

On the morning of August 22, 2014, a floor meeting was held at the Richmond Delivery Centre ("RDC") during which the Superintendent recognized one or two employees by giving them gift cards. According to Russell Einar, a Supervisor at the RDC, one of those employees was recognized with a gift card for "going above and beyond to ensure a [customer] received a passport." During the floor meeting, other employees received service pins recognizing their years of service with the Corporation. These service recognition awards apply to all employees, and the Union and the Corporation have consulted on the program.

Later that same day, Mr. Einar was given two, \$25.00 gift cards to present to employees he believed were performing "outstanding work." He in turn handed the gift cards to two partially disabled employees who were, in his view, "consistently put[ing] real effort and exemplary effort" into their work at the RDC. Mr. Einar testified that he gave the two employees the gift cards because they were "working above and beyond the level of the overtime XX employees."

Under cross-examination, Mr. Einar was asked to elaborate on the meaning of "working above and beyond", and his response was this: "[Vince] and Dale worked at a rate with XX mail that was faster than able-bodied employees." When pressed in cross-examination to agree that such awards are discriminatory for employees who can only work at one job due to a disability, he replied: "Yes. But I recognized the efforts of two disabled employees who performed, in my view, better than my expectation of their capabilities. Working from a wheelchair did not prevent [Vince] from working better than able-bodied employees." Mr. Einar also testified that he had no knowledge of the Union being approached before the gift cards were handed out.

Denish Badadur, the Griever, was working at the RDC on the day in question as an inside assistant. His regular classification was Letter Carrier and his status was "PPD" -- i.e., permanently partially disabled. The Griever was working performing duties on August 22 due to an injury, and under Article 33 of the Collective Agreement, he was exercising his right to refuse to perform unsafe work on the forklift.

The Griever observed Mr. Einar handing out the gift cards, and the Griever observed at least two other employees receiving gift cards that day. One of the employees to whom Mr. Einar had presented a \$25.00 gift card approached the Griever and explained that when Mr. Einar gave him the gift card, he [Einar] said he was "being recognized for going above and beyond his job duties that day." The Griever testified that "being a PPD employee [who is] not able to work at the same level as other employees [I found the presentation of the gift cards to other employees to be] a bit disheartening, and I felt belittled that I did not get a gift card because I did not work above and beyond my capabilities."

Against this factual backdrop, the Union contends that the gift card recognition program the Corporation is pursuing must be the subject of consultation with the Union, the exclusive bargaining agent for the employees in the bargaining unit. Referring to Articles 1.01, 3.01, 3.02, 8 and 37.01, of the Collective Agreement, the Union's position is that the Corporation was contractually obliged to conduct meaningful consultation before it handed out the gift cards. It is only through such consultation, says the Union, that its concerns with the potentially discriminatory impact of the gift card recognition program on employees who do not receive them can be addressed. From the Union's perspective, the gift cards represent a means by which the Corporation is enhancing the wages and compensation package negotiated into the terms of the Collective Agreement directly with employees, and therefore violates the Union's exclusive bargaining authority. See *Toronto Hydro v. Canadian Union of Public Employees, Local 1 (Recognition Program Grievance)*, [2002] O.L.A.A.No.68 (Herman).

The Union claims that a declaratory order is an insufficient remedy for the Corporation's breach of the Collective Agreement, and seeks an award of damages to the Union in the amount of \$1,000.00 to reflect the loss of opportunity to consult before the gift cards were given out. See: *Weyerhaeuser Canada Ltd. v. Pulp, Paper and Woodworkers of Canada, Local 10*, [1993] BCCAAA No. 388 (Kelleher); and, *Maple Leaf Consumer Foods Inc. (Courtland Facility) v. Schneider Employees' Assn. (Contracting Out Grievance)*, [2009] OLAA No. 336 (Herlich).

The Corporation emphasizes that the gift cards given to employees at the RDC on August 22 were of "nominal value" relative to the annual earnings of the recipients. The Corporation submits that the gift cards: did not create any new terms and conditions of work; did not interfere with or change any terms in the Collective Agreement; did not require employees to give up any rights they have under the Collective Agreement; and, had no impact on the Union's role as the sole and exclusive bargaining agent for the Corporation's employees. The Corporation refers to documents describing its years-of-service recognition program for employees and notes that this program has been in place for a number of years without grievance from the Union. The Corporation notes that certain other issues relating to employee recognition were discussed during national level union-management consultation meetings following the August 22nd incident at the RDC, but the gift cards were not discussed and the Union has not filed a national policy grievance regarding the gift cards.

As to the claim for an award of damages to the Union, the Corporation points to the absence of any evidence of bad faith or egregious conduct on management's part. The Corporation submits that there is no

Collective Agreement language prohibiting management from recognizing the efforts of its employees, and the

Corporation maintains that Mr. Einar did not appreciate the wider implications of his conduct on August 22.

In reply, the Union contends that there is a potential for discrimination to occur as a result of a recognition program of this type. The Union argues that unfairness arises as well when employees who all work under the same Collective Agreement and who are all assessed against the same standards observe co-workers receiving gift cards that effectively increase their pay. This type of selective program damages the bargaining unit and the Union's exclusive right to negotiate for higher standards of pay for all employees. With respect to the Corporation's years-of-service recognition program that applies to all employees, the Union emphasizes that it was consulted on, and did not object to, this program. The Union's main concern with the gift card recognition program is the Corporation's failure to consult before the performance-related awards were handed out. If the Union had been consulted, it would have had the opportunity to raise its concerns and protect the rights and uniform working conditions of all employees in the bargaining unit. An award of damages, says the Union, is required in order to ensure that the Corporation understands that the practice of supervisors handing out gift cards to selected employees cannot continue.

I was not referred to any provision in the Collective Agreement expressly prohibiting the recognition of outstanding work performance by way of gift cards, but I am persuaded that the \$25.00 gift cards, which were given to selected employees for what management viewed as exemplary work performance going above and beyond their expectations of employees' capabilities, amounts to a payment for work that exceeds the rates of pay which have been negotiated by the parties under Article 35.01 and set out in Appendix "A". The employees who received the \$25.00 gift cards were already being paid in exchange for their work in the form of the negotiated wage standards set out in Appendix "A". The gift cards, which were clearly linked to management's assessment of the selected employees' work performance, constituted unilateral, discretionary extra payments in exchange for the performance of work.

Arbitrators have generally determined that specific provisions in a collective agreement for the payment of wages exclude such unilateral payments by employers due to the challenge that such payments represent to the exclusive bargaining authority of the union. The wage rates negotiated in the Collective Agreement constitute a fundamental provision of the parties' agreement: they represent the negotiation of a collective benefit. If an employer is free to reward selected employees at different levels for their work performance through the application of a discretionary performance-related gift card program, the status of the Union's exclusive bargaining authority is compromised and the Collective Agreement is of limited value. I am persuaded that the gift cards, which were expressly linked to standards of work performance, essentially constitute an extra payment to those set out in the Collective Agreement in contravention of Articles 1.01 and 3.01, and are inconsistent with Article 35.01 and Appendix "A".

I further find that the Corporation breached its obligation under the terms of the Collective Agreement to consult with the Union about such a gift card recognition program before the gift cards were handed out to employees. Article 3.02 provides as follows:

3.02 Consultation and Discussion

In view of this recognition and in accordance with structures provided for in this Collective Agreement, the parties agree to discuss and consult each other on all matters pertaining to their working relationship. (emphasis added)

The gift card recognition program undoubtedly represents a matter pertaining to the Union's and the Corporation's working relationship and the structures provided for in the Collective Agreement. The Union and the Corporation have negotiated job classifications and associated wage rates which are specified in the Collective Agreement. I was not referred to a performance appraisal procedure that is specifically applicable to the work performed by employees such as the Grievor on August 22, but other provisions of the Collective Agreement address the measurement of employees' work patterns, work standards and procedures. See, for example, Article 48 and Appendix "V"(1), which include the requirement for the parties to consult. I conclude that the Corporation's failure to consult with the Union regarding the gift card recognition program before the gift cards were handed out violated Article 3.02 and was inconsistent with reasonable expectations for consultation arising from the Collective Agreement as a whole.

I additionally accept that the reasoning in the *Toronto Hydro* award provides support for the Union's contention in the case at hand:

A one-time only lottery that all employees have an equal chance to qualify for and to win is distinguishable from a continuing program by the employer unilaterally decides which employees will get non-cash bonuses for work performance. For an employer to unilaterally grant a one-time cash bonus to employees would be to undermine the union's exclusive right to bargain on behalf of employees, and would be in breach of the agreement: see, for example, the comments *re Alberta Government Telephones and International Brotherhood of Electrical Workers*,

Local 348 (1990), 11 L.A.C. (4th) 97. Similarly, a program set up by an employer that gives one or more employees non-cash rewards worth up to \$300.00 linked to performance also breaches the

collective agreement. *That the rewards are in the form of (for example) gift certificates ...* is not sufficient distinction to justify reaching a different conclusion.

The Recognition Program breaches Article 1.02 and Schedule 1 of the collective agreement in that it compensates certain employees for performance with valuable prizes that in effect mean the chosen employees are being compensated for work at levels greater than described in Schedule 1, and in a form not described therein (non-cash tangible rewards). The program is also in breach of the agreement in that the rewards for performance differentially compensate employees working in the same job of classifications, a scheme of compensation at variance with Schedule 1 rates are to apply uniformly to every employee in the same classification with the same length of service. Because the Recognition Program was unilaterally imposed, the employer has also breached the requirement under 2.01(a) that the employer recognize the union as the exclusive bargaining agent for employees covered by the collective agreement. (at paragraphs 29 and 30)

In terms of remedy, in addition to declaratory relief the Union seeks an award of damages in amount of \$1,000.00. In advancing this claim, the Union relies on arbitration awards wherein arbitrators have awarded damages in circumstances where unions have lost the opportunity to consult with employers before they contracted out bargaining unit work.

I accept that the Union suffered a loss in terms of its exclusive bargaining authority and right to consult as a consequence of the Corporation's breach of the Collective Agreement. At the same time, I find the resulting damage was not great. The Union should reasonably have been given the opportunity to discuss its concerns, including the potentially harmful impact(s) of such a gift card recognition program, with the Corporation before the gift card recognition program was instituted. The evidence relating to the number of employees who received \$25.00 gift cards on August 22 differed as between the Union's and the Corporation's witnesses. In my view, the evidence as a whole supports a finding that four employees received \$25.00 gift cards, and I am persuaded that in addition to a declaration that the Corporation contravened the Collective Agreement, the Union should be awarded \$100.00 for the loss of the opportunity to consult with the Corporation before the gift cards were handed out.

It is so awarded.

DATED this 5th day of February 2016 at Vancouver, British Columbia.



Joan M. Gordon
Arbitrator