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*Federal Public Sector Labour Relations and Employment Board Act* and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

**RICHARD HOMER**

Grievor

and

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

Employer

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

In the matter of individual grievances referred to adjudication

**Before:** Margaret T. A. Shannon, a panel of the Federal Public Sector Labour Relations and Employment Board

**For the Grievor:** James L. Shields, counsel

**For the Employer:** Nour Rashid, counsel

Heard at Victoria, British Columbia,
February 19, 2019.

## I. Individual grievances referred to adjudication

[1] The grievor, Richard Homer, was employed in a position classified EL-6 at Canadian Forces Base (CFB) Esquimalt in British Columbia when the employer, the Department of National Defence (DND), changed his hours of work from 08:00 to 16:00 to 10:00 to 18:00 for February 2 to 5, 2015, to accommodate testing certain equipment aboard a ship moored in the harbour of that base. He also grieved when it was done again for March 2 to 5, 2015, for the same reason.

[2] The grievor alleged that the employer violated clause 23.04 of the collective agreement between the Treasury Board and Local 2228 of the International Brotherhood of Electrical Workers (IBEW) for the Electronics group (All Employees), which expired on August 31, 2014 ("the collective agreement"). The grievor is a member of the non-operating group of employees covered by that agreement.

[3] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act* and the *Public Service Labour Relations Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and *the Federal Public Sector Labour Relations Act*.

## II. Summary of the evidence

[4] The grievor is a subject matter expert attached to the Canadian Forces Underwater Weapons Group at the DND's Fleet Maintenance Facility Cape Breton. He was involved in installing highly technical ring-laser gyroscopes on a vessel tied to the jetty at CFB Esquimalt for repairs. The gyros were tested while the vessel was tied up at night to negate the effect of sunlight on the vessel's hull. The fact that the vessel was tied to the jetty is of significance, to distinguish that trial from sea trials. The parties agreed that even though the testing was conducted on a military vessel, it was not at sea, and that article 32 of the collective agreement, entitled "Sea Trials' Allowance", did not apply.

[5] The testing process was scheduled to have four parts. The grievor was to be involved in the third and fourth parts. He had been scheduled to participate in testing scheduled in December, which was cancelled.

[6] On January 30, 2015, he received an email from the Combat Systems Engineering Officer (CSEO) advising him that in anticipation of the upcoming testing, his hours of work for February 2 to 5, 2015, would be changed to 10:00 to 1800. According to the grievor, his normal hours of work are 08:00 to 16:00. He has worked those hours for the entire 21.5 years of his DND employment at CFB Esquimalt.

[7] Again, on February 27, 2015, the CSEO confirmed that the change to work hours would apply for the March testing dates. The emails were the official notification, but earlier, the CSEO had also notified the grievor verbally of the change. Both times, the grievor's work hours were changed due to monetary considerations, according to the emails. The CSEO wanted to avoid paying overtime.

[8] That was not the first time for such a change. In November 2014, the employer had ordered the CSEO to make the same change to facilitate other work on vessels at CFB Esquimalt (Exhibit 3, tab 1, at page 5), but he did not effect the change. On those days, the grievor did not work the amended hours of work for the trials and was paid overtime after 16:00 instead of after 18:00. When the CSEO did make the change in February and March 2015, the grievor was paid overtime for the hours he worked after 18:00.

[9] Commander Damien Chouinard-Prévost testified that he was the CSEO as a Lieutenant Commander in 2015 and that the grievor's supervisor reported to him. Commander Chouinard-Prévost presented the grievor's work description (Exhibit 4) and testified that it lists as a key activity planning, coordinating, and conducting trials, including writing reports. Included is the requirement to work overtime.

[10] Shipboard trials may be conducted in the harbour or at sea. Every system on-board a ship undergoes some level of trial and has some set of conditions to be met specific to that trial. Conditions could include environmental impacts, such as no waves or little wind, or the requirement that the trial be done at night. They may also include system or test-equipment availability. If a problem is noted that affects a trial, it must be identified and corrected.

[11] In this case, the trial required the testers to overcome the impact of the sun on the vessel's hull, so the verification needed to be done at night. The trials were scheduled to begin in the late afternoon, after the setup was completed in the mid-afternoon. Between 10:00, when the employees arrived, and the time the setup began, the employees were expected to complete other work. If they had none, they waited for

the setup to begin. Whether they had other work to do depended on their section head.

[12] Commander Chouinard-Prévost testified that ships go through an operational cycle and that they go through trials in preparation for that cycle. Ships will also go through trials if a system fails and repairs are performed. A ship will normally undergo trials four to eight times per year. When a ship undergoes normal maintenance, the work crews have a couple of months' notice of the trials based on what the ship is scheduled to do. In the case of a system failure, there may be only a couple of weeks' notice of a trial; possibly, as little as one week.

[13] When a trial is to be scheduled, the employees are given as much notice as possible, in the circumstances. The trial coordinator will discuss personnel availability with the subsection head and subject matter experts, which becomes the first notice of the trial. The official notice of the trial is ideally given one week in advance of the trial itself.

[14] In anticipation of this trial, Commander Chouinard-Prévost spoke to the local IBEW shop steward, R. Oxman, in the late fall to discuss altering the start time of the workday to 10:00 under clause 23.04 of the collective agreement. In the Commander's reading of the article, it would still have allowed a 7.5-hour workday within the defined core working hours of 07:00 to 18:00. Mr. Oxman saw no issue with that approach to scheduling the hours of work as long as the workday was 7.5 consecutive hours between the core hours, with a half-hour meal break.

[15] According to the Commander, when the grievor found out about his plan, the grievor went to Paul Cameron, the assistant business manager of IBEW Local 2228, and asked if the employer could shift his work hours. He was told that it could not be done without paying a premium. That was inconsistent with the Commander's understanding of clause 23.04 and his discussion with Mr. Oxman. He tried to speak with Mr. Cameron and Doug Pittman, another IBEW representative, but was unsuccessful.

[16] In an email to Mr. Cameron, Commander Chouinard-Prévost explained his reasoning for changing the start and end times of the workday during the upcoming trials (Exhibit 3, tab 1, pages 1 and 2). Cost savings were a primary reason for the change. The work hours needed to be scheduled so as to limit the number of overtime hours, as was ordered by the engineering manager, Commander Ryan Solomon. The decision to change the work hours for the trial was not arbitrary but was directly

related to the trial's schedule and the need to reduce overtime.

[17] The trial scheduled for December 2014, which was discussed in the late fall of 2014, was cancelled. The grievor continued to work from 08:00 to 16:00 and continued to challenge the employer's authority to alter his work hours to 10:00 to 18:00.

[18] On December 10, 2014, the grievor's supervisor emailed Commander Chouinard-Prévost, looking for clarification (Exhibit 3, tab 3).

[19] On January 9, 2015, the Commander emailed his section heads, summarizing the employer's position that management has the right to shift start and end times within the core working hours (Exhibit 3, tab 5).

[20] On January 30, 2015, the grievor was advised that his work hours during the week of trials scheduled for February 2 to 5, 2015, would be from 10:00 to 18:00. He was also advised that the reasons for the change to his hours were the nature of the trials and monetary considerations. He received that information via email (Exhibit 3, tab 6). The same information was conveyed for the March 2 to 5 trials (Exhibit 3, tab 7). He disagreed as in his opinion, the change contradicted the collective agreement.

[21] In cross-examination, Commander Chouinard-Prévost was asked if he stated in his email to Mr. Cameron (Exhibit 3, tab 1, page 2), about the change to the work hours, why he did not think that clause 23.15 would apply. He explained that there were no exceptional circumstances as anticipated in that clause.

[22] Commander Solomon testified that he was the engineering manager of the Fleet Management Facility Cape Breton when the grievances were filed. He had received a direction from his commanding officer to work within the wage and limited-overtime envelopes he had been provided. Together with his staff, he was required to determine how to use their funds to accomplish the work required as efficiently as possible.

[23] In the fall of 2014, Commander Solomon became aware that the grievor was not happy with the changes to his hours of work that had been proposed because of the impact they would have on his overtime accumulation. Commander Chouinard-Prévost (then a Lieutenant Commander) brought it to Commander Solomon's attention. Commander Solomon asked whether it violated the collective agreement. When he was advised that it did not, he gave the direction to continue to execute the commanding officer's orders and to amend the schedules.

## III. Summary of the arguments

### A. For the grievor

[24] Under clause 7.01 of the collective agreement, management retains the right to schedule shifts and maintain the order and efficiency of the workplace. Clause 7.02 qualifies the rights in clause 7.01 and requires that management rights be weighed against other collective agreement provisions that trump clause 7.01.

[25] Clause 23.04(a)(i) states that the normal scheduled hours of work under the collective agreement are 7.5 hours worked Monday to Friday between the core hours of 07:00 and 18:00. Clause 23.15 states that when circumstances warrant, non-operating employees may be required to work hours other than their normal daily hours of work. The question in this case is whether the decision to shift the grievor's start time from 08:00 to 10:00 was a deviation from the normal working hours.

[26] The employer's right to deviate from a schedule is not absolute when clause 7.02 is read together with clauses 23.04 and 23.15. According to Brown and Beatty, *Canadian Labour Arbitration*, 4th edition, at paragraph 5:3110, management rights may not be exercised inconsistently with the expressed provisions of a collective agreement. When the collective agreement sets out normal hours of work, it is improper for the employer to require employees to regularly work a schedule other than that set out in a collective agreement.

[27] Clauses 23.04 and 23.15 must be read together. Clause 23.04 is an absolute bar to changing an employee's hours of work without implementing clause 23.15. By referring to "their" normal daily schedule, the employer specifically acknowledges that employees work 7.5 hours and that those hours cannot be changed simply to avoid paying overtime. Nothing in the overtime article precludes changing schedules to avoid paying overtime.

[28] The Board's fundamental objective is to determine the parties' intention from the written word of the collective agreement. The parties are assumed to have intended what was written. All the words are presumed to have meaning and are intended to not be in conflict. From what was written, the employer's right to deviate from the grievor's schedule was not unlimited. Had the parties intended that, they would have relied solely on clause 7.01. Instead, they included clauses 23.04(a)(i), which includes the word "normal", and 23.15, which includes the words "normal daily schedule", as a limit as described in clause 7.02.

[29] There is a presumption against redundancy. An arbitrator must assume that the parties did not agree to superfluous or unnecessary wording when crafting their agreement (see *Selkirk and St. Andrews Regional Library v. Canadian Union of Public Employees, Local 336* (2003), 119 L.A.C. (4th) 141 at para. 36; and *Dufferin-Peel Catholic Separate School Board v. Ontario Elementary Catholic Teachers' Association*, 2006 CarswellOnt 10088).

[30] *International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board (Department of National Defence)*, 2009 PSLRB 2 ("*IBEW*"), is the seminal case for interpreting clauses 23.04 and 23.15. That case, unlike the case at hand, involved a sea trial. It established that a condition precedent must be met before the employer has the right to require non-operating employees to work other than their normal hours of work.

[31] The condition precedent is that circumstances must warrant the change. The question in this case is whether the employer evaluated the situation to determine if the circumstances warranted changing the grievor's work hours. Financial considerations do not constitute proper consideration. The employer stated that its primary concern was financial.

[32] According to paragraph 105 of *IBEW*, each change must be decided by a case-by-case assessment. From the email outlining the employer's position on the change to work hours (Exhibit 2, tab 3), it is clear that cost was the driving factor. That is reiterated in other emails (Exhibit 2, tab 2, and Exhibit 3, tab 1, page 2). In cross-examination, Commander Chouinard-Prévost testified that clause 23.15 could not have been invoked because the condition precedent could not be met.

[33] To properly proceed with changing the grievor's hours of work, the employer had to examine clauses 7.01, 7.02, 23.04, and 23.15. If the condition precedent in clause 23.15 can be met, and the circumstances that warrant changing work hours exist, then the employer may change them. If not, then it cannot change them. A trial carried out after dark does not meet the condition precedent.

**B. For the employer**

[34] The bargaining agent had the onus of clearly demonstrating on a balance of probabilities that the alleged situation took place. Discharging that burden goes far beyond entering documents that on their face are unclear (see *Arsenault v. Parks Canada Agency*, 2008 PSLRB 17 at para. 29).

[35] The parties' intention is to be discerned from their written words (see Brown and Beatty, at paragraph 4:2100.) The language they used is a true expression of their intent. The Board is limited by the express terms and conditions of the collective agreement and can interpret and apply only the language in it. To determine the parties' intent when they entered into a collective agreement, the Board must use the ordinary meaning of the words they used, while taking into account the overall context of the agreement (see *Chafe v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112).

[36] Management has the right to alter normal work hours under the broad right to direct its workforce (see Brown and Beatty, at paragraph 5:0000). The employer used its rights in clauses 7 and 23.04 to adjust the grievor's work hours for the February and March 2015 trials. The collective agreement did not limit those rights and contained nothing that would prevent exercising them. The employer had no need to rely on *IBEW*, which is distinguishable as it dealt with sea trials. They are the subject of clause 32 and did not occur in this case.

[37] Clause 23.15 provides for a condition precedent, which is the crux of this case; it is when circumstances warrant. That condition relates to exercising management's right to change work hours to those outside the normal hours of 07:00 to 18:00. To change them, the employer must meet a higher threshold, which is the requirement to examine whether circumstances warrant the change. Since the change implemented in this case was within the normal hours of work, clause 23.15 does not apply.

[38] Simply because the grievor worked the same shift for 21 years did not preclude management from exercising its rights to change it. Unless management is otherwise prohibited specifically or by inference, it may exercise its management rights to reschedule hours of work within the normal work hours. Managerial responsibilities remain unrestricted unless the collective agreement provides otherwise (see *P.S.A.C. v. Canada (Canada Grain Commission)*, 5 FTR 51 (T.D.); and *Brescia v. Canada (Treasury Board)*, 2005 FCA 236).

[39] In this case, there were no such restrictions, so management altered the grievor's work hours within the limits of its discretion. The plain and ordinary meaning of the words in clause 23.04 is clear in that as long as the work hours are within 07:00 to 18:00, there is no violation of the collective agreement.

[40] When it was faced with budgetary restraints, the employer chose not to

schedule the required work outside normal working or core hours. For the work that could not be completed within those hours, the employer paid its employees at the overtime rate, including the grievor. It had legitimate operational reasons for making the change. The grievor was not singled out. The change applied to all employees. They were given as much advance notice as possible. The union was consulted in advance, and the change lasted only as long as was required to complete the trial. The employer acted reasonably in the circumstances.

## IV. Reasons

[41] This grievance calls into question the interpretation and interplay of three collective agreement provisions, which are article 7, "Managerial Rights", and clauses 23.04 and 23.15 of article 23, "Hours of Work". For ease of reference, I will reproduce each and highlight what I consider the key phrases, as follows:

> ***ARTICLE 7***
>
> ***MANAGERIAL RIGHTS***
>
> ***7.01*** *The Local recognizes and acknowledges that* ***the Employer has and shall retain the exclusive right and responsibility to manage its operation*** *in all respects including, but not limited to, the following:*
>
> *a) to plan, direct and control operations; to determine methods, processes, equipment and other operating matters; to determine the location of facilities and the extent to which these facilities or parts thereof shall operate;*
>
> *b) to direct the working forces including the right to decide on the number of employees, to organize and assign work,* ***to schedule shifts*** *and maintain order and efficiency, to discipline employees, including suspension and discharge for just cause;*
>
> ***and it is expressly understood that all such rights and responsibilities not specifically covered or modified by this Agreement shall remain the exclusive rights and responsibilities of the Employer.***
>
> ***7.02*** *Such rights will not be exercised in a manner inconsistent with the express provisions of this Agreement.*
>
> …
>
> ***23.04 Non-Operating Employees***
>
> *a)*

> i) ***Normal scheduled hours of work*** *for non-operating employees shall be thirty-seven decimal five (37.5) hours per week consisting of five (5) consecutive days, Monday to Friday inclusive, each day to be seven decimal five (7.5) hours (exclusive of a meal break)* ***between the hours of 07:00 and 18:00*** *local time.*
>
> ii) *Notwithstanding subparagraph (i), at the request of the employee and with the approval of the Employer, the stated hour of 7:00 may be modified to 6:00. Where such agreement has occurred, the Employer will notify the local union representative or the IBEW business office of the change in the scheduled hours of work.*
>
> b) *These employees will be provided with a scheduled unpaid meal break of not less than thirty (30) consecutive minutes nor more than one (1) hour commencing between one-half (1/2) hour prior to and one (1) hour following the mid-point of the normal work period except that a meal break of less than thirty (30) minutes may be granted to compensate for summer hours. It is recognized that in extenuating circumstances the meal break may be advanced or delayed because of work requirements. However, if the employee is able to take a meal break of at least a half (1/2) hour's duration commencing within the time prescribed it shall be considered as satisfying the requirements of this clause. If an employee is not able to take a meal break within the prescribed time period the period of the meal break shall be counted as time worked.*
>
> …
>
> ***23.15*** *It is recognized that when circumstances warrant certain non-operating employees may be required to work their normal daily hours within a schedule which deviates from their normal daily schedule as specified in clause 23.04. When a non-operating employee is* ***required to work his or her normal seven decimal five (7.5) hours*** *a day* ***at times other than those specified in clause 23.04*** *the employee shall receive his or her normal daily rate of pay plus a premium payment as follows:*
>
> *In a calendar month for days worked in accordance with the above,*
>
> 1) *for the first (1st) and second (2nd) day, in accordance with note 6 of Appendix B-1 for each day,*
>
> 2) *for the third (3rd), fourth (4th) and fifth (5th) day, in accordance with note 7 of Appendix B-1 for each day,*
>
> 3) *for the sixth and subsequent days, in accordance with note 8 of Appendix B-1 for each day.*

> *If the employee works less than three decimal seven five (3.75) hours he or she shall receive the full premium for the day and revert to his/her normal schedule for that day which will be reduced by the equivalent number of hours that the employee worked. If the employee works three decimal seven five (3.75) hours or more he or she shall be paid the full premium for the day and his or her normal daily rate of pay.*
>
> *Hours worked in excess of seven decimal five (7.5) hours per day shall be subject to Article 25.*
>
> [Emphasis added]

[42] I cannot accept the grievor's interpretation of clauses 23.04 and 23.15. With due respect to the 2009 decision in *IBEW*, I do not think it is a proper application of the language in these clauses in the circumstances of this case.

[43] Clause 23.04(a)(i) states that the normal scheduled hours of work for a non-operating employee, such as the grievor, are 37.5 hours per week, consisting of 5 consecutive 7.5 hour shifts, Monday to Friday, scheduled between the hours of 07:00 and 18:00. That means an 8-hour shift, taking into account the half-hour meal break. The shift starts between 07:00 and 10:00 and ends between 15:00 and 18:00, Monday to Friday (unless the start time is modified to 06:00 by an agreement made pursuant to clause 23.04(a)(ii)). Generally, the grievor worked from 08:00 to 16:00, according to his evidence. That was one of the shifts possible within normal working hours, as was the shift that the employer required him to work during the ship trials in February and March 2015.

[44] Contrary to what the grievor would have me accept, which is that his shift was carved in stone, clause 23.04 does not provide that; nor does clause 23.15. If the parties intended that shifts be set, they would have set that out explicitly in the article or somewhere else in the collective agreement. Instead, they left it to the employer's discretion using clause 7.01 to determine all shifts between 07:00 and 18:00, as long as the employer complies with the two prerequisites in clause 23.04. Those are that the shifts are scheduled from Monday to Friday and that they are 7.5 hours in length, excluding a half-hour unpaid meal break. Nowhere in the rest of the article is any restriction made on that authority during the hours of 07:00 to 18:00 for non-operating employees.

[45] On the other hand, clause 23.15 deals with circumstances in which employees may be required to work their normal daily hours on a schedule that deviates from their normal schedules, outside the hours identified in clause 23.04. For instance, it

could occur if the employer implemented a night shift rather than operating only day shifts, or it eliminated day shifts in favour of night shifts.

[46] The phrase "their normal daily schedule" is used in the sentence immediately following "normal daily hours", which are the hours identified in clause 23.04. Since the normal daily hours are set out in that clause, 07:00 to 18:00, then logically, the hours outside them must be between 18:00 and 07:00. The purpose of clause 23.15 is to hinder the employer's ability to schedule employees' normal work hours between 18:00 and 07:00, when normally, they would be with their families or at rest. Scheduling work during those hours results in an additional cost to the employer.

[47] The effect of what the grievor seeks would be that he would be paid at the premium rate identified in clause 23.15 for the hours worked between 16:00 and 18:00, following which he would have been paid at the overtime rate for the rest of the hours worked that day. That is clearly not what the parties intended, on a plain reading of the collective agreement. Had the shift he worked during the trials in February and March 2015 straddled the period ending at 18:00, things might have been different, but that was not so.

[48] The employer shifted the hours within the time frame identified in clause 23.04, which the parties identified as the normal working hours. The grievor began his shift at 10:00, worked 7.5 hours, and ended at 18:00, following which he was paid overtime, as required by the collective agreement. Clause 23.15 was never engaged and for that reason there is no need to determine whether or not the circumstances of this case warranted the change in the hours. Clause 23.04 was never violated.

[49] For all of the above reasons, the Board makes the following order:

*(The Order appears on the next page)*

## V. Order

[50] The grievance is dismissed.

May 22, 2019.

**Margaret T. A. Shannon,**
**a panel of the Federal Public Sector**
**Labour Relations and Employment Board**