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Arbitrator rules on nurses' entitlement to consecutive weekend premium pay

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On October 29, 2012, Arbitrator Parmar released his decision in *Peterborough Regional Health Centre and Ontario Nurses' Association*. The arbitration involved a collective agreement grievance over nurses' entitlement to premium pay for working consecutive weekends. This decision is the latest in a growing body of arbitral jurisprudence involving the interpretation of collective agreement provisions which set out scheduling restrictions on the employer, and then provide for premium pay for employees who work shifts beyond those restrictions. The arbitrator applied the rules for interpreting collective agreements and held that the nurses were not entitled to premium pay in the circumstances. Lynn Harnden successfully represented the Health Centre in this case which provides valuable insight into the interpretation of collective agreements.

THE GRIEVANCES

The dispute arose in February, 2012, when the Health Centre changed its practice of providing premium pay to nurses that voluntarily work two or more consecutive weekend shifts. Prior to this time, if a nurse was offered an additional, unscheduled shift, and this resulted in the nurse working two or more consecutive weekends, the Health Centre would pay the nurse at time and a half for the second and each consecutive weekend worked.

The union grieved the Health Centre's change in practice on the basis that the nurses were entitled to premium pay pursuant to the collective agreement. The union relied on paragraph D-3(c) (iii) of the collective agreement which states:

D-3 For All Employees
(c) Weekend Scheduling (Full-Time and Part-Time)

i) The Health Centre shall schedule every other weekend off.
ii) …
iii) If an employee is scheduled by the Health Centre to work two (2) or more consecutive week-ends, the employee will be compensated in accordance with Article 14.03 for time worked on the second [2nd] and any consecutive subsequent weekend until a weekend off is afforded to the employee. The foregoing shall not apply when:
A) such weekend has been worked by the employee to satisfy specific days off requested by such an employee; or

B) such employee has requested weekend work only, in writing, such request to be renewed quarterly; or
C) such weekend is worked as a result of an exchange of shifts with another employee. [Emphasis added]

Article 14.03, referred to above, provided premium pay at "time and a half".

In the union's view, the phrase "scheduled by the Health Centre" included any shift worked by a nurse at the employer's request. This included both scheduled shifts, and additional shifts worked as a result of a nurse's acceptance of an offer of an additional shift by the Health Centre.

The Health Centre agreed that if a nurse was *scheduled* to work consecutive weekends, the nurse was entitled to the premium. However, the circumstances giving rise to the grievances involved the employer offering *unscheduled* additional weekend shifts, which nurses could accept or decline to work. In the Health Centre's view, the collective agreement obligation to provide the consecutive weekend premium only arose where a nurse was "scheduled" to work consecutive weekends.

INTEPRETING THE COLLECTIVE AGREEMENT

The question at the heart of the grievance, as summarized by Arbitrator Parmar was, whether an employee who works as a result of accepting an additional shift offered by the employer is an employee "scheduled by the Health Centre.". The arbitrator commenced his analysis by citing the fundamental principle of collective agreement interpretation – that in order to give effect to the bargain of the parties, words must be given their plain and ordinary meaning when read in the context of the specific provision in particular and the collective agreement as a whole.

Arbitrator Parmar noted that the union's interpretation of paragraph (iii) would afford it the same meaning as if it read "if an employee works...consecutive weekends." In his view, if the parties had intended that to be the meaning they would have used that language. Instead, the parties chose the more narrow language of "scheduled by the Health Centre". This choice of words suggested that the parties intended the premium to apply when the employer took certain actions, not the employee. The arbitrator also commented on the fact that the union's interpretation afforded a definition to the word "scheduled" that was different from how that word was used elsewhere in the collective agreement. In those other instances, there was no suggestion by the union that the words "scheduled" or "schedule" meant anything other than scheduling in the normal course.

The arbitrator then cited the decision from *Guelph General Hospital and ONA* (2010) a case which directly addressed the interpretation of the word "scheduled". In that case, Arbitrator Herman had to consider the applicability of two different provisions, one which used the words "required to work" and the other which used the word "scheduled". After a thorough canvassing of the jurisprudence, Arbitrator Herman stated that the words "required to work" generally applied to tours nurses are

offered and agree to work. "Scheduled" on the other hand referred to shifts that were scheduled as part of the normal scheduling process.

Based on the *Guelph General Hospital* decision, Arbitrator Parmar concluded that the proper interpretation of the word "scheduled" excluded shifts which were worked as a result of a nurse being offered and agreeing to work a particular shift. This conclusion was further supported by the Health Centre's submission that the collective agreement clearly distinguished between hours scheduled on the posted schedule and "unscheduled hours". "Unscheduled hours" were identified in the collective agreement as hours that become available after the posting of the schedule and are then offered to employees. In the arbitrator's view, this clearly demonstrated that the parties understood that there were two categories of hours worked, scheduled and unscheduled hours. The choice of the parties to use the word "scheduled" in paragraph (iii) can only mean that they were not referring to "unscheduled hours" offered after the posting of the schedule.

Arbitrator Parmar concluded his analysis by giving the word "scheduled" its plain and ordinary meaning and rejected the union's argument that the meaning of the word "scheduled" included any shift *worked* by a nurse. He found that the Health Centre's past practice of paying the premium was not determinative in light of the plain and ordinary meaning of the collective agreement language. He held that a nurse who works solely as a result of accepting the Health Centre's offer to work an available weekend shift is not entitled to premium pay under the collective agreement.

In our view

Arbitrator's Parmar's decision is supported by the result in *Lakeridge Health Corporation and Ontario Nurses' Association* (October 25, 2012). The *Lakeridge* decision was released just a few days before Arbitrator Parmar's decision and also involved a determination of nurses' entitlement to premium pay for working consecutive weekends. The collective agreement language at issue in *Lakeridge* stated, "If a nurse works a second (2nd) consecutive and subsequent weekend(s), she will receive premium payment…" In comparing this language to the language at issue in *Peterborough Regional Health Centre*, one immediately notices the use of the word "works" in the *Lakeridge* collective agreement, as opposed to the words "is scheduled" as was used in the *Peterborough* collective agreement. The employer in *Lakeridge* argued that the word "works" means scheduled work, and not work that arises as a result of a nurse accepting an offer of additional work from the employer. In such circumstances, in the employer's view, a nurse was not entitled to the consecutive weekend premium. The arbitrator in *Lakeridge* applied the same collective agreement interpretation techniques as those employed in *Peterborough*. He rejected the employer's interpretation and held that, subject to the specific exceptions in the collective agreement, a nurse is only required to *work* a consecutive shift in order to be entitled to the premium pay, regardless of the employer's scheduling.

The differing results in these cases highlight the significance of the particular language that collective bargaining parties choose to incorporate into their agreements. Arbitrators will generally afford words

with their plain and ordinary meaning, in the context of the particular provision and the collective agreement as a whole. Small differences in wording may result in significant differences in the parties' collective agreement obligations and entitlements.

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