Case Name:

Unite Here, Local 40 v. Coast Capri Hotel (RG Properties Ltd.) (Wage Rate Grievance)

Labour Relations Code
(Section 84 Appointment)
Arbitration Decision
Between
Unite Here, Local 40, Union, and
Coast Capri Hotel (RG Properties Ltd.), Employer
(Re: Wage Rate - Employees Transferred or Promoted after First Year of Employment)

[2016] B.C.C.A.A.A. No. 66

No. A-056/16

British Columbia
Collective Agreement Arbitration

Panel: James E. Dorsey, Q.C. (Arbitrator)

Heard: June 24, 2016.
Award: July 6, 2016.

(62 paras.)

Labour Arbitration -- The collective agreement -- Interpretation -- Rules of construction.

Labour Arbitration -- Employee rights and benefits -- Remuneration -- Wage rates.

The employer and union agreed that an employee was entitled on the first anniversary of the date of hire to 100 per cent of the minimum wage rate for the employee's job classification. A dispute arose between the parties concerning employees who transferred or was promoted to a new job classification after the first anniversary. The union grieved the employer's decision to pay the grievor 87.5 per cent of the minimum wage rate in her new Front Desk Clerk classification as a violation of the collective agreement. Two other employees were paid the same rate in their new job classifications.

The employer submitted the payment of 87.5 per cent of the classified rate to all three employees was a policy choice within its discretionary management rights.

HELD: Grievance allowed. The mutual intention of the parties was clear from the language and structure of the collective agreement. After the first anniversary of the employee's date of hire, the employee's rate would be the classified rate. The employee's wage rate would not revert to a lower entry level rate in any circumstance other than the one agreed, when the employee was promoted or transferred to another hotel at the employee's request. The employer was ordered to pay the grievor and the other employees the classified wage rate for all hours they were incorrectly paid an entry level wage rate plus all additional vacation pay and other wage dependent benefits to which they were entitled at the classified wage rate.

Statutes, Regulations and Rules Cited:

Labour Relations Code, s. 84

Appearances:

Representing the Union: G. James Baugh.

Representing the Employer: Veronica Ukrainetz and Kelsey A. Robertson.

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AWARD

1. Policy Grievance, Issue in Dispute and Jurisdiction

1 A new manager's reading of the collective agreement persuaded the employer it and the other three employer parties to the agreement had misunderstood their and the union's mutual intention when they negotiated the language in the 1990s or earlier and had administered it incorrectly over the decades. The union does not agree.

2 The employer and union agree an employee is entitled on the first anniversary of the date of hire to 100% of the minimum wage rate for the employee's job classification. If the employee transfers or is promoted to a new job classification after the first anniversary, is the employee entitled to 100% of the minimum wage rate for the new classification or may the employer decide to pay the employee a lower wage rate for the first year in the new classification?

3 The union grieved on February 11, 2016 that the employer's decision to pay Louise Healey 87.5% of the minimum wage rate in her new Front Desk Clerk classification was contrary to the collective agreement.

4 The union subsequently learned two other employees, Rolando Palon and Elliot Hardy, transferred or were promoted to new classifications in May 2016 and were paid 87.5% of the minimum wage rate for the new classifications. Mr. Palon subsequently returned to his former classification and 100% of the minimum wage rate for that classification.

5 The union and employer agreed I am properly appointed as an arbitrator under their collective agreement and the *Labour Relations Code* to finally decide the merits of the grievance as it relates to these three employees.

2. Structure and Content of Collective Agreement

6 The union and Coast Hotels Ltd. have negotiated a single collective agreement for the employee bargaining units the union represents at Coast branded properties in British Columbia. In the 1990's, six properties were covered by a collective agreement called the master agreement. Since the 2006-09 collective agreement, no longer called a master agreement, four properties have been covered.

7 The current collective agreement has the same basic structure as previous agreements. The four hotel employers are parties to the agreement between the union and Coast Hotels Ltd. Some of the Letters of Understanding are between the union and Coast Hotels Ltd. and some are between the union and an individual hotel.

8 In the exercise of management rights, each employer must "observe the provisions" of the agreement (Article 6.01(b)). An employer cannot enter into individual agreements with an employee varying the conditions of employment in the collective agreement and no employee can be asked to make an individual agreement (Article 17.05).

9 Seniority as defined and accrued (Article 10) determines assignment of shifts (Articles 9.05 and 13.06); provides access to overtime (Article 9.01(c)); gives job security on layoffs (Articles 11.04 and 11.05); gives priority in taking floating holidays (Article 13.01); and gives preference on vacation scheduling (Article 14.03). Length of service determines annual vacation leave and pay entitlement (Articles 11.01(e) and 14.02); and severance pay (Article 17.08).

10 Vacancies and new positions are posted (Article 7.01). New employees must complete a probationary period (Article 7.02). All employees are to be given reasonable opportunities to learn the work of other classifications on a voluntary basis during their time off work (Article 8.01).

11 Subject to having the "necessary qualifications, integrity, skill and ability to perform the job", seniority applies when there are competing applicants to fill vacancies and new positions and when offering transfers or promotions (Article 11.01). Transfers between departments require employee consent (Article 11.02(a)).

12 Employees "granted a promotion or transfer" have a 45-day trial period to demonstrate they can satisfy the requirements of the new job. During that time, employees may choose to return to their former jobs. When an employee is unable to satisfy the requirements of the new job or chooses to return to the former job, the employer may "require all employees who changed job positions in consequence of the promotion, to move back into their job positions and wage rates, which they occupied prior to the promotion." (Article 11.03(b))

13 The wage rates in the appendices for each of the four employers are minimum wage rates (Article 12.03(a) and (c)). The employer may pay higher, but not lower rates except for paid training and during probation (Article 12.03(b)).

14 New employees are paid an entry level wage rate for the first six calendar months of employment. It is 75% of the "contractual wage rate for the classification" in which the employee is working (Article 12.04(a)). After six months the rate is to be increased to 87.5% (Article 12.04(b)). "After one (1) calendar year from date of hire, the rate will be the classified rate." (Article 12.04(c)) These provisions are in Article 12.04 with the heading "Entry Level Wage Rates" in Article 12 with the heading "Administration."

15 The disputed language is in Article 12.04(d): "Transfers or promotions within a hotel will not necessitate the employee reverting to an entry level rate."

16 Article 12.04(e) states:

> Promotions or transfers within the corporation to another hotel which are made at the request of the Employer will not necessitate the employee reverting to an entry level rate.
>
> Employees who are promoted or transferred within the corporation to another hotel at the request of the employee will revert to an entry level rate.

17 The word "necessitate" is not used elsewhere in the collective agreement, which provides: "Where a specific definition of a word, expression, term or a phrase is not expressly provided in this Agreement, such word, expression, term or phrase shall be interpreted objectively, not subjectively; and according to common and normal grammatical usage." (Article 22.01)

18 Collective bargaining concluded February 10, 2016 in mediation at the Labour Relations Board, one day before the grievance. The renewed collective agreement includes a new Letter of Understanding on temporary internal transfers to provide leave coverage by filling temporary absences. An agreed form letter from an employer to an employee filling a temporary absence states the employee's hourly rate of pay will be the wage rate for the classification being filled. There is no mention of Article 12.04(d) or (e).

3. Union Learns and Grieves Louise Healey's Wage Rate

19 Ms Healey began employment in 2008 as a Breakfast Server. In 2011, she transferred to Bellperson (Shuttle Driver). While in that position she occasionally filled in as Front Desk Clerk. A vacancy arose and she trained as a Front Desk Clerk from January to March 2015.

20 Rooms Division Manager Dale Sivucha told her she would be paid an hourly rate which was 87.5% of the classification wage rate, but higher than her Bellperson rate. She was told her rate would increase after one year. She began permanently in the Front Desk Clerk position on April 1, 2015.

21 In mid-January 2016, a year after she started her training as a Front Desk Clerk, she emailed an inquiry to payroll personnel: "I was wondering if you could look into when I should be getting the Full front desk agent wage. I was under the impression that I should be getting it already." The reply was the increase in payroll records would begin on April 1, 2015, but her personnel file would be reviewed for more information.

22 Shop Steward Andrew Pritchard began employment in 1993. He was a member of the union collective bargaining committee engaged in collective bargaining from July 16, 2015 to February 10, 2016. At the end of January, he learned Ms Healey was being paid less than the classified rate for the Front Desk Clerk position.

23 On January 30th, he emailed payroll that he had learned Ms Healey's wage rate was reduced to entry level when she changed positions: "This is contrary to 12.04(d). Could you please correct and make whole her vacation pay, severance pay. And lost wages." The reply on February 2nd was that she had not reverted to entry level. She was paid 87.5% of the hourly rate, which at time was $15.37. "I am not sure what the entry level wage you are referring to. Can you elaborate or provide the documentation you are referring so I can look into this further."

24 A couple of days later, Mr. Pritchard spoke to Mr. Sivucha about Article 12.04(d) and the rate he chose to pay Ms Healey. They agreed to disagree.

4. Rolando Palon and Elliott Hardy Paid Entry Level Wage Rate

25 Rolando Palon was employed from September 24, 2014 to April 15, 2016 as Banquet Captain. On April 15, 2016 he transferred to a Front Desk Clerk position in Mr. Sivucha's department. He was paid 87.5% of the classified rate for the position. Within the 45-day trial period he returned to his position as Banquet Captain at the classified rate he was paid before the trial transfer.

26 Elliott Hardy was employed from August 31, 2009 to May 7, 2016 as Bellperson (Shuttle Driver). The position was abolished. On May 8, 2016, he transferred to a higher rated Maintenance position. He is being paid 87.5% of the classified rate for the position.

27 It is agreed there is no other known situation at this hotel or any of the other three hotels covered by the collective agreement where an employee with one calendar year employment was transferred or promoted within a hotel and is or was paid less than the classified rate for the new classification.

5. Union and Employer Submissions

28 The union submits the general scheme and structure of the collective agreement places a high value on seniority rights and length of service. The employer may pay a new employee an entry rate, but after the date of hire anniversary, the hourly rate must be the classified rate. There is no exception for the promotion or transfer 45-day trial period or otherwise.

29 The union submits it is not agreed that on transfer or promotion of an employee currently paid a classified rate the employee may be paid up to 25% less than the classified rate for the new position. This could produce the absurd result that a transfer or promotion results in reduced hourly wage rate for the employee.

30 The union submits the collective agreement expressly limits both the 75% and 87.5% entry level rates to six months for each. Article 12.04(a) to (c) address the rate the employee will receive and for how long, not what the employer will pay.

> (a) For the first six (6) calendar months of employment an employee shall receive seventy five percent (75%) of the contractual hourly wage rate for the classification in which he or she is working.

(b) After six (6) calendar months from the date of hire, the rate will be increased to eighty seven and one-half percent (87 1/2 %).

(c) After one (1) calendar year from date of hire, the rate will be the classified rate.

31 Similarly, Article 12.04(d) is worded in a negative manner with attention on the employee in order to clarify the protection an employee has when transferring or being promoted after one calendar year from date of hire: "Transfers or promotions within a hotel will not necessitate the employee reverting to an entry level rate." The purpose is to provide employee protection against extending the time an employee must work at an entry rate. It is not to grant the employer a broad discretion to pay less than the classified rate years after an employee has been employed.

32 The union submits this is reinforced by the objective and ordinary meaning of "necessitates" which *The Canadian Oxford Dictionary* defines as a transitive verb meaning "make necessary (esp. as a result) (*will necessitate some sacrifice*)." The *Oxford Paperback Thesaurus* lists synonyms as "require, make necessary, demand, oblige, compel, impel, force, leave no choice but to." Transfers and promotions will not result in the employee reverting or force an employee to revert to an entry level rate, which encompasses the two six month rates referred to in Articles 12.04(a) and (b) in Article 12.04 -- Entry Level Wage Rates.

33 The union submits the employer's discovered meaning is a subjective, not objective, interpretation based on its perceived interests and not according to the common and grammatical usage of the words and phrases. This is confirmed by the consistent application of Article 12.04(d) since its inception at this and other properties covered by the collective agreement. The only exception is expressly agreed in Article 12.04(e): "Employees who are promoted or transferred within the corporation to another hotel at the request of the employee will revert to an entry level rate." Similarly, any exception to an employee receiving less than 100% of the minimum classification rate is expressly agreed -- Article 12.04(a) and (b) and Letter of Understanding #5 (Extra Staff Agreement (Banquets & Kitchen)).

34 Mr. Pritchard acted quickly after inquiry to determine the facts. The timing of the grievance on the day after mediation helped successfully conclude collective bargaining was simply his first opportunity to act. The delay from the time Mr. Pritchard spoke to Mr. Sivucha and February 11th caused no harm for the employer. There were no proposals in collective bargaining relating to Article 12.04 giving either the union or employer an opportunity to address this issue in collective bargaining and a dispute over language interpretation and application does not have to be brought to the collective bargaining table by either. By early February, it was long past the time for any new proposals to be presented in normal collective bargaining protocol. There was no representation by the union or reliance by the employer when the employer set Ms Healey's wage rate in 2015 without the union's knowledge. The employer set Messrs Palon and Hardy's rate after the grievance had been filed.

35 The union submits there is no onus when the difference is an issue of language interpretation[1] and any ambiguity can be informed by past and current practice under this multi-employer collective agreement.[2] Each of the three employees was paid contrary to the collective agreement and is entitled to unpaid wages and any additional payments based on hourly rates such as vacation and severance pay.

36 The employer submits the payment of 87.5% of the classified rate to all three employees was a policy choice within its discretionary management rights. It made the same choice for each for administrative convenience. The employer has discretion to pay any rate higher than the 75% entry level rate, even one higher than the classified rate. This is the common sense reading of the collective agreement discerned through the fresh eyes of Mr. Sivucha who first looked at the language of the collective agreement when determining what to pay Ms Healey in her new Front Desk Clerk position.

37 What he discerned was that "not necessitates" in Article 12.04 specifically grants latitude and flexibility to the employer to pay a rate between 75%, the entry level rate, and the classified rate for the first twelve months the transferred or promoted employee is in the new classification. The language is clear and unambiguous and prevails regardless of past interpretations, applications and administration.[3]

38 The employer acted openly and did not have to raise the issue in collective bargaining. Any onus to do so is on the union knowing the employer's enlightened interpretation and administration of Article 12.04(d). Similarly, because the union claims the monetary benefit of protection of the classified rate, it must show in clear, cogent and unequivocal terms this is part of the employees' compensation package.[4] Article 12.04(d) cannot be interpreted to say the employee is absolutely entitled to the classified rate.

6. Discussion, Analysis and Decision

39 There is no sliding or shifting degree of probability in the balance of probabilities standard of proof. The seriousness of allegations or consequences does not alter or intensify the standard of proof. "Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences."[5] The evidence must always be sufficiently clear, cogent and convincing to satisfy the balance of probabilities test.

40 This is not a dispute in which there is conflicting testimony, a burden to prove a fact or questions of fact or credibility to be determined. It is one of interpretation of provisions of a collective agreement.

41 The arbitrator's role when interpreting a collective agreement is to determine the union and employer's mutual intention from the language they used in their agreement. Various rules of construction assist in the interpretation. One is that important promises are likely to be expressed clearly and unequivocally. Another is that the collective agreement is to be read as a whole. A third is that headings are part of the agreement and can assist in determining the mutual intention.

42 The minimum wage rates for each job classification or the classified wage rates are in appendices specific to each hotel covered by the collective agreement. There are different rates for the same job classification at different hotels. The administration of the wage rates in these appendices is addressed in Article 12 headed "Administration."

43 Article 12.03 headed "Wage Rate Conditions" addresses what wage rate employers may and may not pay. It states the appended classification wage rates are minimum wage rates and "do not prevent the Employer from paying a higher wage rate."

44 However, "the Employer is not entitled" to pay wage rates lower than the rates in the appendices except as provided in two clauses addressing the probationary period of employment and paid

training (Article 12.03(b)). The amount of these lower rates is not specified. Any relationship between these lower rates and the classified wage rates is not specified.

45 Articles 12.04 (a) and (b) expressly provide that in addition to the classified wage rates there are two "Entry Level Wage Rates." The use of the plural "rates" in the heading is deliberate and consistent with the article. One rate is for the first six months and one is for the second six months of employment. These rates are agreed percentages of the classified wage rates -- 75% and 87.5%.

46 Unlike the wage rates attached to job classifications for which an employer may pay a higher rate, the two entry level wage rates are attached to the employee's length of employment.

47 The entry level wage rates can be paid only for limited periods determined by the individual employee's "calendar months of employment," regardless of the number of hours the employee works during each six months, which is the basis of seniority.

> Departmental Seniority: For the purpose of this Agreement "departmental seniority" shall be defined as an employee's total length of continuous service identified in hours worked within his/her classification(s) within a particular department in the Employer's operation. (Article 10.01(a))

48 For the "first six (6) calendar months of employment an employee shall receive" 75% and "after six months from the date of hire, the rate will be increased" to 87.5%. These entry level rates attach to the employee. They are not minimum rates. They are not rates the employer has the flexibility to exceed or subject to the requirements when the employer pays a rate higher than the minimum classified rate (Article 12.03(c).

49 If an employer decides to pay entry level rates to an employee, then the employee "shall receive" 75% of the classified rate increased after six months to 87.5% and after one year "the rate will be the classified rate", which is a minimum rate. Again, the entry level rates are tied to the individual employee's length of employment for one year.

50 This agreement gives employers relief to pay new employees two rates for limited periods that are less than, but tied to, the minimum classified rates. It does not give flexibility to pay at any other higher or lower percentage of the classified rates.

51 What if during the first calendar year after date of hire the employee is requested or successfully applies to transfer or is promoted to another classification within a hotel? That event "will not necessitate the employee reverting to an entry level rate." This is because a transfer or promotion does not alter the employee's duration of employment. Whether the transfer or promotion occurs during the first or second six calendar months of employment, the date of hire is not changed. Because it is not, the employee does not have to regress, return or backslide and become an employee at the first or second six month entry level wage rate. The employee does not have to revert to "an" entry level rate.

52 The entry rates are for new employees entering into employment with the employer. They are not for employees with more than one year employment entering into job positions.

53 Article 12.04(d) -- "Transfers or promotions within a hotel will not necessitate the employee reverting to an entry level rate" -- reinforces the agreement there is a limited time, one calendar year, during which the employee shall receive an entry level wage rate. A change in job by promotion or transfer within the hotel or at the employer's request to another hotel within the corporation

does not turn back the clock. The clock does turn back if an employee is promoted or transferred to another hotel within the corporation at the employee's request. Then, "the employee will revert to an entry level rate" (Article 12.04(e)).

54 With minor changes to Article 12.03(c) in the 2012-15 collective agreement, Articles 12.03 and 12.04 have been in successive collective agreements since at least the 1999-00 collective agreement. At the time of the negotiation of the 2002-06 collective agreement when Article 12.03(e) was added, the two entry level wage rates were colloquially referred to as "entry level" and "intermediate" rates. The addition was:

> No entry level, intermediate or full wage rate paid under this collective agreement shall be less than the minimum wage rate paid in British Columbia. The parties agree that the minimum wage rate in effect as of August 2002 is $8.00 per hour.

This was carried forward until the second sentence was deleted in the 2012-15 agreement. There is no other reference to an "intermediate" wage rate in the collective agreement.

55 Using "entry level" and "intermediate" to describe the 75% and 87.5% rates in Article 12.03(e) does not alter the fact there are two entry level rates in Article 12.04. However using two terms to describe the two entry level rates appears to have created confusion or laxity of thought. In replying to Mr. Pritchard's email, payroll said Ms Healey had not "reverted back to entry level" but was given the 87.5% rate.

56 Similarly, Mr. Sivucha regarded the 75% rate as the only entry level rate in Article 12.04(d) despite the language "will not necessitate the employee reverting to an entry level rate." By choosing a percentage higher than 75%, he believed he was not causing Ms Healey to revert to entry level. For convenience he chose 87.5%. He then chose to maintain this rate for Ms Healey for twelve, not six, months. The intent is to pay Mr. Hardy at the 87.5% entry level rate for twelve months.

57 The 87.5% rate is "an" entry level rate. There are two entry level rates, even if the higher one is referred to an intermediate rate or coded in payroll as something other than entry level. A rate at 87.5% of the contractual hourly rate is an entry level rate. Ms Healey was "reverted back" to "an entry level rate" even if it was not the lower entry level rate. There is no authority in the collective agreement for the employer to continue an entry level rate for an employee in any circumstance for twelve months

58 The mutual intention clear from the language and structure of the collective agreement is that if an employer decides to pay a newly hired employee an entry level wage rate, the employee will receive 75% of the classified wage rate for the first six calendar months of employment and 87.5% for the second six months. After the first anniversary of the employee's date of hire, the employee's rate will be the classified rate. The employee's wage rate will not revert to a lower entry level rate in any circumstance other than the one agreed -- when the employee is promoted or transferred to another hotel within the corporation at the employee's, not the employer's, request.

59 The union diligently pursued the employer's incorrect payment of an entry level wage rate of 87.5% of the contractual hourly wage rate to Ms Healey in her seventh calendar year of employment. There was a difference in the interpretation of the collective agreement and the grievance proceeded in the normal manner with no responsibility on either the union or employer to bring it to

the multi-employer collective bargaining table which was on the verge of reaching a collective agreement after six months of negotiations.

60 The employer similarly incorrectly paid Mr. Palon and Mr. Hardy an entry level wage rate in their second and sixth calendar years of employment.

61 The grievance is allowed. I order the employer to pay Mr. Hardy at the classified wage rate and to pay Ms Healey, Mr. Palon and Mr. Hardy the classified wage rate for all hours they were incorrectly paid an entry level wage rate plus all additional vacation pay and other wage dependent benefits to which they were entitled at the classified wage rate.

62 I retain and reserve jurisdiction over the interpretation and implementation of this decision and, specifically, over any difference that might arise over the amount of compensation to be paid to Ms Healey, Mr. Palon or Mr. Hardy.

JULY 6, 2016, NORTH VANCOUVER, BRITISH COLUMBIA.

James E. Dorsey

1 *British Columbia Public School Employers' Association* [2000] B.C.C.A.A.A. No. 43 (Dorsey), para 21

2 *Aeroguard Inc. (Wage Rates Grievance)* [2010] C.L.A.D. No. 216 (Graham), paras 42-47; *Pacific Press* [1995] B.C.C.A.A.A. No. 637 (Bird), para 27)

3 *Mountain Equipment Co-operative* [2015] B.C.C.A.A.A. No. 18 (Keras), paras 27; 67; 73-75

4 *Cardinal Transportation British Columbia Inc.* [1997] B.C.C.A.A.A. No. 83 (Devine), paras 27; 32; 39

5 *F.H. v. McDougall* [2008] 3 S.C.R. 41, para 40