IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *Sodexo Canada Limited v. Hotel Employees and Restaurant Employees International Union, Local 779*, 2020 NLSC 111
Date: August 12, 2020
Docket: 201901G2863

BETWEEN:

SODEXO CANADA LIMITED

APPLICANT

AND:

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION, LOCAL 779

RESPONDENT

Before: Justice Rosalie McGrath

On Judicial Review From: A Decision of David L. Alcock, Sole Arbitrator, File #2018:01 dated April 16, 2018 (Parts 1 and 2), November 9, 2018 (Part 3) and February 25, 2019 (Part 4).

Place of Hearing: St. John's, Newfoundland and Labrador

Dates of Hearing: February 5-6, 2020

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Summary:

The Court upheld the decision of the consensual labour arbitrator in respect of his findings that the CLRA Collective Agreement applied while the construction and production phases of a mining project were ongoing at the same time. The Court further found that the arbitrator reasonably interpreted provisions of the Collective Agreement with respect to overtime and shift differential. His damage assessments were also upheld as reasonable and flexible remedies in circumstances where more precise evidence was not available.

Appearances:

Gregory M. Anthony	Appearing on behalf of the Applicant
Dana K. Lenehan, Q.C.	Appearing on behalf of the Respondent

Authorities Cited:

CASES CONSIDERED: *HERE, Local 779 v. Sodexo Canada Ltd.*, 2016 NLCA 46; *Sodexo Canada Limited v. Hotel Employees and Restaurant Employees International Union, Local 779*, 2019 NLSC 192; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66; *Dunsmuir v. New Brunswick*, 2008 SCC 9; *Resource Development Trades Council of Newfoundland and Labrador v. Muskrat Falls Employers' Association Inc.*, 2019 NLSC 84; *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62; *New Brunswick Liquor Corp. v. C.U.P.E., Local 963*, [1979] 2 S.C.R. 227; *M.A.H.C.P. v. Nor-Man Regional Health Authority Inc.*, 2011 SCC 59; *U.S.W.A. v. Diepdaume Mines Ltd.*, 1982 CarswellOnt 1007, [1982] O.L.R.B. Rep. 369 (Lab. Rel. Bd.); *International Union of Mine, Mill v. Surluga Gold Mines Ltd.*, 1967 CarswellOnt 352, [1967] O.L.R.B. Rep. 352 (Lab. Rel. Bd.); *ABA Maintenance & Contracting Ltd. and UBCJA, Local 579, Re*, 2015 CarswellNfld 364, [2015] L.R.B.D. No. 9 (Lab. Rel. Bd.); *I.A.B.S.O.I., Local 764 v. Skyway Steel Ltd.*, 2007 CarswellNfld 170, [2007] N.L.L.R.B.D. No. 5 (Lab. Rel. Bd.); *Bhasin v. Hrynew*, 2014 SCC 71; *United Steelworkers of America, Local 6480 v. Voisey's Bay Nickel Company Limited*, 2006 CanLII 61544 (NL LRB); *U.A., Local 740 v. North Atlantic Refining LP*, (John Clarke, Q.C., July 28, 2017; *North Atlantic*

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Refining Ltd. v. UA Local 740, 2020 NLSC 100; *Health Quest Inc. v. Arizona Heat Inc.*, 2019 NLSC 52; *Lewis v. Todd*, [1980] 2 S.C.R. 694; *Greater Vancouver (Regional District) v. G.V.R.D.E.U.*, 1999 CarswellBC 3677, 57 C.L.A.S. 279 (B.C. Arb.); *W.W.R.P. Construction Employers' Association Inc. and Council of Construction Trades Inc.* (Unreported) (Browne, 2018); *Resource Development Trades Council of Newfoundland and Labrador and Long Harbour Employers' Association Inc.* (Unreported) (Oakley, 2011); *Canada Post Corp. v. C.U.P.W.* (1993), 33 C.L.A.S. 313, 39 L.A.C. (4th) 6 (Canada Arb.) (Bird); *Halifax Infirmary Hospital v. C.B.R.T. & G.W., Local 606*, 1989 CarswellNS 668, 13 C.L.A.S. (N.S. Arb.); *Bingham Memorial Hospital v. C.U.P.E., Local 2558*, 20 L.A.C. (4th) 434 (Ont. Arb.)

STATUTES CONSIDERED: *Labour Relations Act*, R.S.N.L. 1990, c. L-1; *Judgment Enforcement Act*, S.N.L. 1996, c. J-1.1;

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D

TEXTS CONSIDERED: Mort Mitchnick and Brian Etherington, *Leading Cases on Labour Arbitration*, Second Edition, January 2018 – Update No. 4 (Lancaster House); Donald J.M. Brown and David M. Beatty, et al., *Canadian Labour Arbitration*, 5th ed. (Carswell, 2019)

REASONS FOR JUDGMENT

MCGRATH, J.:

INTRODUCTION

[1] This judicial review is the result of a lengthy and contentious dispute between Sodexo Canada Limited ("Sodexo") and the Hotel Employees and Restaurant Employees International Union, Local 779 (the "Union") over how employees of Sodexo who worked at the Tata Steel Timmins Camp (the "Camp") located in Labrador were to be paid. Arbitral proceedings began in 2014 and ended five years later in February 2019. In total, throughout the course of these proceedings, arbitrator David L. Alcock (the "Arbitrator") rendered more than 333 pages of reasons for decision.

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[2] The Arbitrator made an initial arbitral award finding in favour of the Union dated July 21, 2014 (the "2014 Award"). In that award, the Arbitrator found that Sodexo was subject to a collective agreement in effect between the Construction Labour Relations Association of Newfoundland and Labrador Inc. (the "CLRA") and the Union in respect of a unit of employees providing accommodations and food services at the Camp (the "Collective Agreement"). The Camp was part of the Tata Steel Minerals Canada Limited ("TSMC") direct shipping ore project in Labrador (the "DSO Project").

[3] The 2014 Award is not the subject of this judicial review application as Sodexo previously filed an application for judicial review of that award. While this Court initially quashed the award, the Newfoundland and Labrador Court of Appeal, in *HERE, Local 779 v. Sodexo Canada Ltd.*, 2016 NLCA 46 restored it, with the Supreme Court of Canada refusing leave to appeal.

[4] However, that 2014 Award resulted in further arbitral disputes, leading to this judicial review. The arbitration award that is the subject of this application is comprised of Parts 1 and 2, dated April 16, 2018, Part 3, dated November 9, 2018, and Part 4, dated February 25, 2019. The four parts of the award are collectively referred to as the "Arbitration Award".

[5] The 2014 Award required Sodexo to pay wage compensation of $314,118.56 to affected Union members for the period December 18, 2013 to March 28, 2014, pursuant to the terms of the Collective Agreement. Compensation after March 29, 2014 and amounts for benefits owing to March 28, 2014 were to be determined based upon the findings of the Arbitrator. Sodexo was also ordered to make wage and benefits payments to employees on a continuing basis from the date of the 2014 Award to the completion of the construction phase of the DSO Project. The Arbitrator remained seized of jurisdiction to determine matters related to the amount of compensation should the parties fail to reach agreement.

[6] Sodexo did not in fact make any payment in respect of the amount owing under the 2014 Award. While Sodexo continued to pay employees, it did not make such wage and benefits payments in accordance with the Collective Agreement.

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Further, the parties were unable to agree on the amount of compensation. As a result, hearings began before the Arbitrator in the fall of 2017 (the "2017 Hearing"), followed by several rounds of written submissions.

[7] The issues in dispute related generally to the categories of payment, including payment for shift differential and overtime, and the period of time during which the Collective Agreement applied. The Arbitration Award reflects the Arbitrator's findings on these issues, with Part 4 requiring Sodexo to pay the sum of $7,440,548.59 in respect of past wages and benefits.

[8] Payment was to be made by March 11, 2019, failing which interest from December 1, 2018 to the date of the actual payment was to be calculated by Harris Ryan Accountants. Those additional amounts would be payable and allocated accordingly.

[9] On April 2, 2019, the Union filed the entire Arbitration Award, as well as the 2014 Award, with this Court. Section 90 of the *Labour Relations Act*, R.S.N.L. 1990, c. L-1 (the "*LRA*") allows a decision of a single arbitrator made under a collective agreement to be filed with this Court and, once filed, the decision is to be entered in the same way as a judgment or order of this Court and enforceable as such. The Union then sought to enforce the Arbitration Award under the *Judgment Enforcement Act*, S.N.L. 1996, c. J-1.1 (the "*JEA*").

[10] On April 25, 2019, Sodexo filed this judicial review application.

[11] Sodexo also filed a notice of objection to enforcement proceedings with the Office of the High Sheriff on May 23, 2019. The Office of the High Sheriff subsequently notified Sodexo that its notice of objection was rejected but that it could apply to this Court for a determination of the issue.

[12] On June 11, 2019, Sodexo filed an interlocutory application for a stay and for a determination pursuant to section 163(1)(b) of the *JEA*. In a written decision filed

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on October 29, 2019, *Sodexo Canada Limited v. Hotel Employees and Restaurant Employees International Union, Local 779*, 2019 NLSC 192, I granted a partial stay of enforcement of the Arbitration Award pending judicial review. The amount that remained in dispute was to be paid into an interest-bearing account to be held by the solicitor for Sodexo, in trust, pending final determination of the judicial review application.

ISSUES

[13] The issues to be determined on this judicial review are as follows:

1. What is the standard of review?

2. Was the decision of the Arbitrator unreasonable in finding that the Collective Agreement did not cease to apply to the employees of Sodexo when the DSO Project commenced commercial production operations on April 1, 2015?

3. Was the decision of the Arbitrator unreasonable in his application of the "proportionality" approach?

4. Was the decision of the Arbitrator unreasonable (i) in finding that the Union did not bear the onus of proving that shiftwork actually took place and identifying each employee involved; (ii) in finding that Sodexo was required to compensate the bargaining unit employees for shift differential; and (iii) in awarding a global amount for shift differential?

5. Was the decision of the Arbitrator unreasonable in awarding overtime payment for employees who worked on Fridays?

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LAW AND ANALYSIS

Issue 1: What is the standard of review?

[14] I agree with both parties that the standard of review is one of reasonableness. Given the parties' concession on the standard to be applied, it is not necessary to carry out a detailed review of how a court is to identify the standard. It is sufficient to note that in the December 2019 decisions in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, and *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66, the Supreme Court of Canada clearly stated that reasonableness is now the presumptive standard of review. However, that standard can be rebutted where the legislature intended a different standard to apply, or where the rule of law requires it. Neither of those exceptions apply in this circumstance.

[15] However, the Supreme Court of Canada went on to provide further guidance for reviewing courts on how to conduct a reasonableness review. At paragraph 2 of *Vavilov*, the majority clarified that reasonableness review will continue to be guided by the principles underlying judicial review as articulated in *Dunsmuir v. New Brunswick*, 2008 SCC 9. In particular, they held that the function of judicial review is to maintain the rule of law while giving effect to legislative intent.

[16] The Supreme Court of Canada also affirmed the need to develop and strengthen a culture of justification in administrative decision-making. In particular, the court made the following comments at paragraphs 13 and 14:

> 13 Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.

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> 14 On the one hand, courts must recognize the legitimacy and authority of administrative decision makers within their proper spheres and adopt an appropriate posture of respect. On the other hand, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be "justified to citizens in terms of rationality and fairness": the Rt. Hon. B. McLachlin, *"The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law"* (1998), 12 *C.J.A.L.P. 171,* at p. 174 (emphasis deleted); see also M. Cohen-Eliya and I. Porat, *"Proportionality and Justification"* (2014), 64 *U.T.L.J.* 458, at pp. 467-70.

[17] At paragraph 12 of *Vavilov*, the majority described a reasonableness review as being a robust evaluation. In carrying out such a robust review, at paragraph 83, the court stated that the focus of a reasonableness review should be on the decision actually made, including both the decision-maker's reasoning process and the outcome.

> 83 ... The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 (F.C.A.) , that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

[18] Further, at paragraphs 86 and 87, the Supreme Court of Canada noted that the court is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process, as well as with whether the decision falls within a range of possible, acceptable outcomes, which are defensible in respect of the facts and law.

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[19] The court recognized at paragraph 100 that the burden is on the party challenging the decision to show that it is unreasonable. Before setting aside a decision as unreasonable, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Those shortcomings or flaws must be more than merely superficial or peripheral to the merits of the decision.

[20] At paragraph 101, the Supreme Court of Canada recognized two types of fundamental flaws:

(i) a failure of rationality internal to the reasoning process; and

(ii) when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it.

[21] In looking at the second type of flaw, a reviewing court should look to the constellation of law and facts that are relevant to the decision, including the following that may be relevant to this review: (i) principles of interpretation; (ii) the past practices of the administrative decision-maker; (iii) the potential impact of the decision; (iv) the evidence before the decision-maker; and (v) the submissions of the parties (*Vavilov* at paragraphs 105 to 106).

[22] In assessing the relevant factual constraints, the Supreme Court of Canada also noted at paragraph 125 of *Vavilov* that, while a decision-maker may assess and evaluate the evidence before it, it is only in exceptional circumstances that a reviewing court should interfere with a decision-maker's factual findings.

[23] In respect of alleged errors of fact and the sufficiency of the evidence, the Union refers to a recent decision of Justice Boone in *Resource Development Trades Council of Newfoundland and Labrador v. Muskrat Falls Employers' Association Inc.*, 2019 NLSC 84, in which he defined the court's task at paragraph 23, as follows:

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> 23 … In assessing the fact-finding of an arbitrator for reasonableness, a reviewing court will uphold the decision if there was some evidence that supported the arbitrator's decision, and, viewed the other way around, will only overturn the decision if there was no evidence that supported the finding or award. The task of the reviewing court is not to reconsider the inferences drawn by the arbitrator or conduct its own weighing of the evidence for sufficiency.

[24] While *Vavilov* cautioned that care must be taken in applying pre-*Vavilov* case law, these comments of Boone, J. are in line with the Supreme Court of Canada's direction that reviewing judges should give deference to the factual findings of the decision-maker.

[25] The Supreme Court of Canada also took the opportunity to remind reviewing courts of the importance of reasons. It provided guidance on how comments made in *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62 should be applied. In particular, at paragraph 12 of that decision, reviewing courts were directed to "seek to supplement" reasons which may otherwise appear deficient. The court clarified that the *N.L.N.U.* decision was merely telling courts to pay close attention to a decision-maker's written reasons but to read them holistically and contextually, for the purpose of understanding the basis upon which a decision was made.

[26] While there is a renewed focus on reasons, the Union also asks this Court not to lose sight of the fact that the starting point, as enunciated by the majority of the Supreme Court of Canada in *Vavilov*, remains judicial restraint and deference to administrative decision-makers in their own setting. In fact, both the majority and the dissent in *Vavilov* note that the concept of curial deference to administrative tribunals has its genesis in a labour decision from the Supreme Court of Canada: *New Brunswick Liquor Corp. v. C.U.P.E., Local 963*, [1979] 2 S.C.R. 227.

[27] The Supreme Court of Canada, in *Vavilov*, also made it clear that reviewing courts should not expect the decision of an administrative decision-maker to resemble "judicial justice". At paragraph 91 of *Vavilov*, the Supreme Court of Canada states as follows:

> 91 A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside: *Newfoundland Nurses*, at para. 16. The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.

[28] Further, at paragraph 92, the court takes notice that decision-makers often have expertise and experience that is highly specific to their field. This can impact both the form and the content of their reasons and make them quite different from a judicial decision. Those differences are not necessarily a sign of an unreasonable decision.

[29] At paragraph 93 of *Vavilov*, the Supreme Court of Canada also referenced statements made in *Dunsmuir* that respectful attention to a decision-maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be:

> ...puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision.

[30] In particular, in respect of labour matters, at paragraph 113 of *Vavilov*, the Supreme Court of Canada referred to its prior decision in *M.A.H.C.P. v. Nor-Man Regional Health Authority Inc.*, 2011 SCC 59, recognizing that labour arbitrators are authorized by broad mandates and expertise to flexibly craft remedies. At paragraph 45 of *M.A.H.C.P.*, the court describes how labour arbitrators must be allowed flexibility within the contained sphere of arbitral creativity:

> 45 ... To this end, they may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized.

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[31] The Supreme Court of Canada also noted at paragraphs 45 and 46 of *M.A.H.C.P* that labour arbitrators must consider not only the collective agreement, but "the real substance of the matter in dispute between the parties". They are not bound by strict legal interpretations. A court must recognize that these awards "provide a final and conclusive settlement of the matter submitted to arbitration".

[32] At paragraphs 47 through 49 of *M.A.H.C.P.*, the Supreme Court of Canada also recognized the distinct role that arbitrators play in fostering peace in industrial relations. "Rigidity in the dispute resolution process risks not only the disintegration of the relationship, but also industrial discord." (*M.A.H.C.P.* at paragraph 49).

[33] It is as against these principles that I will consider the issues raised by Sodexo.

Issue 2: Was the decision of the Arbitrator unreasonable in finding that the Collective Agreement did not cease to apply to the employees of Sodexo when the DSO Project commenced commercial production operations on April 1, 2015?

[34] Sodexo submits that the Arbitration Award is unreasonable in finding that the Collective Agreement applied post-April 1, 2015 for the following reasons:

(i) it does not align with the principles adopted by the Arbitrator in the 2014 Award, which was subsequently upheld by the Court of Appeal (leave to appeal to Supreme Court of Canada refused);

(ii) the decision is a result of reasoning which is not logically or consistently applied;

(iii) the decision is not consistent with the evidence presented during the 2017 Hearing; and

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(iv) the decision is contrary to the common law general organizing principle of good faith in contractual performance and the analogous principle of honest and fair collective agreement administration.

[35] Firstly, Sodexo says that the decision is unreasonable as it departs from the approach of recognizing the various stages of mining operations, with those same stages having been the basis for the 2014 Award. In support of this position, Sodexo relies upon decisions of the Ontario Labour Relations Board that discuss various stages of mining operations. These same cases were placed before the Arbitrator.

[36] In *U.S.W.A. v. Diepdaume Mines Ltd.*, 1982 CarswellOnt 1007, [1982] O.L.R.B. Rep. 369, the Ontario Labour Relations Board relied upon a policy it had previously adopted in the case of *International Union of Mine, Mill v. Surluga Gold Mines Ltd.*, 1967 CarswellOnt 352, [1967] O.L.R.B. Rep. 352 (Lab. Rel. Bd.). In that decision, the Board noted it had been its practice for many years to find three types of bargaining units appropriate for collective bargaining in mining operations; namely units relating to the construction stage, the development stage and, finally, the production stage.

[37] In doing so, the Board applies the "build-up principle" of mining operations to ascertain which stage a mine has reached in order to determine the appropriate bargaining unit. Its practice is to find that a mine has entered the production stage when the ore, which has been mined during the development stage, ceases to be stockpiled and is either shipped or processed through a mill at the mine site.

[38] Sodexo submits that deciding whether the Collective Agreement applies based upon the stages of work at site approach is consistent with not only the stage of mining operation approach used by the Ontario Labour Relations Board, but decisions of the Newfoundland and Labrador Labour Relations Board (the "Board") in determining inclusions and exclusions in bargaining unit membership.

[39] In particular, Sodexo refers to the Board's decision in *ABA Maintenance & Contracting Ltd. and UBCJA, Local 579, Re*, 2015 CarswellNfld 364, [2015]

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L.R.B.D. No. 9 (Lab. Rel. Bd.). At paragraph 115, the Board noted the rationale for using the work performed on the date of a certification application in deciding issues of inclusion and exclusion was set forth at pages 17 and 18 of *I.A.B.S.O.I., Local 764 v. Skyway Steel Ltd.*, 2007 CarswellNfld 170, [2007] N.L.L.R.B.D. No. 5 (Lab. Rel. Bd.).

[40] In that case, the Board stated that the date of the certification application determines voter eligibility. Secondly, the nature and extent of the work performed by an employee on the date of the application is determinative of whether an employee who performs more than one function or craft is to be included in a proposed bargaining unit.

[41] Sodexo submits that, in the 2014 Award, the Arbitrator looked at the nature and extent of the stage of work performed by the workers in the bargaining unit. They were held to have been providing support services "predominantly" to construction workers engaged in the "construction phase of the project" at the time of certification. It was on that basis that the Arbitrator found the employees were bound by the Collective Agreement and that the catering and accommodation facility was "primarily" operated as a facility to provide catering and accommodation services to persons principally involved in the construction industry, and not engaged in operating an iron ore mine and mill facility.

[42] In particular, Sodexo refers to the following extracts from the 2014 Award:

> (i) When Local 779 was certified on December 18, 2013, the primary focus of work at the site was construction. Since there was no mining performed from December 2013 until the date of this hearing, the primary focus was construction activity. (page 45);
>
> (ii) Therefore, the evidence clearly establishes that the primary focus of work performed on the project site since 2011 has been construction, not mining. (page 46);
>
> (iii) … that the construction phase is anticipated to be completed by December 2014, after which the predominant activity is expected to be mining operations. (page 68);

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> (iv) … that the nature and scope of the work performed at the camp to date is accommodation and catering, mostly for contractors' construction employees. (page 68);
>
> (v) … I am satisfied that the evidence unequivocally established that, from the date of the certification order on December 18, 2013, construction activity was the predominant activity on that project and that the clientele at the camp were predominantly, but not exclusively, construction industry employees. (page 73);
>
> (vi) Whatever the ultimate intention may have been for the camp, its *raison d'etre* during the construction phase of the development project was mainly to accommodate construction industry employees. Whether by design or circumstance, this was the situation that existed for Sodexo at the time of certification and continues to exist until the construction phase is completed. (pages 73 to 74).

[43] Sodexo submits that this approach was explicitly endorsed by the Newfoundland and Labrador Court of Appeal at paragraph 59 of *HERE*. Further, at paragraph 61, the Court of Appeal found that there was an adequate evidentiary basis and sufficient reasons provided for the Arbitrator's decision.

[44] Sodexo submits this predominant activity or primary focus of site work approach is particularly appropriate when Sodexo's employees themselves are not construction workers. They provide catering and accommodation services. Regardless of the stage of work at the mine, the nature of their work does not change. As such, the only way to determine whether the Collective Agreement applies is to determine the stage of activity using the predominant activity or primary focus of work at site approach.

[45] Sodexo further submits that the reasonableness of using the staged approach is evident when one looks at it from a labour relations perspective. It would not make labour relations sense for two collective agreements to apply to the same group of workers at the same time. There must therefore be a reasonable and logical test for determining which collective agreement should apply, from the time the mine operates until the time the mine goes into production. The test used by the Arbitrator in the 2014 Award provided that logical and reasonable approach.

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[46] However, Sodexo states that the Arbitrator then departed from that test in the Arbitration Award when he appears to find that the Collective Agreement applied so long as construction activity was ongoing. In particular, at page 6 of Part 2 of the Arbitration Award, the Arbitrator states as follows:

> …On the basis of all the evidence provided on this subject, the arbitrator considered it to be a simple, unequivocal, finding of fact as to the status of construction activity on the project at the time. In terms of what that meant for the application of the CLRA collective agreement to Sodexo's employees, it was the equivalent of a slam dunk, a *fait accompli*. The basic fact that Sodexo was providing services for construction employees within the construction industry on the project site justified the application of the collective agreement.

[47] Sodexo submits that this is a fundamentally different test than the one used to determine whether the Collective Agreement applied at the commencement of the construction phase. Sodexo says that using a different test to determine when that same Collective Agreement no longer applies is unreasonable.

[48] Sodexo referred to specific evidence provided to the Arbitrator in the 2017 Hearing that it says clearly established that, as of April 1, 2015, the DSO Project had changed significantly, with a shift of focus from construction to production. The DSO Project commenced processing and shipping to market significant volumes of ore in 2015. In 2014, mining was on a trial basis. Transportation and shipping arrangements were being finalized and construction was in progress to enable commercial operations. By April 2015, all the preliminary work had been completed to commence commercial production. Government entities also viewed the mine as being in the production phase.

[49] Sodexo says that the Arbitrator himself acknowledged that the situation had changed significantly in 2015, referring to the following statements in Part 2 of the Arbitration Award:

> (i) It is abundantly clear that the two phases occurred simultaneously in 2015. The operations phase did not alter, cancel or otherwise affect the construction phase; it merely switched which phase was predominant

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relative to the other. At best, that meant at some point during 2015, operations became the major activity on site and construction became the minor activity. (pages 14 – 15).

(ii) Indeed, the 'switch' to predominantly operations activity, which the Employer asserted occurred on April 1st, 2015 did not actually take place until May 13, 2015. (page 59).

(iii) In the arbitrator's view, however, the situation was not normal from May to December 2015. After May, construction meals started to decline in real terms, but the proportion of non-construction meals climbed from a low of 52% in May to a high of 80% in December. Although the Employer continued its practice of assigning all of the construction and non-construction support work to the bargaining unit, the proportion of non-construction meals increased substantially. (pages 59 – 60).

[50] As such, it could no longer be said that the "predominant activity" or "primary focus of work at site" at that time was construction. Nor could it be said that the *raison d'etre* of the Camp at that time was to accommodate construction employees.

[51] In light of the Arbitrator's own findings that the site was predominantly operations in 2015, Sodexo says that any reasonable person applying the "predominant activity" test set forth by the Arbitrator in the 2014 Award would come to the conclusion that, as of May 2015, Sodexo's workforce was not mainly or predominantly catering to construction employees.

[52] Sodexo submits that logic and fairness dictate that if the Collective Agreement is to apply to Sodexo employees when the predominant activity on site is construction, the opposite must be true when Sodexo employees are not predominantly catering to construction employees. Instead, the Arbitrator seems to have decided that, as long as Sodexo was providing services to any construction employees, the Collective Agreement applies.

[53] Sodexo also submits that a review of the Arbitrator's reasons, in light of the history and context of the proceedings, indicates that a departure from the predominant activity approach utilized in the 2014 Award is unreasonable. When

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the reasons are read in light of the record, with due sensitivity to the administrative regime in which it was given, there is a failure of rationality internal to the reasoning process. The Arbitration Award is also untenable in light of the relevant factual and legal constraints that bear on it.

[54] Sodexo says that one such legal constraint is a requirement for the Arbitrator to give effect to the reasonable commercial expectations of the parties, including the general common law contractual principle that there must be good faith in contractual performance. Sodexo submits that there is an analogous general organizing principle of honest and fair collective agreement administration.

[55] In particular, Sodexo relies upon the following statement from paragraph 66 of *Bhasin v. Hrynew*, 2014 SCC 71:

> 66 This organizing principle of good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. But we should also recognize that this list is not closed. The application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives due weight to the importance of private ordering and certainty in commercial affairs.

[56] Relying upon general organizing principles of contract and fair collective agreement administration, Sodexo says that it would have been the reasonable commercial expectations of the parties that, once the role of Sodexo's employees was to support operations at the DSO Project, the parties in good faith ought to have acknowledged that the Collective Agreement no longer applied.

[57] Sodexo also submits that the doctrine of unconscionability is not only based on considerations of fairness designed to prevent a contracting party from taking undue advantage of the other, it is also based on the concept of unjust enrichment.

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It would be unfair to continue to apply the Collective Agreement to Sodexo's employees when the predominant activity or primary focus of their work was no longer to support the construction phase of the DSO Project.

[58] For its part, the Union's primary submission on the issue of when the Collective Agreement no longer applied is that Sodexo cannot re-litigate an argument that was fully considered by the Arbitrator and dealt with appropriately in the Arbitration Award.

[59] The Union characterizes the thrust of Sodexo's argument as being an assertion that the Arbitrator used one test to determine the application of the Collective Agreement in 2014 and a different test to determine when it ceased to apply. In fact, the Union says this is an inaccurate description of what the Arbitrator determined.

[60] The Union also refutes Sodexo's reliance on a decision from the Ontario Labour Relations Board in *U.S.W.A.* to suggest there are discrete watertight stages in a mine's operations, noting this same authority was placed before the Arbitrator for the same arguments that are now being made on judicial review.

[61] The Union also makes the following comments with respect to Sodexo's reliance on that Ontario case:

(i) The decision of the Ontario Labour Relations Board from 1982 is neither representative of this Province's mining industry, nor is it binding as a legal precedent on an arbitrator in this jurisdiction;

(ii) As each province within Canada is subject to its own specific labour regime, there is significant risk in relying on a decision from another province for the general propositions put forward by Sodexo;

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(iii) The Union acknowledges that, in Ontario, bargaining units in the mining sector have sometimes been certified based on the staged approach. However, *U.S.W.A.* relates to the certification of bargaining units rather than the application of collective agreements, as is the case here. Further, even in respect of bargaining units, stage-based certification has never been the approach in Newfoundland and Labrador. This fact was noted by the Arbitrator at pages 42-43 of Part 2 of the Arbitration Award.

(iv) Furthermore, it is impossible to divorce Ontario's stage-based approach from the application of the build-up principle which underpins Ontario's stage or phase-based model in the mining sector. The build-up principle is directed to the concern that where a small number of employees exist at the time an application for certification is filed, such a group may not be representative of a larger group of employees where expansion is planned in the near future. In the *Surluga Gold* case, referred to in paragraph 5 of *U.S.W.A.*, it is specifically stated that the stage-based approach is used "in order to reconcile the build-up situation with the desire of the employees who seek collective bargaining during the various stages of a mine."

(v) The build-up principle does not apply in the construction industry of Newfoundland and Labrador. This is well established by the jurisprudence (*United Steelworkers of America, Local 6480 v. Voisey's Bay Nickel Company Limited*, 2006 CanLII 61544 (NL LRB)).

[62] With respect to Sodexo's submissions that the Arbitrator used a test that was inconsistent with that used in the 2014 Award, the Union states that Sodexo has failed to properly identify the primary issue in dispute in the 2014 Award; i.e. whether employees supplying catering and accommodation services could be bound to the CLRA Collective Agreement in the industrial and commercial sector of the construction industry.

[63] In particular, at the hearing resulting in the 2014 Award (the "2014 Hearing"), Sodexo had argued that the employees were not construction employees, but merely providing services ancillary to the industry. The Arbitrator accepted that the work

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performed by Sodexo's employees was not "construction" work, as that work was performed by other contractors. However, Sodexo's employees were working in the "construction industry" because the provision of camp accommodation and catering, particularly to remote locations, has always been considered part of the construction industry and was an inexorable part of the construction being performed by TSMC.

[64] In particular, the Union refers to page 72 of the 2014 Award in which the Arbitrator stated that the Union has members engaged in the construction industry "whenever it becomes certified for an employer's employees providing camp accommodation and catering on a large, non-special project."

[65] The Union characterizes Sodexo's extraction of quotations from the 2014 Award, without putting these quotations into context, as misleading as it suggests that the Arbitrator created a "predominant activity test". Taken out of context, the quotations also suggest that the Arbitrator used the stage-based model that is used for mining operations in Ontario for certifications. However, the Union submits that it is clear that the Arbitrator's 2014 Award was based on many factors, most importantly, his finding that the Union's members were engaged in the construction industry when they were certified to an employer operating in that industry.

[66] The Union also asks this Court to place the Arbitrator's reference to "predominant activity" in context by looking at the issue in respect of which it first arose. In 2014, Sodexo was insisting that the camp was a permanent camp in support of mining operations and was not established to support construction work. In response to that assertion, at page 73 of the 2014 Award, the Arbitrator found that the argument was untenable because, factually, the evidence established that construction was the predominant activity on site.

[67] Further, while the Arbitrator does refer to the camp's "*raison d'etre* during the construction phase" being the accommodation of construction employees, the Union submits that this is no more than the Arbitrator acknowledging that, as a fact, the majority of the work taking place at the time was in support of the predominant activity, being construction. He was not in fact using that as the "test" for establishing whether the Collective Agreement applied.

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[68] The Union says that, in his analysis, the Arbitrator fully considered the issue of whether the Collective Agreement applied by looking at relevant legislation and principles of statutory interpretation, as well as a constellation of other factors, including: the Union's involvement with the CLRA; its' membership in the Newfoundland and Labrador Building and Construction Trades Council; the objectives of unions and contractors in promoting economic efficiency and labour stability; and the certification order.

[69] Perhaps most importantly, in Part 2 of the Arbitration Award, the Arbitrator specifically addressed Sodexo's emphasis on the predominance factor and commented on his reference to that in the 2014 Award. In particular, the Arbitrator stated as follows at pages 5-7:

> With the greatest of respect, the arbitrator disagrees with the Employer's conclusion that the collective agreement ceased to apply on April 1, 2015.
>
> In determining whether there was a valid CLRA/HRW Local 779 collective agreement in place which bound Sodexo to its terms and conditions in the particular circumstances that existed after the Labour Relations Board certified the Union on December 18, 2013 as the bargaining agent for a unit of employees of Sodexo Canada Ltd., the unequivocal evidence was precisely as stated at page 68 of the arbitrator's award, particularly in Items 2, 3, and 5, as the Employer has referenced. Yes, the nature and scope of the development work at the site was predominantly construction work. To describe it as "predominantly construction work" was to state the obvious. In his recent testimony, John Tobin responded to the arbitrator's question how he reached the conclusion that, during his tenure, it was mostly construction workers who Sodexo served at the site Camp. Mr. Tobin testified that the camp was originally to accommodate the growing numbers of construction workers, like Sunny Corner, that the night shift was opened for Sodexo in 2013, and he felt the same way about the presence of construction workers during 2015. On the basis of all the evidence provided on this subject, the arbitrator considered it to be a simple, unequivocal, finding of fact as to the status of construction activity on the project at that time.
>
> ...that the evidence indicated that there is so much construction activity happening that it could justify affixing the adverb "predominately" simply meant that there was more than sufficient bargaining work available to justify the application of the

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> collective agreement. This finding of fact more than answered the question whether there was enough construction industry work to occupy the bargaining unit for a reasonable length of time, it made the decision to apply the collective agreement an absolute no brainer, a decision beyond all reasonable challenge.
>
> However, what the unequivocal evidence did not do, and what the arbitrator's finding did not require was to establish "predominately construction activity" as the necessary condition for the application of the CLRA collective agreement. "Predominately construction activity" was simply a reflection of the reality of the situation that existed on the project site at the time…

[70] At page 10 of Part 2 of the Arbitration Award, the Arbitrator continued to note that he did not order Sodexo: "to continue compliance for the duration of the construction phase….*as long as it continues to be the predominant or primary activity phase at the site*". He also said that "no such meaning was expressed and no such meaning was intended".

[71] The Union says Sodexo's argument essentially amounts to arguing that the Arbitrator misinterpreted his own 2014 Award. This is illogical as the Arbitrator commented on the meaning of his 2014 Award in Part 2 of the Arbitration Award.

[72] The Union notes that the Arbitrator demonstrated his expertise in the construction industry with his recognition that, when a particular facility moves from a labelled "construction phase" to a "commercial phase", this does not mean that construction work has entirely ceased. He found the Collective Agreement applies to all construction work in the accredited sector.

[73] The Union also notes that labour arbitrators are frequently called upon to determine whether or not work is construction in the context of an operational facility. This is a matter within their sphere of experience. In particular, the Union

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refers to a decision in *U.A., Local 740 v. North Atlantic Refining LP*, (John Clarke, Q.C., July 28, 2017).[1]

[74] The Arbitrator expressly rejected the notion that the Collective Agreement would cease to apply on April 1, 2015 on the basis that the predominant activity had changed. He said this notion would be tantamount to declaring that attainment of predominantly operations activity made the application of the Collective Agreement null and void. There is no precedent or case law in the construction industry of Newfoundland and Labrador which suggests that would have been the appropriate approach. As noted by the Arbitrator, at page 11 of Part 2 of the Arbitration Award, phases of a project do not need to be mutually exclusive.

[75] At pages 12 to 15 of Part 2 of the Award, the Arbitrator recited specific evidence demonstrating that construction activity continued in 2015, including a notation that specific construction contractors were still on site until December 2015.

[76] The Union submits that this is a reasonable conclusion which is internally coherent and rationally supported. That conclusion had been explained to Sodexo when the Arbitrator met with the parties to suggest that they settle the matter after the evidence had been presented. It was again explained in the Arbitrator's written reasons.

[77] With respect to Sodexo's submission with respect to good faith, honest and fair collective bargaining and the principle of unconscionability, the Union said there is nothing unconscionable about asking that an employer pay its employees collectively bargained wages and benefits when they perform services in the industrial-commercial sector of the construction industry.

[1] While that decision was recently set aside on judicial review in *North Atlantic Refining Ltd. v. UA Local 740*, 2020 NLSC 100, the findings with respect to the characterization of work were not the subject of that judicial review.

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[78] Having thoroughly considered the parties submissions on this issue in light of the relevant factual and legal context, including the 2014 Award, I find that the Arbitrator's decision that the Collective Agreement continued to apply after April 1, 2015 was not unreasonable.

[79] As the Arbitrator himself noted, he did not base his 2014 finding that the Collective Agreement applied based upon a stage-based approach to mining operations, as used by the Ontario Labour Relations Board in certifying bargaining units. A review of the *Surluga Gold* decision, as quoted in *U.S.W.A.*, clearly indicates that the phase-based approach is used in Ontario to address the build-up principle resulting in a change in bargaining unit membership rather than the issue of when a collective agreement applies. Further, the Arbitrator specifically noted that this approach was not adopted in Newfoundland and Labrador.

[80] The only Board authority referred to by Sodexo, *ABA Maintenance & Contracting Ltd and UBCJA, Local 579, Re*, also relates to a different issue of determining inclusion or exclusion in a bargaining unit.

[81] The Arbitrator also explained that his 2014 comments on the extent of the construction activity on site were in response to Sodexo's assertion that its employees were not providing construction services and should therefore not be bound by the CLRA Collective Agreement. A full contextual review of the 2014 Award requires me to consider the question that was asked of the Arbitrator when interpreting his findings. When read in context, I find it is evident that the Arbitrator's statements that the "predominant" nature of the work was construction were made to demonstrate there was no doubt that the members' work was being performed on a project-specific construction site in the industrial and commercial sector. In the Arbitrator's own words, it was an "absolute no brainer".

[82] The Arbitrator explained in Part 2 of the Arbitration Award that he expressly did not find that the Collective Agreement would cease to apply once the work on site was no longer predominantly construction activity. His finding was that construction and production could occur at the same time but that the Collective Agreement continued to apply until construction assignments ceased to the point that

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there was insufficient construction work to support a validly operating bargaining unit late in 2015. That conclusion is internally coherent and rationally supported.

[83] Further, there is nothing in the relevant factual or legal constraints to suggest the decision is unreasonable. The Arbitrator undertook an extremely thorough and comprehensive review of the evidence presented to him, both in 2014 and 2017. He dealt extensively with the parties' submissions and case law on all issues. He also considered the history of the matter and the relevant labour relations context.

[84] I have also considered Sodexo's submission with respect to the general principles of good faith, honest and fair collective agreement bargaining and unconscionability. Having found that the decision of the Arbitrator was reasonable and founded in fact and law, I do not agree that the application of these principles suggests that the decision on this issue was unreasonable. In fact, as referenced later in this decision, the Arbitrator expressly considered relevant labour relations principles, focusing on the equities to the parties. This is also evident in how he fashioned a remedy.

[85] Having found that the Arbitrator's decision that the Collective Agreement applied after April 2015 was reasonable, I must consider whether the Arbitrator reasonably determined the appropriate remedy.

Issue 3: Is the decision of the Arbitrator unreasonable in his application of the "proportionality" approach?

[86] As noted above, at the conclusion of evidence and final submissions in the 2017 Hearing, the Arbitrator met with counsel to advise that he was prepared to give what he called a 'bench ruling'. While there is no formal record of discussions at that meeting, both counsel agreed that the Arbitrator advised he would be finding that both the construction phase and the operations phase existed at the same time. He asked that the parties consider the proportion of work Sodexo employees carried out to support construction activities on site and how long that construction support work continued. He also suggested that counsel consider a proportional settlement

recognizing the extent of construction activity versus commercial operations activity that occurred in 2015.

[87] Sodexo refers to this as the Arbitrator indicating he was adopting a proportionality approach as a means of avoiding over-compensating employees by applying the Collective Agreement wage structure to work offered for the benefit of commercial production operations.

[88] When the parties were unable to reach agreement on a proportional settlement following the Arbitrator's bench ruling, at the request of the Arbitrator, Sodexo and the Union provided the Arbitrator with submissions outlining each party's position on the quantum of compensation owing based upon what they saw as a "proportional approach".

[89] After receiving each party's submissions, the Arbitrator issued Part 2 of the Arbitration Award. The Arbitrator's findings on the manner of determining compensation are found at page 59 as follows:

> In the arbitrator's view, however, the situation was not normal from May to December 2015. After May, construction meals started to decline in real terms, but the proportion of non-construction meals climbed from a low of 52% in May to a high of 80% in December. Although the Employer continued its practice of assigning all of the construction and non-construction support work to the bargaining unit, the proportion of non-construction meals increased substantially.
>
> In the arbitrator's view, the objective of this compensation exercise is to determine as reasonably and as fairly as possible what compensation owing should be to the bargaining unit and the Union. No part of that compensation owing should be intended to penalize the Employer beyond the consequences flowing from the Employer's failure to apply the collective agreement. In these circumstances, the Employer had established a practice of assigning a certain level of non-construction support work to the bargaining unit from March 28, 2014 to April 30, 2015, which may reasonably be determined to be around a 41% average. From May 2015 onward, such assignments exceeded that level. In other words, the Employer's assignments in support of non-construction activity were significantly above the

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> norm of its established practice. Therefore, in the spirit of establishing reasonably appropriate compensation owing on this two-year one-off situation long after the collective agreement ceased to apply, the arbitrator is satisfied that the Employer should not have to pay for the proportions supporting non-construction activity in 2015 assigned each month in excess of the normal average of 41%.

[90] Sodexo says the above reasons are not internally coherent and rational, nor are they justified in relation to the relevant factual and legal constraints that bear on the decision. In particular, Sodexo does not agree that the manner of determining compensation used by the Arbitrator actually resulted in a finding that was compatible with his stated proportional approach. If he were to apply that approach, he ought to have relied upon evidence presented as to the proportion of services supporting construction versus non-construction activity.

[91] Sodexo says that the Arbitrator found that the figures presented by its witness, Mr. Przybylowski, represented the best available measures or indications of the amount of construction activity Sodexo employees serviced. In particular, at page 19 of Part 2 of the Arbitration Award, the Arbitrator stated as follows:

> However, Mr. Przybylowski's numbers do offer the best "available" indication of the amount of construction activity that Sodexo employees serviced, albeit by meals served, in both 2014 and 2015. Those numbers are helpful in demonstrating a measure of how much work there was for the bargaining unit to perform while the collective agreement applied during 2015.

[92] However, Sodexo states that the Arbitrator, instead of adopting a proportional approach, applied an empirical approach, which was not based upon the evidence presented by Mr. Przybylowski during the 2017 Hearing. Sodexo says this is demonstrated in how the Arbitrator commented on the amount of services performed in support of construction activity at pages 61 and 63 of Part 2 of the Arbitration Award:

> In light of the foregoing, the arbitrator is satisfied that there was not sufficient work performed in support of construction activity in December 2015 to sustain a

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> bargaining unit. Therefore, the month of December 2015 is eliminated for the purpose of determining compensation owing.
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> ...
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> Therefore, as a matter of compensation owing, a deduction of an average 15% shall be made from the collective agreement wage and benefit calculations for all the bargaining unit employees for each of the months of May, June, July, August, September, October and November 2015.

[93] Sodexo submits that this approach is unreasonable as:

(i) it results in compensating Sodexo's bargaining unit employees at construction rates contained within the Collective Agreement for work performed in support of commercial production operations; and

(ii) it is contrary to and inconsistent with the proportionality approach which the Arbitrator indicated he was adopting. It is therefore unconscionable and unjustly enriches the Union and the bargaining unit employees.

[94] To support its position that the Arbitrator indicated he was adopting a proportionality approach, Sodexo refers to the Arbitrator's own comment that the CLRA Collective Agreement should not apply to work offered by Sodexo to non-construction employees and that the most accurate and appropriate determination of compensation owing was to be achieved as follows:

> To the extent that some construction employees on the site may not have received services from the bargaining unit at Sodexo, the Local 779 Collective Agreement would not have applied to their circumstances. If there were construction workers on site at the completion of the construction phase in 2015 who Sodexo was not providing services for (eg., mention has been made that Sodexo did not provide service to Sunny Corner employees, some of whom were on site until December 10, 2015), the CLRA collective agreement would not have applied. In effect, the

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> collective agreement would have applied only while Sodexo was providing services to the particular construction worker clients it chose to accommodate and service at its camp on site." (Reference: pages 10-11 of Part 2 of the Arbitration Award);
>
> The Arbitrator's hope for the parties' assistance on these matters was to enable him to achieve the most accurate and appropriate determination of compensation owed. (Reference: page 40 of Part 2 of the Arbitration Award).

[95] However, Sodexo says the Arbitrator then failed to adopt this manner of determining compensation when he made his ultimate finding at page 59 of Part 2 of the Arbitration Award, as reproduced above.

[96] To demonstrate the unconscionability and unjust enrichment of the approach that was ultimately adopted, Sodexo notes that the Arbitrator had decided that the Collective Agreement would not apply in December 2015, when 20% of services were provided to construction employees. However, there is no explanation as to why 20% would warrant such a result and not 40% or 45%. As a result, Sodexo submits that the Arbitrator's decision is arbitrary and not justified in relation to the relevant factual and legal constraints that bear on the decision.

[97] Sodexo notes that the decision to deduct an average of 15% for the months of May to November 2015, inclusive, bears no reasonable relationship to the uncontradicted evidence presented by Mr. Przybylowski, which set out the amount of construction activity that Sodexo employees serviced. Sodexo submits that if it was reasonable for the Arbitrator to adopt the approach of proportionality, such approach must be grounded upon the uncontradicted evidence presented during the 2017 Hearing. Continuing to compensate Sodexo bargaining unit employees at 85% of the Collective Agreement rates overcompensated the Union and its members and penalized Sodexo from a financial perspective.

[98] Sodexo submits that using the uncontradicted evidence of Mr. Przybylowski would have been equitable and have avoided compensating bargaining unit employees at construction rates for work performed in support of commercial production activities. It also says using that evidence would have stayed true to the Arbitrator's philosophy of proportionality.

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[99] Further, Sodexo also repeats its submissions with respect to the requirement of an arbitrator to pay respect to the obligation of contracting parties to perform in good faith and the analogous general organizing principle of honest and fair collective agreement administration. This would also align with the reasonable commercial expectations of the parties.

[100] On the other hand, the Union disagrees with Sodexo's submission that the Arbitrator decided to use a proportionality approach. In particular, the Union says that description is unduly formalistic and reductionist. It is reductionist because Sodexo is relying upon isolated excerpts from the reasons, divorced of context, in presenting its position as to why the decision is unreasonable. As with the issue of when the Collective Agreement ceased to apply, the Union submits that Sodexo is attempting to re-litigate findings without putting the reasons behind those findings in their appropriate setting.

[101] In order to place the Arbitrator's findings in context, the Union asks that I review the Arbitrator's chain of analysis in light of the complete record which formed the case before him, including the findings in the 2014 Award.

[102] In the 2014 Award, wages and benefits were awarded from December 18, 2013 to March 28, 2014 on the basis of all of the work assigned to the bargaining unit, including work in support of construction and non-construction activity. There was also no distinction made between those two groups in the compensation calculations made by Sodexo and provided to the Arbitrator for that time period.

[103] The Union further notes the Arbitrator ordered Sodexo to pay wages and benefits to employees for the period from March 29, 2014 to the date of the 2014 Award, and further ordered that Sodexo make wage and benefit payments to the employees, on a continuing basis, as of the date of the Arbitration Award until the conclusion of construction. All work performed by the bargaining unit fell under the Collective Agreement for that timeframe. It was the 2014 Award that was in all respects confirmed by the Newfoundland and Labrador Court of Appeal.

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[104] The Union also notes that, during the 2017 Hearing, Sodexo argued that no damages should be payable beyond April 1, 2015, since the construction phase had ceased. It did not argue for a proportional approach. Sodexo only made that submission after the Arbitrator met with counsel and advised that he was prepared to issue a bench ruling. He made it clear that he disagreed that the Collective Agreement had ceased to apply after April 1, 2015 and merely asked that counsel consider entering into a proportional settlement which recognized the extent of the construction activity that occurred in 2015. However, it was clear that the parties had issues with that approach for different reasons. As the parties could not reach a settlement on that basis, the Arbitrator then had to invite submissions and make his own determination.

[105] The Union says Sodexo has provided the Court with partial quotations only to support its assertion that the Arbitrator intended to apply a proportional approach. However, these questions need to be placed in context.

[106] In particular, Sodexo reproduced an excerpt noted above from pages 10-11 of Part 2 of the Arbitration Award in which the Arbitrator did say that "if there were construction workers on site at the completion of the construction phase in 2015 who Sodexo was now providing services for..., the CLRA collective agreement would not have applied." However, the Union notes that the Arbitrator continued as follows:

> In effect, the collective agreement would have applied only while Sodexo was providing services to the particular construction worker clients it chose to accommodate and service at its camp on site. It is possible that the end of such services might have occurred at some point prior to the completion of the construction phase. But the evidence does not make it clear when that point occurred. [Emphasis added]

[107] The Union notes that the addition of that comment is relevant as it demonstrates the Arbitrator found there was no way to determine with certainty, from the evidence, when Sodexo ceased servicing clients who were engaged in the construction work or how many construction versus non-construction workers it serviced.

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[108] The Union refers to numerous passages in the Arbitration Award demonstrating this point, including the following:

(i) The Arbitrator noted a matter "complicating an assessment" of the scope of the bargaining unit is that most construction work features a gradual decline in personnel as a project winds down toward completion. Crew numbers decrease and there is a commissioning stage, apart from construction. From the evidence, it was unclear which construction activity contractors were engaged in commissioning. As noted by the Arbitrator at pages 34-35 of Part 2 of the Arbitration Award:

> [A]ll of the foregoing adds to the complexity of determining the size of the Sodexo bargaining unit as a means of determining appropriate compensation owing for 2015.

(ii) Table 1 to Part 2 of the Arbitration Award purported to show a decrease in construction meals and non-construction meals served. The Arbitrator noted that one might expect this to have a corresponding impact on staffing levels for which no analysis had been advanced. As noted by the Arbitrator at page 36 of Part 2 of the Arbitration Award:

> ...determining how much of a decline would have occurred and when it would have occurred is not an exact science, for it is not obvious how to ascertain how much of a decrease in construction activity would actually translate into the reduction of one Sodexo bargaining unit employee.

(iii) The Arbitrator stated at pages 50-51 of Part 2 of the Arbitration Award that determining the precise point at which construction would have completely ended was not possible.

> The evidence currently available to the Arbitrator is of very little assistance in this regard, and there is considerable doubt that it can be provided.

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(iv) The Arbitrator again noted at page 57 of Part 2 of the Arbitration Award, in general, how inadequately the evidence contributed to an accurate or comprehensive determination of compensation.

[109] The Union refers to these findings as support for its position that the Arbitrator felt he could not simply adopt the evidence of Mr. Przybylowski regarding the percentages of meals served in 2015 to support construction versus production work. The Union says that it was incumbent upon the Arbitrator to do what he did, i.e., assess the evidence as a whole and on a continuum, including that from both the 2014 Hearing and 2017 Hearing, rather than rely on the evidence of a single witness.

[110] The Union says that the Arbitrator was also required to consider the quality of the evidence in determining the manner in which compensation was to be awarded. The Union says that the Arbitrator reasonably found that the evidence of Mr. Przybylowski was not of a nature or quality to lead the Arbitrator to any definitive conclusions on compensation. While the Union acknowledges that the Arbitrator felt the evidence may have been helpful, there were serious issues with the evidence, some of which were noted by the Arbitrator, as follows:

(i) Mr. Przybylowski's evidence was restricted to an approximation of meals served in 2014 and 2015. However, the bargaining unit included snow shovellers and bus drivers as well as employees providing housekeeping and janitorial services. At pages 15-16 of Part 2 of the Arbitration Award, the Arbitrator noted that additional work was omitted in the analysis performed by Mr. Przybylowski and no breakdown was provided by Sodexo at the 2017 Hearing.

(ii) Exhibits entered through Mr. Przybylowski suggested 244 construction meals for all of January 2014; 504 construction meals for all of February 2014; and no meals at all for March and April of 2014. Yet, in the evidence from other witnesses, 5,766.5 hours were worked in April 2014 which, as noted by the Arbitrator at page 17 of Part 2 of the Arbitration Award "does not jive with Mr. Przybylowski's numbers at all".

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(iii) The Arbitrator noted at page 17 of Part 2 of the Arbitration Award that, even for meals which were served, "it is obvious that Mr. Przybylowski's analysis does not provide the whole picture of Sodexo's work assignments to the bargaining unit".

(iv) In terms of lodging, evidence was also adduced through Mr. Przybylowski which suggested that Sunny Corner, a construction contractor on site, had launched its workers at the Sodexo camp on August 4, 2015. However, as noted at page 17 of Part 2 of the Arbitration Award, that evidence was in contradiction to other evidence on record, which suggested that Sunny Corner's employees were accommodated and fed at another camp.

(v) At page 18 of Part 2 of the Arbitration Award, the Arbitrator noted that Mr. Przybylowski's calculations for May 2015 contradicted the employer's assertion that predominantly production activity occurred on April 1, 2015.

(vi) At page 52 of Part 2 of the Arbitration Award, the Arbitrator noted that Mr. Przybylowski's figures seemed to suggest the number of Sodexo employees required to serve a full camp in 2015 may have been less than the number in 2014, which "seems hardly logical given the significant increase in both construction and non-construction activity on site throughout 2015".

(vii) The frailties in the evidence led the Arbitrator to conclude at pages 17-18 of Part 2 of the Arbitration Award:

> Therefore, a degree of caution is clearly advised when considering Mr. Przybylowski's analysis for the purpose of establishing a level of Sodexo support for construction activity on site in 2015.

[111] The Arbitrator also noted that Sodexo conducted its business on-site since December 2013 with no regard for the potential finding that it was bound to the Collective Agreement. This made it almost impossible to differentiate work in support of construction activity from work in support of commercial production. It was only in 2017 post-Hearing submissions on compensation that Sodexo argued

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the Arbitrator ought to apply the Collective Agreement by restricting its application to work performed solely in support of construction activity. The Arbitrator recognized this at pages 44-45 of Part 2 of the Arbitration Award in which he stated:

> Sodexo could have assigned its employees altogether differently. The Employer had the ability to accommodate all construction employees somewhere else and arrange for them to be fed by other agencies, as has been suggested was done for Sunny Corner employees at the LIM camp. It also could have considered separating a group of employees at the Sodexo camp for exclusive assignment to non-construction employees. And it could have ceased its practice of assigning everything to the bargaining unit at any time. It did none of those things. The Employer ignored the potential consequences, yet in an obvious demonstration of acknowledging those consequences, it made no suggestion during the compensation hearings that payment owing to the bargaining unit should be restricted to work performed solely for construction clients. That position was not taken until counsel for the Employer did so in post-hearing correspondence. In essence, Sodexo's practice was to assign all its work in 2014 and 2015 to bargaining unit members to whom the collective agreement applied, and it is that evidence which should be fully considered for the purpose of determining compensation owing.

[112] However, Sodexo submits that it should not be faulted for failing to parse out construction support services from non-construction support services and, generally, failing to apply the Collective Agreement for a period following the 2014 Award.

[113] Sodexo applied to this Court for judicial review of the 2014 Award. On November 19, 2014, that application was granted and the decision of the Arbitrator was vacated; meaning there was no longer a decision that the Collective Agreement applied. The Union then appealed to the Court of Appeal and it was not until September 15, 2016 that the decision of the applications judge was set aside, thereby upholding the 2014 Award. On March 9, 2017, the Supreme Court of Canada rejected the application of Sodexo for leave to appeal.

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[114] As such, Sodexo says that prior to the 2014 Award and between November 2014 and September 2016, it was of the view that the Collective Agreement did not apply. It had scheduled workers and operated its services without the need to keep track of construction versus non-construction support services.

[115] However, the Union says the Arbitrator was not finding fault in what Sodexo did but rather made a factual finding that Sodexo's decision not to comply with the Collective Agreement and its lack of record keeping left it in the position where the Arbitrator could not accept its submissions.

[116] The Union further asserts that, not only did Sodexo's approach to the 2014 Award draw no distinction between servicing construction and non-construction clients, but evidence was adduced demonstrating that it was a common industry practice, on other construction sites, for Union members to service both groups.

[117] The Arbitrator therefore did not accept the position of Sodexo that it would have separated those two groups had it known the Collective Agreement applied to services provided to both construction and non-construction workers. As the Arbitrator noted at page 50 of Part 2 of the Arbitration Award, "the best evidence of what the employer's wishes were in this regard is its own practice".

[118] The Union also says that at no time did the Arbitrator conclude that the bargaining unit should be paid at CLRA Collective Agreement rates for only the work done in support of construction activities. In particular, at page 50 of Part 2 of the Arbitration Award, the Arbitrator concluded that the bargaining unit should be paid Collective Agreement rates "for a portion of non-construction support work as well as for all of the construction activity support work it performed".

[119] As noted by the Arbitrator at page 50 of Part 2 of the Arbitration Award, to accept Sodexo's approach would require accurate records Sodexo could not produce showing work performed in support of construction activity, when, how much, and for how long it was performed, and what classifications were involved.

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[120] The Arbitrator therefore took the view that the only reasonable way to approximate compensation was to recognize the fact that all work assigned by Sodexo in 2014 and 2015 was to members of the bargaining unit and that the Collective Agreement applied. He further found at page 51 of Part 2 of the Arbitration Award that "the practice of assigning non-construction activity support work to the bargaining unit establishes the payment of collective agreement wages and benefits for such work".

[121] The Union also notes that other evidence was presented to and considered by the Arbitrator, including the evidence of a representative of Sunny Corner Enterprises. That evidence disclosed that Sodexo did not provide services to Sunny Corner's construction employees in December 2015. Extrapolated from the evidence of the meals served, as adduced by Mr. Przybylowski, it appeared the number of Sodexo camp residents carrying out construction work also declined from a high of just eight on December 1, 2015 to a low of just two by the middle of the month. I note that the Arbitrator also considered the evidence as to when JSM Electrical employees left the site in November 2015. It was on the basis of all of that evidence that the Arbitrator was able to definitively conclude there was insufficient work performed in support of construction in December of 2015 to sustain a bargaining unit.

[122] However, there was still some uncertainty about the May to November 2015 period. It was in the context of accepting that the bargaining unit should be paid for a portion of the non-construction support work, as well as the construction support work for that time period, that the Arbitrator examined Table 1 located at page 20 of Part 2 of the Arbitration Award. That table was premised on data about the number of meals served, the shortcomings of which are set out above.

[123] However, what that Table did demonstrate is that the percentage of non-construction meals served in 2014 (which was included in compensation calculations throughout 2014) was approximately 41%. For the first three months of 2015, the percentage of non-construction meals was also 41%. From May to December 2015, however, there was an increase in the proportion of non-construction meals. It was in respect of this finding that the Arbitrator concluded at page 60 of Part 2 of the Arbitration Award:

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> Therefore, in the spirit of establishing reasonably appropriate compensation owing on this two-year one-off situation long after the collective agreement ceased to apply, the arbitrator is satisfied that the Employer should not have to pay for the proportions supporting non-construction activity in 2015 assigned each month in excess in the normal average of 41%.

[124] The Arbitrator then noted at pages 62 and 63 of Part 2 of the Arbitration Award that the average percentage of non-construction meals from May to December 2015 was approximately 56%. He then concludes:

> [That] equates to an average of 15% more than the 41% calculated for the period of January 2014 through April 2015".

[125] In other words, 15% is the work in excess of the normal average of 41% for which Sodexo was to pay its employees in accordance with the 2014 Award. At page 63 of Part 2 of the Arbitration Award, the Arbitrator then deducted 15% from the damages for those eight months in 2015, to the benefit of Sodexo, to reflect the increase in non-construction meals in those months.

[126] The rationale behind this approach was explained by the Arbitrator at page 63 of Part 2 of the Arbitration Award, as follows:

> Therefore, as a matter of compensation owing, a deduction of an average 15% shall be made from the collective agreement wage and benefit calculations for all the bargaining unit employees for each of the months of May, June, July, August, September, October and November 2015.
>
> The arbitrator proposes that the parties provide a revised spreadsheet calculation for 2015 showing the amounts paid by Sodexo, the amounts payable under the collective agreement, and new columns indicating 1) 15% deduction from collective agreement calculations for each of the 8 months, May to November, and 2) final amount compensation owing. This would allow calculations as the parties have already made them, but then adjust for the 15% deductions from the collective agreement amount calculations for the months May through November 2015.

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> Hopefully, the application of a monthly 15% deduction will resolve the "nightmare" of trying to calculate percentage damages for each individual employee.

[127] The Union acknowledges that the Arbitrator's approach was not mathematically precise but was reasonable in light of the impossibility of retroactively determining a precise figure for each worker. It was also rational, coherent, and supported by the evidence. It also resulted in a deduction in Sodexo's favour which it did not see fit to include in its own calculations for the 2014 Award. The Arbitrator should be shown deference in how he fashioned a remedy.

[128] The Union refers to paragraph 178 of the decision of this Court in *Health Quest Inc. v. Arizona Heat Inc.*, 2019 NLSC 52 in which Burrage, J. stated that "precision is not the yardstick" in assessing damages. A court is entitled to use the best evidence available, provided it does not amount to pure speculation. The Union also notes that in many personal injury cases, quantifications of heads of loss include diminished earning capacity and loss of competitive advantage. Fashioning remedies for such damages requires the courts to exercise a degree of discretion in estimating the loss.

[129] The Union also refers to the Supreme Court of Canada decision in *Lewis v. Todd*, [1980] 2 S.C.R. 694. In that decision, the court noted that, in dealing with evidence as to damages presented by the parties, a court is entitled to a large measure of freedom. In particular, Dickson, J. stated at paragraph 34:

> 34 Third, the award of damages is not simply an exercise in mathematics which a Judge indulges in, leading to a "correct" global figure. The evidence of actuaries and economists is of value in arriving at a fair and just result. That evidence is of increasing importance as the niggardly approach sometimes noted in the past is abandoned, and greater amounts are awarded, in my view properly, in cases of severe personal injury or death. If the Courts are to apply basic principles of the law of damages and seek to achieve a reasonable approximation to pecuniary restitutio in integrum expert assistance is vital. But the trial Judge, who is required to make the decision, must be accorded a large measure of freedom in dealing with the evidence presented by the experts. If the figures lead to an award which in all the circumstances seems to the Judge to be inordinately high it is his duty, as I

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> conceive it, to adjust those figures downward; and in like manner to adjust them upward if they lead to what seems to be an unusually low award.

[130] The *M.A.H.C.P.* decision of the Supreme Court of Canada also discusses how arbitrators require flexibility to craft appropriate remedies. At paragraph 45, the Supreme Court of Canada noted that labour arbitrators:

> 45 ...may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized.

[131] The Union says the reality is that labour arbitrators are concerned with adjusting disputes as efficiently and expeditiously as possible in order to promote finality and foster industrial peace and stability. That is what the Arbitrator did in these circumstances.

[132] Again, I have thoroughly considered the parties' submissions on Issue 3 in light of both the arbitral record, the 2014 Award and the Arbitration Award. In doing so, I find there was nothing unreasonable or arbitrary in the manner in which the Arbitrator computed the damages award.

[133] The Arbitrator was clear in his finding that the Collective Agreement applied so long as there was sufficient construction work to support a validly operating Sodexo bargaining unit. He then carried out the exercise of thoroughly assessing all the evidence to determine the extent of construction work on site but found the evidence was not of a nature or quality to permit a surgical assessment of damages.

[134] This lack of evidence was due, in part, to Sodexo's own failure to abide by the terms of the Collective Agreement, its failure to keep proper records, and to distinguish between work carried out in support of construction versus non-construction work.

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[135] However, the Arbitrator was able to isolate enough evidence, as outlined above, including that supplied by Sodexo, from which to make a reasoned assessment of damages. There was evidence on which he could reasonably find that there was insufficient bargaining unit work in the month of December 2015 with the effect that the Collective Agreement would not have applied as of December 1, 2015.

[136] However, there was some uncertainty in pinpointing the exact time before that date when the services in support of construction declined to the point that the Collective Agreement no longer applied. He then flexibly crafted a remedy which he felt reflected a fair and reasonable estimate of compensation. He explained his approach by acknowledging that services in support of construction declined after April 2015 and went through the exercise of calculating the percentage decline, based largely upon figures supplied by Sodexo.

[137] In doing so, he took into account Sodexo's own practices, the flaws in the evidence based on Sodexo's own record keeping, and the evidence of those who had worked on construction sites.

[138] I find nothing unreasonable with this flexible and fair approach which was based on evidence, albeit evidence that was lacking in detail. While there is an element of rough justice in this approach, the Arbitrator cannot be faulted for failing to throw up his hands and demand evidence that was either not forthcoming or non-existent. In these circumstances, mathematical precision was impossible. The Arbitrator is entitled to deference in the manner in which he assessed the evidence and then fashioned a reasonable and practical remedy designed to resolve the issues in dispute.

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Issue 4: Is the decision of the Arbitrator unreasonable (i) in finding that the Union did not bear the onus of proving that shift work actually took place and identifying each employee involved, (ii) in finding that Sodexo was required to compensate the bargaining unit employees for shift differential, and (iii) in awarding a global amount for shift differential?

[139] In a finding at page 68 of Part 2 of the Arbitration Award, the Arbitrator determined that the Union did not bear the onus of proving that shift work actually took place and identifying each employee involved. In particular, he stated:

> The Union does not bear the onus of proving that shift work actually took place and identifying each employee involved. The only way the Union could provide such proof would be through the Employer's own records. Since the Employer did not establish shifts in 2014 and 2015, its payroll records do not show payments for such time worked. The Union's responsibility is to demonstrate that the collective agreement provides for shift differential premium, and that there were instances observed where the implementation of shifts should have occurred.

[140] In referring to the evidence that was actually presented on this issue, the Arbitrator stated the following at pages 69-70 of Part 2 of the Arbitration Award:

> To the extent any of the foregoing issues were violated by the Employer's practices, the Employer would be the sole beneficiary. As far as the claim for shift differential is concerned, the arbitrator is satisfied that the testimonies of John Tobin (who testified that it was because the camp was originally to accommodate the growing numbers of construction workers, like Sunny Corner, that the night shift was opened for Sodexo in 2013, and he felt the same way about the presence of construction workers during 2015), and Martine Cyr (who testified that Cleaners sometimes stayed after their shifts to clean rooms later) provide convincing indication that some shift work scheduling would have been appropriate to establish under the collective agreement for Housekeepers, Cleaners and likely some Kitchen Staff such as Sandwich Makers and Dishwashers.

[141] The Arbitrator then went on to conclude at page 70:

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> In the absence of any Employer payroll records, showing individual payments for shift differential, the arbitrator has only the Union's estimate of $102,000 to consider as a global amount owing. That estimate is accepted and it shall be apportioned among the bargaining unit employees.

[142] Sodexo submits that it was not reasonable for the Arbitrator to make a finding that the Union did not bear the onus of proving that shift work actually took place.

[143] To understand the claim for shift differential, Sodexo referred the Court to Article 9.01 of the Collective Agreement that provides as follows:

> If the company is desirous of working additional shifts, other than the regular day shift, employees shall be paid an additional 15% per hour.

[144] Sodexo says that the Arbitrator acknowledged that it did not establish shifts in 2014 and 2015 and its payroll records do not show payments for such time worked. Therefore, how could he reasonably conclude that any amount was due and owing for shift differential? While Martine Cyr testified that employees stayed after their shifts to clean rooms later, such additional hours of work would be compensated based upon the overtime provisions of the Collective Agreement. This does not imply the existence of an additional shift or an obligation to compensate employees based upon a shift differential.

[145] Sodexo submits that it is the employer's right to decide whether to implement additional shifts and, unless the employer implements such shifts, there is no entitlement to shift differential under Article 9.01.

[146] Sodexo submits that, as this issue involved a determination on an issue of fact, the Union ought to have had the onus to show, on a balance of probabilities, that Sodexo had implemented additional shifts. As the Union failed to establish the necessary facts to support a claim for shift differential, its claim should have fallen.

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[147] In fact, Sodexo says the Union only called one witness, John Tobin, to testify that he had worked on other than the day shift and it did not identify a name of an individual who was entitled to a shift differential or premium. Sodexo says the reality is that the claimed amount of $102,000 was an estimate and not based on evidence of anyone actually working a night shift.

[148] For its part, the Union says that it did provide testimony from witnesses that some of Sodexo's employees worked additional shifts. That is noted by the Arbitrator at page 98 of Part 2 of the Arbitration Award.

[149] In particular, Mr. Tobin testified that his schedule was 28 days on and 14 days off. However, he was on site at times for longer than 28 days. He also testified that a night shift was opened in 2013 to accommodate the growing number of workers, and he felt the same about the presence of construction workers in 2015. (Reference: Part 1 of the Arbitration Award, at pages 38-43). Martine Cyr also testified that cleaners sometimes stayed after their shifts to clean rooms later, which the Arbitrator found to be a convincing indication that some shift work scheduling would have been appropriate for certain types of workers (Reference: page 69 of Part 2 of the Arbitration Award). In addition to the evidence from the Union witnesses, the Union presented evidence on the quantification from its own expert accountant.

[150] The Union therefore says that the evidence of its witnesses, both factual and expert, was sufficient for it to meet its onus. In particular, it says it bore the onus to demonstrate: 1) that the Collective Agreement provided for the benefit of shift differential, and 2) that there were observed instances where the implementation of additional shifts should have occurred. In essence, the Union says it was incumbent upon it to show the fact of damage, i.e. that the Collective Agreement had not been followed.

[151] The Arbitrator reviewed the evidence and found that damages were actually payable for the shift differential. However, in terms of quantifying the loss, the Arbitrator was not in a position to do so as a result of the absence of any evidence from Sodexo. In those circumstances, the Arbitrator accepted the Union's

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accounting analysis. In particular, at page 70 of Part 2 of the Arbitration Award, the Arbitrator stated that a global amount would be appropriate:

> …because of the all-but-impossible task of determining the identity of each employee who should have been assigned to other shifts instead of reporting to work early or staying after their regular shifts to perform work at a later time.

[152] The Union says that the reason more precise information was unavailable was partially a consequence of Sodexo failing to apply the Collective Agreement, even after the 2014 Award, and its lack of detailed records of employee shift work.

[153] I have considered the parties' positions with respect to the issue of shift differential payment in light of the record and the Arbitration Award, taking into consideration the relevant legal and factual constraints. Overall, I do not find it unreasonable for the Arbitrator to have not placed the onus on Sodexo to prove that shift work actually took place and identifying each employee involved.

[154] The Arbitrator considered and recited the evidence that was provided with respect to that issue. He noted that Mr. Tobin and Ms. Cyr both provided evidence that shift work scheduling would have been appropriate considering the nature of the services provided by certain types of workers. He based this finding on the evidence that a night shift was actually opened and employees would stay after their shift to clean rooms. That evidence supported a finding that the shift work was staggered as opposed to requiring additional time at the immediate end of the regular work shift. As instructed by the Supreme Court of Canada in *Vavilov*, a reviewing court should only interfere with the factual findings of the decision-maker in exceptional circumstances.

[155] It is not unreasonable for the Arbitrator to find that the Union had met its onus by establishing the fact of harm but not each instance of harm in these circumstances. It was the employer who had the means of providing evidence on this issue through its own records but did not do so. What is critical is for the reviewing court to ensure

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that there was some evidence available to the Arbitrator, which he could and did, in fact, use to justify his conclusions.

[156] Sodexo's failure to provide this information also made it impossible for the Arbitrator to quantify damages other than relying on the estimate provided by the Union's accounting expert. Relying upon the decision of the Supreme Court of Canada in *M.A.H.C.P.*, the Arbitrator is entitled to exercise his flexible remedial authority in this instance.

Issue 5: Was the decision of the Arbitrator unreasonable in awarding overtime payment for employees who worked on Fridays?

[157] The Collective Agreement provisions relating to overtime are:

> Article 7:01
>
> The regular work week shall be Monday through Friday inclusive, consisting of five (5) eight (8) hour work days. All hours worked in excess of eight (8) hours per day shall be paid at double time the regular rate of pay or the Employer may have the option of working a compacted work schedule of Monday to Thursday inclusive, consisting of four (4) ten (10) hour days. All hours worked in excess of ten (10) hours per day shall be paid at double time the regular rate of pay.
>
> Article 7:02
>
> All hours worked on Saturday, Sunday or gazetted holidays shall be at double the regular rate of pay.
>
> Article 7:03
>
> There shall be no pyramiding of overtime.

[158] Sodexo takes the position that the above Articles contemplate a 40-hour work-week and do not provide for overtime pay on Fridays. However, at pages 38 and 39 of Part 3 of the Arbitration Award, the Arbitrator found as follows:

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> The essential bottom line is that overtime on Friday will be payable if it was the Employer's fault that employees were unable to fulfill the conditions for earning it. If the reason for employees not working the required number of regular hours was not the Employer's fault, overtime payment for work on Fridays would not be earned until sufficient hours were worked at regular rates on that day.
>
> ...
>
> Overtime for work on Friday will be payable if the Employer was at fault for not scheduling employees on Monday in accordance with the condensed work schedule in article 7:01. Also, in such cases, collateral payment for regular days not assigned to work on Monday through Thursday will be payable at employees' regular rates of pay.
>
> The Employer has some work to do to inform the Union and the arbitrator of the circumstances involved in each case where the Employer has claimed overtime should not be paid for work performed on Friday. The schedule for providing this information and receiving the Union's response is contained above.

[159] Sodexo maintains that the decision on this issue is unreasonable. The Arbitrator focused on assigning fault rather than applying the terms of the Collective Agreement to a particular set of circumstances. Sodexo says this is inconsistent with the clear provisions of the Collective Agreement and suggests a misunderstanding of the nature of Sodexo's operations and scheduling employees.

[160] Sodexo says it was entitled to set its work schedule based on work demands. Its business employs accommodation attendants, housekeepers, janitors, cooks and sandwich makers who must operate seven days a week. As such, not all employees can start work on Monday, while at the same time ensuring coverage of operations from Monday to Sunday. Further, its work schedule includes scheduling most employees for a two-week on/two-week off rotation. There were also times when employees only worked a few days a week and then left.

[161] Sodexo says it calculated overtime in accordance with the Collective Agreement based upon employees working 10-hour shifts under a compressed Monday to Thursday regular schedule. Therefore, employees were compensated at the overtime rate for all hours worked in excess of ten hours per day, for all hours worked in excess of forty hours in a week, and for all hours worked on Saturdays,

Sundays and gazetted holidays (recognizing that there would be no pyramiding for overtime as provided in Article 7:03 of the Collective Agreement).

[162] For example, where an employee worked four 10-hour shifts Monday to Thursday and also worked Friday, the employee would be compensated at the overtime rate for all hours worked on Friday. However, where an employee worked three 10-hour shifts Tuesday to Thursday, for a total of thirty hours, they would be compensated at the regular rate of pay for the first ten hours worked on Friday and at the overtime rate for any hours worked in excess of ten hours on Friday.

[163] Sodexo's position is that, as the Collective Agreement contemplates a forty-hour work week, it provided for the calculation of overtime on Friday based upon whether an employee had accumulated forty hours of work. However, the Arbitrator accepted the Union's position that any employee who worked on Friday was entitled to overtime at the rate of double their straight time rate of pay regardless of the number of hours worked in the week.

[164] Sodexo submits that that decision is unreasonable because:

(i) the language of the Collective Agreement does not lend itself to such an interpretation;

(ii) the decision with respect to overtime for work performed on Fridays had the effect of amending or adding to the Collective Agreement; and

(iii) the decision is at odds with the legal and factual context and is not supported by intelligible and rational reasoning.

[165] Sodexo also relies upon the general principle of contractual interpretation that applies to collective agreements; i.e., that arbitrators must generally begin the

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interpretative exercise by looking at the express language of the Collective Agreement viewed in its normal or ordinary sense.

[166] In particular, Sodexo relies upon the decision of Arbitrator McPhillips in *Greater Vancouver (Regional District) v. G.B.R.D.E.U.* (1999), 57 C.L.A.S. 279, 1999 CarswellBC 3677 (B.C. Arb.), at paragraph 17:

> 17 With interpretation questions, an arbitration board must begin with the express language of the collective agreement and it is the language of the agreement which is the "primary resource" in a disputed interpretation…

[167] Sodexo also refers to unreported decisions from arbitrators in this jurisdiction which have followed the same approach. In a recent decision in *W.W.R.P. Construction Employers' Association Inc. and Council of Construction Trades Inc.* (Unreported) (Browne, 2018), Arbitrator Browne made reference to the unreported decision in *Resource Development Trades Council of Newfoundland and Labrador and Long Harbour Employers' Association Inc.* (Unreported) (Oakley, 2011), at page 12 as follows:

> Arbitrator Oakley, in a recent decision, summarized these principles of interpretation as follows:
>
> > The Arbitrator has considered the principles of collective agreement interpretation that apply in this case. The principles of interpretation are discussed in Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, and include, that the object of construction is to determine the intention of the parties from the express provisions of the collective agreement (paragraph 4:2100), that the language should be viewed in this normal or ordinary sense (paragraph 4:2110), that it should be presumed that all the words used were intended to have some meaning (paragraph 4:2120), and that the language is to be interpreted within the context of the collective agreement as a whole (paragraph 4:2150) and the industrial relations practices of the parties (paragraph 4:2300).

[168] Later, at page 13 of the *W.W.R.P.* decision, Arbitrator Browne referred with approval to a Federal Labour Relations Board decision in *Canada Post Corp. v.*

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C.U.P.W. (1993), 33 C.L.A.S. 313, 39 L.A.C. (4th) 6 (Canada Arb.) (Bird), in which the arbitrator stated:

> 21. To succeed in a interpretation grievance, so as to require a party to a collective agreement to pay money, clear contractual language is required; see *Re B.C. Transit and Independent Canadian Transit Union, Local 1* (1988) 30 L.A.C. (3d) 201 (Bird), at p. 223 referring to *Re Noranda Mines Ltd. (Babine Division) and U.S.W.A., Local 898* [1982] 1 W.L.A.C. 246 (Hope) as explained in *Re B.C. Transit and I.C.T.U., Local 1,* unreported, April 14, 1987 (Larson) …

[169] Sodexo submits that the usual meaning of overtime was considered in the Nova Scotia decision in *Halifax Infirmary Hospital v. C.B.R.T. & G.W., Local 606,* 1989 CarswellNS 668, 13 C.L.A.S. (N.S. Arb.). Overtime was defined as consisting of hours of work actually performed which, because of the circumstances in which it is performed, attracts the premium rate provided in the agreement.

[170] Sodexo also references the decision of Arbitrator Marcotte in *Bingham Memorial Hospital v. C.U.P.E., Local 2558,* 20 L.A.C. (4th) 434 (Ont. Arb.), in which the arbitrator cites the common or usual meaning of overtime as stated in Webster's New Collegiate Dictionary, as follows:

> 1. time in excess of a set limit; esp. working time in excess of a standard day or a week.

[171] In that case, Arbitrator Marcotte found that the standard number of hours in a work week pursuant to the Collective Agreement was 37.5 hours. Thus, time worked in excess of 37.5 hours in a standard work week attracted overtime rates of pay.

[172] Sodexo also references the text by Mort Mitchnick and Brian Etherington, *Leading Cases on Labour Arbitration*, Second Edition, January 2018, Update No. 4 (Lancaster House), at page 23-14 in which the authors identify entitlement to overtime pay as generally falling into two patterns. Under the first type of provision, overtime rates are payable only after an employee has worked a specified number of hours per shift or per week. Under the second type of provision, overtime is payable

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in respect of any hours worked "in excess of or outside an employee's normal work day or work week, as set out in the collective agreement".

[173] An example of a collective agreement falling into the first category was that at issue in the *W.W.R.P.* decision. The arbitrator denied a grievance seeking overtime for hours worked outside of an employee's regular work schedule. The applicable article read as follows:

> 19.2 This Article is intended to identify regular hours of work, Regular Work Schedules and overtime hours:
>
> (a) The Regular Work Schedule shall consist of forty (40) hours divided into five (5) consecutive eight (8) hour work days, or four (4) consecutive ten (10) hour work days, at the option of the Contractor. The start time for the day shift for a regular work day will be between 5 a.m. and 9 a.m. Contractor shall provide the Council with 24 hours notice of any change to the Regular Work Schedule.
>
> (b) Overtime shall be paid on all hours worked in excess of forty (40) hours per week at the rate of one and one-half (1 1/2) the straight time rate of pay. Overtime shall be paid on all hours worked in excess of fifty (50) hours per week at the rate of double the straight time rate of pay.

[174] Sodexo submits that overtime under the Collective Agreement falls into the first type of provision, i.e., where overtime rates are payable only after an employee has worked a specified number of hours per shift or per week. Using that approach, with the exception of Saturday, Sunday and gazetted holidays, Sodexo would not be required to compensate an employee at the overtime rate for work on a Friday where they had not worked the prescribed number of hours in the day or week at issue.

[175] Sodexo also relies upon Donald Brown and J.M. Beatty's text, *Canadian Labour Arbitration*, 5th ed. (Carswell, 2019), section 2:1202 as support for its position that an Arbitrator cannot amend or add to an agreement. That text reads as follows:

> 2:1202 – Express prohibition against amending or adding to the agreement

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> Many collective agreements expressly provide that the arbitrator shall not "alter, amend, add to or vary" the collective agreement. The effect of including such a provision in the agreement is, however, not free from doubt. Some arbitrators have said that this provision adds nothing to the limitation that the arbitrator is confined to determining disputes arising from the interpretation, administration, application or alleged violation of the collective agreement.

[176] The Union's primary submission on the issue of overtime is that the interpretation of the Collective Agreement is a matter which falls squarely within the bailiwick of a grievance arbitrator. Further, the Arbitrator had already addressed this overtime issue, in part, in the 2014 Award which is not the subject of this review.

[177] The Union submits that the Collective Agreement was properly interpreted by the Arbitrator as providing for two types of work schedules. The regular work schedule is Monday through Friday, consisting of five, 8-hour workdays. All hours in excess of eight are paid at double-time the regular rate of pay. The second work schedule is a compressed work schedule of Monday through Thursday, consisting of four 10-hour workdays. All hours in excess of ten attract the double-time rate.

[178] Meanwhile, Article 7:02 provides that all hours worked on Saturday, Sunday and gazetted holidays are at double the regular rate of pay. The Arbitrator noted that it is more appropriate to view these days as attracting a "premium" rate than an overtime rate since they are not tied to the work week. For the purposes of compensation, however, the rate is the same: double the straight time rate of pay.

[179] Sodexo acknowledged it had scheduled its employees on the basis of 10-hour shifts, including on Fridays. It also acknowledged that all hours worked in excess of forty in a week attracted the overtime rate of pay. While not provided for in Articles 7:01 and 7:02, this was done as a matter of consent between the Union and Sodexo, as specifically noted by the Arbitrator at pages 33-34 of Part 3 of the Arbitration Award.

[180] The Union submits that Sodexo's submissions at arbitration indicated that its primary concern was with respect to situations which were not contemplated by the

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work schedule set out in the Collective Agreement, i.e. where an employee had not worked the prescribed number of hours because, for example, they worked Tuesday to Thursday, for a total of thirty hours. Sodexo also used the example of a work week starting on Friday for a particular employee. A second concern that Sodexo raised before the Arbitrator was that its employees were not construction workers and therefore would require different scheduling arrangements. Those two concerns were considered by the Arbitrator, but rejected.

[181] A third point of contention now raised by Sodexo is the Arbitrator's reference to fault. Sodexo says this focus on fault suggests the decision is unreasonable.

[182] The Union submits that all these criticisms are without merit, primarily because Sodexo's submissions fail to appreciate that it is bound to a Collective Agreement, including the two potential work schedules in that agreement. There is no schedule which begins on a Tuesday or a Friday. The language of Article 7:01 is mandatory in stating what the work week "shall" be. It then proceeds to set out what will be a regular work schedule versus a compressed work schedule.

[183] The Union submits that the Arbitrator's reference to Sodexo's "fault" is really just a reference to the employer's decision not to schedule employees to a work week starting on Monday in accordance with the condensed work schedule. In particular, the Union refers to pages 24-25 of Part 3 of the Arbitration Award as follows:

> For the purposes of this particular dispute, the arbitrator finds that the two work weeks in article 7:01 are the only work week schedules permitted by the Collective Agreement. That clause is not a mere suggestion of the work weeks the Employer may choose to utilize. Rather, it specifically prescribes what the Employer's two options are. This limitation fetters the exercise of management rights in article 3:01 viz:
>
> > Article 3:01
> >
> > The Union recognizes and acknowledges that it is the exclusive function and responsibility of the employer *subject to the terms and conditions of this agreement* to operate and manage its business in all respects in accordance with its responsibilities and commitments.

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> Since article 3:01 is subject to article 7:01 (and also to article 7:04A where security personnel are concerned), the Employer would be in violation of 7:01 if it assigned its non-security personnel employees to any other different weekly work schedule.
>
> What the foregoing means for determining compensation owed for this particular Friday overtime interpretation issue is that, in addition to payment for hours worked on Friday, collateral compensation would be involved if the Employer scheduled any employees in the past to a compressed work week in which Friday was their first day of work rather than Monday. This is so because the Employer's initial violation of the collective agreement would be that it denied such employees the rightful entitlement to work the standard 10 daily hours each on Monday, Tuesday, Wednesday and Thursday of the specified condensed work schedule. The remedy for that violation would be an award of compensation for all four (4) lost regular days.

[184] Also, the Union notes that the Arbitrator actually acknowledged the scenarios suggested by Sodexo. At page 31 of Part 4 of the Arbitration Award, he found that requiring work on a Friday when the employer chose to schedule a compressed work week would have added another day to the work week. In respect of starting on Friday and working on Tuesday to Thursday, his following response to those scenarios at page 36 of Part 3 of the Arbitration Award is coherent and intelligible.

> The Employer has indicated that its pursuit of the Friday overtime issue was raised to dispute the payment of overtime to employees who started work on a Friday and did not work the required 40 hours during the previous Monday, Tuesday, Wednesday and Thursday. For the purpose of this dispute, the arbitrator has found that employees should have been assigned to the condensed work schedule on Monday through Thursday. If employees started work on Friday instead of on Monday because the Employer failed to schedule them properly, the Employer would be in violation of article 7:01, for which loss compensation for Monday, Tuesday, Wednesday and Thursday would be payable in each case.
>
> Also, if Friday was the first day worked because the Employer failed to schedule employees in accordance with the collective agreement, the employees would also have been denied the opportunity to meet the condition enabling them to be paid overtime on Friday. Therefore, compensation for overtime pay loss at double time the regular rate of pay would be payable for hours worked on Friday in each case.

[185] The Union also asks that I place the Arbitrator's comments regarding the circumstances in which Sodexo would not follow the regular or condensed work

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schedule in context. Those comments only arose in response to concerns raised by Sodexo's counsel in submissions. They had no foundation in any of the evidence at the 2017 Hearing. In support, the Union refers to page 36 of Part 3 of the Arbitration Award:

> It should be noted that the arbitrator has not yet been provided with the specific reasons or circumstances of any employees who were found to have started work on a Friday in any work week. That information clearly must have been known by the Employer in order for it to pursue its position at arbitration. The arbitrator presently has no way of knowing whether the Employer failed to schedule the affected employees as the collective agreement required. Consequently, the Arbitrator has no means of calculating overtime payment for employees under that scenario. The Employer is directed to provide the Union and the arbitrator with the circumstances involved in each case of a Friday start.

[186] The Union also references the same text relied upon by Sodexo, namely Brown and Beatty's text, *Canadian Labour Arbitration*. At chapter 8:2100, the authors refer to overtime as being time worked outside an employer's regular schedule. The applicable excerpt is reproduced below:

> Almost all collective agreements provide that work performed outside of an employee's regular schedule must be paid at premium rates, commonly known as overtime pay. Typically, and apart from any legislative requirements, collective agreements provide that overtime rates must be paid for work performed outside of an employee's daily hours as well as for work performed within those hours which fall outside of the employee's regular work week…

[187] Overall, the Union says that the Arbitrator took a methodical and deliberate approach to analyzing the work schedule provisions in the Collective Agreement, which he then interpreted and applied to the facts and evidence before him. This care is demonstrated in his approach to defining overtime, to identifying the premium, and to his use of related provisions and precedents, including the compensation of security personnel under Article 7:04A.

[188] In turn, in assessing how to compensate employees, the Arbitrator rightfully noted that he was faced with the difficult task of retroactively applying the terms of

the Collective Agreement to work assignments which, as noted at page 17 of Part 3 of the Arbitration Award, "were deliberately not made in compliance with the agreement's provisions". The Arbitrator noted that employees ought not to be disadvantaged by Sodexo's own decision not to adhere to the Collective Agreement terms.

[189] With respect to Sodexo's submission that it was reasonable for it to create work schedules other than those found in the Collective Agreement, the Arbitrator dealt with that issue by noting that the management rights clause in the Collective Agreement is fettered by other express terms of the agreement, such as Article 7, which states what the work schedules "shall" be between the employer and the Union.

[190] Further, in placing the decision in context, the Union refers back to a finding in the 2014 Award identifying the requirement to adhere to work schedules set out in the Collective Agreement. In that initial arbitration, the Union's expert accountant provided two methods to calculate wages for the first three months of 2014. At page 36 of the 2014 Award, reproduced at page 8 of Part 3 of the Arbitration Award, the Arbitrator describes these two methods as follows:

> Scenario 1: The pay is calculated using the rates of pay applicable to each employee under the collective agreement. Overtime pay is calculated using the provisions of the collective agreement, which is all overtime pay is at double the base hourly rate. Overtime hours are determined in accordance with the terms of the collective agreement, that is, any hours worked in excess of 10 hours a day, and hours worked in excess of 40 hours in a week, and any hours worked on either a Saturday or a Sunday are overtime hours. The work week begins on Monday and ends on Sunday, in accordance with the collective agreement.
>
> Scenario 2: The pay is calculated using Sodexo Canada Ltd.'s payroll records with the only change being to modify the rates of pay to be the rates of pay specified in the collective agreement. In other words, whatever hours Sodexo Canada Ltd. paid at regular rates use the regular rates in the collective agreement and whatever hours Sodexo Canada Ltd. paid at overtime rates use the overtime rates specified in the collective agreement.

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[191] The Arbitrator exercised his discretion in accepting the second method of calculation at pages 82-83 of the 2014 Award. This gave Sodexo a four-week grace period to adjust to the new work schedule stipulated by the Collective Agreement. In doing so, the Arbitrator recognized an element of unfairness inherent in an expectation that the employer would be able to switch immediately to the Collective Agreement work schedule upon being advised of the certification order. The Union therefore submits that there should have been an expectation on Sodexo to switch to the Collective Agreement work schedules.

[192] In considering this final issue raised by Sodexo, again, I find it is inappropriate for me to interfere with the Arbitrator's decision. The interpretation of the provision of a collective agreement dealing with overtime is a matter that is regularly dealt with by arbitrators who have developed expertise in this area.

[193] Further, a review of legal principles and case law dealing with the interpretation of such provisions supports the meaning given to the provision by the Arbitrator. As recognized by Sodexo, there are generally two types of overtime provisions: (i) where overtime rates are payable only after an employee has worked a specified number of hours per shift or per week; and (ii) in respect of hours worked in excess of or outside an employee's normal work-day or work week, as set out in the collective agreement.

[194] In this instance, the Arbitrator thoroughly reviewed the provisions of the Collective Agreement and placed them in context within the entirety of the agreement. There is nothing unreasonable in his finding that Article 7:01 provided the employer with two options for scheduling employees' regular work week: i.e., either (i) five eight-hour work days from Monday through Friday, inclusive; or (ii) a compressed work week from Monday through Thursday consisting of four ten-hour days. Hours worked outside the chosen regular work schedule would be paid at overtime rates. As noted by the Arbitrator, hours worked on Saturday, Sunday or gazette holidays would attract a premium rate as they are not tied to the work week.

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[195] Having chosen the second option of scheduling a compressed work week from Monday through Thursday, Sodexo was bound to pay overtime for work performed on Friday.

[196] The language in the Collective Agreement is distinguishable from that contained in the collective agreement at issue in the *W.W.R.P.* decision reproduced above. In that case, the agreement did not specify the days of the week that would constitute a regular work week and specifically allowed the employer to change its regular work schedule. There were no mandatory schedules. The overtime provision also specifically tied overtime to the hours of work per week.

[197] In this instance, it is apparent that the thrust of Sodexo's argument is that the Collective Agreement provisions were not suitable to the reality of its workforce, comprised of camp accommodations and services workers working on a rotational basis, seven days a week. However, that does not mean the Arbitrator can ignore the wording of the Collective Agreement. He took note of Sodexo's concerns. He found that the employer had the exclusive function and responsibility to operate and manage its business in accordance with Article 3:01. However, this right is clearly stated to be subject to the terms and conditions of the Collective Agreement.

[198] While the Arbitrator may have referred to Sodexo being at fault for the manner in which it scheduled its workers, read in context, it is evident that the Arbitrator was merely expressing the view that Sodexo must bear the financial responsibility of paying employees in accordance with the Collective Agreement and the work schedule it chose.

[199] These schedules were also not made in accordance with the findings in the 2014 Award, in which the Arbitrator identified the requirement to adhere to the work schedules in the Collective Agreement. The Arbitrator further provided the employer with a four-week grace period to adjust its work schedule. It did not do so.

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[200] Overall, I find the decision on overtime is justified, transparent and intelligible. The reasons provided by the Arbitrator are internally rational and coherent. They are further supported by the legal and factual constraints that bear upon them.

CONCLUSION

[201] Having found that the decision of the Arbitrator on all issues was reasonable, the application to set aside the Arbitration Award is dismissed in its entirety.

[202] As a result, the partial stay of enforcement ordered on October 29, 2019, is lifted. I order that the solicitor for Sodexo shall apply the monies held in an interest-bearing account, together with interest thereon, against the sum due and owing pursuant to the Arbitration Award.

[203] Interest on the amount owing under the Arbitration Award shall be calculated by the accountant for the Union, and payable and allocated accordingly in accordance with the provisions of the Arbitration Award.

[204] As the Union was the successful party, I order that Sodexo pay costs to the Union in accordance with Column 3 of the Scale of Costs appended to Rule 56 of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D.

ROSALIE MCGRATH
Justice