

IN THE MATTER OF AN ARBITRATION

BETWEEN:

GOVERNMENT OF THE NORTHWEST TERRITORIES
as represented by the Minister responsible
for the *Public Service Act*

Employer

- and -

THE UNION OF NORTHERN WORKERS

Union

GRIEVANCE RE

GRIEVANCE NUMBERS

Relief Workers' Minimum Staffing
Standby Pay Claim

08-G-00728;
08-G-00775

A W A R D

BEFORE:

Thomas Jolliffe, Q.C.

FOR THE EMPLOYER:

Brian Asmundson

FOR THE UNION:

Michael Penner

HEARING LOCATION:

Yellowknife, Northwest Territories

HEARING DATE:

July 22, 2009

Date Award Issued:
October 30, 2009

This matter concerns two filed policy grievances. In its first grievance (08-G-00728), the Union alleges that the Employer has violated the collective agreement by requiring shift availability minimums for relief employees who work in correctional facilities operated by the Department of Justice. It asserts specifically that some employees have been told that they are required to be available for a minimum of six shifts per month as well as for at least three statutory holidays per year, leaving them open to possible termination for failing that requirement. Further, offer letters are being sent to potential new employees requiring signed confirmation of acceptance of the stipulated minimum availability, which presumably means that unless they agree they will not be employed, or if they fail to meet these minimums after becoming employed they too could be subject to discharge. In describing relief employees as being unscheduled employees who are required on an as-and-when basis, the Union has grieved that the supposed shift minimums were not supported by the collective agreement. In addition, it asserted that relief employees, as a newly defined category appointed to positions for which there were no established hours on a daily, weekly, or monthly basis, should be subject to the same protection from summary dismissal as any other indeterminate employees.

In its second grievance (08-G-00775), to be heard and determined jointly with the other, the Union asserts that despite grieving the issue of relief employees being informed they are required to work a minimum number of shifts per month in addition to a minimum number of shifts on statutory holidays during the year, the Employer has continued to act in what it describes as an "arbitrary manner". As such, the employees who are on a continuing to be affected by the minimum shift requirements "(should) be compensated for their time while on standby", meaning that they should receive standby pay under article 29, requested to be retroactive to the time of the decision made to impose shift availability minimums. As described by the Union therein: "For example, if an

employee works seven shifts per month (non-statutory days) then the first six will be compensated per article 29 and the seventh will be compensated as a 'regular', i.e. non-standby, shift. The same formula shall be used for statutory holidays".

In its considering the grievances as filed, the Employer sees there to be no conflict with its obligations under the collective agreement in placing certain availability expectations into offer letters at time of hire, nor in its sending letters to any existing employees, and it cites article 5.03 as allowing such directions to new or existing employees. It also states its actions to have been a management responsibility permissible under article 7.01. These two provisions read as follows:

5.03 Conflict of Provisions

Where there is any conflict between the provisions of this Agreement and any regulation, direction or other instrument dealing with terms and conditions of employment issued by the Employer, the provisions of this Agreement shall prevail.

7.01 Managerial Responsibilities

Except to the extent provided herein, this Agreement in no way restricts the Employer in the management and direction of the Public Service.

Further, the Employer sees nothing about the new Appendix A1, entitled Relief Employees, which limits its ability to seek a level of suitable availability for shifts as offered where thought to be significant. Further, it disputes any suggestion of an ongoing standby situation having been created by its actions of insisting on minimum availability. Appendix A1 in its entirety reads as follows:

APPENDIX A1

RELIEF EMPLOYEES

- A1.01** The Employer shall hire relief employees into positions for which there are no established hours on a daily, weekly or monthly basis and may be required to report to work on an as-and-when required basis for facilities where services operate on a daily basis throughout the entire year.
- A1.02 (a)** An employee may not be appointed as a relief employee to perform a job in the same facility (which includes a hospital, health centre, correctional facility, young offenders facility, or college residence) as the employee performs in the employee's other position.
- (b)** An employee in a nursing position may be appointed as a relief employee in the same facility providing that the position is more than 2 pay ranges apart from the employee's other position.
- A1.03** The Employer shall ensure that a series of relief employees will not be employed in lieu of establishing a full-time position or filling a vacant position.
- A1.04** A relief employee shall be entitled to all the provisions of this Collective Agreement with the following modifications:
- 2.01 (z)** "Probation" for relief employees means a period of paid employment of one year from the day upon which an employee is first appointed to or promoted within the Public Service. An employee who is appointed to a position which has the same duties, as his/her previous position shall not serve an additional probationary period. If an employee does not successfully complete his/her probationary period on transfer or promotion the Employer will make every reasonable effort to appoint him/her to a position comparable to the one from which he/she was transferred or promoted.
- 24.09 (1)** A relief employee holding a position for which there is a minimum and maximum rate of pay may be granted increases in pay until he/she reaches the maximum of the pay range for the position. Such pay increases are dependent on satisfactory performance of the duties of the position by the employee for a period of paid time

equivalent to the standard yearly hours of work for their position, or two (2) years whichever is less and shall not be granted to the employee until his/her Deputy Head certifies to the Employer that the employee is so performing the duties of his/her position.

42.02 (a) (i) Length of Service

A relief employee's entitlement to Ultimate Removal Assistance is based on years of continuous service with the Government of the Northwest Territories. A relief employee's year of service is equivalent to the completion of the standard yearly hours of work for the position.

A1.05 The following Articles and Clauses contained in this Collective Agreement do not apply to relief employees:

- Article 16 - Entire Article except Clauses 16.05(a) and 16.08
- Article 17 - Entire Article except Clause 17.08
- Article 18 - Entire Article
- Article 19 - Entire Article
- Article 20 - Entire Article except Clauses 20.09 and 20.10
- Article 22.02 (a), (d), (e), and (f)

A1.06 Relief employees are entitled to be paid on a bi-weekly basis for services rendered at the appropriate pay range in Appendix B.

A1.07 The Employer shall make every reasonable effort to allocate relief work on an equitable basis among readily available qualified relief employees.

It is also necessary for one to review the article 29 language, entitled Standby, which reads in its entirety as follows:

ARTICLE 29

STANDBY

29.01 (1) Where the Employer requires an employee to be available on standby during off-duty hours, an employee shall be entitled to a standby payment of one hour's pay at the employee's base salary for each eight (8) consecutive hours or portion thereof that he/she is on standby, except on his/her days of rest and designated paid

holidays.

For each eight (8) consecutive hours or portion thereof that an employee is on standby on a day of rest or a designated paid holiday, he/she shall be paid one and one-half hours pay at the employee's base salary.

- (2) An employee designated by letter or by list for standby duty shall be available during his/her period of standby at a known telephone number and be available to return for duty as quickly as possible if called. In designating employees for standby the Employer will endeavour to provide for the equitable distribution of standby duties among readily available, qualified employees who are normally required, in their regular duties, to perform that work.
- (3) No standby payment shall be granted if an employee is unable to report for duty when required.
- (4) An employee on standby who is required to report for work shall be paid, in addition to the standby pay, the appropriate overtime rate for all hours worked, subject to a minimum payment of four (4) hours pay at the straight time rate each time he/she reports, except that this minimum shall only apply once during each standby period of eight (8) consecutive hours or portion thereof.
- (5) Except in the case of an emergency, standby schedules shall be posted fourteen (14) days in advance of the starting date of the new shift schedule.

29.02 When an employee on standby is required to report for work, he/she shall be reimbursed transportation costs as follows:

- (a) Actual cost of commercial transportation each way not to exceed five dollars (\$5.00) without the production of a receipt;
- (b) Where he/she uses his/her personal motor vehicle, the appropriate distance rate specified in Clause 45.11(a)(i).

29.03 Subject to operational requirements and where there is cause, employees may refuse to be on standby during off-duty hours.

The parties were able to provide an agreed statement of facts applicable to both grievances. It includes specific reference to the definition language contained that article 2.01(m)(v) for the category of indeterminate employee known as "Relief Employee". The agreed facts are as follows:

1. **In the Collective Agreement between the Union of Northern Workers (UNW) and the Government of the Northwest Territories (GNWT) for the period April 1, 2005 to March 31, 2009, a new category of indeterminate position was created called relief worker. As set out in that collective agreement, Article 2.01 indicated as follows:**

(m) "Employee" means a member of the Bargaining Unit and includes:

- (v) a "relief employee" is an employee appointed to a position for which there are no established hours on a daily, weekly or monthly basis and may be required to report on an as-and-when required basis for operations where services operate on a daily basis throughout the entire year.

2. **Some time after the commencement of the Collective Agreement dated April 1, 2005 to March 31, 2009, the employer commenced issuing a letter to all new hires prior to their employment herewith attached hereto as Tab 7 to this Agreed Statement of Facts. In particular, the paragraph added to the letter with respect to new hires is as follows:**

"As a Relief Corrections Officer you must be available to work a minimum of six shifts per month as well as being available to work a minimum of three statutory holidays per year. You may not be called in but you must be available. Hours of work will be on an as required basis."

3. **In addition to the above, the employer issued another letter to all employees hired as relief employees prior who did not have the above paragraph in their initial hire letter. Attached hereto as Tab 8 to this Agreed Statement of Facts is a copy of the letter issued to these employees.**
4. **Appendix A1 of the Collective Agreement is a section which deals specifically with Relief Employees. Article 1.05 in Appendix A1 indicates as follows:**

The following Articles and Clauses contained in this Collective Agreement do not apply to relief employees:

- Article 16 - Entire Article except Clauses 16.05 (a) and 16.08
 - Article 17 - Entire Article except Clause 17.08
 - Article 18 - Entire Article
 - Article 19 - Entire Article
 - Article 20 - Entire Article except Clauses 20.09 and 20.10
 - Article 22.02 (a),(d), (e), and (f)
5. Article 29 of the Collective Agreement deals with Standby pay. There is not anything in Appendix A1 of the Collective Agreement from April 1, 2005 to March 31, 2009 which specifically excludes the standby pay clauses from applying to Relief Workers. The GNWT's Human Resources Manual, which is not part of the collective agreement, indicates the following in Section 604 (Overtime - General), Item 34:
34. Relief employees will be compensated at the applicable overtime rate for work performed in their relief position in excess of the standard or regular hours of work for full-time employees in similar positions on a daily or weekly basis. Relief employees will receive cash payment for overtime, as they are not eligible to receive lieu time.
6. The Employer does not pay standby pay for the six shifts per month it requires Relief Corrections Officers to be available or the three statutory holidays per year. Standby pay is paid however to relief correction officers in certain instances. For example, where a relief employee is taking over the scheduled shifts of a full-time employee and they are scheduled for up to 21 days, if the employer requires this employee to be on standby one evening outside of their shift rotation, such an employee would receive the same entitlement to standby pay as a full-time employee would be had they been on standby. The sole issue regarding standby pay for Grievance # 08-G-00775 Arbitration is whether such pay is applicable for the six shifts per month and three statutory holidays per year for which it is indicated the Relief Corrections Officer must be available.

The agreed statement of facts includes as its attached Tab 7, the offer letter containing the above quoted paragraph with respect to new hires into positions in Corrections. This letter also includes a sign-back provision entitled "Acceptance of Appointment" and reading: "I _____ accept the offer and have read the position's Job

Description on the terms and conditions outlined.”

The agreed statement of facts also includes as attached Tab 8, the letter sent to all bargaining unit members in Corrections already hired into relief employee positions. This letter reads as follows:

The Department of Justice operates a number of facilities that require staff on a continuous basis to meet operational requirements. To ensure this requirement is met, Relief Workers are hired to provide coverage when permanent full-time staff are not available. While Relief Workers cover shifts throughout the year, there are times when there is a greater need for this type of coverage. This includes statutory holidays, evenings, weekends, and peak holiday times such as summer and late December.

As a Correctional Service Relief Worker, you must be available, if called in, to work a minimum of six (6) shifts per month of the schedule including availability to work a minimum of three statutory holidays per year. Hours of work will be as and when required and include all three shifts (Day 0700-1500, Evening 1500-2300 and Night 2300-0700). Failure to make yourself available for the minimum amount of offered shifts or stat holidays can result in frustration of the employment contract and termination of your relief worker employment.

If you have any questions, please do not hesitate to contact me at (PHONE NUMBER).

In conducting its Corrections' operations, the Employer no doubt sees itself as having to realistically require that relief employees commit themselves to working a certain minimum number of shifts per month, and working a minimum number of statutory holidays per year, not as a matter of their being on standby in any usual sense of the word but by taking it upon themselves to accept enough offered shifts to satisfy the Employer's operational needs, and to justify the substantial training requirements.

The first witness to testify in this matter, Doug Friesen, is the Deputy Warden at the North Slave Correctional Center, an adult correctional facility. He does all the shift scheduling for the permanent employees a year in advance, comprising three 22 employee squads, each squad working an eight hour shift. He also attempts to schedule relief employees as far in advance as he is able to do, which is to say as soon as he knows his operational coverage requirements such as filling long-term illness relief or bid vacation relief. However, often

there is little lead time as might occur with a variety of short-term leaves, sometimes no more than a few hours. By his description, at the correctional facility where he works, there were 28 relief workers employed at the time the grievance was filed, of which he understood that only eight were without employment elsewhere and relied on the correctional facility for regular assignments. The rest of them, he said, had a “smattering” of outside employment commitments, some scheduled for mine work on a two weeks in/two weeks out basis, and others being difficult to find on short notice for various reasons. He attempts to reach relief employees by telephone, working his way down the call-in sheet not by seniority or date of hire but going from one name to the next on an equal opportunity/availability basis. He said that he has had occasion to place calls to everyone on the list throughout the course of the day looking for available relief employees, sometimes even twice.

By Mr. Friesen’s description, the disputed availability provision was introduced into the hire letters in about March 2008, and also into the letters sent to already hired relief workers, requiring that they make themselves available for a minimum number of shifts as described therein, because he and the other schedulers in the correctional facilities were not able to find enough willing relief employees when they called to request they take an upcoming shift(s). He said that generally the response to often was not that they were unable to work as requested, or simply did not answer their phones. It was causing an overtime usage issue by having to work scheduled permanent employees additional hours when not able to find any replacements. At the same time it was apparent, he said, that numbers of unwilling or unavailable relief workers were “tying up” positions which could better be made available to others who wanted to do the work. There is also, by his description, a realistic training, even a health and safety issue, where relief workers have continued to be employed but take only a few or no offered shifts over a considerable period of time. Moreover, the initial training program, the entry-level training at time of hire, is itself a relatively expensive proposition, involving four weeks of classroom work, possibly two additional weeks depending on availability of staff, followed by 14 mentoring shifts.

In Mr. Friesen's experience, subsequent to the parties creating the new relief employee classification, it was apparent that patterns of refusing or not being available to work when requested became significant enough to have become disruptive, both in terms of his time and other managers' time spent in attempting to bring people into work, and inevitably having to face short staffing situations. He recalled one individual eventually being contacted in Edmonton where he had taken a job as a sheriff but wanted to remain on the Corrections' employee roll, with no ongoing intention to maintain any real availability.

Mr. Friesen also testified that no permanent staff or relief employees receive standby pay in Corrections. The permanent staff are scheduled a year in advance, and the relief workers are called into work when needed, albeit with as much advance notice as is available in those circumstances. With the new programme in place by mid 2008 requiring relief employees to be willing to take a minimum number of shifts, in his facility, during the month preceding the July 2009 arbitration hearing 22 out of 28 relief employees worked enough shifts to average approximately 76 paid hours as a group, which is to say an average of some nine shifts each that month, ranging anywhere from their covering long-term full-time absences to working weekends covering days off. He said that lately only three relief employees have been taking no shifts, either not accepting any telephone calls or known to be otherwise occupied for the time being. Indeed, by his recollection, these three relief employees had not taken any shifts offered to them during the four months preceding this hearing despite there being regularly telephoned when he is called upon to work his way down the call-in sheet. He said that he had no problem with a few employees needing to be out of town for a full month, possibly more time, there having been no ramifications in any such case, meaning that once advised (a "heads-up") he would simply take the person off the call-in list until his/her expected return. In addition, one employee was known to be off work on maternity leave, and two others were on medical leave for the month. By Mr. Friesen's description, having relief employees understand the significance of making a time commitment to Corrections, in terms of taking a minimum number of shifts as

indicated in the letters, has certainly improved the situation over what it was. As it now stands, he said, the majority of relief employees will “take the bull by the horns” and let their supervisors know when they are available for insertion into shifts during an upcoming month, which he sees as easily satisfying the issue of minimum availability as enough shifts are able to be scheduled on that basis. He said that it has become quite commonly done as a way of reaching a “working understanding” suitable to both sides. At the same time he accepts that there has to be some workable standard set to ensure that the facility is getting a suitable commitment from all its relief employees, which is what he understands the minimum availability requirement to address, as opposed to having to “flag them” individually as the other alternative. He said that currently, as matters now stand, he might have to look for relief employee call-ins over 200 times in a given month, spread out across the 28 relief staff, and hence the need as he sees it for some reliable availability standard.

Colette Perry has been the Manager of Labour Relations in the Department of Human Resources since March 2006, and prior to that time had spent three years as a labour relations advisor in the same department. She was closely involved with the negotiations surrounding the creation of a new employee category, that of relief employee, during the last round of collective bargaining leading up to the 2005- 2009 collective agreement. She saw it as a matter of the parties recognizing that it was not operationally feasible in some departments, including Corrections, to be running short staffed on a sustained basis. It became apparent that having an identifiable, suitably trained, employee group in place to cover sick leave, special leave, and vacation time, was necessary. Subsequent to the current collective agreement taking effect, in discussions amongst management persons, it became apparent that in Corrections the scheduling situation had turned frustrating inasmuch as some employees hired as relief staff were “for months on end” not indicating any availability for their irregularly assigned shifts, some not even being regularly reachable. She said that the point was reached where it was considered essential for management to make clear its expectations at time of offering employment for a level of reasonable availability, and even to those already

hired.

By her review, Ms. Perry saw nothing about the new Appendix A1 which limited the Employer's ability to call upon relief employees as thought by its managers to be required for operational reasons, or seek some assurance from them as to a reasonable level of ongoing availability. Further, she saw no conflict with the "relief employee" definition language of article 2.01(m)(v) which referred to this new category of employee as being appointed to a position with no established hours and "may be required to report to work on an as-and-when required basis...". Indeed, she saw it as consistent with its contractual obligations that the Employer be able to set out some reasonably clear expectations as to one's availability to work the supposedly "required" shifts. Being repeatedly telephoned by a manager, with reference to the call-in sheets, but being available only one or two days a month or even less, or perhaps not even regularly reachable, was not thought to be workable. Persistent unavailability on anyone's part was seen by management to have a direct operational impact for obvious reasons. Having adequate coverage in place to balance ongoing workplace demands was thought to be essential, she said, otherwise one could envisage some pattern of ongoing unavailability defeating the purpose of having relief employees in the workplace to begin with.

Ms. Perry, in her testimony, also made reference to the Employer's "Q & A" sheet distributed to employed relief workers as an introduction to their working in this defined employee category. It includes references to numbers of collectively bargained rights attaching to the position, such as eligibility for the Public Service Health Care Plan as an indeterminate employee with job security, and also referencing certain rights and benefits to which they have no access, such as not qualifying for the Employer's pension plan or its disability insurance plan. She also cited the Human Resources Manual, both topic 604 dealing with over time and some general issues, and topic 604a addressing standby and call-back pay. Clearly, by reference to the collective agreement article 23.08, overtime compensation was to be paid as indicated therein "... at the applicable overtime rate for work performed in their

relief position in excess of the standard for regular hours of work for full-time employees in similar positions, either on a daily or weekly basis". At the same time, she did not see any likelihood of standby pay under article 29.01(1) which references the Employer "requir(ing) an employee to be available on standby during off-duty hours...", and 29.01 (2) which requires them to "be available during his/her period of standby at a known telephone number and be available to return to duty as quickly as possible if called...", and 29.01 (3) which requires that "no standby payment shall be granted if an employee is unable to report for duty when required". The contract language does not suggest, in her view, that standby pay is accessible to compensate relief employees for simply being reasonably available during any given month, or on some statutory holidays, to accept offered shifts "as required" by reference to the definition language of article 2.01 (m) (v).

The Human Resources Manual topic 604 sums up the Employer's understanding by indicating that the definition for "standby" is "where an employee must be available during off duty hours and has been placed on standby status", and topic 604a which defines it somewhat differently as "time outside of the employee's regular working hours. An employee, on direction from an authorized manager, must be available for recall to work". Ms. Perry sees contractually obligated standby pay as compensating employees for having to be immediately, absolutely, reachable when called to require their attending at work outside of their regularly rescheduled work hours. She does not understand that it has anything to do with managers seeking some indication from relief employees of reliable availability, "for clarity purposes" as she put it, in their taking shifts as might be offered to them in the normal course of fulfilling their ongoing employment obligations. Certainly they are not expected to always be available to work, or even always reachable, when called by managers for coverage purposes in the usual course of working their way down the call-in lists.

Ms. Perry acknowledged in cross-examination that it was only in Corrections where relief employees were being issued the letters giving rise to the grievances. She agreed that it came about following discussions with the

Director of Corrections and the Client Service Manager for Justice Department, with no union representative present. The relief employee category had existed from November 2005 under the current collective agreement, with these discussions over the necessity of Corrections' relief employees committing to a level of availability occurring by about June 2007 after ongoing operational difficulties had become apparent. Admittedly, there had been no consultation with the Union over this issue of availability expectations. She acknowledged not having any awareness of any discharges or other discipline being imposed at any time against employees who were chronically unavailable, although she believes that at least "some contracts were terminated" after six months of taking no offered shifts. She agreed that the Q & A sheet handed out to new relief employees made no reference to the minimum availability requirement, albeit item 18 therein indicated "as a Relief Worker, you are expected to be available to cover operational needs on evenings, weekends, statutory holidays and during peak vacation times for regular employees such as summer, Christmas and March break", and indeed the definition language 2.01(m)(v) indicated that they "may be required to report to work on an as-and-when required basis...". At the same time, by Ms. Perry's description, the Employer had to be concerned with Corrections being able to meet its general expectations with respect to fulfilling operational requirements, which required relief employees to be generally available when needed. By her understanding, it was the very reason for the category of relief employee being created under the current collective agreement. It carries indeterminate employee group status as having been appointed to positions, as opposed to the Employer continuing to rely on casual employees to fulfill its relief coverage needs as it had previously done.

Ms. Perry also testified that by her understanding, were management at Corrections not to have any written expectations in place as to level of availability, presumably the Employer prior to ever being able to eventually commence a disciplinary course of action would at some point have had to explain expectations to employees in some reasonable fashion, which at least has now been set out with some clarity through these disputed letters. The

Employer thought it useful, perhaps even critical, to get the point across to its employees, especially in Corrections with its established operational needs, that there was an expectation they would be reasonably available for work as relief employees. She believed that it still left the Corrections' managers to consider cases on an individual basis where it was thought that reasonable availability was not being met. Nor did she see that putting the expectation in an offer letter of hire somehow meant that the Union was being deprived of its position as the exclusive bargaining agent, although she agreed that these persons who were expecting to be hired, by accepting indeterminate employment as relief workers, signing the offer letter, were expressly agreeing to take the job on the basis of being reasonably available as set out therein. She was not quite sure how the situation would be monitored over time, and presumably there might be some conflicted versions as to how many days a person might consider himself to have been available, although presumably the call-in list information could be consulted from time to time. She agreed that while stated in the employment offer as an availability requirement, there were no consequences set out for not meeting expectations once hired. She thought that ultimately it might raise the issue of possible frustration of contract were a person not to comply as the months progressed.

During her testimony, Ms. Perry, was presented with an excerpt from an arbitration case, *Re Nav Canada and I.B.E.W., Loc. 2228 (Mews Grievance)* (2000), 90 L.A.C. (4th) 354 (T. Jolliffe), concerning which she said she was an agreement with the characterization of "standby". In that case, mandatory call-back overtime work was contrasted with the standby requirement set out in a specific article of the collective agreement. The arbitrator discussed the difference as follows:

Under the terms of the collective agreement, the employer has the right to assign overtime and to discipline employees who refuse to work overtime. This right exists with respect to "regular" overtime and call-back overtime. However, while most types of overtime can be known in advance and the employee can be informed of an overtime assignment, either by scheduling the overtime or by informing the employee while he is at work, call-back overtime presents a problem.

The requirement for call-back overtime arises after the employee has left the workplace and

his services are needed before he is scheduled to return to the workplace. The problem is that the employer must first make contact with him to order him to return. This is where standby comes in.

The word "available" was used on numerous occasions during the hearing of the present reference to adjudication. What does it mean in the context of this case and particularly in the context of Article 29?

It can be said with certainty that it does not mean only that the employee holds himself available to work overtime and, therefore, it must be assumed that an employee who is ordered to work overtime is available to do so. The term available, as used here, must be understood to mean that the employee makes himself available to be reached by the employer so that he may be ordered to work overtime. In the words of Article 29.02: "an employee designated for standby duty shall be available ... at a known telephone number ...". Once ordered to report for overtime, the employee on standby must then be capable of doing so.

An employee who is not designated by the employer to be on standby is free to do as he pleases on his own time. For example, he can choose to go out drinking with his friends so that even if the employer succeeds in reaching him, he will be in no condition to report for work.

The standby provisions of the collective agreement refer to the procedure whereby employees are designated to make themselves available to be reached by the employer so that they may be called back to the workplace and, of course, they maintain themselves in a state of readiness to return in the event that they are called. The purpose of the standby premium is to compensate such employees for the fact that, to some extent, their time is no longer entirely their own to do with as they please.

Quite unshakable in cross-examination, Ms. Perry does not view the written notification to incoming new relief employees, or existing relief employees, as constituting any standby requirement whether or not the Employer can be seen to have validly sought assurances from individuals as to their minimum availability to take shifts when offered, and whether or not it can even be realistically or effectively monitored from month to month. In her considering the situation facing Deputy Warden Friesen in Corrections, she said that in her view the three employees who had been not been available over the four months preceding this arbitration hearing, while apparently not being disciplined, were not making themselves reasonably available by anyone's test, whether under the written notification as to minimum availability, or otherwise.

In argument on behalf of the Union, Mr. Penner submitted that fundamentally the Employer in having potential new employees sign back a pre-employment offer letter, which required their accepting the provision as a condition of employment that they “must be available to work a minimum of six shifts per month as well as being available to work a minimum of three statutory holidays per year...”, constituted an invalid pre-employment contract. The Employer was prevented from negotiating terms and conditions of employment with individual employees, or those about to become employees of. Any such provision, either at the pre-employment stage, or said by the Employer to be applicable and enforceable against existing employees in the same fashion, should be seen to conflict with the collective agreement for violating the exclusive bargaining rights of the Union, or specific provisions presumably such as those dealing with discipline and just cause. The Union, he said, relies on the established line of arbitration awards which apply the principles set out in such cases as *McGavin Toastmaster Ltd. v. Ainscough* (1975), D.L.R. (3d) 1 (S.C.C.), which affirmed previous Court reasoning that with a collective agreement in effect there was not much left outside its parameters except possibly the act of hiring. Judson J. famously stated at p. 6, after referring to the previous Supreme Court of Canada judgment in *Syndicat Catholique des Employes de Magasins de Quebec Inc. v. Cie Paquet Ltee* (1959), 18 D.L.R. (2d) 346, that:

“The reality is, and has been for many years now throughout Canada, that individual relationships as between employer and employee have meaning only at the hiring stage and even then there are qualifications which arise by reason of union security clauses in collective agreements. The common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement which, as the one involved here, deals with discharge, termination of employment, severance pay and a host of other matters that have been negotiated between union and the company as the principal parties thereto.”

This arbitrator notes there has been recognized, including by the Court of Appeal of Ontario in *Loyalist College of Applied Arts and Technology v. O.P.S.E.U.* (2003), 225 D.L.R. (4th) 123, that the jurisprudence in this area has been well summarized by *Brown and Beatty, Canadian Labour Arbitration* at topic 2:1210. The authors

have remarked in the current looseleaf fourth edition as follows:

It has long been established that individual employment relationships have meaning only at the hiring stage and that the individual employee's bargaining rights over terms and conditions of employment are pre-empted by a collective bargaining relationship.... The only scope for individual bargaining with regard to terms and conditions of employment would appear to be where it is sanctioned by the collective agreement, by the collective bargaining agent, where it is ancillary to routine administration of the collective agreement, where the terms fall outside the scope of the agreement, such as an agreement concerning an early retirement arrangement, a confidentiality acknowledgment in the healthcare sector or reimbursement for relocation expenses, in some cases where there is a voluntary waiver of the collective agreement benefit that does not undermine the collective agreement, or where it involves statutory benefits not covered by the collective agreement.... Not only have arbitrators declined to deal with grievances seeking to enforce individual agreements on the ground that their jurisdiction is limited to arbitrating disputes arising out of collective agreements, but they have also declared such individual agreements to be invalid and directed employers to cease and desist from negotiating individually with employees in relation to terms and conditions of employment....

In their summarizing, the authors rely in part on some relatively recent comments from the Supreme Court of Canada in *Isadore Garon Ltee v. Syndicat du Bois Ouvre de la Québec Inc.* (2006), 146 L.A.C. (4th) 1 at para. 27:

The precedence given to the collective scheme is sometimes taken to mean that freedom of contract is abrogated once a collective agreement is concluded: *Paquet*, at p. 212. However, it is clear that the employment relationship arises only when the employee accepts the employer's offer to hire him or her. There is therefore no source in either Canadian case law or legislation for the theory that individual contracts are completely abolished in the context of the collective scheme. The individual contract does not cease to exist, but it is simply suspended... During the term of the collective agreement, however, the individual contract of employment cannot be relied on as a source of rights.

Interestingly, one notes that in the earlier *Loyalist College* case, it had been a matter of the aggrieved employee being hired as a full-time teacher on condition that she enroll in a graduate studies programme in her field. She failed to do so and accordingly was dismissed during her probationary period on that basis. The Court of Appeal upheld the Divisional Court which had upheld the arbitrator who had determined that the hiring condition was invalid inasmuch as the employer was not able to negotiate terms and conditions of employment with

individual employees at time of hire or at any other time. Accordingly, the dismissal based on the employee's subsequent failure to fulfill an invalid hiring requirement was also invalid.

The Union tabled arbitrator Susan Stewart's award in *Air Canada and CAW - Canada (Courtemanche Grievance)* (1999), 82 L.A.C. (4th) 436, an unjust dismissal case where the employer had set out to impose French language requirements at time of hire, and where the situation evolved into a discussion over whether it amounted to a condition of employment which had not been fulfilled, or a workplace rule in the nature of the policy directive. In her consideration of what would occur were it found to be the former, the arbitrator cited *McGavin Toastmaster Ltd.* She also agrees with arbitrator Weatherill's decision in *Re Canada Post Corp. and C.U.P.W.* (1998), 1 L.A.C. (4th) 138 who was looking at a situation where the union was acknowledged as the sole bargaining agent for all employees by operation of the collective agreement. He had stated at pp. 141 - 142 of the award that "it is not the case... that matters affecting terms and conditions of employment, which are not dealt with in a collective agreement may properly be the subject of individual bargaining. The bargaining agent's rights of representation are not limited to those matters covered by an agreement. They are, as this agreement acknowledges, sole and exclusive rights of representation".

Ultimately, arbitrator Stewart went on to consider issues of legitimate workplace policy applicable to existing employees, and just cause, under the well-known *Re Lumber Mill Workers Union, Loc. 2537 and KVP Co.* (1965), 16 L.A.C. 73 (Robinson) guidelines, dealing with unilaterally introduced employer rules not agreed to by the union, which an employer may or may not be entitled ultimately to enforce. Such consideration of validity under *KVP* in order not to be fatally inconsistent with the collective agreement, which here also would be expressly prohibited by article 5.03, includes that the rule must be clear and unequivocal, not unreasonable, nor inconsistent with the collective agreement, must be brought to the affected employees' attention, requires notification were such a breach to have disciplinary consequences, and should have consistent enforcement. As she noted, her

determination centered on the factual circumstances, although on those presented in that case a legitimate policy application did not give rise to just cause for dismissal, all things considered.

Hence, with respect to do the pre-employment contractual element, and the post-hiring directive, the Union submits that the Employer should be taken as having violated its exclusive bargaining rights for having attempted to insert an element into the employment relationship at time of hire which has not been contractually negotiated, namely stipulated availability minimums. These provisions should be declared invalid. Further, it contends that even if, somehow, there is no such conflict one should still consider that the pre-employment letter, and the written directions presented to current relief employees, amount to a "standby letter" under article 29 of the collective agreement. This provision, Mr. Penner said, requires that those affected should have received standby pay for having to make themselves available in compliance with the terms thereof. There should be enough of an element of specificity, he said, so as to satisfy the standby concept. By the Union's perspective, the relief employees' personal time has been compromised enough with respect to the minimum availability requirement, and the statutory holiday work requirement, that the standby element has been met.

Mr. Asmundson on behalf of the Employer, in his submission, asserted that it was entitled to put "information" into letterform documentation, whether specifically directed to about-to-be hired employees or to existing employees. It should not be prevented from setting out an expectation, common to them all, and applicable as such, even if that meant specifying a minimum number of shifts. He said the it was not necessary to read into the Employer's action any conflict with any provision of the collective agreement, with its longsince agreed contractual language only expressly requiring under article 5.03 that it was "(w)here there is any conflict between the provisions of this Agreement and any regulation, direction or other instrument dealing with terms and conditions of employment issued by the Employer, the provisions of this Agreement shall prevail". At the same time the Employer relies on the article 7.01 managerial responsibilities provision, which states that "(e)xcept to the extent provided herein, this

Agreement in no way restricts the Employer in the management and direction of the Public Service". Further, by the Employer's review of the collective agreement, there is no provision which expressly prevents or prohibits the Employer from issuing such letters, or seeking to clarify minimum expected availability from relief employees who by definition are "required" to report for work "on an as-and-when required basis".

In addition, Mr. Asmundson said, the Employer should not be taken to have individually negotiated with any incoming employee, inasmuch as the same provision was incorporated into the letters sent to all prospective hires, done as a matter of setting out its valid expectations for employee commitment as to availability. Further, by way of justifying the existence of such a provision, the Employer relies on the nature of operations in Corrections not being such, certainly, that its relief employees can expect to accept offered work only haphazardly, or from time to time at their own unfettered choice, or only for a few days a year, despite being asked to work by reference to an established call-in sheet, and contractual definition that they "may be required to report to work on an as-and-when required basis for operations...". It is far better, he said, that they should be aware of their expected availability commitment from outset, even from time of considering their entry into the employment relationship with receipt of the offer letter. Hence, the Employer should be able to set out its needs at that point, and also to advise those already having established an employment relationship that some reasonable level of availability is a job-related requirement. There was no evidence, he said, that the Employer has ever moved the issue along to the point of discharging an employee on the basis of his or her breaching the stated availability standard, but even if that were the case the employee would always have access to the grievance process covering any disciplinary action.

With respect to the remaining issue of whether there was any application of the article 29 standby pay provisions, Mr. Asmundson submitted that the facts presented simply did not bring anyone within the standby concept for being required as a relief employee to provide minimum work availability. He said that it was only necessary to consult the clear wording of the article in its entirety to understand that there was no such mutual

intention, which in any event “must be gathered from the written instrument”, to cite *Halsbury's Laws of England*, as relied on in the *Brown and Beatty, Canadian Labour Arbitration (4th ed)* discussion at topic 4:2100. To be applied, it realistically would have to have been conveyed by the parties in a contractual term that they intended to apply the standby concept to encourage relief worker availability for call-in on the usual as-and-when required basis, which is simply not the case on the language reviewed. Further, there was no evidence that the Employer had any interest in restricting or limiting anyone's off work activities or choices in order for them to be absolutely available when called, only wanting employees in the general sense to commit themselves to being available to work a minimum number of shifts per month, and some statutory holidays, as a matter of providing coverage for absent co-workers which was the job of a relief employee. Certainly there was enough opportunity for ample choice on the part of relief employees, given that the Deputy Warden responsible for scheduling at his corrections facility, Mr. Friesen, found himself going through the complete call-in list on a daily basis.

By Mr. Asmundson's presentation, both grievances should be dismissed on the evidence presented.

Conclusion:

In my dealing firstly with grievance 08-G-00728 regarding shift availability minimums, it requires one to return to the exact wording that the Employer has included as a paragraph in the employment offer letter, which also includes an “Acceptance of Appointment” sign-back provision. The letter crucially reads: “As a Relief Corrections Officer you must be available to work a minimum of six shifts per month as well as being available to work a minimum of three statutory holidays per year. You may not be called in but you must be available. Hours of work will be on an as required basis.” Presumably, one signing back the letter as accepting the appointment as offered “on the terms and conditions outlined” is necessary to enter into the employment relationship and on its face binds the new employee to the minimum availability stipulation contained therein. The letter sent out to its already hired relief

workers states it a little differently in that: “As a Correctional Service Relief Worker, you must be available, if called in, to work a minimum of six shifts per month of the schedule including availability to work a minimum of three statutory holidays per year. Hours of work will be as and when required and include all shifts... Failure to make yourself available for the minimum amount of offered shifts or stat holiday can result in frustration of the employment contract and termination of your relief worker employment”.

In my considering the Employer’s injection of the above provisions into the employment relationship, whether as a condition of being hired into a position, or as put to already hired relief employees as being capable of supporting termination on the basis of frustration of contract were the described minimum availability stipulation not followed, it is necessary to note what the parties have bound themselves to through negotiated contract language. Firstly, article 2.01(m)(v) states by definition that a relief employee is one appointed to a position for which there are no established hours and “may be required to report to work on an as-and-when required basis for operations...”. It is followed by Appendix A1 which comprehensively deals with certain rights and obligations specific to this classification of employee, including stating those articles and clauses contained in the collective agreement which do not apply to relief employees. They are not excluded from grieving under article 37.01 in all those areas included therein as equally applicable to other indeterminate employees, such as over the interpretation or application of the collective agreement, suspension or dismissal from the Public Service. Notably Appendix A1.01 basically repeats the definition language in its confirming the parties’ contractual agreement that the Employer “shall hire relief employees into positions for which there are no established hours... and may be required to report to work on an as-and-when required basis for facilities...” and with respect to their use, under A1.07 the parties have agreed that “the Employer shall make every reasonable effort to allocate relief work on an equitable basis among readily available qualified relief employees”.

Simply put, it would seem that the Employer has injected into the relief employment relationship in

Corrections the expressly stated requirement for a stipulated minimum availability of working six shifts per month and three holidays per year, firstly as a condition of hire for those being offered positions, and secondly as a stated requirement for those already hired to continue working inasmuch as failure to comply “can result in frustration of the employment contract and termination of your relief worker employment”. While the evidence indicates that the Employer has not yet been strictly following its stated minimum availability requirements, they certainly are out there hanging over relief workers, having been a stated as a condition for hire, and then as grounds for terminating the employment relationship of those already hired. The question arises of whether one or both of these provisions are incompatible with the collective bargaining relationship, with the existence of a collective agreement encompassing the contractual relationship between the parties, as addressed by the well-developed caselaw pointing to the significance of the union security clauses, exclusive bargaining agent status, and the terms and conditions of the collective agreement as defining the employment relationship. Or, can they somehow be considered ancillary to or compatible with the Employer’s routine administration of the collective agreement and its operating the workplace in compliance therewith, as would be the case with any number of policy driven administrative guidelines and workplace rules? The Employer seeks support for its position by reference to article 5.03 which provides that where there is any conflict between the collective agreement and any directions or conditions of employment the former will prevail, and article 7.01 which provides that except to the extent provided in the collective agreement it in no way restricts the Employer in the management and direction of the Public Service. However, certainly these articles do not detract from the paramountcy of the collective agreement itself in setting out the terms and conditions of employment, including the working conditions of all employees covered thereunder, except as that relationship is specifically and expressly affected by statute.

On balance, I accept that the pre-employment provision dealing with stipulated minimum availability as set out in the letter provided to prospective incoming relief employees, stated as a condition of their hire into available

positions in Corrections, and most significantly as a condition sought to be imposed with obvious continuing effect beyond the decision to hire, conflicts with matters specifically covered by the collective agreement, and cannot be seen to legitimately involve any Employer concern standing outside the scope of the collective agreement. Indeed, the collective agreement plainly contemplates both within the definition section 2.01 (m) (v) and Appendix A1.01 that relief employees are appointed to positions for which there are no established hours and “may be required to report to work on an as-and-when required basis...”. There is no suggestion anywhere in that language that agreeing to an expressly stipulated minimum availability as to numbers of shifts, and covering a specific minimum number of statutory holidays, can be raised to the level of a condition of employment on hiring. In my view, as such, it cannot stand and must be taken as an invalid paragraph in the letter of hire. It should be removed.

In my considering the situation involving the already hired relief employees in Corrections, they face the same kind of precise availability expectation injected into their employment relationships. It is said by the written notification to somehow provide express grounds, if going unmet by existing employees, for frustration of the employment relationship and termination. Nevertheless, at the same time, their employment relationship continues to be governed by the collective agreement provisions which have hereinbefore been discussed. No doubt, their basic employment situation as relief employees is one of being needed for work on as-and-when required basis for operations’ purposes in Corrections with anyone’s availability commitment presumably having to be guided thereby. The fatal difficulty with the current wording would be with respect to the Employer unilaterally declaring precise grounds for frustration of the employment contract, thereby leading to termination, when the collective agreement itself does not address minimum shift availability in any precise terms, or realistically contemplate that less than availability for six shifts per month, or three statutory holidays per year, necessarily amounts to frustration of the employment contract as having passed over a threshold. However, at the same time, I do not see how the Employer is prevented on a policy formulated basis from providing scheduling guidelines that it will follow in Corrections with

respect to its administration of Appendix A1, which by its contractually agreed wording indicates that relief employees “may be required to report to work on an as-and-when required basis for operations...”.

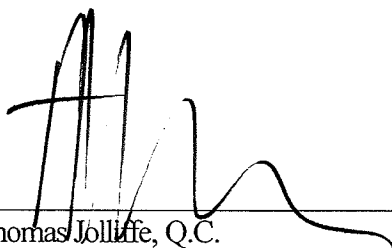
In the result, in my dealing with grievance 08-G-00728, I conclude that both the pre-hiring and post-hiring provisions discussed in evidence impinge the Union’s exclusive bargaining position under the collective agreement. I direct that both disputed paragraphs be removed as written, firstly from the offer of employment letter, and secondly from the letter to existing relief employees. In that respect the grievance is successful. However, I also believe it necessary to remark as *obiter* comment that in my view the Employer is able to state its position in writing, as a policy driven internal guideline, at any time, whether to incoming employees at time of issuing the offer letter, but not as a stated condition of accepting employment, or to existing employees at any time. It could indicate that in its administration of the collective agreement in Corrections, including that relief employees “may be required to report to work on an as-and-when required basis for operations”, it considers that for operational reasons they should commit to being available to work a minimum of six shifts per month as well as being available to work a minimum of three statutory holidays per year, as a current reasonable availability standard in its view. They may not be called in but they are expected to be available on this basis, with hours of work further being on as required basis. I would see no violation were it also to indicate that failure to comply would result in the Employer taking whatever reasonable corrective action as may be considered available and ultimately justifiable under the collective agreement.

In my having considered the second grievance, 08-G-00775 regarding the standby pay issue, from the evidence submitted, and from my review of article 29 of the collective agreement, and the caselaw tabled at hearing, including my award in the *Nav Canada* case, I cannot find that any legitimate claim to standby pay by anyone has been established. Unquestionably, in Corrections the Employer has been looking for some commitment from relief employees on their individual minimum availability to take offered shifts from the call-in list, as indeed may well be the case generally with relief employees in various working situations under many collective agreements.

However, it is not an operational concern which speaks to their qualifying for standby pay simply by reason of the Employer seeking to apply some minimum standard of availability in its administering the collectively bargained relief employees' as-and-when work requirements. Realistically, as a defined category of indeterminate employee, none are required at any set time to be absolutely available at a known telephone number and thereby be able to report for duty as quickly as possible if called, nor are they included in any standby schedule. I accept that the facts simply do not disclose any need for the Employer to have paid anyone on a standby basis under article 29, with this second grievance 08 - G - 00775 being dismissed on that basis.

With respect to grievance 08 - G - 00728, as requested I remain seized pending implementation of the direction given to strike the current wording, and in the event there are any additional representations forthcoming on additional remedy.

DATED this 30th day of October, 2009.



Thomas Jolliffe, Q.C.