

IN THE MATTER OF A GRIEVANCE under the *Labour Relations Act, 1995* and
pursuant to a collective agreement

BETWEEN:

BRADGATE ARMS
(the “Employer”)

-AND-

UNITED FOOD AND COMMERCIAL WORKERS UNION CANADA, LOCAL 175
(the “Union”)

Group Grievance re Failure to Provide Pay Stubs

Before: Gail Misra, Arbitrator

Appearing for the Employer:

Erin Porter, Counsel
Geoff Tadema, Student-at-Law
Tanya Maguire, Executive Director, Bradgate Arms by Revera
Amy Rezek, Regional Director of Labour Relations, Revera Inc.

Appearing for the Union:

Georgina Watts, Counsel
Matthew Appignanesi, Student-at-Law
John DiFalco, Union Representative
Geraldine Alinsod, Union Steward
Fem Bagindoc, Union Steward

Hearing held on December 17, 2018 in Toronto, Ontario

Decision issued: February 8, 2019

DECISION

1. I have been appointed pursuant to the collective agreement between the parties to hear a group grievance dated December 20, 2017, claiming that the Employer has failed to provide employees with pay stubs contrary to Article 18.01 of the collective agreement.

2. The parties relied on an Agreed Statement of Facts; they stipulated to some facts; and, as well they relied on the evidence of two witnesses: Geraldine Alinsod for the Union, and Lauren Leppik for the Employer.

FACTS

3. The Agreed Statement of Facts (“ASF”) states as follows, although the references to supporting documents that were provided at the hearing have been removed:

1. The Employer operates an exclusive retirement home, Bradgate Arms, located in heart of Rosedale. It houses 81 independent living suites and employs 51 bargaining unit members. It offers top tier services and amenities to its residents.
2. The Employer and the Union are parties to a collective agreement, the most recent of which runs from February 1, 2017 to December 31, 2018 (the “Collective Agreement”).
3. Article 18.01 states:

The Employer shall pay salaries and wages as set out in Schedule “1” attached hereto and forming part of this Collective Agreement. Each employee shall be provided with an itemized statement of his/her wages, overtime and other supplementary pay and deductions (pay stub). Wages shall be paid bi-weekly.
4. The Employer had historically provided employees with printed pay stubs.
5. In the summer of 2017, Revera Inc. expanded its use of My Self Service (“MSS”), an online system that manages pay statements, benefit information, T4s and personal contact information. Employees were required to register for MSS between July 17th and August 14th so that they could access the site.
6. Employees were informed of the requirement to register through stand up meetings. A Frequently Asked Questions document was also posted

by the punch clock and attached to employee pay stubs. Employees were informed that one of the reasons for expanding MSS was to eliminate paper pay stubs in the coming months.

7. Amy Rezek, Regional Director of Labour Relations for the Employer, sent an email to John DiFalco, National Service Representative for the Union, on July 26, 2017 informing the Union of the Employer's intent to expand the use of MSS to all front-line employees and to eventually eliminate the use of paper pay stubs.
8. The majority of employees at the Bradgate had registered for MSS by the end of the summer. Even though they could access their pay information online, they still received paper pay stubs.
9. The Employer moved forward with its decision to stop issuing printed pay statements in October 2017. This was a corporate initiative that impacted almost all of Revera's long term care and retirement homes, including Bradgate Arms. The Employer believed that utilizing MSS would be more efficient, more cost effective, be better for the environment and actually allow employees to access more detailed pay information.
10. On the front of the printed pay statement that employees received on October 19, 2017, the following message appeared:

Effective November 2, 2017 you will no longer receive a paper copy of your pay stub unless required by a collective agreement. Visit My Self Service as soon as possible to view and print your pay stub.
11. On the front of the printed pay statement that employees received on November 2, 2017, the following message appeared:

After this pay stub you will no longer receive a paper copy of your pay stubs unless required by a collective agreement. Visit My Self Service as soon as possible to view and print your pay stub.
12. A copy of an electronic pay stub [was attached to the ASF].
13. A Frequently Asked Questions document for MSS and a notification about the move to Electronic Pay Stubs were posted by the punch clock, placed by the employee computer kiosks and attached to employee pay stubs.

14. There are two employee kiosk computers located in the Upper Canada room. Both are connected to printers and are available for employee use to view and print pay stubs, T4s or benefit information.
15. At the kiosks, there are copies of the tools “How to Log on to MyRevera from Home” and “Quick Reference Guide: View and Print my Pay Stubs & T4”.
16. The Union filed a group grievance, R2-18-0007, on or about December 20, 2017 alleging that the Employer had violated section 18.01 of the Collective Agreement for failing to provide employees with a pay stub.
17. The Employer denied this grievance stating that employees were still able to access a pay statement and also had access to a computer and printer to print their pay stubs if they desired.

4. The parties stipulated to following facts. The current language of Article 18.01 was negotiated into the collective agreement in the February 1, 2009 to January 31, 2012 collective agreement. In the last round of collective bargaining for the February 1, 2017 to December 31, 2018 agreement, the Employer, as part of a company-wide proposal for all Revera homes, had proposed a change to the language of Article 18.01 regarding electronic access to pay stubs. The proposal was as follows:

Article 18.03 Add the following language NEW

In the future, when pay stubs will be available on line once a computer & printer are made available in the workplace. In the event the computer, the printer or internet is not working, the employer will provide pay stubs in a timely manner for employees who so request it. Such electronic pay stubs will contain no less information than the pay stubs presently given to employees.

5. The parties had no discussion about this Employer proposal but it was rejected by the Union on May 19, 2017. In accordance with the Revera corporate initiative, the Employer continued to seek its proposed language at interest arbitration before a panel chaired by Arbitrator John Stout. The arbitration board did not grant the Employer the language sought in this regard, and provided no reasons in the April 5, 2018 decision (*Bradgate Arms Retirement Residence and The United food and Commercial Workers Union Canada, Local 175*, 2018 CANLII 38424 (ON LA)).

6. Geraldine Alinsod testified for the Union. She has been at the Bradgate Arms for about fifteen or sixteen years, and works in Housekeeping. She has also been a Union Steward for the last 11 years. According to Ms. Alinsod, the average age of the members of the full time employees in the bargaining unit is 50 years, with one member being 85 years old, and a few in their 70s. Most of the approximately 50 members of the bargaining unit are from countries other than Canada, and English is their second language. Some of the employees do not know how to use a computer.

Prior to November 2017 all pay stubs would be left in envelopes at the Front Desk of the Bradgate Arms for each employee to pick up.

7. Since November 2017, while at work, employees have access to two computers and printers on the fifth floor of the home to permit them to access and print their pay stubs. However, when not scheduled to work, employees do not have free access around the building. Hence, if not scheduled to work, an employee must ask a bargaining unit member working at the Front Desk to print their pay stub for them, which entails giving that person one's user name and password to access the MSS system.

8. Ms. Alinsod has a computer at home, but it is used by her children. She knows how to use a computer, and is on Facebook. Ms. Alinsod has utilized the Employer's computer and printer to print her pay stub, but testified about the problems she has encountered. Although employees were not apparently told this when the system was instituted, it would appear that one must change one's password at regular intervals in order to maintain access to MSS. However, if one does not use the system very often, and does not change the password, one is locked out of the database. This causes the employees considerable frustration. Ms. Alinsod herself was not aware of the need to change passwords, and has been unable to access her MSS account about ten times since the Employer initiated the electronic pay stub policy in November 2017.

9. When unable to get into her account, Ms. Alinsod had asked her manager for help once, but was told that he did not know how to use the system. She has therefore had to seek help from Lauren Leppik, the Director of Administrative Services. Ms. Leppik is not always in her office, or may be busy. However, if she is there and can help Ms. Alinsod, she will go into the system and reset the password to allow Ms. Alinsod to access her pay stub. Since Ms. Alinsod is usually trying to get her pay stub while on her break, she does not have much time to deal with this situation. She has also tried to access her account before or after work, but has had to give up and leave because she cannot get into her MSS account.

10. Ms. Alinsod has a smartphone with internet service, and while she was able to see her pay stub on her phone a few months ago, that no longer works either. She testified that most of her colleagues do not have smartphones, and some do not have cell phones at all.

11. As the Union Steward, Ms. Alinsod receives a lot of complaints about the inability of employees to get their pay stubs. In the week before she testified, Ms. Alinsod had been on vacation, and when she returned, four staff complained to her about this issue of not being able to access the Revera portal to get their pay stubs (a cook, a front door person, a front desk clerk, and a dishwasher). She did not go to management about these complaints.

12. At the employees' request, Ms. Alinsod prepared a petition in early December 2018. It requested that the Employer provide a paper pay stub because not all employees have access to computers and printers at home. The petition, signed by 33 people, including Ms. Alinsod, was tendered in evidence.

13. Ms. Alinsod testified about the ramifications of not receiving an original pay stub from the Employer. When Ms. Alinsod had first purchased her home she had to provide an original pay stub in order to get a mortgage. Approximately two weeks before she testified, Ms. Alinsod was looking to purchase a property again. Her real estate agent asked her to provide a pay stub to show her earnings. Ms. Alinsod went into the Bradgate Arms on the weekend, and asked Bert, at the Front Desk, to print her pay stub for her. She gave Bert her user name and password to allow him to get into her MSS account, but was advised that the password was incorrect. The next day she asked Phoenix, another person at the Front Desk to try to get her pay stub. Although Phoenix tried, she too was unable to access Ms. Alinsod's account. In the afternoon of that day Ms. Alinsod asked Esther, who was then on the Front Desk to try, but to no avail. On Monday, Ms. Alinsod was off work, but called in to ask Phoenix to try again. She was not successful. When Ms. Alinsod, who really needed her pay stub, asked if she could speak to Ms. Leppik, the Director of Administrative Services, she was advised that Ms. Leppik was on holidays. It was obvious that Ms. Alinsod was very frustrated that by the date of this hearing, almost two weeks later, she had still not got a copy of her pay stub.

14. According to Ms. Alinsod, the Employer is aware that staff have been having trouble getting their pay stubs on line, and has tried to fix the problem by giving them all the same password, to be used with each employee's own user name. However, while that works sometimes, it does not always work. She testified that she does not have an Employer email address, and does not believe that most, if any, of the bargaining unit employees have Employer email addresses either.

15. In cross-examination the witness was taken through screen shots of the My Revera and MSS screens that would get one to where one could see one's pay stub on line. Ms. Alinsod indicated she knows how to get her pay stub once she is in the portal, but the problem for her is the password to get in. She stated that the Employer has provided an easy step by step guide for how to actually get to the screen with the pay stub.

16. Ms. Alinsod was asked if she had followed the instruction that if having difficulty, to call IT at a toll free number. The witness indicated she had tried that too, on the Monday when she had been unable to get her pay stub through Phoenix, and when Lauren Leppik had been away. Phoenix had given Ms. Alinsod the IT phone number; Ms. Alinsod had called it; she had waited on hold for an hour before she had to hang up after not having got through to anyone. She had not complained to management about her inability to get through to the IT staff.

17. Ms. Alinsod explained that the staff do not want to have to go to management every time they cannot get into their MSS accounts. It was her uncontested evidence that staff had never been told that a person's password expires every three months, and she had never used the prompt on the MSS page about having forgotten one's password as she had not in fact forgotten her password. She did not know how that prompt worked.

18. The parties stipulated to the fact that employees sometimes need an original pay stub for a bank, e.g. to renew mortgages, or for Service Ontario, for such things as renewal or replacement of a health card. From time to time employees may also need a letter from the Employer verifying employment and wages, but there is no dispute that the Employer has provided such letters when requested.

19. Lauren Leppik testified for the Employer. She is the Director of Administrative Services and has been at the Bradgate Arms for a year and a half. She is responsible for scheduling, payroll discrepancies, the invoicing of residents, and external vendors. The electronic pay stub system was instituted when she had been at the Bradgate Arms for about six months. She confirmed that in the months preceding November 2017 several memos were posted about the process and frequently asked questions, both at the computer/printer kiosks on the fifth floor and by the punch clock on the first floor. As well, that information was provided to each employee with his or her paper pay stub in the lead up to the transition to electronic pay stubs. To her knowledge, there had been no technical problems with the computers or printers at the fifth floor kiosks.

20. According to Ms. Leppik, the information that had been provided to employees detailed the company-wide initiative to move away from paper to electronic pay stubs. People were given two or three months to learn how to access their pay stubs on line. During that period, while they were still receiving paper pay stubs, each employee had to register on line, and managers encouraged employees to go on line to see how they would find and print their pay stub before the paper stubs were discontinued.

21. Ms. Leppik testified that there had been many problems in the initial period as people needed assistance in setting passwords, and logging on. For some employees she helped the same person a number of times, and overall, she had helped many employees to learn the system. She indicated she was prepared to help an employee understand the system by leading them through the process as needed. According to Ms. Leppik, the password seemed to be the usual issue, along with not being able to log on. While employees should be checking for their pay stubs bi-weekly, she was aware that people may not be checking regularly, and that their passwords would expire every three months. They would then have to go through a re-set process again. In the month before she testified Ms. Leppik indicated she had not had anyone come to her about a password problem. In the previous three months, she had had between three and five employees come to her for assistance in this regard.

22. When the system was first set up, and each employee registered on line, they were asked to pick and answer two security questions. If the employee later forgot their password, or had it lapse, they would be required to answer their security questions, and then would get a new password with which to log on and set their own new password. However, in November 2018 the forgotten password system was simplified so that each employee who had registered their personal email or personal cell phone number with Revera IT could get a code texted or emailed to them to enable them to log in. If an employee does not have a cell phone or email address, they can call IT, where IT staff would use the two security questions to confirm identity before providing the employee with a new password to log in to MSS.

23. Ms. Leppik testified that she used to help staff by taking them step by step through the password re-setting process, and then would log in with them to ensure that it worked. If the employee had forgotten the precise answer to their security questions, then Ms. Leppik would have to do a full re-set of their account. She has never received any complaints about staff not being able to reach someone on the IT hotline.

24. According to Ms. Leppik, the Employer is making an exception for four employees, by having their managers print out their respective pay stubs for them bi-weekly. These are older workers who are not computer literate. Ms. Leppik has tried to teach these individuals how to use the system, but they are not able to do so. If an employee goes to their manager and explains why they cannot work with the system, then on a case by case basis, the manager may agree to print their pay stub for them. Ms. Leppik stated that the Employer was not going to withhold a pay stub from any employee, but she expected the employees to have done their due diligence.

25. It was put to Ms. Leppik that Fem Bagindoc, an employee and Union Steward, has not been able to get a pay stub since November 2017. Ms. Leppik indicated that Mr. Bagindoc had never come to her about this, and she did not know that he had not been able to access his pay stub. She had also not heard from his manager that he was having trouble with printing off his own pay stub. Ms. Leppik indicated that if she was not aware of a problem, she could not help the person. She agreed that if someone had been unable to access their pay stub they would not be able to ascertain if there had been an error on their pay.

26. Ms. Leppik conceded that employees are expected to create a new password every three months, and that they are unable to use one that they have used previously. There is no prompt on the system to tell an employee that the three months have lapsed or that they will need to re-set their password because the time is approaching when it will lapse. Rather, if they are unable to log in using the password they had, the employee is expected to know to indicate that they have

forgotten their password. Ms. Leppik conceded that one may not in fact have forgotten one's password, but that is what the prompt says.

27. When asked what an employee is supposed to do if she or he cannot get their pay stub, and if Ms. Leppik is away, the witness indicated they must go to their manager. Even though Ms. Alinsod had done so, Ms. Leppik testified that her manager should have been able to help her. Nonetheless, she admitted she is the expert on site, but if she is away, an employee has to call IT.

28. If asked for a letter of employment for a bank or for a visa application, Ms. Leppik tells employees that it may take three to five business days to get one to them. She usually tries to get it to them within two business days, but since she prepares the letters and the Executive Director has to sign them, she cannot guarantee that can be accomplished in less than 5 business days.

ARGUMENTS

29. It is not necessary to outline the parties' arguments in detail. Generally, the Union argues that the language of Article 18.01 is clear and requires that the Employer provide employees with a hard copy of their pay stubs. It posits that was what was bargained in 2009, and the language has been in three collective agreements since. According to the Union, the Employer cannot unilaterally change the established practice.

30. The Union points out that the Employer tried to bargain the right to provide an electronic pay stub, was not successful in doing so, but went ahead and unilaterally began to provide employees with an electronic pay stub. In addition, the Union posits that the type of pay stub that employees used to receive before November 2017 was superior to what they can get on line since the original version was issued by Revera, and could be used for Service Ontario or to get a mortgage. The current version, even when printed, is not acceptable as an original document by Service Ontario.

31. According to the Union, what employees have to do in order to get access to their pay stubs is difficult for people who are older, whose first language is not English, who are not computer literate, and who may not have a computer or smartphone. It points out that even Ms. Alinsod, who is somewhat computer literate, was unable to access her pay stub. The Union states that the evidence shows the password problem and the intricacy of the system has led to some people not getting their pay stubs at all.

32. The Union argues that the Employer cannot, for its own convenience, cost reason, or environmental reasons, change the process of provision of employee pay stubs when nothing in the collective agreement permits it to do so. It argues that what the Employer is doing is not even consistent with the minimum standards set in the *Employment Standards Act, 2000* ("ESA") as it is not even sending the

employees their pay stubs by electronic mail. The Union argues, in the alternative, that the Employer must comply with the ESA, and deliver pay stubs by electronic mail to those employees who have email addresses, while those who do not have email addresses would have to receive their pay stubs by hard copy.

33. The Union relies on *Clarke Transport Ltd. and Teamsters Local Union 938*, 2005 CanLII 51588 (ON LA)(Kaplan) and the Oxford Dictionaries definition of the word “provide” in support of its arguments.

34. The Employer submits that the issue in this case is the meaning of “provide” in Article 18.01. It argues that it is providing employees with their pay stubs through an electronic pay service, and therefore has not violated the collective agreement. It argues that a printed pay statement is not the only way to provide employees with an itemized statement of wages, overtime, other supplementary pay and deductions.

35. The Employer relies on the Management Rights clause, Article 4.01, for the proposition that it has the right to introduce electronic pay stubs in order to maintain order and efficiency, in its general management of the enterprise, and to direct and control its operations. It also relies on Article 4.03 for the proposition that it has the discretion to enforce reasonable rules for the efficient operation of its business, and in this instance, suggests that it can require employees to access the Revera portal using a user name and password. It argues that the Union was advised of the impending changes, and it was reasonable, subject to any specific employee accommodation needs, to expect that employees would comply. According to the Employer it is common in everyday modern life to have to use a user name and password.

36. The Employer argues that the parties have used the word “provided” in various sections of the collective agreement, and that meaning should be drawn from those references. In Article 5.02(b) the parties agreed that a remittance statement documenting union dues and initiation fees would be provided to the Union by the Employer in the form of an email or on a computer diskette, as well as a hard copy being attached to the remittance cheque. Since in this Article the parties had specified how the information was to be provided, the Employer argues that where the manner of provision is not specified, it is within the Employer’s discretion to decide how to provide something. The Employer notes that the parties have agreed in various collective agreement provisions when things must be provided in writing (Articles 5.03, 6.04(b), 8.03, 10.01, 10.05, 10.11, 11.02(b), 13.01, 13.02, 27.01). It therefore argues that where the parties did not so specify, that is not a requirement.

37. Ultimately, the Employer argues that it was reasonable to require employees to have an active MSS account in order that they could see their pay stubs, and states that it has provided employees with an itemized pay stub. It further argues that to require the Employer to provide a hard copy of a pay stub to each employee is outside the jurisdiction of the arbitrator as Article 10.06 prohibits an arbitrator

from changing the provisions of the collective agreement or making a decision in conflict with the provisions of the agreement.

38. The Employer relies on the following jurisprudence and excerpts in support of its arguments: The Merriam Webster dictionary definition of the word “provide”; *Brown & Beatty* 4:2100; *C.E.P. Local 777 v. Imperial Oil Strathcona Refinery* (July 7, 2004)(Elliott); *Niagara (Regional Municipality) v. Canadian Union of Public Employees, Local 1287 (Pay Period Grievances)* [2005] O.L.A.A. No. 333 (Albertyn); *City of Prince Albert and Canadian Union of Public Employees, Local 160*, 2016 CanLII 95931 (SK LA)(Ish); *Sodexo Canada Ltd. v. Unite Here Local 47 (Wage Rates Grievance)* [2017] A.G.A.A. No. 49 (Tettensor); *Reynolds Bros. Concrete Ltd. v. International Union of Operating Engineers Local No. 115 (Failure to Remit Contributions Grievances)* [2010] B.C.C.A.A.A. No. 43 (Bischoff); *Siemens Vdo Automotive Inc. v. CAW-Canada, Local 127, 2004 CarswellOnt 5472 (Levinson)*; *Simon Fraser University and CUPE, Local 3338, 2004 CarswellBC 3940 (Moore)*; *Coca-Cola Bottling Co. v. U.F.C.W., Local 393W, 2003 CarswellOnt 9593 (Marcotte)*; *Employment Standards Act, 2000*, s. 12; and, the *Employment Standards Act, 2000 Policy and Interpretation Manual*, Version 2018 Release 2, pp. 145 – 147.

39. In reply, the Union argues that the language and the long standing practice has been that this employer provides employees with a hard copy pay stub in an envelope. Furthermore, the Employer’s management rights are circumscribed where there is language in the collective agreement that limits those rights. The Union points out that Article 5.02(b) shows that when the parties want to agree on provision of documents by electronic means, they have specifically done so. In regards to Article 18.01, the Employer tried to negotiate an electronic means of providing pay stubs, but was unsuccessful.

40. According to the Union, this case is not about a reasonable rule: it is about the payroll policy that was unilaterally instituted. The parties have agreed that if employees breach employer rules and regulations, they may be subject to discipline, up to and including discharge. The Union points out that there are employees who are unable to access their pay stubs, for various reasons, but they are not subject to discipline as this is not a “rule” issue.

41. With respect to the Employer’s list of articles that contained language about providing things in writing, the Union points to other articles in the collective agreement where it has to be inferred that what is being provided is in writing, but the parties did not say so: Article 6.05, provision of copy of the collective agreement to new employees; Article 17.04, that an employee will endeavor to provide the employer with 28 days’ notice of when she wishes to take a floating holiday; and, Article 24.07, an employee will provide a medical certificate upon request of the Employer. The Union argues that the parties knew that in the above examples they were talking about hard copies of documents, and the same is true regarding Article 18.01. They did not have to say that it was “written”, which according to the Union

would be true of the electronic pay stub too, as it is a written record: the only question is whether it is printed by the Employer or the bargaining unit employees.

42. The Union made submissions to distinguish the caselaw relied on by the Employer. Ultimately, it argues that employees should not have to go to a manager every time they cannot access their pay stub on line, and should not have to ask management every time they need an original pay stub if renewing their health card, or for any other purpose. In this instance, the Employer has made a significant change in the manner in which it provides employees with records of their wages, and it has done so without having been able to bargain language that would support this change in practice.

DECISION

43. The question raised by the group grievance before me is whether Article 18.01 requires the Employer to provide bargaining unit employees with a printed pay stub. According to the Union, the Employer's obligation can only be met by providing a hard copy pay stub. The Employer position is that it simply has to supply its employees with access to an itemized statement or pay stub.

44. For ease of reference, Article 18.01 is reproduced here with emphasis added to the relevant sentence:

The Employer shall pay salaries and wages as set out in Schedule "1" attached hereto and forming part of this Collective Agreement. *Each employee shall be provided with an itemized statement of his/her wages, overtime and other supplementary pay and deductions (pay stub).* Wages shall be paid bi-weekly.

45. What is a pay stub? Commonly also known as a pay slip or a pay advice, it is an itemized statement that an employee may receive attached to a pay cheque, or as notice and information about the direct deposit of their wages to their bank account. Bradgate Arms employees receive their pay through direct deposit, so there is in fact no stub or detachable portion of a pay cheque. These parties have agreed that an employee's pay stub will contain information about wages, overtime, supplementary pay and deductions.

46. The Oxford Dictionary definition of the word "provide" is to "make available for use, supply". To "provide someone with" means to "equip or supply someone with (something useful or necessary)". This latter phrase appears to be the definition most consistent with the manner in which the word "provided" has been used in Article 18.01. The employees of the Bradgate Arms are to be supplied with an itemized pay stub, which is obviously both necessary and useful. It is noteworthy that the language the parties have agreed to is "each employee shall be provided with", not that the "employer shall provide each employee with". At issue is how the employee shall be provided or supplied with the pay stub.

47. On the evidence before me in this case the Employer used to meet its obligation in this Article by providing each employee with a printed copy of the itemized statement of his or her wages in an envelope addressed to each worker. Those pay stubs were made available for pick up by all employees at the Bradgate Arms Front Desk. That had been the practice for at least eight years, from the time this language was introduced into the collective agreement in 2009, and until November 2017, when it stopped.

48. Contrary to the Union's assertion, nothing in Article 18.01 states that a pay stub must be provided in hard copy form. The Article only says an employee must be provided with a pay stub that contains certain information. However, there is no dispute that pay stubs had in fact been provided in paper form to employees before November 2017.

49. The Employer argued that there are many provisions in the collective agreement where the parties have used the word "provided" and specified how that is to be done. As such, it argued that if these mature bargaining agents had wanted to do so, they could have specified that the pay stubs should be in writing. It is worth reviewing the provisions the Employer points to:

Article 4.03(3): All such rules shall be in writing and shall be posted on the bulletin boards herein provided for and made available on request to any employee desiring a copy of such rules. ...

Article 5.02(b): The remittance statement shall be documented by location containing a dues and initiation report which will be provided in the form of e-mail [email address for union] or on a computer diskette as well as a hard copy of the dues report being attached to the remittance cheque. ...

Article 5.03: The Union shall provide the employer with thirty (30) days written notice of any increase or decrease in the amount of dues to be deducted from the bargaining unit employees.

Article 6.04(b): The Union shall notify the Employer in writing of the name of each steward and, where applicable, each Committee member, before Management shall be required to recognize any person so selected.

Article 8.03: [regarding the Grievance Procedure, Step No. 1] ... The supervisor shall render the decision in writing within seven (7) calendar days of the receipt of the complaint.

[regarding Step No. 2] ...the steward and/or the employee shall submit the written grievance within ten (10) calendar days to their supervisor or their designate. The supervisor or designate shall render the decision in writing to the Union steward and the employee within seven (7) calendar days after presentation at this Step.

Article 10.01: When either party requests that a grievance be submitted to arbitration as provided under Article 8; it shall make such a request in writing

addressed to the other party to this Agreement and, at the same time, nominate a nominee.

Article 10.05: Any and all time limits referred to under the Grievance and Arbitration Procedures herein may, at any time, be extended by written agreement between the Employer and the Union.

Article 10.11: ... That neither party shall raise or proceed with a timeliness argument regarding "filing for arbitration" without first giving the other party written prior notice of its intent to do so.

Article 11.02(b): [regarding a job posting] Any employee who is absent at the time the posting occurs, and who has made a request in writing prior to such absence, shall be considered for job postings occurring during the period of such absence.

Article 13.01: ... All such requests for leaves of absence shall be in writing as far in advance as is practical. The Company agrees to reply to such requests in writing within seven (7) working days wherever possible.

Article 13.02: (regarding union leaves) ... the Union Business Agent shall notify the Company in writing not less than ten (10) days prior to the start of the leave of absence of the name of the member requiring leave.

Article 27.01: (regarding the duration of the collective agreement) ... This Agreement shall remain in full force and effect thereafter from year to year unless notice of desire to modify, amend or terminate is given in writing by either party to the other party at any time within ninety (90) days prior to the expiry of this Collective Agreement.

50. The Union responded with its own list of Articles but noted particularly that when these parties want to indicate that something will be provided in an electronic form, they have specifically done so. The only place that has happened in this collective agreement is in Article 5.02(b).

51. According to the Union, there are many provisions in the collective agreement where things are to be provided, but it does not specify in what form. However, the context indicates that it must be in writing. In particular, the Union points to the following examples:

Article 5.06: The Company shall provide the Union, monthly, with a list of those employees:

- (1) Who submit a change of address, and
- (2) Who are on W.S.I.B.

Article 6.05: On commencing employment, the employee's immediate supervisor shall introduce the new employee to the Union steward who will provide the new employee with a copy of the Collective Agreement.

Article 17.04: [regarding taking a floating holiday] ... the employee shall endeavor to provide the Company with twenty-eight(28) days' notice of when he wishes to take the floating holiday.

Article 24.07: [regarding sick days] ... the employee will provide a medical certificate upon request to the Employer.

52. While I accept the Employer's assertion that these parties have a mature bargaining relationship, it seems apparent that they do not always clearly articulate whether something has to be provided in writing or not. They appear to have applied common sense when crafting language: Thus, could it be said that the list to be provided pursuant to Article 5.06 could be a verbal list given by someone acting for the Employer to someone at the Union? That would defy common sense. Similarly, in Article 6.05, did the parties envisage the Union steward providing a new employee with an electronic version of the collective agreement? That seems highly unlikely.

53. However, whether something is produced in writing is not the core of the issue here: Rather it is the manner in which it is delivered to the employee. There is no dispute that the wage statements are in writing, albeit on an electronic platform. The question is how is that document supposed to get to the employee.

54. The Employer asserts that its management rights permit it to decide how to provide employees with their pay stubs. In particular it relies on Article 4.01. However, the parties have agreed in the first sentence of that article that "Except as and to the extent specifically modified by this Agreement, all rights and prerogatives of management are retained by the company and remain exclusively within the rights of the Company and its management". Thus, while the Employer has the right to maintain efficiency (Art. 4.01(1)), and "generally to manage the enterprise in which the Company is engaged without restricting the generality of the foregoing to plan, direct, and control operations to direct the work forces, ..." (Art. 4.01(3), those rights are subject to the limitation that any of those powers have not been "specifically modified in this Agreement" (Art. 4.01(3)).

55. These parties, unlike the parties in *Simon Fraser University and CUPE, Local 3338*, cited above, have specifically agreed that the Employer is obligated to provide to each employee a pay stub. That decision will be discussed in more detail later.

56. What is to be made of the evidence that in the last round of collective bargaining, the Employer proposed language that envisaged pay stubs being made available on line, and that only when the employer-provided printer or internet were not working, that the "employer will provide pay stubs in a timely manner for employees who so request it"? The latter language suggests that the Employer would, in certain circumstances, provide pay stubs to requesting employees in paper form.

57. Although the Union rejected that proposal, what the Employer proposal suggests are two things: 1) that it did not believe it had the right to simply begin to provide employees access to a computer and printer in order to download and print their own pay stubs, and, 2) that when the internet or printer were not working, that employees could still receive a hard copy pay stub from the Employer. I note that the Employer proposal in respect of when there were printer or internet problems did not specify that it would provide “hard copy pay stubs”: the language it used was “will provide pay stubs”. That language is much like the present Article 18.01 in that it does not specify that hard copy pay stubs will be provided, but they had been until November 2017.

58. What can be deduced from the Employer’s proposed language in bargaining is that while the prevailing practice was to provide hard copy pay stubs to employees, Bradgate Arms was seeking to move away from that practice; and, that only when it was not possible for an employee him or herself to print their pay stub because of the malfunction of the Employer’s assets, then the Employer would, upon employee request, revert to the previous practice, and provide a hard copy pay stub in a timely manner. It is noteworthy that even after the Union rejected the Employer’s Article 18.03 proposal, the Employer made the same proposal to the interest arbitration board, where it was also unsuccessful in achieving the language.

59. In *Clarke Transport and Teamsters Local Union 938*, 2005 CanLII 51588 (ON LA)(Kaplan), the issue in dispute was whether an employer was prohibited by the collective agreement from introducing two new shifts. The union relied on the language of the agreement which created time “windows” within which it claimed that new shifts could be established, and argued that the employer could not create new shifts outside those time windows. The employer maintained that based on specific language as well as its management rights, it could make shift changes outside the windows. The evidence established that in the previous 15 years the employer had never attempted to establish a new shift outside the time windows. As well, in the three previous rounds of bargaining the employer had made proposals to change the time windows, but after the union rejected the proposals, the employer had ultimately withdrawn those proposals. The employer maintained that those proposals were simply to increase flexibility, and were not made because the employer believed it was constrained from introducing new shifts by the time windows. When a new Executive Vice President and Chief Operation Officer had started at the company, he wanted to improve service and increase efficiencies, which led to the introduction of two new shifts outside the time windows in the agreement.

60. The arbitrator allowed the grievance on the bases that the wording of the provision, the evidence of past practice, and of bargaining history, all favoured the union. Reading the provision as a whole in its context he found that the union’s interpretation was correct. Furthermore, the arbitrator found that there was no satisfactory explanation for why the employer had repeatedly introduced proposals to broaden the time windows to increase flexibility if it already had the right to

introduce new shifts outside the windows. In his view, if the employer truly believed it had the power to do so, it would not have sought changes in bargaining. The arbitrator accepted as relevant 15 years of past practice consistent with the union's interpretation of the language.

61. In the case before me, I accept that the past practice has been to provide employees with a hard copy pay stub, and that considering Article 18.01 in its context, that is what the parties had bargained. Arbitrator Kaplan's comments in *Clarke Transport*, cited above, at p. 12, are instructive:

It may very well be that this agreement no longer gives effect to the employer's operational requirements and that a change is justifiably required. If that is indeed the case, the change must be achieved in collective bargaining, not arbitration. Put another way, the employer is certainly within its rights to achieve efficiencies, but having bargained Article 19.5, if it wants to make changes to that provision the place to do so is at the bargaining table.

62. The Employer is correct when it states that today electronic versions of documents are commonly made available in all manner of settings. However, that does not mean that this Employer can simply decide that is the only way that an employee can get his or her pay stub unless the language of the collective agreement, or prevailing legislation, supports such a finding.

63. Section 12 of the *Employment Standards Act, 2000* ("ESA") addresses the pay stub issue as follows:

Statement re wages

12 (1) On or before an employee's pay day, the employer shall give to the employee a written statement setting out,

- (a) the pay period for which the wages are being paid;
- (b) the wage rate, if there is one;
- (c) the gross amount of wages and, unless the information is provided to the employee in some other manner, how that amount was calculated;
- (d) Repealed: 2002, c. 18, Sched. J, s. 3 (3).
- (e) the amount and purpose of each deduction from wages;
- (f) any amount with respect to room or board that is deemed to have been paid to the employee under subsection 23 (2); and
- (g) the net amount of wages being paid to the employee. 2001, c. 9, Sched. I, s. 1 (2); 2002, c. 18, Sched. J, s. 3 (3).

(2) Repealed: 2002, c. 18, Sched. J, s. 3 (4).

Electronic copies

(3) The statement may be provided to the employee by electronic mail rather than in writing if the employee has access to a means of making a paper copy of the statement. 2000, c. 41, s. 12 (3).

64. As is clear from s. 12(1), an employer is required to “give to the employee a written statement”, including information that these parties have agreed will constitute a pay stub. In s. 12(3) above, the ESA contemplates the provision of a pay stub by electronic mail (or email) so long as an employee has the means of making a paper copy of their pay stub. What this means is that an employer can “give” an employee the written statement of their wages by sending it to them by email, so long as the employee has access to a means to make a paper copy of the statement.

65. The Employer relied upon an excerpt from the *Employment Standards Act, 2000 Policy & Interpretation Manual* (the “ESA Interpretation Manual”) for the proposition that the Employment Standards Branch recognizes that an employer can provide a written statement by way of an internet accessible database, and be in compliance with s. 12(1). The relevant excerpt states as follows:

It is the Program policy that an employer can provide the written statement by way of a secure internet accessible database and be in compliance with s. 12(1), even though an individual wage statement is not personally sent in any format to the employee, if the employees have reasonable opportunity to access the database and a printer (*and know how to use them*) on or before their payday. ...

(emphasis added)

66. Since the ESA Interpretation Manual is not part of the legislation, I am not bound by what it states. However, I note that the writers of the Manual recognize that where the employer is utilizing a secure internet accessible database to provide employees with their statement of wages, the employees have to have reasonable opportunity to access that database, and a printer, and they must know how to use both.

67. This bargaining unit is comprised of the following eleven classifications of workers: Dining Room Server, Maître D, Station Chef, Cook, Housekeeper, Laundry, Front Desk, Door Person, Dishwasher, Night Auditor, Receptionist/Lead Hand. The wage rates on the February 1, 2018 Schedule 1 of the collective agreement range from a low of \$14.66/hour to a high of \$21.76/hour. The only two classifications that make over \$20/hour are the Station Chef and the Cook. Six of the eleven classifications are paid between \$14.66/hour and \$15.29/hour, and include the Dining Room Servers, Housekeepers, Laundry, Front Desk, Door Persons, and Dishwashers.

68. The evidence before me of the hardship that bargaining unit members are suffering as a result of the Employer’s unilateral introduction of electronic pay stubs was undisputed. I accept that there are a large number of older workers in this workplace; that English is not their first language; and that many simply do not have

the technological skills or electronic equipment to go on line and find their pay stubs. The Employer has already recognized that four of these workers simply cannot operate the on line portal to get their pay stubs, so it is printing pay stubs for them. It is problematic that, because he does not know how to operate a computer system, at least one other employee has not seen a single pay stub since November 2017 when the Employer introduced this new policy and stopped providing hard copy pay stubs to its employees.

69. On the evidence before me, even when an employee may be capable of getting herself on line to find her pay stub, she too is stymied by the Employer's system, which locks out employees when their password has lapsed. As Ms. Alinsod testified, she had not forgotten her password: the system simply would not accept it. She had not been told that passwords had to be changed every three months, and she did not know how to use the prompt regarding having forgotten one's password, which in any event she had not forgotten. She tried repeatedly to get her co-workers to print her pay stub for her, but to no avail. The manager who could have helped her was away on holidays. She waited on hold for one hour for Revera IT help, but never got through to anyone. Weeks later, at the hearing, Ms. Alinsod still did not have a copy of her pay stub, which she had needed in order to purchase a property. It is an untenable situation for a worker to be put in, but in any event, is contrary to s. 12(1) of the ESA, which requires that an employee should be given her wage statement on or before her pay date.

70. The Employer's evidence is that it has essentially provided "accommodation" for the four workers who have been identified as unable to cope with the system to get electronic pay stubs. It does not appear that it had advertised that option to its employees, and indeed it appeared that Ms. Leppik or managers would be exercising their discretion about whether an individual should be able to learn how to use the Employer's on line system.

71. It is understandable that more than one year after the introduction of the Employer's policy employees may not want to keep identifying themselves to management as incapable of utilizing the MSS to get their pay stubs. The fact is that even when they know how to find their pay stub on line, employees simply get shut out of the system without warning because of the way the system has been set up by the Employer.

72. I have reviewed all of the documents that the Employer provided to employees regarding the new system. While there is reference in the "Frequently Asked Questions" document to what to do if one forgets one's password, nowhere does it advise employees that they will be required to re-set their password every three months; that they will be locked out of the on line database if their password is more than three months old; and that they are never allowed to use the same password again. They were not told that if they could not get into the system, it may be because their password had expired, so they needed to use the prompt that they had forgotten their password, even if they had not in fact forgotten their password.

It is unclear why the Employer never gave employees any of this vitally important information.

73. The answer to this failure to provide proper training and information at the outset, and of the intricacy of the Employer's system, is not as Ms. Leppik suggested, that employees should just go to their managers (who on the evidence before me are unable to help), or call the IT line (which on the evidence before me was unresponsive), or to come to her if they are having trouble accessing their pay stubs on line on the Employer's database.

74. That is not what the parties had agreed in Article 18.01: they had agreed that each employee was to be provided with an itemized statement of their wages. Furthermore, the ESA requires that a written statement be given to an employee before or at the time they receive their wages, which is clearly not possible for all employees in light of the evidence of the various barriers employees are facing in accessing their pay stubs through the Employer's on line system.

75. With respect to s. 12(3) of the ESA, which provides that a pay statement can be provided to an employee by electronic mail, the relevant portion in the ESA Interpretation Manual states:

Under s. 12, it is the employer's responsibility to ensure that a wage statement is provided. Where the employee's "access to a means of making a paper copy" is outside the employer's control, the employer will not be able to ensure the provision of a statement; therefore, "access to a means" must be interpreted to mean "at the workplace".

Some examples of situations where this section's requirements will not be met include:

- ...
- The employee is unable to access computer equipment and software necessary at the workplace on the day that the wage statement is due under s. 12(1);
- The employee is not provided with an electronic mail account at the workplace;
- ...
- The employee must request another individual at the workplace, other than the employee's manager, to produce a copy of the document.

Confidentiality will be a reasonable expectation with regard to the employee's ability to make a copy of his or her own wage statement under s. 12(3).

76. On the evidence before me, the bargaining unit employees do not have Bradgate Arms email addresses, but in any event, they are not being provided copies of their pay stubs by email. What is instructive about this portion of the Manual is that it

recognizes that there are confidentiality concerns if an employee has to ask someone in the workplace other than their manager to print their pay stub for them.

77. Ms. Alinsod's uncontested evidence is that she, and others, have to ask the Front Desk staff (who are fellow bargaining unit members) to print their pay stubs for them on days when they want to get their pay stubs, but are not scheduled to work at Bradgate Arms, and so cannot access the fifth floor employee computer/printer kiosks. They have to tell the Front Desk staff their user name and password. Clearly the Employer's system for how employees have to try to get a copy of their pay stub on the Employer premises on days they are not scheduled to work lacks the most basic elements of confidentiality. It is difficult to understand why employees must compromise their personal and confidential login information in order to get a copy of their pay stub, which pay stub is also then available to the co-worker to see.

78. The decision in *Simon Fraser University and CUPE, Local 3338*, cited above, addressed a set of circumstances that is somewhat similar to the matter before me, and is the only case that the parties were able to find where the manner of provision of pay statements had arisen. In that case the university had for many years provided employees with paper notification of their wages and deductions by distribution through the campus mail system to individual campus mailboxes or to supervisors for distribution to their respective employees. When the university updated its human resources software, it was able to provide employees access to their pay related information through the university's computer system. The employer placed some computers and printers around the campus to provide access for all employees to a confidential way of printing their own pay statements. This resulted in some inconvenience to some employees if they had to travel any distance to obtain access, especially if they had to do it on their own time. The collective agreement made no reference at all to pay statements; the practice of delivery of pay statements to employees had been in place for many years, and through many rounds of bargaining; and, the issue had never been raised in bargaining. The union argued the employer was estopped from changing the practice despite the lack of any language regarding pay statements in the collective agreement.

79. Arbitrator Moore found that a long-standing method of operating or a long-standing practice which is not referenced in the collective agreement, and is not contrary to any provisions of a collective agreement, cannot be the subject of an estoppel (paras. 7 and 9). The arbitrator noted that the provision of wage statements was governed by the British Columbia *Employment Standards Act*, which expressly contemplated the provision of electronic wage statements, and the university was not in violation of that Act (para. 8). As such, he dismissed the grievance.

80. The facts before me are distinguishable in a number of respects. The collective agreement before me does contain language referring to the Employer's obligation to provide a pay stub to employees. While it does not specify how employees should be provided with their pay stubs, it does envision that they will be provided, and the

long-established practice has been that they were provided in a printed format, in envelopes, made available for pick up by employees at the Front Desk. The Employer unsuccessfully tried to bargain about the future availability of pay stubs on line. It also unsuccessfully made the same proposal at interest arbitration.

81. Not only does the collective agreement in this instance have specific reference to the provision of pay stubs to employees, it is also a provision that the Employer has sought to get more flexibility on in the course of bargaining. More importantly, the evidence before Arbitrator Moore regarding the impact of the university's change in practice was thin when compared to the evidence before me in this case. As noted earlier, I am satisfied that the impact of the Employer's change in practice on this bargaining unit has been significant because of the make-up of this employee group: They are older workers, whose first language is not English, some of whom may not have access to cell phones or computers (which would limit their familiarity with how they work), and many of whom are not technologically capable of working with the Employer's sophisticated MSS system. Additionally, the difficulties encountered with using the Employer's MSS system has meant that employees must forfeit the confidentiality of their income information in order to try to get a copy of their pay stubs through co-workers working at the Front Desk. Finally, and perhaps most importantly, I have found that the Employer's new practice does not meet the requirements of the ESA.

82. On the evidence before me, and for the reasons outlined above, I find that the Employer policy of providing employees access to their pay stubs using the MSS database is in breach of section 12(1) of the ESA. The Employer has not given all bargaining unit employees a written statement as required by the Act. I am satisfied that it has not provided reliable and user-friendly access to the MSS database such that an employee can be given his or her written statement of wages on or before his or her pay day. I also find that the Employer has breached its obligation in Article 18.01 that each employee shall be provided with an itemized statement of their wages, other payments, and deductions, which based on the long-standing practice, is by way of printed statements.

83. The grievance is upheld.

Dated at Toronto this 8th day of February, 2019.

"Gail Misra"

Gail Misra, Arbitrator