PART 3

RULING ON FRIDAY OVERTIME

A Penultimate Award containing two large documents was mailed electronically to the parties on April 16, 2018. It was later discovered that the parties did not receive the documents. They were re-sent on April 24, 2018.

During compensation hearings, the parties made it clear that they wanted the arbitrator to answer the question of what categories of compensation had to be paid, and that they and their accountants/consultants would then determine the appropriate amounts. The complexity of the hearings proved the parties' wish to be simplistic and unrealistic.

The Penultimate Award made decisions on all the known relevant issues, explaining how final compensation calculations should be determined, and it assigned the parties a deadline to have their accounting consultants put correct dollar amounts on the various categories of compensation, after which the parties would provide the arbitrator with a joint submission on the final dollar totals owing, and upon receipt of those agreed totals the arbitrator would issue a brief final award confirming the totals. The deadline was extended after the Penultimate Award failed to reach the parties as intended.

The parties and their consultants clearly had considerable difficulty determining and agreeing upon the required numbers. It was not until August 10, 2018 that the arbitrator received a letter from counsel for the Employer, advising that the parties had been meeting as directed, but had failed to agree on an issue of paying overtime for work on Fridays. Therefore, the Employer sought a ruling on that issue based on its interpretation of the overtime provisions of the collective agreement. Although the Employer requested that the arbitrator's ruling would be part of the Final

Award on the overall compensation matter, it was clear that the arbitrator's expectation of a "brief" Final Award confirming the parties' joint submission was rendered impossible.

Counsel's submission on the Friday overtime issue follows below, with apologies for minor formatting glitches involved in incorporating the document.

August 10, 2018

Re: Hotel and Restaurant Workers Union, Local 779 v. Sodexo Canada Inc.

Dear Mr. Alcock,

On April 24, 2018 you provided the parties with your penultimate award (the "Penultimate Award"), which award required the parties to make revised calculations and to provide them to you so that you could confirm the amounts as part of the Final Award.

Following the receipt of the Penultimate Award and review by the parties, both the Hotel and Restaurant Workers Union, Local 779 (the "Union") and Sodexo Canada Inc. (the "Employer") engaged their financial consultants to carry out the necessary calculations based upon the Arbitrator's considerations and decisions contained in the Penultimate Award.

The Employer's calculations are contained in the attached Excel Spreadsheet. These calculations are based uponthe following assumptions:

- Calculation of interest using the Prime Rate up to June 30, 2018 (this will have to be adjusted to provide for interest to the date of the Final Award);
- Interest on the sum of $102,000 awarded for shift differential is calculated from November 2015; and
- Employees worked 10 hour shifts and therefore overtime rates have been calculated for all hours worked in excess of 10 hours per day, for all hours worked in excess of 40 hours per week and for all hours worked on Saturdays, Sundays and gazetted holidays.

The total amount owing to June 30, 2018 as calculated by the Employer based upon the language of the Penultimate Award would be $7,209,281.58. Please note that the calculation of compensation and damages by the Employer in accordance with the considerations and findings contained within the Penultimate Award shall not be interpreted as an acceptance of the considerations and findings of the Arbitrator with respect to the Penultimate Award and/or Final Award and the Employer reserves all rights to seek judicial review of the Arbitrator's Penultimate Award and/or Final Award.

We have been in consultation with the Union's legal counsel, Mr. Lenehan, and the Union's total figure, assuming interest to June 30, 2018 is $7,358,565.52.

The difference between the parties' respective positions is $149,283.94 (calculated to the end of June, 2018). Based upon the discussions of the parties, I believe that most, if not all of this difference can be attributed to the calculation of overtime on Fridays. I will leave it for Mr. Lenehan to outline the Union's position in this regard but it is my understanding that the Union takes the position that overtime should be paid for all hours worked on Friday. It is the Employer's position that employees only qualify for overtime when they work more than 10 hours per day, more than 40 hours per week or where they work on a Saturday, Sunday or gazetted holiday.

In light of the above, we request that you provide, as part of your Final Award, your consideration and decision with respect to the calculation of overtime. In addition, please confirm whether the parties have correctly calculated and applied interest in accordance with the language of the Penultimate Award.

The position of the Employer with respect to the calculation of overtime is set out below. It is my understanding that Mr. Lenehan will provide a submission on behalf of the Union with respect to your request for revised calculations, including the calculation of overtime.

The applicable provisions of the CLRA Collective Agreement with respect to the calculation of overtime are as follows:

> Article 7:01
> The regular work week shall be Monday through Friday inclusive, consisting of five (5) eight (8) hour work days. All hours worked in excess of eight (8) hours per day shall be paid at double time the regular rate of pay or the Employer may have the option of working a compacted work schedule of Monday to Thursday inclusive, consisting of four (4) ten (10) hour days. All hours worked in excess of ten (10) hours per day shall be paid at double time the regular rate of pay.
>
> Article 7:02
> All hours worked on Saturday, Sunday and gazetted holidays shall be at double the regular rate of pay.
>
> Article 7:03
> There shall be no pyramiding of overtime.

The above Articles are based upon a 40 hour work week. It is respectfully submitted that the Collective Agreement does not provide for overtime pay on Fridays and the Arbitrator cannot make the agreement for the parties in this respect: Overtime is paid when an employee works more than 8 hours a day (when working 5 - 8 hour shifts), more than 10 hours in a day (when working 4 - 10 hour shifts) and on Saturdays, Sundays and gazetted holidays.

Arbitrator's Authority

In relation to an arbitrator's authority to interpret and apply a collective agreement, we

refer to the following section of Brown & Beatty's text *Canadian Labour Arbitration:*

> 2:1202 - Express prohibition against amending or adding to the agreement
>
> Many collective agreements expressly provide that the arbitrator shall not "alter, amend, add to or vary" the collective agreement. The effect of including such a provision in the agreement is, however, not free from doubt. Some arbitrators have said that this provision adds nothing to the limitation that the arbitrator is confined to determining disputes arising from the interpretation, administration, application or alleged violation of the collective agreement.

Interpretation of Collective Agreements

With respect to the interpretation of collective agreements, Arbitrator McPhillips stated in *Greater Vancouver {Regional District) v GVRDEU,* 1999 CarswellBC 3677 (copy attached) at page 7 that:

> "With interpretation questions, an arbitration board must begin with the express language of the collective agreement and it is the language of the agreement which is the "primary resource" in a disputed interpretation".

In the recent decision in *WWRP Construction Employers' Association Inc. and Council of Construction Trades Inc.* (unreported) (Browne, 2018) (copy attached), Arbitrator Browne, in reviewing the principles of interpretation of collective agreements, made reference to the unreported decision of Arbitrator Oakley in *Resource Development Trades Council of Newfoundland and Labrador and Long Harbour Employers Association Inc.* (Unreported) (Oakley, 2011) at page 12 of his decision:

> Arbitrator Oakley, in a recent decision, summarized these principles of interpretation as follows:
>
> > The Arbitrator has considered the principles of collective agreement interpretation that apply in this case. The principles of interpretation are discussed in Brown & Beatty, *Canadian Labour Arbitration,* 4th edition, and include, that the object of construction is to determine the intention of the parties from the express provisions of the collective agreement (paragraph 4:2100,) that the language should be viewed in its normal or ordinary sense (paragraph 4:2110), that it should be presumed that all the words used were intended to have some meaning (paragraph 4:2120), and that the language is to be interpreted within the context of the collective agreement as a whole (paragraph 4:2150) and the industrial relations practices of the parties (paragraph 4:2300).

Arbitrator Browne in the *WWRP* decision went on to state as follows at page 13:

There is other jurisprudence which pertains to a grievance in which the Union is seeking a financial benefit, as is the case here. The jurisprudence on that issue is instructive.

In Canada Post Corporation and Canadian Union of Postal Workers ([1993)] 39 L.A.C. (4th) 6 (Bird), the arbitrator stated:

> 21. To succeed in an interpretation grievance, so as to require a party to a collective agreement to pay money, clear language contractual language is required; see Re B.C. Transit and Independent Canadian Transit Union, Local 1 (1988) 30 L.A.C. (3d) 201 (Bird) at p. 223 referring to Re Noranda Mines Ltd. (Babine Division) and U.S.W.A., Local 898 [1982] I W.L.A.C. 246 (Hope) as explained in Re B.C. Transit and I.C.T.U., Local 1, unreported, April 14,1987 (Larson) ...

Overtime

Overtime considered from the view point of pay consists of hours of work actually performed which, because of the circumstances in which it is performed, attracts the premium rate provided in the agreement (see: *Halifax Infirmary Hospital v CBRT & GW Local 606*, 1989 CarswellNS 668, copy attached).

In *Bingham Memorial Hospital v CUPE,* Local 2558, 20 LAC (4th) 434 (copy attached), Arbitrator Marcotte stated at page 15:

> The common or usual meaning of overtime is, as stated in Webster's New Collegiate Dictionary, as follows: "1. time in excess of a set limit; esp. working time in excess of a standard day or week". In the instant case, the standard number of hours in a work week, pursuant to [the collective agreement] is 37 1/2 hours. Thus, time worked in excess of 37 1/2 hours in a standard work week attracts overtime rates of pay.

In Mitchnick and Etherington's *Leading Cases on Labour Arbitration* it is stated:

> 22.2.2 **Two Types of Overtime Entitlement**
> The way in which the parties frame an employee's entitlement to overtime pay generally falls into two patterns. Under one type of provision, overtime rates are payable only after an employee has worked a specified number of hours per shift or per week. Under the second type of provision, overtime is payable in respect of any hours worked "in excess of or outside an employee's normal work day or work week, as set out in the collective agreement". Arbitrators have held that the words "in excess of" do not carry the same meaning as "in addition to", but rather denote *any* time worked outside an employee's regular or scheduled hours. ... Arbitrator Kennedy held that the grievor was entitled to be paid at the overtime rate for all hours worked after the end of his regular shift, even though, having arrived at work late, he had not put in a full shift.

In the *WWRP* decision Arbitrator Browne, denied the grievance filed by the Council of Construction Trades Inc. seeking overtime for hours worked outside of an employee's regular schedule. In that matter, Article 19.2 of the collective agreement stated as follows:

> 19.2 This Article is intended to identify regular hours of work, Regular Work Schedules and overtime hours:
>
> a) The Regular Work Schedule shall consist of forty (40) hours divided into five (5) consecutive eight (8) hour work days, or four (4) consecutive ten (10) hour work days, at the option of the Contractor. The start time for the day shift for a regular work day will be between 5:00 a.m. and 9:00 a.m. Contractor shall provide the Council with 24 hours' notice of any change to the Regular Work Schedule.
>
> b) Overtime shall be paid on all hours worked in excess of forty (40) hours per week at the rate of one and one-half (1 1/2) the straight time rate of pay. Overtime shall be paid on all hours worked in excess of fifty (50) hours per week at the rate of double the straight time rate of pay.

It is submitted that overtime pay under the CLRA Collective Agreement falls into the first type of provision referred to by Mitchnick and Etherington, that being where overtime rates are payable only after an employee has worked a specified number of hours per shift or per week. It is respectfully submitted that there is no provision in the CLRA Collective Agreement which obliges the Employer to compensate employees at the overtime rate for all hours worked on Fridays. Instead, with the exception of Saturday, Sunday and gazetted holidays, overtime is paid where an employee works more than the prescribed number of hours. Based upon the language of the CLRA Collective Agreement, which provides for overtime after an employee has worked a prescribed number of hours, it would be absurd to compensate an employee at the overtime rate for work on a Friday where they have not worked the prescribed number of hours in the day or week.

Further, as was noted in the *Canada Post* case referred to above, it is submitted that in order for the Union to succeed in this case so as to require the Employer to pay overtime rates for all work on Friday, clear contractual language is required. There is no clear language in the CLRA Collective Agreement which requires the Employer to pay overtime rates where an employee has not worked the prescribed number of hours per day or week.

All overtime has been calculated by the Employer based upon employees working 10 hour shifts. Therefore, employees have been compensated at the overtime rate for all hours worked in excess of 10 hours a day, for all hours worked in excess of 40 hours in a week, and for all hours worked on Saturdays, Sundays and gazetted holidays (recognizing that there shall be no pyramiding of overtime as provided in Article 7:03 of the CLRA Collective Agreement). For example, where an employee worked four 10 hour shifts Monday to Thursday and also worked Friday, the employee would be compensated at the overtime

rate for all hours worked on Friday. However, where an employee worked 3 ten hour shifts Tuesday to Thursday, for a total of 30 hours, they would be compensated at the regular rate of pay for the first 10 hours worked on Friday and at the overtime rate for any hours worked in excess of 10 hours on that day.

The Employer respectfully submits that its calculation of overtime is in accordance with the language of the CLRA Collective Agreement and requests that you adopt and apply the Employer's calculation of overtime.

I trust the above is satisfactory at this time and we look forward to receipt of your Final Award.

Thank you very much,

Yours truly,

Gregory M. Anthony
GMA/mm

Counsel for the Union responded on September 17, 2018. His submission appears below, also with apologies for technical glitches involved in its incorporation.

September 17, 2018

David Alcock
55 Mortimore Drive Mount Pearl, NL A1N 3C3

Dear Mr. Alcock:

Re: Hotel and Restaurant Workers Union, Local 779
v. Sodexo Canada Inc.

Please accept this rather lengthy letter as the further submission of Hotel and Restaurant Workers Union, Local 779 *("Local 779"*, or, *"the Union")*. The submission is, in part, a response to the further submission of Sodexo Canada of August 10, 2018.

The parties attempted to resolve the damages in accordance with the Penultimate Award of April 16, 2018. The parties exchanged written submissions and ultimately met, with their accountants present, to discuss the damages. When the parties could not come to a complete agreement on the damages despite discussions, they agreed Sodexo Canada would make its further submission first.

The Excel spreadsheet, provided by Mr. Anthony, is accepted by Local 779 save and except the omission of the proper calculation of overtime on Fridays.

Local 779 states:

1. If Sodexo Canada is correct on its submissions with respect to overtime on Fridays as set forth in Mr. Anthony's August 10 letter, the sum of $7,209,281.58 owing to June 30, 2018 is accurate.

2. If Local 779 is correct in its submissions with respect to overtime on Fridays as set forth in this letter, the amount owing to June 30, 2018 is $7,358,565.52 (which I believe Sodexo is in agreement with as a calculation).

3. The difference between the parties' respective positions is $149,283.94 to June 30, 2018. (There is an adjustment to interest of $23,425.32 contained in the $149,283.94)

In other words, subject to the additional interest after June 30, 2018, the final award should be $7,209,281.58, or $7,358,565.52, or some figure between those two amounts.

The balance of this submission is divided into three principal parts. The first addresses the issue of the calculation of overtime on Fridays. The second responds to the request within Mr. Anthony's letter for you to confirm the correct calculation and application of interest. Finally, as a third issue, Local 779 makes a submission for directives to achieve finality to this matter.

I. The Calculation of Overtime on Fridays

The Union submits the arbitrator has already concluded the collective agreement applies, that 10 hour work days were the norm at the workplace and, therefore, overtime on Fridays should be double time regardless of when the worker actually started a work rotation.

1. The Employer Acknowledgement of Ten (10) hour work days

In the August 10, 2018 letter from Mr. Anthony, on page 1, at paragraph 3, at the third bullet, the employer, Sodexo Canada, submitted:

> *"Employees worked 10 hour shifts and therefore overtime rates have been calculated for all hours worked in excess of 10 hours per day".*

This positon was confirmed at page 6, in the second paragraph beginning with:

> *"All overtime has been calculated by the Employer based upon employees working 10 hour shifts..."*

2. The Original Award - July 21 , 2014

In the initial arbitration, a Union witness, Douglas Harris, CA, provided an exhibit in which he outlined two scenarios for the calculation of wages for essentially the first three months of 2014. A summary of the assumptions in the two scenarios is contained in an extract from the exhibit as quoted at pages 36-37 of the award:

> *"Scenario 1: The pay is calculated using the rates of pay applicable to each employee under the collective agreement. Overtime pay is calculated using the provisions of the collective agreement, which is all overtime pay is at double the*

base hourly rate. Overtime hours are determined in accordance with the terms of the collective agreement, that is, any hours worked in excess of 10 hours a day, and hours worked in excess of 40 hours in a week, and any hours worked on either a Saturday or a Sunday are overtime hours. The work week begins on Monday and ends on Sunday, in accordance with the collective agreement.

Scenario 2: The pay is calculated using Sodexo Canada Ltd.'s payroll records with the only change being to modify the rates of pay to be the rates of pay specified in the collective agreement. In other words, whatever hours Sodexo Canada Ltd. paid at regular rates use the regular rates in the collective agreement and whatever hours Sodexo Canada Ltd. paid at overtime rates use the overtime rates specified in the collective agreement."

In reviewing the submission of the Union, the arbitrator wrote on page 48, in the second paragraph.

"Scenario 2 makes calculations on the basis of the actual work schedule followed by Sodexo, which would result in a lesser difference owed to each employee. If the arbitrator rules that a period of grace must be given to Sodexo to convert its own rotation to the CLRA rotation, then the arbitrator may accept Scenario 2 as the appropriate one".

The arbitrator held, of course, that the CLRA collective agreement applied. He wrote at page 81:

"Under the circumstances, I accept that the CLRA/HRW, Local 779 collective agreement was valid and legal and did bind Sodexo and the Union to its terms and conditions effective December 18, 2013".

The Union directs the arbitrator to the last paragraph of page 82 of the award continuing over to page 83:

"On the issue of Wages, the Union has left it to the arbitrator to choose either scenario 1 or scenario 2 as the appropriate calculation, ostensibly at least on the rationale that some period of grace might be given to the Employer because of the difficulty that would be involved in switching to the CLRA work schedule as of December 18, 2013. Since I have been granted discretion on this matter by the Union, I will use it. In my opinion, there is a significant element of unfairness inherent in an expectation that the Employer would be able to switch immediately to a new CLRA agreement work schedule upon being advised of the certification order. <u>On the one hand, I would be inclined to suggest that it might take up to 4 weeks to adjust the camp's current schedule to the new one in the collective agreement</u>. On the other hand, it would seem to me that the Employer should take some responsibility for mitigating its circumstances within a reasonable period of time. However, it appears that the Union has not put too fine a point on the subject to make complicated calculations necessary. Therefore, I accept the difference owed of $314,118.56 as determined by Scenario #2 as the

established compensation for wages owed to employees for the period December 18 to March 28, 2014" [Emphasis Added].

In essence, the arbitrator ruled in the first award that Sodexo Canada was obligated to all of the provisions of the collective agreement which, if working 10 hour shifts, would trigger the Monday to Thursday work schedule.

3. The Penultimate Award of April 16, 2018 - Part 1

The following extracts in this part of The Penultimate Award are relevant to the issue. At page 33, in recounting the evidence of Douglas Harris and, in particular, the exhibit introduced as DH#5, the arbitrator noted near the bottom of the page:

"These calculations were adjusted to reflect no pyramiding of overtime".

Mr. Harris squarely addressed the approach that the Union took which is overtime, at the rate of double time, would be payable on Fridays regardless of when the employee started their shift. At page 34, near the bottom of the page, the arbitrator recounted:

"An example of how overtime would be calculated in DH#2 for an employee who started work on a Friday, Friday would be his first day worked and he would be paid 2 times the hourly rate for all time worked. Mr. Harris explained that overtime in DH#5 is calculated on the Union's interpretation of the collective agreement, which pays more overtime to employees than Sodexo determined".

In addressing the Union's argument and specifically the *"end of the construction period"* around that calculation, at page 76 of the award, the arbitrator, beginning on the last two lines at page 76 and continuing over to page 77 wrote:

"It should be noted that his final numbers were modified in recognition of Sodexo's claim that the Union's calculation of overtime was pyramided. In other words, the Union agreed with the Employer's position and revised its DH#1 numbers on DH#5".

4. The Penultimate Award of April 24, 2018 - Part 2

There are several extracts from this portion of the award which confirm the original finding of the arbitrator and the determination that compliance with the collective agreement would require scheduling of 10 hour work shifts from Monday to Thursday and therefore payment for Fridays at double time.

On page 46, near the bottom of the page, the arbitrator wrote:

"Therefore, the arbitrator finds that the bargaining unit is entitled to be paid for all work assigned to it at CLRA/Local 779 rates, and that the other terms and conditions of the agreement also apply to all bargaining unit employees while the Employer's practice persisted".

At page 47, near the bottom of the page, the arbitrator wrote:

> *"It was open to the Employer to change the assignment of all work to the bargaining unit in 2015 if it wished. It did not do so. Payment for all such work has already been ordered in the July 21, 2014 award. None of the evidence and submissions at compensation hearings warrants changing the basis for determining such compensation".*

At page 48, at the bottom of the page, the arbitrator wrote:

> *"Therefore, the Employer does not have the right to change the decisions it made regarding assignments to the bargaining unit in the past. Rather, it is now responsible for any decisions it did make that were in violation of the collective agreement".*

At page 49, midway through the page, the arbitrator wrote:

> *"The fact is that the collective agreement did apply, albeit retroactively, from December 2013 until December 31, 2015".*

At pages 56 and 57 of Part 2 of The Penultimate Award, the arbitrator noted that Sodexo had treated all work performed by its employees as if there was no bargaining unit and no collective agreement. It was noted that there was no opportunity for an information exchange to occur including on how overtime should be calculated. The discussion on this continues to the top of page 57 of the award.

At page 57 of the award, in the last paragraph, the arbitrator wrote:

> *"Since the employees and the Union are entitled to be made whole in this compensation exercise, it is important that the Employer's past decisions do not unfairly disadvantage their entitlement".*

The following lengthy extract beginning mid-way on page 65 to near the top of page 66 of Part 2 of The Penultimate Award addressing 12 hour shifts has implicitly, if not explicitly, determined the calculation of the overtime on Fridays.

> *"In the arbitrator's view, if a normal bargaining relationship had been in place, all the provisions of the collective agreement would have applied, among them the various hours of work shift schedules, and judging from the testimony of Union witness who described that a 12 hour shift was not at all uncommon at Sodexo, it is the 10 hour/4 days/week compacted schedule that must be applied to employees on 12 hour shifts for the calculation of overtime in the overall determination of compensation owing.*
>
> *The second aspect of overtime is how it should be calculated. Article 7.01 states: "All hours worked in excess of ten (10) hours per day shall be paid at double time the regular rate of pay." To avoid the pyramiding of overtime prohibited by Article 7.03, the arbitrator's interpretation of the relevant collective agreement wording in the context of the whole of Article 7 (including Article 7.02) is that*

overtime for employees who worked 12 hours/day should be calculated in the following manner:

Monday	*10 hours straight time*	*2 hours double time*
Tuesday	*10 hours straight time*	*2 hours double time*
Wednesday	*10 hours straight time*	*2 hours double time*
Thursday	*10 hours straight time*	*2 hours double time*
Friday	*All hours at double time (i.e., after 40 hours straight time per week)*	
Saturday	*All hours at double time*	
Sunday	*All hours at double time"*	

The submission of Local 779 is that the arbitrator has already concluded the 4 times 10 work schedule, Monday to Thursday, applies which would trigger overtime at the rate of double time on Fridays.

II. The Calculation and Application of Interest

At page 2 of the Sodexo Canada submission, that is, the letter of Mr. Anthony of August 10, 2018, Sodexo requests:

> *"In addition, please confirm whether the parties have correctly calculated and applied interest in accordance with the language of The Penultimate Award".*

The arbitrator should be aware that the parties mutually agreed to calculate interest on the sum of $102,000.00 awarded for the shift differential from November 2015. In Part 2 of The Penultimate Award at the bottom of page 70, the arbitrator had written interest shall apply on that sum calculated to November 30, 2015. The parties mutually agreed that the arbitrator must have intended to mean from November 2015 rather than to November 2015, as the $102,000.00 amount would only have crystallized by November of 2015, and the interest which would be intended to compensate would be calculated going forward.

The calculation and application of interest as it is applied in both Sodexo's figure of $7,209,281.58 and the Union's figure, is the same, mutually agreed upon by the parties' accountants. Local 779 submits it is a redundant exercise and one which cannot be done without the assistance of a third accountant, for the arbitrator to confirm an interest calculation and application already agreed upon by the parties.

III. Request for Final Directives

The parties are desirous of a final award being rendered. At this point, the arbitrator has been requested, *inter alia,* to determine a single issue which separates the parties on reaching the total damages payable. In addition to determining the total damages payable and the application of further interest after June 30, 2018, the Union submits the arbitrator should direct the manner of payment of the damages. The Union's request is the final award of the arbitrator determine the total damages (and additional interest) be payable under the following conditions:

1. The full damages and interest be paid by a date certain.

2. The damages be paid to the employees listed in the payroll lists provided by Sodexo Canada at the arbitration in separate amounts determined and directed by Local 779 and its accountants, Harris Ryan.

3. Those portions of the damages that are payable in wages and other direct benefits to the employees be paid in the form of payroll cheques *("employee cheques")* with all of the required statutory deductions.

4. The employee cheques be delivered to Local 779 whose responsibility will be to ensure the delivery of the cheques to the respective employees.

5. Those portions of damages which are payable as dues deductions and other remittances of Local 779 be paid to Local 779.

I trust the above submissions will be taken into consideration. My client looks forward to receipt of your final award.

Yours truly,
MARTIN WHALEN HENNEBURY STAMP

Dana Lenehan, Q.C.
/cdg
Cc: Greg Anthony

Counsel for the Employer advised by e-mail on September 28, 2018 that, with one exception, the Employer did not wish to make any further submissions. His comments follow below, viz:

> We do not wish to make any further submissions except with respect to the submissions of the Union contained within **III. Request for final Directives**. The Employer, Sodexo respectfully submits that any amounts owing to the employees would be paid in accordance with the Collective Agreement and your award, less the required statutory deductions. Where the individual is no longer employed by the Employer and the Employer does not have a current address for the worker, the Employer can work with the Union to locate the individual and provide payment. It is respectfully submitted that payment of union dues and other assessments as required by the Collective Agreement and your award would be paid in accordance with the Collective Agreement. For example, certain payments required under Article 12 of the Collective Agreement are to be paid to the Benefit Plan Administrators Limited.
>
> I trust the above is satisfactory and we look forward to receipt of your final decision.
>
> Yours truly,
> Greg Anthony

In a September 29, 2018 e-mail to counsel, the arbitrator acknowledged receipt of the parties' foregoing submissions and advised them of his limited availability to write the award and that he would be out of the province for a month as of October 6, 2018. The following are some further comments contained in that e-mail:

> . . . .
>
> I had written a portion of the final decision prior to hearing from you. I shall now return to that task as I am able and as my time permits.
>
> If either feels that any further comment is necessary on these issues, now is the time to come forward so that this compensation matter can be completed.
>
> I am acutely aware that the parties want a quick end to this dispute. However, my analysis of the issue so far is that there are complexities involved which neither party appears to realize. Therefore, a longer award is now necessary than first anticipated and I intend to be thorough in my deliberations.
> . . . .

On October 1, 2018, the arbitrator received a proposal from counsel for the Union for a brief teleconference on this matter on Wednesday October 3, 2018 at 4:00 pm. It was indicated that counsel for the Employer was in agreement with this proposal. The arbitrator agreed to be available and further indicated his willingness to meet with counsel in person at that time if they felt it would be beneficial. A conference call was held at the appointed time. The arbitrator explained the "complexities involved". To assist in a resolution of the Friday overtime issue and a quick Final Award, the Union offered to split the cost of the remaining difference between the parties. A further discussion was held on the additional directives referred to in the Union's latest submission. Counsel for the Employer indicated that he would discuss these matters with his client and receive direction from same.

Counsel for the Employer responded again on October 13, 2018, viz:

> WITHOUT PREJUDICE
> Gentlemen:
> I have had an opportunity to speak with my client and take instructions with respect to this matter. Unfortunately, our client is not prepared to agree with the proposal of

the Union to split the difference with respect to the calculation of overtime on Fridays and is requesting that [the arbitrator] provide a determination on this issue and provide your final award to the parties.

I apologize for the delay but my client was travelling in Asia and it was difficult for me to arrange a call to discuss this matter until recently.

I trust that the above is satisfactory at this time and we look forward to receipt of the final award in due course.

The arbitrator responded on the same date, viz:

Thank you [Mr. Anthony]:

I expected this but had hoped otherwise.

It is fortunate however that I had not erased what I had already had written. At least some of the ruling has been put together.

Please advise your client that I will deal with the Friday overtime issue in the context of determining an award for overall compensation owing. However, since there are complexities associated with this issue, which may require further analysis by the Employer to explain the individual circumstances why employees did not work Monday, Tuesday Wednesday and Thursday in any week, the parties should not expect my ruling to be the final award in this compensation matter. As a consequence. this may prolong matters longer than the parties anticipated.

I will not be able to commence writing again until Monday October 22nd.

For the foregoing reasons, I am unable to determine a date for concluding the final overall compensation award.

CONSIDERATIONS

The Issue of Payment of Overtime on Fridays

Background

Had the issue of Friday Overtime arisen during the term of the collective agreement under a normal continuing bargaining relationship, it is probably safe to say that it would have been dealt

with through the grievance procedure very early in the game, and it would have been resolved by the parties or ultimately decided by arbitration. Since the issue would have been live at the time, the parties would have been able to make their arguments on interpretation and possibly introduce evidence of industry practice contrary or confirming, if any, under the same language.

Consultation by the Employer with the Executive Director of the Construction Labour Relations Association on the issue would also have been appropriate. Since the CLRA negotiating committee would have negotiated the relevant collective agreement language on behalf of all employers who would subsequently become bound by its provisions, the Executive Director would be able to provide interpretation advice on the issue, and would also be able to provide information on or examples of industry practices that might have occurred in the interim. Whatever then may have been the pros and cons of relevant evidence adduced in such circumstances, it is unlikely that the issue still would still be in dispute at these compensation hearings.

If this type of issue had arisen as an interpretation matter associated with an individual or group grievance during the term of the collective agreement, (a common event during the course of most normal continuing bargaining relationships), the approach by this arbitrator at the conclusion of hearings would have been to go directly to the wording of the collective agreement and attempt to determine its meaning by employing the usual principles of interpretation provided by counsel for the Employer in his submission here. If the meaning could be reasonably ascertained from the words expressed, then the arbitrator's ruling would reflect that interpretation on a go forward basis. The material facts, if any, of the grievance would then be examined in light of that interpretation and a decision upholding or denying the grievance would be made, and a financial remedy might flow from a finding of violation of the collective agreement.

If the issue had arisen as a policy grievance, the interpretation approach would be the same, and all the parties would have an answer to the meaning of their collective agreement provision on a go forward basis.

Application of newly interpreted agreement language different in these compensation hearings

Unfortunately, the particular issue here did not arise in the course of a normal continuing bargaining relationship. As has been established in the July 2014 award and the April 2018 penultimate award, there has been nothing normal about the bargaining relationship between Sodexo Canada and HRW Local 779. The Employer did not recognize the existence of the NCLRA collective agreement and did not at any time follow its provisions. The arbitration process has found that the relevant CLRA collective agreement did apply and was violated by the Employer while construction activity at the Site continued until December 2015. Recourse sought from the Courts ultimately has not disturbed that finding, thereby returning the original dispute to this arbitrator to determine the issue of compensation owing.

In addressing matters of compensation owing, the arbitrator already has had to retroactively apply the terms and conditions of the collective agreement to assignments of work for bargaining unit employees which were deliberately not made in compliance with the agreement's provisions. To the extent that the Employer has not adhered to its provisions, the arbitrator has found that employees so affected are not to be disadvantaged by the Employer's violations. Therefore, compensation determinations have been decided for employees and the Union in the manner that the collective agreement provisions would have required them to be applied since December 2013. Most of that process has involved the retroactive application of the entire collective agreement from the very beginning.

However, this current dispute involves a situation which one would not normally associate with a grievance taken under an active operating collective agreement. This situation requires a retroactive interpretation of the collective agreement for the sole purpose of determining compensation owing for years past by relying in part on the Employer's payroll records for that

time, which have been generated on the basis of work schedules that did not conform to the requirements of the collective agreement, and did not compensate employees correctly. In essence, the Employer's payroll records are not accurate indications of how employees should have been scheduled, assigned and compensated in accordance with the collective agreement. Determining appropriate compensation to address that deficiency is what these compensation hearings are all about. Both the process and the result lack perfection because the Employer consistently and deliberately violated the collective agreement in directing its employees. The Employer's records accurately describe how employees were directed. They do not describe how they should have been directed. But the Employer's records, albeit deficient, are the only hard information of time actually worked available to assist these compensation hearings. It is a situation in which we are all faced with doing the best we can to come as close as we can to making each employee whole.

No specific interpretation of Friday Overtime previously conducted

To arrive at this current stage of determining compensation owing, the arbitrator already has had to refer to the provisions of the agreement referencing overtime. However, as the arbitrator recalls, the previous issue in dispute with respect to overtime calculations was pyramiding, which the Employer challenged how Mr. Harris, who had to rely on Sodexo's payroll records of actual time worked, determined overtime payment owing for work performed on Thursdays after employees had worked 12 hours on Mondays, Tuesdays and Wednesdays. Fridays were not the primary focus of the pyramiding disagreement. At this point, the issue of overtime calculations for work on Thursdays has been determined. No interpretation of the collective agreement was necessary on that matter.

As part of his explanation how he calculated overtime from the Employer's records, which showed actual time worked, Mr. Harris also commented that he applied the Union's interpretation for the example of an employee who had started work on a Friday, namely, double time for all time

worked on that day. Obviously, Mr. Harris must have been aware that the Employer's records indicated there were examples of that kind of thing happening throughout the parties' relationship. There was no immediate reaction by the Employer to that comment at the time and there was no discussion about why an employee's start day during the work week actually occurred on a Friday instead of on Monday. Essentially, the fact of the matter was that the Employer had scheduled its employees as it wished to do so, not as the collective agreement required, and Mr. Harris was tasked by the Union to calculate overtime compensation retroactively for each and every employee circumstance he encountered in the Employer's pay records. Often there was a disconnect between the hours employees actually worked and the hours the collective agreement required them to work. That is why he testified that he relied on the (Union's) interpretation of the collective agreement and the payroll information he had received from Sodexo. Mr. Harris' comment about overtime on Friday was made in that context.

The arbitrator's sense of the hearing at that time is that Mr. Harris' comment was quickly forgotten in the discussion of pyramiding of overtime on Thursdays, especially when Mr. Harris declared that he had revised his overtime calculation on the basis of the Employer's interpretation of pyramiding of overtime at that time. Since the Employer did not then declare its understanding of overtime as it applied to an employee's weekly start time on Fridays, the arbitrator cannot confirm that the Employer expressly accepted Mr. Harris' position on Friday overtime. For certain there was no detailed explanation of the Employer's interpretation as has been made recently by Employer counsel. On balance the arbitrator cannot conclude that the Employer tacitly agreed with the Union's interpretation at that time. And for certain, the arbitrator was not previously requested to issue a ruling on that particular matter. It appears that only during the subsequent process of comparing overtime calculations after the Penultimate Award was issued, did the parties' different views on Friday overtime become an obstacle to the determination of overall compensation owing, thereby requiring a ruling on the interpretation of the relevant collective agreement language.

Until now, in-depth comprehensive interpretation of the collective agreement has not been necessary. In the Penultimate Award, where differences have arisen in the determination of compensation, the issues have generally been matters of application of certain provisions rather than serious interpretative analysis of agreement language. Therefore, there was little likelihood of an interpretation ruling that might have a serious impact on the meaning of the agreement in future. This point cannot be emphasized too strongly, especially where a future significant financial benefit is at stake.

Arbitrator concerned that CLRA was neither consulted nor notified this issue was to be arbitrated

It is important to note that this particular collective agreement was not negotiated by Sodexo Canada and the Union. Rather it is the product of negotiations between The Construction Labour Relations Association of Newfoundland and Labrador (CLRA) and the Hotel and Restaurant Workers Union (HRW Local 779), which, by law, binds Sodexo Canada to its provisions in the bargaining relationship with the Union. The 2011-2016 CLRA collective agreement would apply equally to other employers in similar situations by virtue of its umbrella provisions. It is not open for Sodexo to impose its interpretation of any provision in a different way than was intended by the CLRA negotiating committee and the Union in the first place.

This point is of concern to the arbitrator in these particular circumstances. The arbitrator's view is that the CLRA should have been consulted first by Sodexo Canada on the matter of interpretation involving Friday overtime it has raised in these compensation hearings, so as to obtain the CLRA's position on the issue. The CLRA is the Employer governing body with the most experience and knowledge with this collective agreement and also with any industry practices that might be relevant. The CLRA also should have been notified by the Employer that it intended to request that this arbitrator provide an interpretation ruling of the CLRA collective agreement. Such notification would have given the CLRA opportunity to request standing during this

particular arbitration hearing on the grounds that the issue in dispute was a matter in the CLRA's legitimate interest. There is no indication that the CLRA was contacted on this particular issue. Also concerning is the fact that the process of submissions by the Employer and the Union on Friday overtime potentially might have deprived the arbitrator of learning about the CLRA's interpretation of the agreement as well as about possible relevant industry practices, if any, or any other relevant industry information the CLRA may have been able to shed light on the issue.

The arbitrator is aware that verbal testimony by the then Executive Director of the CLRA was received during initial hearings in 2014, and that it was the position of the CLRA that it was content for Sodexo and the Union to pursue the primary issue in dispute at the time. That primary purpose was to determine whether the CLRA collective agreement applied after the date of certification. On balance, the arbitrator distinguishes that situation from the current dispute which challenges the interpretation of the collective agreement on a single narrow issue, which is not as simple or straight-forward as the parties appear to think it is. It is also an issue which might have an impact on how this employer or other employers would determine a particular financial benefit in future. In the arbitrator's view, it is one thing for the CLRA to agree with this employer's carriage of the primary issue, i.e., whether the overall agreement applies in the first place. It is quite another thing for the CLRA to be denied opportunity to participate in a collective agreement interpretation issue that might possibly affect employers in the future in a way that potentially might be inconsistent with the CLRA's position on the issue. Whether it is or is not inconsistent is not the point. The point is that Sodexo Canada should have advised the CLRA of its intent to challenge whether the collective agreement compels the Employer to pay overtime premium for employees whose work week started on Fridays. It would then have been up to the CLRA whether or not to seek participation.

Absent any contribution by the CLRA or declaration that it did not wish to be involved in this particular issue, the arbitrator has only the Employer's and the Union's submissions to assist

his deliberations. The arbitrator reluctantly proceeds without the CLRA's involvement to interpret the CLRA collective agreement, which by now may have been renegotiated. The arbitrator does this exclusively in the context of a retroactive determination of compensation owing for years past, not as an interpretation intended to bind the parties on a go forward basis should their bargaining relationship become active again in future.

Interpretation of Article 7: whether overtime pay applies to work performed on Fridays

The Employer's position in this dispute concerns what the collective agreement says about the payment of "overtime" on Fridays. Counsel particularly references articles 7:01 and 7:02 in support of his interpretation.

Overtime not defined in the agreement

Article 7 contains four sub articles. The word "overtime" is absent in articles 7:01 and 7:02. In fact, the word appears only twice in the whole of Article 7: once in 7:03, which says "There shall be no pyramiding of overtime" and again in 7:04B, which says "Overtime shall be shared equally between all Employees". There is no dedicated overtime clause in the collective agreement, and the word is not expressly defined in Article 7 or anywhere else for that matter. The heading for Article 7 is "Hours of Work", but it contains the only references to the word overtime. Therefore, whatever overtime is supposed to mean in this collective agreement must be determined from those two lone references, aided, the arbitrator submits, by the principles of interpretation cited by the Employer attributed to arbitrator Oakley in *Resource Development Trades Council of Newfoundland and Labrador and Long Harbour Employers Association Inc.,* at page 12 of that decision:

> Arbitrator Oakley, in a recent decision, summarized these principles of interpretation as follows:

> The Arbitrator has considered the principles of collective agreement interpretation that apply in this case. The principles of interpretation are discussed in Brown & Beatty, *Canadian Labour Arbitration,* 4th edition, and include, that the object of construction is to determine the intention of the parties from the express provisions of the collective agreement (paragraph 4:2100,) that the language should be viewed in its normal or ordinary sense (paragraph 4:2110), that it should be presumed that all the words used were intended to have some meaning (paragraph 4:2120), and that the language is to be interpreted within the context of the collective agreement as a whole (paragraph 4:2150) and the industrial relations practices of the parties (paragraph 4:2300).

The interpretation of article 7 in this collective agreement is in some need of the assistance described above, especially regarding what is meant by "overtime" itself. It appears that the language of the agreement lacks initial clarity on what should be the most important basic concept involved in determining when to assign higher than normal pay for non-standard hours worked. The reader is not led to a direct, straight-forward conclusion. One has to resort to testing the consistency of terminology such as "double time the regular rate of pay" used in article 7:01 and article 7:04A and "double the regular rate of pay" in article 7.02, and to search among various fragmented portions of article 7 language in the hope of finding wording which might support a logical train of thought as to its meaning. In this exercise, establishing supporting connections is sometimes elusive. However, whatever the complexities involved, the interpretation of article 7 is nonetheless required and is hereby submitted by the following considerations. The result is probably not exactly what either party anticipated.

Two work weeks specified in article 7:01

In this collective agreement, two work weeks are declared in article 7:01, namely, the regular work week and a compacted work schedule, viz:

1. The regular work week … Monday through Friday inclusive, consisting of five (5) eight (8) hour work days. All hours worked in excess of eight (8) hours per day shall be paid at double time the regular rate of pay… [Emphasis added]

2. or the Employer may have the option of working a compacted work schedule of Monday to Thursday inclusive, consisting of four (4) ten (10) hour days. All hours worked in excess of ten (10) hours per day shall be paid at double time the regular rate of pay. [Emphasis added]

There is a completely different shift schedule for Security Personnel in article 7:04A of "seven (7) twelve (12) hour shifts in a two (2) week fourteen (14) day period. Friday overtime for Security Personnel appears not to be an issue in the determination of compensation owing for Friday overtime in this instance. However, since 7:04A mentions that "All time worked in excess of eighty-four (84) hours in a two (2) week period shall be paid at double time (2x) the regular hourly rate", reference to that wording may contribute to finding what is meant by overtime in this agreement, and might also explain the parties' joint understanding that overtime also applies for work performed after 40 hours work in the work weeks described in article 7:01.

Employer not free to choose other work weeks

For the purposes of this particular dispute, the arbitrator finds that the two work weeks in article 7:01 are the only work week schedules permitted by the collective agreement. That clause is not a mere suggestion of the work weeks the Employer may choose to utilize. Rather it specifically prescribes what the Employer's two options are. This limitation fetters the exercise of management rights in article 3:01, viz:

Article 3:01

The Union recognizes and acknowledges that it is the exclusive function and responsibility of the Employer *subject to the terms and conditions of this Agreement* to operate and manage its business in all respects in accordance with its responsibilities and commitments. [Emphasis added.]

Since article 3:01 is subject to article 7:01 (and also to article 7:04A where security personnel are concerned), the Employer would be in violation of 7:01 if it assigned its non-security personnel employees to any other different weekly work schedule.

What the foregoing means for determining compensation owed for this particular Friday overtime interpretation issue is that, in addition to payment for hours worked on Friday, collateral compensation would be involved if the Employer scheduled any employees in the past to a compressed work week in which Friday was their first day of work rather than Monday. This is so because the Employer's initial violation of the collective agreement would be that it denied such employees their rightful entitlement to work the standard 10 daily hours each on Monday, Tuesday, Wednesday and Thursday of the specified condensed work schedule. The remedy for that violation would be an award of compensation for all four (4) lost regular days.

The rate of pay for working/starting on Friday will be determined by the following considerations.

Since there is the possibility of other scenarios applying to employees who did not work Mondays, Tuesdays, Wednesdays, and Thursdays, or who worked less than the full 10 standard hours during those days in any week, the arbitrator chooses to address those issues later in these considerations.

Condensed work schedule is the relevant work week for determining compensation owing

The arbitrator finds that the scheduling of employees until construction activity ceased in December 2015 was required to be made solely to one or the other of the two work weeks in Article 7:01. The relevant weekly work schedule for the purpose of these compensation hearings has been determined to be the compacted work schedule of 10 hour days Monday to

Thursday inclusive. That schedule is the context for the dispute the Employer has raised regarding the status of double time pay for work on Fridays. Any employee not assigned to the regular 5-day work week is required to start work on Monday of each week and continue the required compacted work week daily hours of work on Tuesday, Wednesday and Thursday. Those particular four days constitute the standard or regular days of work for the compacted schedule. Friday is not listed as a standard work day in that schedule.

Employer asserts that Friday work is not overtime because it is not mentioned in article 7:02. Employer also asserts that work on Friday would be overtime after 40 hours worked.

The Employer asserts that Friday is not an overtime day because it is not mentioned as such in article 7.02 as Saturday, Sunday and gazetted holidays are. In addition to asserting that article 7:02 deals with overtime, an interpretation with which the arbitrator will soon provide reason for disagreeing, the Employer asserts that overtime on Friday may only occur when an employee has worked 40 previous hours on Monday, Tuesday, Wednesday and Thursday, i.e., 10 hours each day, in the compressed week schedule. Essentially, the Employer submits that work performed on Friday would constitute overtime if the condition of having worked 40 standard hours in that week has been met. Yet sufficient support for that position from the language of the agreement has not been established by the Employer. Indeed, the arbitrator has been provided with no supporting reasons for this from each party's own interpretation of agreement language, and there has been no evidence offered or suggested of an industry practice on the matter. On the arbitrator's initial reading of article 7 in this collective agreement, no express language establishing overtime after 40 hours in a week was quickly identifiable as it was for daily overtime in article 7:01. Finding collective agreement support for that notion occurs only after more detailed interpretative analysis.

Meaning of overtime determined

Both parties appear to accept the notion that double pay and overtime pay are synonymous. The rationale for that appears to be based partly on article 7:02, which provides for "double the regular rate of pay" for work performed on Saturdays, Sundays and gazetted holidays, and also based on the reference to "double time the regular rate of pay" mentioned in article 7.01. However, caution should be taken not to assume generally that a reference to double pay in this collective agreement necessarily means that overtime must be involved.

For example, one would indeed be correct to conclude that the mention of "double time the regular rate of pay" in article 7:01 refers to overtime pay because the wording of that clause makes it clear that double time the regular rate of pay shall apply to work performed after employees have completed 10 hours of work during a day. This supports the Employer's position that the condition for double time the regular rate of pay to be paid is that the required amount of time previous must have been worked. In turn, this logically supports the conclusion that the time worked after the condition has been met is "overtime", i.e., over time, in the sense that it is more or extra time worked beyond that worked during the standard or regular hours of work. For that reason, the arbitrator accepts the Employer's position that this collective agreement provides that overtime pay will apply after employees have previously worked the number of qualifying standard hours in each day. In the arbitrator's view, the wording of article 7:01 clearly and unequivocally establishes that "double time the regular rate of pay" and overtime pay are synonymous where overtime work is performed on a daily basis, namely, on Mondays, Tuesdays, Wednesdays and Thursdays.

Work performed under article 7:02 is not overtime

However, it would not be correct to assume that the mention of "double the rate of pay"

in article 7:02 refers to overtime pay. That clause reads:

> All hours worked on Saturday, Sunday and gazetted holidays shall be paid at double the regular rate of pay.

Whereas overtime connotes time worked extra to regular time worked, payment for work performed on Saturday, Sunday and gazetted holidays under article 7:02 requires no precondition that an employee must work any particular number of other immediately previous hours or days. The wording of 7:02 is clear and unambiguous on that point. Any time an employee works on a Saturday or Sunday or a gazetted holiday in accordance with article 7:02, that employee would be entitled to "double the regular rate of pay". That terminology is different from the terminology used in article 7:01 and in 7:04A. The difference is that the word "time" does not appear in the method of payment in 7:02.

A principle of collective agreement interpretation is that every word is presumed to have meaning. The presence of the word "time" in the method of payment for time worked has a different connotation than its absence does. No precondition exists in 7:02 for an employee to work any number of regular hours at all during the week. Therefore, when hours are worked on a Saturday, Sunday or gazetted holiday under article 7:02, no overtime is involved.

The meaning of overtime is made clear in both article 7:01 and article 7:04A, and is further distinguished from work performed under article 7:02, by the terminology describing the method of payment in 7:01 and 7:04A, namely, "double time the regular rate of pay", which each clause carefully uses. The method this collective agreement utilizes to compensate for overtime is to double the number of hours actually worked and pay for them at the employee's regular rate. That is precisely what "double time the regular rate of pay" means. Simply put, the employee is considered to have worked two times (2x) the hours he/she actually worked, and those hours are paid at the employee's regular rate of pay. In contrast, the method used to compensate for work on a Saturday, Sunday or gazetted holiday under

article 7:02 is to multiply the actual number of hours worked by twice the employee's rate of pay. That is precisely what "double the rate of pay" means: the rate of pay is doubled for an employee who works hours on the designated days in 7:02. This recognizes the special status of those days in the collective agreement as worthy of a premium rate of pay when they are worked. Also, the different methods of payment in article 7:01 and article 7:02 make logical sense because they each fit the peculiar activity that is happening for work performed in each clause. Article 7:01 addresses payment for overtime; article 7:02 addresses premium pay for work performed on designated special days.

Saturdays and Sundays may be viewed as extra to either the 5 day or the compressed work week because they are always weekend days. The same cannot be said for work on gazetted holidays. As such gazetted holidays may occur during regular week days as well as weekend days and they are not ordinarily considered extra to a work week. Indeed, they may substitute for regular work days. In the arbitrator's opinion, the common thread between weekend days and gazetted holidays is that they are viewed as special days employees enjoy having off. Therefore, when that opportunity for enjoyment is interfered with, as in having to work on such days, it is considered an acceptable tradeoff that double the regular rate of pay should be paid. The arbitrator submits that this is the logic behind the authors' wording in article 7:02. The intent is to ensure that tradeoff exists no matter when those special days are worked, and that such entitlement would not be contingent on any employees working any preceding qualifying hours or days, as would ordinarily be the case with overtime. In essence then, the arbitrator finds that article 7:02 does not provide any entitlement to overtime. Rather it provides unconditional entitlement for double the regular rate of pay for work performed on special days, namely, Saturday, Sunday and gazetted holidays.

Work on Saturdays and Sundays under article 7:01 after 40 regular hours have been

worked would constitute overtime by the same principle as work after 10 hours daily constitutes overtime. Work on Saturdays and Sundays under article 7:02 is not subject to any requirement that previous hours must be worked. Therefore, such work is not overtime. This is not a distinction without a difference. The distinction matters. For example, article 7:04B establishes that it is only overtime that is to be shared equally. That concept does not apply to work performed under article 7:02.

The effect of not including Friday in article 7:02 or article 7:01

On the one hand, if Friday were included in article 7:02, it would clash with the 5-day work week in article 1:01 where Friday is a standard or regular day for which work performed clearly is intended to be paid at the regular rate of pay, not at double that rate. Friday cannot be a regular day and a special day at the same time. On the other hand, the inclusion of Friday in 7:02 would not clash with the Monday through Thursday compressed work schedule in article 7:01. But without careful wording to specify that double the regular rate of pay for work on Friday would apply only to the condensed work week schedule and not to the regular 5-day week, its inclusion would be contradictory. In the arbitrator's opinion, including Friday in article 7.02 would also be contradictory if work on that day actually was intended to be overtime. Work performed on the special days that are mentioned in article 7:02 is not intended to constitute overtime. Friday cannot be both a special day and an overtime day at the same time.

In the arbitrator's opinion, the authors appear to have deliberately avoided the unnecessary complications that the inclusion of Friday in article 7:02 would cause.

Friday is not named as a day to which double time will apply, as Saturday, Sunday and gazetted holidays are in article 7:02, but Friday is also not named as part of the compressed

work week in article 7:01. However, the effect of this language or lack thereof does not cause Friday to cease to exist. That would be illogical. The collective agreement does not prohibit the assignment of work to employees on that day. While Friday may be outside the regular work week, work on that day may still be assigned to employees. If work may be assigned to employees on that day, the issue therefore, is what rate of pay is contemplated for such assignments.

Logically, the non-mention of Friday in the condensed work week in article 7:01 as a day to which double time must be paid for work performed, does not mean double time may not be paid on that day if the conditions for such payment are otherwise met. If the Employer assigns work on Friday after an employee has worked Monday through Thursday and pays straight time for such work, it would effectively be adding another work day to the condensed work week, thereby violating the condensed work schedule described article 7:01. However, the Employer would not violate article 7:01 in those circumstances if it paid overtime rates on Friday. In fact, paying double time for work on Friday, which is in excess of the 40 weekly hours Monday through Thursday, would be the only way to avoid violating Article 7 of the collective agreement. Logically then, the interpretation of articles 7:01 and 7:02 in this way ensures the consistency and integrity of the collective agreement. Clearly no violence occurs within article 7 under the foregoing interpretation. In the arbitrator's view, this interpretation supports the meanings of the various individual clauses in the context of article 7 itself, and solidifies them as a cohesive, consistent language unit within the context of the collective agreement as a whole.

Any confusion with the notion of overtime after 40 hours may well be due to the fact that Saturdays and Sundays are weekend days, i.e., those occurring after the 5 day Monday through Friday work week, and that work performed on a weekend day is commonly

considered overtime in other collective agreements. Work on Saturday and Sunday under the instant collective agreement may be considered overtime when it occurs after 40 hours have been worked during the regular Monday through Friday 5-day work week. There, all the days from Monday through Friday are accounted for as regular work days, and when they have all been worked, work on Saturday and Sunday fits the meaning of overtime. The notion of weekend overtime for the four day compacted work schedule is a little less obvious. There Friday is neither a regular day nor a weekend day. In a sense, it separates them. Yet it can be possible for work on Friday to be assigned, thereby making it extra to 40 hours worked Monday through Thursday, just as work on Saturday and Sunday would. In other words, work on Friday, Saturday and Sunday would be in the same category, each of them fitting the meaning of overtime.

Overtime after 40 hours in a week

The parties' positions demonstrate that they fully agree that "overtime" should be paid for work performed after 40 hours have been worked in a compressed work schedule. The arbitrator wishes to make it perfectly clear that he will not interfere with the parties' mutual agreement on that significant benefit in the determination of compensation owing.

At the same time, however, the arbitrator considers this information worthy of mention in addressing one of the Employer's assertions on how to determine whether the language of an agreement does or does not provide a financial benefit. That assertion suggests that express wording must exist in the agreement to establish such a benefit. To test this principle of interpretation establishing entitlement to overtime after 40 hours worked in a week, one would expect to readily find express language in the collective agreement stating so. Interestingly, this expectation is not readily met by the language the arbitrator has been referred to for

interpretation. It is also curious that neither of the parties has so far attempted to explain where the collective agreement expressly provides for overtime after 40 hours worked in a week. One wonders then what constitutes the basis of the parties' common understanding that such a benefit exists? If such a benefit exists without express wording in the collective agreement establishing it, one wonders why entitlement to double time for any time worked on Fridays cannot similarly exist?

The wording of article 7:01 expressly establishes overtime entitlement in terms of hours worked in excess of the scheduled daily 10 hour days worked on Monday, Tuesday, Wednesday and Thursday. As a matter of interpretation of article 7:01, the arbitrator also finds that double time is contemplated for overtime work performed after an employee has worked the required number of standard work hours in a day.

Interestingly, the language of article 7.01 does not expressly state that overtime pay shall be provided for work performed in excess of the scheduled weekly hours worked. Yet it is abundantly clear that both parties have agreed in their submissions that such entitlement exists. Counsel for the Employer clarified the Employer's position with the example that an employee who worked 10 hours on Monday, Tuesday, Wednesday and Thursday would be paid "overtime" at the rate of double time for work performed on Friday. No explanation was offered where the collective agreement expressly says this. Meanwhile counsel for the Union has concurred, also without reference to supporting collective agreement language, suggesting that the parties' agreement on that subject settles that double time applies for work performed on Fridays in those circumstances.

Since the parties fully agree that overtime rates apply for work hours performed in excess of 40 hours in a week, the arbitrator reiterates that he will not disturb their mutual agreement in the determination of compensation owing. However, the grounds on which the parties base

their joint understanding is intriguingly unclear. The question of course is how a conclusion of double time pay can be reached on an interpretation of article 7:01 and 7:02, which, one might argue, appear to be silent on the matter.

The Employer, also effectively claiming silence or absence of wording, has argued that since overtime payment for work on a Friday is not expressly provided in the collective agreement, the arbitrator has no right to establish that financial benefit. In the arbitrator's view, the answer to both matters lies in the existing relevant language of the collective agreement logically interpreted.

The language of article 7:01 does not expressly state that overtime rates will be paid after 40 hours weekly as well as after 10 hours per day. As counsel for the Employer correctly pointed out, articles 7:01 and 7:02 contemplate a 40 hour work week. We know how employees are to be paid during the work week, so what needs to be determined is how much to pay for work performed in excess of the 40 hour work week.

Article 7:04A expresses the notion of overtime pay for Security Personnel under a two-week work schedule. In particular, the concept of overtime pay after a certain number of hours has been worked during the period of a work schedule is expressed in the last sentence of that clause, viz:

> ...All hours worked in excess of eighty-four (84) hours in a two (2) week period shall be paid at double time (2x) the regular hourly rate.

The method of payment, i.e., double time the regular rate of pay is precisely the same as expressed in article 7:01. Therefore, the work described is overtime. Though a two-week work schedule is involved in 7:04A, the principle of incurring overtime pay in excess of weekly hours would be no different if it were applied to the 40 hour compressed work schedule in article 7:01. In effect, although the express wording regarding the principle of establishing

overtime after 40 hours one might have expected to see in article 7:01 is not there, the principle is clearly expressed in article 7:04A, which provides support for its application under the 5-day work week and the compacted work schedule in article 7:01. In the arbitrator's view, finding support for this notion by referring to the whole of article 7 is no different than finding the meaning of overtime by the same process. In both cases a financial benefit is at issue, and in both cases, due to a lack of express wording where one would expect to find it, a more detailed analysis of the language has been able to reveal the relevant benefit.

In any event, there is little doubt that the parties are equally convinced that overtime after 40 hours is contemplated by the collective agreement. That common understanding is sufficient to establish the benefit for the purpose of helping to determine the status of Friday overtime as part of the calculation of overall compensation from December 18, 2013 to December 31, 2015.

<u>In the condensed work schedule, work on Friday is overtime after 40 hours in a week</u>

The arbitrator holds the parties to their mutual agreement that work performed after 40 hours in a week is overtime. In addition, the arbitrator's interpretation of article 7:01 and article 7:04A together supports the payment of overtime after 40 hours worked. It is the Employer's position that work on Friday constitutes overtime if employees have worked the required preceding number of regular hours on Monday, Tuesday, Wednesday and Thursday. The arbitrator finds that work in those circumstances on Friday to be overtime after 40 hours have been worked in a week.

<u>Scenarios the Employer has suggested regarding Friday overtime</u>

Employees starting work on a Friday

The Employer has indicated that its pursuit of the Friday overtime issue was raised to dispute the payment of overtime to employees who started work on a Friday and did not work the required 40 hours during the previous Monday, Tuesday Wednesday and Thursday. For the purpose of this dispute, the arbitrator has found that employees should have been assigned to the condensed work schedule on Monday through Thursday. If employees started work on Friday instead of on Monday because the Employer failed to schedule them properly, the Employer would be in violation of article 7:01, for which loss compensation for Monday, Tuesday, Wednesday and Thursday would be payable in each case.

Also, if Friday was the first day worked because the Employer failed to schedule employees in accordance with the collective agreement, the employees would also have been denied the opportunity to meet the condition enabling them to be paid overtime on Friday. Therefore, compensation for overtime pay loss at double time the regular rate of pay would be payable for hours worked on Friday in each case.

It should be noted that the arbitrator has not yet been provided with the specific reasons or circumstances of any employees who were found to have started work on a Friday in any work week. That information clearly must have been known by the Employer in order for it to pursue its position at arbitration. The arbitrator presently has no way of knowing whether the Employer failed to schedule the affected employees as the collective agreement required. Consequently, the arbitrator has no means of calculating overtime payment for employees under that scenario. The Employer is directed to provide the Union and the arbitrator with the circumstances involved in each case of a Friday start.

Employees failed to work 10 hours on Monday, Tuesday, Wednesday or Thursday

The Employer has also argued that if an employee failed to work the full 10 hours on

Monday, Tuesday, Wednesday or Thursday, overtime would not kick in on Friday until the deficient number of hours had been worked. This of course would not entail a Friday start to the work week. Therefore, it is presumed that such employees would have been properly scheduled to start work on Monday. However, for reasons known to the employees but not provided to this arbitration, such employees did not work the full 10 hours on one or more days Monday through Thursday. Such reasons are presumably also known by the Employer, and must be communicated to the Union and the arbitrator before overtime (if any) can be calculated in those circumstances.

All circumstances must be communicated to the Union and the arbitrator where the Employer challenges payment of overtime on Friday

All the various circumstances of each employee where the Employer seeks to challenge the payment of double time for work performed on Friday must be determined and categorized for the Union and the arbitrator before the appropriate compensation owing amounts may be finalized.

In the meantime, the most the arbitrator can do is indicate that, if the Friday start days were the sole fault of the Employer's failure to schedule employees for Monday, Tuesday, Wednesday and Thursday, compensation will be due for those days at the employee's regular rate of pay. Also, compensation of overtime pay for work on Friday will be due for the Employer's failure to provide employees with the opportunity to earn overtime.

However, if employees were scheduled properly but did not work the required number of regular daily hours to entitle them to overtime pay because of their own personal reasons, it will be unlikely that their remuneration on Friday would be payable at double time their regular

rate of pay, unless there are extenuating circumstances such as being given permission by the Employer to miss work with the understanding that it would not affect their entitlement for overtime pay on Friday. All the possible reasons could be many and varied. However, it is not yet possible to determine whether any of them might justify the payment of overtime. However, there should be no general expectation that the reasonableness of an employee's absence will automatically permit payment at overtime rates.

The essential bottom line is that overtime on Friday would be payable if it was the Employer's fault that employees were unable to fulfill the conditions for earning it. If the reason for employees not working the required number of regular hours was not the Employer's fault, overtime payment for work on Fridays would not be earned until sufficient hours were worked at regular rates on that day.

Notwithstanding the foregoing, the arbitrator is prepared to hear that the parties disagree on certain cases, which might require further individual final rulings. In the arbitrator's view, there might also be situations in which employees are short a few hours which might be able to be worked at regular rates, after which overtime rates on Friday will kick in. It would be of great benefit if the number of categories or scenarios involved turn out to be few and straight forward. However, until the Employer provides the arbitrator and the Union with the reasons and circumstances associated with each case, the final dollar amount for the Friday overtime issue cannot be determined.

Schedule for Employer to provide circumstances and Union to respond

On balance, the arbitrator chooses to be hopeful that the Employer should have all the necessary information ready and available to send to the Union and the arbitrator within 10 days of this ruling. The Union should be able to respond within a further 10 days. After that,

the parties should be in a position to finalize the total value of compensation owing, subject to adjustment for interest to date. The issues of providing a date certain for implementing the final award, who should distribute the cheques, and to whom the industry funds are to be forwarded, etc., have already been discussed by counsel. In the arbitrator's view, those issues are no longer contentious. Therefore, there should be no reason for further delay in providing the arbitrator with a joint directed award, which the arbitrator would be happy to sign and distribute immediately.

RULING

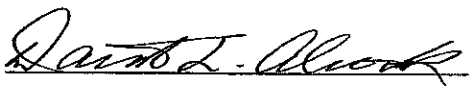
The foregoing considerations constitute the arbitrator's ruling on the issue of Friday overtime.

Overtime for work on Friday will be payable if the Employer was at fault for not scheduling employees on Monday in accordance with the condensed work schedule in article 7:01. Also, in such cases, collateral payment for regular days not assigned to work on Monday through Thursday will be payable at employees' regular rates of pay.

The Employer has some work to do to inform the Union and the arbitrator of the circumstances involved in each case where the Employer has claimed overtime should not be paid for work performed on Friday. The schedule for providing this information and receiving the Union's response is contained above.

It is the arbitrator's expectation that this ruling and the process for clarifying the amount of Friday overtime owed will enable the parties to complete the overall calculation of compensation amounts owing and to provide the arbitrator with a final, brief directed award for his signature.

Respectfully submitted as the ruling of the arbitrator.
Dated at Mount Pearl, Newfoundland and Labrador, this 9th day of November, 2018.



Sole Arbitrator