IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE PUBLIC SERVICE ALLIANCE OF CANADA

(the "Union")

and

THE HAY RIVER HEALTH AND SOCIAL SERVICES AUTHORITY

(the "Employer")

RE: POLICY GRIEVANCE – DISTRIBUTION OF OVERTIME

13-P-01601

For the Union:
Rebecca Thompson, Grievance and Adjudication Officer

Rosalie Patrick
Union Representative

For the Employer:
Michelle Theriault, Counsel

Jennifer Croucher
Employer Representative

A HEARING IN THIS MATTER WAS HELD IN HAY RIVER, NORTHWEST TERRITORIES ON JANUARY 13 AND 14, 2016.

AWARD OF LYLE S.R. KANEE, Q.C.

Introduction

[1] The Union filed a Policy Grievance claiming the Employer violated the overtime provisions of the Collective Agreement by: (i) giving overtime to casual employees in preference to full and part-time employees when casual employees are called-in or scheduled for 12-hour shifts, and; (ii) giving overtime shifts to full-time employees who are working as casuals in another department in preference to full-time employees regularly working in that department.

[2] The Employer admits that casual employees are being called in to work 12-hour shifts in preference to full-time employees and are being paid 1.5x their regular pay for the last 4 or 4.5 hours of their 12-hour shifts. However, it argues that the casual employees are not being paid "overtime" as defined in the Collective Agreement but are rather being paid statutory overtime required by the *Employment Standards Act*, S.W.N.T. 2007, c.13 and amendments thereto (the "*ESA*"). Further, the Employer argues that it is not administratively practical to split up the 12-hour shifts.

[3] The Employer denies that it is giving overtime shifts to full-time employees who are working as casuals in another department in preference to full-time employees regularly working in that department. The Employer argues that, in the example offered by the Union, all of the employees in question were from the same department and overtime was properly distributed.

Evidence

[4] The evidence was admitted by way of an agreed statement of facts and the testimony of one witness on behalf of the Union and two witnesses on behalf of the Employer.

[5] The parties have had a collective bargaining relationship since at least 2005. The current Collective Agreement expires March 31, 2016.

[6] Article 24.04(a) of the Collective Agreement, at issue in this grievance, was modified in late 2012 during the last round of bargaining. It currently reads:

> **24.04** Subject to operational requirements, the Employer shall make every reasonable effort:

(a) to offer overtime work on an equitable basis among readily available qualified employees who are normally required in their regular duties to perform that work, **in the following order:**

i. **Full-time employees;**
ii. **Part-time employees;**
iii. **Casual employees.**

(b) to give employees who are required to work overtime reasonable advance notice of this requirement.

(The changes made to the Article in the last round of bargaining are in bold.)

[7] "Overtime" is defined in Article 2.01(u) as follows:

2.01 (u) "Overtime" means work performed by an employee, at the request of the Employer, in excess of or outside of the regularly scheduled hours of work. In the case of part-time, casual and term employees, overtime means work performed by the employee in excess of full-time hours for the position. (Emphasis added.)

[8] With regard to overtime for casual employees specifically, Article 63.05 provides:

63.05 Casual employees shall be paid overtime for all hours worked in excess of the regular hours, daily and weekly, of a full time employee in the same position. Where a casual employee works in more than one casual position, overtime shall be based upon the total number of hours worked by the causal employee, daily and weekly, in all casual positions.
(Emphasis added)

[9] The rates of pay for overtime are set out in Article 24.07:

24.07 Overtime work shall be compensated as follows:

a) one and one-half times (1 1/2 X) for the first four consecutive hours of overtime worked; and

b) at twice (2X) for all consecutive hours of overtime worked after the first four (4) consecutive hours of overtime, and at twice (2X) for all hours worked on the second or subsequent day of rest, provided the days of rest are consecutive; and

c) in lieu of (a) and (b) above, at the request of the employee and subject to Article 24.10, the Employer shall grant equivalent paid leave to be taken at any time mutually agreeable to the Employer and the employee.

[9] The Employer provides health and social services in Hay River, Northwest Territories,

and employs a variety of staff with various job titles in order to fulfill its mandate. Two of the facilities the Employer operates are: (i) the Extended Care Unit (the "ECU"), and; (ii) Woodland Manor ("Woodland"). Both facilities are part of Long Term Care. The ECU is located in the Hay River Hospital and Woodland is in a separate building. The patients at these two facilities require and receive similar levels of care from Long Term Care Aides ("LTCAs") and other staff. Since at least 2010 staff employed at the two facilities have received orientation at both facilities.

[10] Article 22 ("Hours of Work") of the Collective Agreement provides that "a normal full-time work week shall be thirty seven point five (37.5) hours per week." No similar provision exists in the Collective agreement that expressly sets out the number of hours in a normal full-time work day.

[11] The Employer assigns work through a variety of shifts of varying durations. Employees may be full-time, part-time, or casual. Employees are permitted to hold a casual position in conjunction with a full or part-time position.

[12] The Employer has obtained Overtime Averaging Permits from the Employment Standards Office of the Government of the Northwest Territories, however they apply only to full-time employees, and not part-time or casual staff. The permits are issued pursuant to section 11 of the *ESA*, which reads:

> **11.** *(1) The Employment Standards Officer may make an order in respect of an industrial establishment, authorizing the employer to calculate the standard and maximum hours of work in a day and in a week as an average for a period of one or more weeks, if the nature of the work in the industrial establishment necessitates a regular distribution of employees hours of work.*
>
> *(2) An order made under this section may authorize the hours of work in a day to exceed the standard hours of work by requiring the days of work in a week to be reduced.*
>
> *(3) An order may only be made under this section on the application of the employer with the consent of a majority of the affected employees.*
>
> *(4) An order made under this section must specify*
>
> *(a) the hours of work that are overtime; and*
> *(b) any conditions applicable to the order.*

[13] Article 23 of the Collective Agreement describes the parties' intent in modifying the normal work week and sets out the regular hours of work for employees covered by Overtime Averaging Permits:

> **Article 23: Modified Work Week**
> **23.01** It is recognized that the Employer shall implement modified work weeks for employees covered by the overtime averaging permit with Employment Standards and other employees who work a modified work week. The primary intent of the modified work week is to provide employees working it a compressed work period with no increased cost to the Employer. All Articles of this Agreement shall be interpreted in such a manner as to take into account the effect of the extended workday, the resultant compressed work week, and the intent of no additional costs.
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> **23.02** Regular hours of work for all employees on modified work week schedules, exclusive of unpaid meal periods, shall be:
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> (a) twelve (12) consecutive hours per day;
> (b) one thousand nine hundred and fifty (1950) hours per year;
> (c) a maximum of four consecutive shifts;
> (d) thirty-seven point five (37.5) hours per week when averaged over one complete shift schedule specified in Article 27.02.

[14] Article 24.11 of the Collective Agreement sets out the entitlement of employees working a modified work week to overtime pay:

> **24.11** Notwithstanding Article 2.01(u) or other provisions of this Article, employees working modified work week schedules shall only be entitled to overtime compensation when they work in excess of and contiguous with, twelve (12) consecutive hours per day, or in excess of thirty-seven point five (37.5) hours per week, when averaged over a complete shift cycle. Except as modified by this Clause, the other provisions of this Article shall apply to employees working modified workweek schedules.

[15] Pursuant to a Permit for Extended Hours issued by the Employment Standards Office, the Employer may schedule or call-in casual or part-time staff to work 12-hour shifts. However, the Permit (or at least the 2004 Permit that was admitted into evidence) provides that: "Overtime must be paid for all time worked in excess of seven and one half (7.5) hours per day and thirty seven and one half (37.5) hours per week as per your collective agreement."

[16] When it is necessary to call-in an employee to replace a full-time employee who is sick or otherwise away from work, the Employer first looks to fill the shift with part-time or casual employees who have not yet worked the maximum number of hours per week (37.5 hours) ("maxed out") so as to avoid incurring overtime pay. If no such employees are available, the Employer offers the shift to full-time employees on the call-in list beginning with the employee on the top of the list. If a full-time employee accepts the shift, she drops down to the bottom of the list. If no full-time employees accept the shift, the Employer offers it to maxed out part-time employees and then to maxed out casual employees.

[17] The Employer regularly calls in or schedules casual employees who have not maxed out to work 12-hour shifts in preference to full or part-time employees who have maxed out. The evidence was inconsistent with regard to whether these casual employees are paid 1.5 x their regular pay for 4 or 4.5 hours per shift. The agreed statement of facts reads:

> 10. Because casual employees are not subject to the averaging agreements, they are required under the *Employment Standards Act* to be paid at time and half after 8 hours of work in a day.
>
> 11. Casual employees can be scheduled or called-in to work 12-hour shifts for the Employer. When a casual employee works a 12-hour shift for the Employer, they are paid at straight time for the first 7.5 hours of the shift and at overtime for the remainder of the shift.

[18] The Employer's reply to the grievance dated September 17, 2013 reads in part:

> Because part time and casual employees cannot be covered under the Overtime Averaging Permits, by law, the Employer is required to pay the last 4 hours of their 12-hour shifts at time and one half or double time.

[19] The Manager of Human Resources testified that the *ESA* requires the Employer to pay casual employees 1.5x their regular rate after 7.5 hours and the Employer has paid them that way since at least 2007 and likely since 2004.

[20] The Manager of Continuing Care testified that while it would be possible to split up twelve-hour shifts, it would be an "administrative nightmare". If the shifts were split, the Employer would try to cover the two shifts with a casual or part-time employee who had not maxed out so as to avoid paying any overtime. Further, she speculated that full-time employees would likely not accept a 4-hour overtime shift as they would go to the bottom of the overtime call-in list and thereby miss potential overtime shifts of 12-hours length.

Did the Employer violate the Collective Agreement when it scheduled or called-in casual employees for 12-hour shifts in preference to full-time or part-time employees?

[21] The Union argues that the last 4.5 hours of a casual employee's 12-hour shift is "overtime work" that is subject to the protocol for offering overtime work provided for in the recently amended Article 24.04(a). As a result of the Employer's actions, casual employees are receiving overtime work in priority to full-time and part-time employees in violation of Article 24.04.

[22] The nub of the Employer's argument is that the last 4 or 4.5 hours of a casual employee's 12-hour shift is not "overtime" as defined by the Collective Agreement and is therefore not subject to the protocol in Article 24.04.

[23] The Employer submits that it pays 1.5x regular pay to casual employees for the last 4 or 4.5 hours of their 12-hour shift because of a statutory requirement under the *ESA*. The *ESA* requires that 1.5x regular pay be paid for any work that exceeds the "standard hours of work in a day" (s.9(1)) and the *Act* defines standard hours of a day as 8 hours (s.7(1)). If the Employer is paying casual employees 1.5x their regular rate of pay after 7.5 hours, it is paying them .5 hours more at the premium rate than the *ESA* appears to require.. The Extended Hours Permit issued in 2004 required the Employer to pay overtime to causal and part-time employees "for all time worked in excess of seven and one half (7.5) hours per day and thirty seven and one half (37.5) hours per weeks as per your collective agreement." Perhaps, if the Employer is paying casual employees 1.5x their regular rate of pay after 7.5 hours, it is doing so because it is a requirement of an Extended Hours Permit. Unfortunately, the current permit was not entered into evidence nor was the hours of work provision of the collective agreement in effect in 2004.

[24] In any event, the current Collective Agreement does not expressly require that overtime pay must be paid to casual employees who work in excess of 7.5 hours per shift. Article 2.01(u) defines "overtime" for casual employees to mean "work performed by employees in excess of full-time hours for the position" and Article 63.05 refers to "hours worked in excess of the regular hours, daily and weekly, of a full time employee in the same position." The Collective Agreement does not set out how many hours per day comprise "regular" or "full time hours for the position". Article 22.01 simply states, "a normal full-time work week shall be thirty-seven point five (37.5) hours per week."

[25] The Union notes that Article 23.02(a) establishes 12 consecutive hours per day as the "(r)egular hours for all employees on modified work week schedules". It argues that the reference in Article 63.05 to "regular hours" is to non-modified hours and the regular daily hours for employees on a non-modified work week are 7.5 hours. However, the Collective Agreement does not say that - Article 22 ("Hours of Work") only establishes normal or non-modified weekly hours.

[26] In the absence of an express provision in the Collective Agreement specifying what the daily "regular" or "full time hours for the position" are, I am left to consider the testimony of the witnesses regarding the regular hours of full-time employees covered by the Collective Agreement. The Manager of Human Resources testified that all full-time LTCAs work 12-hour shifts. The Union's witness, who is a Licensed Practical Nurse, works a twelve-hour shift. Licensed Practical Nurses and Registered Nurses employed under the Collective Agreement are exempt from sections 7 to 9 of the *ESA* and therefore can be scheduled, and are regularly scheduled, to work 12-hour shifts without permits. The Union's witness also testified that some employees work 8-hour shifts and one employee works a 4-hour shift. The employee who works a 4-hour shift is a part-time employee. The witness did not indicate the status of the employees working 8-hour shifts, although she did indicate they are at Woodland. There was no evidence of any employees regularly working 7.5 hour shifts.

[27] Reviewing the Collective Agreement as a whole and the practice of the parties, I conclude that the intent of the parties is that casual employees, who fill-in for absent regular employees, are expected to perform the work of the regular employees' position. When casual employees are called in for twelve-hour shifts, they are filling in for full-time employees' whose regular full-time hours are 12-hours per shift and the expectation is that they will work 12 hours, not 4, 6 or 8 hours.

[28] Therefore, when casual employees are called-in or scheduled to work a 12-hour shift, the "regular" or "full-time hours for the position" are 12-hours per shift. The express overtime provisions of the Collective Agreement are not triggered. The statutory requirements of the *ESA*, or perhaps a requirement in an Extended Hours Permit, explain why payments are made to casual employees at 1.5x their regular rate of pay in these circumstances.

[29] The Manager of Human Resources testified that casual employees have been scheduled and paid in this manner since at least 2007. It is unlikely that when the parties

amended Article 24.04(a) in the last round of bargaining, they intended to require the Employer to limit casual employees' shifts to 8 hours or less or to treat the last 4 or 4.5 hours of their 12-hour shifts as "overtime work" for the purposes of Article 24.04(a). Given the extended practice of scheduling or calling-in casual employees for 12-hour shifts and paying them a higher rate for a portion of their shift, I would have expected a clear statement of the parties' intent to effect such a substantial change and none exists.

[30] It is also important to note that limiting casual employees' shifts to 8 hours or less would not necessarily create more overtime opportunities for full or part-time employees. The Employer would more likely call-in or schedule another casual or part-time employee, who was not maxed out, to work the balance of the shift and thereby avoid paying any overtime. That the Employer has not chosen that route at this point and is content to schedule casual employees for 12-hour shifts and incur the additional costs, underscores the operational difficulties in splitting up shifts that are otherwise scheduled for 12 hours. Again, it is unlikely the parties intended to achieve that result when they amended Article 24.04 in the last round of bargaining.

[31] For all of these reasons, I conclude that the Employer has not violated Article 24.04 when it scheduled or called-in casual employees for 12-hour shifts in preference to full-time or part-time employees.

Has the Union established that the Employer violated Article 24.04 of the Collective Agreement by giving preference to Woodland employees when filling overtime opportunities at the ECU?

[32] This component of the Union's grievance reads: "..Full-time employees who are working as Casual employees in another department are being offered overtime hours ahead of Full-time employees regularly employed in that department…" In particulars subsequently provided to the Employer, the Union clarified that it was specifically alleging that employees regularly working full-time at Woodland were working casual overtime shifts at the ECU in preference to employees working full-time at the ECU. The Union did not establish any incidents when this actually occurred, either though the agreed statements of facts or any of the witnesses' testimony, and on this basis alone, the second component of the grievance could be dismissed.

[33] However, the witnesses, and counsel in their arguments, explored the question of whether, if this occurred, would it be a violation of Article 24.04? The focus of the inquiry is on

the words in Article 24.04(a): "qualified employees who are normally required in their regular duties to perform that work".

[34] The Union submits that Woodland and the ECU are separate facilities and employees normally work at only one of the facilities. There are separate employee rosters for each facility. Therefore it argues that Woodland employees are in a different department than the ECU and are not "normally required in their regular duties to perform" work at the ECU.

[35] The Employer submits that both facilities are components of the same department – long term care. While employees are assigned to work primarily at one site, they may be called upon to work at both. They are oriented at both. They perform essentially the same duties providing the same level of care to patients in similar medical circumstances. Perhaps the most compelling evidence is that none of the employees who work primarily at Woodland have applied to be casual at the ECU or *vice versa*. The Union witness, who testified that she worked full-time at ECU and "casual" at Woodland testified that she did not have to apply for a casual position at Woodland; she just expressed her desire to pick up shifts there to the Manager of Continuing Care, who arranged for her to be oriented at the Woodland site. The Manager of Continuing Care testified that if full-time employees at one site want to pick up overtime shifts at the other site, they simply advise her. The Employer treats them as full-time employees, not casual employees for the purpose of distributing overtime.

[36] Based upon the testimony of the witnesses, I conclude that Woodland and the ECU are one department and the Employer would not breach the Collective Agreement if it gave full-time employees working at Woodland opportunities to work additional shifts at the ECU in preference to full-time employees working at the ECU. (This assumes that the Woodland employees were ahead of the ECU employees on the overtime call-in list.)

Conclusion

[37] For the reasons set out above, both aspects of the Union's grievance are dismissed.

Dated this 23rd day of February, 2016.

Lyle S.R. Kanee, Q.C.