IN THE MATTER OF AN ARBITRATION

BETWEEN:

TELUS COMMUNICATIONS COMPANY

AND:

TELECOMMUNICATIONS WORKERS UNION
UNITED STEELWORKERS, LOCAL 1944

(Remedy for Grievances #2013-352 Sekora et al and #2014-028 Williams et al)

ARBITRATOR:	Christopher Sullivan
COUNSEL:	Alexander D. Mitchell for Employer
	Richard L. Edgar and Natasha L. Edgar for Union
WRITTEN SUBMISSIONS:	March 26, May 7, June 9 and 16, 2020
PUBLISHED:	October 19, 2021

15057.1

This decision pertains to remedy resulting from an arbitration award issued on December 14, 2018 regarding Concierge agents. That award determined the Company violated Article 1.02 of the Collective Agreement, which provides as follows:

> 1.02 When the Company establishes a new job title within the bargaining unit, it shall be placed within the appropriate Appendix and Wage Schedule based on a commonality of duties and location of the employees performing the new job.

The December 14, 2018, award stated the following regarding outcome and the matter of remedy:

> The circumstances warrant a determination upholding the grievances, a declaration that the Employer has violated Article 1.02 of the Collective Agreement by failing to place the Concierge agent job within the same Appendix and Wage Schedule as the L&R Rep job title based on a commonality of duties, and an order for all employees who worked as Concierge agents to be compensated for their loss. It is so ordered.

The parties currently dispute the loss to be compensated. The Company has calculated the amount owing based on what the affected employees would have earned if they had been L&R Reps. The approximately 195 Concierge agents in the relevant 2014 to 2017 time period had been paid Wage Group D wages plus additional pay from an enhanced SIP. L&R Reps belong to Wage Group E, and employees in this job title receive an L&R Rep SIP.

The application of the enhanced SIP to affected employees meant that, although their base pay was lower than that paid to L&R Reps, they could potentially earn more total compensation than if they had been working as L&R Reps. A number of affected employees – about 75 out of the 195 affected employees – made more money during the material time through their base pay at Wage Group D and their participation in the

enhanced SIP than L&R Reps earned through base pay at Wage Group E and participation in the L&R SIP.

L&R SIP is based on certain metrics and allows an employee to earn a base target payout of $200 per month. The enhanced SIP paid to Concierge agents were based on different metrics and allowed for a monthly base target payout of $375. The Company's calculations reduce the target amount of the enhanced SIP to reflect that of the L&R SIP, and do not seek to alter the metrics upon which the enhanced SIP was achieved.

The retroactive difference between wages at Wage Groups D and E for the affected employees for the period in question totals $742,167.48. From this amount the Company has deducted enhanced SIP payments that exceed L&R SIP and has arrived at a total amount owed of $303,169.60.

The Company gives the following explanation regarding its remedial calculations, with reference to documentation provided:

> To be clear, the Company is not and will not demand or require that any Affected Employee repay the Company in the event that the deduction of their SIP difference from their RETRO amount (the difference between wages at Wage Groups E and D) would result in them owing money to the Company. For those Affected Employees, the Company's position in this proceeding is that they should receive no retroactive pay. Receiving more pay than they would have received had they been paid at Wage Group E from the outset amounts to a windfall, which must be avoided. Accordingly, once the amounts in the SIP Difference column are deducted from the amounts in the RETRO column and the positive numbers in the Final Payment column are manually added up, the total amount that the Company would pay to Affected Employees is $303,169.60.

The Union disputes the inclusion of SIP payments in calculating the loss to be remedied.

SUMMARY OF ARGUMENTS

The Union argues the Company is improperly seeking to claw back SIP monies designed and paid on the basis of certain criteria that attached to the Concierge role. It asserts the jurisdiction of this board of arbitration does not extend to addressing SIP, which is a discretionary Company incentive payment. The December 14, 2018 arbitration award does not state that remedial calculations are to include SIP, consistent with the language of Article 1.02.

The Union points out the Concierge role was found to be a "new job" under Article , which was never formally evaluated. The arbitration award did not find Concierge agents were the same as L&R Reps and warrant identical compensation; rather the award only found "commonality" between the two warranted classification at Wage Group E rather than D. The Union notes the Company never performed a proper review of the Concierge role under Article 1.02, and it adds calculating remedial loss based on the affected employees being L&R Reps is speculative, not actual, and contrary to evidence called by the Company at the arbitration hearing regarding how different the two positions were.

The Union argues, in the alternative, that SIP constitutes a separate contractual benefit between the Company and affected employees that was calculated and paid based on performance in the Concierge role and it cannot now be taken away or otherwise deducted. Further, the Company is estopped from claiming SIP monies and it cannot now resile from its representations about the incentive pay and recoup those monies.

In support of its arguments the Union referred to the following authorities: *Parry Sound v. OPSEU, Local 324*, [2003] SCC 42; *City of Calgary and CUPE, Local 38*, [2004] A.G.A.A. No. 8 (Sims); *Inmet Mining Corp (Willett Grievance*), (1997) 49 C.L.A.S. 264 (Rose); *Telus v. TWU (Share Purchase Plan Grievance)*, (2010) 201 L.A.C. (4th) 15 (Sims); *Telus v TWU (Tubbs Grievance)*, (2012) CarswellNet 3121

(Chankasingh); Brown & Beatty, *Canadian Labour Arbitration*, para. 2:1300; *Ontario Hydro v. Power Workers' Union*, (1996) 53 L.A.C. (4th) 163 (Burkett); *University of Ottawa*, (2018) 292 L.A.C. (4th) 276; *Litwin Construction (1973) Ltd. v. Kiss 29*, (1988) B.C.L.R. 88 (C.A.); and *BC Rail v. UTU, Local 1778*, [1992] B.C.L.R.B.D. No. 8.

The Company argues that consideration of SIP monies is necessary to calculate mitigation and place the affected employees in the position they would have been in but for the collective agreement violation that was determined, and that is placement in the L&R Rep job. The December 14, 2018 award specifically refers to the L&R Rep job title as the commonality comparator for the Concierge role and there is no basis upon which to support a conclusion that the affected employees should effectively receive more in pay for the period in question than an L&R Rep. At no time did the Company ever consider paying the Concierge agents wages at Wage Group E together with an enhanced SIP, which is what the Union is now seeking.

The Company asserts the remedy sought by the Union would constitute an improper windfall for many employees who earned more at the relevant time from wages at Wage Group D together with enhanced SIP, than they would have had they been paid at Wage Group E with L&R Rep SIP. The Company points out affected employees are not being asked to repay any amount they earned through the enhanced SIP, but rather the Company only seeks these monies to be taken into account in relation to determining mitigation of loss. The Company never considered placing Concierge agent at Wage Group E together with an enhanced SIP and, of note, L&R Reps who worked in the High Volume queue did not receive the enhanced SIP but rather only the L&R SIP.

The Company argues in the alternative if the SIP monies are not considered as mitigation they must be considered as constitute a collateral benefit to be taken into account in determining the actual loss incurred by the affected employees. The Company states the enhanced SIP was found by this board of arbitration to be an indemnity for the

classification of Concierge agents as CCR IV rather than Wage Group E, and is therefore a relevant consideration in determining the actual loss of affected employees.

The Company referred to the following authorities in support of its positions: *BG Checo International Ltd. v. BC Hydro and Power Authority*, [1993] 1 S.C.R. 12; *Wertheim v. Chicoutimi Pulp Co.*, [1911] A.C. 301 (J.C.P.C.); *Association of Radio and Television Employees of Canada v. Canadian Broadcasting Corporation*, [1975] S.C.R. 118; Brown and Beatty, *Canadian Labour Arbitration*, para. 2:1505; *Normandy Private Hospital v. BCNU*, (1994) 44 L.A.C. (4th) 410; *British Westinghouse Electric and Manufacturing Co. Limited v. Underground Electric Railways Co. of London Limited*, [1912] A.C. 673; *Cockburn v. Trusts and Guarantee Co.*, (1917), 33 D.L.R. 159 (O.N.C.A.); *Neilson v. Vancouver Hockey Club Ltd.*, (1988) 25 B.C.L.R. (2d) 235 (C.A.); *Dr. David F. Charbonneau Inc. v. Dr. Peter Brown Inc.*, 2002 BCSC 738; *Toronto (City) v. Toronto Civic Employees Union, Local 416*, [2004] O.L.A.A. No. 967 (Tacon); *Richmond Intermediate Care Society and HEU*, [2000] B.C.C.A.A.A. No. 358 (Jackson); *Board of Education for School District No. 71 v. CUPE, 439*, [2011] B.C.C.A.A.A. No. 201; *Health Employers Association of BC v. Community Bargaining Association*, [2008] B.C.C.A.A.A. No. 70; *Telus v. Telecommunications Workers Union (Mueller Grievance)*, [2003] C.LA.AD. No. 645 (Sims); *IBM Canada Limited v. Waterman*, 2013 SCC 70; *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315; *Toronto (City) v. CUPE, Local 416*, [2012] O.L.A.A. No. 172; *Parsons v. IMP Group Ltd.*, [2007] C.L.A.D. No. 377; *Swindler v. Saskatoon Tribal Council Urban First Nations Services Inc.*, [2003] C.L.A.D. No. 345; and *OPSEU v. Ontario (Ministry of Attorney General) (Hunt Grievance)*, [2012] O.G.S.B.A. No. 150.

DECISION

Having considered the parties' respective submissions, I determine SIP monies are not to be included in calculating the loss incurred by the affected employees in the present case.

The December 14, 2018, award expressly stated those affected employees in the "new job" are entitled to pay at the same Appendix and Wage Schedule as L&R Reps based on commonality, and this expressed outcome mirrors the wording of Article 1.02. The appendix referred to in the award is "Appendix A – West", and the wage schedule is Wage Group E, which is not exclusive to L&R Reps.

To the extent the Employer's remedial calculations precisely equate the Concierge role with that of the L&R Rep job title (in terms of being in Wage Group E and receiving a particular SIP), they are speculative and cannot be upheld. There is no evidentiary basis to determine the Concierge role would have received the L&R Rep SIP if the position had been initially placed in Wage Group E, instead of Wage Group D. While this may have been an identified option, it was one without any detailed substantive consideration, as is usually performed, to determine compensation. There was no in depth review of the "new job" Concierge role under Article 1.02.

It bears noting at the arbitration hearing the Union often referred to the Concierge role as "L&R plus", and in argument it submitted the role may well justify a higher wage rate than Wage Group E, but it was only seeking to have it put in Wage Group E.

The Company's discretionary authority regarding SIP is referenced in a Memorandum of Agreement between the parties, which provides as follows:

COMMISSION/INCENTIVE PAY PLANS

> The parties acknowledge that the Company has, from time to time, implemented Commission/Incentive Pay Plans which promote and support the achievement of the Company's business goals and recognize individual and team contributions.

> The parties acknowledge that the Company retains its right to establish, modify and/or discontinue Commission/Incentive Pay Plans in response to changing business requirements or changing market conditions.

Evidence at the arbitration hearing indicated there were myriad SIP plans and that in some situations even employees with the same job title do not have the same SIP. The discretionary payments provide incentives targeted at achieving "driving outcomes" for specific jobs. The Company possesses expressly recognized access to utilizing discretionary pay incentive schemes and these involve sophisticated and nuanced evaluations beyond the scope of this arbitration board with the evidence presented.

In arriving at this conclusion, I accept the object of remedying a collective agreement violation is to put the aggrieved party in the position they would have been but for the breach. However, a loss cannot be speculative, and, in the present case, there is no reasonable certainty as to what precisely the new Concierge job would receive in terms of SIP if it was placed in Wage Group E as opposed to D.

The Employer's assertion that a result in the Union's favour will necessarily lead to some employees receiving a windfall is based on the premise that the position the employees would have been in but for the breach of collective agreement was L&R Rep, and this conclusion is not necessarily so. While the evidence indicated the Company identified an option wherein it would pay the Concierge agent the same as L&R Rep (Wage Group E plus L&R Rep SIP), such option was not given any considered analysis. For certain the December 14, 2018, award determined the Concierge role to be a "new job" distinct from that of L&R Rep, although with sufficient commonality to warrant placement in the same wage group as per Article 1.02.

To the extent that determining remedial loss must be based on actual as opposed to speculative loss, the actual loss in the present case is best reflected in the difference

between Wage Group E and D and does not include a speculative amount reflecting discretionary sales incentive payments.

This is not to say an appropriate Article 1.02 review would have concluded the Concierge role warranted a different SIP than L&R Rep SIP; however, it is a sufficiently speculative outcome that has bearing on the outcome of the present dispute, particularly as the December 14, 2018, award noted Concierge agents performed all of the duties of L&R Rep, plus additional duties performed by a variety of other roles. On this point the award stated, at page 32:

> This group of employees is doing all the work that would have previously been performed by six different employees and three different job classifications, one of which being a quasi-job classification.

For essentially the same reason, I also determine the enhanced SIP amounts paid to Concierge agents during the period in question cannot be considered as a "collateral benefit" warranting deduction from the remedial damages owed in this case. Again, the Company is basing its calculations based on the Concierge role being paid precisely the same as the L&R Rep job, which it was not ever determined to be.

To be clear, while both the principles of mitigation and collateral benefit may lead to proper deductions in calculating loss due to a breach of contract, there must be some reasonable degree of certainty as to what the outcome would have been but for the contractual breach, and this cannot be achieved in the present case at this time as the Concierge role was never properly evaluated under Article 1.02 prior to being concluded. Having found the Concierge agents were performing a new job and were not regular L&R Reps I am unable to find they would have been paid the precisely the same.

In any event, the SIP monies paid in the present case constitute an earned benefit for performing work for the Company, and do not at all resemble an indemnity program

or compensating advantage that can properly be used to offset a remedial damage claim. The enhanced SIP amounts were developed and paid by the Company under its sole discretion, aimed at achieving outcomes specific to the Concierge role, and there has been no substantive review that concluded differently.

The arrangement for and payment of discretionary SIP payments to incentivize nuanced outcomes for specific roles are completely within the Company's discretion and there is no basis for this board of arbitration to effectively take on such a role in the context of the present case.

For the foregoing reasons the calculation of remedial loss arising from the December 14, 2018, arbitration award shall not include consideration of discretionary SIP monies. The loss to be remedied shall reflect the difference in wages between Wage Groups D and E. It is so awarded.

Christopher Sullivan