IN THE MATTER OF AN ARBITRATION

BETWEEN:

GOVERNMENT OF THE NORTHWEST TERRITORIES

("Employer")

AND:

THE UNION OF NORTHERN WORKERS,
A COMPONENT OF THE PUBLIC SERVICE ALLIANCE OF CANADA

("Union")

(Grievance #21-E-02778 – Caitlin Chappell)

| | |
|---|---|
| ARBITRATOR: | Amanda Rogers |
| COUNSEL: | Mark Ishack and<br>Kirsty Hobbs<br>for the Employer |
| | Michael Penner<br>for the Union |
| HEARING VIA VIDEO CONFERENCE: | April 25, 26 and 27, 2023 |
| AWARD: | June 21, 2023 |

1190

1. This matter pertains to a grievance filed by the Union on behalf of the Grievor, Caitlin Chappell. In it, the Union alleges she was denied overtime pay for hours worked in excess of 150 hours in a 28-day period – specifically, the 28-day period between April 10 and May 7, 2021.

2. The Grievor is a Relief employee at Stanton Hospital ("Stanton") in Yellowknife. Her evidence was that she used to be a full-time, Indeterminate employee, but that she moved into a Relief position for more flexibility around her hours.

3. The hours of work provisions applicable to Relief employees, and that are at issue in this proceeding, are found in Appendix A1 of the Collective Agreement. Specifically at issue in this case, is A1.08, which reads as follows:

APPENDIX A1
RELIEF EMPLOYEES

…

A1.08

(a) Relief employees whose work is scheduled by the Employer as provided for in clause 22.01 shall be compensated at the applicable overtime rate for work performed in their relief position in excess of the standard or regular hours of work for full-time employees in similar positions, either on a daily or weekly basis.

(b)

i. Relief employees whose work is scheduled by the Employer to fall outside of the standard hours of work as defined in clause 22.01 shall be compensated at the applicable overtime rate for work performed in their relief position in excess of the regularly scheduled hours of work as set out on the shift schedule for full time employees in similar positions on a daily basis.

**ii. Relief employees whose work is scheduled by the Employer to fall outside of the standard hours of work as defined in clause 22.01 shall be compensated at the applicable overtime rate for work performed in**

> **their relief position in excess of 150 or 160 hours over a 28 day period depending on their position.**
>
> A1.09 Unless otherwise agreed upon by the Employer and the Union, the standard hours of work for relief employees on a daily, weekly and annual basis is based on the standard work week of similar fulltime positions.
>
> [emphasis added]

4. The present dispute arises from the Parties' differing views of what "a 28 day period" means as the term is used in Appendix A1.08 for the purposes of determining Relief employee eligibility for overtime. According to the Union, this language means that if an employee works more than the specified number of hours in *any* 28-day period, they are to be paid overtime for those excess hours. In other words, the time period for calculating when overtime is payable to Relief employees is "rolling" – in that it does not have a defined start or stop date.

5. The Employer's practice, however, which led to the filing of this grievance, is to link the 28-day period referred to in Appendix A1.08 to the 26 bi-weekly pay periods throughout the year. Put differently, according to the Employer's interpretation, an employee can work more than the specified maximum number of straight-time hours in a 28-day period without incurring overtime rates so long as these additional hours are not worked within the two pre-determined pay periods it has linked for the purposes of defining a 28-day period. For 2021, the 28 day periods used by the Employer to determine Relief employees' overtime eligibility were as follows:

> **28 Day Pay Period Schedule (2021/2022)**
>
> **Period 21 & 22**
> January 02, 2021 – January 29, 2021
>
> **Period 23 & 24**
> January 30, 2021 – February 26 ,2021
>
> **Period 25 & 26**
> February 27, 2021 – March 26, 2021

**Period 1 & 2 (New fiscal year begins April 01)**
March 27, 2021 – April 23, 2021

**Period 3 & 4**
April 24, 2021 – May 21, 2021

**Period 5 & 6**
May 22, 2021 – June 18, 2021

**Period 7 & 8**
June 19, 2021 – July 16, 2021

**Period 9 & 10**
July 17, 2021 – August 13, 2021

**Period 11 & 12**
August 14, 2021 – September 10, 2021

**Period 13 & 14**
September 11, 2021 – October 08, 2021

**Period 15 & 16**
October 09, 2021 – November 05, 2021

**Period 17 & 18**
November 06, 2021 – December 03, 2021

**Period 19 & 20**
December 04, 2021 – January 31, 2022

6. The evidence at the hearing was that the above set out 28 day periods were communicated to the Union in a document provided during the back-and-forth exchanges with the Employer on this issue in respect of the Grievor. The Union's Director of Membership Services, Anne-Marie Thistle, testified that the Union was unaware of the Employer's practice for calculating overtime for Relief employees and that it had not previously been provided with information about the 28 day periods being used for the calculation of Relief overtime to her

knowledge until the issue was raised by the Grievor. She was unaware of any other grievances being filed alleging a breach of A1.08.

7. For reference, Article 22.01, which is referred to in Appendix A1, sets out the hours of work provisions for Regular employees and reads, in part, as follows:

> 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.
>
> (iii) The standard daily hours are exclusive of a minimum half hour lunch period scheduled as close as possible to midday.
>
> (iv) There shall be a paid 15-minute break in the morning and a paid 15-minute break in the afternoon.
>
> (b) Unless otherwise agreed upon by the Employer and the Union, the standard hours of work for employees whose standard work week is 40 hours are:
>
> (i) The standard daily hours will be eight consecutive hours, between 08:00 and 17:00, each day from Monday to Friday.
>
> (ii) The standard yearly hours will be 2080.
>
> (iii) The standard daily hours are exclusive of a minimum half hour lunch period scheduled as close as possible to midday.
>
> (iv) There shall be a paid 15-minute break in the morning and a paid 15-minute break in the afternoon.

8. Article 22 goes on to address terms for employees regularly scheduled outside of normal working hours, including the following:

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 least14 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.

22.03 The Employer will post a master work schedule for employees in an operation who work shift hours.

(a) The Employer shall:

(i) avoid excessive fluctuations in hours of work; and

(ii) post a schedule no less than 14 calendar days in advance to run for at least 28 calendar days;

(b) The Employer shall make every reasonable effort to:

(i) give employees every second Saturday and Sunday off, ensuring a minimum of 48 consecutive hours off duty;

(ii) schedule at least two consecutive days off; and

(iii) not schedule more than one shift in any 24 hour period.

(c) When an employee works two shifts in any calendar day:

(i) one of the shifts shall be deemed overtime; and

(ii) except in an emergency an employee may not work more than two consecutive shifts.

(d) An employee shall be granted alternate weekends off as often as reasonably possible with each employee receiving a minimum of every third weekend off. Overtime rates of pay shall apply to weekend hours worked by an employee on the third consecutive weekend and subsequent consecutive weekends worked thereafter. It is understood that if an employee is required to be on travel status on a weekend, it shall be deemed as a weekend worked for the purpose of this clause. This Clause does not apply to employees who are hired exclusively to work weekends or who request to exchange shifts with other employees to work weekends.

(e) The Employer agrees that there shall be no split shifts.

…

9. Under A1.05, Article 22.02 (a), (d), (e), and (f) do not apply to Relief employees.

**The Previous Collective Agreement and 2015 Consent Award**

10. The Parties have long been divided over the issue of calculating overtime hours for Relief employees. The evidence was that Relief employees were added as a new employee

category to the Collective Agreement in 2005. The provision at issue in this dispute, A1.08, was negotiated by the Parties in 2009, after a grievance was filed in 2007 under the language in the Agreement at that time. In the 2007 grievance, the Union alleged that the Employer had violated the Collective Agreement by not compensating Relief Workers with overtime pay for hours worked in excess of either 37.5 regular hours (75 hours per pay period) for an employee working 1950 hours per year and 40 regular hours (80 hours per pay period) for employees working 2080 hours per year. The Union identified eight individuals who it claimed were adversely impacted by the Employer's breach.

11. The language in dispute in the 2007 case – which has since been replaced with the language now found in A1.08 – was set out in Article 23.08 at that time:

> 23.08 Relief employees shall be compensated at the applicable overtime rate for work performed in their relief position in excess of the standard or regular hours of work for full-time employees in similar positions, either on a daily or weekly basis.

12. Although new language was negotiated in 2009 that replaced the above, the conflict under the former language was not brought to an end until a 2015 Consent Award of Allen Ponak settled the Parties' dispute about the former Article 23.08 calculation for Relief employee overtime. A reading of the Consent Award suggests that the dispute lay in the difference between the Article 2.01(kk) of the Collective Agreement definition of week as commencing at 12:01 a.m. on Monday and terminating at midnight on Sunday, and the Employer's payroll system that used Saturday to Friday for payroll purposes. This can be gleaned from the Preamble of the Consent Award, stipulates that "for the purposes of this Memorandum of Settlement, the parties have agreed to use the Bi-weekly Relief Pay Report which shows hours worked in excess of 75 or 80 regular hours during each bi-weekly pay cycle as the methodology for auditing overtime for Relief Employees" and that "for the purposes of this Memorandum of Settlement, the parties have agreed to define a week based on the pay-

cycle definition of 'week' which runs from Saturday to the following Friday rather than the definition of week set out in Article 2.01(kk) of the Collective Agreement."

13. Ms. Thistle in her evidence described this solution as a "compromise" necessitated by the difficulty of retroactively examining hours worked in strict adherence to the formula set out in the Collective Agreement. In her opinion, the Parties' agreement to link the calculation of overtime with pay cycles was relevant only to settlement of the grievance under the Relief overtime language, and that the Parties' negotiation of the current language set out in A1.08 in 2009 into the Collective Agreement expiring in 2012 replaced the formula set out in the Consent Award with a new approach, thus rendering any earlier agreement inoperative.

14. Ms. Thistle testified that she reviewed bargaining notes from the 2012 round of collective bargaining and provided evidence on this basis, although she was not directly involved in these negotiations. According to her evidence, the language ultimately agreed upon by the Parties that became A.108 was contained in a counter proposal put forward by the Employer in response to the following proposal advanced by the Union, which Ms. Thistle described as an attempt by the Union to clarify the 2005 language at issue in the dispute before Arbitrator Ponak:

> A1.08 Relief employees shall be compensated at the applicable overtime rate for work performed in excess of 37.5 or 40 hours per week depending on their position. Hours of work shall be calculated per employee not position.
>
> A1.09 When the Employer determines a position is filled by a term (over 21 days) rather than using Relief Employees to fill in, these "terms" shall be allocated to relief workers on an equitable basis within the same facility.

15. According to Ms. Thistle's evidence, the Employer explained when tabling its own proposal for Relief employee overtime compensation that it was unable to cost the Union's proposal and preferred its own language that was ultimately agreed to by the Parties.

16. Ms. Thistle's evidence was that the 2016 round of collective bargaining lasted approximately three years and was ended by way of a report issued by Vince Ready. She testified that although many grievances were filed around 2015 and 2016 about Relief employees, and that changes to Appendix A1 were made in Mediator Ready's binding recommendations as a result, there were no changes to A1.08(b)(ii), nor were there any discussions during that round of bargaining about how the 28-day period was calculated according to Ms. Thistle.

**Facts leading to the Filing of the Grievance**

17. On May 7, 2021, the Grievor received an email from her supervisor advising that she had improperly inputted overtime hours into the software utilized to record hours for May 6, 2021. The Grievor responded, advising that it was her understanding that she was entitled to overtime pay for hours worked above 150 hours in any four week period and that, in her view, because she had worked 85.5 hours of straight time between April 10 and 23, she was entitled to overtime for the excess hours worked in the pay period ending May 7. The supervisor responded that she would look into the matter and get back to the Grievor once she had an answer.

18. Emails in evidence reveal that the Grievor's supervisor sought advice from the Client Service Manager on May 10, 2021, who in turn, consulted the Employer's Labour Relations department via email the same day. Labour Relations responded the following day indicating that:

> We need to determine if her hours of work regularly fall outside the standard hours of work as outlined in clause 22.01 (08:30 or 08:00 until 17:00). The 28 days would be a rolling 28 days though.

19. In response, the Manager sought further clarification, writing:

> Thank you. By rolling you mean “continuous” 28 days. she is a relief RN – OBS mostly she works 12 hour shifts, which is standard for this position. If her ppsition [sic] threshhold [sic] is 150 hours she is only entitled for OT once she reach [sic] 150 over continuous 28 day period. Correct?

20. Labour Relations responded in an email dated May 12, 2021 indicating her agreement with the Manager’s summary of the requirement as set out above. She provided further clarification in an email dated May 19, 2021, in which she wrote:

> As discussed, I think the confusion lays in the description by the staff member [Caitlyn], where she speaks about four week periods/blocks.
>
> The collective agreement, in A 1.08 (b) ii, speaks about a 28 day period, not a set block of 28 days, not two pay periods, not one month, simply a 28 day period.
>
> For example:
>
> - One 28–day period happens to be February 1–28.
> - The employee works 150/160 regular time hours by February 23rd, any hours worked February 24–28 would be overtime.
> - The employee takes March 1–4 off and goes back to work on March 5.
> - You count back 28 days from March 5th, and if the employee has worked 150 hours in the 28 previous days, the hours worked on March 5th would be overtime hours.
> - February 1–4 hours worked do not count in the 28-day period now.
> - The 28 days referred to in A 1.08 (b) ii are a ‘rolling’ 28 days

21. She went on to write:

> If an employee is working enough hours in one position to be getting overtime on a regular basis, the department needs to create an indeterminate position, do at TA with the relief employee into the position, or call other relief employees for equitable distribution of shifts, and overtime for that matter.
>
> Please let me know if this makes sense or if you need any other assistance with this.

22. On May 18, 2021, the Grievor's supervisor forwarded an email from the Client Service Manager indicating that Labour Relations was still looking into the matter.

23. On May 19, 2021, the Grievor emailed the Client Service Manager directly, stating:

> Matthuschka forwarded your update related to the issue of my overtime hours in my relief position at Stanton. This week is an early cutoff for payroll with a deadline of May 20th at 16:00 and at this point, if I am not approved for my overtime hours for last pay period and the current pay period (as defined in the collective agreement as hours over 150 hours in a 28 day period), I will be short the pay for a total of 33.25 hours of overtime.
>
> At a time when Stanton is short-staffed in the specialty areas where I work relief and where there is an ongoing need for staff to continue to work overtime, I feel it is a reasonable expectation to be compensated for overtime worked in a timely manner. I wonder if it would be possible for this to be resolved before this week's pay cut off? I understand that there may be more clarification needed in the future for how this issue is handled and perhaps changes to the wording of the collective agreement or a MOU to address this but I would ask that this not hamper me being paid for the hours I have already worked.

24. Also on May 19, 2021, the Union, having been made aware of the issue by the Grievor, reached out directly to Labour Relations, setting out the issue with respect to the Grievor and explaining the Union's view that:

> Based on the strict language of the Collective Agreement, I would interpret it to mean that the 150 hours would apply to any period of 28 days pulled from the calendar. As mentioned on the phone, I would be interested in hearing the Employer's interpretation of A 1.08(b) and potentially having a larger conversation about its application.

25. On May 20, 2021, the Employer's Labour Relations Representative responded to the Union explaining that he understood the Grievor's request for overtime for time worked over 150 hours and in a 28day period was being approved and that "this decision should convey the

employer's position on a 1.08(b)(ii)." This was conveyed by the Union to the Grievor, who responded that same day explaining that while her manger had verbally told her that she was approving the overtime, her manager "back tracked and sent me the email below" which was as follows:

> Although I said I would, unfortunately I am not able to approve the time the way you entered it because I need direction from Keith in order to do so. All managers approve it based on the 28 day pay period schedule and so I need to follow the same directive until we get a different directive from Keith through the HR/LR/UNW channels. I have a record of how you entered the time for the current pay period as I took a snip of it, and I have a snip of how I changed it based on the 28 day Pay Period Schedule. Based on those calculations you needed 55.5 hrs of Reg time this pay period to get you to 150 hrs from April 24-May 21. See below.
>
> I understand that you will continue to work with the union on this, as I will be working on this on my end with Keith and HR and LR. We have a regular meeting tomorrow at 10 am with HR, so I will be bringing it up there. If corrections need to be made, it will be done as required.

| Date | Hours worked | Total cumulative | OT |
|---|---|---|---|
| 24-Apr | 0 | | |
| 25-Apr | 0 | | |
| 26-Apr | 8 | | |
| 27-Apr | 12 | | |
| 28-Apr | 14 | | |
| 29-Apr | 12 | | |
| 30-Apr | 4 | | |
| 01-May | 0 | | |
| 02-May | 0 | | |
| 03-May | 4 | | |
| 04-May | 12 | | |
| 05-May | 2 | | |
| 06-May | 12 | | |
| 07-May | 12 | | |
| 08-May | 0 | | |
| 09-May | 8 | | |
| 10-May | 0 | | |
| 11-May | 8 | | |
| 12-May | 8 | | |

| | | | |
|---|---|---|---|
| 13-May | 12 | | |
| 14-May | 12 | | |
| 15-May | 0 | | |
| 16-May | 0 | 140 | |
| 17-May | 12 | 152 | OT1 2 hrs |
| 18-May | 9.5 | | OT1 2 hrs<br>OT2 7.5 |
| 19-May | 8 | | OT2 8 |
| 20-May | 12 | | OT2 12 |
| 21-May | 12 | | OT2 12 |

26. In a subsequent email to the Grievor, her supervisor confirmed that the Employer would continue to apply its interpretation of the collective agreement, writing:

> The meeting that was to take place with this week to review the LR recommendation regarding OT calculation for relief staff was postponed until next week. I approved your time based on the two pay periods to = 28 days scheduled that all managers are using to calculate OT for relief workers, that being May 22 to June 18. I've taken snapshots of your initial entries for my records. Until I receive different directions from the COO, I will continue to approve OT for relief based on the 28 days outlined in the pay period schedule attached.

27. Internal emails between Stanton leadership and Labour Relations reveal that discussions continued in respect of the correct interpretation of A1.08. For instance, in an email dated May 28, 2021, the Client Service Manager wrote to the Grievor's supervisor, copying Labour Relations, indicating:

> I have sent the information LR has provided on this, Tina, You & I also had a meeting to discuss this & following is the advice provided by the LR. This advice is reviewed by LR again & this is how it should be.
>
> Could you please connect with the employee to resolve this issue.

28. Following that statement, the Manager cut-and-pasted the information she had received from Labour Relations confirming that a Relief employee who exceeds the maximum regular hours for their position in any 28 day period is entitled to overtime pay.

29. The Grievor's supervisor responded:

> Please let me know if I am to follow this advice. As mentioned previously, the implications are huge and the actual process to calculate and approve OT for relief who work a lot of hours like Caitlyn is complicated. If I am not to follow this advice, please let me know how I am to respond to the employee. I have let her know that until the HR advice has been reviewed by senior management I will be approving time the way we have been based on the approved two pay period schedule.

30. The response from Labour Relations was:

> Can we hold off on this. For issues where there is a shift in advice or where the advice would result in a major change in practice – we are going to have a very small working group grapple with it before implementing.
>
> The little working group is meeting this coming week.
>
> Mike and I spoke about this as a mechanism to ensure that all the factors are considered both in considering the issue and rolling change out.

31. Neither the Grievor's supervisor nor the Client Services Manager were called as witnesses at the hearing, nor did a representative from Labour Relations provide evidence.

**Operational Impacts of the Competing Interpretations**

32. Stanton Chief Operating Officer, Jennifer Torode, was called as a witness by the Employer. She testified that, in her view, Article A1.08 requires some arbitrary line be drawn in the sand to calculate overtime and explained that the rational way to do this is to link the 28 days referred to in A1 to two-specific pay periods. This, Ms. Torode explained, is something

everyone can understand and is something the Employer is able to easily communicate and allows it to ensure it is providing access to shifts and overtime based on a common position. Ms. Torode's evidence was that having a defined time period also assists the Employer in complying with the requirement in Article 1.07 that it distribute overtime equitably amongst Relief employees. She testified that to the best of her knowledge the Employer's practice in this regard has been in place for several years.

33. Ms. Torode testified the Union's interpretation would also cause disparity in awarding shifts and result in more grievances being filed and that it would cause confusion amongst both the Employer and employees around overtime generally. Her evidence was that the Union's approach would require significantly more resources to manage, as schedulers would have to review each individual relief worker's schedules to determine when each would be entitled to overtime pay and whether they were being offered overtime opportunities equitably.

34. Stanton Manager, Sherry Connors, was also called upon to give evidence at the hearing. She testified that although the Employer's priority overall is to staff safely, in doing so, it attempts to incur as little overtime as possible to keep within budget. Ms. Connors' evidence was that she has trained schedulers to understand the situations by which premium rates are payable to Relief employees and that in doing so, the Employer has utilized a document setting out the 28 day periods in each given year since at least 2012. Ms. Connors testified that this document is circulated each year and that managers reference in approving overtime.

35. Ms. Connors queried during her testimony how management and employees would know what hours were at overtime rates if there was no set 28day period within which this is calculated. According to Ms. Connors' evidence, if the 28day period does not reset, then an employee would just essentially keep incurring overtime. essentially. She testified that it would be labour intensive and increase the workload of schedulers to calculate overtime in the manner proposed by the Union and that this would be particularly problematic for filling short notice vacancies. Ms. Connors' evidence was consistent with Ms. Torode's in respect of the

confusion she felt would result from implementation of the Union's interpretation of A1.08. She testified there would be a "huge impact" on current processes, as the point of reference for assessing overtime would reset daily. In her view, this could ultimately risk patient safety by impacting staffing.

36. Ms. Connors testified that the fixed 28 day periods for calculating overtime had been implemented consistently through their time in their jobs and that the implementation of the Union's interpretation would add to the complexity of scheduling and overtime calculation.

**POSITIONS OF THE PARTIES**

37. The Union submits that there is no ambiguity in the language. The standard hours of work as set out in Article 22.01 is 37.5 hours per week or 40 hours per week, and there is no additional language indexing "a 28 day period" to any other defined expression of time. More specifically, the Union alleges, the language is not indexed to any "pay period" nor a predetermined combination of bi-weekly pay periods to equal 28 days. The Union contrasts that language with the Consent Award language, which it notes explicitly linked overtime calculation to a daily or weekly basis as defined in the Collective Agreement. The Union points out that Article 37.22 expressly prohibits the arbitrator from altering or amending any of the provisions of the Collective Agreement or substituting any new provisions in lieu thereof, or from rendering any decision contrary to the terms and provisions of the Collective Agreement or increasing or decreasing wages.

38. The Union argues that, to the extent there is any ambiguity in the language, the guiding interpretative principals set out in *Pacific Press v. G.C.I.U., Local 25-C*, [1995] B.C.C.A.A.A. No. 637 support its interpretation. The Union points to the evidence of Ms. Thistle, who testified about the Union's proposed change to the relief overtime language for the Collective Agreement expiring 2012 (the "2012 CA") and the Employer's counter proposal. The Union points to Ms. Thistle's evidence that the Employer rejected the Union's proposed language

because they were unable to cost the outcome, noting it was the Employer that put forward the 28 day suggestion. According to the Union, the Employer must have accepted the cost implications of its proposed language.

39. The Union stresses that it was open to the Parties to agree to link overtime compensation to "pay periods" as is done in Article 22.14 of the Collective Agreement, which sets out that school year employees will be paid over 26 pay periods. The Union asserts it is significant that overtime for relief employees is indexed to the regular or standard work performed by full time employees in similar positions.

40. In response to the evidence called by the Employer that is has been calculating overtime for Relief employees consistently for some time, the Union emphasizes that there was no evidence that the Employer's practice had been communicated clearly to the Union and expressly or tacitly accepted by the Union. In other words, the Union states, there are no grounds for estoppel. Further, the Union asserts, there is "no salvation in repetition". According to the Union, the Employer has knowingly applied a practice in direct contravention of the advice given by Labour Relations.

41. The Union rejects the notion that the complexity and associated costs in terms of time and money resulting from its interpretation would create an absurdity, noting that there was no actual evidence tendered by the Employer to demonstrate the cost differential. Further, it states that the fact that its interpretation of A1.08 may create work for the Employer is a far cry from saying that its application would be impossible, contradictory and absurd. Further, the Union observes that the Parties negotiated a separate appendix for health workers that modifies many entitlements under the Collective Agreement for these employees and that the Parties could have carved out these employees if they had intended for them to be treated differently than Relief employees in other departments.

42. The Union relies on the following authorities in support of its position: *Government of the Northwest Territories and Union of Northern Workers (Policy Grievance respecting the banking of hours for statutory holidays by Corrections Workers)*, unreported, November 27, 2009 (Phyllis A. Smith, Q.C.); *Government of the Northwest Territories and Union of Northern Workers (Grievance #17-P-02136 Lieu Time Policy)*, unreported, November 30, 2022 (J. Alexander-Smith); *Government of the Northwest Territories and Union of Northern Workers (Special Leave (Bereavement))*; unreported, June 2, 2020 (Tom Jolliffe, Q.C.); *Government of the Northwest Territories and Union of Northern Workers (Grievance #22-P-02917 Covid Leave Codes)*, unreported, December 30, 2022 (J. Alexander-Smith); and *Pacific Press v. G.C.I.U., Local 25-C*, [1995] B.C.C.A.A.A. No. 637.

43. The Employer contends that its interpretation is consistent with the Collective Agreement and makes administrative sense. In its submission, both the Union's and the Employer's interpretation require the arbitrator to read in language that is not present. The Employer suggests the Union's position requires that the word "rolling" be read into the language, whereas the Employer's requires addition of the concept of "two consecutive pay periods."

44. The Employer objects to the Union's reliance on Article 22.14, noting there is a "clear distinction" between the context of school year employees and hospital Relief workers. Further, it emphasizes that although it is unknown precisely when the Employer's practice of using two specific pay periods to calculate overtime entitlement for Relief employees began, the only evidence suggests there has been a consistent practice for some time. The Employer observes that there are avenues for the Union to relay disagreement with Employer practices and for the parties to discuss these issues, and that there is no evidence this issue was raised with the Employer by the Union outside of this grievance since the language was negotiated.

45. The Employer suggests that the rules of collective agreement interpretation as set out in *Pacific Press, supra,* support its interpretation. It objects to the extrinsic evidence called by the

Union, noting that Ms. Thistle was not present for the bargaining sessions about which she testified, and that extrinsic evidence is only useful when it demonstrates the parties' mutual intentions. While the Employer acknowledges the language is ambiguous, and not clear and unequivocal, it denies the bargaining evidence reveals any mutual intention. The Employer points to the fact that the Grievor and the Union both advanced different interpretations of the language – the latter suggesting that a 28day period consists of any two consecutive pay periods (as opposed to two specific consecutive pay periods as is the Employer's practice), and the Union suggesting there is no link to pay periods whatsoever, and that the 28 days is a "rolling" period with no defined start or stop.

46. In its submission, in cases where an arbitrator is faced with two (or more) linguistically permissible interpretations, the Employer asserts the case law specifies that the arbitrator ought to be guided by the purpose of the provision, the reasonableness of the various interpretations, administrative feasibility, and whether one of the possible interpretations gives rise to anomalies. According to the Employer, the case law indicates that when parties to a collective agreement are drafting language, they are taken to have attempted to arrive at a solution that is easy to apply. The Employer maintains that while both interpretations are permissible linguistically in this case, the Union's position is less administratively feasible and would, in fact, be "nearly impossible" to adopt from an administrative standpoint. In the Employer's submission, an arbitrator ought not to construe language in a manner that would create an unworkable process, nor should they assume the parties intended such a result. The Employer points to the evidence of Ms. Connors and Ms. Torode about how unworkable the Union's interpretation would be in practice, and that it would require schedulers to manually calculate the overtime threshold for each Relief employee on a daily basis. Indeed, given the large number of Relief employees utilized in the NTHSSA, the Employer submits it would require almost a "minute-by-minute calculation".

47. In contrast, it submits, the Employer's method of linking two specified pay periods to create set 28 day blocks provides "certainty and workability" that allows employees to calculate

their overtime. According to the Employer, if it were to implement a 28day rolling period as suggested by the Union, it may not even be possible for employees to makes these calculations themselves, and thus they would be unable to determine whether they were being paid appropriately. In sum, the Employer contends that its decision to index the 28 day period to specific pay periods was intended to create a workable and transparent solution for employees to be able to apply on their own. It opines that the failure to choose an arbitrary point of reference could lead to staffing issues and possibly affect patient safety.

48. The Employer relies on the following authorities: *Government of the Northwest Territories and Union of Northern Workers Consent Order (Grievance #07-G-00473 Relief Overtime)*, unreported, April 22, 2015 (Allen Ponak); *John Bertram & Sons Co., v. I.A.M., Local 1740*, 1967 CarswellOnt 782, [1967] O.L.A.A. No. 2, 18 L.A.C. 362; *City of Vancouver v. Canadian Union of Public Employees, Local 15 – VMECW*, 1997; *Coca-Cola Bottling Company (Weston Plant) v. United Food and Commercial Workers International Union, Local 393W*, 2003; *Sattva Capital Corp. c. Creston Moly Corp.*, 2014, CSC 53; *Cape Breton Victoria Regional Centre for Education and CUPE, Local 5050*, Re 2020 CarswellNS 271, 143 C.L.A.S. 155, 314 L.A.C. (4th) 196; *Lakeland College v. Lakeland College Faculty Assn.*, 2003 CarswellAlta 1978, [2003] A.G.A.A. No. 86, 124 L.A.C. (4th) 28, 75 C.L.A.S. 384; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73; *SHH Management Limited v. Philip*, 2020 B.C.S.C. 1411; and *Canadian Labour Arbitration*, 5th Edition; Donald J.M. Brown, Q.C., David M. Beatty, Adam J. Beatty.

**DECISION**

49. As noted at the outset, this dispute arises from the Parties' differing interpretation of what constitutes "a 28 day period" as the term is used in A1.08(b)(ii) for the purposes of calculating overtime entitlement for Relief employees. Does "a 28-day period" mean *any* period of 28 consecutive days, without any specified start or end date, as the Union alleges is the correct interpretation? Or can "a 28 day period" be a defined time period—and if so, can it be

two specific pay periods linked together to create thirteen 28 day periods per year as the Employer asserts?

50. I find the language at issue in this case is ambiguous, as it is not clear on a plain reading of the language that one interpretation must prevail. Respectfully, I do not accept that the term "a 28 day period" as used in A.108(b)(ii) can only mean that *any* 28 day period will give rise to overtime entitlement and that the term cannot be reasonably interpreted to mean a specific 28 day period. While I acknowledge that the language is silent in respect of how a 28day period is to be calculated, I do not find the absence of such reference on its own definitively means that the Parties intended for the 28-day periods to be "rolling."

51. Thus, in determining this grievance, I have applied the well-established principles of collective agreement interpretation set out in *Pacific Press v Graphic Communication International Union, Local 25-C*, (1995) BCCAAA No 637 (Bird) at para. 27:

1. The object of interpretation is to discover the mutual intention of the parties.
2. The primary resource for an interpretation is the collective agreement.
3. Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.
4. Extrinsic evidence may clarify but not contradict a collective agreement.
5. A very important promise is likely to be clearly and unequivocally expressed.
6. In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.
7. All clauses and words in a collective agreement should be given meaning, if possible.
8. Where an agreement uses different words, one presumes that the parties intended different meanings.
9. Ordinarily words in a collective agreement should be given their plain meaning.
10. Parties are presumed to know about relevant jurisprudence.

52. I start by noting there is no evidence before me that the Parties ever discussed what "a 28 day period" would mean at the time this language was tabled. The Employer did not explain it, and the Union did not inquire about it. There is evidence, from Ms. Thistle however, that the Employer explained during bargaining that it preferred its proposal to the language put forward by the Union because it was easier to cost. This, in my view, strongly suggests that the Employer, at least, intended that the 28 day periods would be linked to pay periods, since the evidence was that utilizing a 28 day rolling period for calculating overtime would be difficult and would require day-by-day and even hour-by-hour calculations be performed for each employee to determine when overtime is triggered.

53. The uncontradicted evidence called by the Employer was that it would require significantly more scheduling resources to calculate overtime in accordance with the Union's interpretation. In so stating, I accept that controlling the cost of overtime and the ability to determine when overtime will be incurred are necessary components for the Employer to be able to budget its resources. I also accept that the Union's interpretation would require significantly more scheduling resources to manage Stanton's budget and to avoid relying on overtime where possible.

54. I also find that the Union's interpretation, if accepted would make it more difficult for employees and managers to calculate when overtime is payable. There is no dispute that under the current system, employees are responsible for inputting their own hours into the PeopleSoft program and for identifying the hours to be paid at overtime rates (later reviewed and approved by a manager). I accept it would be challenging for individual employees to count back to the previous 28 days each time they work to determine whether they are in overtime hours or not, and that it is much simpler for an employee to see how many hours they worked in the previous pay period and add up the hours worked in the current pay period to determine when they are eligible for overtime.

55. When one considers what is involved in the Union's interpretation, it is unlikely, in my view, that the Parties mutually intended this process. Put differently, in my view it would require clearer language, to substantiate the Union's assertion that the Parties intended to require the Employer to calculate overtime entitlement on an ongoing rolling basis, unlinked to pay cycles, given this is such a drastic departure from the way overtime currently and historically has been calculated. Rather, I find that an important promise such as that—which, as noted, would represent a significant departure from the Parties' historical and current practices—would need to be more clearly and unequivocally expressed. In the absence of an explicit agreement by the Parties to use a rolling basis for overtime calculation, I cannot find such was the mutual intent of the language. The Union's interpretation simply does not fit the conceptional landscape of the benefit, nor of the Collective Agreement when read as a whole. Rather, I find the most probable interpretation is that the Parties intended the 28 day period to be linked to pay periods, and this is why they chose to use a 28 day period rather than a 25 day or 30 day period, for example.

56. That being said, however, I also find there is no basis for the Employer's arbitrary linking of specific pay periods for the purpose of calculating 28 days, and that the Employer's practice in this regard violates the Collective Agreement.

57. Similar to my finding in respect of the Union's interpretation, the Employer's interpretation, in my view, would require clearer language to establish that the Parties intended for 28 days to mean two specifically linked pay periods unilaterally chosen by the Employer. A plain reading of A1.08(b)(ii) does not support such an interpretation, nor does the extrinsic evidence in this case establish that the Parties intended this. I note there was no evidence that any discussion took place in bargaining about how the 28 days would be calculated, and I accept that the Union was unaware of the Employer's practice until the facts giving rise to this grievance.

58. Given the absence of language supporting the Employer's practice, and the lack of extrinsic evidence demonstrating the Parties intended for this provision to be administered this way, I find A1.06(b)(ii) must be interpreted as meaning that if an employee works over the maximum hours in any two consecutive pay periods, they are entitled to be paid at overtime rates for those additional hours. Considering the Collective Agreement as a whole, and applying the principles in *Pacific Press*, *supra*, set out above, this is the most probable interpretation intended by the Parties. Such an interpretation is consistent with the Parties' intention to link the 28-day period to pay periods, but does not allow for the arbitrary and unilateral linking of specific pay periods that I have found is not supported by the language.

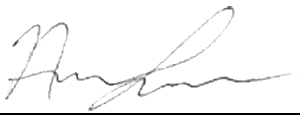
59. As a final note I observe that the Union in this case placed great emphasis on the fact that the Labour Relations Advisor concurred with its interpretation of A1.08 and advised the manager that she was owed overtime pay in the circumstances. While I understand the Union's frustration in obtaining a consistent and unanimous position from the Employer on this issue, I cannot find that the Employer breached the Collective Agreement or acted unreasonably by declining to follow the initial advice of its Labour Relations representative in this case. Rather, it is clear from the email correspondence that the Labour Relations advisor was unaware of the Employer's practice and the significance of the interpretation advanced, and that further meetings were to be held within the Employer to better understand the issue. Nothing turns on the fact that the Employer's own representatives were unsure how to interpret A1.08(b)(ii). The fact that there was internal dissention within the Employer about what the language means, in my view, only bolsters the finding that the language is ambiguous on its face and that it can give rise to more than one plausible interpretation.

60. In sum, I find the Employer improperly denied the Grievor's overtime claim in the present case by applying an improper definition of A1.08(b)(ii) and that its action in this regard violates the Collective Agreement. I order that the Grievor be made whole for the difference in overtime hours resulting from applying the correct interpretation to her hours worked since April 2021.

61. I remain seized with the requisite jurisdiction to resolve any disputes arising from the interpretation or implementation of this Award.

62. The grievance is allowed in part. It is so ordered.

Dated at the City of Vancouver in the Province of British Columbia this 21st day of June, 2023.



Amanda Rogers, Arbitrator