IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE MINISTER OF HUMAN RESOURCES
(GOVERNMENT OF THE NORTHWEST TERRITORIES)

Employer

-and-

THE UNION OF NORTHERN WORKERS

Union

RE: SHIFT SCHEDULING OUTSIDE STANDARD HOURS

AWARD

Before:	Tom Jolliffe, Q.C.
Counsel for the Employer:	Trisha Paradis
Counsel for the Union:	Michael H. Penner
Joint Book of Documents and Authorities and Counsels' Submissions and Briefs Received:	June 23, 2020
Hearing Date:	June 26, 2020 (via Zoom)

Date Award Issued:
September 17, 2020

My File:
53,372

The Parties have accepted that a contract interpretation dispute exists between them which does not lend itself to the grievance process set out in Article 37 of the Collective Agreement. They agreed to present this dispute in an expedited format heard by this arbitrator on a remote-hearing platform basis, intending on the decision being binding on them pursuant to Article 37.21(2). Its nature and the relief sought has been detailed for me in their filed Memorandum of Agreement together with an agreed book of documents. There were no witnesses called prior to the Parties' respective counsel presenting their arguments. They have agreed on the **Nature of the Dispute** and **Relief Sought** as set out below:

> **The dispute between the parties is with respect to the application of Article 22 to short term contracts as well as arising from work required for an unspecified duration due to the current COVID pandemic. In assessing the proposed shift work schedules presented to the Union by the Employer, the Union has responded as follows:**
>
> > ***Effectively this is an overtime averaging permit. The union is seeking the ER's assurance that, if ended partway through (for example a rotation or cycle) that the ER would review for any OT due an employee because the schedule is terminated or changed by the ER.***
>
> **The Employer's position is that no Overtime Averaging approach is required under the Collective Agreement and that Overtime is clearly defined as "means work performed by an employee in excess of or outside of his/her regularly scheduled hours" and the requirements for creating, posting, and changing a shift schedule are clearly set out in the Collective Agreement. As well, the Employer is applying the Collective Agreement benefits and that there is no explicit language to such an obligation contained in the agreement.**
>
> **The Union's position is that Overtime Averaging is built into the Collective Agreement through the application of Article 22 - Hours of work inclusive of, but not limited to, day work, shift work, standard yearly hours, work week and daily hours and all the associated benefits associated with such. For example, Overtime, vacation leave accrual, etc. Further, the Union's position is that all employees are entitled to the rights and benefits under the terms and conditions of employment as set out in the Collective Agreement.**

Relief Sought

The parties request an arbitral decision in the nature of a declaration as to the interpretation of Article 22 with respect to the matters in dispute. The parties intend for the decision to be binding as per Article 37.21(2) of the Collective Agreement and the parties will apply the decision rendered to all relevant and applicable articles of the Collective Agreement.

The factual background of this matter includes the Minister of Health and Social Services for the Northwest Territories having declared a Public Health Emergency on March 21, 2020. On that day the Chief Public Health Officer ("CPHO") issued the Public Health Order – COVID-19 Travel Restrictions and Self- Isolation Protocol ("the Order ") as thereafter amended which continues to be extended at this point. The order significantly limits travel into the Northwest Territories across any inter-jurisdictional border. Those persons coming within the various exceptions for entry face a 14 day self-isolation requirement, also self-monitoring and social distancing protocols as established by the CPHO. It is apparent that in response to the directives contained in the Order, the Employer set out to reorganize its workforce to sufficiently address what it recognized as a requirement for additional government services outside what might be considered the standard work hours of one's position. This need resulted in its proposing irregular work schedules for some employee groups outside the standard, repeatable, 37.5 or 40 hours per work week as the case might be under the traditional scheduling described in article 22.01 as the "standard hours of work for employees whose standard work week is...." these hours, and the "standard daily hours" of either 7.5 or 8 hours. The newly regularized distribution still came within their established hours of work over each two-week cycle; meaning for the Incident Management Team used as an example, employee scheduling would be premised on a two-week cycle totalling 75 hours – their established two-week commitment, capped at 53 hours and 20 minutes for the five 10 hour and 40 minute shifts, week one, followed by 21 hours and 40 minutes, week two, no overtime paid where the scheduled hours were

not exceeded. The Employer takes the position that employees working these described newly scheduled hours within the 75 hour limit are not considered to be earning any overtime pay, but rather are paid straight time pursuant to Article 22.02 of the Collective Agreement unless they work in excess of their scheduled hours.

In April 2020 the Union inquired of the Employer as to the overtime impact were the rotation to be ended and the two-week cycle discontinued or changed by the Employer before starting the second week, which is to say "disrupted". The Union's position was that the Employer at that point should apply an overtime averaging formula to compensate the employee where the shift cycle had been ended mid rotation, meaning that in the above example were there to be no second week following the 53 hours and 20 minutes scheduling for week one. The Employer has responded that overtime averaging is not reflective of any long-standing practice when ending/changing a shift schedule and more specifically, there is no explicit contract language covering any such obligation in the Collective Agreement. The employees are paid straight time for the hours they work according to the shift schedule.

Scheduling work outside the "standard daily hours" under Article 22.01 is set out as follows at Article 22.02 under the heading Shift Work, with my attention directed to paragraph (e):

> **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.**
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> **(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.**
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> **(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.**

It can be seen that Article 22 references certain non-applicable provisions of Article 16 dealing with rights accruing with respect to statutory holidays, not an issue in this matter.

It is also to be noted that the Collective Agreement defines overtime under Article 2.01(w) as:

> **"Overtime" means work performed by an employee in excess of or outside of his/her regularly scheduled hours of work.**

The contract language under Article 23 deals with overtime entitlements, whether to be paid at time and one half or at double time for the authorized/required overtime, and the administration thereof. Article 23.01(a) provides the same definition:

> **"Overtime" means work performed by an employee in excess or outside of his/her regularly scheduled hours of work.**

There is no express reference in Article 23 to any overtime averaging requirement, although it is noted that Article 23.06 provides:

> **Notwithstanding anything in this Article, an employee's scheduled hours of work shall not be construed as guaranteeing the employee minimum hours of work.**

In dealing with this matter, there is no dispute that this revised scheduling for the affected employees constitutes a two week cycle, meant to be repeatable on that basis, and I accept that the Employer has reasonably summarized the issue in its brief as:

In the event a work cycle is discontinued or changed mid-rotation and an employee has completed the first part of a rotation, working more than 37.5 or 40 hours per week, is the Employer required to pay overtime rates for the hours worked in excess of 37.5 or 40 hours per week.

In that the reference to arbitration is wide enough to include casuals, it is to be noted that they are not covered by certain provisions of the collective agreement as listed in Appendix A under the heading CASUAL EMPLOYEES which exclusions do not include Articles 2, 22 and 23. Appendix A5 contains certain requirements which are pertinent considerations in this matter, namely:

A5.01 The Employer shall hire casual employees for a period of not less than five(5) days and not to exceed six (6) months of continuous employment in any particular department, board or agency. Casual employees shall have scheduled hours.

...

A5.02 ... Any hours in excess of or outside of the employee's regularly scheduled hours of work in the same job shall be paid as overtime. ...

....

A5.07 Unless otherwise agreed by the Employer and the Union, the standard hours of work for casual employees on a daily and weekly basis is based on the standard work week of similar full-time positions.

It is also necessary to consider *Public Service Regulations* under the *Public Service Act,* and in particular ss.7, 8, and 10 which are set out below:

7. (1) The standard hours of work in respect of clerical staff employees shall be 7.5 hours a day, 37.5 hours a week.

(2) The standard hours of work in respect of employees other than clerical staff shall be 8 hours a day, 40 hours a week.

8. Where, in the opinion of the Minister, the nature of the work necessitates an irregular distribution of the hours of work of the employee, the Minister may average the standard hours of work over a period of up to one year.

...

10. (1) A Deputy Minister may require an employee to work in excess of the daily or weekly standard hours or on a holiday where, in his or her opinion, the workload so requires.

> **(2) Where an employee, other than a manager or a professional, is required to work 0.5 hours or more in excess of the daily or weekly standard hours, he or she shall be paid for the overtime at 1.5 times his or her regular rate of pay.**
>
> ...

Argument:

The Parties' respective counsel provided both written and oral arguments.

Union presentation covering appointed position employees:

Union counsel, Mr. Penner, referenced the legislative backdrop as having significance, and in particular the *Public Service Regulations* which apply to the Public Service under the under the *Public Service Act.* He cited the *PSA Regulations* at s.7 dealing with hours of work which states that the standard hours of work for clerical staff shall be 7.5 hours a day, 37.5 hours per week, and with respect to non-clerical staff shall be 8 hours a day, 40 hours a week, but also referencing the possibility for "irregular distribution of the hours of work" under s. 8. This distribution is subject to averaging the standard hours of work over a period of up to one year. The *PSA Regulations* at s.10 recognize the Employer's requiring overtime, but at a premium to be paid in referencing daily or weekly standard hours.

Accordingly, one must acknowledge, the statute language does not discount the possibility for irregular, imbalanced, scheduling based on operational demands, which is to say a scheduling longer than 7.5 or 8 hours per day as contemplated under the Collective Agreement, thereby giving rise to a consideration of the concept of "averaging".

Mr. Penner submitted that this "averaging" provision allows management, as he put it in his written brief:

> .... to adopt an asymmetric schedule so long as the annual hours for the employee reconcile to 1,950 or 2,080 – annual equivalent of a 7.5 and 8 hour standard day respectively. To be precise, what is being 'averaged' is the **standard hours of work** [emphasis his] as defined by Section 7 . The 'reconciliation' to which I refer is the process by which the employee's working hours are compared to his/her standard work hours over the corresponding period. As set out in Section 8, this must occur at least annually. If the employee's total hours work exceed the standard work hours, those excess hours must be paid as overtime.

Accordingly, the Union contends that these affected employees have found themselves working in an "averaging" arrangement as required for those working an irregular distribution of hours, yet by the Employer's approach no actual averaging is about to take place when the last portion of a cycle is lopped off and what has been worked is only the 53 hours and 20 minutes work of the first week of the cycle, paid at regular time wages, before instituting some other schedule. Presumably it would occur every time the last week of an irregular cycle does not take place for whatever reason. Not completing the full cycle should always be seen to ultimately affect the averaging requirement. As counsel succinctly put it in his oral presentation: just so long as the cycle completes itself on the basis of the irregular distribution it will reconcile with the standard hours, but if the cycle has not been completed as scheduled, the worked hours must be compared with the standard hours "and if in excess, attracts overtime".

Mr. Penner submitted that the phrase "regularly scheduled hours", not being specifically defined in the Collective agreement, "is likely at the root of the dispute" and from the Union's analysis should be seen to correspond with the term "standard daily hours" from Article 22.01 contending that shift work under Article 22.02 references an employee's work being scheduled to fall outside the standard hours of work as defined in Article 22.01. He also submitted that the phrase "regular scheduled hours of work" as referenced in Article 23.01(a) is used to describe the daily work hours of both "regularly scheduled" and "shift scheduled". All in all, by the Union's assessment, it can result in an employee pursuant to Article 22.02 facing the potential prospect of

regularly working in excess of their 7.5 or 8 standard hours per day representing the first half of the scheduling cycle but, by the Employer's approach, not meriting overtime for those hours in excess of their standard hours, standing alone where with the second week disappears, unless exceeding 1,950 or 2,080 hours at the end of the year, even though the cycle itself has not been completed. This would be contrary, counsel submitted, to the accepted labour relations proposition reflected in *Domglas Ltd. and United Glass and Ceramic Workers, Local 203*, 1984 CarswellOnt 2498 (Kennedy) that overtime provisions fall into two general categories, the first being where one works in excess of the specified number of daily or weekly hours, and the other where one works outside the periods of time for which he or she is scheduled.

It can be noted, Mr. Penner submitted, that the *PSA* Regulations at s.10 should be considered as referencing the first category which requires a "totting up" as remarked upon by arbitrator Goodfellow in *Cadillac Fairview Corp. v. C.E.P., Local 2003*, 2011 CarswellOnt 1664, which is to say first identifying the total number of hours that constitute the regularly scheduled work week followed by a "totting up " of the hours actually worked in that week, and comparing the two . It would be a situation where if the second week were somehow excised from the scheduling, overtime would be payable. Counsel submitted that by virtue of the *PSA Regulations,* ss. 8 and 10, the a"totting up" would be statutorily entrenched for public servants working in an "averaging" arrangement. It should first be a matter of identifying the total number of hours that constitute the work week even though this revised shift work encompassing two weeks can be viewed as "scheduled" work pursuant to the terms of Article 22.03 dealing with the requirement to post the schedule no less than 14 calendar days in advance to run for at least 28 days. Nevertheless, from the Union's perspective, the posted shifts do not become "regularly scheduled hours" even though they occur as a repeatable schedule. He described Article 22.03(e) as affecting those working under the

current revised scheduling, but it states that they would not merit overtime for their hours in excess of the 7.5 or 8 hours standard per day, unless the total hours worked at the end of the year exceeds 1,950 or 2,080, which presumably depends on their biweekly scheduling remaining at 75 or 80 hours, meaning the irregular schedule continuing unabated in order not to disrupt the averaging requirement. One observes that there is no express language dealing with the lower-hour end weeks being lopped off the schedule for whatever reason .

Accordingly, the issue remains, Mr. Penner submitted, what happens when the schedule is changed back to the traditional standard hours, or incorporating another differently imbalanced schedule, after week one of the cycle, which is to say there being no availability to reconcile the schedule on the basis of the compressed week, whenever that calculation is made, but possibly only the 53 hours and 20 minutes from the first week is left as the glaring nub end of an otherwise repeatable two-week cycle. It is what could presumably happen at any point in the cycle repetitions, ending before the second week commences, and being changed to something else. Mr. Penner submitted that by operation of Articles 2.01, 22 and 23 and the *PSA Regulations*, the additional 15 hours and 50 minutes from the first week over the standard 37.5 hours being the "regularly scheduled hours of work" contemplated by he contract language for the example group would require the overtime premium even though not falling outside their scheduled hours. Further any provision which can be said to contravene the *PSA Regulations* should be considered null and void.

As he stated it:

> It is the Union's position that in the absence of express language, the correct and only treatment of excess hours worked beyond the standard hours is the payment of overtime pursuant to Article 23, unless these hours reconcile with the shift cycle.

In summary, the Union contends, realistically there can be no reconciliation where the schedule is simply ended prematurely before the cycle is completed. It is what could presumably

happen in any repetitions ending before it is completed thereby stranding the additional hours already worked over the contractual standard week and arguably subjecting them to an overtime payment.

Union presentation on casual employees:

In his dealing with the situation of the same described cycle scheduling for affected casuals Mr. Penner referenced the rights and obligations of casual employees set out in Appendix A, and in particular that they must have scheduled hours under A5.01; that any hours in excess or outside the employees regularly scheduled hours of work in the same job must be paid as overtime under A5.02; and that the standard hours of work under A5.07 is based on the standard work week of similar regular positioned employees. The Union contends that they should be seen to be in the same situation as non-casuals when not completing their assigned shift cycle. It includes the possibility that their imbalanced cycle could be left uncompleted at the point of their fulfilling their casual contract and leaving employment, which would put them in the same situation under the described two week cycle for the regular employees on the Incident Management Team of having worked in excess of the 37.5 or 40 hours' standard over the first week without any ability for reconciliation during the second week or later. Accordingly, the excess first-week hours should be treated as overtime even though they were the permissible assigned scheduled hours.

The Union's argument essentially centres, for both regular and casual employees, on dealing with the irreconcilable second week hours, using the example Incident Management Team, hours which are not being worked and have been lopped off the imbalanced schedule, as opposed to giving rise to any possibility for averaging in line with the standard hours for such employees, whether 37.5 or 40 hours per week.

Employer presentation covering appointed position employees:

Employer counsel, Ms. Paradis, described the *PSA Regulations* as fully recognizing that despite the existence of standard work weeks of 37.5 or 40 hours per week, s.8 allows for the "irregular distribution" of hours. She submitted that quite certainly the Employer was not prevented from instituting an imbalanced schedule for workers on the Incident Management Team where the nature of the work required their working outside the standard hours of work. Assigning shifts within a two weeks' scheduling format totalling 75 or 80 hours depending on the job, she said, satisfies an averaging cycle, requiring straight time pay pursuant to Article 22.02, unless one were to work in excess of the scheduled hours. She submitted that Article 22.02(e) is built on s.8 of the *PSA Regulations* in contemplating any irregular scheduling having to come within the standard yearly shift hours, in committing the Employer to an averaging cycle up to one year (either at 1,950 or 2,080 hours depending on the job). There is a long-established application; for example, nurses have been regularly scheduled for some considerable time to work 12 hours over 4 consecutive shifts. In the described situation at hand, employees are working 53 hours and 20 minutes the first week and 21 hours and 40 minutes the second week, being likewise their regularly scheduled hours as per Article 22.02 of the Collective Agreement and s. 8 of the *PSA Regulations.* As counsel put it:

> **In the event the cycle is discontinued before the employee completes week two, there is no language in the Collective Agreement or the legislation that:**
>
> **i directs the Employer to treat the hours worked in week one as anything other than regularly scheduled hours.**
>
> **ii reclassifies the hours in week one pursuant to an overtime averaging formula.**

The reason for this, counsel submitted, was that overtime is defined in the Collective Agreement, citing Article 2.01(w) and Article 23.01(a) as both referencing an employee performing "in excess of or outside of his/her regularly scheduled hours", but the regularly scheduled hours for these employees are what make up the averaging cycle over two weeks, or sometimes longer. It cannot be a matter of characterizing scheduled and posted shifts as something other than the regularly scheduled hours for the affected employees, although admittedly they are irregular when compared to the. 37.5 hours standard. The cycle itself has been established well in advance. The Union's position, Ms. Paradis submitted, ignores the operation of s.8 of the *PSA Regulations* and suggests that an employee's standard hours remains eight hours per day in a working environment where rotational shift workers regularly have their scheduled hours at 10 or 12 hours per workday. The *PSA Regulations* allow and the Collective Agreement does not prevent management from scheduling irregular hours of work outside the hourly or weekly standard, which is to say permitting imbalanced scheduling, and the Union's interpretation was said by counsel to read in language which does not exist.

The Employer takes the position that the contemplated averaging applies to these irregular scheduled hours. But it is not an overtime averaging provision as dealt with under Appendix A1.08 for Relief Employees generally working "as and when needed" whereby specific language covers their hours falling outside the standard hours of work as defined in clause 22.01. Notably, for those hours in excess of 150 or 160 over a 28 day period, it expressly requires overtime to be paid on that basis – thereby providing a plain enough description of the contractual obligation. Counsel submitted that the differentiation is significant and comes down to interpreting the plain meaning of the language by applying the usual rules of contract interpretation as summarized in *GNWT and PSAC (UNW) (Special Leave Grievance)*, unreported January 7, 2019, Holden. It includes

recognizing the object of interpretation is to discover the mutual intention of the parties through the words used to express themselves in the collective agreement being the primary resource for interpretive purposes; also to construe provisions harmoniously with each other; and where different words are used one presumes that the parties intended different meanings; while also recognizing the plain and ordinary meaning of the words used to express mutual intention.

In the *Special Leave Grievance* case, one observes, it was a matter of arbitrator Holden considering the special leave entitlement as it applied to healthcare employees regularly scheduled to work 12 hour shifts. It was a situation where the employee, on her seeking three days paid special leave, was informed that the entitlement would be applied by reference to the "standard working day" for the position being 7.5 hours per day, with a five day cap. However, the pertinent contract language provided that special leave must be taken in hours "on the basis of the employee's regularly scheduled hours of work for the day the leave is taken". Inasmuch as the employee's regularly scheduled hours, by reference to the ordinary meaning of words, required her working 12 hour shifts at that point, the Union contended that she had been disadvantaged by reason of her scheduling, were the 7.5 hour standard to be applied, and she should have been paid 12 hours for each leave day in accordance with her schedule. To decide otherwise, it said, ignored the fact that she had been working 12 hour shifts over a considerable period of time, including the three days on which she would have been scheduled to work had she not taken leave time. Arbitrator Holden considered the meaning of "regularly scheduled hours" versus "standard hours" with her analysis touching on a number of provisions including Article 22.01, 22.02 and 22.08, the focus of her examination being the situation involving one working a compressed work week premised on an averaging cycle. She referenced the language contained in Appendix A10.B3 addressing the "regular hours of work" for those employees working a compressed work week, i.e. full-time nursing employees "shall be"

working 12 consecutive per day for a maximum of four consecutive shifts, totalling 1,950 hours per year. It was what she took to be the regularly scheduled hours of the nursing employees by definition and not the standard hours of work according to Article 22, although one might observe there is no identical express governing language relative to the imbalanced scheduling over the two week cycle (53 hours 20 minutes + 21 hours 40 minutes) as described here for the affected employees. On her analysis of the language the arbitrator declared that paid special leave was based on the regularly scheduled hours which would have been scheduled for the days in question, which for the healthcare worker meant 12 hours per day for the three days translated into 36 hours of paid leave time.

The Employer contends that the *PSA Regulations* taken together with the Collective Agreement do not create any overtime averaging directive in this situation. Counsel submitted:

> Continuing with the example of the Incident Management Team [53hr,20min week one, 21hr,40min week two for the 37.5 hour per week employees]; were the cycle to end after week one, the Employer would pay regular straight time to the employee because the employee has not worked in excess of or outside the regularly scheduled hours.
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> The Employer urges me to reach the following conclusion:
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> Regularly scheduled hours are the actual hours an employee is scheduled to work. In the present matter, the analysis presented by the Union identifies the absence of the definition for regularly scheduled hours within the Collective Agreement to be at the root of the dispute between the parties. The argument put forward relies on the standard hours being interpreted is 7.5 or eight hours per day or 37.5 or 40 hours per week. This argument must fail; the decision of Arbitrator Holden on the meaning of regularly scheduled hours is binding upon these parties, the definition of "regularly scheduled hours" cannot be relitigated.
>
> Using the binding definition of 'regularly' scheduled hours as it relates to the definition of overtime; employees who have been working their scheduled rotation are considered working their regularly scheduled hours even if the rotation is disrupted mid-cycle, the requirement to pay overtime has not been triggered.

Employer presentation covering casuals:

Casual employees are engaged by an Employer to perform short-term contracts as needs dictate, with their entitlements and benefits being limited as per Appendix A5. Ms. Paradis referenced the scheduling issue affecting casual employees as reflecting their being contracted to fill a position which is scheduled on an averaging cycle, and the cycle is not completed. It gives rise to consideration of whether the Employer would then be required to pay overtime rates for the hours in excess of 37.5 or 40 hours per week using an averaging formula. The Employer holds to the view that they can always be employed to work imbalanced cycles as their regularly scheduled hours and thereby do not earn overtime within the regular hours of those cycles, but rather are paid straight time percent to Article 20.02. As counsel stated it, the Employer's position is: "casual employees are placed into the line of the position they are filling in for and they work that particular schedule – any hours outside of that schedule are paid as overtime." It may well be considered a plain reference to the Employer relying on AppendixA5.02 which requires overtime to be paid for "any hours in excess of or outside of the employee's regularly scheduled hours work in the same job". They are performing the work otherwise done by employees subject to the standard hours of work per s. 7 of the *PSA Regulations* or an averaging cycle per s. 8 when working in an irregular scheduling.. As counsel put it: "casual employees are not entitled to their own averaging cycle; they are expressly hired to fill a need in an existing cycle that has been already been averaged".

In support, counsel cited arbitrator Knopf's award in *The Government of Nunavut and The Nunavut Employees Union (Overtime for Relief Workers)*, unreported June 16, 2017, dealing with "as and when needed" relief employees used to backfill positions when regular employees were off work on leave or for other reasons, no minimum level of availability. The dispute centered on their entitlement to overtime that accumulates when the relief employee exceeded the standard hours of

work for the position they were filling over a defined period of time, the schedule for the positions they were filling being 12 hour shifts, four days on four days off. The employer was paying overtime to the leave-filling "as and when" employees when they are asked to work in excess of the regular hours of the shift they were being assigned to work. She considered that these relief workers "regular" or "scheduled" hours were those hours that they were scheduled and accordingly earned overtime pay where working in excess of that scheduled shift. However it did not mean they were entitled to receive overtime pay if they worked beyond the standard weekly hours of positions they were filling. The language would have to be much more clear, she reasoned, for that obligation to arise. It would be the same situation here Ms. Paradis submitted, where the regularly scheduled hours of the employee normally working in the position are adopted by the casual, including those hours based on the averaging cycle. Counsel cited arbitrator Knopf's reference to the overtime reconciliation or averaging requirement for relief employees, which employee group is described in our Collective Agreement at Appendix A for the same employees. They are utilized for last-minute shift coverage, filling in for absent regular employees or providing services on an "as and when required basis", there being a specific overtime provision covering them at A1.08. However it is a different defined group than casual employees some of whom are no doubt working on relatively lengthy contractual periods, and not always being used to fill in for absent indeterminate or term employees but rather being used as additions to cover available work, and without any express overtime averaging language available to them.

The Employer relies on the definition of overtime at Article 2.01(w) and Article 23.01 as made applicable for casual employees at Appendix A5.02 which states, as with regular employees, that "any hours worked in excess of or outside the employee's regularly scheduled hours of work in the same job shall be paid as overtime" and accordingly their first week of scheduled 53 hours, 20

minutes cannot generate overtime were it worked on that basis, even if the next week is cancelled. There is nothing in the collective agreement that prevents casual employees working irregular hours or imbalanced schedules, nor, as with regular employees are they subject to any overtime averaging where the shift cycle is not completed regardless of where they start or end working in the rotation. They are still part of the regularly scheduled hours and cannot attract rates when working those scheduled hours.

Conclusion

I start by observing that inasmuch as there was no mention of any layoff occurring respecting those regular employees working the imbalanced scheduling, and since Article 23.06 provides that nothing in this article dealing with overtime parameters guarantees the employee's minimum hours of work, by inference, presumably the Employer would be moving on to assigning other hours, or possibly no hours, associated with the previously established scheduling for the cycle in what would otherwise have been the second week and subsequent two weeks' cycles. It could be a matter of returning to scheduling the standard 37.5 hours per week presumably, or some other irregular schedule. At the same time, I must accept that an employee's regularly scheduled hours under this Collective Agreement covers their working an imbalanced, but regularized cycle for scheduled hours, comprising week one week two. Arbitrator Holden's analysis in the *Special Leave Grievance* case concerning her interpreting the meaning of regularly scheduled hours is compelling on this issue, whether or not it can be said to be binding, dealing as it does with a different factual scenario concerning the issue of compensating special leave in accordance with one's regularly scheduled hours. For my purposes, the overtime time reference in Article 23.01(a) covers deviating from one's regular scheduling as described therein, meaning here working in excess or outside of the hours

associated with the established two week cycle; otherwise the Employer could not utilize such imbalanced scheduling without paying overtime during the first week for the extra 15 hours and 20 minutes over a standard 37.5 work week.

As with any permissible regularly scheduled hours, whether disrupted or changed leaving the first week of 53 hours and 20 minutes marooned, as it were, overtime is payable only if the work is performed in excess or outside those scheduled hours, being the definition for overtime payment contained in Article 2.01(w) and Article 23.01(a). Nor is there any rule preventing the Employer from "disrupting" the second week of the cycle, presumably on notice, and for valid business reasons, thereby changing or doing away with the asymmetrical scheduling at that point or changing to something else which is imbalanced in a different way. I do not find that there is any conflict with *PSA Regulations* which contemplate an eventual possibility of requiring an irregular distribution of the hours of work, which may be averaged against the standard hours work for clerical staff and other employees over a period of up to one year, the standard hours being either 7.5 hours a day, 37.5 hours a week or eight hours a day, 40 hours. Having to revert to standard hours is not a requirement. One observes that there is no express overtime averaging mechanism which does exist for the Relief Employee group as analysed by Arbitrator Knopf in her *Nunavut* award where the same entitlement may well exist for the same group of "as and when" employees.

Essentially, it would seem that the Union is presenting an argument based on its perception of fairness, meaning the Employer's rearranging ("disrupting") the second week of the schedule leaves the employees having worked more than standard hours during the first week without any recognition of an overtime obligation for those presumed extra hours, by reference to that supposedly reverted standard by referencing how the scheduling has been applied within the disrupted two week cycle. But, in all, I accept the Employer's principal position that any overtime pay requirement must

come within the definition of Article 2.01(w) and Article 23.01(a) that the work in question must be "performed by an employee in excess of or outside of his/her regularly scheduled hours of work" which work hours can include an imbalanced scheduling just as it can include a compressed work week. The first week of the cycle remained regularly scheduled and was worked on that basis. I would venture to say that if the hours of the "disrupted" second week of the regularly scheduled hours pertaining to the established cycle were altered so that employees, whether regular or casual, were called upon to work in excess or outside their regularly scheduled hours there could be an argument for overtime to be paid on that basis, relative to the second week; but that would be and obiter statement on my part, there being no evidence on that potential aspect.

That said, I see no reason to distinguish between regular employees and casual employees in considering the issue of an employee's regularly scheduled hours pursuant to established cycle being disrupted. Appendix A 5.02 provides the same kind of protection in that it requires any hours worked in excess or outside of the employer's regularly scheduled hours be paid at overtime rate. Otherwise their daily and weekly hours are based on the standard work week of similar full-time positions. In this situation their regularly scheduled hours were the same as their positioned coworkers and required a 53 hour and 20 minute commitment covering the first week of their regularly scheduled hours under the two week cycle. In my view whether the scheduled hours can be reconciled with standard hours within one year is a separate issue and does not impact on whether the first week of the cycle requires overtime where the second week is disputed. There is no evidence that the disruption of the second week of the cycle has resulted in employees working in excess or outside of the hours associated with their regular scheduling covering week one which had been properly established for purposes of solidifying the two week cycle on an imbalanced scheduling basis.

My declaration to issue is that there is no requirement for overtime averaging pertaining to the cycle scheduling approach in question and that the Employer has not been shown to have proceeded outside the requirements of Article 22 where the second week of the cycle is disrupted.

DATED at Calgary, Alberta, this 17th day of September, 2020.

Tom Jolliffe, Q.C.