ONTARIO LABOUR RELATIONS BOARD

Labour Relations Act, 1995

OLRB Case No: 0741-18-G
Construction Grievance

IBEW Electrical Power Council Of Ontario, Applicant v Electrical Power Systems Construction Association, Responding Party

OLRB Case No: 0756-18-G
Construction Grievance

Ontario Sheet Metal Workers' Conference for Locals 30, 47, 235, 269, 397, 473, 504, 537 and 562, Applicant v Electrical Power Systems Construction Association, Responding Party

COVER LETTER

TO THE PARTIES LISTED ON APPENDIX A:

The Board is attaching the following document(s):

Decision - July 06, 2018

DATED: July 06, 2018

Catherine Gilbert
Registrar

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Ontario

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OLRB Case No: **0741-18-G**

IBEW Electrical Power Council of Ontario, Applicant v **Electrical Power Systems Construction Association**, Responding Party

OLRB Case No: **0756-18-G**

Ontario Sheet Metal Workers' Conference for Locals 30, 47, 235, 269, 397, 473, 504, 537 and 562, Applicant v **Electrical Power Systems Construction Association**, Responding Party

BEFORE: Bernard Fishbein, Chair

APPEARANCES: Ron Lebi and James Barry appearing on behalf of IBEW Electrical Power Council of Ontario; Daniel Anisfeld appearing on behalf of Ontario Sheet Metal Workers' Conference for Locals 30, 47, 235, 269, 397, 473, 504, 537 and 562; Patrick Moran, Alex Lolua and Lucy Wu appearing on behalf of Electrical Power Systems Construction Association

DECISION OF THE BOARD: July 6, 2018

1. These are two Referrals of Grievance to Arbitration (Construction Industry) pursuant to section 133 of the *Labour Relations Act, 1995,* S.O. 1995, c.1, as amended (the "LRA"), filed against the Electrical Power Systems Construction Association ("EPSCA"). Board File No. 0741-18-G was filed by the IBEW Electrical Power Council of Ontario ("the IBEW"). Board File No. 0756-18-G was filed by the Ontario Sheet Metal Workers' Conference ("the Sheet Metal Workers" and hereafter collectively referred to with the IBEW as "the Unions"). They arise out of the recently enacted provisions of the *Employment Standards Act, 2000*, S.O. 2000, c.41, as amended, (the "ESA"), and in particular with

respect to personal emergency leave. Section 50(5), (6), (9), (10) and (11) of the ESA provides:

> **Limit**
>
> (5) Subject to subsection (6), an employee is entitled to take a total of **two days of paid leave** and eight days of unpaid leave under this section in each calendar year.
>
> **Same, entitlement to paid leave**
>
> (6) If an employee has been employed by an employer for less than one week, the following rules apply:
>
> 1.The employee is not entitled to paid days of leave under this section.
>
> 2.**Once the employee has been employed by the employer for one week or longer, the employee is entitled to paid days of leave under subsection (5),** and any unpaid days of leave that the employee has already taken in the calendar year shall be counted against the employee's entitlement under that subsection.
>
> 3.Subsection (8) does not apply until the employee has been employed by the employer for one week or longer.
>
> ...
>
> **Personal emergency leave pay**
>
> (9) Subject to subsections (10) and (11), if an employee takes a paid day of leave under this section, **the employer shall pay the employee**,
>
> (a)**either**,
>
> (i) **the wages the employee would have earned had they not taken the leave**, or
>
> ...
>
> **Personal emergency leave where higher rate of wages**
>
> (10) If a paid day of leave under this section falls on a day or at a time of day when overtime pay, a shift premium or both would be payable by the employer,

> (a)the employee is **not entitled to more than his or her regular rate for any leave taken under this section**; and
>
> (b)the employee is **not entitled to the shift premium for any leave taken under this section**.
>
> **Personal emergency leave on public holiday**
>
> (11) If a paid day of leave under this section falls on **a public holiday, the employee is not entitled to premium pay** for any leave taken under this section.
>
> [emphasis added]

These provisions were enacted by Bill 148, the *Fair Workplaces, Better Jobs Act, 2017* which was given royal assent on November 27, 2017 and became effective January 1, 2018.

2. For convenience's sake I also reproduce the following from section 1, the definitions section, of the ESA, all of which were referred to by the parties in their arguments and which will be referred to throughout this decision:

> "**benefit plan**" means a benefit plan provided for an employee by or through his or her employer;
> "**personal emergency leave pay**" means pay for any paid days of leave taken under section 50;
>
> "**regular rate**" means, subject to any regulation made under paragraph 10 of subsection 141 (1),
>
> (a) for an **employee who is paid by the hour**, the **amount earned for an hour of work in the employee's usual work week, not counting overtime hours**,
>
> (b) otherwise, the amount earned in a given work week divided by the number of non-overtime hours actually worked in that week;
>
> "**regular wages**" means **wages other than overtime pay, public holiday pay, premium pay, vacation pay, domestic or sexual violence leave pay**, personal emergency leave pay, termination pay, severance pay and termination of assignment pay and entitlements under a provision of an employee's contract of employment that

under subsection 5 (2) prevail over Part VIII, Part X, Part XI, section 49.7, section 50, Part XV or section 74.10.1;
"**regular work week**", with respect to an employee who usually works the same number of hours each week, means a week of that many hours **but not including overtime hours**;

"**wages**" means,

(a) **monetary remuneration payable by an employer to an employee under the terms of an employment contract, oral or written, express or implied**,

(b) any payment required to be made by an employer to an employee under this Act, and

(c) any allowances for room or board under an employment contract or prescribed allowances,

but does **not include**,

(d) tips or other gratuities,

(e) any sums paid as gifts or bonuses that are dependent on the discretion of the employer and that are not related to hours, production or efficiency,

(f) expenses and travelling allowances, or

(g) subject to subsections 60 (3) or 62 (2), **employer contributions to a benefit plan** and payments to which an employee is entitled from a benefit plan;

[emphasis added]

3. After Bill 148 received royal assent, Regulation 526/17 was made on December 13, 2017, filed on December 18, 2017 and printed in the Ontario Gazette on January 6, 2018. It also became effective on January 1, 2018. Section 4 of that regulation amends Regulation 285/01 ("the Regulation") under the ESA by introducing Special Rules relating to the payment of personal emergency leave for employees in the construction industry:

Construction employee

3.0.1 If a construction employee who works in the construction industry **receives 0.8 per cent or more of his or her hourly rate or wages for personal emergency pay**, the employee,

> (a)**is not entitled to paid days of leave under section 50 of the Act**; and
>
> (b)is entitled to take a total of 10 days of unpaid leave under section 50 of the Act in each calendar year.
>
> [emphasis added]

4. It would be fair to say that the interaction and implementation of these provisions has created some degree of uncertainty in the construction industry.

5. EPSCA, as its name suggests, represents employers in the electrical systems power sector of the construction industry, and has 17 collective agreements with 19 unions, many of which are applied on the same construction sites simultaneously as the various construction trades covered by these various agreements are working side by side.

6. On or about April 18, 2018, EPSCA issued the following:

> **Notice to All Employee Bargaining Agents**
>
> The purpose of this letter is to inform you of steps EPSCA is taking to ensure compliance, by our members and other contractors working under EPSCA agreements, with the recent changes to the *Employment Standards Act.* As you are aware Bill 148, recently amended the *Employment Standards Act* and provided that, annually, the first two days of Emergency Leave be paid by the employer. Regulations under the *Act* also allowed Construction employers the option of paying 0.8% of the employee's "hourly rate" in lieu of providing pay for the first two Emergency Leave days.
>
> In order to maintain consistency across employers on EPSCA sites and comply with the amended legislation, **EPSCA is directing** all Members as well as non-member Contractors working under EPSCA agreements **to pay 0.8% of the employees base hourly rate on all "weekly" (non-overtime) hours worked commencing May 1, 2018**.
>
> **We are also adding an additional column to the wage schedule sheets to show the 0.8% in lieu to be paid to comply with the *Employment Standards Act.***
>
> **This additional column is for informational purposes only for contractors to comply with the *Employment***

> ***Standards Act*** **and does not form part of the wage schedule negotiated pursuant to and forming part of the Collective Agreement.**
>
> Alex Lolua
> General Manager
>
> [emphasis added]

7. It is that notice and the practice implementing it that have prompted these grievances by the IBEW and the Sheet Metal Workers. EPSCA, the IBEW and the Sheet Metal Workers agreed to deal with these grievances by posing seven questions to the Board, and agreed to make time limited submissions to the Board so that the hearing could be concluded in one single day. It was. At the outset the Board wishes to commend and thank the parties for their agreement and the intelligent and expeditious way these grievances have been litigated.

8. The seven questions posed to the Board were set forth in a letter dated June 8, 2018 from counsel for the IBEW as follows:

> 1) Is it an unfair labour practice and/or a breach of Section 2 of the Collective Agreement (in which EPSCA recognizes the Union as the exclusive bargaining agency for bargaining unit employees for employers bound to the collective agreement) and/or a breach of Section 9 ("Wages and Pay Procedure") to unilaterally pay bargaining unit members .8 percent PE Pay pursuant to the section 3.0.1 of 0. Reg. 285/01 without the agreement of the trade union?
>
> 2) In order to fall within the exemption described in section 3.0.1 of 0. Reg. 285/01, is .8 percent PE Pay to be calculated on the base rate or the wage package or something else?
>
> 3) In order to fall within the exemption described in section 3.0.1 of 0. Reg. 285/01, must .8 percent PE pay be paid on "hours worked" or "hours earned"?
>
> 4) In order to fall within the exemption described in section 3.0.1 of 0. Reg. 285/01, must .8 percent PE Pay be paid on all hours worked in a week (including overtime hours) or on a maximum of 40 hours per week (that is, the regular hours of work in the collective agreement)?

5) In order to fall within the exemption described in section 3.0.1 of 0. Reg. 285/01, must .8 percent PE pay be paid retroactively to January 1, 2018?

6) Where an employee has already received one paid PEL day from a Contractor, may the employer decline to pay PE pay to that employee so that the employee would remain entitled to one further paid day of leave under section 50 of the Employment Standards Act prior to January 1, 2019?

7) Regarding the employer's pay obligation when an employee takes a paid day of leave under section 50 of the Employment Standards Act, should the Employer be paying and remitting a day's pay based on the Wage Package or some other amount?

For purposes of answering the questions there is no dispute that we are talking about construction employees who are working in the construction industry.

The Jurisprudential Framework

9. The ESA has been frequently criticized as being unnecessarily overly technical, overly complex and overly dense, if not opaque – i.e. not easy to understand or apply – particularly for a statute dealing with basic minimum employment standards. As will be seen, it uses many statutory terms, some of which are slightly different from others, some of which are statutorily defined to not only illustrate their slight or nuanced differences but to exclude or include items that might not readily appear ought to be excluded or included, and some of which, again although slightly different, are not defined at all. Sadly, this case is as good an illustration as any of that. Just by way of example, the statute in section 50(9) refers to “personal emergency leave pay” for the payment made to the employee who actually takes (and is absent from work on) one of the paid personal emergency leave days, which is defined, but the Regulation refers to the 0.8 percent addition to wages (itself a controversial term) as “personal emergency pay”, which is not.

10. Not surprisingly, as this is a case involving the ESA, at the outset, I was referred by the Unions to the Supreme Court of Canada decision in *Rizzo & Rizzo Shoes Ltd.* (Re) [1998] 1 S.C.R. 27, 154 DLR (4th) 193, and the often quoted words of Iacobucci J. speaking for the Court:

> **36** Finally, with regard to the scheme of the legislation, **since the ESA is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation.** As such, according to several decisions of this Court, **it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant** (see, e.g., Abrahams v. Attorney General of Canada, [1983] 1 S.C.R. 2, at p. 10; Hills v. Canada (Attorney General), [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40a of the ESA, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.
>
> [emphasis added]

11. Notwithstanding the parties posing seven distinct questions to the Board, their arguments grouped some questions together and did not follow the order the questions were originally posed to the Board. I have attempted to group their arguments in this decision in the same manner.

Question 1 - *Is it an unfair labour practice and/or a breach of Section 2 of the Collective Agreement (in which EPSCA recognizes the Union as the exclusive bargaining agency for bargaining unit employees for employers bound to the collective agreement) and/or a breach of Section 9 ("Wages and Pay Procedure") to unilaterally pay bargaining unit members .8 percent PE Pay pursuant to the section 3.0.1 of 0. Reg. 285/01 without the agreement of the trade union?*

12. Although in their grievances, the Unions baldly alleged violations of sections 70, 72 and 76 of the LRA, no real argument was directed at how those statutory provisions were violated. As a result EPSCA did not respond to those bald allegations and so this decision does not really address them. Rather the Unions focused on violations of their collective agreements, whose language although maybe not verbatim identical, were very much based on the same fundamental principles and structure. As a result any references to the collective agreements will be from the EPSCA-IBEW collective agreement only.

13. The Unions initially pointed me to:

(a) The Preamble:

> WHEREAS EPSCA is an Association formed to represent Employers engaged in construction industry work in the electrical power systems sector in collective bargaining **and on their behalf enter into collective agreements covering those of their employees in the bargaining unit** as hereinafter defined; and
>
> ...
>
> WHEREAS EPSCA and the Union **desire to mutually establish and stabilize wages, hours and working conditions** for journeymen and apprentices employed by Employers within the electrical power systems sector of the construction industry, and further, to encourage closer co-operation and understanding between EPSCA and the Union to the end that a satisfactory, continuous and harmonious relationship will exist between the parties to this Agreement.
>
> NOW THEREFORE, EPSCA and the Union **mutually agree that the working conditions as set out below shall be applicable throughout the Province of Ontario.**
>
> [emphasis added]

(b) Section 2 – Scope of Agreement, which contains the usual recognition of the Union as "the exclusive bargaining agent" by EPSCA and of EPSCA as the "sole and exclusive bargaining agent" for all of the employers covered by this agreement and in all matters pertaining to the administration of this "collective agreement";

(c) Section 3.02, Amendments, which provides the Agreement "shall be subject to amendment at any time by **mutual consent** of the parties";

(d) Section 8.06 which clearly stipulates how overtime is to be paid (1.5 time for the first two hours and double-time for any hours thereafter);

(e) Section 9 which clearly indicates "**the rates of pay for employees … shall be as set forth in the wage structure attached hereto**";

(f) Section 9.02 A which clearly stipulates "the vacation and recognized holiday pay rate shall be ten percent of hourly earnings";

(g) Section 10 A which clearly requires the employer to pay into "welfare pension and SUB funds" as identified in the local schedules "based on each hour earned" and also pay a combined "rate of ten percent of hourly earnings" for vacation pay and recognized holiday pay (as opposed to the Education Fund provided for later which is based on "hours worked" and is above and outside of the wage package.

14. Given the structure of the collective agreement, the obligation to pay wages, defined wage schedules, the very "bargain" made between the Unions and EPSCA regarding wages (of which the wage schedules are an essential element), the Unions say it is not open to either party to "tinker" with, alter, or supplement it in any way outside of the collective bargaining process. To put it bluntly, the Unions say that no unionized contractor in the construction industry with a collective agreement can avail itself of the alternative in section 3.01 of the Regulation, the payment of 0.8 percent personal emergency pay, without the agreement of the union(s) representing its employees. The Unions reject any notion that in these circumstances there is any discretion given to employers to decide how to implement paid emergency leave if it in any way involves provisions already agreed to in the collective agreement.

15. In support of this position the Unions pointed me to *Porti Construction Inc.* (2006) 150 LAC 4th 155 (McKee) where, *inter alia*, there were "other payments" in addition to those specified in the applicable collective agreements made by the employer to certain employees, as described at pages 157-158:

> Porti takes the position that these extra payments were made for various reasons: a profit-sharing scheme, a bonus intended to retain valuable employees, a Christmas bonus, or payments made in consideration of the particular circumstances of an individual employee. It asserts that

> these payments are within an employer's discretion, are not a violation of the collective agreement, and in any event do not attract the obligation to pay any employer contributions or deductions from income as specified in the collective agreement for regular hours worked.

Although unable to conclude exactly what the purpose of the payments were, the arbitrator still found them to be a violation of the collective agreement at pages 161-163:

> ...
>
> Porti asserted that it had right under the collective agreement to make a unilateral bonus or profit-sharing payments to its employees. It will be noted that I cannot conclude they were performance bonuses or payments under a profit-sharing plan on the basis of the evidence that I have before me. They are simply extra payments for work performed. Counsel for Porti asserts that the arbitral jurisprudence is "mixed" and that arbitrators are divided as to whether a collective agreement that is silent with respect to bonus payments, prohibits unilateral payments. I conclude that this is not the case. While a few decisions, in particular *Re USW and Dominion Break Shoe Co. Ltd.* (1962) 12 L.A.C. 318 (Hanrahan), found that a collective agreement that did not explicitly deal with incentive plans permitted an employer unilaterally to introduce one, that view, and in particular that case, have not received any substantial support for some time. Indeed, the Supreme Court of Canada had earlier said in *Syndicat Catholique Des Employes De Magasins de Quebec Inc. v. Compagnie Paquet Ltee.* (1959) 18 D.L.R. (2d) 346:
>
> > Certainly to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated. The collective agreement tells the employer on what terms he must in the future conduct his master and servant relations. When this collective agreement was made, it then became the duty of the employer to modify his contracts of employment in accordance with its terms so far as the inclusion of those terms is authorized by the governing statutes. ... It was not within the power of the employee to insist on retaining his employment on his own terms, or on any terms other than those lawfully inserted in the collective agreement.

> Arbitrators have generally relied on the ratio of this judgment of the Supreme Court of Canada, and specific provisions in the collective agreement for the payment of wages, to conclude that a collective agreement excludes the possibility of unilateral payments by an employer: *Re Toronto Hydro and C.U.P.E. Local 1* (2002) 103 L.A.C. (4th) 289 (Herman), *Re Atomic Energy of Canada Ltd. and Society of Professional Engineers and Associates* (2000) 90 L.A.C. (4th) 129 (Shime), *National Grocers and Teamsters Local 91* (1999) 82 L.A.C. (4th) 278 (Weatherhill), *Re Alcan Building Products (Lambeth) and U.A.W. Local 27* (1984) 14 L.A.C. (3rd) 289 (Brunner), *Re United Rubber Workers, Local 723 and Fluid Power Ltd.* (1967) 19 L.A.C. 51 (Weiler) *Inamo Credit Union v. Office and Technical Employees Union Local 15* [2000] B.C.C.A.A.A. No. 143 and *Pine Falls Paper Co.,* [1997] M.G.A.D. No. 41). Decisions of arbitrators have generally rejected the reasoning in *Dominion Break Shoe Company Limited, supra*, where they mention it at all. Later decisions rely almost exclusively on the challenge such payments represent to the exclusive bargaining authority of the union.
>
> With respect, I agree with this general approach. **The wage rate negotiated in a collective agreement is perhaps the most fundamental provision in a collective agreement. If a union does nothing else, it seeks to ensure that its members are paid the highest rate that it can achieve in an industry and from a particular employer. If an employer is free to apply an incentive programme, selectively to certain employees and not to others, the Union's status as a bargaining agent is severely eroded if not completely compromised. The simplest result of collective bargaining is collective benefit. If an employer is free to reward different employees at different levels for their work, the collective agreement is of limited value. The practice of paying wages in addition to those set out in the collective agreement is not sanctioned by the collective agreement and represents a violation of Article 3 of the collective agreement that recognizes the Union as the sole and exclusive bargaining agent for all employees.**
>
> **[emphasis added]**

16. I was also referred to *Toronto Hydro,* (2002) 103 L.A.C. (4th) 289 (Herman) where the arbitrator found a unilaterally implemented “recognition program” (found nowhere in the collective agreement

which did however contain a provision dealing with performance appraisal) whereby the employer would unilaterally recognize employees it considered merited special appreciation because of their work performance with non cash rewards ranging in value up to $300, to be in breach of the collective agreement.

17. As well I was also referred to *Inco Ltd.* (2006) 153 L.A.C. (4th) 183 (Rayner) where the employer unilaterally granting bonuses (not otherwise found in the collective agreement) to encourage employees not to retire until a certain period, was also held to be a violation of the union's exclusive bargaining agency at page 191:

> **27** However I do agree with Mr. Shell that the bonus was paid to keep employees at work. Indeed that was its very purpose. In my view the bonus was paid to eligible employees in the Copper Refinery then have them forgo a right which arose from their employment with Inco, and if not specifically mentioned in Article 23, implicitly forms part of their conditions of employment under Article 2:01. **Given the importance of the exclusivity principle I do not believe that Article 2:01 should be read in a restrictive manner. Even if one does not read the Article broadly but one simply gives the words "other conditions of employment" their ordinary meaning it is hard to come to any other conclusion that I am forced to reach in this case. An offer of a substantial sum of money to a selected number of bargaining unit employees, albeit a large number, to forgo their right to retire for a stated period does relate to their conditions of employment and is a violation of Article 2:01.**
>
> [emphasis added]

The Unions say that the employers' apparent choice about personal emergency pay (the 0.8 percent) provided under the ESA or the Regulation is irrelevant and does not alter this jurisprudence.

18. I just do not see it this way. There is no dispute that any form of paid emergency leave is not contained in, or contemplated by, the collective agreements. There is no suggestion that this was a subject even raised in collective bargaining. Rather the Legislature, in its wisdom, determined to provide two paid personal emergency leave days as a minimum benefit, or an employment standard, to all qualifying employees in Ontario – whether unionized or not. Equally the Legislature, in its wisdom, by the Regulation under the same legislation,

determined an alternative way of satisfying or meeting this new statutorily conferred benefit for qualifying employees in the construction industry – whether unionized or not. I do not see this as involving (let alone violating) the Unions' exclusive bargaining agency status.

19. There is no question here of an employer unilaterally selecting or designating some employees for some preferential treatment (while denying it to others) without discussing that with the Union as in all of the cases the Unions referred me to. There is no question of bargaining with or trying to get individual employees to agree to anything at all, let alone circumventing the union to do so. This is a case of complying with legislation – legislation which offered (at least in the construction industry) two ways of complying with this new legislative requirement. I simply do not see this as a case of violating the Union's exclusive bargaining agency status because it is not a benefit which the employer has unilaterally and selectively **chosen** to confer upon its employees and avoiding some otherwise legally required obligation to bargain with the Union. Rather it is a benefit that the legislature has **compelled** an employer to provide its employees. Certainly no one suggests that the Legislature must negotiate with the unions. All that the EPSCA (or its employers) have done is select one of the two methods the Legislature has provided to comply with this new statutory requirement.

20. To me the flaw in the Unions' argument is apparent by the distinction they sought to make (or the concession they were forced to concede). The Unions asserted that if employers chose to actually allow employees to take (or be absent from work on) the two paid personal emergency leave days, no discussion with or agreement of the Unions was required (although there may still be disputes about exactly how much the employees should be paid). But if an employer chose to pay the personal emergency pay, the additional 0.8 percent, that would require the agreement of the Union because there were agreed upon wage schedules in the collective agreement. It is not apparent to me why one would be a violation of the Union's exclusive bargaining agency and the other would not.

21. The Unions said this was because there was an agreed upon wage schedule – but, in my view, the wage schedules are not being violated or compromised in any real way. The Employer is paying everything in the wage schedule **plus** paying 0.8 percent more (leaving aside any dispute about how that should be calculated) which it is transparently indicating separately and distinctly. The Unions say that is a distinction without a difference – they are still altering the wage

schedule. But to me it is a crucial difference (without being too glib, would it be a violation of the wage schedule if every pay cheque gratuitously had a happy face on it?) and why EPSCA explicitly, clearly and necessarily stated that the 0.8 percent payment was not part of the wage schedule or collective agreement.

22. Both parties tried to offer different scenarios to show why their argument and interpretations were correct. I need not go through all of them. Simply put, if the agreed upon wage schedule provided a wage rate now below the recently increased minimum wage (e.g. for a first year apprentice or a pre-apprentice) there would be no question that for those classifications that fell below the new minimum wage, the old agreed upon wage schedule would not matter, even if the employer added a "column" to indicate that it was paying the difference to reach the now legally required minimum wage for those classifications.

23. To be clear, I am not suggesting that there might not be circumstances where an employer may be improperly creating individual distinctions or selectively providing a benefit to some employees and not others that might violate a union's exclusive bargaining agency status as in the cases the Unions referred me to – but that it not this case. No anti-union animus, improper motive, can *per se* be attributed to EPSCA, nor did the Union seriously attempt to do so. There is no individual preference or selection. Like the ESA and/or the Regulation it is being applied to everyone. It is not being negotiated with anyone – not only not the Unions but neither with individuals nor groups of employees. If such a case arises, it can be litigated then when such specific facts might be important to, if not determinative of, any outcome.

24. Also, to be clear, I am not saying where the precise borders of exclusive bargaining agency are with respect to items not covered by a collective agreement and whether those might just be matters of residual management discretion or management rights not covered or not restricted by the collective agreement. This is not that case. This is a case where the employer is attempting to comply with a new statutory obligation imposed on the employer midterm during a collective agreement in one of the two legally allowed methods to comply with the statute.

25. As noted by EPSCA, Bill 148 not only included these changes, among many, to the ESA, but also many changes to the LRA. It would have been a simple matter for the Legislature to require the matter be

negotiated with a union that already had a collective agreement. Certainly the Legislature would not be unaware that many construction employers affected by the Regulation would be bound to collective agreements. That absence or silence speaks louder and more persuasively to me than the tortured, in my view, interpretation of exclusive bargaining agency status that the Unions advance here. Moreover the Legislature acted, as it undoubtedly would also be aware, in the middle of the term of very many construction industry collective agreements. Any opportunity to negotiate lost to the Unions (leaving aside their own right to lobby the Government) is at most for the balance of those collective agreements. No one disputes the entitlement of the Unions to bargain (or EPSCA's corresponding duty to bargain in good faith) about emergency leave pay in the renewal of their collective agreements.

26. Since I will say more later about the principles in *Rizzo & Rizzo, supra,* I will merely observe that they do not appear to be particularly relevant to this question since we are essentially arguing about "union" rights, not "employee" or individual rights – nor was *Rizzo & Rizzo* argued to me by the Unions in this context with respect to this question.

27. Accordingly I do not find that ESPCA's notice to be either an unfair labour practice contravening the LRA (again no real argument in that regard having been made to me), nor is it a violation of the collective agreement.

Questions 2-4 and 7: How is the emergency leave pay (the 0.8 percent) calculated?

28. These questions posed by the parties all involve essentially the same question – how is the 0.8 percent calculated?

29. In a nutshell, as further elaborated below, the Unions say that the 0.8 percent must be applied to all of the payments made under the colletive agreement which, according to the Unions, includes the employee's base rate, vacation pay, holiday pay, overtime or other premium pay, and the contributions to all benefit funds provided for in the collective agreement (with the exception of the Education Fund). EPSCA, on the other hand, says that the 0.8 percent must be applied only to the base wage rate.

30. The Unions point me to section 50(9) of the ESA, dealing with personal emergency leave pay, (not personal emergency pay under the Regulations) which they say is the guiding or dominant principle – that

the employer shall pay the employee "the wages the employee would have earned had they not taken the leave."

31. "Wages" is a defined term under the ESA meaning essentially "monetary remuneration payable by an employer to an employee under the terms of an employment contract" which is also a defined term to include a collective agreement. Again, section 50(9) applies to an employee who actually takes (i.e. is absent from work) a paid day of leave ("personal emergency leave pay" – also a defined term).

32. The Regulation, on the other hand, in providing that "an employee is not entitled to paid days of leave under section 50", applies to a construction employee who "receives 0.8 percent or more of his or her **hourly rate or wage for personal emergency pay**". Neither "hourly rate" nor "personal emergency pay" are defined terms under the ESA. That is to be contrasted with "regular rate" which, for an "employee paid by the hour", is explicitly defined as "the amount earned for an hour of work in the employee's usual work week, not counting overtime hours" (to the same effect is the definition of "regular work week" which also specifically excludes "overtime hours"). Moreover "regular wages", again a defined term, explicitly excludes "overtime pay, public holiday pay, premium pay, vacation pay", and many others. This, the Unions say, shows that "regular" is an important modifier or qualification and more narrowly defines what an employee might actually receive. More importantly, it is not used either in section 50(9) or the Regulation.

33. "Wages", also a defined term under the ESA, has specific exclusions as well (tips, bonuses, expenses or travelling allowances – not relevant here except for employer contributions to a benefit plan – more about that in a moment).

34. As a result, in a statute as tightly or highly defined as the ESA with respect to regular rate, regular wages, regular work weeks, the Unions say the omission of "regular" cannot be unintended and should not go unnoticed. In view of the principle in section 50(9) that the employee should receive "the wages the employee would have earned had they not taken the leave", the Unions say the wages the employees should receive (or that the 0.8% should be calculated on) should be the employees' total wage package. That is what the employee would have earned had they not taken the leave so there should be no deductions and none are required by the ESA's definition of wages.

35. The Unions recognize that the definition of wages does exclude "employer contributions to a benefit plan" but say that equally does not apply here. The benefit plan contributions in the wage schedules and the employee's total package are not for "employer benefit plans" (i.e. plans that the employer arranges and pays for itself), but for union or trusteed benefit plans (generally only union trustees) and about this there is no dispute, at least factually, even if there is a dispute about whether that somehow matters. In fact, the Unions point me to the ESA Policy and Interpretation Manual which refers to the definition of "benefit plan" in the ESA as a benefit plan provided for an employee "by or through" his or her employer and therefore including:

> "…. Both employer-sponsored plans and plans that are provided through an employer by a third-party insurer fall within the definition of "benefit plan".

and very obviously saying nothing about union or trusteed plans which therefore are not included. Accordingly they should not be deducted from the total wage package – except of course the Education Fund, which is explicitly agreed by the parties to the collective agreement to be above and beyond the total wage package.

36. The Unions say that the reference to "hourly rates **or** wages" in section 3.01 is simply because there is a possibility that some employees covered under the Regulation are not paid by an hourly rate, but everyone receives "wages". Moreover there should be no difference in quantifying the amounts of entitlement between the two. They say that there is an equivalency between the quantum of the benefit whether personal emergency leave pay under section 50 or personal emergency pay under the Regulation. That is why 0.8 percent is selected because it is roughly equivalent to 2 days of pay. In fact EPSCA does not disagree with this notion of equivalency (even if they arrive at it by means of a slightly different arithmetic calculation than the Unions – a difference I need not go into here). However EPSCA argues this notion of equivalency takes me to an opposite conclusion – see below.

37. So considering this equivalency, i.e., that neither are modified by the word "regular" (which must be purposeful in a highly defined and structured statute like the ESA) which elsewhere is used to narrow the otherwise plain meaning of the words (i.e. excluding overtime etc.), all that leads to the conclusion that the basis of the calculation is the full wage package. Again I was referred to *Rizzo & Rizzo, supra,* that provides:

> "... since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant ..."

38. Although there might be other alternative interpretations, according to the Unions none would support a conclusion that "hourly rate" meant only the "base rate" in the collective agreement because that would render the definition sections of the ESA (and in particular the definition of wages) nugatory. At a bare minimum, the Unions say alternatively, that hourly rate should mean the base rate plus the vacation and statutory holiday pay in the collective agreement because to do otherwise would not only ignore that the Regulation speaks of "hourly rate", not "base rate", but specifically did not anywhere use the defined terms "regular rate", or "regular wages" (or "regular day" or "regular work week"), the only route by which one could exclude overtime pay or overtime. Since the definition of wages includes "all monetary remuneration payable by an employer to an employee", then the calculation must include all remuneration (hours) earned and not just hours worked.

39. EPSCA did not see it that way. Their starting point is that section 3.01 of the Regulation speaks to the 0.8 percent applying to either "hourly rate **or** wages". They are not without a difference, nor is the distinction meaningless as the Unions contend. Although "wages" generally refer to salaried individuals and in the construction industry that generally applies to managerial or non-bargaining unit personnel (as opposed to the bargaining unit employees where "base rate" or "base wage" rate or "hourly rate" would be terms commonly used, commonly understood and commonly found in collective agreements), no one suggested the ESA (or the Regulation) required an employer to pay one way or the other – it was an employer's choice. Whatever else was in dispute, these grievances did not involve any salaried individuals, only hourly rated employees. So to the extent the Unions' arguments depended on the definition of "wages" in the ESA, it was not really applicable here. Moreover, even if applicable, EPSCA says the use of the word "or" between "hourly rate" and "wages" indicates that it is still the employer's choice.

40. From this premise EPSCA says that contributions to benefit funds must be excluded. It says that even if the definition of wages

were applicable, and it certainly is for calculating personal emergency leave pay under section 50(9), it still requires the remuneration to be payable to an employee. Moreover, even if the definition of wages did not already explicitly exclude employer contributions to a benefit plan, the fund payments are not payable "to an employee" as required under the definition – they go elsewhere, to the funds themselves in accordance with the clear instructions of the collective agreements. Leaving aside that the ESA Policy and Interpretation Manual the Unions referred to is not actually binding on me (it is only the asserted position or interpretation of the Ministry of Labour), it did not say what the Unions wanted it to say. It did not explicitly exclude union sponsored or union trusteed funds from the definition of benefit plan. Moreover, EPSCA asks what is the difference between the employer paying a premium to a third party insurance company (which was indisputably excluded) to pay for the benefits for the employees and the employer paying a contribution to a union sponsored plan to pay for the benefits for the employee?

41. As well, EPSCA says, not only should the benefit funds be excluded but so should the overtime pay, vacation and statutory holiday pay because they were not "earned" in any way by an employee, unlike wages. Wages are earned because the employee actually works the hours for which the wages are paid but vacation pay is merely an entitlement that was conferred by the ESA (much like paid emergency leave) because of status as an employee – not earned by working and therefore not included in wages.

42. Clearly, says EPSCA, overtime is not included in the payment of personal emergency leave pay under section 50(9) because it (and shift premiums) are explicitly excluded by section 50(10). Moreover section 50(10) clearly refers to the employee as being entitled to no more than his/her "regular rate" (which even the Unions concede by its definition excludes overtime).

43. Since these amounts are clearly excluded from a payment under section 50(9), EPSCA argues, on the same notion of some equivalency asserted by the Unions (albeit to the very opposite conclusion) between the payments under section 50(9) and emergency leave pay under the Regulation, these other payments should also be excluded, and the .8% should be applied only to the base rate as specified in the collective agreement.

44. In my view both EPSCA and the Unions overreach in their conclusions. Both assert some notion of equivalency between personal emergency leave pay (under section 50) and personal emergency pay (under the Regulation) to conclude one must be calculated and paid the same as the other, and use it to arrive at polar opposite conclusions. However, that equivalency notion is by no means clear to me – either in logic or on a policy basis and certainly not on the face of the language of either the statute or the Regulation. That is the case even if the 0.8 percent is roughly equivalent to two days' pay (and that is really only true if the employee actually works approximately 50 weeks a year – certainly not always the case in the construction industry). Although it is true, as I have earlier found, that the statute and the Regulation offer two alternative ways in the construction industry of meeting the newly imposed employment standard of two paid personal emergency days, they are not, in my view, the same.

45. The employees who qualify for and take one or both of the two personal emergency days obviously have the time off and are away from work to deal with their eligible personal emergency, and the employer must permit them to do so. If that is the choice made the employee must get that day off regardless of how convenient it is to an employer's operations or construction schedule at that time. Pursuant to section 50(9) the employees are entitled to receive the wages they would have otherwise received had they not taken the leave. The construction industry, by its very nature, can often (if not always) involve short term employment with multiple different employers. Obviously tracking paid emergency leave days would be problematic, if not impossible, even assuming that fresh entitlement did not arise with every new employer. If the paid emergency leave entitlement arises with every new employer after one week's of employment (as will inherently be more frequent in the construction industry by its very nature) that is also problematic. There is no obvious policy reason why employees in the construction industry (nor was one advanced by the Unions) should have a greater entitlement to or entitlement to a more valuable or extensive paid emergency leave than other employees – remembering the option provided in the Regulation is only available in the construction industry. For these reasons, among others, it appears that in the construction industry, the Regulation offers the employer the choice of paying everybody 0.8 percent more all the time to avoid these problems. But then all construction employees get the increased payment whether they would have ever taken a paid emergency leave (or qualified for one) or not. There is a trade-off and who actually ends up "better off" obviously depends on an employee's individual circumstances in any

given situation or in any given year – but they are not exactly the same and I see no reason why they must be considered, let alone precisely calculated on the exact same basis – particularly when both parties use that "principle" to arrive at opposite results. I therefore do not accept that the payment under section 50(9) and payment under the Regulation must be equivalent.

46. I also see no basis why either the section 50(9) payment (personal emergency leave pay) or the 0.8 percent increase (personal emergency pay) would include benefit contributions, as the Unions asserted. In either case, the Unions asserted that this was on the basis of the definition of wages. Even if I accept that (and ignore use of "or" and "hourly rate"), I do not see that this includes the amounts for the various union funds included in the total wage package.

47. First, as EPSCA points out, these contributions are not paid or payable to an employee as required under the definition of wages. They are specifically and explicitly payable to the various funds in the manner set out in the collective agreement and local appendices (and undoubtedly would elicit grievances from the Unions were they ever paid directly to employees).

48. Second, the definition of wages specifically excludes "employer contributions to a benefit plan". I see no basis for interpreting that language to exclude these contributions because they are union or trusteed funds. "Employer" in the definition of wages modifies "contributions", not "funds" – and these contributions are paid or made by the employer. Further, the Unions cited to me no authority or decisions to support their distinction other than the ESA Manual (referred to in paragraph 31, *supra*). At best the Manual, while specifically stating that "employer-sponsored plans and plans that are provided by a third party insurer" fall within the exemption, is completely silent about "union" plans or trusteed plan (even assuming they are not some form, for ESA purposes at least, of an employer sponsored plan because they are funded by employer contributions agreed to in the collective agreement). That silence is hardly a ringing endorsement or support of the Unions' interpretation.

49. Finally, and most importantly, there appear to be no reasons in policy or in logic to exclude these payments from the definition of benefit plan when the definition explicitly includes plans provided by a third party insurer. I appreciate that a third party insurer is different from a union or trusteed plan, but from the perspective of the benefit the

employee actually receives, what does it matter whether it comes from a third party insurer or a union or trusteed plan? Or put another way, why should construction employees, where unions or trusteed funds are common for reasons completely independent of the ESA (i.e. construction employment is ephemeral and intermittent so employees would not be covered or covered adequately by just single employer provided plans) be so significantly advantaged over all other employees in construing the definition of wages?

50. For these reasons, I reject the Unions' argument that benefit contributions pursuant to the collective agreement are included in the "hourly rate or wages" set out in the Regulation.

51. Having said that, I reject EPSCA's argument that vacation pay should not be included because it is somehow not earned like wages, but is a benefit or entitlement that is somehow conferred merely by the status of being an employee. First, leaving aside that such an argument seems almost "Dickensian" and left over from a bygone era, EPSCA provided me no authority for this position nor could they point me to any explicit references in the ESA or the Regulation to support this theoretical or philosophical distinction. Second, since vacation pay and statutory holiday pay under these collective agreements (and under the ESA – certainly for vacation pay and to a lesser extent for holiday pay) are a percentage of hours worked, in my view they are also earned. The more an employee works under these collective agreements, the more vacation and holiday pay they earn. Third, if somehow there is any difficulty in the language here, I view the interpretive principles from *Rizzo & Rizzo, supra,* as directly applicable. The ESA should "be interpreted in a broad and generous manner" and any doubt "should be resolved in favour of the claimant".

52. Accordingly, I conclude that vacation and holiday pay should be included in the calculation.

53. Are overtime and other premiums also included in the calculation? The Regulation speaks of the employee's "hourly rate". Not only is this not a defined terms under the ESA, but it is clearly not modified or qualified by the word "regular", a word which is not only frequently used elsewhere, but when defined, is defined in such a way as to make clear it does not include items such as overtime. Not only do I think that such an omission cannot be ignored (particularly in the highly defined and structured context of the ESA) and must be construed as purposeful, as the Unions assert, but the use of the singular term "an

employee" and "his or her hourly rate", suggests to me that we are looking at the individual employee. That is, the "hourly rate" is the rate that the individual employee is receiving at the time the individual employee is working, including premiums applied to or used to calculate that hourly rate the individual employee is receiving. So, if an employee is working on a shift where shift premiums are applied to arrive at the hourly rate the employee is receiving, then the 0.8 percent should be applied to that hourly rate which the employee is receiving. That is equally true for overtime. Unlike personal emergency leave pay provided for in section 50, the Regulation contains no specific direction to exclude overtime or premiums for holidays or direction to pay regular rates (e.g. section 50(10) or 50(11).

54. If I did not think this clear enough on the face of the language, then any doubt I have ought to be resolved in favour of an interpretation favouring the employee, in accordance with the *Rizzo & Rizzo* principles (already referred to), calling for a broad and generous interpretation of the ESA. Again, although that may lend to the 0.8 percent being applied to a different base number than used to calculate the personal emergency leave pay under section 50 when an employee actually takes the day off, for the reasons outlined above, I do not see that to be problematic. I do not see this so much as a distinction between hours worked versus hours earned as the parties framed it (and terminology not really used in the ESA, although perhaps in the collective agreements), but if necessary to state, this is equivalent to hours earned, not hours worked.

55. With all of the foregoing in mind I turn to answer the specific questions as put to me by the parties.

Question 2 – *In order to fall within the exemption described in section 3.0.1 of 0. Reg. 285/01, is .8 percent PE Pay to be calculated on the base rate or the wage package or something else?*

56. Because I believe that the Regulation calls for the employee to receive 0.8 percent more than the individual employee's hourly rate, I believe this requires it to be applied to what the individual employee is earning at the time, including premiums (shift, overtime or otherwise) and vacation and statutory holiday pay, but not benefit fund contributions.

Questions 3 and 4 - *In order to fall within the exemption described in section 3.0.1 of 0. Reg. 285/01, must .8 percent PE pay be paid on*

"hours worked" or "hours earned"? and In order to fall within the exemption described in section 3.0.1 of 0. Reg. 285/01, must .8 percent PE Pay be paid on all hours worked in a week (including overtime hours) or on a maximum of 40 hours per week (that is, the regular hours of work in the collective agreement)?

57. Although I believe the answer to these questions are to some extent subsumed by my answer to question 2, there is nothing in the Regulation that either explicitly limits the payment to 40 hours per week or to the "regular hours of work". Therefore employees receive the 0.8 percent for all the hours they worked calculated as I explained above and in my answer to question 2.

58. Again, although I do not see this so much as a difference between hours worked and hours earned, to the extent that I appreciate the distinction is used by the parties, this is tantamount to saying the calculation is made on the basis of hours earned.

Question 7 - *Regarding the employer's pay obligation when an employee takes a paid day of leave under section 50 of the Employment Standards Act, should the Employer be paying and remitting a day's pay based on the Wage Package or some other amount?*

59. Since this question is guided by the principle articulated in section 50(9) except as specifically modified by 50(10) and 50(11), an employee who actually takes the personal emergency day off work should be paid only the base rate plus vacation and statutory holiday pay, but for all of the hours the employee would have worked had the employee not taken the day off.

Question 5 - Retroactivity - *In order to fall within the exemption described in section 3.0.1 of 0. Reg. 285/01, must .8 percent PE pay be paid retroactively to January 1, 2018?*

60. Both the ESA and the Regulation explicitly state they are effective January 1, 2018. The Unions say that the percentage is applicable to hours worked starting January 1, 2018, while EPSCA says that the percentage is applicable to hours worked starting May 1, 2018, the effective date of its direction to contractors. I agree with the Unions.

61. EPSCA says that leaving aside the difficulties it encountered in reaching a consensus among the many contractors and employers it represents with respect to many different unions for a common

interpretation or practise, any employee who actually asked for a paid emergency leave day prior to the effective date of its direction (May 1, 2018) was actually granted that paid day off (I will deal with the remaining entitlement of those employees below). As a result, employees who did not ask either because they did not wish to or did not encounter those circumstances that would entitle or qualify them for a personal leave, have not lost anything. For the period before May 1, 2018, they are analogously akin to individuals who had no insurance claims even if the required insurance to cover them that was supposed to be in place was not, says EPSCA. They will receive the 0.8 percent personal emergency pay from May 1, 2018 for the balance of the year – whether they would need or ever qualify for a paid personal emergency day off or not. Simply put, therefore although technically there may be some "winners" or "losers" it all "comes out in the wash" or "washes out in balance". I just do not see it that way.

62. Leaving aside the explicit effective date, neither the ESA nor the Regulations provided any transitional provisions, which both easily could have. There is no question of retrospective application here at least insofar as either the ESA or the Regulation are concerned. Both the ESA and the Regulation were publicly known before their effective date (even if not well before in the case of the Regulation). Quite simply, I am of the view that "effective January 1, 2018" means exactly what it says.

63. Moreover I have already determined earlier that the choice of whether to pay the 0.8 percent emergency leave pay or actually grant the two paid emergency leave days off was the employer's (or here, EPSCA's) choice. Choices have consequences. Having exercised its choice, as EPSCA has done for its members and the contractors it represents, there is no right or entitlement for these employers to be protected from the consequences of that choice – i.e. the payment of the 0.8 percent is retroactive to January 1, 2018. That there might be employees who receive the additional 0.8 percent when they individually might never claim or encounter the emergency circumstances qualifying them to actually take paid emergency leave is a possibility always inherent in the choice of the option of paying the additional 0.8 percent, regardless of whether it was effective January 1, 2018 or any date chosen by EPSCA. Moreover, there is no discernable significance (or significance that leans to one interpretation over the other) to the selection of May 1, 2018. It seems to me that the force (if any) of EPSCA's argument (that it will all "come out in the wash") is the same whatever the effective date EPSCA selected (whether it be May 1, 2018 or June 1, July 1, August 1, etc.) – which to me seriously undercuts any persuasiveness of this argument, other than, of course, to deprive

EPSCA (and its contractors) of a longer “free ride” of not having to pay the 0.8 percent, the emergency leave pay, after choosing that option – and that is not persuasive.

64. Accordingly, I am of the view that having chosen the option of paying 0.8 percent emergency leave pay, it must do so in accordance with the explicit provision in the Regulation that it is effective from January 1, 2018 – and employees should receive that payment retroactively. If there was any doubt (and I do not think there is), I would again resolve that doubt in accordance with the directions and principles of *Rizzo & Rizzo*, that the statute be given a wide and generous interpretation that favours the position of the employee.

65. I also note, there does not appear to be any contravention of the ESA or the Regulation if an employer paid any accrued retroactivity all now in a single lump sum cheque.

Question 6 – *Where an employee has already received one paid PEL day from a Contractor, may the employer decline to pay PE pay to that employee so that the employee would remain entitled to one further paid day of leave under section 50 of the Employment Standards Act prior to January 1, 2019?*

66. The parties left this question to last in their arguments, as do I. As I understood the Unions’ argument, they say that regardless of whether any employee had already taken a paid personal emergency leave day prior to EPSCA’s direction, in light of EPSCA’s unilateral choice, effective May 1, 2018, such an employee must still receive the additional 0.8 percent personal emergency pay for the balance of the year (in reality, in view of my answer to Question 5 above, retroactive to January 1, 2018). Otherwise, so the Unions say, it allows the employer to grant some employees a further paid emergency leave day, or, to just pay the 0.8 percent personal emergency leave pay, and thus to punish or give preferential treatment to some employees. The Unions say this is solely the result of EPSCA’S unilateral declaration and the timing of it. All of this was completely in the control of EPSCA – and certainly not any fault of any employee. I reject that argument at least to some extent as explained, below.

67. Again, I just do not see it this way. First of all, it is hard to see how “fault” (even if that is an appropriate, correct or applicable term to use here) has anything to do with it. Not only did I hear no evidence nor any suggestion of anti-union animus on the part of EPSCA, the Unions

essentially, as discussed above, advanced no real argument in support of any contravention of the LRA.

68. Second, I see no possible interpretation of the ESA or the Regulation (nor was I really pointed to any) that required or compelled an employer to **both** pay employees 0.8 percent personal emergency pay and grant paid emergency leave days (or part thereof) for the same period of time. Whether an employer chooses to do that voluntarily is another matter, and which I need not deal with here (i.e. depending on how an employer did it and if the Union challenged such payment on the basis of a violation of its sole exclusive bargaining agency status, as discussed above).

69. Section 50 of the ESA and section 3.01 of the Regulation, as I have earlier said, are alternative means for the employer to comply with the new two days of paid personal emergency leave requirement in the ESA. What is clear from the wording of section 3.01 is that if the employee receives the emergency leave pay, “the employee is not entitled to paid days of leave under section 50 of the Act”.

70. In my view then, the solution for an employee who has already taken a paid day of emergency leave under the ESA, is straightforward: an employer may choose to pay that employee the 0.8 percent personal emergency pay (in which case the employee will not be entitled to paid leave under section 50 of the ESA), bearing in mind I have already held above that payment must be retroactive to January 1, 2018 (again, there does not appear to be any contravention of the ESA or the Regulation if an employer paid that all now retroactively in a lump sum cheque), or must grant him or her the second paid emergency leave day off when and if such employee requests and qualifies. I am not suggesting that an employer cannot make such a decision based on its own calculation of its self-interest (the gamble that an employee might never qualify or ask for a second paid personal emergency in that calendar year or the countervailing gamble that when asked, the employer will be able to readily, easily and conveniently comply with or accommodate the request, which cannot be refused) provided that no provision of the LRA is violated (and again none were suggested here – and in any event that would likely turn on the particular facts of the individual case).

71. I believe the foregoing answers the questions as posed to me, and therefore the grievance is disposed of on this basis.

"Bernard Fishbein"
for the Board

APPENDIX A

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