**Date:** 20121102

**Files:** 567-02-42 and
566-02-4868, 4884 and 4885

**Citation: 2012 PSLRB 118**

*Public Service*
*Labour Relations Act*

Before an adjudicator

BETWEEN

**FEDERAL GOVERNMENT DOCKYARD TRADES AND LABOUR COUNCIL EAST, ANDREW WALLACE, LORIN CARTER AND MATTHEW VAN ROSSUM**

Bargaining Agent and Grievors

and

**TREASURY BOARD**
**(Department of National Defence)**

Employer

Indexed as
*Federal Government Dockyard Trades and Labour Council East et al. v. Treasury Board (Department of National Defence)*

In the matter of a group grievance and individual grievances referred to adjudication

**REASONS FOR DECISION**

***Before:*** Augustus Richardson, adjudicator

***For the Bargaining Agent and Grievors:*** Raymond Larkin and Jillian Houlihan, counsel

***For the Employer:*** Karen Clifford, counsel

Heard at Halifax, Nova Scotia,
May 15, 2012.

## I. Group grievance and individual grievances referred to adjudication

[1] These grievances arose from two separate occasions on which overtime was worked at Fleet Maintenance Facility Cape Scott, otherwise known as the Ship Repair Unit (East) in Halifax, Nova Scotia ("Cape Scott"). One occasion arose from weapon systems trials conducted from October 2008 to May 2009 and gave rise to the group grievance filed in PSLRB File No. 567-02-42 (in the proceedings before me, the parties referred to this grievance as "the Group B grievance" and to the employees covered by this grievance as "the Group B grievors" and I am using these expressions in this decision). The other occasion arose out of work done to prepare *HMCS Toronto* to take part in the Haiti earthquake disaster relief effort in January 2010 and gave rise to the individual grievances filed by Andrew Wallace, Lorin Carter and Matthew van Rossum in PSLRB File Nos. 566-02-4868, 4884 and 4885 respectively (in the proceedings before me, the parties referred these grievances as "the Group A grievances" and to Messrs Wallace, Carter and van Rossum as "the Group A grievors" and I am using these expressions in this decision).

[2] The Group B grievance was filed on June 19, 2009. With respect to the Group A grievances, they were filed on February 5, 2010.

[3] The Group B grievors and the Group A grievors (to whom I refer collectively in this decision as "the grievors") are all governed by the collective agreement signed on June 16, 2008 ("the collective agreement") by the Treasury Board ("the employer") and the Federal Government Dockyard Trades and Labour Council East ("the bargaining agent") for the Ship Repair–East Group bargaining unit. The bargaining agent and the Group A grievors claimed certain remuneration at premium overtime rates on the grounds that the grievors had been required to work during – or had been denied – a nine-hour period of rest mandated by clause 15.10 of the collective agreement under certain circumstances.

## II. Summary of the evidence

[4] The parties agreed that the evidence could be submitted primarily in the form of an agreed statement of facts. The bargaining agent and the Group A grievors elected to call no witnesses. The employer called two: Ian Mitchell, Group Manager 6 (Weapons) at Cape Scott; and J.F. Beaulieu, who at the relevant times was Technical Services Manager, Mechanical One Division, in the same facility.

## A. Agreed statement of facts

[5] I will set out the agreed statement of facts, which was introduced by agreement of the parties as Exhibit 1, in its entirety:

. . .

*AGREED STATEMENT OF FACTS*

1. *At all material times, the grievors were members of the Federal Government Dockyard Trades and Labour Council (East); (FGDTLC East). At the dates in question, their employment was governed by a collective agreement between the Treasury Board and the FGDLTC East, expiry date December 31, 2009, ("the collective agreement").*

2. *The provisions of Article 15: Hours of Work and Overtime, of the collective agreement state as follows:*

***Article 15***
***Hours of Work and Overtime***

***15.01 Hours of Work***

*(a) The hours of work shall be forty (40) hours per week and eight (8) hours per day.*

*(b) The workweek and workdays shall be:*

*(i) from Sunday 2345 hours to Friday 2345 hours inclusive for employees subject to clause 15.02(a),*

*(ii) from Monday to Friday inclusive for employees subject to clause 15.02(b),*

*and*

*(iii) from Monday 0015 hours to Saturday 0015 hours inclusive for employees subject to clause 15.02(c).*

*(c) The first and second days of rest shall be:*

*(i) from Friday 2345 hours to Saturday 2345 hours and from Saturday 2345 hours to Sunday 2345 hours respectively for employees subject to clause 15.02(a),*

*(ii) Saturday and Sunday respectively for employees subject to clause 15.02(b),*

*and*

*(iii) from Saturday 0015 hours to Sunday 0015 hours and from Sunday 0015 hours to Monday 0015 hours respectively for employees subject to clause 15.02(c).*

***15.02*** *The hours of work shall be scheduled as follows:*

*(a) the first (night) shift shall be from 2345 hours to 0815 hours with an unpaid meal period from 0345 hours to 0415 hours;*

*(b) the second (day) shift shall be from 0745 hours to 1615 hours with an unpaid meal period from 1200 hours to 1230 hours;*

*(c) the third (evening) shift shall be from 1545 hours to 0015 hours with an unpaid meal period from 1945 hours to 2015 hours.*

***15.03*** *Notwithstanding the provisions of clause 15.02, the Council recognizes the requirement for certain employees to regularly report for work and to cease work at different hours than those established in clause 15.02, and the Employer agrees to discuss with the Council such changes in working hours before implementing them.*

***15.04*** *The hours of work described in clauses 15.01 and 15.02 shall not be construed as a guarantee of a minimum or of a maximum hours of work.*

***15.05*** *An employee may be transferred from one shift to another within a workday subject to the application of clause 15.09.*

***15.06*** *Notwithstanding the provisions of clause 15.02:*

*a) An employee who works on the first (night) or third (evening) shift:*

*(i) on three (3) or more consecutive workdays within a workweek,*

*or*

*(ii) on the first or on the first and second workdays in a workweek following a full workweek on the first (night) or third (evening) shift,*

*or*

*(iii) on the last or on the last and next to last workdays in a workweek preceding a full workweek on the first (night) or third (evening) shift,*

*shall receive a shift premium as specified in clause 24.01.*

*For the purpose of clause 15.06(a), an employee on leave during the days referred to in clause 15.06(a) shall not be considered as breaking the consecutive workday or full workweek requirement of that clause.*

*For the purpose of clause 15.06(a)(i), a paid holiday shall not be considered as breaking the consecutive workday requirement providing three (3) days of shift work are scheduled.*

*Where shift work is scheduled for a full workweek which includes a designated paid holiday, the holiday shall not affect the requirements of a full workweek referred to in clause 15.06(a)(ii) and (iii).*

*(b) An employee who works on the first or third shift, other than as described in 15.06(a) shall be paid at double (2) time rate for each hour so worked and no shift premium shall be paid.*

***Shift while on Course***

*(c) Notwithstanding clause 15.05 and 15.06(a) and (b), the parties recognize the need to amend shift schedules by mutual consent to accommodate training courses.*

***15.07** The Employer will schedule shift work only when necessary. On the occasion of shift on a project, the Employer will give to the employees and Council, as much notice as practicable prior to the commencement of shift work.*

***15.08 Overtime***

*The Employer will make every reasonable effort:*

*(a) to distribute overtime fairly among available qualified employees;*

*(b) to give at least four (4) hours' advance notice to employees who are required to work overtime;*

*(c) to keep overtime to a minimum.*

***15.09 Overtime Compensation***

*Subject to clause 15.13, overtime shall be compensated at the following rates:*

*(a) double (2) time for all hours worked in excess of eight (8) hours in a continuous period of work or in excess of eight (8) hours in a day to a maximum of sixteen (16) hours in a*

*continuous period of work; and for all hours worked on a day of rest to a maximum of sixteen (16) hours;*

*(b) triple (3) time for each hour worked in excess of sixteen (16) hours in a continuous period of work or in excess of sixteen (16) hours in any twenty-four (24)-hour period, and for all hours worked by an employee who is recalled to work before the expiration of the nine (9)-hour period referred to in clause 15.10.*

***15.10*** *Subject to clause 15.11, an employee who works for a period of fifteen (15) hours or more in a twenty-four (24) hour period shall not report on his/her next regular scheduled shift until nine (9) hours has elapsed from the end of the previous working period unless otherwise informed by the supervisor. If, in the application of this clause, an employee works less than his/her next full shift, the employee shall, nevertheless, receive eight (8) hours' regular pay.*

***15.11*** *An employee will not work more than fifteen (15) hours in a twenty-four (24) hour period except where operational requirements dictate otherwise.*

***15.13*** *An employee is entitled to overtime compensation for each completed six (6)-minute period of overtime worked by him/her.*

***15.14*** *When management requires an employee to work through his/her regular meal period, the employee shall be paid at the applicable overtime rate for the period worked therein, and the employee shall be given time off with pay to eat commencing within one-half (1/2)-hour immediately prior to the regular meal period or commencing within one-half (1/2)-hour of the termination of the regular meal period.*

***15.15***

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*(a) Notwithstanding the provisions of clauses 15.09 and 17.03, an employee may request, in lieu of overtime payment, compensatory leave with pay for a maximum credit equivalent to forty (40) hours straight-time pay at any one time in a fiscal year. Approval of the Employer shall not be unreasonably withheld.*

*(b) The rate of pay to which an employee is entitled during such leave shall be based on the employee's hourly rate of pay as calculated from the classification prescribed in the employee's certificate of appointment in the employee's substantive position on the day immediately prior to the day on which leave is taken.*

*(c) The Employer shall grant compensatory leave at times convenient to both the employee and the Employer.*

*(d) Accumulated compensatory leave not used by March 31st of each year shall normally be paid in cash. Such leave may by mutual agreement be carried over to the following leave year.*

***15.16 Rest Periods***

*The Employer shall schedule two (2) rest periods of ten (10) minutes each during each full shift.*

***15.17 Overtime Meal Allowance***

*(a) A meal allowance of ten dollars and fifty cents ($10.50) will be paid:*

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*(i) to an employee who is required to work overtime and provided the employee works for three (3) hours, commencing not more than one (1) hour following the employee's normal quitting time;*

*(ii) to an employee who is required to work at least three (3) hours immediately preceding the employee's normal starting time;*

*(iii) after an employee has worked an initial period of three (3) hours overtime, for each subsequent four (4)-hour period of overtime worked;*

*and*

*(iv) to an employee who has been recalled to work as provided in clause 18.01 for each four (4)-hour period of overtime worked;*

*(b) Except as provided in clause 15.17(a)(iv), an employee who works overtime on days of rest or holidays is not entitled to a meal allowance for the first eight (8) hours worked. A meal allowance of ten dollars and fifty cents ($10.50) will be paid for each subsequent four (4)-hour period of overtime worked.*

*(c) The provisions of clauses 15.17(a) and (b) will not apply to employees assigned to sea trials where meals are provided without charge to the employees during periods described in clauses 15.17(a) and (b).*

***15.18*** *Unless otherwise informed by the Employer, any employee required to work overtime shall take an unpaid*

*meal break of not less than forty-five (45) minutes immediately following the end of his/her normal shift.*

3. *The grievors normally work the day shift; i.e. the shift referenced in article 15.02(b.), from 0745 hours to 1615 hours, with an unpaid meal period from 1200 hour to 1230 hours.*

4. ***Dates/Shifts in Issue***

***Group A Grievors***

*(a) At the dates in question, these grievors were all assigned to the Heavy Electrical Shop at DND Fleet Maintenance Facility, Cape Scott, Halifax.*

*(b) On Thursday, January 14, 2010, as a result of the earthquake in Haiti, the employer determined it necessary to ready the ship HMCS Toronto for deployment as soon as possible in order to assist with the relief effort.*

*(c) On January 14, 2010, the grievors were scheduled to work their regular day shift of 0745 hours to 1615 hours (i.e. eight hours, plus one half-hour unpaid break). * EXCEPTION: Lorin Carter started his regular day shift at 1015 hours on January 14, 2010. He was paid for time from 0745 to 1015, as part of his rest period due to hours worked previously.*

*(d) At approximately 1400 hours on January 14, 2010, the grievors were advised of the need for overtime to commence that evening at 2345 hours. The grievors were sent home and advised to rest prior to their return at 2345 hours.*

*(e) Accordingly, the grievors departed on or by 1445 hours on January 14, 2010. However, they were paid (regular pay) until the conclusion of their scheduled shift at 1615 hours.*

*(f) The grievors were not required to accept the overtime hours.*

*(g) The grievors re-attended at work for overtime at 2345 hours on January 14, 2010. They were paid overtime (i.e. double time as per Article 15.09(a)) until 7:45 AM on January 15, 2010 (i.e. 8 hours).*

*(h) The grievors were informed they had to stay and work their regular scheduled shift (i.e. until 16:15).*

*(i) The grievors then worked their regularly scheduled day shift from 0745 hours to 1615 hours on January 15,*

*2010 (i.e. eight hours, plus a one half-hour unpaid meal break).*

5. **Group B Grievors**

*(a) At the dates in question, these grievors were all assigned to the Weapons Division at DND Fleet Maintenance Facility, Cape Scott, Halifax.*

*(b) As part of their work, the grievors were working with the Engineering Department conducting trials. Certain trials cannot be conducted during daytime hours (due to instrument sensitivity to sunlight, and other variables). Accordingly, most trials are conducted at night.*

*(c) On the dates in question, the grievors were scheduled to work their regular day shifts of 0745 hours to 1615 hours (i.e. eight hours, with an additional one half-hour unpaid meal break).*

*(d) On the applicable date(s) in question, each respective grievor was offered overtime work to attend later that same evening at 2300 hours for purposes of conducting trials.*

*(e) In each case, the respective grievor was sent home at 1400 hours from his/her regular Day shift. However, he/she was paid until the end of the scheduled shift at 1615 hours.*

*(f) The grievors were not required to accept the overtime work.*

*(g) On the applicable date(s) in question, each respective grievor was paid overtime (i.e. double time, as per Article 15.09(a)) from 2300 hours until 0700 hours (i.e. eight hours).*

*(h) The time between 0700 hours and 0745 hours was used as unpaid meal break.*

*(i) The grievors were informed they had to stay and work their regular scheduled shift (i.e. until 16:15).*

*(j) Each respective grievor worked his/her regular Day shift of 0745 to 1615 hours (i.e. eight hours, with an additional one half-hour unpaid meal break).*

*(k) The breakdown of the applicable dates in question for this group of grievors is as follows:*

*(i) James Logan: October 2 – 3, 2008;*

*(ii) Marc Samson: October 2 – 3, 2008;*

*(iii) Shawn Seaboyer:* *November 5-6, 2008;*

*(iv) Margaret Miller:* *November 5-6, 2008;*

*(v) Brandon Cameron:* *November 4-5, 2008;*

*November 5-6, 2008;*

*January 29-30, 2009;*

*(vi) Anthony Casella:* *May 13-14, 2009;*

*(vii) Joshua Carew:* *May 14-15, 2009;*

*(viii) Mitchell Ellis:* *May 14-15, 2009.*

. . .

[*Sic* throughout]

[Footnotes omitted]

**B. Mr. Mitchell's testimony**

[6] The Weapons Division maintains and overhauls the weapons systems on vessels and submarines. Along with its several subdivisions, it also conducts periodic trials of weapons systems to ensure that they are working properly. The trials must be conducted both during daylight and at night, because the sun's heat, which causes expansion and contraction in a ship's superstructure, can alter the performance of weapons systems.

[7] The Weapons Division conducted three trials from October 2008 to May 2009. As noted, some were conducted entirely at night. Hence, some employees who routinely worked the day shift were offered an overtime night shift, commencing at 23:00.

[8] Mr. Mitchell testified that the full complement of 12 that normally worked on the day shift was not needed to work during the night part of the weapons test. The necessary overtime was split in half. Half the employees worked overtime immediately after the conclusion of the day shift, and the other half came in at 23:00 to work their overtime during the night shift. He and his supervisor knew that those working the night shift worked in the small hours of the morning and that, accordingly, they needed extra rest time. He was aware that a nine-hour rest period was mentioned in the collective agreement and felt that nine hours was an appropriate period of rest to

prepare them for working the night shift. Accordingly, he counted nine hours back from the expected start time of the night shift (23:00). That brought him to 14:00. He sent the employees who would be working overtime on the night shift home at 14:00 rather than at their regular end time of 16:15.

[9] In cross-examination, Mr. Mitchell testified that he was not thinking of clause 15.10 of the collective agreement expressly when he analyzed the amount of rest time he should allow the day-shift employees who were also going to work an overtime night shift. He was thinking only about ensuring that the employees had the appropriate period of rest to prepare them for the overnight shift. He agreed during cross-examination that, had he not sent those employees home early, he would have had to provide them with the nine hours of rest mandated by clause 15.10 at the end of the night shift, because the two shifts combined would have exceeded 15 hours of work in a 24-hour period. He added that he ". . . was not conscious of that at the time . . . [he] was more focused on the needed rest . . . but now that [counsel for the bargaining agent and the Group A grievors lays] it out like that, the math works, so they would have been entitled to [the nine hours of rest]."

**C. Mr. Beaulieu's testimony**

[10] Mr. Beaulieu testified that on January 10, 2010, a major earthquake hit Haiti. On January 13, the employer received orders to dispatch *HMCS Toronto*, *HMCS Preserver* and *HMCS Athabaskan* to assist in the relief effort. *HMCS Toronto* required a lot of work on, among other things, its diesel generators to ready it for the work it was to do in Haiti. The orders included one to work around the clock to ready the ship.

[11] To carry out the orders, Mr. Beaulieu needed to have electricians working on the ship as well as in the shop. He needed them working during their regular day shifts. Since he could not have the same workers working overtime on both the afternoon and the night shifts, he split them. The employees decided how to allocate the overtime, resulting in half working the afternoon shift and half working the night shift.

[12] With respect to those who agreed to work overtime on the night shift, Mr. Beaulieu thought that it was important to give them some extra time to rest between the end of their regular day shifts and the start of the overtime night shift at 23:45. Accordingly, he sent those employees home early (but with pay) at 14:45. They returned later and worked the overtime night shift. At the end of that overtime shift,

they asked for a nine-hour break pursuant to clause 15.10 of the collective agreement instead of starting their next regularly scheduled day shifts at 07:45. Mr. Beaulieu did not think that clause 15.10 applied because, by his calculation, the employees had not worked 15 hours in the previous 24 hours. Like Mr. Mitchell, he thought that the bargaining agent and the employer had agreed to nine hours as a reasonable amount of rest. In cross-examination, he testified that, although he had the power to compel employees to work overtime if necessary, it had not been necessary on that occasion. He also admitted that when he discussed the issue with a bargaining agent representative, he said that, if he lost the Group A grievances, he would in the future simply start the overtime at 01:15 rather than at 23:45 the previous day and that, if he did, "there was nothing the union could do about it."

[13] Mr. Beaulieu testified that, in practice, overtime in the shops could be and has been worked both before the start of a regularly scheduled shift as well as after such a shift ended.

**D. <u>The basic issue</u>**

[14] All the grievors regularly worked the day shift, with the regular hours of 07:45 to 16:15, ". . . with an unpaid meal period from 1200 to 1230 hours" (see clause 15.02(b) of the collective agreement). The grievances arose from the following scenario:

- the grievors began their regular day shifts at 07:45 on the first (Day 1) of a two-day period;
- they were sent home early before the normal end (16:15) of their regular eight-hour shift;
- they returned to work towards the end of Day 1 to work an overtime shift of eight hours;
- that overtime began at 23:45 in the case of the Group A grievors or 23:00 in the case of the Group B grievors on Day 1 and carried over to the second day (Day 2); and
- that overtime ended immediately before the regular day shifts started on Day 2 in the case of the Group A grievors or at 07:00 on Day 2 in the case of

the Group B grievors, who then started their regularly scheduled day shift at 07:45 after a 45 minutes meal break.

[15] There was no dispute that, normally (that is, had the grievors not been sent home early on Day 1), the total number of hours worked during the 24-hour period that began with the start of the regular day shift on Day 1 would have exceeded 15 hours. Clause 15.10 of the collective agreement would have been triggered, and the grievors would have been entitled to nine hours of rest at the end of the overtime shift unless otherwise informed by the supervisor. Hence, the grievors would have been entitled to the following:

- heading home at the end of the overtime shift on Day 2 and, nevertheless, receiving eight hours' pay; or

- working their regular day shifts on Day 2 at the premium overtime rates specified under clause 15.09(b) because they were being required to work before the end of the nine-hour rest period provided for in clause 15.10.

However, the grievors were not required to work their full regular shifts on Day 1. They were sent home early. Counsel for the bargaining agent and the Group A grievors conceded (and counsel for the employer did not deny) that that meant that the grievors had worked only roughly 6.5 of the 8 hours that they would have normally worked on Day 1. Since the overtime shift that followed consisted of 8 hours of work, the total number of hours worked during the 24-hour period that began with the start of the regular shift on Day 1 was less than the 15 hours referenced in clause 15.10 of the collective agreement.

## III. Summary of the submissions

[16] The employer's position was simple. The grievors did not work more than 15 hours in the 24-hour period starting at 07:45 on Day 1. Hence, they were not entitled to the nine-hour rest period mandated by clause 15.10 of the collective agreement.

[17] On the other hand, the bargaining agent's and the Group A grievors' position was more subtle. The employer should not have been allowed to evade what would have happened had the normal work schedules been followed, particularly if the evasion was the result of an attempt to avoid the provisions of the collective

agreement. The bargaining agent and the Group A grievors argued in essence that, in such a case, what would have happened ought to be deemed as what did happen.

**A. <u>For the bargaining agent and the Group A grievors</u>**

[18] Counsel for the bargaining agent and the Group A grievors built his argument in several steps.

[19] First, the grievors who were sent home early were nevertheless paid for the balance of their shifts, even though they did no work. Nothing in the collective agreement requires the employer to pay for regular work that is not done. Moreover, subparagraph 34(1)(*a*)(i) of the *Financial Administration Act* (*FAA*), R.S.C., 1985, c. F-11, provides that "[n]o payment shall be made in respect of any part of the federal public administration unless . . . the work has been performed . . . ." Hence, the employer's decision to send the grievors home early but still pay them for a full shift could not be explained by – and was in fact inconsistent with – both the collective agreement and the *FAA*.

[20] Second, logic and common sense suggest that the bargaining agent and the employer agreed to clause 15.10 of the collective agreement because they recognized that an employee who worked a significant amount of overtime after his or her normal shift would be suffering from fatigue. To require that employee to then start his or her next regular shift without a rest period was to court poor performance at best and accidents at worst. The grievors fit the situation that clause 15.10 was designed to address, even though, strictly speaking, they did not work 15 hours. For the employer to rely simply on the fact that the grievors worked fewer hours than normal during their regular shift ignored the fact that the fatigue associated with a full overtime shift after that abbreviated regular shift would still have been a material and significant factor – the very factor clause 15.10 was intended to address.

[21] Third, under clause 5.01 of the collective agreement, the employer's managerial rights ". . . will not be exercised in a manner inconsistent with the expressed provisions of this Agreement." In these cases, the employer's strict interpretation and application of clause 15.10 was inconsistent with the collective agreement. It required or condoned payment for work not done. It ignored the underlying intent and purpose of a provision like clause 15.10. Hence, the employer ought not to be allowed to exercise its right to manage the workplace hours of its employees in a way that is inconsistent

with the normal expectations of the bargaining agent and the employer as set out in and secured by the collective agreement.

[22] Fourth and last, counsel for the bargaining agent and the Group A grievors submitted that it was a reasonable inference that the real reason that the employer sent the grievors home early on Day 1 was not to give them some extra rest before the start of the overtime that evening. Rather, it was to enable the employer to avoid triggering clause 15.10 of the collective agreement by enabling it to argue – as it did before me – that the grievors did not work a total of 15 hours before the start of their next regular shift the following day. There was no true operational reason for the employer to organize the work how it did other than to avoid clause 15.10. Counsel submitted that that was inconsistent with the collective agreement as a whole and that I ought not to countenance it.

[23] Counsel for the bargaining agent and the Group A grievors submitted in the alternative that, if the grievors were not entitled to the nine hours following the completion of their overtime shift on Day 2, they ought to have been paid at double time for their regular shift on Day 2. This submission was built on the wording of clause 15.09(a) of the collective agreement, which provides that ". . . overtime shall be compensated at . . . double (2) time for all hours worked in excess of eight (8) hours in a continuous period of work or in excess of eight (8) hours in a day . . . ." The grievors worked eight hours of overtime before starting their regular eight-hour shift on Day 2. They were required to work their regular day shifts on Day 2. Hence, they worked more than eight hours "in a continuous period of work" and so were entitled to double time at the start of their regular day shifts on Day 2.

[24] Counsel for the bargaining agent and the Group A grievors conceded that that submission, on its face, conflicted with the definition of overtime in the collective agreement. Clause 2.01(o) provides that "'overtime' means time worked by an employee outside of the employee's regularly scheduled hours." Given that definition, counsel's alternative submission depended on me finding that the regular day-shift hours on Day 2 were in effect hours ". . . outside of the employee's regularly scheduled hours . . . ." However, he submitted that, at a number of places, the collective agreement provides for overtime rates for time in fact worked inside the employee's regularly scheduled hours.

[25] For example, clause 15.09(b) of the collective agreement provides that an employee is to be paid triple time ". . . for all hours worked by an employee who is recalled to work before the expiration of the nine (9)-hour period referred to in clause 15.10." Hence, clause 15.10 expressly contemplated the possibility of an employee being required to work his or her regularly scheduled shift, even though that shift might fall during the nine-hour break otherwise mandated by clause 15.10. Counsel submitted that this was an example of the collective agreement providing for overtime rates for work done during an employee's regularly scheduled hours.

[26] Counsel for the bargaining agent and the Group A grievors also referred to clause 15.14 of the collective agreement, which entitles an employee to overtime rates if he or she is required to work through his or her "regular meal period." He said that that was another example of overtime paid for work done during an employee's regularly scheduled hours.

[27] Finally, counsel for the bargaining agent and the Group A grievors pointed to clause 15.05 of the collective agreement, which permits transferring an employee ". . . from one shift to another within a workday subject to the application of clause 15.09." When the employer transfers an employee from one shift to another within the same day overtime rates apply, even though the shifts in question are both regularly scheduled hours; see *Brady et al. v. Treasury Board (National Defence)*, PSSRB File Nos. 166-02-24895, 24896, 24898 and 24134 (19931130).

[28] Therefore, the basic submission was an employee required to work more than eight hours in a continuous period is entitled to overtime rates, even though those excess hours might fall within what would otherwise be considered the employee's regularly scheduled hours of work.

[29] By way of remedy, counsel for the bargaining agent and the Group A grievors sought the following:

- with respect to his primary submission;
    - a declaration that the employer breached the collective agreement by denying the grievors the nine hours' rest they were entitled to under clause 15.10 of the collective agreement, starting at the beginning of their regular day shifts on Day 2;

- an order that the employer must compensate the grievors for the loss sustained due to that breach; and

- that I retain jurisdiction to determine the amount of that compensation in the event that the parties are not able to reach an agreement on that compensation; or

- with respect to his alternative submission;

  - a declaration that the employer is obligated to pay the grievors at overtime rates for the hours they worked on their regularly scheduled shifts on Day 2;

  - an order that the employer is to compensate the grievors for the difference between the applicable overtime rate and the rate actually paid; and

  - that I retain jurisdiction to determine the amount of that compensation in the event that the parties are not able to reach an agreement on that compensation.

**B. <u>For the employer</u>**

[30] Counsel for the employer submitted that the focus in clause 15.10 of the collective agreement, and indeed in the overtime provisions in clauses 15.09(a) and (b), is on hours worked. That being the case, the only hours that counted when determining whether clause 15.10 was triggered were those worked during a 24-hour period. Since the grievors did not work a total of 15 hours in any relevant 24-hour period they were not entitled to the nine-hour rest period that clause 15.10 mandates.

[31] The fact that the employer's decision to send the grievors home early on Day 1 avoided what would otherwise have happened – the triggering of clause 15.10 of the collective agreement – did not alter that conclusion. The employer was fully entitled to send the grievors home before the end of their regular shifts. Although clause 15.01(a) provides that "[t]he hours of work shall be . . . eight (8) hours per day . . .", clause 15.04 makes it clear that those hours ". . . shall not be construed as a guarantee of a minimum or of a maximum hours of work." Hence, nothing barred the employer from sending its employees home early. Even though the employer paid the grievors for the

hours not worked, and sending them home might have been a mistake, the collective agreement does not bar the employer from paying for work not done. Thus it was not a mistake that vitiated the basic point that the grievors did not work a full 8-hour shift on Day 1. Therefore, they did not work 15 hours by the time of their next regularly scheduled shifts, at 07:45 on Day 2.

[32] Counsel for the employer submitted that the employer did not attempt to avoid the collective agreement, contrary to what was suggested by counsel for the bargaining agent and the Group A grievors. In fact, it lived up to its obligations. The employer was concerned about the health and safety of its employees, which is precisely why it sent them home early on Day 1, to give them extra rest to enable them to work safely on Day 2.

[33] Turning to the alternative argument advanced by counsel for the bargaining agent and the Group A grievors, counsel for the employer submitted that the bargaining agent's and the Group A grievors' position was premised on the assumption that overtime occurred only after a regularly scheduled shift.

[34] However, the evidence of Mr. Beaulieu, which the bargaining agent and the Group A grievors did not contest, was that overtime was in practice assigned before as well as after a regularly scheduled shift began. Moreover, overtime is, in clause 2.01(o) of the collective agreement, defined as ". . . time worked . . . outside of the employee's regularly scheduled hours . . . ." In these cases, the hours worked by the grievors on Day 2 were their regularly scheduled hours. Hence, those hours could not be considered overtime.

[35] Counsel for the employer emphasized that the overtime in question was not required in the sense of being ordered by the employer. The evidence was that the overtime was offered to the grievors and that they accepted it and agreed among themselves on who would work it and at what time.

[36] Counsel for the employer concluded by requesting that all the grievances be dismissed.

**C. <u>Bargaining agent's and Group A grievors' rebuttal</u>**

[37] Counsel for the bargaining agent and the Group A grievors submitted that the point was not whether the employer had the power to send its employees home early.

Instead, it was whether, in context, the employer used its right to send the grievors home to avoid the obligation that would otherwise have arisen. In other words, if the employer used its power not for operational reasons but to avoid the nine-hour rest provided for under clause 15.10 of the collective agreement, then it used its power in a manner inconsistent with the collective agreement.

## IV. Reasons

[38] The grievances before me turn on a question of interpretation. It is trite law in adjudicative jurisprudence that my obligation as an adjudicator is to draw the bargaining agent's and employer's intention from the words they used when fashioning the collective agreement. I am not permitted to rewrite the collective agreement, by virtue of section 229 of the *Public Service Labour Relations Act* (*PSLRA*), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22. Section 229 provides as follows:

> ***229.*** *An adjudicator's decision may not have the effect of requiring the amendment of a collective agreement or an arbitral award.*

If the words used are clear, then I must apply them, unless the context suggests that the bargaining agent and the employer intended a different result.

[39] I will start with clause 15.10 of the collective agreement and the question of its interpretation. The operative words, as far as the grievances are concerned, are the following: ". . . an employee who works for a period of fifteen (15) hours or more in a twenty-four (24) hour period shall not report on his/her next regular scheduled shift until nine (9) hours has elapsed from the end of the previous working period . . . ." The agreement of the bargaining agent and the employer as expressed in the wording of clause 15.10 appears clear. An employee who works 15 hours or more in a 24-hour period is entitled to a 9-hour rest period at the conclusion of that 24-hour period.

[40] In these cases, the parties agree that the 24-hour period in question commenced at 07:45 on Day 1 and ended at 07:45 on the following day. Did the grievors work 15 hours or more during that period? The answer has to be "No." As detailed above, in both cases the total hours worked by the Group A and the Group B grievors in the 24-hour period that commenced at the start of their regularly scheduled shift at 07:45

on Day 1 was less than 15 hours. Hence, clause 15.10 of the collective agreement is not, on its face, triggered.

[41] The bargaining agent's and the Group A grievors' submission requires a finding that such a result is contrary to the collective agreement. I accept that the employer was able to achieve the result of the grievors working less than 15 hours by sending the regular day-shift employees home early. Had it not done so, the total hours worked would have exceeded 15, and clause 15.10 would have been triggered. But that did not happen. The employer sent the grievors home early on Day 1. Nothing in the collective agreement barred the employer from doing it. The regular hours of work set out in clauses 15.01 and 15.02 ". . . shall not be construed as a guarantee of a minimum or of a maximum hours of work . . .": see clause 15.04. The employer ". . . has and shall retain the exclusive right and responsibility to manage its operation in all respects . . .": see clause 5.01. If the employer decides to send its employees home early, it is entitled to.

[42] The bargaining agent and the Group A grievors acknowledged the employer's rights but argued that it cannot exercise its rights ". . . in a manner inconsistent with the expressed provisions of this Agreement . . .": see clause 5.01 of the collective agreement. The inconsistency is said to be that the employer paid for work that was not done, that it failed to act according to the underlying intent of clause 15.10, and that, in all respects, it acted as it did not for valid operational reasons but solely to avoid the effect of clause 15.10.

[43] In the end, I was not persuaded by those submissions.

[44] The employer's decision to pay the grievors for hours not worked might have been contrary to subparagraph 34(1)(*a*)(i) of the *FAA*; I make no decision on that point. However, the alleged illegality, for the sake of argument, of the decision is not relevant or material to the issue before me. If the employer had not paid the grievors for hours not worked, they would have remained in exactly the same position vis-à-vis clause 15.10 of the collective agreement. They still would have worked only approximately 6 hours of regular time on Day 1 and so still would have worked less than the 15 hours necessary to trigger clause 15.10. In both cases, I would be left with the same question: can the employer, on the facts of these cases, avoid triggering clause 15.10 by sending its employees home early?

[45] This brings us to the intent of clause 15.10 of the collective agreement. The bargaining agent and the Group A grievors submitted that logic as well as reality dictates a conclusion that the bargaining agent and the employer understood and meant the 9-hour rest period for which the collective agreement provides to occur after rather than before or during the 15 hours of work. People become fatigued after rather than before a long period of work. Hence, the wording of clause 15.10, which times the start of the nine hours of rest ". . . from the end of the previous working period . . . ." Giving the grievors' nine hours of rest between the end of the first period of work (the foreshortened regular shift) and the start of the second period of work (the overtime work that started that evening) did not comply with that intent. The difficulty with that submission is that it invites me to, in effect, rewrite the collective agreement, which is something that I am not allowed to do by virtue of section 229 of the *PSLRA*.

[46] Clause 15.10 of the collective agreement is focused on hours of work in a 24-hour period. Its only express concern is whether the employee worked 15 hours or more in a 24-hour period. Those 15 hours could be accumulated in one of the following two ways:

- back-to-back shifts over a continuous 15-hour (or more) period; or
- shifts or periods of work that total 15 hours or more separated by a period of non-work.

The second situation is of concern in these cases. Clause 15.10 of the collective agreement does not say that non-work hours do not count if they might otherwise have been worked. It does not create two classes of non-work hours, those that occur after the end of a regularly scheduled shift and those that occur because the shift has, for whatever reason, ended early. It focuses solely and expressly on the number of hours worked during a 24-hour period. For me to accept the bargaining agent's and the Group A grievors' submission would mean adding, amending or altering the wording of clause 15.10 to incorporate a consideration of the character of non-work hours, or when they occurred during the 24-hour period, in addition to the number of work hours. I am not entitled to do that, by virtue of section 229 of the *PSLRA*.

[47] Moreover, nothing on the facts flies in the face of, or is manifestly inconsistent with, what the bargaining agent and the Group A grievors stated was the underlying

intent of clause 15.10 of the collective agreement. If that clause is intended to remedy the fatigue and loss of productivity that comes with long hours of work in a given period, then whatever reduces those hours, regardless of whether it is regular time off or extraordinary time off by way of a foreshortened shift, is still an expression of that intent. If, then, the total number of hours of non-work is 9 or more, the goal of clause 15.10 (to ensure that employees have a minimum number of hours of rest in a 24-hour period), is met.

[48] In my view, the other difficulty with the bargaining agent's and the Group A grievors' submission is that it lacks a yardstick by which to determine when the concern about fatigue is satisfied. The submission depends to some extent on the notion that a six-hour shift is not much different from a regular eight-hour shift. To the extent that that is true, then sending an employee home two hours early does not really satisfy the fatigue issue that clause 15.10 of the collective agreement was intended to address. But what does? Suppose the employer sent the grievors home three, or four, or six hours early? Surely at some point the fatigue issue that the bargaining agent and the Group A grievors submitted underlies clause 15.10 would be satisfied. Yet, nothing in the interpretation or the submission urged upon me by the bargaining agent and the Group A grievors helps the bargaining agent and the employer determine when the fatigue issue is satisfied. In essence, then, I am being asked to choose an interpretation that results in uncertainty as to its application over the interpretation in the express wording of clause 15.10, which is certain. As a rule, an interpretation certain in its application is to be preferred over an uncertain interpretation.

[49] The same interpretative concerns apply with respect to the alternative submission advanced on behalf of the bargaining agent and the Group A grievors. Clause 15.09(a) of the collective agreement states that ". . . overtime shall be compensated at . . . double (2) time for all hours worked in excess of eight (8) hours in a continuous period of work . . . ." And it is true that the grievors worked in excess of 8 hours in a continuous period from 23:45 on Day 1 to 16:15 on Day 2. But for me to decide that, as urged by counsel for the bargaining agent and the Group A grievors, the grievors were accordingly entitled to be paid at double time on Day 2 would be for me to ignore the definition of overtime. Clause 2.01(o) provides that "'overtime' means time worked by an employee outside of the employee's regularly scheduled hours." The day shift on Day 2 consisted of regularly scheduled hours. Hence, by definition,

the hours worked during the day shift on Day 2 cannot be overtime within the meaning of clause 15.09(a).

[50] As outlined by counsel for the bargaining agent and the Group A grievors, there are certainly some situations in which overtime could be worked within what might otherwise be an employee's regularly scheduled shift. However, every one of them is expressly provided for and mandated by the collective agreement. Absent such an express and specific exception, the general definition of "overtime" applies, being work done outside of a regularly scheduled shift. Hence, the bargaining agent's and the Group A grievors' alternative submission must, in my view, fail as well.

[51] For all of the above reasons, I make the following order:

*(The Order appears on the next page)*

## V. Order

[52] The grievances are dismissed.

November 2, 2012.

**Augustus Richardson,**
**adjudicator**