Date: 20120319

File: 566-02-3601

Citation: 2012 PSLRB 33

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

JOSH HORNER

Grievor

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
Horner v. Treasury Board (Department of National Defence)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Kate Rogers, adjudicator

For the Grievor: Kimberley Turner, Q.C., counsel, and Kelsey McLaren

For the Employer: Adrian Bieniasiewicz, counsel

Heard at Halifax, Nova Scotia,
November 15, 2011.

I. Individual grievance referred to adjudication

[1] At the time of the events in question, Josh Horner, the grievor, was a deck officer, classified SO-MAO-03, employed by the Department of National Defence (DND) as Master on the Ville-class harbour tug, the *Listerville,* in Halifax, Nova Scotia. On November 13, 2009, he grieved violations of article 30 ("Hours of Work and Overtime") and Appendix "K" ("40 Hour Work Week System") of the collective agreement between the Treasury Board ("the employer") and the Canadian Merchant Service Guild ("the union"), for the Ships' Officers Group, expiry date March 31, 2011 ("the collective agreement").

[2] The grievance alleged that DND breached the collective agreement by failing to provide adequate notice of a change to the grievor's hours of work, as required by article 30 and Appendix "K". As corrective action, the grievor requested that he be compensated as per his overtime claim for August 11 to 13, 2009, in addition to a declaration that the employer violated the collective agreement.

[3] Throughout the grievance process and in its final-level response, dated June 23, 2010, DND acknowledged that it had failed to respect the requirements of article 30 of the collective agreement by not providing notice of a shift change. However, DND held that, as the collective agreement offered no remedy for a breach of the provisions in question, the grievor was not entitled to the overtime compensation that he claimed. Accordingly, the grievance was only partially allowed, in that the employer granted only the declaratory remedy requested and not the overtime compensation.

[4] The grievance was referred to adjudication on April 1, 2010. At issue is the appropriate remedy for an acknowledged breach of the requirement to provide 48 hours' notice of a shift change, as set out in clause 30(d) of Appendix "K" of the collective agreement, which provides as follows:

> *(d) For officers who regularly work five (5) consecutive days per week on "non-watchkeeping" vessels the hours of work shall be consecutive, except for meal periods,*
>
> *and*
>
> *The normal daily hours of work shall be between 0600 and 1800 hours.*

> *and*
>
> *Officers shall be given forty-eight (48) hours notice of any change in scheduled starting time.*

II. Summary of the evidence

[5] The parties provided an agreed statement of facts with two attached appendices (Exhibit G-1). The grievor testified on his behalf. Archibald McAllister, National Superintendent of Auxiliary Vessels, Department of National Defence (DND), testified for the employer. In addition to the agreed statement of facts and its appendices, four other documents were tendered into evidence.

[6] The agreed statement of facts provides the following:

> 1. *The Guild is the bargaining agent for Ship Officers employed by the Federal Government, which unit includes Officers assigned to auxiliary vessels operated by the Department of National Defence.*
>
> 2. *Josh Horner is an officer within the bargaining unit. At all times relevant to this grievance he was regularly employed as Master on the Ville Class Harbour tug, the* Listerville. *The* Listerville *is a non-watchkeeping vessel.*
>
> 3. *Mr. Horner's hours of work are as set out in Appendix K of the collective agreement applicable to this bargaining unit (attached as Appendix A). His regular hours of work are Monday to Friday, 0730 – 1530, 40 hours per week.*
>
> 4. *On August 11, 2009, Mr. Horner worked his normal shift of 0730 until 1530, and an additional 2 hours of overtime.*
>
> 5. *During the morning of August 11, 2009, Mr. Horner was advised by Jim Costen, the Assistant Superintendent of Operations, that he was required to join the* Glenbrook, *a Glen class naval tugboat, to proceed to Shelburne, Nova Scotia, that evening, departing at 2000 hours.*
>
> 6. *The* Glenbrook *is a non-watchkeeping vessel. The* Glenbrook*'s normal Deck Officer complement while in the harbour is two (2), one Master and one Mate. While at sea, the* Glenbrook *requires a Master and two Mates, which necessitated the addition of Mr. Horner to the crew.*
>
> 7. *The trip was to sail to Shelburne and tow the* Summerside, *a Kingston class coastal defence vessel, from drydock back to Halifax.*

> 8. *The Regular Officers and Crew on the* Glenbrook *received at least 48 hours notice of the trip to Shelburne.*
>
> 9. *Mr. Horner did not receive 48 hours notice of this change in work assignment, contrary to Appendix K, article 30(d) which provides:*
>
> > *(d) For officers who regularly work five (5) consecutive days per week on "non-watchkeeping" vessels the hours of work shall be consecutive, except for meal period,*
> >
> > *and*
> >
> > *The normal daily hours of work shall be between 0600 hours and 1800 hours*
> >
> > *and*
> >
> > *Officers shall be given forty-eight (48) hours notice of any change in scheduled starting time.*
>
> 10. *Mr. Horner's assignment on the* Glenbrook *extended from 2000 hours on August 11, 2009, until 1200 hours, August 13, 2009, when the* Glenbrook *had returned to Halifax. During this time, Mr. Horner worked sea watches of four (4) hours on and eight (8) hours off. A copy of the logbook for the applicable days is attached as Appendix B.*
>
> 11. *Deleted*
>
> 12. *The Employer denied this claim and on November 4, 2009, a grievance was filed on behalf of Mr. Horner (attached as Appendix C).*
>
> [*Sic* throughout]

[7] The grievor testified that, at the time of the events in question, he was the captain of the *Listerville,* which was a small tug working within the confines of Halifax harbour. On August 11, 2009, at about 10:00, the grievor was told that he was to report at 20:00 to the *Glenbrook*, a naval tugboat, for a two-day assignment sailing to Shelburne to pick up a naval boat that had been in dry dock and to return it to Halifax. The grievor explained that he was to be on board the *Glenbrook* as a watchkeeping mate, to assist with navigation when the captain was not on watch.

[8] The grievor testified that, on August 11, 2009, he worked his regular shift on the *Listerville* from 07:30 to 15:30 and then worked about two hours of overtime, immediately following his regular shift, on another ship, assisting with an experiment.

He reported to the *Glenbrook* about 15 minutes before vessel was scheduled to leave port, which was at 20:00. In fact, according to the logbook pages, entered on consent as Appendix "B" of the agreed statement of facts, the *Glenbrook* departed at 19:55.

[9] The grievor worked sea watches while on the *Glenbrook*. Generally, during non-watchkeeping hours, the grievor was on his own time and was free to get his meals or to sleep. However, he explained that it was also possible to become involved in work during non-watchkeeping hours if a need arose to assist.

[10] Although he reported for duty just before 20:00 on August 11, 2009, his first watch did not start until 04:00 on August 12, 2009. On August 12, the grievor was on watch between 04:00 and 08:00. He went back on watch between 18:00 and midnight. He explained that, although watches were normally four hours on and eight hours off, they switched to six hours on for that particular watch, to prepare for the towing of the naval ship. On August 13, the grievor was back on watch at 04:00 until 08:00. The *Glenbrook* arrived in Halifax harbour shortly after his watch ended. The grievor testified that he could not remember if he assisted when they arrived in the harbour, but he would have been available to work. Once the ship was secured at 10:00, he stayed on board for a barge move. That was completed by 12:00; he then returned home.

[11] The grievor submitted an overtime claim (Exhibit G-2) for the two hours of overtime worked on August 11, 2009 before he reported to the *Glenbrook* and for all the hours spent on the *Glenbrook* outside his regular shift, including all non-watchkeeping hours. He explained that, even though non-watchkeeping hours were free time, he was not free to leave the ship and was required to be willing and able to work as required even in his off hours. In his view, this was captive time because he was at his place of work and was not able to return home. However, he acknowledged that officers would not be paid overtime for non-watchkeeping hours on a watchkeeping vessel in a regular overtime situation.

[12] The grievor based his overtime claim on a claim he submitted in 2008 in which he had been paid overtime for all hours outside his regular schedule when, as in this situation, he had been asked to do almost exactly the same trip without 48 hours' notice. He testified that, in 2008, Ms. McMillan, the administrative clerk, told him to submit his claim for all the hours outside his regular shift. Given that experience, he used the same formula to claim overtime for this trip. However, this time his overtime

claim form was returned to him with a sticky note attached to it stating that the claim did not fall within the approved interpretation of overtime (Exhibit G-3). The grievor testified that he believed that another officer was paid the overtime claimed when he made exactly the same trip earlier in 2009, also without notice.

[13] Mr. McAllister testified that there was some urgency to the *Glenbrook*'s trip to retrieve the naval ship from dry dock. He explained that, once the shipyard in Shelburne finished the repairs to the ship, it ceased to have responsibility for it. The vessel was no longer insured, so it had to be picked up and secured quickly. They had about 48 hours' notice of the need to pick up the ship. As a result, most officers received the required 48 hours' notice of the change to their shift schedules. Unfortunately, the grievor did not.

[14] Mr. McAllister explained that he does not authorize or administer individual overtime payments. The administrative clerks, like Ms. McMillan, have the authority to approve overtime payments. However, he explained that the administrative clerks are concerned only with the administration of overtime, not with what overtime work is actually being approved. The captain approves the overtime work, and the clerks approve how it is claimed. Mr. McAllister then signs off on the control sheets, which give the administrative clerks the final authority to pay overtime. When he reviews the control sheets, he does not have the actual overtime claims. Instead, he sees only the overall amount being claimed. If the amount seems unusually high to him, he asks to see the actual claims.

[15] Mr. McAllister testified that he was not involved in the decision to deny the grievor's overtime, and he did not believe that he was consulted about it. He said that, if he had been consulted, he would have noticed that the grievor should have been paid overtime for the two hours worked immediately following his regular shift on August 11, 2009. He stated that employees are entitled to receive overtime, even in a watchkeeping situation. He noted that, in some circumstances, employees on a watchkeeping vessel might be engaged in work outside watch time, such as when they go on harbour time or are working to secure a vessel.

III. Summary of the arguments

A. For the grievor

[16] The union noted that the only matter at issue in this grievance is the appropriate remedy for an admitted breach of the collective agreement. The grievor was not provided with 48 hours' notice of a change to his regularly scheduled hours of work, as required by his collective agreement. The requirement to provide this notice is absolute.

[17] The union submitted that, although some collective agreements include a penalty clause that permits changing an employee's hours of work on short notice on the payment of a penalty, clause 30(d) of Appendix "K" of the collective agreement is not such a provision. In the absence of a penalty, the clause must be construed as establishing a mandatory requirement for 48 hours' notice of a change to designated hours of work.

[18] The union argued that, on a plain reading of "shall," and in the absence of any language to the contrary, the provision at issue must be construed as mandatory. If clause 30(d) of Appendix "K" of the collective agreement were not interpreted as mandatory, the word "shall" would be negated. The parties agreed to the language in the agreement, which is clear and unambiguous. Therefore, it must be found mandatory and not directory. The union cited *Foothills Hospital v. U.N.A., Local 115* (1993), 33 C.L.A.S. 631, and *International Chemical Workers, Local 721 v. Brockville Chemical Industries Ltd.* (1972), 24 L.A.C. 423.

[19] The grievor's hours of work, as established under clause 30(d) of Appendix "K" of the collective agreement, were 07:30 to 15:30, Monday to Friday (Exhibit G-1). The employer could not just pretend that the designated hours of work did not exist so that it could change them at will. The grievor was entitled to rely on the fact that he had regular, designated hours of work. Citing *United Glass and Ceramic Workers, Local 248 v. Canadian Pittsburgh Industries Ltd.* (1972), 24 L.A.C. 402, and *Rodd Grand Hotel v. Hotel and Restaurant Employees and Bartenders' International Union, Local 662* (1997), 48 C.L.A.S. 150, the union argued that employees are entitled to rely on the schedules created by their employers, which allow them to arrange their lives. Depriving an employee of the right to work regular hours would require express language in the collective agreement.

[20] The union argued that because the grievor's designated hours of work cannot be changed without 48 hours' notice, they must be deemed to remain in place for 48 hours, to satisfy the notice requirement. All other hours worked by the grievor between August 11 and 13, 2009 must have been overtime because they were hours worked in excess of his designated hours of work. Clause 30.06 of the collective agreement defines overtime as ". . .time worked by an officer in excess of his/her designated hours of work. . . ."

[21] Although the Federal Court's decision in *Attorney General of Canada v. McKindsey,* 2008 FC 73, which reversed *Maessen and McKindsey v. Treasury Board (Department of National Defence),* 2006 PSLRB 95, held that, absent a penalty clause, no monetary remedy could be ordered in similar circumstances and involving similar collective agreement provisions, the union argued that that decision does not apply to the facts of this case. *McKindsey* involved a different collective agreement, different parties and different factual circumstances. The union suggested that the differences in the collective agreement reflected deliberate choices made during bargaining, which changed the context of this grievance. For example, the union observed that the collective agreement in this case does not have any negotiated penalty clauses because of its intention that the provisions be understood to be mandatory, which is a significant difference from *McKindsey*.

[22] The union noted particularly that *McKindsey,* unlike this case, explicitly did not address the argument that the requirement to provide 48 hours' notice of a shift change is mandatory and that the regular hours therefore continue. Because the adjudicator in *McKindsey* found that the shift had been changed, he concluded that overtime was not payable in the circumstances. Instead, he ordered a monetary remedy as a penalty for the breach of the collective agreement. On judicial review, the Federal Court agreed that overtime was not payable but also found that no monetary remedy was appropriate based on the particular language of the collective agreement involved, noting that other provisions of that collective agreement dealing with notice requirements for shift changes included penalty clauses but that the provision in question did not.

[23] Citing *Machining Plant Waltec Components, a division of EMCO Ltd. v. United Steelworkers of America, Local 9143,* [1998] O.L.A.A. No. 7 (QL), the union argued that there can be no right without a remedy and that the collective agreement should be

interpreted in a way that would provide a remedy. In this case, the overtime provisions of the collective agreement can be interpreted in a way that would be consistent with the grievor's rights under the agreement and that would provide a remedy.

[24] The union contended that all hours spent by the grievor on the *Glenbrook* outside his designated hours of work must be characterized and paid as overtime, because that was the direction that was given to the grievor in 2008 by Ms. McMillan, who was responsible for authorizing overtime. In the alternative, the union argued that the grievor should be paid overtime for all watchkeeping hours outside his designated hours of work.

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

[25] The employer stated that the question that must be answered is whether the grievor is entitled to overtime compensation for hours worked outside his modified work schedule, even though not all the hours claimed as overtime were actually worked, simply because he did not receive the required notice. The burden of proof is on the union to demonstrate that there are consequences beyond a declaration of a breach of the notice requirements set out in the collective agreement.

[26] Clause 30(d) of Appendix "K" of the collective agreement sets out no consequences for a failure to provide the requisite 48 hours' notice of a shift change. The parties are highly sophisticated. Had they wished to attach a penalty to the provision, they would have done so. They did not. A finding that there are consequences for failing to provide notice under clause 30(d) would have the effect of amending the collective agreement, which an adjudicator cannot do.

[27] The employer argued that the overtime provisions in the collective agreement do not apply to the circumstances of this case. Clause 30.06 defines overtime as ". . . time worked by an officer in excess of his/her designated hours of work. . . ." There is a difference between the phrases "in excess of" and "outside of." The grievor worked "outside of" his designated hours, not "in excess of" them. Clause 30.01 establishes that officers work eight hours per day and clause 2.01(f) defines "day" as the 24-hour period beginning at 00:00. The definition of "in excess of" is "beyond," according to *Merriam-Webster's Collegiate Dictionary* (10th Ed.). The definition of overtime does not say "regularly designated hours," but simply "designated hours." The grievor did not work in excess of his designated hours, since his designated hours

were those of the new shift assigned to him. Furthermore, the grievor was not ordered to accept the new shift. His assumption of the new hours of work was entirely voluntary.

[28] The employer argued that the *McKindsey* decision dealt with the identical issue and noted that, although the portion of the adjudication decision that dealt with the remedy was quashed, the adjudicator's findings on the interpretation and application of a similar overtime provision in similar circumstances remain applicable. In particular, the adjudicator held that the phrase "in excess of" in the definition of overtime must have meaning. An employee cannot receive overtime for hours not worked; overtime applies only if the employee worked "in excess of" eight hours.

[29] Having found that, as a result of the change to his scheduled hours of work, the grievor's situation did not meet the definition of overtime, the adjudicator in *McKindsey* ordered monetary remedy as a penalty for the breach of the notice provision of the collective agreement. The Federal Court overturned that remedy on the grounds that the collective agreement did not provide for such a remedy and further that it was beyond the adjudicator's jurisdiction to award compensatory damages, as no evidence of financial loss was presented. The employer argued that the Federal Court's decision is binding on subsequent adjudicators of the Public Service Labour Relations Board, unlike the cases cited by the grievor, which are not binding.

[30] The employer submitted that the grievor's request for a financial remedy should be denied. It argued that, in the circumstances of this case, and based on the language of the collective agreement, the notice period set out in clause 30(d) of Appendix "K" means little because the clause itself does not specify the consequences of a breach.

C. Rebuttal

[31] The union noted that the argument in *McKindsey* was different from the argument being made in this case. In *McKindsey*, there was no argument that the employer could not change employees' shifts without 48 hours' notice, whereas in this case, the union contended that the notice requirement was mandatory and that, therefore, shifts could not change without notice. Furthermore, the collective agreement language examined in *McKindsey* differed from that in this case, including the use of the word "designated" in the definition of overtime at clause 30.06.

[32] Despite the employer's argument that awarding a monetary remedy for a breach of the collective agreement would amount to an amendment to the collective agreement, in fact, such an order would simply be giving effect to the overtime provision and would be consistent with a finding that the shift does not change until the notice period is exhausted. The union argued that the provision of a specific remedy attached to the notice provision would have weakened the clause because it would have allowed for a shift change without 48 hours' notice.

[33] Although the employer argued that the grievor volunteered for the new shift assignment, there was no evidence that he did anything more than accept the shift. Paragraph 5 of the agreed statement of facts (Exhibit G-1) states that the grievor was "required" to join the *Glenbrook*, which is quite different from "volunteering" to join her.

IV. Reasons

[34] The grievor filed a grievance on November 13, 2009, which alleged that the employer violated clause 30(d) of Appendix "K" of the collective agreement by "… not providing adequate notice to change the Officer's hours of work as required…." As corrective action, in his grievance, he asked that he be "… financially compensated as per his overtime claim for the dates August 11-13, 2009. Furthermore, the Guild requires a declaration that the employer has violated the Collective Agreement."

[35] Both in its final-level response to the grievance and at the hearing, the employer acknowledged that it had failed to provide the 48 hours' notice required by clause 30(d) of Appendix "K" of the collective agreement. However, the employer denied the request for financial compensation on the grounds that the grievor had not worked overtime during the period in question and that the collective agreement specified no remedy for a breach of clause 30(d) of Appendix "K".

[36] At the hearing, the employer drew support for its position from the *McKindsey* decision, which involved the same employer, the same workplace and similar facts, although it dealt with a different bargaining unit and a different collective agreement. The adjudicator in *McKindsey* found that, in similar circumstances, overtime was not payable because the grievors in that case had not worked in excess of their normal daily or weekly hours of work. However, he ordered financial compensation as a penalty for the breach of the collective agreement on the ground that there cannot be a

right without a remedy. On judicial review, the Federal Court held that the adjudicator erred when he awarded financial compensation for the breach of the collective agreement, as it did not provide for such a remedy, the grievance did not ask for it and the grievor did not substantiate any financial loss.

[37] The employer argued that I was bound by the Federal Court's decision in *McKindsey*. However, the union argued that *McKindsey* concerned different parties, a different collective agreement, somewhat different facts, and different arguments and, therefore, was not binding on me.

[38] As a general rule, I agree that previous adjudication decisions involving similar facts and similar collective agreement language ought to be persuasive. Consistency and predictability in decision making will obviously assist the parties in their collective bargaining relationship. Nevertheless, I agree with the adjudicator in *Breau et al. v. Treasury Board (Justice Canada),* 2003 PSSRB 65, at para 13, when he said the following:

> *[13] . . . It is generally accepted that to deny the persuasive force of previous decisions made in similar fact circumstances and calling for the interpretation of the same or closely related collective agreement terms between the same parties would wholly undermine those values universally accepted as essential to any rational system of third-party dispute resolution: certainty, uniformity, stability and predictability. On the other hand, neither justice nor equity are to be sacrificed to these values as in our collective bargaining regime, absent a jurisdictional challenge, an arbitrator or adjudicator is statutorily bound to adjudicate a dispute upon its merits. Indeed, to do otherwise by blindly adopting the reasons for decision given in a previous dispute could arguably be viewed as an improper declining of jurisdiction.*

I also agree with his observation that a court decision on judicial review, which upholds or overturns an adjudication award on the basis of patent unreasonableness, is not necessarily binding on future adjudications. I see no reason his reasoning would not equally apply to judicial review decisions in which the standard of review is reasonableness. The adjudicator quoted extensively at paragraph 16 from *Essex County Roman Catholic School Board v. Ontario English Catholic Teachers' Association* (2001), 56 O.R. (3d) 85, and I believe that that passage is worth repeating here:

. . .

> *There is a fundamental difference in judicial review proceedings between the correctness and patently unreasonable standards of review. Where a decision of an arbitrator (or an administrative tribunal) is reviewed on the standard of correctness, the court's decision on judicial review will determine the "correct" interpretation - i.e., the only interpretation. The implications of the court's decision will be, looking backward, the resolution of any conflicts among previous decisions of arbitrators and, looking forward, the existence of a clear binding precedent to be followed by all arbitrators in future cases.*
>
> *Where a decision of an arbitrator is reviewed on the standard of patently unreasonable, the effect of the court's decision is entirely different. All the reviewing court decides is whether the challenged award is patently unreasonable. In deciding that issue, the court does not decide whether the award was the only possible award or the best possible award: see United Brotherhood of Carpenters & Jointers of America, Local 579 v. Bradco Construction Ltd., [1993] 2 S.C.R. 316 at p. 341, 102 D.L.R. (4th) 402, per Sopinka J. . . .*

. . .

[39] There are other reasons I believe that I should not simply follow *McKindsey* without further analysis. *McKindsey* was decided under the *Public Service Staff Relations Act (PSSRA).* This has clear implications for the remedial authority of an adjudicator, as subsection 228(2) of the *Public Service Labour Relations Act (PSLRA)*, which gives an adjudicator the jurisdiction to make whatever order he or she considers appropriate, differs from the language used in the *PSSRA.* Under the *PSSRA*, in subsection 96.1, adjudicators were given all the enumerated powers of the Board, but there was no equivalent to the broad grant of remedial authority set out in subsection 228(2) of the *PSLRA.* As held in *Amos v. Deputy Head (Department of Public Works and Government Services),* 2008 PSLRB 74 (overturned in 2009 FC 1181, upheld in 2011 FCA 38), subsection 228(2) is considered broader than its predecessor provision because it is not simply an enumerated list of powers. It seems to me that this has clear implications for this case, which is at its core about remedy.

[40] Further, although the employer in this case is the same as in *McKindsey*, the union and collective agreement are different. The union in this case argued that the differences in the collective agreements are important. In particular, the collective agreement in this case does not have any explicit penalty clauses, unlike the one under

consideration in *McKindsey*. This is significant because one of the factors that influenced the Federal Court when it reviewed the *McKindsey* decision was the fact that the collective agreement in that case contained three clauses that specified penalties when hours of work were changed without the required notice, even though the one under consideration did not. The Court concluded that, had the adjudicator "… referred to these clauses, his interpretation of the collective agreement and his ability to make the monetary remedy pursuant to paragraph 1(d) might have been different…" (at paragraph 37).

[41] In my view, this grievance raises a different issue than *McKindsey*. It was not argued in *McKindsey* as it was in this grievance that the requirement to provide notice before changing an employee's hours of work is mandatory. In fact, the adjudicator noted with interest that that argument had not been made. The difference is important. In *McKindsey*, the parties accepted that the grievors' scheduled hours of work changed. The whole question of the grievors' entitlement to overtime took place in the context of the new schedule and resulted in a finding that the grievors had not worked in excess of their scheduled hours of work and therefore were not entitled to overtime. The rest of the decision concerned the adjudicator's attempt to find a remedy for an admitted breach of the collective agreement and his determination to impose financial compensation as a penalty for the breach. The decision on judicial review concerned that latter point.

[42] In this case, the union argued forcefully that clause 30(d) of Appendix "K" of the collective agreement, which requires the employer to provide 48 hours' notice of any change to an employee's schedule, is mandatory. I agree. In my view, the collective agreement must be interpreted in a manner that gives effect to the intention of the parties as indicated by the language that they used. The parties to this agreement agreed that "[o]fficers shall be given forty-eight (48) hours notice of any change in scheduled starting time." Nothing in the clause suggests any retreat from the plain reading of "shall" as mandatory. For example, it does not say "shall normally," as found in clause 30(b) of Appendix "K".

[43] The employer, without specifically addressing the argument that the provision is mandatory, contended that no consequences could attach to a breach of the provision because it provided for no penalty. The employer noted that the parties are highly sophisticated and that, had they wanted a penalty to attach to a breach of the

provision at issue, they would have negotiated one. In response, the union observed that attaching a penalty to the clause would have made it less than mandatory; hours of work could then be changed on less than 48 hours' notice, as long as a penalty were paid. The union argued that a conscious bargaining decision was made to reflect the importance placed on regular working hours.

[44] As I stated, I believe that it is my job to interpret the collective agreement in a manner consistent with the intentions of the parties as expressed through the language that they used. In my view, I must find an interpretation that most closely honours the bargain negotiated. I believe that clause 30(d) of Appendix "K" is mandatory. The language used is quite clear, and I do not believe that the failure to provide a penalty clause makes the provision less than mandatory. However, it does suggest to me that the remedy for the breach of the provision is best found by applying the provision strictly. If 48 hours' notice is required before a shift can be changed, then it seems to me that an employee's hours of work do not change until the notice requirement is satisfied. This is the only conclusion that gives effect to the actual language of the collective agreement.

[45] The employer acknowledged that it violated the collective agreement when it required the grievor to report to the *Glenbrook* outside his regular working hours and to work watchkeeping shifts without the requisite 48 hours' notice. However, the employer argued strenuously that the overtime provisions do not apply because the grievor did not work in excess of 8 hours in a 24-hour period, which are his designated hours of work. This argument would succeed only if the grievor's hours of work immediately changed to the new schedule. However, if the grievor's hours of work could not change until he had received the required 48 hours' notice, then he must be deemed to have kept his designated hours of work, and all hours worked in excess of that schedule would be overtime. This conclusion is consistent with the language of the collective agreement. I must also note that I do not believe that the fact that the grievor agreed to the change in his hours of work in any way lessens the employer's obligation to provide 48-hours' notice.

[46] I do not believe that, by deeming that the grievor maintained his original or designated hours of work until the notice period was satisfied and by characterizing all hours worked outside that schedule as overtime, I am imposing a penalty not contemplated by the collective agreement. I am remedying a breach of the collective

agreement by putting the grievor in the position he would have been in had the breach not occurred, as nearly as I can. In my opinion, this is not different from the awards of deemed overtime that adjudicators frequently order to remedy missed overtime opportunities. As noted in para 10 of *Fanshawe College v. O.P.S.E.U., Local 110* (1994), 39 L.A.C. (4th) 129, at 132:

> *Where an award of damages is contemplated, the question is not whether the collective agreement precisely requires a payment of the kind sought, but whether the breach of the collective agreement has caused harm to the grievor which should be compensated by a payment of a certain amount.*

Further, I believe that this is well within my remedial authority, as set out in subsection 228(2) of the *PSLRA*.

[47] The grievor claimed overtime for all hours outside his normally designated hours of work between August 11 and 13, 2009. The union argued that non-watchkeeping as well as watchkeeping hours should be compensated because the grievor was captive on the vessel and could not pursue his normal life. However, in his testimony the grievor acknowledged that non-watchkeeping hours would not be considered overtime in a normal overtime situation. The union also argued that the grievor's claim should be paid as submitted because he had been told to submit it that way by Ms. McMillan, the administrative officer. I do not find that a singular example from the past constitutes a practice. I believe that the grievor's own testimony that non-watchkeeping hours are not generally compensated as overtime is more persuasive.

[48] For all these reasons, I believe that the grievor should be compensated at the applicable overtime rate for all hours actually worked outside his regularly designated hours of work. Included in those hours should be the two hours of overtime that he worked on August 11, 2009, before he boarded the *Glenbrook* that were not paid but which Mr. McAllister acknowledged should have been paid. The grievor should also be paid overtime at the applicable rate for any hours actually worked during the securing of the naval vessel *Summerside* or on the return to Halifax harbour if he returned to duty during his non-watchkeeping hours to assist. However, given the evidence before me, I do not believe that the non-watchkeeping hours constitute hours worked in excess of the grievor's designated hours of work and therefore will not order overtime compensation for those hours.

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

(The Order appears on the next page)

V. Order

[50] The grievance is allowed to the extent that the grievor is to be paid overtime at the applicable rate for all hours actually worked outside his regularly designated hours of work between August 11 and 13, 2009.

[51] I will remain seized for a period of 90 days in the event the parties require assistance implementing this award.

March 19, 2012.

Kate Rogers,
adjudicator