

IN THE MATTER OF AN ARBITRATION
BETWEEN
MARKHAM STOUFFVILLE HOSPITAL
("the Hospital" / "the Employer")

- AND -

CANADIAN UNION OF PUBLIC EMPLOYEES LOCAL 3651
("the Union")

CONCERNING GROUP AND POLICY GRIEVANCES (MY #1033 and MY
#1034)

Board of Arbitration:

Christopher Albertyn – Chair

Beverly J. Lanigan-Gilmour – Employer Nominee

Joe Herbert – Union Nominee

APPEARANCES

For the Union:

Mark Wright, Counsel, Sack Goldblatt Mitchell LLP

Louis Rodrigues, Vice-President, Ontario Council of Hospital Unions

Charles Van Vliet, CUPE National Representative

Joe Reddy, President, CUPE Local 3651

Jim Tsontsas, Vice-President, CUPE Local 3651

Omwattie Rampersand, Chief Steward, CUPE Local 3651

John Czorny, Grievor

Kristy Davidson, CUPE, Local 79

For the Hospital:

Sarah Eves, Counsel, Hicks Morley Hamilton Stewart Storie LLP

Anne Kennie, Director, Human Resources
Gail Percival, Human Resources Advisor
John Healy, Director of Facilities Management

Hearing held in TORONTO on January 30, 2007.

Award issued on December 3, 2007.

AWARD

1. This award concerns whether journeyperson mechanics working on standby are entitled to the call-back premium in the collective agreement when they are contacted at home and either diagnose or fix the problem remotely through use of a laptop.

2. The Grievors affected by this award include: Rick Quercia, John A Czorny, Ed McNairn, Joe Reddy and Rick Zeeman. They are all journeyperson mechanics in the Hospital's maintenance department.

3. The parties agree that if the Union's interpretation of the relevant collective agreement provision is upheld, the remedy is to be remitted to the parties for resolution, failing which we are to remain seized.

4. The key provision at issue in the central hospitals' agreement is Article 15.06, which reads:

15.06 – Call-Back

Where employees are called back to work after having completed a regular shift, and prior to the commencement of their next regular shift, they shall

receive a minimum of four (4) hours of work or four (4) hours pay at the rate of time and one-half (1½) their regular hourly earnings. Superior provisions shall remain.

5. The other relevant provisions of the collective agreement are the following:

14.01 – Daily & Weekly Hours of Work

(a) Normal Daily Hours

The normal daily hours of work shall be seven and one-half (7.5) hours exclusive of a thirty (30) minute unpaid meal break.

(b) Regular Weekly Hours

Normally, a regular work week equals thirty-seven and one-half (37.5) hours divided into five (5) days.

(c) Extended Hours

Departments may also develop schedules with hours averaged over a six-week period (or other appropriate period as defined by the department) and with extended daily hours.

In such cases where schedules exceed the normal daily or weekly hours of work, the Hospital shall make application to the Employment Standards Branch of the Ministry of Labour to approve the extended work schedule.

15.02 – Definition of Overtime

Authorized hours worked in excess of the normal daily hours, regular work week, or extended daily or weekly hours of work as defined in Article 14.01 shall be deemed to be overtime and shall be paid at time and one-half the

employee's straight time hourly rate.

Where an averaging of hours over the duration of the scheduling cycle exists, hours worked in excess of the scheduling cycle shall be deemed to be overtime and shall be paid at time and one-half the employee's straight time hourly rate.

15.05 – Reporting Pay

Employees who report for any scheduled shift will be guaranteed at least four (4) hours of work, or if no work is available will be paid at least four (4) hours except where work is not available due to conditions beyond the control of the Hospital. The reporting allowance outlined as herein shall not apply whenever an employee has received prior notice not to report for work. Part-time employees scheduled to work less than seven and one-half (7½) hours per day will receive a pro-rated amount of reporting pay.

15.07 – Standby

An employee who is required to remain available for duty on standby, outside the normal working hours for that particular employee, shall receive standby pay in the amount of \$2.50 (\$2.75 effective April 1, 2005 and \$3.00 effective April 1, 2006) per hour for all hours on standby.

Standby pay shall, however, cease where an employee is called into work under Article 15.06 above and works during the period of standby.

6. The parties have prepared an agreed statement of fact. It reads:

6. In September 2004, the Hospital provided notice to CUPE that it would no longer make payment under the call-back provision (Article 15.06) in the CUPE central collective agreement in circumstances where the employee was not required to return to the workplace after having completed a regular shift. (See attached letter dated September 23, 2004).
7. Subsequent to issuing this letter, CUPE requested that the Hospital continue to pay the call-back provision until local bargaining was completed. (See attached letter dated November 18, 2004). The Hospital agreed and payments under call-back were reinstated.
8. During local negotiations, the parties agreed to a different payment provision for employees who were not required to return to work. Unfortunately, it was deemed that this was a central provision and the parties were unable to ratify this provision.
9. As a result, in June 2005, the Hospital advised CUPE that it would be reverting to the strict interpretation of the collective agreement, as outlined in the letter dated September 23, 2004.
10. On January 4, 2006, CUPE filed two grievances (Policy and Group) claiming that the Hospital had violated Article 15.06. These grievance were returned to the Union as they were filed beyond the time limits specified in the collective agreement. Call-back payments have not been paid since June 2005 for work performed outside regular hours where the employees did not return to the Hospital.

9. Union counsel argues that call-back pay is for those occasions when one is called back to perform work for the employer. The disruption of doing so during one's own time is immaterial to a requirement to actually attend at the Hospital's premises. The work may be away from the premises, but it is work required by the Employer and it is outside of one's regular working hours. The inconvenience of being required to work outside of one's regular working hours – called back to do the work – is compensated by the call-back allowance.

10. The Union contends there is no ambiguity in the call-back provision, but, if there is, then the long-standing practice of the Hospital of paying the call-back allowance for work remotely done while on standby requires that the Hospital continue the practice.

11. Employer counsel suggests that the Ontario jurisprudence is not the same as that of British Columbia, relied on by the Union. She argues that the work done

a telephone call – was an integral part of his job function, albeit performed away from the employer's premises. See also *Re Health Employers Assn. of B.C. and B.C.N.U.* (1994), 43 L.A.C. (4th) 25 (Taylor) (sometimes referred to as "the Tumbler Ridge decision") in which on-call nurses receiving calls at home from the emergency department were found, on receiving the calls at home, to be called back to work. In *Re Greater Vancouver Regional District and G.V.R.D.E.U.* (2002), 110 L.A.C. (4th) 72 (Kelleher) an employee on standby was found to be entitled to overtime for time spent on the telephone engaged in the employer's business.

at home for the Employer in this case, should have been paid as overtime under Article 15.02, but it was not a call-back and no call-back pay is due².

12. Employer counsel says that call-back is to compensate an employee summoned back to work for the extra trip to and from the workplace, for the disruption of getting up and dressed and driving to the Hospital. The call-back pay is also a disincentive to the Employer from calling in employees.

13. Employer counsel draws attention to the reference to call-back in the standby provision, Article 15.07. There is mention of "where an employee is called into work under Article 15.06". This – the calling *into* work – counsel suggests, means that the employee is required to physically attend at work. The employee is not just being called to perform work, the employee is being called *into* work.

14. This is the proper construction of the call-back provision, Employer counsel argues, because an employee receives at least 6 hours pay for any work under the provision: 4 hours at time and one-half. Counsel suggests the parties did

² *Re Weyerhaeuser Canada, Ltd. and Pulp, Paper and Woodworkers of Canada, Loc. 10* (1982), 9 L.A.C. (3d) 308 (Bird).

not agree that an individual would be so well remunerated for performing some brief task on the computer at home. The overtime provision is intended to cover this type of work: i.e. when an employee works authorized hours in excess of the normal daily hours. In contrast, the call-back provision contemplates the real inconvenience of having to come back to work at the workplace.

15. Employer counsel refers to *Re International Moulders & Allied Workers Union, Loc. 49 and Webster Manufacturing (London) Ltd.* (1971), 23 L.A.C. 37 (Weiler), a seminal case in the jurisprudence on this issue, for the proposition that the guarantee of four hours pay compensates for the "significant disruption and expense for an employee" in having physically to come to work outside of normal working hours. In the absence of this disruption, additional work outside of normal working hours is compensated by overtime pay.

16. The same principle was expressed in *Re LECO Industries and Oil, Chemical and Atomic Workers International Union, Loc. 9-819* (1980), 26 L.A.C. (2d) 80 (Brunner). The arbitrator said this:

I am also of the opinion that an employee who responds to a call from the device, does not thereby become "an employee who is called in and reports for work outside his regularly scheduled hours of work" within the meaning

of art. 22.02. In my view this provision which has been generally referred to as a "call in" clause applies only to an employee who is called in and then reports for work at the Company's premises and this is supported by the last sentence of the article.

17. Notably, the language in *LECO Industries* involved reporting to work ("an employee who is called in and reports for work"), which language Union counsel concedes entails physically attending at work.

18. Employer counsel argues that the collective agreement distinguishes between those circumstances when an employee works hours in excess of their normal daily hours, and those circumstances when they are called back to work. The first situation attracts overtime pay; the latter, which requires return to work, earns call-back pay: *OPSEU (Stecko) and The Crown in Right of Ontario (Ministry of Revenue)*³. Counsel refers also to *Re University of Alberta Hospital and U.N.A., Loc. 301* (2000), 90 L.A.C. (4th) 328 (Ponak), where the words "called back to duty" (read in conjunction with other words in the provision that suggested work at the employer's premises), were found to require physical return

³ Unreported decision of the Ontario Crown Employees Grievance Settlement Board (File No. 2499/92) June 2, 1993 (Devlin). Here the call-back language involved an employee being "recalled to the workplace". Overtime was payable if an employee performed other work as required.

to the workplace, as explained below.

19. We find no ambiguity in Article 15.06. The past practice is therefore not relevant to our consideration.

20. Technological changes increasingly allow for employees to perform their work equally well remotely. When working on the employer's business at their homes during their off time, employees are no less recalled to work than if they are required to physically attend at work (*Greater Vancouver Regional District*, p.74), although the physical disruption will obviously be less. Union counsel points out that the Hospital gains an advantage by being able to rely upon the mechanics to adjust a maintenance problem remotely from their homes. They can remedy the problem more promptly from home than if they had to drive to the Hospital and make the adjustment there.

21. We start by looking at the difference between being paid overtime for work done for the Employer outside of one's normal working hours, and being paid the call-back premium. One receives overtime at time and one-half the

normal rate for the time spent on the overtime work (Article 15.02). One receives a minimum of 4 hours pay for call-back work, at time and one-half (Article 15.06). It seems the standby allowance is still paid for overtime if one is on standby when the overtime work is done, but the standby allowance is not paid if one receives call-back pay (Article 15.07).

22. We see from this that the key difference between the overtime and the call-back provisions is the guarantee of four hours pay for the call-back work. Why is there the guarantee? The rationale for having a call-back premium has been explained as compensation for the significant disruption of being required to work during one's off hours, and to discourage employers from making unnecessary and too frequent use of its employees when they are not scheduled to work⁴.

23. The approach, originated in *Webster Manufacturing*, which included reference to the disruption of leaving home and physically coming into work, has been steadily modified in subsequent arbitral jurisprudence. As stated in *Re O.P.S.E.U. and Northeast Mental Health Centre (Call Back Pay Grievance)*,

⁴ *Webster Manufacturing.*, at pp.40-1.

[2004] O.L.A.A. No. 673 (Whitaker), the approach has come to centre on compensation for the disruption of one's personal life:

¶ 49 Most of the authorities provided to us by the parties dispose of this issue on the basis of an analysis of the purpose of call back pay with little reference to the wording of the specific collective agreement provisions that are being construed. In considering these as a whole, one must conclude that there has been a steady march away from the early *Webster* analysis. The vast majority of arbitrators now understand the general purpose behind call back to be compensation for disruption to one's personal life and nothing more.

24. The board of arbitration in *University of Alberta*, above, distinguished the circumstances when arbitrators have treated call-back as requiring physical attendance at the employer's premises and when they have treated call-back as applying whenever an employee is performing the employer's work outside of their regular working hours. If the language provides, as stated in *University of Alberta*, that "it is the act of returning to duty that matters, not the physical location of where the duty is performed", then call-back is payable even if the work is done at the employee's home.

25. *University of Alberta* is instructive in its discussion of the relevant provision in that case:

In the current case, the relevant provision of the collective agreement is art. 9.04(a). It contains three sentences. The first sentence specifies that entitlement to three hours of call-back pay occurs "[f]or each occasion that an Employee is called back to duty during the Employee's on-call period". It contains no reference to physical location. If this was the sole sentence in art. 9.04(a), the Board would have little difficulty concluding that physically returning to the hospital was not a requirement for call-back pay -- simply being called back to duty, which telephone consultation entails, would be sufficient to substantiate a call-back claim.

26. We find this case instructive because our case is much like what was contained in the first sentence there: "an employee is called back to duty". This phrase is a lot like our "called back to work". In *University of Alberta*, different from our case, the provision had two further sentences which led the board of arbitration to conclude that the call-back was qualified by the requirement to attend at the employer's premises. Those sentences contained the words, "leave" and "leaving", which made sense only if the employee were actually returning to the workplace. From the addition of these sentences, the board concluded that the call-back provision was not invoked by the work done off site. In our case there is

no such qualifying language.

27. This approach can be found also in the *Northeast Mental Health Centre* decision:

¶ 50 There is no doubt that the primary task before this or any board of arbitration is to interpret the particular provisions of this collective agreement as they apply to the facts put before us. Certainly, we must do this in the context of an understanding as to the commonly accepted underlying purposes behind call back pay. Having reviewed the authorities, we find that in the absence of language which indicates something else, call back entitlement should turn on whether an employee is obliged to perform "work" for the employer where she would otherwise be entitled to private pursuits. In the absence of language in the collective agreement that would require attendance at work, call back pay should be understood as compensation for the disruption to one's own time and nothing else. ...

28. The question then is whether there is language in the collective agreement which indicates that the call-back entitlement requires the conclusion that it is payable only upon physically returning to the workplace to perform the work as, on the language, was the case in *Northeast Mental Health Centre*⁵.

⁵ The language there, found to mean attendance at the workplace for call-back to be invoked, is described in ¶¶53-54. There was reference in the language to "leaving" the Hospital premises, which

29. As in *The Queen in Right of Manitoba*, and *Greater Vancouver Regional District*, above, and in *Re Health Employers Assn. of British Columbia and B.C.N.U.*, [1996] B.C.C.A.A.A. No. 337 (QL) (Larson), the call-back provision in Article 15.06 is based in time, not place. The notion described in the provision does not expressly require physical recall to the workplace to perform work there. Rather, it concerns the time period during which the recall to work occurs. If during the period between the employee's regular shifts they are required to work, they are then treated as being recalled to work, or called back, and so are entitled to the premium described in Article 15.06.

30. Here the reference is to employees being "called back to work" (Article 15.06), and "called into work" (Article 15.07). This can mean being physically called back and into the work location, but, we find, it includes being called back temporally, being required to get back "into work", to resume work for the Employer. The notion of being called back to work, to do one's job for the Employer, can mean having to do it at home as much as at the usual workplace.

implied, for the purposes of call-back, that the employee return to the workplace. This conclusion was reinforced by reference to call-back not being paid if the employee remained on standby at the hospital premises. This, the board found, implied that returning to the workplace mattered for the purpose of obtaining call-back pay.

Its purpose is to compensate the employee for the intrusion into their private repose.

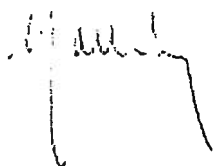
31. In light of the above, as Union counsel argues, if the call-back provision does not contain clear reference to the physical premises of the Employer's workplace, then the call-back can be either temporal or physical: time spent away from the Employer's premises in response to a call to perform work, as in this case, or actually working at the Employer's premises.

32. We are fortified in this view by Article 15.05 – Reporting Pay. The explicit reference to reporting pay and to reporting for any scheduled shift in this provision suggests that if the parties had wanted Article 15.06 to be restricted to occasions of return to the workplace, then the words, reporting for duty, or reporting to work, could easily have been included.

33. In the circumstances, we uphold the grievances. The individual mechanics are entitled to the call-back premium in the collective agreement when they are contacted at home and either diagnose or fix the problem remotely through use of a laptop. The remedy is remitted to the parties.

34. We remain seized if there is any dispute concerning the implementation of the award.

DATED at TORONTO on December 3, 2007.



Christopher J. Albertyn

Chair

I dissent.

“Beverly J. Lanigan-Gilmour”

Beverly J. Lanigan-Gilmour

Employer Nominee

I concur.