover, the "flexibility" applied to equitable principles in cases such as *LAC Minerals* and *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 [61 B.C.L.R. (2d) 1], should not have the effect of diluting to the point of disappearance the principles themselves. One of those principles, approved by the trial judge at p. 42 of her Reasons, is that acquiescence on the part of a plaintiff will deprive it of its legal right only if it is of such a nature that it would be "dishonest or unconscionable of the plaintiff to set up that right after what has occurred": *per* Buckley, L.J. in *Shaw v. Applegate*, [1977] 1 W.L.R. 970 (C.A.), at 978; see also *Litwin Construction (1973) Ltd. v. Kiss* (1988), 29 B.C.L.R. 88 (C.A.).)
>
> (emphasis added)

[58] It is important to note that the B.C.C.A.'s decision in ***Cadbury Schweppes*** was later reversed by the S.C.C. (See [1999] 1 S.C.R. 142 and same case at (2001), 95 B.C.L.R. (3d) 385 (S.C.) and (2001), 86 B.C.L.R. (3d) 136 (S.C.).) The

S.C.C. held that the permanent injunction granted by the Court of Appeal should be vacated. The Court commented at para. 79:

> The fact the respondents may have delayed action under a misapprehension of their legal rights was certainly a consideration relevant to the defence of acquiescence raised against them, but the delay thus explained away may nevertheless be taken into consideration when weighing the equities of a permanent injunction.

[59] In the case at bar there are indeed factors that raise concern about the plaintiff's conduct. These were touched on earlier in these reasons and include the fact that the budgets he produced made no allowance for standby duty. In addition, the plaintiff provided no documentation of his time to his administrative officer and he took no steps to see that staff members who filled in for him from time-to-time advanced such claims.

[60] On the other side of the balance is the fact that Mr. Nowzek, the Regional Director, Civil Aviation, testified that the practice of having the standby duty performed by employees on a rotating schedule was discontinued because of the magnitude of the overtime bill. The duties were then assigned to managers who generally did not present claims for compensation. The plaintiff's immediate supervisor was, at all times, aware that under the collective agreement the

plaintiff was entitled to compensation. During the period for which the plaintiff claims compensation, Mr. Nowzek was seeking clarification on this very point from his national board.

[61] I find the equities in this case to be equally balanced. On the one hand, we have the plaintiff's delay and the other matters touched on above. On the other, we have an employer who, knowing the language of the Collective Agreement and the costs occasioned by the previous system, turned a blind eye to the absence of ongoing claims for compensation while pursuing the specific issue with his national board.

[62] The equities between the parties are not such as to justify depriving the plaintiff of his remedy.

[63] The test to be applied when considering *estoppel* by conduct was considered by our Court of Appeal in ***Litwin Construction (1973) Ltd. v. Kiss*** (1988), 29 B.C.L.R. (2d) 88 (C.A.), and ***Sami's Restaurant Corp. v. W. Hanley & Co.***, 2002 BCCA 218. The test is whether the conduct of the plaintiff was such as to make it "wholly inequitable that he should be entitled to succeed in the proceeding".

[64] For the reasons already given, this test has not been met in the present case.

[65] In addition, the defendants have failed to establish any prejudice flowing from the situation. Given their state of knowledge, both of the previous overtime cost, the mandatory language of Article 44.01 and Mr. Nowzek's continued pursuit of the issue until 1997, their position amounts to little more than - we decided to take a chance on avoiding the costs. If anything, the equities favour the plaintiff succeeding rather than allowing the defendants to avoid a cost they were aware of while directing the plaintiff to perform the services.

IMPLIED TERM

[66] The defendants submit that if the Court concludes there is no express term in the employment agreement requiring the plaintiff to submit his claim for entitlement to standby compensation in a timely manner then one should be implied.

[67] An unexpressed term of a contract can be implied if the court finds that the parties must have intended that term to form a part of their contract. It is not enough for the court to conclude that the parties, as reasonable men, would have adopted such a term if it had been suggested to them, for that is not giving effect to the agreement reached by the parties but imposing one. The test is much more stringent. An unexpressed term can be implied only where the court finds that the term under consideration must have been a term of the

agreement as it was necessary to give business efficacy to the contract. In this sense, though unexpressed, it formed a part of the contract the parties made themselves.

[68] The defendants submit that there is a “common sense requirement generally for timely requisition for benefits” and that, beyond that common sense requirement, other provisions of the Collective Agreement call out for the implied provision.

[69] The defendants point to Article 19.04, which is the portion of the Collective Agreement dealing with overtime. It provides:

> ARTICLE 19
> OVERTIME
>
> In this Article:
>
> “Overtime” means in the case of a full-time employee, authorized work performed in excess of the employee’s normal scheduled hours of work.
>
> ...
>
> 19.04
>
> (a) All overtime earned under Article 19 - Overtime, Article 20 - Travelling Time, Article 22 - Designated Paid Holidays, Article 43 - Call-Back, Article 44 - Standby, and Article 45 - Shipboard and Special Assignment Allowance, shall accumulate as compensatory leave at the sub-group level at which it is earned. Such accumulated compensatory leave shall be held in reserve to be liquidated in leave or cash at the direction of the Employer, or at the

> request of the employee and the discretion of the Employer.
>
> (b) Employees shall be paid for each hour of earned but unused compensatory leave remaining to their credit on March 31st and September 30th. Such payment is in lieu of compensatory leave remaining on that date and shall be paid at the rate of the employee's hourly rate of pay on that date.
>
> (c) Notwithstanding 19.04(a) and (b), a maximum of ten (10) days earned but unused compensatory leave may be carried over, at the request of the employee, beyond September 30th.
>
> (emphasis added)

[70] In essence, the defendants' submission is that the employer has the ultimate contractual discretion as to whether standby compensation will be paid out in cash or compensatory leave. They go on to submit that the plaintiff's failure to submit the claim in a timely manner precluded the employer from exercising that discretion.

[71] In my view, the difficulty with the whole of these submissions is that they fly in the face of the employer's knowledge of the language and its obligation under Article 44.01. In addition, this is an employer who knew the overtime cost of providing such services from its past experience with the previous system. The employer directed the plaintiff to perform the work and published contact manuals showing that he was performing the work. The only times when the plaintiff

was not performing the services were occasions on which his employer specifically approved the delegation of his job function during approved absences.

[72] This is, with respect, not a situation where the employer, for any number of reasons, may not have known the work was being performed. In this case, the employer not only knew it was being performed, but had within its knowledge the details of that work. This was not a situation where the ability to verify that that work was done became an issue.

[73] In my view, the test has not been met and, in the circumstances of this case, no term should be implied.

[74] The plaintiff will recover compensation for standby duty performed from July 24, 1995 to March 31, 1998, in the agreed amount of $67,584.78.

[75] The plaintiff is also entitled to court order interest and costs.

[76] Court order interest will run at the Registrar’s rates from the date of denial of the plaintiff’s claim to the date of judgment.

Mr. Justice Parrett