

**IN THE MATTER OF A GRIEVANCE ARBITRATION #17-G-02161
(Sheriff's Office Staff Overtime Group Grievance)**

BETWEEN:

UNION OF NORTHERN WORKERS

(the "Union" or the "UNW")

-and-

GOVERNMENT OF THE NORTHWEST TERRITORIES

(the "Employer" or "GNWT")

AWARD

Heard: July 7, 8 and 9, 2020

Issued: February 26, 2021

Arbitrator: J. Alexander-Smith (the "Board")

Appearances:

For the Union:

Michael Penner, Counsel
Darin Black, Senior Sheriff's Officer
Shane Pike, Service Officer UNW

For the Employer:

Jeannie Scott, Counsel
Georgina Rolt, Labour Relations Advisor GNWT
Jeff Round, Director of Court Services GNWT

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INTRODUCTION

[1] This matter involves a group grievance filed by the Union on behalf of the Sheriff's Office Staff arising from a change in the Employer's interpretation and application of the overtime provisions under Article 23.05 of the collective agreement expiring March 31, 2016 (the "Collective Agreement"). More specifically, this grievance involves the calculation of overtime for work performed by Sheriff's Office Staff prior to the regularly scheduled start of the first day of the work week under Article 23.

[2] The parties agreed to proceed by way of a virtual arbitration hearing on July 7, 8 and 9, 2020 (the "Hearing").

[3] At its outset, the parties accepted the composition and jurisdiction of the Board to hear and determine the merits of grievance #17-G-02161 (the "Group Grievance").

RELEVANT PROVISIONS OF THE COLLECTIVE AGREEMENT

ARTICLE 2

INTERPRETATION AND DEFINITIONS

- 2.01 (f) "Day of Rest" in relation to an employee means a day other than a holiday on which that employee is not ordinarily required to perform the duties of his/her position other than by reason of his/her being on leave of absence.
- (r) "Holiday" means the twenty-four (24) hour period commencing at 12:01 A.M. of a day designated as a paid holiday in this Agreement.
- (w) "Overtime" means work performed by an employee in excess of or outside of his/her regularly scheduled hours of work.
- (kk) "Week" for the purposes of this Agreement shall be deemed to commence at 12:01 A.M. on Monday and terminate at midnight on Sunday.

ARTICLE 22

HOURS OF WORK – GENERAL

DAY WORK

- 22.01 (a) Unless otherwise agreed upon by the Employer and the Union, the standard hours of work for employees whose standard work week is 37.5 hours are:
- (i) The standard daily hours will be seven and one-half consecutive hours, between 08:30 and 17:00, each day from Monday to Friday.
- (ii) The standard yearly hours will be 1950.

SHIFT WORK

- 22.02 Where the employee's work is scheduled by the Employer to fall outside of the standard hours of work as defined in 22.01, the following process applies:
- (a) The Employer and the Union will agree before establishing new or revised shift hours for an operational unit. Such agreement will not be unreasonably withheld. The Employer shall give employees at least 14 days notice of any change.
 - (b) The daily shift hours will be no more than sixteen (16) hours.
 - (c) The number of consecutive shift days of work shall be no more than 7 days.
 - (d) The number of consecutive days of rest between shifts shall be no less than 2 days.
 - (e) The number of shift days in a year for which the employee is entitled to be paid is determined by dividing the standard yearly hours 1950 or 2080 by the daily shift hours.
 - (f)
 - (i) The following provisions of Article 16 shall not apply to employees covered by Clause 22.02: 16.01(1), 16.02, 16.03, 16.04 and 16.06.
 - (ii) **Notwithstanding (i), employees who work Monday to Friday, who are not scheduled to work designated paid holidays, and whose hours of work fall outside of the standard hours of work as defined in 22.01, shall be entitled to the provisions of article 16, except 16.09.**

ARTICLE 23
OVERTIME

- 23.01 In this Article:
- (a) "Overtime" means work performed by an employee in excess or outside of his/her regularly scheduled hours of work.
 - (b) "Straight time rate" means the hourly rate of pay.
 - (c) "Time and one-half" means one and one-half times the straight time rate.
 - (d) "Double time" means twice the straight time.
- *****
- 23.05 (a) An employee who is required to work overtime shall be entitled to a minimum of one hour's pay at the appropriate rate described below in (b).
- (b) Overtime work shall be compensated as follows:
 - (i) at time and one-half (1 1/2) for all hours except as provided in Clause 23.05 (b)(ii);

- (ii) at double time (2) for all hours of overtime worked after the first four (4) consecutive hours of overtime and double time (2) for all hours worked on the second or subsequent day of rest, provided the days of rest are consecutive.

Consecutive hours of overtime will not be considered interrupted when:

- (a) one unpaid meal break of up to one hour is taken after a minimum of three consecutive hours have been worked and the employee returns to work after the meal break; or
 - (b) the overtime commences immediately prior to the start of the employee's regular hours of work and continues immediately following the conclusion of the employee's regular hours of work.
- (iii) in lieu of (i) and (ii) above, the Employer may agree to grant equivalent leave with pay at the appropriate overtime rate to be taken at a time mutually agreeable to the Employer and the employee. Any unused equivalent leave may be carried over into the next fiscal year.
- (c) "First day of rest" is defined as the twenty-four (24) hour period commencing at midnight of the calendar day on which the employee completed his/her last regular shift, and
 - (d) When the first and second or subsequent day of rest are consecutive, "second or subsequent day of rest" is defined as the period immediately following expiration of the first day of rest and ending at the time of commencement of the employee's next regular shift.

ARTICLE 59

DURATION AND RENEWAL

59.01 The term of this Agreement shall be four (4) years, from April 1, **2012** to March 31, **2016**.

The pay schedules contained in Appendix B shall be effective April 1, **2012**. All other provisions of this Agreement shall take effect on the date of ratification, unless another date is expressly stated.

EXHIBITS

[4] During the course of the Hearing, 8 exhibits were entered on the Record; listed below.

- 1(a) July 17, 2017 Email from Jeff Round with attachment entitled "Clarification of Overtime, Reporting Pay and Call-Back" dated July 17, 2017.
- 1(b) July 31, 2017 Email from Cory Pond with attachment entitled "Clarification of Overtime, Reporting Pay and Call-Back" dated July 17, 2017.
- 2 Group Grievance filed by UNW on August 8, 2017 by Darin Black.

- 3 Letter from Employer, Jeff Round, denying the grievance at the first level dated September 12, 2017.
- 4 Grievance submitted at step 2, filed October 4, 2017 by Shane Pike.
- 5 Letter from Employer, Martin Goldney, denying the grievance at the final level dated November 3, 2017.
- 6 Grievance submitted at step 3 and referring matter to arbitration, by Shane Pike and dated November 24, 2017.
- 7 Collective Agreement between UNW and Employer expires March 31, 2016.

AUTHORITIES

[5] For the Union:

1. *Re Domglas Ltd. and United Glass and Ceramic Workers, Local 203* [1984] 19 L.A.C. (3d) 156
2. *Cadillac Fairview Corp. v. C.E.P., Local 2003* [2011] 105 C.L.A.S. 161
3. *Rouge Valley Health System v. O.N.A.* [2009] O.L.A.A. No. 682

[6] For the Employer:

1. GNWT v. UNW (re: Hospital Nurses Group Overtime Grievance) Award, July 28, 1995
2. *Saskatchewan (Ministry of Justice) v. SGEU (Humble)* 2014 CarswellSask 645, 120 C.L.A.S. 191, 248 L.A.C. (4th) 117
3. Report and Binding Recommendations submitted to the parties pursuant to the *Public Service Act*, RSNWT 1988 C.P-16, Section 42(2) by Vincent L. Ready, dated March 22, 2019
4. Collective Agreement between GNWT and UNW expiring March 31, 2021
5. Public Service Act Regulations, R.R.N.W.T. 1990,c.P-28

[7] For the Board:

1. David M Beatty, Donald J Brown & Adam Beatty, *Canadian Labour Arbitration*, 5th ed (Toronto: Thomson Reuters Canada, 2006, loose-leaf):4:2000-4:2155

FACTUAL BACKGROUND

[8] Members of the Sheriff's Office work a standard work week of 37.5 hours, comprised of 7.5 consecutive standard daily hours, between 08:30 and 17:00 each day, Monday to Friday, described as Day Work under Article 22.01 (a) , with Saturdays and Sundays being "days of rest" as defined at Article 2.01(f) of the Collective Agreement.

[9] From time-to-time, sheriffs are required to travel with the Court on its circuits outside of Yellowknife, whether by air or by motor vehicle. The pre-Covid Circuit Court schedules generally started on the first day of a sheriff's standard work week. In order to accommodate the travel time associated with Court circuits, sheriffs are required to work before the start of their regular hours of work, attracting an entitlement to overtime pay pursuant to Article 23.

[10] For some time, the Employer had treated the hours immediately prior to the start of a sheriff's regularly scheduled hours of work on the first day of the standard work week (usually Monday, absent a holiday), as part of the "second day of rest", resulting in an entitlement to double time pay (OT2) for these early hours under Article 23.05(d).

[11] On July 17, 2017, Jeff Round, the Director of Court Services for the Department of Justice, announced via email a policy change in the Employer's calculation of a sheriff's entitlement to overtime pay arising from its re-interpretation of the "second day of rest" provision set out in Article 23 [Exhibit 1(a)].

[12] More specifically, effective July 17, 2017, the Employer announced that overtime payable to members of the Sheriff's Office when required to work before 8:30 am on the first day of the standard work week was, thereafter, payable at time and one-half (OT1) pursuant to Article 23.05(b)(i), notwithstanding a long-standing practice to the contrary.

[13] The rationale for the interpretive change implemented by the Employer was detailed in Mr. Round's email as follows:

*Where an employee is directed to work overtime immediately before their shift and on the first day of the week, the employee is entitled to OT1 as it is **contiguous** to their regular shift on their regular workday which commences at 12:01 AM on Monday (or Tuesday when Monday is a stat holiday). Day of Rest is defined in the Collective Agreement as "in relation to an employee means a day other than a holiday on which that employee is not ordinarily required to perform the duties of his/her position other than by reason of his/her being on leave of absence." In addition, Holiday, "means the 24 hour period commencing at 12:01 am of the day designated as a paid holiday in this Agreement". [Emphasis added by the Board]*

It would follow that days of rest start at 12:01 a.m. and end at 12:00 a.m.; therefore time after 12:01 a.m. on Monday is not considered a day of rest.

[14] Included in Mr. Round's July 17, 2017 email was a revised internal Court Services document entitled "Clarification of OT Reporting Pay" to explain to Court Services employees (court officers, sheriff officers and court reporters) how they were to thereafter record their time; distinguishing between hours of work immediately preceding or immediately following regular hours of work (OT1) and hours of work required during a Day of Rest (OT2).

[15] On August 8, 2017, the Union expressed its objection to the unilateral changes in the Employer's overtime pay practices through the filing of a Level 1 Group Grievance under Article 37 [Exhibit 2], on the basis that the Employer was in violation of the Collective Agreement. Although initiated by Darin Black, the Group Grievance was continued thereafter by Shane Pike, Service Officer of UNW, through to its referral to arbitration on November 24, 2017 [Exhibit 6].

Union Witnesses

Darin Black

[16] Mr. Black joined the GNWT in 2002 and worked as a sheriff irregularly until joining in a full-time capacity in 2006. He currently occupies the position of Senior Sheriff's Officer and reports to Cory Pond, Manager of Sheriff Services.

[17] On July 17, 2017 Mr. Black was in the course of completing a 4-week internship with the Union, following which he returned to the Sheriff's Office. He testified that upon reading Mr. Round's overtime directive, he reviewed the applicable provisions of the Collective Agreement and concluded that the Employer's policy change did not accord with Article 23 of the Collective Agreement.

[18] In Mr. Black's view, the Employer's re-interpretation of the overtime provisions of the Collective Agreement was contradicted by the express wording of Article 23.05(d), which provided that the second day of rest only ended at the start of an "employee's next regular shift"; that being at 8:30 Monday morning. He said that the Employer provided no explanation for the policy change beyond the information set out in Mr. Round's email.

[19] Mr. Black reported his concerns regarding the change in the Employer's calculation of overtime to his manager, Cory Pond; without effect, and he thereafter assisted in submitting a Level 1 Grievance on August 8, 2017, shortly before resuming his position with the Sheriff's Office.

[20] Although Mr. Black was unable to recall specific dates, he explained that when he first worked as a sheriff time recorded on Monday mornings before the start of a regular workday was paid at OT1; a practice which was later changed to pay for those early hours at OT2 on the basis that the hours worked prior to 8:30 Monday morning fell on a "day of rest". Mr. Black believed that the OT2 pay practice was continued for several years prior to the change in July 2017.

[21] According to Mr. Black, although he worked a standard workday of 7.5 hours as a sheriff, he was only required to "record" overtime hours worked in the Employer's People Soft database by using the applicable overtime codes.

[22] He confirmed that the Employer's overtime policy change was continued after July 17, 2017 and remained in effect as of the date of the arbitration.

[23] In response to questions on cross-examination, Mr. Black confirmed that he was not a "shift worker", unlike a hospital nurse. He agreed that he worked a regular work week. He confirmed that he

likely received a copy of an email from Cory Pond dated July 31, 2017 [Exhibit 1(b)], which reiterated the change in overtime entitlements first introduced by Mr. Round on July 17, 2017.

[24] Mr. Black explained that in most cases when he was required to work before his regular 8:30 am Monday start time, he travelled to Hay River or to Fort Smith for a circuit, or in the event of special circuit or a Supreme Court trial.

Shane Pike

[25] Mr. Pike has been a Service Officer for the UNW since February 2016. In that role he represents approximately six different locals and five different bargaining units.

[26] In response to Mr. Round's July 17, 2017 overtime pay "clarification" for members of the Sheriff's Office, Mr. Pike noted that Mr. Round's rationale was based upon his introduction of a qualifier to the express language set out in the Collective Agreement, that hours of overtime worked "contiguous" to regularly scheduled hours (whether immediately preceding or immediately following) were payable at OT1. Mr. Pike pointed out that Article 23.05(d) the Collective Agreement contained no such language, replicated below for ease of reference:

When the first and second or subsequent day of rest are consecutive, "second or subsequent day of rest" is defined as the period immediately following expiration of the first day of rest and ending at the time of commencement of the employee's next regular shift.

[27] In Mr. Pike's view, a "regular shift" is equivalent to an employee's regular hours of work, regardless of whether the employee is employed in "Day Work" or in "Shift Work" under Article 22.

[28] Mr. Pike testified that the Union disputed the Employer's assertion that the "second day of rest" for Monday-Friday employees working 08:30 to 17:00 necessarily ended at midnight Sunday because 12:01 am Monday (or Tuesday if Monday was a holiday) was a day ordinarily worked by the sheriffs.

[29] In Mr. Pike's view, the Employer's position was contradicted by the express provisions of Article 23.05(d), which provided that the "second or subsequent day of rest" continued until the start of the "employee's next regular shift"; resulting in an entitlement to OT2 for the early start times required on Court Circuits, in accordance with the Employer's practice prior to July 17, 2017.

[30] Mr. Pike explained that changes to existing language or new provisions in a Collective Agreement are **bolded**. Having reviewed the Overtime provisions of Article 23 of the Collective Agreement, whose term was April 1, 2012 – March 31, 2016, Mr. Pike said that the absence of any bolded words caused him to conclude that the overtime language was likely carried over from the previous Collective Agreement.

[31] Mr. Pike confirmed that he had assisted in preparing the Level 1 grievance filed by Mr. Black on August 8, 2017, following which Mr. Pike assumed conduct of the Group Grievance thereafter through to its referral to arbitration.

[32] Although Mr. Pike acknowledged that the Employer's Response to the Grievance (Level 2) referenced a "long-standing practice" of paying OT1 for hours contiguous with the workday across government for employees who work Monday-Friday, no specific examples of any such practice was provided.

[33] Mr. Pike also acknowledged that the Collective Agreement had "expired" during these events but pointed out its existing provisions were continued under Article 59.02. Following the signing of the renewed Collective Agreement in 2019, the provisions of Article 23.05 remained unchanged.

Employer Witnesses

Jeff Round

[34] A 26-year employee of the Department of Justice, Mr. Round was formally appointed to the position of Director of Court Services in January 2017. In this role, he is responsible for the Sheriff's Office.

[35] Over his long career with the GNWT, Mr. Round occupied a number of positions in which he had occasion to travel with Court parties and attend court as a clerk and, thereby, became familiar with the Sheriff's Office work schedules for court officers, sheriff officers and court reporters; each of whom he described as having different work requirements.

[36] Mr. Round testified that, in his view, a sheriff's Day Work schedule was distinct from those employees assigned to Shift Work, whose work assignments altered between day shifts and night shifts, such as the schedules worked by hospital nurses and firefighters.

[37] Mr. Round confirmed that on July 17, 2017 he circulated an email and clarification document [Exhibit 1(a)] to Court Services' supervisors and to Monday – Friday staff regarding a change in how they should, thereafter, record overtime hours worked immediately proceeding or immediately following regular hours worked on the first day of the scheduled workweek (usually Mondays, absent a statutory holiday) as OT1, as distinct from overtime hours worked when called in on a weekend (OT2). He confirmed that this change was to be applied strictly on a go-forward basis, effective immediately.

[38] Mr. Round testified that the Employer's application of its interpretive change to the "second or subsequent day of rest" and reduced overtime entitlements arising therefrom, had originated in the Employer's Human Resources Department, although he could not recall precisely when, how or by whom it was initiated. In preparation for the arbitration hearing Mr. Round explained that he had reviewed all of his meeting minutes and emails but was unable to identify any specific conversation that sparked this change.

[39] Mr. Round was, however, certain that he received advice from Human Resources which was reflected in the contents of his July 17, 2017 email. He explained that Human Resources had concluded that the "second day of rest" for those working a Monday-Friday 08:30 – 17:00 schedule ended at midnight on Sunday. As Monday is a regular workday for those on a Day Work schedule, Human Resources

directed that contiguous hours worked on Monday morning prior to the regular start time of 8:30 am triggered an obligation to pay OT1 under the Collective Agreement (not OT2) and that those hours were to be coded accordingly.

[40] Mr. Round had a recollection that an Interpretive Bulletin had earlier been issued under the *Financial Administration Act* that “changed something” in his words; triggering Human Resources to bring the interpretative change to the “second day of rest” to his attention. Mr. Round was unable to locate a copy of this Bulletin, having made inquiries with others in the Department of Finance, without success. He added that the Financial Administration Manual was re-written in 2018 which, he believed, “wiped out” all previous Bulletins.

[41] In response to the Union’s Level 1 grievance, Mr. Round confirmed his involvement in the creation of the Employer’s letter dated September 12, 2017 [Exhibit 3]; which reiterated the rationale for the interpretive change in overtime pay for contiguous hours worked prior to the commencement of the regular hours at the start of the work week, as described in his July 17, 2017 email.

[42] In response to questions on cross-examination, Mr. Round acknowledged that from 2015 – 2017 he was aware that sheriffs had been paid overtime at OT2 for contiguous overtime hours worked on the first day of the work week, with Human Resources approval, up to the July 17, 2017 directive as set out in the Employer’s own policy document, attached to Mr. Round’s email. He further acknowledged that in denying the grievance at Level 1 [Exhibit 3], he referenced the Employer’s long-standing practice of paying OT1 for contiguous overtime hours worked in other areas of the GNWT, which practice had not been applied to the Sheriff’s Office between 2015 - July 17, 2017 as a result of what he described as a Court Services’ interpretation of Article 23.

[43] At the same time, Mr. Round acknowledged a distinction between overtime hours worked contiguous with the start or end of a regular workday schedule as compared to overtime hours worked when called in in the middle of the night. Similarly, he noted a distinction between contiguous overtime hours from those arising from standby, callback or reporting pay; the former classification merely extending the start or end of a workday while the other categories do not. Mr. Round also pointed out that, historically, sheriffs were consistently paid overtime at OT1 for hours worked prior to the start of the regularly scheduled hours on Wednesdays, Thursdays and Fridays.

[44] Sheriff attendances on Circuit Court schedules required an early start to the regular workday; to either catch a flight or complete a drive to a location in order to arrive at the location prior to the commencement of Court proceedings at 9:30 am. Mr. Round testified that these earlier starts were required approximately every four to six weeks (pre-Covid) and would have required that a sheriff report to the airport between 5:00 am to 7:45 am, depending upon the destination.

[45] Mr. Round acknowledged that Article 23.05(d) expressly provided that the “second or subsequent day of rest” ended “...at the time of commencement of the employee’s next regular shift”. He also acknowledged that sheriff’s regular workweek schedule commenced at 8:30 on Monday mornings. However, although he conceded that clause 23.05(d) could be interpreted that way as applied to sheriff

staff, he stated that he presumed that the direction that he received from Human Resources on this issue was correct.

[46] In connection with the Employer's final denial of the grievance penned by the Deputy Minister [Exhibit 5], Mr. Round could not recall whether he had any input into its creation and could not say whether the Deputy Minister had relied on the Employer's earlier denial letters or not.

SUBMISSIONS OF THE PARTIES

The Union

[47] It is the Union's position that the Employer instituted a policy in July 2017 in breach of Article 23 of the Collective Agreement, resulting in the Group Grievance filed on behalf of sheriffs working in Court Services for the Department of Justice.

[48] The Union submitted that the issue before the Board is not one of an interpretation of one or more provisions of the Collective Agreement but, rather, simply an application of Article 23.05(d); the wording of which it urged the Board to find is clear and unambiguous and deals specifically with the computation of time and the valuation of overtime for work performed during an employee's second day of rest.

[49] It argued that Article 23.05(d) expressly provides that an employee's "second day of rest" continues until the commencement of the employee's "next regular shift" which, in the case of sheriffs is 8:30 Monday morning (or Tuesday should Monday be a holiday). Accordingly, it submitted that sheriffs are entitled to double time pay for hours worked during the second day of rest, which accords with the Employer's long-standing payment practice and stated policy in place prior to July 2017.

[50] The Union submitted that there is nothing in the language of Article 23.05(d) that limited its application to "shift workers"; having noted that the phrase "regular shift" or "regularly scheduled shift" is found elsewhere in the Collective Agreement, and which phrases do not apply exclusively to "shift workers", such as in Article 25, at page 57, as follows:

- (1) If an employee reports to work for his/her regularly scheduled shift and there is a change in his/her shift assignment, he/she shall be entitled to four (4) hours of work. When no work is available he/she shall receive compensation of four (4) hours pay at the straight time rate.
- (2) If an employee reports to work on his/her regularly scheduled shift and there is insufficient work available, he/she is entitled to four (4) hours of work. When no work is available he/she shall receive compensation of four (4) hours pay at the straight time rate.

[51] The Union contrasted Article 25 with Article 27 [Shift Premium], the latter of which it submitted is an example of how the parties deal with language that is specific to shift workers to the exclusion of regular employees:

27.01 An employee who is regularly scheduled to work outside of the normal hours of work, 0800 to 1700, shall be paid a shift premium of two dollars and fifty cents (\$2.50) per hour for all hours worked between the hours of 4:00 p.m. and 8:00 a.m. Shift premium will also be paid for all overtime hours worked contiguously to the period specified above, but for no other overtime hours.

27.02 Employees shall receive an additional premium of two dollars and fifty cents (\$2.50) per hour for work on Saturday and/or Sunday for hours worked. Weekend premium shall be payable in respect of all regularly scheduled straight time hours worked on Saturday and/or Sunday.

[52] The Union argued that the Employer led no evidence to support an assertion that Article 23.05(d) applied exclusively to shift workers. It noted that the Employer did not advance any such assertion at any time during the grievance process prior to the referral to arbitration. Rather, the Union submitted that the Employer simply ignored Article 23.05(d) when it instituted its policy change in July 2017.

[53] The Union argued that the language of Article 23.05(d) has been in place for over a decade and remains unchanged in the current Collective Agreement.

[54] In support of its position, the Union urged the Board to consider Article 5.03 [Conflict of Provisions] of the Collective Agreement, which provides:

Where there is any conflict between the provisions of this Agreement and any regulation, direction or other instrument dealing with terms and conditions of employment issued by the Employer, the provisions of this Agreement shall prevail.

[55] The Union submitted the Employer's repeated assertion that it had a long-standing practice to pay only time and one-half for contiguous hours to regularly scheduled hours worked Monday to Friday, is contradicted by the evidence, as follows:

- The Employer introduced no evidence of any such long-standing practice in other departments of the GNWT.
- The Employer's Human Resources knew and approved a long-standing practice to apply Article 23.5(d) to members of the Sheriff's Office staff, entitling them to double time pay for hours worked prior to the start of their regular shift at 8:30 on Monday mornings (and on Tuesday mornings where Monday was a statutory holiday).
- The Employer introduced no evidence that Court Services overtime practices was somehow out of step with GNWT practices in any event. Mr. Round testified that he was aware of the Court Services overtime practices prior to the change instituted on July 17, 2017.
- No evidence of the rationale for the Employer's sudden reversal in its interpretation of the "second day of rest" under Article 23 was introduced at the hearing; no member of Human Resources was called as a witness.
- The Bulletin which Mr. Round postulated may have triggered Human Resources re-interpretation of the "second day of rest", was not introduced at the hearing; nor was a member of the Financial Management Board produced at the hearing to speak to this issue.

- The Employer introduced no evidence to permit the Board to construe that Article 23.05(d) applied exclusively to shift workers.

[56] It also submitted that applying the standard rules of interpretation of the Collective Agreement provide further support of its interpretation of the clear and unambiguous language of Article 23.05(d) which, simply put, that the "second day of rest" extends to the beginning of the next regularly scheduled workday on Monday at 8:30 am (or Tuesday should a holiday fall on a Monday).

[57] Conversely, the Union submitted that if the Board determined a need to interpret the meaning of the overtime provisions in the Collective Agreement; it was urged to apply the accepted rules of constructions, the particulars of which are set out in the authorities identified in paragraph [5] above.

[58] In the result, the Union submits that the Board must allow the Grievance.

[59] In terms of relief, the Union seeks:

- (i) a Declaration that the Employer has misinterpreted Article 23 of the Collective Agreement;
- (ii) that the Employer pay all sheriffs within Court Services their appropriate double time pay retroactively to July 17, 2017; and
- (iii) that the Employer make employees within Court Services whole in terms of compensation, excluding an award for interest.

The Employer

[60] The Employer essentially agreed with the Union's characterization of the facts for employees of Court Services working a Monday-Friday work week, 08:30 – 17:00, with Saturdays and Sundays off.

[61] In July 2017, the Employer acknowledged that affected employees were given notice of a change in the payment of overtime for work before scheduled hours of work on Monday mornings (or on Tuesday mornings when a holiday fell on a Monday). While the Employer did not dispute a past practice of paying double time (OT2) for these hours, it argued that in doing so it had made a mistake, which it asserts it was entitled to correct. Thereafter, the Employer paid overtime at time and one-half (OT1), without a claw back for mistaken overtime payments earlier made. The Employer conceded that having directed employees to record these hours as OT2, it sought no retroactive repayments.

[62] The Employer also did not dispute that the Union filed a grievance in August 2017, objecting to the change on the basis of the wording of Article 23.05(d) and the definition of "second or subsequent day of rest". However, the Employer submitted that it did reply to this particular provision of the Collective Agreement through its interpretation of the broader scope of the Collective Agreement.

[63] At the time the Group Grievance was advanced, the Collective Agreement then in place had expired but was continued as the parties participated in the bargaining process thereafter which resulted in a renewed collective agreement, expiring March 31, 2021. The Employer produced a copy of this collective agreement for the Board to demonstrate that the language of Article 23 remained unchanged.

[64] The Employer sought clarification from the Board as to whether Article 23.05 relates to workers who are not shift workers under the Collective Agreement. It submitted that Article 23.05(d) applies only to shift workers and to find otherwise would be squarely at odds with other provisions of the Collective Agreement.

[65] The Employer argued that Article 23.05 is not clear and unambiguous, but rather that, at minimum, contains a latent ambiguity when reviewed within its context of other definitions within the Collective Agreement. It further argued that the "day of rest" definition in 23.05(d) offends those other definitions when applied to someone other than a shift worker.

[66] Although the Employer conceded that there was a long-standing past practice in the payment of overtime, it argued that it was not estopped from changing its past practice because the Union failed to introduce any evidence of detrimental reliance on any representation that the Employer had made.

[67] The Employer submitted that having put the affected employees on notice of the change in practice at a time when bargaining was about to commence and noting no change in the wording of either Article 23.05 or the adoption of a new Memorandum of Understanding or any other agreement between the parties, that there was no case for estoppel before the Board. Having made this argument before the Board, the Employer also conceded that since the Union did not raise an estoppel in any event, the point is moot.

[68] The Employer urged the Board to consider the technicality of the use of the word "shift" in Article 23.05(d) and argued that the only appropriate interpretation of the intentions of the parties in including the word "shift" in this clause was that it was only to apply to shift workers and not to regularly scheduled workers.

[69] Counsel argued that the Union witness Darin Black testified that he did not consider himself a shift worker and that the Employer's witness Jeff Round also testified that he did not consider employees at Court Services to be shift workers.

[70] The Employer submitted that the term "shift worker" is defined in the Collective Agreement as someone other than a "day worker" or a "regular worker"; the latter of which work regular hours, 5 days a week, Monday-Friday, with 2 consecutive days off on Saturdays and Sundays, under Article 22.02.

[71] The Employer pointed out that the *Public Service Act Regulations* provide a similar dichotomy between "standard hours of work" [section 7] and "shift work" [section 8]; the latter being something other than the standard hours of work.

[72] The Employer submitted that the Board should consider the following additional provisions within the Collective Agreement, which it argued carried through with the distinction between those employees who worked "Day Work" [Article 22.01] and those employees who worked "Shift Work" [Article 22.02], as follows:

- Article 16.08 [shift work]
- Article 16.09 [day work]
- Article 17.05(ii) [shift work]
- Article 21.08(5) [both]
- Article 23.05 [shift work]
- Article 24(2) [both]
- Article 27 [shift work]
- Article 29(5) [shift work]
- Appendices: A1.08 [both]

[73] The Employer disputed the Union's interpretation of Article 25 [Reporting Pay] on the basis that this Article 25.01 and 25.02 only applied to shift workers, while 25.03 and 25.04 only apply to those with "regular work hours". It submitted that each of the Articles and Appendices identified above deliberately distinguished between those provisions which applied to regular day workers and those that applied to shift workers.

[74] The Employer urged the Board to consider the deliberate wording of Article 23.05, particularly the definition of the first and second days of rest and to conclude that it was necessary to have an extra definition for "second or subsequent day of rest" to address overtime payable for shift workers. It submitted that regular day workers have the same two days of rest (Saturday and Sunday) each week but because shift workers' days of rest can change with a schedule change, 23.05(d) was intended to apply only to shift workers.

[75] The Employer submitted that the express provisions of Appendix 2 further illustrate the distinctions between those who work shift rotations and those who do not, such as Correctional Security Shift Workers and Correctional Officers. Appendix 2.03(a) identifies as a 3 week rotation period (7 regular days on and 3 regular days off; followed by 7 regular days on and 4 regular days off). The shift rotations would result in different days of rest on different days of the week, depending upon which shift rotation was worked.

[76] The Employer argued that it was for this reason that Article 23.05(d) was necessary to address the "second or subsequent day of rest" for those working a shift rotation, which entitles a shift worker on the second half of the rotation to 4 days off and expands an entitlement to OT2 to 3 days for these particular workers.

[77] The Employer directed the Board to a 1995 arbitration decision [*GNWT*, supra, para 6] dealing with hospital nurses (night shift workers) who successfully grieved for overtime compensation for hours of work performed on their second day of rest. The employer had argued that the nurses were not entitled to 24 hours rest on the second day of rest under Article 23.05, but the arbitrator held otherwise and awarded overtime pay to the nurses required to work between 8 pm and midnight on their "second or

subsequent day of rest” because they were entitled to a full 48 hours of rest under the collective agreement. The Union had argued that the “second day of rest” did not end until midnight. The arbitrator found a latent ambiguity between Article 22.02(a) and 23.05(d) and looked to other provisions in the collective agreement to resolve the conflict; as the Employer argues this Board should do in assessing the merits of the Group Grievance.

[78] The Employer submits that applying Article 23.05(d) to employees assigned to Day Work results in an absurdity on the basis that sheriffs working a standard work week, 37.5 hours, Monday-Friday, are entitled to 2 days of rest; 24 hours on Saturday and 24 hours on Sunday. As Monday starts at 12.01 am, it cannot properly be classified as a “day of rest”. Accordingly, hours worked before the start of a sheriff’s regular work hours attracts an entitlement to OT1 under Article 23.02(b)(i).

[79] In further support of its position, the Employer noted that “week” is defined at Article 2.01(kk) as commencing at 12.01 am Monday and ending at midnight on Sunday. Similarly, “days of rest” are defined at Article 2.01(f) as “...means a day other than a holiday on which that employee is not ordinarily required to perform the duties of his/her position other than by reason of his/her being on leave of absence”.

The Union’s Reply

[80] Counsel noted that however the Employer discovered its mistake in its interpretation of Article 23.05(d), which is not in evidence before the Board, it took no action during the subsequent bargaining to change that mistake.

[81] The Union disputed that Article 27 only applies to shift workers and noted that no evidence was presented to the Board to reach that conclusion. Indeed, the Union provided the Board with an anecdotal example of an ongoing application of the benefits extended to shift workers under Article 27, which it submitted has also been extended to social workers who work a regular schedule of 7:30 – 3:30 Monday – Friday.

[82] The Union submitted that interpreting Article 23.05(d) to include day workers would not result in an absurdity, as the Employer had argued. It pointed out that the corollary to that argument is that words in a collective agreement must have meaning. The Union argued that the issue of overtime payable for work on days of rest for shift workers is already addressed in Article 22.03(d) and in Article 27. That being the case, then if the Board adopted the Employer’s position, Article 23.05(d) would apply to no one, because its terms would be superseded by the specific language of 22.03(d) and Article 27; rendering Article 23.05(d) both a nullity and an absurdity.

[83] The Union asserted that Article 23.05(d) must have meaning. Therefore, it urged the Board to find that work prior to the first shift following two days of rest conferred upon all eligible employees an entitlement to double overtime in the absence of explicit language limiting this provision to shift workers.

THE DECISION

[84] I have carefully considered the evidence presented by the witnesses presented during the course of the hearing and the documentary evidence submitted to the Board through those witnesses, entered as Exhibits in these proceedings, along with the submissions of counsel and the authorities identified at paragraphs 4-7 above.

[85] Arbitral jurisprudence has long accepted that the source of this Board's jurisdiction is found in the Collective Agreement and in the issues identified in the grievance before it. In assessing the merits of the Group Grievance, my task is to construe the applicable provisions of the Collective Agreement and in doing so, declare the meaning of the words that the parties have adopted and thus give effect to the intentions expressed by the parties who agreed to it.

[86] I have noted a number of rules of construction to be applied as aids in construing an agreement, aptly summarized in *Brown & Beatty, supra* para 7 at 4.2000-4:2155, among them:

- parties are assumed to have intended what they said
- a collective agreement is to be read and construed as a whole
- words under construction should be read in the context of the sentence, section, and agreement as a whole
- clear words are to be given their normal or ordinary meanings
- plain meaning may be departed from where it would result in an absurdity or inconsistency with the rest of the agreement
- in the absence of ambiguity or lack of clarity in meaning, effect must be given to the words of the agreement
- extrinsic evidence is admissible as an aid to interpretation where an ambiguity is identified

[87] The essential facts of the grievance are not in dispute. Sheriffs work a "Day Work" schedule as defined in Article 22.01(a) of the Collective Agreement; whose standard work week is 37.5 hours, Monday to Friday, and whose standard daily hours of work are 08:30 to 17:00 each day; followed by 2 consecutive days of rest on Saturdays and Sundays, constituting days that sheriffs are not "ordinarily required to perform the duties of his/her position", as defined in Article 2.01(f).

[88] A second broad category of employees covered under Article 22.02 relevant to this Group Grievance are those assigned to "Shift Work", whose hours of work fall outside of the "standard hours of work" set out in Article 22.01(a), entitling them to "no less than two consecutive days of rest between shifts" under Article 22.02(d). The precise "days of rest" for employees performing Shift Work are not defined, as they will differ depending upon the applicable rotation schedule worked.

[89] The parties also agree that from time-to-time, sheriffs were required to report for work before 8:30 on Monday mornings (or Tuesday mornings if Monday was a holiday) to accommodate travel requirements for Circuit Courts scheduled outside of Yellowknife, NWT. The parties further agree that those early hours worked prior to 8:30 am attracted an entitlement to overtime pay under Article 23.

[90] There is no dispute that for some time prior to July 2017, the Employer paid double overtime to Sheriffs for those hours worked immediately prior to the start of their standard work hours on Mondays (and Tuesdays where applicable) pursuant to Article 23.05(d). While the Employer conceded that this was a practice of long standing, it did not provide any additional particulars of when this practice was instituted, or why it was instituted, or by whom. The parties also agree that sheriffs have always been paid overtime at time and one-half (OT1) for earlier starts to their standard workdays on Wednesdays, Thursdays and Fridays.

[91] I accept Mr. Round's testimony that in July 2017, initially through his email communication dated July 17, 2017 [Exhibit 1(a)], he informed affected members of Court Services that, thereafter, employees were required to record those early Monday/Tuesday starts as OT1, as the Employer had changed its practice of paying OT2 for those hours.

[92] This change in the payment of overtime resulted in the Group Grievance filed by Mr. Black on August 8, 2017 and is the issue to be determined by the Board; whether Article 23.05(d) applies to all employees or only to those who work Shift Work under Article 22.02.

[93] The evidence before the Board as to the basis for the Employer's change in paying OT2 to sheriffs under Article 23.5(d) is rather limited; even sparse. I accept Mr. Round's evidence that the Employer's change in its payment of overtime in July 2017 arose at the direction of Human Resources; whether that change in its interpretation of Article 23.05(d) was based upon an earlier Interpretive Bulletin or otherwise, as that evidence is not before the Board.

[94] The Board accepts that the essence of Mr. Round's understanding of the Employer's rationale for the change in the payment of overtime to sheriffs was that Article 23.05(d) did not apply to those who worked a standard work week Monday-Friday with Saturday and Sundays off, because being called into work early on a regular day of work (that being Monday or Tuesday in the event of a Monday holiday) was not a "day of rest", which ended at midnight on Sunday, and which therefore attracted only an entitlement to OT1 under Article 23 of the Collective Agreement.

[95] The Board also accepts that the Employer's rationale for the change as explained by Mr. Round, is consistent with Mr. Pond's email of July 31, 2017 [Exhibit 1(b)], and the Employer's letters denying the Grievance at Level 1 and Level 2 [Exhibits 3 and 5].

[96] Mr. Black, currently the Senior Sheriff Officer at Court Services, has been employed by the Department of Justice since 2002. He appeared before the Board as a witness for the Union in these proceedings. The Board accepts Mr. Black's uncontradicted evidence that when he first worked as a sheriff for the Department of Justice, time recorded before the start on the regular workday on Mondays was paid at OT1; a practice which he said was later paid at OT2, on the basis that hours worked prior to 8:30 on a Monday morning fell on a "day of rest". As Mr. Black could not recall when the Employer calculated overtime payments to sheriffs at OT1 in the past or under which provision of the collective agreement then in place, Mr. Black's testimony does little to supplement the Employer's past practice on this point under Article 23.05(d). No other witnesses spoke to this issue during the hearing, nor did

counsel do so during argument, underscoring the Board's conclusion that this aspect of Mr. Black's testimony can be assigned little weight.

[97] The Union did not raise an estoppel argument in connection with the Employer's change in the payment of overtime in July 2017, despite the Employer's extensive argument on this issue. Nonetheless, having considered the authorities and submissions on this issue, *Brown & Beatty, supra* para 7 at 4.2000-4:2155, I am unable to conclude that an estoppel is present on the limited evidence before me, despite the past-practice of paying sheriffs double overtime for a finite period of time, in the absence of any evidence of detrimental reliance. The Board accepts that in the Employer's view, the policy change in the payment of overtime under Article 23.05(d) was triggered by what it perceived to be an error in its earlier interpretation and/or application of its provisions and its efforts to correct that mistake thereafter.

[98] The Union argued that to assess the merits of the Group Grievance, the Board need not "interpret" Article 23.05(d) of the Collective Agreement but simply apply its plain and unambiguous language to affected Sheriff's Office Staff, resulting in an entitlement to double overtime from hours worked on Monday morning prior to the start of the standard hours of work.

[99] I am not persuaded by the Union's argument that this is indeed a matter of a straightforward application of the clear language of Article 23.05(d) to members of the Sheriff's Office. Rather, I have concluded that the substance of the grievance requires an interpretation of an ambiguous provision in Article 23.05(d) within the context of the whole of the Collective Agreement in order to give effect to the meaning intended by the parties in their deliberate use of the words "next regular shift" in Article 23.05(d).

[100] The ambiguity arises, at the very least, between the conflict between the definition of "day of rest" under Article 2.01(f) and under Article 23.05(d), each of which is set out below for ease of reference:

2.01(f): "Day of Rest" in relation to an employee means a **day** other than a holiday on which an employee is not ordinarily required to perform the duties of his/her position other than by reason of his/her being on a leave of absence. (emphasis added by the Board)

23.05(d): When the first and second or subsequent day of rest are consecutive, "second or subsequent day of rest" is defined as the period immediately following expiration of the first day of rest and ending at the time of commencement of the employee's next regular shift.

[101] There is no dispute that sheriffs are not ordinarily required to perform the duties of their position on Saturdays and Sundays; days of the week which run for a 24 hour period: 12:01 am to midnight Saturday and from 12:01 am to midnight Sunday. There is also no dispute that sheriffs are ordinarily required to work on Mondays unless a holiday falls on a Monday. Accordingly, I am persuaded that should I conclude that Article 23.05(d) applies to "day workers" in addition to "shift workers", I note such an interpretation raises an inherent contradiction between these two provisions; a contradiction that must be resolved through rules of interpretation to allow the Board to properly construe the applicable provisions of the Collective Agreement and in doing so, declare the meaning of the words that the parties have adopted and thus give effect to the intentions expressed by the parties who agreed to it.

[102] This task is not unlike that which was before Arbitrator Chertkow in *GNWT*, supra, para 6, albeit in assessing days of rest and corresponding overtime entitlements under Article 23.05(d), as described at page 3 of the Award:

What we have here, as noted previously, is a conflict between an employee's entitlement to two consecutive days of rest under article 22.02 (d) and the definition of a first day of rest, which is defined as a 24 hour period commencing at midnight of the calendar day on which the employee completed his/her last regular shift as provided in subparagraph (c) of article 23.05, and the employer's assertion that under subparagraph (d) of that provision, the second or subsequent day of rest, which is defined as following the expiration of the first day of rest and ending at the time of commencement of the employee's next regular shift, gives it the right to schedule the employee for work during the second or subsequent day of rest.

In my view, given the above conflict, the entitlement of employees under article 22.02 (d) must be given precedence over the equivocal and unclear wording of article 23.05 (d).

[103] The Union submitted that there are numerous provisions within the Collective Agreement that demonstrate the parties' deliberate use of language to demonstrate an intention to restrict a particular provision of the Collective Agreement only to shift workers in contrast to language which demonstrated an intention to include both day workers and shift workers. The Union argued that the best examples of such intentions are set out Article 25 (Reporting Pay) and in Article 27 (Shift Premium), which provide:

ARTICLE 25
REPORTING PAY

- 25.01 (1) If an employee reports to work for his/her regularly scheduled shift and there is a change in his/her shift assignment, he/she shall be entitled to four (4) hours of work. When no work is available he/she shall receive compensation of four (4) hours pay at the straight time rate.
- (2) If an employee reports to work on his/her regularly scheduled shift and there is insufficient work available, he/she is entitled to four (4) hours of work. When no work is available he/she shall receive compensation of four (4) hours pay at the straight time rate.
- (3) If an employee is directed to report for work on a day of rest or on a designated paid holiday, and there is insufficient work available, he/she shall be entitled to four (4) hours of work at the appropriate overtime rate. When no work is available, he/she shall receive compensation of four (4) hours pay at the appropriate overtime rate.
- (4) If an employee is directed to report for work outside of his/her regularly scheduled hours, he/she shall be paid the greater of:
- (a) compensation at the appropriate overtime rate; or

- (b) compensation equivalent to four (4) hours pay at the straight time rate.
- (5) An employee who receives pay under this Article is not entitled to pay under Article 26 –Call-Back Pay or Article 29 – Standby.

ARTICLE 27
SHIFT PREMIUM

- 27.01 An employee who is regularly scheduled to work outside of the normal hours of work, 0800 to 1700, shall be paid a shift premium of two dollars and fifty cents (\$2.50) per hour for all hours worked between the hours of 4:00 p.m. and 8:00 a.m. Shift premium will also be paid for all overtime hours worked contiguously to the period specified above, but for no other overtime hours.
- 27.02 Employees shall receive an additional premium of two dollars and fifty cents (\$2.50) per hour for work on Saturday and/or Sunday for hours worked. Weekend premium shall be payable in respect of all regularly scheduled straight time hours worked on Saturday and/or Sunday.

[104] The Union asserts that the wording of Article 25 contains no limitation to support an interpretation that it only applies to shift workers and urges the Board to find otherwise, despite the Employer's argument to the contrary. The Board is not persuaded by the Union's position on this issue.

[105] In the first place, the Employer did not submit that Article 25 applied only to shift workers; it submitted that Article 25 (1) and (2) applied only to shift workers and that Article 25 (3) and (4) applied only to regular workers. The Board is persuaded that the plain and ordinary meaning of Article 25 (1) and (2) would result in an absurdity if applied to day workers as day workers' regular hours have already been expressly "scheduled" in Article 22.01(a). In contrast, shift workers hours are not expressly identified in Article 22.02, precisely to address fluctuating schedule rotations. Similarly, Article 27 expressly and necessarily applies only to shift workers because, in the Board's view, day workers do not work different hours on different shifts and are not eligible for "Shift Premiums" at all. Additional hours worked by day workers attract an entitlement to overtime pay under Article 23.

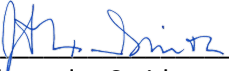
[106] The Board is persuaded that the wording of Article 23.05(d) meaningfully expresses an intention that the parties intended that it apply only to shift workers, to the exclusion of day workers. There is no evidence before the Board to conclude otherwise. I am not persuaded the further evidence of the parties' bargaining history would alter the Board's findings. I have reached this conclusion independently of arguments made, without the introduction of evidence, to support the premise that the Sheriff's Office was out of step with other GNWT departments. Those arguments were not considered in determining the merits of the Group Grievance or for the purpose of interpreting Article 23.05(d).

[107] The Board has concluded that, unlike the unclear wording of Article 23.05(d), the plain and ordinary meaning of the express provisions of Articles 22.01 and Article 2.01(f) are clear and unequivocal; sheriffs work a set five day Monday to Friday schedule running from 08:30 to 17:00, with 2 consecutive days of rest, that being two 24 hour days on Saturdays and Sunday. Monday is a regular workday for

sheriffs and hours worked before the regular start of the workday attract an entitlement to time and one-half (OT1) under Article 23 (b)(i).

[108] Applying the fundamental tenets of the interpretation of collective agreements and being mindful of the Employer's right to manage and direct the Public Service under Article 7, I am persuaded that the Employer's correction of an error in interpreting days of rest as applied to members of the Sheriff's Office in July 2017 and thereafter, did not breach any provision of the Collective Agreement, including Article 23.05(d) and, as a result, this Grievance is dismissed.

Dated this 26 day of February 2021.



J. Alexander-Smith
Arbitrator