THE OTTAWA-CARLETON PUBLIC EMPLOYEES' UNION, LOCAL 503

(the Union)

AND

THE CORPORATION OF THE CITY OF OTTAWA

(the Employer)

Before: Joseph W. Potter, Arbitrator

For the Union: John McLuckie, Counsel

For the Employer: Margaret-Marie Steele, Counsel

HEARD AT OTTAWA, ONTARIO, OCTOBER 7, 2005, AND JANUARY 20, ARPIL 20 AND 27, 2006.

Introduction

[1] This policy grievance, dated July 7, 2005, pits the obligations of the *Employment Standards Act, 2000* (*ESA*) against the collective agreement provisions with respect to the issue of meal breaks for paramedics.

[2] More specifically, the grievance alleges that section 20 of the *ESA* "…requires the City to ensure that no employee works more than five consecutive hours without receiving an uninterrupted eating period of at least one-half hour in duration" (Exhibit U-1).

[3] Alternatively, the grievance states that: "…the City has failed to meet its obligation to use 'best efforts' as required by Article 31.2(c)(iii) to ensure that all paramedics employed by the City are provided with uninterrupted eating periods during the course of their shifts."

[4] As remedy, declaratory relief was requested, stating that the Employer breached the *ESA* as well as the collective agreement. Furthermore, the Union sought the issuance of an order directing that the Employer ensure that paramedics receive uninterrupted eating periods of one-half hour for each five consecutive hour work period.

[5] Damages were also sought for all paramedics deprived of their eating periods. The amount sought was 2.5 times the employee's hourly rate of pay for all eating periods that were either missed or interrupted.

[6] At the commencement of the hearing, the Employer took the position that the collective agreement provided a greater benefit than the *ESA*. As a consequence, the provisions of section 20 of the *ESA* did not apply.

[7] Also at the outset of the hearing, the Employer, with the Union's consent, tabled a letter dated September 20, 2005, from the Ministry of Labour, Employment and Labour Policy Branch (Exhibit E-1). The letter was addressed to Anthony DiMonte, Chief, Ottawa Paramedic Service. The letter refers to consultations that took place between the Ministry of Labour and City of Ottawa officials concerning the provision of meal breaks for paramedics. The letter was twofold. It outlined the current entitlement under the *ESA* and a "Proposed Special Rule for Paramedic Eating Periods".

[8] Although the document is labeled "Confidential", there was no dispute both sides were aware of it. Part I of the document states:

Confidential
Ministry of Labour

Proposed Regulation Governing Eating Periods for Paramedics

1. Current Eating Period entitlement under the *Employment Standards Act 2000*, Section 20:

- Subsection 20(1) states that "An employer shall give an employee an eating period of at least 30 minutes at intervals that will result in the employee working no more than five consecutive hours without an eating period."

- Subsection 20(2) provides that, if the employer and employee agree, the employee may instead be given two eating periods that together total at least 30 minutes in each period of five consecutive hours.

Therefore, paramedics are currently entitled to a 30-minute eating period for every 5 hours of work. On an eight-hour shift, the paramedic is entitled to a 30-minute break (could be taken as one or two breaks); on a 12-hour shift s/he is entitled to two 30-minute breaks.

Currently, MOL operational policy is that the meal break can be interrupted for work and the employer can designate where the break be taken and require that the employee be available. Unless the employee receives an uninterrupted and clear 30 minutes he or she is not considered to have received their eating period entitlement (e.g. if a 30-minute break is interrupted after 10 minutes, the employer must re-schedule the full 30-minute break within the five hour window).

[Emphasis in the original]

[9] Part 2 of the letter outlined the proposed special rule for paramedics, but it is not germane to these proceedings.

Evidence

[10] The provision of the ambulance service was downloaded from the provincial government to the City of Ottawa in January 2001. The service is provided by paramedics and prior to the download, these employees were specifically exempt from the provisions of the *ESA*. No such specific exemption was made following the download.

[11] Mr. DiMonte was hired to oversee the download, and he began as Chief in December 2000. He explained that when he arrived the City of Ottawa operated what was termed a "level of effort" ambulance service. There was no dispute that it was a very poor performing service, with performance-based measurements being non-existent.

[12] Brian Moloughney, a City of Ottawa paramedic, explained that while under provincial jurisdiction paramedics would bring their meal to work and put it in a refrigerator at their home base location. It was hoped that there would be some time to take their meal during their shift, but the witness stated that it was not always possible to do so.

[13] Once it was known that the download was to occur, the City of Ottawa hired a consultant to look at the existing service and make recommendations on a new one. Currently, the City of Ottawa operates what is termed a "dynamic deployment model". Specific response times were set consisting of 8:59 minutes for high density areas and 15:59 minutes for low density areas. The evidence indicated that these response times provide the maximum opportunity for saving lives, given the resources available.

[14] In order to meet these performance targets, ambulances no longer return to a home base. Instead, the dispatch unit sends the ambulance to an area in need of their availability in accordance with a predetermined deployment plan.

[15] Myles Cassidy is the Deputy Chief, Communications, with the paramedic service and is in charge of the Dispatch Centre. He explained that the Dispatch Centre handles all emergency "911" calls and dispatches the appropriate vehicle(s) as necessary.

[16] For the most part, paramedics work a 12-hour shift and they receive, on average, three to five calls per shift lasting one to one and a half hours each. Mr. Moloughney explained that in order to receive a meal break, the paramedic would contact the Dispatch Centre and request a post for lunch. The granting of such a request was dependent on the number of vehicles available. If the request was granted and a call came in during the break, the call had to be responded to.

[17] Mr. Cassidy responded that the deployment plan (Exhibit E-3) outlines how communications officers deal with meal breaks. At page 5 of the document it states:

> LUNCH PROCESS
>
> Communications will use best efforts to assign a 30-minute eating period within every 5-hour period of an assigned vehicle shift. Crews remain available for emergency calls during this period.

[18] The paramedic crews are asked by dispatch to state their preference for going to a post for lunch. Mr. Cassidy testified that, generally, the crew are either sent to that post or they remain mobile. Once the post is assigned, the crews are given time to travel to the post and pick up their meal. Upon arrival at the post, 30 minutes are given to the crews by dispatch for the

meal break. It was acknowledged, however, that during this entire time crews remain available for "Code 3 or 4" calls (higher priority). If a call comes in, the meal is interrupted.

[19] Marc Ouimet is a paramedic with the City of Ottawa, and has been for some 25 years. In his estimation, he gets a meal break about 50 percent of the time; of those he gets, about 70 percent are interrupted by a call.

[20] In order to examine the issue of scheduling crews, the Employer established a scheduling working committee. The committee's primary mandate is to address the issue of response times and recommendations are made to alter shift times if problems exist with the response times. The goal is to reduce response times. Mr. Ouimet participates on this committee.

[21] The committee designs various shifts, although in doing so meal breaks are not a consideration. Mr. Ouimet did acknowledge that a number of different shift models have been looked at to address the meal break issue, including the introduction of an eight-hour shift. None of these models have been implemented.

[22] In looking at various shift models, the committee had to keep in mind a change that occurred in 2002; namely, that no longer could two vehicles be in the same place at the same time. This was done to further decrease response times.

[23] In an effort to determine the frequency of providing meal breaks, the City collected data from July 11 to August 12, 2005 (Exhibit U-14). The data showed when the first break took place in relation to the commencement of an employee's shift. It indicated that just over 60 percent of the crews were able to take a meal break within the first five hours of their shift commencing.

[24] The daily statistic sheets from July 18 to 31, 2005 were also introduced (Exhibits U-16 to U-29, inclusive). Mr. Cassidy testified that these documents show the shift times of the assigned crew and when their scheduled break should occur. The documents also show when the break actually occurred. This is the document dispatch uses to trigger the meal break and record the time actually taken. The witness acknowledged that a number of crews were assigned a break outside the five-hour window, but stated that crews could have a break before the one actually assigned, during their downtime.

[25] Following the completion of his testimony, Mr. Cassidy was recalled to further explain the data showing shift times and the actual assigned meal breaks. For those crews that worked July 18 and 19, 2005, and received a meal break outside the first five hours of the commencement of their shift, their call assignments throughout the shift were reviewed (Exhibits E-5 to E-8). The data shows where each crew was throughout their shift, the calls each

received and the time spent on each call. The data also summarizes the total downtime each crew had on each shift. The data on the downtime varied significantly between crews, from as little as 19 minutes to over four hours, with a variety in between.

[26] Mr. Cassidy stated that during this downtime, employees are free to eat at the post if they wish. He acknowledged that they would remain available for work if a call came in. He also explained that when a crew receives a call, they have to be mobile within 90 seconds of receiving the call. Since the calls cannot be predetermined, the crews must be ready to respond when a call comes in.

[27] During the downtime, the employees could be doing paperwork or other duties. Mr. Cassidy acknowledged the data does not indicate whether work was being done during this downtime.

[28] The Chief, Mr. DiMonte, stated that meal breaks were a very difficult and potentially explosive issue. The high performance model had been approved by City Council and target response times had been established in order to increase the likelihood of saving lives. Prior to the download, the service was exempt from the provisions of the *ESA*, but not so now. This, according to the Chief, made no sense. Nor did it make sense to take vehicles off the board or have two vehicles at the same location in order to increase the likelihood of paramedics getting meal breaks. The focus of the job is on saving lives and those two suggestions take away from that focus.

[29] None of the witnesses who testified disputed the fact that no matter what was done, nothing could guarantee, with 100 percent certainty, that paramedics could get a 30-minute meal break every shift.

Arguments

For the Union

[30] There is no question that the service in existence now is much improved from that which existed before the download took place. Funding has increased, and response times of ambulances have decreased. However, it is the Union's position that, at least in part, employees themselves are paying for this improved service. Employees are expected to be working at all times and must be ready to respond to a call within 90 seconds of receiving it. There is no dispute that employees never have a time when they know they will have the next 30 minutes off work.

[31] Before the download took place, there was no movement from post to post like there is currently. Also, in the past, two vehicles could be at the same place at the same time. This is not so today. In the new system, meal breaks are harder to get.

[32] The evidence was uncontradicted that the Employer did not provide employees with an uninterrupted break within five hours of the commencement of the employee's shift.

[33] What best efforts has the Employer made to provide meal breaks? Firstly, there are no reports on when breaks that did occur, were interrupted. No one knows. There is no specific individual responsible in dispatch for ensuring crews get their meal breaks. Operationally, two vehicles are no longer allowed at the same post at the same time, nor does the Employer take vehicles off the board to ensure an uninterrupted meal break.

[34] The Employer also acknowledged that it had attempted to get the Ministry of Labour to change the law insofar as the applicability of the *ESA* is concerned, but without success. The law is the law, and the Employer has to comply.

[35] Mr. DiMonte recognized it would be politically unpalatable to have any additional resources cover meal breaks. Any new resources, he said, would go to further reducing response times.

[36] The statutory mandate as detailed in section 20(2) of the *ESA* is clear: employees are to be provided with a meal break. This is a remedial piece of legislation and, as such, exceptions are to be read narrowly.

[37] The *ESA* was intended to ensure that, at a minimum, every five hours at work employees would receive 30 minutes to relax and have a meal.

[38] In section 6 of the Regulations, the word "work" is defined. Under this definition, there can be no doubt that the entire shift for the paramedics must be considered work. Therefore, no time in the shift could be considered as an eating period within the meaning of the *Act*.

[39] The Employer also argued that a better benefit exists in the collective agreement; therefore the *ESA* does not apply. Is just paying for the meal break a better benefit? The case law suggests just paying for the time cannot be the same as time off. In order to compare the two benefits, one must compare "apples to apples", not "apples to oranges". The Employer says the greater benefit is pay, but the *ESA* talks about time off. They are not the same.

[40] Furthermore, the Ministry of Labour itself has said that the employees have to be given 30 minutes free from interruption in its September 20, 2005 letter to Chief DiMonte.

[41] Little, if anything, has been done to ensure best efforts have been made to see that employees get a meal break. It is clear that clause 31(2)(c)(iii) has not been complied with.

[42] In terms of compensation, the Union requests either money or time off from the date of the grievance until the date of the decision for every crew, for every shift. No one ever had an uninterrupted 30-minute meal break.

[43] The Union submitted the following case law: Espanola Taxi (1989) Ltd. v. John R. Good, E. Robert Unger and Ministry of Labour, [2002] O.E.S.A.D. No. 181 (Brown); Ontario Inc. o/a Acura 2000 v. Christopher Masoure and Ministry of Labour (1998), (Sargeant); Filet of Sole Sea Grill Ltd. (c.o.b. Fred's Not Here Steakhouse & Grill), [2003] O.E.S.A.D. No. 93 (Trachuk); Re Norampac Inc. v. Independent Paperworkers of Canada (2002), 73 C.L.A.S. 70 (MacDowell); Re McKesson Canada v. Teamsters Chemical Energy and Allied Workers, Local 424 (2004), 130 L.A.C. (4th) 34 (Reilly); Re Al's Steak House v. Ministry of Labour and Cathy McGrath, [1995] O.E.S.A.D. No. 180 (Palumbo); and Toronto Transit Commission v. Amalgamated Transit Union, Local 113 (Scheduling Grievance), [2003] O.L.A.A. No. 391 (Springate).

For the Employer

[44] The Employer's position is that they provide a greater benefit in the collective agreement than exists in the *ESA*. In the alternative, the Employer submits that the *ESA* permits work to be performed during the meal period by virtue of section 21. Furthermore, there is no requirement anywhere for an uninterrupted meal period.

[45] Historically, the Employer has used, and continues to use, best efforts in securing the cooperation from the Dispatch Centre to see that employees receive a meal break. However, it is acknowledged that there may be times when crews cannot get a meal period.

[46] The City operates what is known as a hybrid performance model. In a pure high performance model, paramedics would be totally mobile, going from street corner to street corner. In this hybrid model, the Employer has built posts to provide paramedics with a fixed location to rest during downtime.

[47] The response times of 8:59 minutes and 15:59 minutes are internationally recognized standards. A patient has greater survivability if the response time is within these parameters. This saves City of Ottawa residents' lives. Anything that alters these response times has a direct relationship to saving lives.

[48] All the witnesses agreed it was impossible to expect a meal break every five hours on every shift. That is why the Employer negotiated collective agreement language to deal with meal breaks. The Employer pays employees for their breaks.

[49] The collective agreement does not guarantee meal breaks, uninterrupted or otherwise. There is no absolute entitlement to a meal break. In fact, the collective agreement recognizes paramedics may miss a meal period so they get paid whether or not they get their meal period.

[50] The collective agreement language was negotiated after the download occurred. It was negotiated to provide a greater benefit than the *ESA* for paramedics.

[51] Best efforts have been made to provide meal breaks and will continue. Attempts are made to match dispatchers with crews in order to foster a good working relationship and this facilitates the securing of meal breaks. The Dispatch Centre attempts to get employees to a post and their travel time is not factored into the 30 minutes. Also, a scheduling committee has been formed, with representation from paramedics, to look at scheduling issues.

[52] The paramedics should call in to request a break during their downtime. The average shift has three to five calls with each lasting, on average, one to one and a half hours. Over the course of a 12-hour shift, there is some downtime.

[53] Section 20 of the *ESA* refers to an "eating period" and not a break. The Employer's position is that this section requires the Employer to provide an opportunity to eat during the five-hour window. The *ESA* permits a meal period to be taken while at work.

[54] Section 21 of the *ESA* states:

> An employer is not required to pay an employee for an eating period in which work is not being performed....

[55] The Employer states that the converse is also true; namely, the Employer is required to pay an employee for an eating period in which work is being performed. That is precisely what the collective agreement provides.

[56] If the legislature had intended it to be a break away from work, they would have written the word "break". They have not done so, and the words have to be given their proper meaning.

[57] What then is a meal period? It is an opportunity during a five-hour period to eat. The Ministry of Labour order for Frontenac supports this position (Exhibit U-15).

[58] Section 5(2) of the *ESA* states:

> If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.

[59] The minimum standard of the *ESA* is an unpaid 30-minute meal break given when and where the Employer directs. The Employer, in this case, pays the paramedics whether they get a break or not. They get this payment while on annual leave or sick leave, and it is all pensionable. The Employer feels it is a greater benefit.

[60] No matter what suggestions were put in place, the fact is nothing can guarantee that all paramedics will get a meal break every shift. It is simply not possible to do so, given the nature of the job.

[61] The Employer submitted the following case law: Ontario Secondary School Teachers' Federation v. Upper Canada District School Board et al. (2005), 78 O.R. (3d) 194; GO Transit v. Amalgamated Transit Union, Local 1587 (Holiday Pay Grievance), [2000] O.L.A.A. No. 486 (Goodfellow); Toronto Transit Commission v. Amalgamated Transit Union, Local 113 (Scheduling Grievance), [2003] O.L.A.A. No. 391 (Springate); Re Toronto Transit Commission v. Amalgamated Transit Union, Local 113 (2004), 76 C.L.A.S. 175 (Burkett); Re McKesson Canada v. Teamsters Chemical Energy and Allied Workers, Local 424 (2004), 130 L.A.C. (4th) 34 (Reilly); Re Norampac Inc. v. Independent Paperworkers of Canada (2002), 73 C.L.A.S. 70 (MacDowell); Labatt Breweries of Ontario v. Brewery, General and Professional Workers' Union (Double Shift Grievance), [2005] O.L.A.A. No. 252 (Raymond); Labatt Breweries of Ontario v. Service Employees International Union, Local 2.ON, Brewery, General and Professional Workers' Union Branch Local 1 (2005) (unreported) (Raymond); Columbia Forest Products v. United Steel Workers (Formerly IWA) Local I-2693 (2006) (unreported) (Carrier); First Bus Canada Ltd. v. Amalgamated Transit Union, Local 279 (2004) (unreported) (Starkman); and Re Ottawa Civic Hospital v. Retail Wholesale Canada, Local 414 (1996), 61 L.A.C. (4th) 101.

Rebuttal

[62] The Ministry of Labour's own letter to the Employer, dated September 20, 2005, refers to an "uninterrupted and clear 30 minutes". Arbitrators are bound to consider the *ESA*'s policies and this is the Ministry's policy.

[63] The case law referred to by the City relates to hours of work. Here it is time off versus pay. The two cannot be compared insofar as a greater benefit is concerned.

[64] The law is clear that employees get a break. The Ministry of Labour's own correspondence supports this. If the Employer was convinced of its argument, why engage in a consultation process seeking an exemption?

Reasons for Decision

[65] The Union's policy grievance has essentially raised two issues. Firstly, the Union contends that the Employer has violated section 20 of the *ESA* by requiring paramedics to remain on call throughout their entire shift, thus not being able to receive an uninterrupted eating period of at least one-half hour. The Employer contends that section 20 of the *ESA* does not apply in this situation because the negotiated benefit at clause 31(2)(c) of the parties collective agreement provides a greater benefit. Such a greater benefit would invoke the provisions of section 5 of the *ESA*, which allow a greater benefit in the collective to supersede the provisions of the *ESA*. In the alternative, the Employer stated that the *ESA* permits work to be done during the meal period by virtue of section 21 of the *ESA*.

[66] The second issue raised in the policy grievance is an alternative position. The Union stated that the Employer has violated the provisions of clause 31(2)(c)(iii) by not ensuring that "best efforts" have been made to provide a meal break for paramedics. The Employer contends it made "best efforts"; consequently, there is no violation.

[67] I will deal with the Union's alternative argument first; namely, an alleged violation of clause 31(2)(c)(iii) of the collective agreement. The clause reads as follows:

> The Employer agrees to use best efforts in attempting to secure cooperation from the Ambulance Dispatch Centre in order to ensure all employees are given uninterrupted eating periods. The Union recognizes that the actual dispatching of ambulances is controlled by the Ambulance Dispatch Centre and as such is beyond the control of the Employer. In light of the above, it is recognized that there may be occasions where it is not possible for ambulance crews to be provided with the above-noted breaks.

[68] The Union stated that the data clearly shows that there are a great many occasions when paramedics are not given time to have a meal break. Furthermore, on many occasions when they did get a break, it was interrupted. The employees are always on call and must be ready to roll within 90 seconds of receiving a call.

[69] In order to find there was a violation of the collective agreement, I would need more specific evidence concerning the events surrounding the actual shift where an uninterrupted eating period did not occur. The data provided by the Union (Exhibit U-14) indicates that about 60 percent of the time the paramedic crews are given a break within the first five hours of the commencement of their shift. No evidence was led as to whether these breaks were uninterrupted or not. If they were interrupted, I simply do not know what efforts were made to avoid the interruption, if any. With respect to the remaining 40 percent that did not get a break within the first five hours of the commencement of their shift, I have no evidence in front of me as to what, if any, efforts were made to provide them with a break.

[70] In light of this, I am not prepared to conclude that there has been a violation of clause 31(2)(c)(iii) of the collective agreement, and this aspect of the grievance is dismissed.

[71] The second issue I will address is, for all intents and purposes, the main thrust of the Union's policy grievance, and that is the alleged violation of section 20 of the *ESA*.

[72] The issue of arbitrators having jurisdiction to decide matters concerning other employment related statutes, such as the *ESA* in this case, has been canvassed by other arbitrators, as seen in Toronto Transit Commission v. Amalgamated Transit Union, Local 113 (Scheduling Grievance) (*supra*). At paragraph 20, Arbitrator Springate wrote:

> Ever since the judgement of the Supreme Court of Canada in McLeod v. Egan (1974), 46 D.L.R. (3d) 150 it has been settled law that an arbitrator must interpret and apply a collective agreement in light of the general law. The Employment Standards Act takes this one step farther and provides that the Act is enforceable against an employer as if it were part of a collective agreement. It also provides that, subject to certain exceptions, upon making a finding that the employer has contravened the Act an arbitrator may make any order that an employment standards officer could have made. The relevant provisions of the Act read as follows:
>
> 99(1) If an employer is or has been bound by a collective agreement, this Act is enforceable against the employer as if it were part of the collective agreement with respect to an alleged contravention of this Act that occurs,
>
> (a) when the collective agreement is or was in force;

> (b) when its operation is or was continued under subsection 58(2) of the Labour Relations Act, 1995; or
>
> (c) during the period that the parties to the collective agreement are or were prohibited by subsection 86(1) of the Labour Relations Act, 1995 from unilaterally changing the terms and conditions of employment.
>
> . . .
>
> 100(1) If an arbitrator finds that an employer has contravened this Act, the arbitrator may make any order against the employer that an employment standards officer could have made with respect to that contravention but the arbitrator may not issue a notice of contradiction.

[73] There can be no doubt that I have the requisite jurisdiction to decide this matter.

[74] The issue that I must decide here is whether or not a greater benefit exists in the collective agreement, thereby invoking the provisions of section 5 of the *ESA*, which state:

> . . .
>
> (2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.

[75] The Employer's position is that clause 31(2)(c) of the collective agreement provides a greater benefit than section 20 of the *ESA* because employees receive compensation for their entire shift. Meal breaks, when taken, are not unpaid. Additionally, the totality of the terms and conditions of employment augment this argument.

[76] Section 5(2) of the *ESA* is specific in that this exemption only applies in matters "…that directly relate to the same subject matter…." I note that none of the case law supplied to me deals with the issue of applying section 5(2) to meal breaks. However, a number of decisions deal with the "greater benefit" issue.

[77] The Employer referred to a decision in this regard rendered by Arbitrator Goodfellow in GO Transit v Amalgamated Transit Union (*supra*). In that decision, a comparison was made between holidays and the pay accorded to them pursuant to the collective agreement versus the *ESA* provisions as they related to holidays and the pay to be accorded to them. Arbitrator Goodfellow determined that the two issues could be compared, and he did so, finding that the

collective agreement provided a greater benefit. While I do not take any quarrel with the decision, I do not find it helpful in this instance when the two issues I must rule on are not quite so similar in nature.

[78] A decision cited by both counsel was that of Arbitrator Reilly in Re McKesson Canada v. Teamsters Chemical Energy and Allied Workers, Local 424 (*supra*). At page 19 of his decision, Arbitrator Reilly wrote:

> Section 5(2) of the ESA ensures that where an employment contract provides employees with a greater right or benefit than that provided for in the Act, the greater right provided to employees prevails. Arbitrators have found that collective agreement provisions dealing with vacation entitlement, holiday and/or vacation pay, lesser hours of work, and a greater rate of pay all may constitute a "greater right or benefit". However it is clear, the case law is also settled that the comparison, which is to take place, must place the employment standard on one side of the balance and the provision of the agreement dealing with the same entitlement on the other side. That is to say that the comparison is between different types of apples, not between apples and oranges.

[79] Similarly, in a recent decision of Arbitrator Carrier in Columbia Forest Products v. United Steelworkers Local I-2693 (*supra*), at page 17, paragraph 5, he wrote:

> If there is the possibility of a greater right or benefit than the granting of eleven consecutive hours free from work what could comprise the benefit? [The Employer] argued that it must be directly related to hours of work whereas [the Union] argued that various benefits inclusive of overtime could be bundled together for the comparison. It is my view that [the Employer's] contention is more in keeping with the scheme of these provisions. Therefore, if a collective agreement benefit is greater, it must be one that is directly related to the standards set out in the ESA, in this case, eleven consecutive hours free from work.

[80] The comparison, therefore, must be of a collective agreement provision that directly relates to the *ESA*. To see whether or not such a comparison can be made in the instant case, I find it helpful to compare the two provisions side by side:

Section 20(1) of the *ESA*:	Clause 31(2)(c) of the collective agreement:
Eating periods: An employer shall give an employee an eating period of at least 30 minutes at intervals that will result in the employee working no more than five consecutive hours without an eating period.	Eating period: i) Advanced Care Paramedics, Primary Care Paramedics and Equipment Controllers assigned to a twelve-hour shift shall be entitled to two (2) thirty (30) minute paid eating periods during each shift. All other Emergency Medical Services employees assigned to a twelve (12) hour shift shall be entitled

	to two (2) thirty (30) minute unpaid eating periods.

[81] The *ESA* provides a 30-minute eating period for an employee while at work. The Employer says this does not apply because the collective agreement provides a greater benefit.

[82] In a recent decision by Arbitrator Richard Brown in Hartmann Canada Inc. v. Untied Steelworkers of America, Local 1-500, [2006] O.L.A.A. No 79 (QL), at page 24, he wrote, in part:

> ... When the legislature grants time off without pay, the obvious objective is to allow employees relief from work, not to fatten their wallets. In the language of section 5(2), the "subject matter" of the employment standard is time off, not compensation. A contractual entitlement to pay does not "directly relate" to the "same" subject. The logic of this analysis extends to any trade of money for unpaid time off under the statute, including emergency leave.

[83] I find that I must come to the same conclusion in the case before me. The *ESA* provides for a meal break at some point in an employee's shift. The collective agreement provides for compensation during the meal break. The two issues are not, in my view, comparable for the purposes of invoking section 5 of the *ESA*. The *ESA* is quite specific in saying employees are entitled to a break, and that is the benefit. To take the position that the benefit does not apply because the employees get paid is not, in my view, comparing apples to apples. The law is clear: employees are entitled to a break. The law is not about payment for breaks or pay for work.

[84] A similar finding was made by Arbitrator MacDowell in Norampac Inc. (*supra*), a case cited by both counsel. At paragraph 26 he wrote, in part:

> PART VII of the *Employment Standards Act* deals with hours of work and hours free from work. The thrust of the provision is to limit the number of consecutive hours that an employee may work, and guarantee that the employee has a minimum amount of time off. It is about "time in" and "time off". It is not about payment for work, or extra work or overtime work. It is not about payment at all....

[85] In light of this, I determine that section 5 of the *ESA* is not applicable in these circumstances; therefore, the employees are entitled to the provisions of section 20 of the *ESA*.

[86] The Employer advanced an alternative argument that section 21 of the *ESA* essentially permits work to be done during a meal period; therefore, there is no entitlement to a 30-minute uninterrupted meal break.

[87] Section 21 of the *ESA* reads as follows:

> An employer is not required to pay an employee for an eating period in which work is not being performed unless his or her employment contract requires such payment.

[88] The Employer's position is that the converse of this provision must also be true; namely, that the Employer is required to pay for an eating period when work is being performed. The Union stated that this is not so, as evidenced by the Ministry of Labour's letter of September 20, 2005.

[89] The Ministry of Labour has clearly addressed this issue in its September 20, 2005 letter to the Employer. The applicable portion of the letter reads as follows:

> *Currently, MOL operational policy is that the meal break <u>can be interrupted for work</u> and the employer can designate where the break be taken and require that the employee be available. Unless the employee receives an uninterrupted and clear 30 minutes he or she is not considered to have received their eating period entitlement (e.g. if a 30-minute break is interrupted after 10 minutes, the employer must re-schedule the full 30-minute break within the five hour window).*
>
> [Emphasis in the original]

[90] The answer to the question is readily apparent from Ministry policy. The meal break can be interrupted for work, but if it is, another full 30-minute break within the five-hour window has to be scheduled. The question then becomes: "What happens when it is not possible to reinstate a 30-minute break?" The answer to that is where the issue of damages comes in, and I deal with that later in this award.

[91] The Employer spoke about the potential negative impact that a decision in favour of the Union's position may have. It stated the need to be able to have ambulances respond to calls within set time frames, failing which the chances of saving lives diminish. In his testimony-in-chief, Mr. DiMonte stated this was a very difficult issue and it did not make sense that the *ESA* exemption, which existed in the past for paramedics, did not continue.

[92] The Union responded that the law is the law, and it must be respected.

[93] While it is not at all difficult to see the potential problems cited by the Employer, I agree with the Union's statement that the law is the law, and it must be applied. The legislature is obviously aware of this situation, and has been for some time, and alternatives are being proposed, as evidenced in the September 20, 2005 correspondence from the Ministry of Labour to the Employer. As of now, however, I find that the provisions of the *ESA* do apply.

[94] The Union has asked for damages in this matter. They seek either money or time off. At this juncture, I believe it would be more advisable to let the parties discuss and attempt to resolve this particular issue themselves. However, I will retain jurisdiction on this issue for a period of four months from the date of issue of this award should the parties find themselves unable to resolve it.

[95] In summary, my findings in this matter are as follows:

1. The Union's contention that the Employer has violated clause 31(2)(c)(iii) by failing to use "best efforts" as required, is dismissed.

2. The Union's contention that the Employer has breached its obligation pursuant to section 20 of the *ESA* is sustained, and it is so declared. The Employer is obligated to adhere to the provisions of section 20 of the *ESA*.

3. The issue of damages is returned to the parties for further discussion and resolution. I remain seized of this issue for a period of four months from the date of issue of this award should the parties not be able to resolve it.

[96] Finally, I would like to thank the representatives for a thorough and thoughtful, and at times emotional, presentation. The professionalism that paramedics exhibit throughout their every shift was evident in the many and varied testimonies of all witnesses. I have no doubt that the high standards established by paramedics in response to emergency situations will continue.

DATED AT OTTAWA, ONTARIO, MAY 16, 2006.

Joseph W. Potter
Arbitrator