IN THE MATTER OF AN ARBITRATION

BETWEEN:

CARILLION SERVICES INC.

("the Employer")

and

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183

("the Union")

Appearances for the Union:

Amanda Laird, Associate Counsel
Aruna Vithiananthan, Articling Student
John Cruz, Sector Co-ordinator
Humberto Alferez, Business Representative
Michele Williams, Grievor

Appearances for the Employer:

Scott Shaw, Labour Relations Director
Hilda Armstrong, H.R. Manager – Outland Carillion
Daniel Wright, V.P. Operations – Outland Carillion
Weedad Rajahbalee, H.R. Manager – Outland Carillion

A hearing in this matter was held at Toronto, Ontario on May 15, 2018.

AWARD

1. This arbitration arose from individual grievances filed on behalf of Michele Williams and Maricar Baptista on January 23, 2018. The issue raised by their grievances stems from the amendment of the *Employment Standards Act, 2000* (the "ESA") to provide that the first two days of personal emergency leave under the statute in a calendar year are paid leave days for individuals employed by their employer for more than one week.

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2. The parties provided me with an Agreed Statement of Facts (the "Agreed Facts") and made their submissions without additional evidence.

3. The full text of the Agreed Facts is as follows:

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> 1. Labourers' International Union of North America, Local 183 (the "Union") is a trade union within the meaning of section 1(1) of the *Labour Relations Act, 1995* which represents over 55,000 members in construction and non-construction industries.
>
> 2. Carillion Services Inc. (the "Employer") is a provider of integrated support services including but not limited to waste management, cleaning, and maintenance services.
>
> 3. The Union and the Employer are parties to various collective agreements including a collective agreement in effect from July 1, 2016 to June 30, 2019, applicable to the Employer's employees employed at Terminal 1 of Toronto's Pearson International Airport (the "Collective Agreement") . . . .
>
> **Floater Days: Collective Agreement and Past Practice**
>
> 4. Article 17 of the Collective Agreement provides employees in the bargaining unit with the right to three (3) paid floater days in a twelve-month period running from July 1 to June 30.
>
> 5. The scheduling of a floater holiday is governed by Article 17.01(a) and (b). In practice, when an employee wants to book his/her floater holiday, the employee fills out a form obtained from the management office requesting the specific day(s). The written request is to be made at least three (3) weeks in advance. Employee requests are accommodated by the Employer unless to do so would result in a scheduling conflict.
>
> 6. The use of a floater holiday for a justified absence is governed by Article 17.01(c). In practice, if an employee has an unexpected justified absence from work and they have an available floater holiday, that employee can elect to be paid out a floater day for the justified absence. It is common for the Employer to remind an employee of his/her option to use a floater day when he/she have [*sic*] been out of the workplace for a justified absence.
>
> 7. The relevant provision of the Collective Agreement reads as follows:

ARTICLE 17 – PAID HOLIDAYS

17.01 The following shall be recognized as holidays to be paid for on the basis of the employee's straight time hourly rate specified in this Agreement:

New Year's Day	Labour Day
Good Friday	Thanksgiving Day
Victoria Day	Christmas Day
Family Day	Boxing Day
Canada Day	Two (2) Floater Days*

Effective July 1, 2017 one additional Floating Day (for a total of 3)

Floater Days to be scheduled by mutual agreement of the Employer and employee. Employee to request in writing of [*sic*] his/her intended floating holiday at least three (3) weeks in advance.

(a) Employees hired after July 1, 2009 must be employed for one (1) year before qualifying for a Floater day. Floater day to be scheduled by mutual agreement of the Employer and employee. Employee to request in writing his/her intended floating holiday at least three (3) weeks in advance.

(b) The Employer will apply any available floater days when the employee fails to report to work for any justified absence until floater days have been used.

(c) For the purpose of Floater day entitlement "year" shall mean the period from July 1st of one year to June 30th of the next year.

Personal Emergency Leave: Employment Standards Act

8. On January 1, 2018 the Bill 148 amendments to the *Employment Standards Act, 2000* (the "ESA") regarding entitlement to personal emergency leave days ("PEL days") become in effect [*sic*]. Section 50 of the ESA pertaining to PEL days reads as follows:

Personal Emergency Leave

Definition
50 (0.1) In this section,
"qualified health practitioner" means,

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(a) a person who is qualified to practise as a physician, a registered nurse or a psychologist under the laws of the jurisdiction in which care or treatment is provided to the employee or to an individual described in subsection (2), or
(b) in the prescribed circumstances, a member of a prescribed class of health practitioners. 2017, c. 22, Sched. 1, s. 39 (1).

Personal emergency leave
(1) An employee is entitled to a leave of absence because of any of the following:
1. A personal illness, injury or medical emergency.
2. The death, illness, injury or medical emergency of an individual described in subsection (2).
3. An urgent matter that concerns an individual described in subsection (2). 2017, c. 22, Sched. 1, s. 39 (2).

Same
(2) Paragraphs 2 and 3 of subsection (1) apply with respect to the following individuals:
1. The employee's spouse.
2. A parent, step-parent or foster parent of the employee or the employee's spouse.
3. A child, step-child or foster child of the employee or the employee's spouse.
4. A grandparent, step-grandparent, grandchild or step-grandchild of the employee or of the employee's spouse.
5. The spouse of a child of the employee.
6. The employee's brother or sister.
7. A relative of the employee who is dependent on the employee for care or assistance. 2000, c. 41, s. 50 (2); 2004, c. 15, s. 4; 2016, c. 23, s. 46.

Advising employer
(3) An employee who wishes to take leave under this section shall advise his or her employer that he or she will be doing so. 2000, c. 41, s. 50 (3).

Same
(4) If the employee must begin the leave before advising the employer, the employee shall advise the employer of the leave as soon as possible after beginning it. 2000, c. 41, s. 50 (4).

Limit
(5) Subject to subsection (6), an employee is entitled to take a total of two days of paid leave and eight days of unpaid leave under this section in each calendar year. 2017, c. 22, Sched. 1, s. 39 (3).

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Same, entitlement to paid leave

(6) If an employee has been employed by an employer for less than one week, the following rules apply:

1. The employee is not entitled to paid days of leave under this section.

2. Once the employee has been employed by the employer for one week or longer, the employee is entitled to paid days of leave under subsection (5), and any unpaid days of leave that the employee has already taken in the calendar year shall be counted against the employee's entitlement under that subsection.

3. Subsection (8) does not apply until the employee has been employed by the employer for one week or longer. 2017, c. 22, Sched. 1, s. 39 (3).

Leave deemed to be taken in entire days

(7) If an employee takes any part of a day as paid or unpaid leave under this section, the employer may deem the employee to have taken one day of paid or unpaid leave on that day, as applicable, for the purposes of subsection (5) or (6). 2017, c. 22, Sched. 1, s. 39 (3).

Paid days first

(8) The two paid days must be taken first in a calendar year before any of the unpaid days can be taken under this section. 2017, c. 22, Sched. 1, s. 39 (3).

Personal emergency leave pay

(9) Subject to subsections (10) and (11), if an employee takes a paid day of leave under this section, the employer shall pay the employee,

(a) either,

(i) the wages the employee would have earned had they not taken the leave, or

(ii) if the employee receives performance-related wages, including commissions or a piece work rate, the greater of the employee's hourly rate, if any, and the minimum wage that would have applied to the employee for the number of hours the employee would have worked had they not taken the leave; or

(b) if some other manner of calculation is prescribed, the amount determined using that manner of calculation. 2017, c. 22, Sched. 1, s. 39 (3).

Personal emergency leave where higher rate of wages

(10) If a paid day of leave under this section falls on a day or at a time of day when overtime pay, a shift premium or both would be payable by the employer,

(a) the employee is not entitled to more than his or her regular rate for any leave taken under this section; and

(b) the employee is not entitled to the shift premium for any leave taken under this section. 2017, c. 22, Sched. 1, s. 39 (3).

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Personal emergency leave on public holiday

(11) If a paid day of leave under this section falls on a public holiday, the employee is not entitled to premium pay for any leave taken under this section. 2017, c. 22, Sched. 1, s. 39 (3).

Evidence

(12) Subject to subsection (13), an employer may require an employee who takes leave under this section to provide evidence reasonable in the circumstances that the employee is entitled to the leave. 2017, c. 22, Sched. 1, s. 39 (3).

Same

(13) An employer shall not require an employee to provide a certificate from a qualified health practitioner as evidence under subsection (12). 2017, c. 22, Sched. 1, s. 39 (3).

9. Section 5 of the ESA is also relevant and reads as follows:

No contracting out

5 (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void. 2000, c. 41, s. 5 (1).

Greater contractual or statutory right

(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. 2000, c. 41, s. 5 (2).

10. An “employment contract” includes a collective agreement (Section 1(1) of the ESA).

Grievance of Michele Williams

11. Michele Williams (“Williams”) is a Carillion employee employed at Terminal 1 pursuant to the Collective Agreement.

12. Williams has been employed with Carillion for twenty (20) years. She works in a waste management position from 7:00 am to 3:00 pm for six (6) days a week.

13. Pursuant to Article 17.01 Williams is entitled to take three (3) floater days during the period of July 1, 2017 to June 30, 2018.

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14. Williams requested in writing, was approved, and took her three (3) floaters days as follows:

    a. September 2 and 3, 2017; and
    b. October 22, 2017.

15. On or about January 23, 2018, Williams became ill with the flu.

16. That night, she sent a text message to Jessie Learn ("Learn"), her manager, requesting to be paid a PEL day on Wednesday January 24, 2018 because of her inability to attend work due to her personal illness.

17. Learn responded to her text message denying the request to be paid a PEL day. In his response, Learn authorized the absence and gave Williams the option to take the day off without pay or to use a floater day. Williams told Learn that she did not have a floater day available. He responded by saying that she would be able to take the day off but would not be paid.

18. Williams did not work on January 24, 2018 due to personal illness.

19. The Employer did not pay Williams a PEL day for the day of work missed on January 24, 2018.

20. Upon being notified of the refusal to pay a PEL day, the Union filed a grievance dated January 23, 2018, on behalf of Williams alleging the Employer had violated the Collective Agreement by failing and/or refusing to pay a personal emergency leave day to Williams in accordance with the ESA . . . .

Grievance of Maricar Baptista

21. Maricar Baptista ("Baptista") is a Carillion employee employed at Terminal 1 pursuant to the Collective Agreement.

22. Baptista has been employed with Carillion for almost twelve and a half (12.5) years since December 26, 2005. She works in a waste management position from 7:00 am to 3:00 pm for six (6) days a week.

23. Pursuant to Article 17.01 Baptista is entitled to take three (3) floater days during the period of July 1, 2017 to June 30, 2018.

24. Baptista requested in writing, was approved, and took two (2) floaters days on October 29 and 30, 2017.

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25. On or about January 18, 2018, Baptista became ill.

26. Baptista sent a text message to Learn, her manager, requesting to be paid a PEL day, as a result of her inability to attend work due to personal illness.

27. At which point, Learn and Baptista exchanged the following text messages:

> Learn: "The company is saying the floater days count as the paid emergency days. Nothing else will be given at this time."
>
> Baptista: "This is starting January 1, 2018, floater days was in our contact, *[sic]* the government implemented this starting January 1, 2018."
>
> Learn: "The company is saying they are already doing more than the new law by paying 3 emergency days per year instead of 2."

28. After this text conversation, Baptista took two (2) days off due to sickness on or about January 18 and 19, 2018. Baptista was not paid PEL days for the days missed due to personal illness.

29. It was not suggested by management that Baptista was to take the last remaining unscheduled floater day if she wanted to be paid. She did not request to be paid her last remaining floater day.

30. Upon being notified of the refusal to pay a PEL day, the Union filed a grievance dated January 23, 2018, on behalf of Baptista alleging the Employer had violated the Collective Agreement by failing and/or refusing to pay two personal emergency leave days to Baptista in accordance with the ESA . . . .

31. On March 25, 2018, Baptista scheduled her third and final floater day for April 12, 2018 and was approved.

The Parties' Submissions

4. The Union's contention was that Ms. Williams and Ms. Baptista were entitled to paid statutory personal emergency leave on the days in question notwithstanding that both clause 17.01(c) of the collective agreement and the Employer's practice raised the possibility of their having paid absences through the use of contractual "floater days". In the Union's submission, the fact that as many as three paid floating holidays might be available when personal emergency leave was

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warranted did not furnish employees with a greater benefit than the employment standard established by section 50 of the ESA.

5. The Union noted that subsection 5(2) of the ESA permits the substitution of a contractual provision for an employment standard only if the former directly relates to the same subject matter as the employment standard. The Union argued that the Article 17 afforded employees access to paid holidays and, therefore, the contractual floater days addressed needs that were different from and not directly related to those provided for in section 50.

6. In that context, the Union referred to and relied upon the analyses in *I.A.M. & A.W., Lodge 771 v. Abitibi-Consolidated Co. of Canada*, 2006 CarswellOnt 4181, [2006] O.L.A.A. No. 328 (Jesin), *Cargill Value Added Meats London v. UFCW, Local 175*, 2015 CarswellOnt 7405, [2015] O.L.A.A. No. 196 (Nyman), and *USW, Local 2020 v. Bristol Machine Works Ltd.,* 2018 CarswellOnt 5531 (Mitchnick).

7. The Employer took and urged a different view of the benefit available to employees under the collective agreement. As set out in paragraph 6 of the Agreed Facts, the collective agreement allowed the use of floater days for any justified absence and, by practice, an employee with an available floater holiday could elect to be paid out a floater holiday if he or she had an "unexpected justified absence from work". In that respect, the contractual arrangement was a "like benefit" to the protection afforded by section 50 of the ESA when an employee confronts "unexpected circumstances".

8. Ms. Baptista elected not to apply her remaining floater day to her absence on January 18 or January 19, 2018. Ms. Williams had no remaining days; however, the Employer noted that both would be entitled to three days effective July 1, 2018 and, therefore, the employees had a greater entitlement – three paid days under Article 17 versus two paid days under section 50 – than that established by the ESA.

9. The Employer referred me to *National Steel Car Limited* v. *United Steel, Paper And Forestry, Rubber, Manufacturing, Energy, Allied Industrial And Service Workers International Union, Local 135*, 2011 CanLII 86373 (ON LA)(Mohamed), and to the discussion therein of *Shepherd Village Inc. v. Service Employees International Union Local 1*, [2008] O.L.A.A. No. 185 (Burkett) and *Zehrs Markets v. U.F.C.W., Local 1977*, 2009 CarswellOnt 678 (Albertyn).

10. In doing so, the Employer submitted that, on the facts before me, the "global benefit test" recognized in those decisions was satisfied and employees were afforded a greater individual benefit – an employee's floater holidays could be applied to as many as three justified absences, including those provided for in section 50 of the ESA, and thus the collective agreement regime presented a greater benefit than the employment standard.

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Analysis and Decision

11. Having carefully considered the facts and the submissions of the parties, I have concluded that the grievances must be allowed and, as set out below, that the grievors are entitled to be compensated for the personal emergency leave days they requested in January 2018.

12. In *Abitibi-Consolidated*, *supra*, the grievor was obliged to take three days off work to attend to the medical needs of his daughter in circumstances that unquestionably attracted the application of the emergency leave provisions of section 50 of the ESA as it was then. Instead of regarding the time away as unpaid statutory leave, the employer treated the days taken as floating holidays with the result that the grievor lost three days from his holiday bank. The grievance sought the reinstatement of the three days holiday entitlement.

13. There, as here, the contention was that floating holidays do not directly relate to emergency leave and that subsection 5(2) of the ESA did not apply to permit the employer's action. After noting that arbitrators "have been careful to ensure that they are comparing 'apples to apples' when comparing benefits to determine whether the collective agreement provides a greater benefit than the ESA", Arbitrator Jesin distinguished Abitibi's floating holidays and statutory personal emergency leave as follows:

> 16. In addition . . . the floating holidays in our case are set out as a subsection in an article entitled "Holidays". Indeed . . . the floating holiday provision is described under the heading "additional paid holidays". The floating holidays and the shutdown days are both treated as holidays, in my view. There are similar qualifying provisions for payment – that is the employee must work the day before and the day after both the shutdown holiday and the floating holiday. . . .
>
> 17. S. 50 of the ESA, on the other hand [*sic*] is clearly not a holiday provision. It is a provision entitling employees to time off work to deal with specified personal or family emergencies. I agree with cases such as *Metropolitan Toronto Zoo* [*v. C.U.P.E., Local 1600* (2001), 102 L.A.C. (4th) 397] which suggest that one must be sure that benefits are of the same type before they can be compared under s. 5(2) of the ESA. In my view, the floating holiday cannot be considered in comparing whether the basket of leave benefits in the collective agreement are greater than those under s. 50 of the ESA.
>
> . . .
>
> 19. . . . In my view, holidays and emergency leave are of different subject matters – apples and oranges – and I do not think that an employee should be forced to reduce his/her holiday entitlement in order to receive emergency leave.

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In the result, Arbitrator Jesin ordered the reinstatement of three floating holidays to the grievor's holiday bank.

14. Arbitrator Nyman also dealt with "floater days" and emergency leave in *Cargill Value Added Meats*, *supra*. Cargill introduced an Attendance Management Program to which Local 175 objected because it offset the emergency leave days provided for under section 50 with personal floater days provided for in the collective agreement.

15. I agree with and adopt the following observations made and conclusions reached by Arbitrator Nyman following his review of several authorities apposite to the issue:

> 48. . . . [I]t appears to me that following principles generally flow from the above cases with respect to when a collective agreement benefit offsets the [emergency leave] day entitlement:
>
> > a) If the benefit or benefits in the collective agreement do not directly relate to the [emergency leave] day employment standard benefit, the employee is entitled to both the collective agreement benefit and the [emergency leave] day employment standard;
> >
> > b) If the benefit or benefits in the collective agreement directly relate to the [emergency leave] day employment standard benefit, the employee's entitlement to the [emergency leave] day employment standard may be fully or partially reduced accordingly; and,
> >
> > c) Unless the collective agreement as a whole or a specific provision supersedes the [emergency leave] day provisions entirely (and thereby eliminates the right of the employees to the benefit of section 50 of the Act), it is only when an employee actually claims the benefit or benefits in the collective agreement (such as bereavement leave) that directly relate to the [emergency leave] day employment standard benefit, that their [emergency leave] day entitlement is reduced. In such cases the employer may grant the collective agreement benefit that directly relates to the [emergency leave] day right and count that leave towards the employee's allotment of ten [emergency leave] days per year; however, there is no reduction in [emergency leave] days if the benefit is not claimed at some point during the year.
>
> 49. I also find that the foregoing cases establish that with respect to [emergency leave] days in particular the question as to whether a collective agreement benefit directly relates to the [emergency leave]

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day employment standard is, for the most part, answered by reference to the purpose of the two benefits. . . .

> . . .
>
> 56. I agree with the arbitrator in *Abitibi* . . . that paid holidays serve a different purpose than emergency leave. Emergency leave is designed to ensure an employee can be absent from work without fear of reprisal to attend to a personal or family emergency. Holidays are designed to provide a day of rest from work without monetary loss. These are different purposes and Holidays do not directly related [*sic*] to [emergency leave] days. I therefore find that Cargill cannot reduce an employee's [emergency leave] day entitlement by the number of Floater days to which he or she is entitled under the Collective Agreement.

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16. In *Bristol Machine Works, supra*, Arbitrator Mitchnick noted that a number of employees had called in sick in the first months of 2018 immediately following the amendment of the ESA to entitle employees to two days of emergency leave on a paid basis. The employer resisted claims for paid emergency leave on the grounds that the benefits provided under the collective agreement did not require it to pay these "additional sick days".

17. Arbitrator Mitchnick reviewed a number of the arbitral authorities, concluding with reference to *Queen's University v. Fraser* (1985), 51 O.R. (2d) 140 (Ont. Div. Ct.) – a case that dealt with holiday entitlements under a collective agreement and section 26 of the ESA. There the Divisional Court quashed an arbitration award, with the following comments by Madam Justice Van Camp (as quoted by Arbitrator Mitchnick at para. 10):

> One must look at the entirety of the terms in the agreement respecting holidays and not compare each individual item. . . .
>
> In my opinion, the arbitrator erred in not considering all the provisions of Article 18 under the heading of "Holidays". Article 18.04 provides for full time off between Christmas Day and New Year's Day inclusive. . . .
>
> On the face of the agreement, the greater time off under Article 18.04 at that specific time of the year outweighed the statutory benefit with respect to Christmas Day and New Year's Day as did the greater number of holidays granted under s. 18.01 and the provisions as to when the holiday should commence, which are set out in the other parts of Article 18.

Arbitrator Mitchnick noted that Mr. Justice White had added the following:

> In my opinion, the arbitrator erred in ruling that he could not compare all of the benefits apropos of holidays and holiday pay as found in article 18 with the standard found in s. 26(4) of the Act. A proper comparison, which in my opinion involves the placing in one pan of a metaphorical scale the minimum standard set out in s. 26(4) and placing in the other pan the totality of rights or benefits or lesser hours of work provided for in article 18, would fully preponderate the scale in favour of article 18: [citations omitted].

18. Remarking that subsection 5(2) of the ESA directs a comparison of "one or more provisions in an employment contract . . . that directly relate to the same subject as an employment standard" and that the matter before him engaged a standard dealing with "a personal illness, injury or medical emergency", Arbitrator Mitchnick reasoned as follows:

> 14. . . . [T]he extent to which income protection is provided along with personal leave for illness is, on the claim put forward here, the critical part of the comparison between the totality of the benefit provided by the statute, and the totality of the benefit provided by the collective agreement. As for the statute, what it provides on that issue is two days leave with pay, period. The Plan under the collective agreement, on the other hand, paid for fully by the employer, provides up to 17 weeks of Sickness and Accident Insurance, at 65% of earnings ($700 weekly maximum), followed by an unlimited period of Long-term Disability Insurance, again at 65% of earnings ($2500 monthly maximum). When these two levels of income protection for sickness are placed in the pans of the metaphorical scale described by Mr. Justice White, the comparison, I consider apparent, is not close. The Plan negotiated by the Steelworkers, as one might expect, is manifestly better than the minimal pay protection provided to all employees, represented or otherwise, under the terms of the *Employment Standards Act*. . . .
>
> 15. The claim by the Union that employees having the benefit of the Income-protection Plan provided by the instant collective agreement are entitled as well to the two days of paid leave provided as a minimum by the *Employment Standards Act* is accordingly rejected. . . .

19. By way of comparison, the provisions of the collective agreement argued before me were those quoted in the Agreed Facts. Neither party referred to any additional benefits that were to be weighed against the provisions of section 50 of the ESA. As cautioned by the Divisional Court and the decisions cited by the parties, I am obliged to consider the entirety of the provisions referable to the subject matter of section 50; however, I am left to understand that clause 17.01(c) and the annual refreshment of contractual floater days effective July 1 capture the

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provisions that are argued to relate directly to the requirements of section 50 of the ESA and, most particularly, the payment obligations in subsections 50(5) and (8).

20. In the *National Steel Car* decision relied upon by the Employer, Arbitrator Mohamed dealt with a claim for holiday pay under the ESA for a Good Friday holiday. The grievor had worked the holiday; however, he was a probationary employee and not entitled to holiday pay under the terms of the parties' collective agreement. The contention of the union in that instance was that the employer was in breach of subsection 5(1) of the ESA and that the grievor should have received wages for the public holiday in accordance with the statute.

21. In sustaining the employer's position, Arbitrator Mohamed adopted the approach taken by Arbitrators Burkett and Albertyn in *Shepherd Village Inc.*, *supra*, and *Zehrs Markets*, *supra*, respectively. Referring to the latter, Arbitrator Mohamed set out the following:

> [19] Arbitrator Albertyn held:
>
> **"I am persuaded that the approach of Arbitrator Burkett in *Sheppard Village* [*sic*] should be followed. The comparison of benefits, as between a collective agreement and the *ESA*, is global; the application of the benefit must be assessed on an individual basis. The first inquiry is to make the global comparison between the general holiday pay benefit under the collective agreement and the statutory holiday pay provisions under the Act. This is distinct from the second inquiry into the application of the overall, better benefit to each particular employee. Taking the two inquiries together, the question is, do the collective agreement holiday pay provisions provide a greater benefit for each and every employee? That is the question to be answered."**
>
> [emphasis by Arbitrator Mohamed]

22. The first inquiry in *National Steel Car* was easily dealt with – all of the paid holidays in the collective agreement directly related to those in the ESA and the agreement recognized twelve holidays, significantly more than required under the statute. The collective agreement "provided generally greater benefits for employees in the bargaining unit". Notwithstanding that the grievor was barred by his probationary status at the time of the Good Friday holiday, Arbitrator Mohamed found that all the "annual" benefits were to be included and the grievor would have greater benefits under the collective agreement than would be available to him under the ESA. In doing so, she referred to *Shepherd Village Inc.* as follows:

> [29] . . . Arbitrator Burkett concluded that the assessment of benefits included "all" the provisions within the paid holiday section of the

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collective agreement, including the moving and float days, notwithstanding any restrictions on the entitlements of those days. Arbitrator Burkett further held that the moving and float days should not be removed from the comparison analyses, but rather should be included with the appropriate weighting.

Arbitrator Burkett held, at page 9:

> **"For the foregoing reasons, it is my view that all the provisions within the paid holiday section of the collective agreement are "directly related". The balancing that follows must necessarily take into account the characteristics of the float holidays such that where there are restrictions or limitations compared to a statutory public holiday, the effect is not to remove the float holiday from consideration but rather to assign it a lesser weight on the "metaphysical scale". Where an employee receives a float day off with pay, even if in some way less beneficial than a statutory holiday, and that day is in addition to the gross number of statutory holidays provided under the employment standard, the float day must tilt the balance in favour of finding a "greater benefit' under the collective agreement for that employee. However, if such a float day merely brings the total number of holidays under the collective agreement to the same gross number of statutory holidays under the employment standard, but not beyond, the restrictions or limitations attached to the float days may prevent a finding of "greater benefit".**
>
> [emphasis by Arbitrator Mohamed]

[30] From the above, it is clear that the scope of the comparison encompasses an assessment of "all" the provisions of the collective agreement, notwithstanding any restrictions attached to those provisions. Therefore "all" the provisions of the collective agreement can be logically construed to include all the "annual" benefits and not a comparison specific benefits [*sic*] only. Accordingly, in this instant, I conclude that an assessment of all the paid holiday provisions under the collective agreement must be compared to all the public holiday provisions under the ESA, notwithstanding any restrictions attached to those provisions.

The grievance failed even though the grievor was ineligible for the Good Friday holiday under the collective agreement. His global or annual entitlement exceeded the minimum required by the ESA: while he had lost Good Friday, when his probationary period ended a few days after that holiday he became entitled to more paid holidays than are provided for under the statute.

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23. The decision in *National Steel Car* was relevant to the Employer's submission that, by way of example, the fact that Ms. Williams had no entitlement to contractual floater days when she claimed paid personal emergency leave in January 2018 was immaterial given that she would have three paid floater days effective July 1, 2018 and, therefore, access to three days for which she could receive pay in circumstances that would entitle her to paid emergency leave for only two days under section 50.

24. The collective agreement between these parties presents a context – a combination of concepts – that differs from those in the cases referred to in submissions.

25. I agree with the arbitrator in *Abitibi* that floater days as such are not equivalent to and do not directly relate to the personal emergency leave days required by statute; however, the option to substitute a floater day for a personal emergency leave day introduced by clause 17.01(c) dictates that these floater days are not always to be excluded as being irrelevant to the fulfillment of the Employer's obligations to furnish employees with paid leave in personal emergency situations. I am satisfied that they are not "apples and oranges" in all circumstances contemplated by the collective agreement between these parties.

26. The parties had agreed to increase the number of "Floater Days" from two to three effective July 1, 2107. At that date, the ESA did not require any employer to pay an employee for any absence under section 50. Nevertheless, clause 17.01(c) would allow an employee to claim entitlement to unused paid floater days when he or she was eligible for and was taking what would otherwise have been an unpaid statutory emergency leave. The Employer could then properly assert that the employee's statutory entitlement to ten personal emergency days was reduced correspondingly.

27. The language used in clause 17.01(c) is that the Employer "will apply any available floater days" in described situations. The Agreed Facts satisfy me (and it was not suggested to be otherwise) that the parties' intention and practice in relation to the provision are that the application of "available floater days" is neither automatic nor mandatory. Rather, an election is reserved to the employee. The Employer's commitment is to honour an employee's request to apply an available floater day to avoid a loss of income attributable to a justified absence.

28. The questions raised by these grievances are several. Did the situation established by the parties' collective agreement and practice change with the introduction of the statutory obligation to pay an employee for the first two personal emergency leave days taken in a calendar year? Is an employee obliged to invoke clause 17.01(c) in response to a personal emergency leave that section 50 of the ESA would require to be paid? Is an employee disentitled to paid personal

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emergency leave if or to the extent that he or she has previously used paid floater days for reasons other than personal emergency leave?

29. In my view, the situation under the collective agreement and established by prior practice did not change materially on January 1, 2018: the collective agreement does not require an employee to invoke clause 17.01(c) in response to a personal emergency leave that section 50 of the ESA would require to be paid; it does not require an employee to save floater days for personal emergency leave applications; and it does not disentitle an employee to paid personal emergency leave if or to the extent that he or she has previously taken paid floater days for reasons other than personal emergency leave.

30. Ms. Williams had been under no obligation to forego the use of her floater days in 2017 and to preserve them in case the need for personal emergency leave might arise in January 2018. Furthermore, and for the avoidance of doubt, it is my view that she would have no obligation to forego the use of the floater days to which she will become entitled in July 2018 or to preserve them in case the need for personal emergency leave might arise in January 2019 or later in that calendar year. Similarly, although not asked to do so, Ms. Baptista had no obligation to use her last remaining floater day for the collective agreement year ending June 30, 2018 in order to be paid for her personal emergency leave on January 18 or 19, 2018.

31. There is no suggestion in the collective agreement or by the Employer that an employee is permitted to anticipate the benefit of floater days. Moreover, there is nothing in Article 17 to suggest that he or she has any obligation to do so or to use any floater day for any purpose dictated or determined by the Employer. Accordingly, a floater day that will not be available to an employee until July 1, 2018 could not be brought into the equation in respect of an emergency leave situation that arose or arises earlier in the year when the ESA would require the first two personal emergency leave days to be paid.

32. In these circumstances, it is my view that while clause 17.01(c) creates a relationship between the contractual floater days and personal emergency leave, the link is weak and, at most, a conditional or contingent one. Arbitrator Burkett noted that in the balancing process one must take into account the characteristics of the contractual benefit with the result that restrictions or limitations compared to the employment standard might lead one to "assign [the contractual benefit] a lesser weight on the 'metaphysical scale'". The weight that one might attach to these floater days for the purposes of sections 5 and 50 of the ESA is negligible given that the collective agreement affords the employee – and not the Employer – the discretion to determine the purpose for which a floater day is to be used. The employee has the right to determine that a floater day will not be spent to respond to a circumstance in which the ESA would provide for personal emergency leave under section 50.

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33. The approach taken by the Employer in responding to the grievors had the effect of eliminating three floater days as holidays or days upon which an employee could, with the cooperation of the Employer on scheduling, plan to enjoy "a day of rest from work without monetary loss". Those days would be converted for use (or would be deemed to have been used) "to ensure that an employee can be absent from work . . . to attend to a personal or family emergency". That unilateral modification of the negotiated terms of the collective agreement was not open to the Employer, just as Arbitrator Nyman found in *Cargill Value Added Meats* (*supra,* at para. 55) that the employer had no right "to unilaterally change the meaning or intent of a collective agreement provision . . . to transform a paid holiday into an emergency leave".

34. Article 17 entitled each of the grievors to nine named "paid holidays" and three additional paid holidays, identified as floater days. The floater days are not reserved for or available only in circumstances that would entitle an employee to paid personal emergency leave under the ESA. If an employee put the floater days to that use (or, as here, was deemed by the Employer to have done so), he or she would be giving up holidays to which he or she was entitled under the collective agreement. In effect, the employee – and not the Employer – would be paying for paid statutory personal emergency leave days by foregoing paid holidays. In that scenario, the contractual benefit to be placed on the scale would have the characteristic of being funded by the employee whereas the statutory benefit is available at no expense to the employee. Looked at from that perspective, the statutory benefit tips the "metaphysical scale": it cannot be said that the elements of the collective agreement presented by the Agreed Facts "provide a greater benefit to an employee than the employment standard". To the contrary, absent a negotiated requirement that the floater days be reserved for the purposes of providing the equivalent of three personal emergency leave days with pay – in which case the floater days would lose all value as "holidays" – they cannot be withheld or applied by the Employer as the means by which its obligations to provide paid leave under subsections 50(5) and (8) are to be satisfied.

35. As noted previously, I also adopt and apply the third of Arbitrator Nyman's observations in *Cargill Value Added Meats*.[1] Both of the grievors had

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[1] As set out above, Arbitrator Nyman put it this way:

> c) Unless the collective agreement as a whole or a specific provision supersedes the [emergency leave] day provisions entirely (and thereby eliminates the right of the employees to the benefit of section 50 of the Act), it is only when an employee actually claims the benefit or benefits in the collective agreement (such as bereavement leave) that directly relate to the [emergency leave] day employment standard benefit, that their [emergency leave] day entitlement is reduced. In such cases the employer may grant the collective agreement benefit that directly relates to the [emergency leave] day right and count that leave towards the employee's allotment of ten [emergency leave] days per year; however, there is no reduction in

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elected to use floater days months before the amendment of the ESA took effect and it was not open to the Employer to charge either of them with paid personal emergency leave days they had not taken.

36. Ms. Williams had applied for and been granted the three floater days that had been available to her for the twelve months commencing July 1, 2017. Clause 17.01(c) was spent, in accordance with its terms, in 2017 before she asked for paid personal emergency leave for January 24, 2018. Her use of floater days in September and October 2017 could have no bearing on a right that subsisted only from January 1, 2018. It was not open to the Employer to count those paid holidays towards (let alone to eliminate) the employee's statutory right to paid personal emergency leave when it arose in 2018. The fact that she would have three floater days at her disposal effective July 1, 2018 was of no immediate consequence when she communicated with Mr. Learn in January 2018. Ms. Williams had no remaining entitlement under clause 17.01(c) and that provision was irrelevant as an offset to her statutory rights when she made her request.

37. Similarly, Ms. Baptista had applied for and been granted two of the three floater days that had been available to her for the twelve months commencing July 1, 2017. Clause 17.01(c) was two-thirds spent, in accordance with its terms, when she asked for paid personal emergency leave for January 18 and 19, 2018. Again, her use of floater days in 2017 could have no bearing on a right that subsisted only from January 1, 2018 and it was not open to the Employer to count those paid holidays towards or to eliminate the employee's statutory right to paid personal emergency leave on the first two qualifying days that arose in this calendar year. The fact that she would have three floater days at her disposal commencing on July 1, 2018 was of no immediate consequence to her or the Employer in January 2018. Ms. Baptista had the benefit of one remaining floater day that she might have claimed under clause 17.01(c); however, she did not choose to apply the benefit and it was irrelevant as an offset to her statutory rights when she made her request.

38. Both grievors asked for but were refused paid personal emergency leave in January 2018. I have concluded that both were wrongly denied that benefit and that the grievances must be allowed.

39. Ms. Williams is to be compensated in accordance with the ESA for her unpaid absence on January 24, 2018 and that will constitute the first of two paid personal emergency leave days for which she is eligible in calendar 2018 under section 50 of the ESA. Unless she elects otherwise, Ms. Williams shall not be obliged to apply floater days to which she becomes entitled on July 1, 2018 to any subsequent absence to which section 50 of the ESA might apply.

[emergency leave] days if the benefit is not claimed at some point during the year.

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40. Ms. Baptista is to be compensated in accordance with the ESA for her unpaid absences on January 18 and 19, 2018. Those will fulfill her entitlement to two paid personal emergency leave days for which she is eligible under section 50 of the ESA in calendar 2018. Unless she elects otherwise, Ms. Baptista shall not be obliged to apply floater days to which she becomes entitled on July 1, 2018 to any subsequent absence to which section 50 of the ESA applies.

41. I shall remain seized only to resolve any issues arising in the implementation of this award.

Decision released this 25th day of May 2018.

Derek L. Rogers
Sole Arbitrator

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