

I further find that the special allowance given to approved leave in Article 18.05 is for the sole and exclusive purpose of calculating overtime pay and does not apply to determining consecutive days of work and the consecutive work premium.

I further find that the grievor did not attain seven (7) consecutive days of work per Article 17.07(a) and, therefore, there was no eighth (8<sup>th</sup>) and subsequent consecutive days of work that qualified for consecutive work premium.

I further find that there is no contractual support for the claim that February 23<sup>rd</sup> should be considered a bridging day for the purpose of calculating consecutive work premium.

Therefore, the grievance is denied.

Respectfully submitted as the decision of the Arbitrator.

**Dated at Mount Pearl, Newfoundland and Labrador this 8<sup>th</sup> day of March 2010.**

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**David L. Alcock**  
**Sole Arbitrator**

16<sup>th</sup>, 20<sup>th</sup> and 27<sup>th</sup>. Curiously, the latter date appeared to be relegated to an unclear status by the Union's final claim for consecutive work premium "at least for February 24<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup>." But in the final analysis, whatever the number of days claimed for consecutive work premium in this case, February 23<sup>rd</sup> did not qualify as a consecutive work day and the collective agreement also provided no right or entitlement that it be considered a bridging day.

My earlier considerations found that, for the Union's interpretation of the collective agreement to prevail, clear and unequivocal language supporting its interpretation would have to be expressed. Such express language does not exist for counting annual leave days as time worked for determining consecutive work days. In my view, no less a clear and unequivocal express contractual provision would be needed to consider an annual leave day as a bridging day. There is no such language in this agreement. Therefore, I reject the notion that February 23<sup>rd</sup> should be considered a bridging day.

### **DECISION**

On the basis of the evidence and by the foregoing considerations, I find that the Employer's interpretation of Articles 17.07(a), 18.05 and 18.09(a) is to be preferred.

I find that actual work must be performed on any day for that day to constitute a consecutive day of work for the purposes of Article 17.07(a) and Article 18.09(a).

I also find no specific express provision and no combination of provisions examined together in context that establishes an employee right for an annual leave day on which the employee performs no actual work to be considered a consecutive day of work for the purposes of Article 17.07(a) and Article 18.09(a).

18.09(a) would negate that overtime benefit. However, nor would it create a right for annual leave days to be considered consecutive days of work for the purpose of determining consecutive work premium. Under the circumstances, I find no conflict between the Employer's interpretation and application of Article 18.09(a) and the application of Article 17.06, or Article 25.02(d).

*Whether February 23<sup>rd</sup> should be a bridging day for the payment of consecutive work premium*

My findings to this point effectively mean that, in the grievor's particular circumstances, due to him not performing actual work on any of his four (4) days of annual leave, there was no period from February 15<sup>th</sup> to February 28<sup>th</sup> when he worked on sufficient consecutive days to be entitled to consecutive work premium. Since he did not accumulate more than three (3) consecutive days of work at any time, he never attained the prerequisite seven (7) consecutive days of work per Article 17.07(a) that would create the basis for the 8<sup>th</sup> and subsequent consecutive days of work to which a consecutive work premium might apply. For that reason, no consecutive work premium applies to February 23<sup>rd</sup>, 24<sup>th</sup>, 25<sup>th</sup>, 26<sup>th</sup> and 27<sup>th</sup> in the grievor's case.

At the conclusion of its submissions, the Union argued that the grievor's annual leave day on February 23<sup>rd</sup> should be considered a bridging day at least for consecutive work premium on February 24<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup>. In my view, the notion of considering an annual leave day as a bridging day between two groups of consecutive work days is inconsistent with the Union's original claim that annual leave days should be considered as time worked and counted as consecutive work days themselves. The Union cannot have it both ways. Indeed, it is my view that neither way is contractually valid. Despite its proximity between two small groups of consecutive days of work, nothing contractually elevated February 23<sup>rd</sup> to anything more than an annual leave day on which no work was performed, i.e., precisely the same status as February

& (b). Subsection (a) establishes a minimum allocation of two (2) consecutive days off, except where mutually agreed. Subsection (b) addresses how such an allocation shall apply to temporary employees working 12 hour shifts, 8 hour shifts, or a combination of such shifts. By way of example, the Union described an employee who might work Friday, Saturday and Sunday, and then receive two leave days, but argued that the Employer's interpretation of Article 18.09(a) would negate that entitlement. With the greatest of respect, I disagree with that conclusion. Article 17.06 (a) and (b) do not deal with annual leave days. They clearly establish the allocation of two (2) consecutive days off following a certain number of consecutive days worked depending on an individual's shift schedule. Nothing in Article 18.09(a) conflicts with that allocation. Article 25.02(d) defines a day off as one "on which the employee is not ordinarily required to perform the duties of his/her position ...". The expression "not ordinarily" does not mean never. The parties are very much aware that, while employees are entitled to two (2) consecutive days off, situations may occur which results in them working on those days. Indeed, in the instant case, the grievor agreed to the Employer's request that he work overtime on his days off on February 21<sup>st</sup> and 22<sup>nd</sup>. His days off were allocated in accordance with Article 17.06(a) and he chose to work them for the substitute benefit of overtime pay. Not only did the application of Article 18.09(a) not adversely affect his days off, it actually counted them as consecutive work days, which otherwise would have constituted his 6<sup>th</sup> and 7<sup>th</sup> consecutive work days per Article 17.07, except that this possibility was interrupted by the fact that his four (4) intermittent annual leave days on which he did not perform any work did not qualify as consecutive days of work.

If the employee received two (2) annual leave days after working the three consecutive shifts, I would also disagree that the Employer's application of Article 18.09 would adversely affect those days. For the purpose of calculating overtime, his annual leave days would count for the purpose of calculating overtime per Article 18.05. Nothing in the operation of Article

Absent the expression, approved leave such as annual leave, could not be counted for the purpose of computing overtime pay. The fact that it is expressed for the purpose of computing overtime does not automatically mean that it also applies to determining consecutive work premium or any other benefit for that matter. For that to happen, in my view, the wording of 18.05 would have to contain a clear and unequivocal expression generally extending its application to other provisions, or the same special allowance would have to be specifically expressed in other Articles, such as in Article 18.09(a), where the parties could easily have expressed it for the separate purpose of that clause. Since no such language exists in this collective agreement, I believe it would be an excess of my jurisdiction to presume the existence of such an extended right from the wording of Article 18.05, or from any other provisions that have been referred for my consideration.

I suggest that the above finding is supported by Article 18.09(d), in which the parties deliberately turned their minds to call-ins or scheduled overtime on an employee's day off and clearly and unequivocally provided that such circumstances "shall apply for the purpose of calculating consecutive days." Although every opportunity was available for the parties to provide the same benefit to the various types of approved leave as were expressed in Article 18.05 for calculating overtime, no such language was included. More importantly, no language was expressed there or elsewhere in the collective agreement to ensure that time not worked while on approved leave should be considered as time worked, or as if the time had been worked, for the purposes of calculating consecutive days that would qualify an employee for consecutive work premium. Therefore, I decline to read such a right into the collective agreement.

*The effect of Article 17.06(a) and (b) and Article 25.02(d)*

On a final matter, I will consider the Union's assertion that the Employer's interpretation of Article 18.09 (a) would adversely affect employees' days off as contemplated by Article 17.06(a)

instead. At no time did he perform work on those days by way of call-in or overtime (per Article 21.09), or any other reason. Therefore, none of those days fulfilled the necessary work requirement that would qualify them as consecutive days of work for either the first 7 consecutive days of work or for the 8<sup>th</sup> and subsequent consecutive days of work. In the result, unless special allowance may be found in some other provision or provisions for those annual leave days to be considered time worked, or as if time had been worked, entitlement to consecutive work premium would not have been available for the grievor.

At this point, it is appropriate to consult any other potentially relevant provisions that might, on examination, provide such a special allowance in the grievor's circumstances. The Union strongly argues that Article 18.05 – Calculating of Overtime Rates provides the very allowance that benefits the grievor.

#### *The effect of Article 18.05*

I agree with the Union that Article 18.05 should be carefully considered when deciding whether consecutive work premium applies to the grievor's particular situation. After all it does address the status of approved time off, including annual leave for the purpose of computing overtime pay. The article clearly says that such time off for an employee "shall . . . be considered as if he/she had worked during his/her regular hours during such absence." However, as a matter of interpretation, I find that this allowance is solely and exclusively for the purpose of computing overtime pay. It does not apply to any other situation. On the plain wording of Article 18.05, annual and other approved leave is permitted to count for the purpose of computing overtime pay. Realistically, if this allowance was not expressly stated in Article 18.05, those on approved leave would not have the right to count such time as if it had been worked, and they would not be entitled to use it to calculate overtime. In other words, this allowance had to be deliberately expressed in 18.05 for it to exist as a collective agreement right for one particular benefit.

Article 18.09(a) discusses the notion of consecutive work premium being payable on “the eighth (8<sup>th</sup>) day and subsequent consecutive days of work”. As a matter of interpretation, I find that the foregoing expression would have no meaning were it not contractually linked to Article 17.07(a). That link is firmly established by 18.09(a) being “Subject to clause 17.07” – Consecutive Work Days. Therefore, the 8<sup>th</sup> day must be the next day of work immediately following seven (7) consecutive days of work established in accordance with Article 17.07. Clearly the 8<sup>th</sup> day would have to be a subsequent consecutive day of work to the previous 7 consecutive days of work and, along with any other subsequent consecutive days of work, it would entitle an employee to the consecutive work premium. There is no doubt in my mind that, although an employee may not ordinarily be required to report for work on the immediate next day after 7 consecutive days of work, (for example, it might be one of his days off, or a leave day) that day will not constitute the 8<sup>th</sup> consecutive day worked as contemplated by 18.09(a), unless the employee performs some work during that day. As it is in Article 17.07, the *sine qua non* for qualification for a consecutive work day in Article 18.09(a) is that it must be a day on which work is performed by the relevant employee.

In the grievor’s circumstances, he did not work on Sunday Feb. 15<sup>th</sup> because it was one of his days off and he was neither called in to work nor asked to work overtime. Therefore February 15<sup>th</sup> did not constitute a consecutive day of work for him. In contrast, Saturday and Sunday Feb. 21<sup>st</sup> and 22<sup>nd</sup>, were also his days off, but he worked overtime on those days – circumstances which both parties agree constituted overtime. Those days do fit the requirement for consecutive work days.

*The effect of the grievor’s annual leave days*

Monday Feb. 16<sup>th</sup>, Friday Feb. 20<sup>th</sup>, Monday Feb. 23<sup>rd</sup> and Friday Feb 27<sup>th</sup> were among the grievor’s originally scheduled work days, but he requested that he receive annual leave days

precisely what is expressed, namely, that no consecutive work day could occur unless an employee performed “work” on that day. I concur with the Employer’s reasoning on this issue.

The Littlejohn award dealt with that same subject, ruling that any amount of work performed on a particular day (in that case, a day off) would qualify that day for the purpose of determining consecutive days worked. There can be no doubt that arbitrator Oakley has made it abundantly clear that the performance of work on a disputed day is the essential element for such qualification.

Although the evidence is that there have been instances of employees being scheduled to work for 7 consecutive days, off for 2 days, and scheduled again for 5 more days, which is more than is contemplated by Article 17.02(a), it is unclear whether in their particular circumstances the employees were compelled to work more than 7 consecutive days in a 10 day period as prohibited by Article 17.07(a). Absent sufficient evidence of a 17.07(a) violation, other explanations might include that such circumstances were voluntary (as Ms. Nichols suggested), or involved the smoothing of hours so as to achieve 75 hours per fortnight in accordance with Article 17.01(a) – a matter the parties agree is not part of this dispute. It also occurs to me that the existence of a consecutive work premium in the collective agreement logically presumes that employees may indeed work more than 7 consecutive days, albeit with their agreement.

Article 17.07(a) is concerned with an employee being compelled by the Employer to work too many consecutive days. However, the second sentence of that clause clearly renders inapplicable any consecutive days worked at the employee’s signed written request. There is no mention among that language that days merely scheduled consecutively shall be established as consecutive work days, or that they shall be considered as days worked, or as if they had been worked. On the basis of the foregoing, therefore, I find that the actual performance of work on a day is the *sine qua non* for establishing that day as a potential consecutive work day in accordance with Article 17.07(a).

interpretation, the union attempts to tease various threads of wording from the contractual cloth in order to fashion a garment of right suitable to its own wearing, which challenges the employer's first characterization and application of the garment, it bears the onus of establishing that its interpretative weaving is to be preferred over the employer's initial assessment. It occurs to me that, if a right claimed is not clearly expressed in the provision where one would expect to see it in the first place, an attempt to establish such a right by gathering and combining aspects of various provisions, would have to be convincing on the plain wording of those provisions in order to be accepted.

Does the wording of Article 18.09(a) establish the grievor's right to consecutive work premium?

*The effect of Article 17.07*

The Employer's reason for denying the grievor consecutive work premium for February 23<sup>rd</sup>, 24<sup>th</sup>, 25<sup>th</sup>, 26<sup>th</sup> and 27<sup>th</sup> is based upon its interpretation of Article 18.09(a), as well as its interpretation of Article 17.07(a), to which the language of 18.09(a) specifically states it is subject. When faced with the decision whether to pay consecutive work premium in the grievor's situation, it was logical for the Employer to initially consult the collective agreement provision that specifically deals with the subject, namely, Article 18.09(a). However, the evidence indicates that the Employer did not rely solely on its interpretation of the wording of Article 18.09(a) in complete isolation. It also considered Article 17.07 as it was required to do.

Noting that the analysis of entitlement to consecutive work premium starts with Article 17.07, the Employer first interpreted subsection (a), which clause fit the grievor's particular hours of work, namely, 8 hour shifts. The Employer reasoned that, to constitute "consecutive work days" as the subject heading suggests, or "shall be compelled to work more than seven (7) days in a ten (10) day period" as the first sentence states, the wording of the clause means

arbitration. However, it is perhaps a tribute to their cheerful nature that the residents appear to be adapting well to global chilling of the arbitral environment.

On a more serious note, the parties also agree on one other point, namely, that the answer to the grievance lies in the interpretation of the collective agreement. From the scope and extent of the supporting authorities and jurisprudence submitted, it is clear to me that the parties have thoroughly canvassed the various principles of interpretation and have a solid understanding of the issue. Therefore, I think it is unnecessary to conduct an in-depth analysis of that subject in this award.

As a general premise, I accept that, in determining whether an employee right exists in a collective agreement, care should be taken to consider all provisions that might be relevant and in context rather than to rely exclusively on a single isolated provision. A reading of all pertinent articles in the collective agreement might serve either to support or alter one's initial conclusion of the meaning of a single clause. The casting of all available light upon all relevant language is both prudent, reasonable and necessary in order to arrive at a reasonable interpretation of whether a collective agreement actually provides a disputed right.

As a general premise, I also accept that, in determining whether an employee right exists in a collective agreement, there must be express wording that clearly and unequivocally establishes that right. In any collective agreement, the combination of employee, union and employer rights constitutes the critical substantive and procedural foundation on which the parties' bargaining relationship will operate for the duration of the agreement. If the language chosen is equivocal, confusing, misleading, or unclear, entitlement to certain rights may well be in doubt. On the one hand, the more clearly and unequivocally a right is expressed, especially in condensed language in a specific provision and uncontradicted by others, the more likely it will be that arbitrators will accept it. On the other hand, if an alleged employee right has been denied by an employer, and in the absence of a condensed expression in a specific provision upholding the union's

For the purposes of (a), (b), (c)(i) and (ii), if an employee is recalled or scheduled for overtime on his/her day off it shall apply for the purpose of calculating consecutive days.

Annual leave is absent from that clause. Therefore, such time away from work is not considered for the purpose of calculating consecutive days of work or consecutive work premium. To conclude otherwise, the arbitrator would improperly amend the collective agreement.

### **Union Rebuttal**

There is little guidance in the Employer's jurisprudence. However, attention should be given to the Littlejohn award because the arbitrator's decision interpreted the same collective agreement provisions that are in dispute in the instant grievance.

It should also be noted that, among Tab #1 of the Employer's authorities on matters of collective agreement interpretation, the authors conclude that a collective agreement provision cannot be read in isolation, but must be read in context with all other relevant provisions. That means that the Employer cannot isolate Article 18.09(a) from the other provisions of Article 18.09. Therefore, Article 18.05 must be considered in determining whether the grievor's annual leave should have been counted for the purpose of a consecutive work premium in his circumstances.

### **CONSIDERATIONS**

The aforementioned evidence and submissions clearly set out the parties' opposing positions, each one leaving with the parting admonition that an award upholding the other's position would violate Article 12.04.

May I be forgiven the perhaps facetious observation that it would be almost disappointing these days if one were to find the thermostat of comfort set above zero in the house of

February 27<sup>th</sup>. Therefore, he did not perform work on consecutive work days from the 23<sup>rd</sup> to the 28<sup>th</sup>.

In the Employer's view, Article 18.09(d) contemplates a trigger for consecutive work premium only when the employee works as required. For the Union's case to succeed, the grievor's annual leave days would have to be considered as days worked. But the grievor did not perform work on his approved leave days. To perform work an employee would have to be under the control and direction of the Employer, such as during a regular work day or overtime work on an employee's day off, or on unpaid lunch break on the Employer's premises. That was not the case on the grievor's annual leave days. Therefore there was no trigger that activated the consecutive work premium for him.

Reliance may not be made on Article 18.05 to claim that annual leave counts for the purpose of determining the consecutive work premium. It is solely for the specific purpose of computing overtime pay that Article 18.05 makes special provision for counting leave days as if the employee had worked. Without Article 18.05, the grievor would not have achieved the qualifying hours for overtime pay on February 21<sup>st</sup> and 22<sup>nd</sup>. Clearly, there is no link between Article 18.05 and Article 18.09(a) that would entitle an employee to claim his/her annual leave for the purpose of determining consecutive work premium. However, there is a direct link between Article 17.07 and Article 18.09(a) because the language of 18.09(a) expressly says so. Those clauses taken together provide the trigger for the consecutive work premium.

In the result, the Union has claimed a consecutive work premium benefit for employees in circumstances that are not expressly provided for in the collective agreement. Articles 17.07 and 18.09(a) combine to trigger entitlement for consecutive work premium based upon the actual performance of work on sufficient consecutive work days, which the grievor did not fulfil in his circumstances. As far as calculating consecutive days for temporary employees is concerned, the parties, in Article 18.09(d), addressed the following limited factors, namely:

In Article 2.01, the Employer is given the right to direct the working force. The Union’s position would have the arbitrator amend the collective agreement by extending the benefit in Article 18.09 to circumstances which are not expressed in that provision.

MN#5 provides the following hypothetical schedule explaining the purpose of Article 18.05 – Overtime:

**February 2009**

<b>Sun</b>	<b>Mon</b>	<b>Tues</b>	<b>Wed</b>	<b>Thurs</b>	<b>Fri</b>	<b>Sat</b>
Scheduled DAY OFF	WORKED	WORKED (+ another 4 HRS OT)	WORKED	18.05 LEAVE	18.05 LEAVE	Scheduled DAY OFF
Scheduled DAY OFF	WORKED	WORKED (+ another 4 HRS OT)	WORKED	18.05 LEAVE	18.05 LEAVE	Scheduled DAY OFF

Article 18.05 allows leave to be treated as “worked time”, so for the above pay period, 8 hours of overtime pay would be due. Without Article 18.05, the 4 days of leave above would be considered as time not worked for the purposes of overtime calculations and, therefore, the 8 hours of overtime pay would not be due.

In the Employer’s view, consistency is the key in Articles 17.07, 18.05 and 18.09. The purpose of the consecutive work premium in Article 18.09 is to compensate employees for having to work more than 7 consecutive days. The analysis actually starts at Article 17.07, not Article 18.09. In the Employer’s view, it is not so that being scheduled to work is the trigger and that being on annual leave does not matter. Article 17.07 says 7 “consecutive” days, not 7 scheduled days. In the grievor’s particular circumstances as indicated by MN#1, Article 17.07 was not triggered during the week of February 16<sup>th</sup> – 22<sup>nd</sup> because he did not work 7 consecutive days in that period. Also, it should be noted that Article 18.09(a) speaks of “all work performed on the eighth (8<sup>th</sup>) day and subsequent consecutive days of work” being those to which the consecutive work premium applies. Clearly, someone on leave cannot perform work without actually being present at work to do so. The grievor did not perform work on February 23<sup>rd</sup> or

approved leave, viz: “for the purpose of computing overtime pay, be considered as if he/she had worked during his/her regular hours during such absence.” However, such consideration of annual leave is solely for the purpose of computing overtime, not consecutive work premium.

The Union argues that the reference to the 8<sup>th</sup> day forward in Article 18.09(a) requires consideration only of that time period and not days before that. The Employer’s position is that, since 18.09(a) is expressly subject to Article 17.07 – Consecutive Work Days, it is absolutely necessary to consider first whether an employee has actually worked 7 consecutive work days in a 10 day period. In other words, by inference, there is no eighth (8<sup>th</sup>) day unless 7 previous consecutive days have been worked.

The Union has suggested that the arbitrator skip the grievor’s annual leave on February 23<sup>rd</sup> and use it as a bridging day for the 8<sup>th</sup> day. That would count the 23<sup>rd</sup>, an annual leave day, as a consecutive day worked, which would be an improper consideration because none of the grievor’s annual leave days in the relevant time period were days on which he worked.

If the Union’s grievance is allowed, an employee could conceivably work 7 straight days, be on annual leave for the next 5 days Monday through Friday, be called into work on Saturday and Sunday his days off, be on annual leave for another week, which would all count as consecutive work days for the purpose of determining the consecutive work premium for the days he works as soon as he returns to work. In the Employer’s view, that would not be a valid interpretation of Article 18.09(a).

The onus is on the Union here to prove that the Employer breached Article 18.09(a) by denying the grievor consecutive work premium in his circumstances. The law is that a clear expression must exist in the collective agreement to provide a benefit. Although the Union suggests that annual leave triggers entitlement to consecutive work premium, there is no clear collective agreement expression to that effect. Therefore, the Union’s case appears to be that the right asserted may be created by happenstance.

13. *Re Renfrew County and District Health Unit v. Ontario Police Service Employees Union (Haslam Grievance)* [2005] O.L.A.A. No. 608, 83 C.L.A.S. 249;
14. *Re The Newfoundland and Labrador Nurses' Union and Newfoundland and Labrador Health Boards Association* (May 4, 2004) unreported (Thistle).

Although *Re Newfoundland and Labrador Association of Public and Private Employees and St. John's Nursing Home Board (Hoyles Escasoni Complex)(Littlejohn grievance)* discussed the same articles that are before this arbitrator, the case is distinguishable because the issue there was whether certain time worked by the employee constituted "a shift". The grievor there worked on March 16<sup>th</sup> Saturday (12 hr shift), Sunday March 17<sup>th</sup> (8 hr shift) and Monday March 18<sup>th</sup> (12 hr. shift). On Friday March 15<sup>th</sup> (one of his two consecutive days off), the grievor was called in to work for 4½ hours, i.e., less than a full shift. The arbitrator ruled on p. 21 that a call-in to work on an employee's day off "may be counted towards the requirement of consecutive days under Article 18.09(a)." This Employer accepts that a day off on which an employee works any amount of time applies for the purpose of determining consecutive days worked. However, the issue in the instant case is whether a day of annual leave may be considered a consecutive day worked. That issue was not dealt with by the arbitrator in the Littlejohn case. In the Employer's view, an annual leave day is not a trigger for consecutive work premium unless actual work is performed on that day, which it was not in Mr. O'Neil's circumstances.

In Article 18.09, the trigger of work is the key to determining consecutive work premium. It has nothing to do with temporary employees' days off. Article 18.01(a) defines overtime for full time employees as "All time worked by a full-time employee before or after his/her regularly scheduled daily or bi-weekly hours . . ." Temporary employees benefit from this in subsection (d) "All time worked by a temporary employee beyond the normal full-time daily, or bi-weekly hours, depending on the work area that the employee is working in, shall be considered overtime." In every case, overtime is actual time worked, not regularly scheduled hours. Article 18.05 makes an exception for all employees in respect of annual leave and other types of

In the result, the Employer's interpretation is not plausible on a reading of the collective agreement as a whole. Therefore, February 23<sup>rd</sup> should be considered for bridging purposes for entitlement to Article 18.09 and the Employer should be required to compensate the grievor at least for February 24<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup>.

### **The Employer**

In support of its various positions, the Employer submitted the following authorities and jurisprudence:

1. *Canadian Labour Arbitration*, 4<sup>th</sup> ed., Paras: 4:2000, 4:2100, 4:2110, 4:2120, 4:2130, 4:2140, 4:2150, 4:2151, 4:2152, 8:2100, 8:2130, 8:3210, 8:3220;
2. *Collective Agreement Arbitration in Canada*, 4<sup>th</sup> ed., Paras: 19.1, 19.2, 19.3, 19.30 – 19.40;
3. Mitchinik & Etherington, *Leading Cases on Labour Arbitration*, Vol. 3, Contract Interpretation;
4. Gorsky/Usprich/Brandt, *Evidence and Procedure in Canadian Labour Arbitration*, Vol. 2;
5. *Black's Law Dictionary*, 7<sup>th</sup> ed.;
6. *Canadian Oxford Dictionary*, 2<sup>nd</sup> ed.;
7. *Re Martin-Brower of Canada Ltd. V. General Truck Drivers' and Helpers' Union, Local 31*, [1992] B.C.C.A.A.A. No. 226, Award No. A-226/92 (Korbin);
8. *Re Cardinal Transportation British Columbia Inc. and Canadian Union of Public Employees, Local 561* (1997), 62 L.A.C. (4<sup>th</sup>) 230, [1997] B.C.C.A.A.A. No. 83, Award No. X-19/97, (Devine);
9. *Re Canada Post Corp. v. Canadian Union of Postal Workers* (1993), 39 L.A.C. (4<sup>th</sup>) 6, [1993] C.L.A. D. No. 1139 (Bird);
10. *Re Belleville Intelligencer and C.E.P., Loc, 87* (1996), 55 L.A.C. (4<sup>th</sup>) 213, [1996] O.L.A.A. No. 97 (Thorne);
11. *Re DDM Plastics Inc. v. International Assn. of Machinists and Aerospace Workers, Local 2792* (Holiday Pay Grievance) (2000), 88 L.A.C. (4<sup>th</sup>) 299, [2000] O.L.A.A. No. 421 (Solomatenko);
12. *Re Health Employers Assn. of British Columbia and Hospital Employees' Union Local 180* (1996), 54 L.A.C. (4<sup>th</sup>) 35, [1996] B.C.C.A.A.A. No. 646 (Morrison, Q.C.);

would endeavour to grant every second weekend off. Article 17.03(c) requires the working schedule of each employee to be posted two (2) weeks in advance. Therefore, the grievor knew what his schedule would be and he applied for and was granted annual leave for four (4) individual days. Article 17.06(a) and (b) indicate that, if a temporary employee is scheduled to work Friday, Saturday and Sunday and is on leave for two (2) days, those leave days are presumed to be time worked. Annual leave is a benefit to which employees are entitled, which, in the Union's view, cannot be used against him. The Employer did use the grievor's annual leave benefit against him in applying Article 17.07 by claiming that he was not compelled to work more than seven (7) consecutive days in a ten (10) day period. That would have an effect on the employee's days off.

Article 18.00 contains overtime provisions, one of which is 18.05, which cannot be read in isolation. Article 18.05 clearly requires that absence on approved leave, including vacation leave, during an employee's scheduled work week, shall for the purpose of computing overtime be considered as if he/she had worked. Therefore, annual leave does indeed count as time worked. However the Employer did not consider the grievor's annual leave as time worked. In the Union's view, the grievor's annual leave day on Monday, February 23<sup>rd</sup> is a bridging day for the consecutive work premium on February 24<sup>th</sup>, 25<sup>th</sup>, and 26<sup>th</sup>.

Article 25.02(d) defines a "day off" as other than an annual leave day. A "day" is defined by (e) as a working day. Clearly, a working day must be one that is specific to an employee's work schedule.

It is also the Union's view that Article 18.09(a) does not require an employee to "report" for work on the 8<sup>th</sup> day. Temporary employees would not get days off if the Employer's interpretation is preferred. In Article 23 there is a requirement for employees to report for work to be entitled to the benefit, but there is no such requirement for Article 18.09 (a).

conflicts with other relevant provisions. The right of the Employer to do what it did was fettered by Article 17.07 and Article 18.05.

Mr. O'Neil was scheduled to work Mondays to Fridays during a two-week pay period. He requested and was approved for annual leave on both Mondays and both Fridays. Since the Employer scheduled him to work Monday February 16<sup>th</sup> to Friday February 20<sup>th</sup> and the Employer asked him to work overtime on two of his days off Saturday and Sunday February 21<sup>st</sup> and 22<sup>nd</sup>, and he was again scheduled to work the following Monday through Friday, the result was a twelve (12) day consecutive work period from Monday February 16<sup>th</sup> to Friday February 27<sup>th</sup>.

Article 17.01(a)(i) establishes the normal hours of work for employees working an 8 hour shift schedule as seventy-five (75) hours divided into 7½ hour shifts in accordance with Article 17.02(a) and (b), which establishes the normal or average days per week as five (5) days per week or either four (4) days in one week and six (6) days in the alternate week, or three (3) days in one week and seven (7) days in the alternate week. In the grievor's case, he was scheduled for five (5) days in each week. Notwithstanding the above, MN#6 clearly demonstrates that an employee may work for seven (7) consecutive days, be off for two (2) days, and then be scheduled for five (5) more days – for a total of fourteen (14) days scheduled in a fortnight.

Ms. Nichols claims that, if an employee takes an annual leave day instead of a scheduled work day, such time cannot be used as a bridge for the purpose of establishing a consecutive work period that would qualify for a consecutive work premium per Article 18.09(a). However, the Union's position is that the double time premium in Article 18.09(a) only applies to "all time worked on the eighth (8<sup>th</sup>) day and subsequent consecutive days of work". Therefore, days off worked and annual leave days must be considered.

Article 17.03 (a)(i) establishes that days off shall be planned so as to distribute weekends off in such a manner that employees shall receive every third weekend off and the Employer

- Finally, Ms. Nichols and the Union both agreed that, while the work schedule and pay period may not actually coincide, smoothing of hours for pay purposes is not an issue in this dispute.

## ARGUMENT

### The Union

In support of its various positions, the Union submitted the following authorities and jurisprudence:

1. *Re Newfoundland and Labrador Association of Public and Private Employees and St. John's Nursing Home Board (Hoyles Escasoni Complex)(Littlejohn grievance)* (June 26, 2003) unreported (Oakley);
2. *Collective Agreement Arbitration in Canada*, 3<sup>rd</sup> ed., Chapter 4 – Interpretation of the Collective Agreement, pp. 117-128;
3. Mitchinik & Etherington, *Leading Cases on Labour Arbitration*, Vol. 3, Contract Interpretation;
4. *Canadian Labour Arbitration*, 4<sup>th</sup> ed., Paras: 4:2100, 4:2110, 4:2130.

It was the Union's position that the Employer's interpretation of the collective agreement language as a whole alters the agreement's meaning, whereas the Union's interpretation is the clear one.

In *Re Newfoundland and Labrador Association of Public and Private Employees and St. John's Nursing Home Board (Hoyles Escasoni Complex)(Littlejohn grievance)*, the arbitrator agreed that the Employer's interpretation of Article 18.09 with respect to call-in work for less than a full shift on an employee's day off would lead to an absurd result. There the issue was whether any amount of work on an employee's day off would qualify that day as a consecutive work day. In the instant dispute, the Employer's interpretation that the grievor's annual leave days did not constitute consecutive days of work is absurd because such an interpretation

time during the period February 15<sup>th</sup> – 28<sup>th</sup>. Therefore he did not meet the requirements of Article 17.07(a).

- Ms. Nichols' position is that approved paid or unpaid leave constitutes time away from an employee's scheduled work days and, therefore, cannot be considered as time worked in determining consecutive work days.

- Between two (2) of his annual leave days, i.e., on Friday Feb. 20<sup>th</sup> and Monday Feb. 23<sup>rd</sup>, the grievor agreed to the Employer's request that he work overtime on both of his days off on Saturday Feb. 21<sup>st</sup> and Sunday Feb. 22<sup>nd</sup>. Ms. Nichols explained that, in accordance with Article 18.05, "for the purpose of computing overtime pay" on the two days off he worked, the grievor's approved annual leave days during the above period were "considered as if [he] had worked during [his] regular hours."

- However, Ms. Nichols explained that it is only for the purpose of computing overtime pay that Article 18.05 considers the grievor's annual leave "as if [he] had worked" during such leave. In her view, Article 18.05 cannot be interpreted as extending consideration of annual leave days as time worked for the purpose of determining consecutive days of work contemplated by Article 17.07 and consecutive work premium for the 8<sup>th</sup> and subsequent consecutive days as contemplated by Article 18.09(a).

- In her view, an employee must actually attend the workplace and perform work on a day, including part of a day, in order for that day to be determined a consecutive work day.

- Although Article 18.09(b) specifically mentions only the 8<sup>th</sup> consecutive work day forward, the clause is subject to Article 17.07, which deals with the prerequisite first seven (7) days. Since the grievor did not work the first seven (7) consecutive days, no 8<sup>th</sup> or subsequent consecutive work day existed in his case.

- In the result, Ms. Nichols' position was that there was no 8<sup>th</sup> or subsequent consecutive days worked by the grievor during the relevant period because his approved annual leave effectively broke up his work schedule, thereby preventing him from accumulating the prerequisite seven (7) consecutive work days that he needed to entitle him to a consecutive work premium for consecutive work days worked thereafter. Had the grievor not taken annual vacation days during the relevant time period, he would have actually worked those scheduled days.

- In Ms. Nichols's view, Article 25.02(d) makes it clear that an annual leave day is not a day off. Therefore, the grievor's annual leave days did not constitute a trigger for the purposes of Article 17.07 or Article 18.09(a).

- Also in her view, nowhere does the collective agreement say that annual leave shall be considered work time for the purpose of determining the consecutive work premium. If Articles 18.05 and 18.09(a) do what the Union claims, an employee could be on annual leave or sick leave for two weeks and then get the consecutive work premium if he came back to work directly after such leave. Ms. Nichols considered it illogical to compensate an employee for consecutive work premium if he/she does not actually work.

## THE EVIDENCE

### The Union

No witnesses were called by the Union.

### The Employer

Referencing the grievor's posted 8 hour work schedule for the period February 15<sup>th</sup> to February 28<sup>th</sup>, 2009, his subsequent approved annual leave on Monday the 16<sup>th</sup>, Friday the 20<sup>th</sup>, Monday the 23<sup>rd</sup>, and Friday the 27<sup>th</sup> and, *inter alia*, other hypothetical work schedules, Ms. Marilyn Nichols' evidence consisted generally of explanations of the Employer's interpretation of the relevant collective agreement provisions as they applied to entitlement for the consecutive work premium in the grievor's particular circumstances.

The following (MN#1) depicts the grievor's actual situation:

Sun	Mon	Tues	Wed	Thurs	Fri	Sat
15 Scheduled DAY OFF	16 A/L	17 WORKED	18 WORKED	19 WORKED	20 A/L	21 Scheduled DAY OFF (WORKED OVERTIME)
22 Scheduled DAY OFF (WORKED OVERTIME)	23 A/L	24 WORKED	25 WORKED	26 WORKED	27 A/L	28 Scheduled DAY OFF

The following constitutes the essence of the most relevant aspects of Ms. Nichols' testimony:

- The grievor's claim is that he is entitled to consecutive work premium for Feb. 23<sup>rd</sup>, 24<sup>th</sup>, 25<sup>th</sup>, 26<sup>th</sup>, and 27<sup>th</sup>.
- Although Article 17.07 does not permit the Employer to compel employees to work more than seven (7) consecutive days in a ten (10) day period, Ms. Nichols agreed that employees may be scheduled for more than seven (7) consecutive days if they agree to do so. Specifically because the grievor requested and received approved annual leave on Feb, 16<sup>th</sup>, 20<sup>th</sup>, 23<sup>rd</sup> and 27<sup>th</sup>, Ms. Nichols explained that he did not work more than seven (7) consecutive days at any

(b) An employee who is unavailable for overtime, or unable to accept overtime shall be considered as having worked the overtime and it shall be recorded as such as per Article 18.06(c).

....

18.09 Consecutive Work Premium

(a) Subject to clause 17.07, all work performed on the eighth (8<sup>th</sup>) day and subsequent consecutive days of work shall be paid for at the rate of double (2) time. This cause shall not apply to those consecutive days of work in excess of seven (7) days worked at the request of the employee.

(b) Twelve Hour Shifts

....

(c) Consecutive Work Premium for Employees Working as Temporary Employees

(i) If a temporary employee works three (3) consecutive twelve (12) hours shifts, all work performed on the fourth (sic) (4<sup>th</sup>) day shall be paid for at the rate of time and one-half (1½) and double time for the fifth (5<sup>th</sup>) and subsequent consecutive days.

(ii) If a temporary employee works in excess of seven (7) consecutive days, all work performed on the next and subsequent consecutive days of work shall be paid for at the rate of double time.

(iii) If a temporary employee works in excess of the hours as per 17.06(b)(iii), all work performed on the next calendar day shall be paid at the rate of time and one-half (1½) and double time for subsequent consecutive days.

(d) For the purposes of (a), (b), (c)(i) and (ii), if an employee is recalled or scheduled for overtime on his/her day off it shall apply for the purpose of calculating consecutive days.

....

25.02 For the purpose of this Agreement:

....

(d) “Day Off” means a day on which the employee is not ordinarily required to perform the duties of his/her position other than:

- (i) a designated holiday
- (ii) a calendar day on which the employee is on leave of absence.

....

(b) The working schedule of each employee, showing the shifts and day(s) off work, shall be posted in an appropriate place at least two (2) weeks in advance. When an employee's day(s) off are changed without having been given at least forty-eight (48) hours prior notice of having to work on his/her day(s) off, he/she shall be paid double his/her regular hourly rate for each hour worked on the scheduled day(s) off.

....

17.06 Days Off

(a) ....

(b) Days Off for Employees Working as Temporary Employees

Employees shall be allocated two (2) consecutive days off if any of the following scenarios are met:

(i) ....

(ii) ....

(iii) An employee who works a combination of shifts, which includes at least one (1) shift of greater than eight (8) hour duration, will be scheduled for two consecutive days off once they work 37.5 hours or seven (7) consecutive days whichever comes first.

....

17.07 Consecutive Work Days

(a) No employee shall be compelled to work more than seven (7) consecutive days in a ten (10) day period. This clause shall not apply to those consecutive work days worked subject to the written and signed request of the employee.

....

18.01 Definition of Overtime

(a) Full Time Employees

All time worked by a full-time employee before or after his/her regularly scheduled daily or bi-weekly hours shall be considered overtime.

....

(d) Temporary Employees

All time worked by a temporary employee beyond the normal full-time daily, or bi-weekly hours, depending on the work area that the employee is working in, shall be considered overtime.

....

18.05 Calculating of Overtime Rates

An employee who is absent on approved time off during his/her scheduled work week because of sickness, bereavement, holidays, vacation or other approved leave of absence shall, for the purpose of computing overtime pay, be considered as if he/she had worked during his/her regular hours during such absence.

18:06 Sharing of Overtime

....

The following items were introduced into evidence by Ms. Nichols:

- MN#1 Grievor's Schedule -- February 15-28 (Inclusive)
- MN#2 Grievor's Schedule -- for purpose of applying Articles 17.07(a) and 18.09(a)
- MN#3 Grievor's Schedule -- for purpose of applying Article 18.05
- MN#4 Hypothetical Schedule -- for purpose of applying Article 18.09(d)
- MN#5 Hypothetical Schedule -- for purpose of applying Article 18.05
- MN#6 Actual Time Record, all PCA positions

The relevant collective agreement provisions are as follows:

2.01 The Union recognizes and agrees that all the rights, powers and authority both to operate and manage the facilities under the Employer's control and to direct the working forces is vested exclusively with the Employer except as specifically abridged or modified by the express provisions of this Agreement.

Should a question arise as to the exercise of management's rights in conflict with the specific provisions of this Agreement, failing agreement by the parties, the matter shall be determined by the grievance and arbitration procedure.

....

12.04 Decision of the Board

...The decision of the Board of Arbitration shall be final, binding, and enforceable on all parties, and may not be changed. The Board of Arbitration shall not have the power to change this agreement or to alter, modify or amend any of its provisions. However, the Board shall have the power to dispose of a grievance by any arrangement which it deems just and equitable.

....

17.01 Hours of Work

(a) (i) Eight Hour Shifts

The normal hours of work for employees working an eight (8) hour shift schedule shall be seventy-five (75) hours a fortnight divided into seven and one-half (7½) hour shifts as per 17.02(a) and (b) excluding a one-half (1/2) hour unpaid meal period but including a rest period of fifteen (15) consecutive minutes in the first half and second half of the shift. The meal period and rest period(s) may be combined by mutual agreement between the employee and his/her supervisor.

....

17.03 Working Schedule

(a) (i) Days off shall be planned in such a way as to distribute weekends off so that employees shall receive every third weekend off and the Employer shall endeavour to grant every second weekend off.

....

3. Mr. O'Neil was requested by Eastern Health to work overtime and Mr. O'Neil subsequently attended the Health Sciences Centre and worked 8 hour shifts of overtime on both Saturday, February 21<sup>st</sup>, 2009 and Sunday, February 22<sup>nd</sup>, 2009.

4. Mr. O'Neil alleged that he was entitled to the consecutive work premium, pursuant to the 2009 NAPE HS Collective Agreement, for the time period when he was on approved annual leave on February 23<sup>rd</sup> and February 27<sup>th</sup>, and including for the time period Mr. O'Neil attended at work at the Health Sciences Centre from February 24<sup>th</sup> through to and including February 26<sup>th</sup>.

5. As a result of Eastern Health not agreeing to pay Mr. O'Neil a consecutive work premium in this respect pursuant to its interpretation of the 2009 NAPE HS Collective Agreement, NAPE, on behalf of Mr. O'Neil, filed grievance # 09GRV0164/NAPE HSS 260-09.

.....

The arbitration hearing was held at St. John's Newfoundland & Labrador on January 21, 2009.

For the Union:	Mr. Jerry Earle, NAPE Employee Relations Officer
For the Employer:	Mr. Jay Neville LLb, <i>et al</i>
Sole Arbitrator:	Mr. David Alcock

The parties agreed:

1. to the selection of the arbitrator;
2. that the arbitrator had jurisdiction to deal with the dispute;
3. that the arbitrator would remain seized of the matter to deal with issues arising from the award including the *quantum* of compensation, if any, should the parties fail to agree.

The parties agreed to the following consent items:

1. collective agreement, effective February 12, 2009; expiring March 31, 2012;
2. grievance form and replies, dated March 25, 2009;
3. grievor's PAYROLL/PERSONNEL attendance report for the weeks commencing February 14, 2009; February 21, 2009; February 28, 2009 and March 7, 2009;
4. AGREED STATEMENT OF FACTS/CONSENT EXHIBITS.

Witness for the Employer

Ms. Marilyn Nichols, Acting Director of Human Resources

**In The Matter of a Dispute**

between

**EASTERN REGIONAL INTEGRATED HEALTH AUTHORITY**  
(hereinafter referred to as the Employer or “Eastern Health”)

and

**NEWFOUNDLAND & LABRADOR ASSOCIATION OF PUBLIC & PRIVATE  
EMPLOYEES**  
(hereinafter referred to as the Union or “NAPE”)

**THE GRIEVANCE**

The following excerpt from the parties’ Agreed Statement of Facts/Consent Exhibits provides the background for the issue in dispute:

**AGREED STATEMENT OF FACTS/CONSENT ITEMS**

**WHEREAS** NAPE represents employees with Eastern Health whose terms and conditions of employment are governed by the NAPE Hospital Support Staff Collective Agreement, effective February 12, 2009 (“**the 2009 NAPE Collective Agreement**”); and

**AND WHEREAS** NAPE filed an individual grievance on the behalf of Mr. Keith O’Neil, pursuant to the 2009 NAPE HS Collective Agreement, as more specifically described as bearing Grievance #: 09GRV0164/ HSS-260-09; and

**Re: Individual Grievance # 09GRV-164 – Keith O’Neil**

1. Keith O’Neil, employee number 014992, is a Personal Care Attendant who works for Eastern Health in the Perioperative Program at the Health Sciences Centre in St. John’s. Mr. O’Neil is a permanent full time employee who is regularly scheduled to work 8 hour shifts.

2. Mr. O’Neil was on approved annual leave on Monday, February 16<sup>th</sup>, 2009; Friday February 20<sup>th</sup>, 2009; Monday February 23<sup>rd</sup>, 2009, and Friday, February 27<sup>th</sup>, 2009.