

IN THE MATTER OF AN EXPEDITED ARBITRATION

BETWEEN:

AIR CANADA
("Air Canada" or the "Company")

AND:

IAMAW DISTRICT LODGE 140
("IAMAW" or the "Union")

(VACATION PRORATION WHILE ON CEWS)

EXPEDITED ARBITRATOR:

Corinn M. Bell, K.C.

COUNSEL:

Alexandra Meunier
for the Employer

Guillaume Lingat and
Kevin Timms
for the Union

HEARING:

February 20, 2024
Richmond, BC

DATE OF AWARD:

March 28, 2024

I. Introduction

1. The parties agree that I have the jurisdiction, further to their November 16, 2017 Memorandum of Agreement respecting expedited arbitrations of a National nature (the “MOA”), to hear this matter.
2. In March 2020, the COVID-19 Pandemic (the “Pandemic”) was declared by the Government of Canada. Shortly after that declaration, Air Canada invoked the “Force Majeure” clause in the Collective Agreement between the parties. On April 5, 2020 the Company and the Union entered into an agreement respecting the Canadian Emergency Wage Subsidy (“CEWS”) (the “CEWS Agreement”).
3. The CEWS Agreement allowed bargaining unit members to withdraw from “off duty status” and return them to payroll, pursuant to CEWS eligibility requirements. Eligible bargaining unit members that agreed to participate in CEWS were placed on inactive status with pay.
4. The Union seeks to restore the vacation pay for all its members who had their vacation pay prorated as a result of time spent on CEWS. The Union asks the Company to make all affected members whole.

II. The Collective Agreement, the CEWS Agreement and the *Canada Labour Code (RSC, 1985, C.L-2)* (the “Code”)

(i) The Collective Agreement

5. Article 20.14.09 of the Collective Agreement reads:

Employees who are on vacation at the time, will continue on such vacation with pay for the dates of the actual vacation only.

Employees whose vacations are scheduled to start after or during "off-duty status" will take such vacation with pay as scheduled. Such vacations will not be postponed or re-scheduled.

(ii) The CEWS Agreement

6. The CEWS Agreement reads:

I am writing today seeking your support for additional measures Air Canada wants to implement to address the challenges we now face and to alleviate the effects of those challenges on our employees.

As a result of the COVID-19 crisis, we have abruptly reduced our flying and operations by over 90%. Any near-term recovery is exclusively reliant on the lifting of domestic and international travel restrictions and protocols. With the exception of our efforts in repatriating Canadians and moving essential supplies, we are, effectively, "closed for business" for the next months. Furthermore, despite the fact that we had a strong balance sheet at the beginning of the year, we are depleting our available liquidity at a very significant rate amount per month, even after taking into account mitigation programs - including operating cost and capital expenditure reductions, furloughs and layoffs.

While our operations, flights and revenues have decreased by approximately 90%, we have furloughed less than 90% of our workforce thus far, keeping as many of our staff, and your members, employed as possible.

The timing of the Government of Canada's recent announcement of the Canadian Emergency Wage Subsidy ("CEWS") overlapped with our current implementation of furloughs. Given the timelines for many furloughed employees to apply for Employment Insurance ("EI"), we analyzed the new program quickly and feel that it will help alleviate the number of unemployed Air Canada staff.

Accordingly, we write today to secure your support for Air Canada's plans to implement measures to reduce the effects of the COVID-19 crisis on our employees and their families, as follows:

1. Subject to applicable legislation adopting CEWS, Air Canada plans to return to payroll or keep on payroll for the duration of the CEWS program all employees who, as a result of the COVID-19 crisis, are or may, after today, be placed on off-duty status, lay-off status or who have been furloughed since March 15, 2020 (together the "Furloughed Employees"). As there is no work for

these employees to perform, they will not be required in the workplace, unless otherwise directed by their manager. Air Canada will pay each of the Furloughed Employees 75% of the hourly wage rate earned immediately prior to their being placed on off-duty status, being placed on laid-off status or being furloughed, exclusive of overtime and premiums, up to a maximum of \$847 per week, and based on 40 hours per work week for full time employees and, where applicable, 20 hours per week for part time employees (the "CEWS Wages"). No other compensation provided for in the applicable collective agreement or Air Canada policies will be paid for the time the CEWS Wages are paid to the Furloughed Employees, except as described in point 2, below.

2. While receiving CEWS Wages, Furloughed Employees will also participate in applicable benefit plans, including health and pensions plans, and Furloughed Employees will continue paying the contributions required according to those plans.
3. The payment of CEWS Wages will cease on the earlier of June 6, 2020, or when the employee is recalled to regular employment. Accordingly, Air Canada will continue mitigation discussions as required by individual collective agreements over the coming weeks in case mitigation is needed later. If Air Canada's operational needs do not justify recalling all Furloughed Employees by June 6, 2020, the off-duty, lay-off or furlough status and processes, as applicable, of the Furloughed Employees who then remain surplus to our needs will continue, from where they stand today without further notice. All time limits and periods applicable to off-duty status, lay-off and furlough processes and mitigation discussions are suspended effective when the first Furloughed Employees are returned to payroll and until June 6, 2020. Should there be surplus employees as of June 6, 2020, these processes, time limits and periods will resume running from where they left off, but otherwise as if they had not been interrupted.
4. Accordingly, and most importantly, while receiving CEWS Wages, Furloughed Employees' employment continues. While they may be granted the new Covid-19

Leave recently added to the Canada Labour Code and the Canada Emergency Response Benefit (CERB) or other leaves if they are eligible, while receiving CEWS Wages they are not eligible for the CERB, or severance or termination payments under their collective agreement, Air Canada policies, or applicable laws, including the Canada Labour Code. When leave concludes for employees currently on leave, they will be treated as all other Furloughed Employees, unless their seniority and the applicable collective agreement permits "bumping" and a return to regular employment in which case the employee they "bump" will be treated as all other Furloughed Employees are according to this letter.

Air Canada fully supports facilitating participation in the CEWS program, given the many benefits to employees, including avoidance of waiting for EI benefits or other government payments and preserving access to the company's benefit plans during this period. But most importantly, it will help alleviate anxiety and improve personal finances during this pandemic crisis.

For your information, due to taking the actions described above, Air Canada will incur an additional \$5M per month in payroll taxes (\$15M over the term of the program), as well as higher benefit costs compared to not participating in the CEWS program. Nonetheless, we believe CEWS program is the right thing to do for our Furloughed Employees.

As the CEWS program is helpful, but not enough to stabilize the substantial loss of Air Canada's revenues, we expect that the leadership of your union will support our efforts to secure government relief from the effects of the Covid-19 crisis. We also ask that we review your messages to employees about the actions described in this letter and about further government relief we may seek before they are sent.

The CEWS is an exceptional program offered by the Federal Government. Air Canada is doing its part to support the government's efforts to minimize the financial and economic impacts of the COVID-19 crisis and is prepared to adopt the CEWS. However, we must underline that this program is unique and as such we require your agreement that it will not be invoked as a precedent or otherwise to Air Canada's prejudice

in future negotiations, consultations, discussions or interest or rights arbitrations, or in any other context.

Lastly, Air Canada intends to return the Furloughed Employees to payroll as soon as possible to avoid an interruption in their earnings. Accordingly, we ask that you indicate your agreement with the above by signing below and returning a signed copy of this letter to my office no later than 1700 Eastern Time, April 6, 2020.

(iii) The Code

7. Sections 184 and 184.01 of the *Code* reads:

Annual vacation with pay

184 Except as otherwise provided by or under this Division, in respect of every year of employment by an employer, every employee is entitled to and shall be granted a vacation with vacation pay of

- (a) at least two weeks if they have completed at least one year of employment;
- (b) at least three weeks if they have completed at least five consecutive years of employment with the same employer; and
- (c) at least four weeks if they have completed at least 10 consecutive years of employment with the same employer.

Calculation of vacation pay

184.01 An employee is entitled to vacation pay equal to:

- (a) 4% of their wages during the year of employment in respect of which they are entitled to the vacation;
- (b) 6% of their wages during the year of employment in respect of which they are entitled to the vacation, if they have completed at least five consecutive years of employment with the same employer; and
- (c) 8% of their wages during the year of employment in respect of which they are entitled to the vacation, if they have completed at least 10 consecutive years of employment with the same employer.

III. Positions of the Parties

8. Both parties provided thorough written submissions. In the arbitration hearing, the written submissions were fully canvassed, highlighting certain documents and legislation.

(i) The Union

9. The crux of the Union's position is captured in paras. 17-25 of its written submissions which read as follows:

The agreement signed on April 5th, 2020, between Arielle Meloul-Wechsler and Fred Hospes, provides no modification to the collective agreement with respect to ODS or Vacation entitlements.

Furthermore, in the April 5th, 2020, agreement, line 3 of the agreement clearly established that all time limits and periods applicable to "Off Duty Status", lay-off, and furlough and mitigation discussions were suspended effective when the first person was furloughed, and employees are returned to the payroll until June 6th, 2020.

At any point, an employee could be returned to the workplace should the workload increase, as this was not viewed as a leave or vacation.

Further to lines 12 and 13 of the Union's brief, Michael Abott (Managing Director of Air Canada Labor Relations now Vice President of Labor Relations) goes on to explain that to be able to comply with the government's emergency wage subsidy programs, the members will have to be taken off ODS and their employment continues.

The letter signed by Arielle Meloul-Wechsler), also referenced online 2, continues to explain that the employees will continue to participate in applicable benefit plans, including health and pension plans. This denotation is quite clear that it is inclusive of benefits but does not exclude any other benefits such as vacation accrual.

The letters from Arielle Meloul-Wechsler and Michael Abbot both clearly explain that employees benefiting from the CEWS program would be taken off ODS and benefits were to continue.

The further extension of the CEWS program at the end of May 2020 continues with the same language with regards to benefits, company and Union Seniority and do not in any way suggest any exemption to halt allowable time to account for vacation accrual).

Per the Collective Bargaining Agreement (the CBA), vacation accrual and entitlement are driven solely by an employee's company service date.

Further supporting the Union's position, the Federal Labor Code's rules and regulations regarding the annual vacations and general holidays for Federally regulated employers clearly states the following:

Calculating annual vacation pay

Your vacation pay is calculated as a percentage of the gross wages that you earn during your "year of employment". When your vacation is:

- *2 weeks; vacation pay is 4% of earnings,*
- *3 weeks; vacation pay is 6% of earnings, and*
- *4 weeks; vacation pay is 8% of earnings*

10. At the end of its written submission, the Union concludes as follows:

The Union is of the opinion that the question of vacation accrual with regards to the CBA, agreements, correspondences between the company and the Union, the Canada Labor Code, and the Government of Canada rules and regulations for CEWS do not show any type of exemption to this benefit.

In every letter that was sent to the Union and the documents that were signed between the two parties, should one of the parties, and in this case the Company, wanted to exempt/modify a specific benefit, the company had the responsibility and obligation to make this fact specifically clear under the doctrine of "contra proferentem" as the party who drafted the agreements. As is clear, none of the agreements

provided have made any such demand or even remotely alluded to this as being a condition of agreement.

The employees placed on the CEWS program were taken off “Off Duty Status” as to allow their employment to continue per Michael Abbott’s and Arielle Meloul’s letters. Furthermore, should the workload increase, employees would have been held liable to return to work within 72 hours, essentially placing them in a holding pattern on standby. As such, the time away from work in receipt of the CEWS payments could not be viewed as paid time off and/or vacation. Taking that into consideration, unless otherwise agreed to, since their employment was to continue with their Union and Company seniority (Company seniority drives the vacation entitlement of an employee), the vacation benefits must continue and must include all wages earned under the gainful employment of Air Canada and to be in compliance with the Canada Labor Code.

11. In the alternative, the Union submits that the vacation pay entitlements provided for in s. 184 of the *Code* ought to be applied.

(ii) The Company

12. The Company disputes that there has been any violation to the Collective Agreement in this case.

13. The Company asserts that the vacation pay provided to employees who were in receipt of CEWS accounts for the period of inactive status. Its argument has four main aspects:

- (i) There is a distinction in the *Code* and Company policy between vacation entitlement and vacation pay.

Here, employee entitlement remained unchanged, but vacation pay was properly prorated.

- (ii) “Wages” is a key element to vacation pay entitlements in both the *Code* and Company Policy.

CEWS is not wages. Rather it is a subsidy created by the federal government in response to the Pandemic.

- (iii) Employees on CEWS were not performing work for wages. They were placed back on payroll but returned to inactive service.
 - (iv) The Union agreed to this proration of vacation pay in the CEWS Agreement and points to paragraphs 1 and 2.
14. On April 11, 2020, the Company provided a “Questions and Answers-CEWS Inactive Status (IAMAW\FAQ email (“Company FAQ”) to all bargaining unit employees on April 11, 2020.

Question 23 of the FAQ reads:

Q23. Will my vacation entitlement be impacted by my inactive status?

A23. You will be eligible for your full vacation entitlement; however, you will only receive vacation pay for the prorated portion of the year that you were on active duty status. The time spent in receipt of CEWS wages will not have an impact on your vacation accrual. Please refer to the Vacation Policy on HR Connex under Policies and Forms > Forms and Reference Documents > HR Policies and Programs > HR policy – Vacation.

15. The Company concludes as follows in its written submissions:

The letter sent by Arielle Melloul-Weschler on April 5, 2020 was clear. Employees electing to receive CEWS would not be entitled to any other compensation provided for in the applicable collective agreement or in Air Canada policies for the time they would be in receipt of CEWS. Then IAMAW President Fred Hospes accepted Air Canada’s proposal by signing and returning the letter.

While on CEWS, Employees were in receipt of a subsidy. They were on inactive status, not working and were not in receipt of wages.

Air Canada was simply a third party transferring the subsidies it was receiving from the Government of Canada to employees who had elected to participate in the CEWS program.

Accordingly, because no wages were paid during that period, no wages could be calculated for the purposes of calculating vacation pay.

Vacation time is distinguished from vacation pay both in the Code and in Air Canada's Vacation Policy. While vacation time was not impacted by CEWS, vacation pay was impacted by the fact that employees did not received wages for that period.

The Company did not violate the collective agreement. The grievance must be dismissed.

IV. DECISION

16. There is no doubt that the Pandemic had a devastating impact on the airline industry.
17. The CEWS Agreement, signed by both Parties, was an impressively timely response to the federal CEWS legislation.
18. The Union submits that the "applicable benefits plans" referred to in the CEWS Agreement includes vacation pay. I have reviewed all the documents presented at the hearing, including the CEWS Frequently asked questions – Canada Emergency Wage Subsidy (CEWS) comprehensive document, submitted by the Union. Given the plain wording of the CEWS Agreement and the underlying intent of the CEWS legislation, I conclude that vacation pay was not included in the CEWS Agreement.
19. This conclusion is supported by the Company FAQ that followed only a few days after the Parties signed the CEWS Agreement. While I accept that the Company FAQ was not negotiated with the Union, there is no evidence that the Union disputed or questioned the Company's position respecting vacation pay after the Company FAQ was widely distributed.

20. CEWS were clearly government subsidies, provided in this case to bargaining unit employees who were agreeing to return to payroll. These employees were placed on inactive service. I cannot conclude that the payments were wages for the purpose of the *Code* or Company Policy. This understanding is reiterated in the Will-say statement of John Beveridge, Senior Director of Labour Relations at Air Canada.

21. In these very unique circumstances I cannot find a violation of the Collective Agreement. This grievance is dismissed.

It is so ordered.

DATED at Kamloops, BC this 28th day of March, 2024.



Corinn M. Bell, K.C.