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Re Izaak Walton Killam Hospital for Children and NSGEU, Loc 22A

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Re Izaak Walton Killam Hospital and Nova Scotia Government Employees Union, Local 22A

c

[Indexed as: Izaak Walton Killam Hospital for Children and N.S.G.E.U., Loc. 22A, Re]

File No. 92-122

Nova Scotia, I. Christie. *October 26, 1992.*

d

e

f

POLICY GRIEVANCE relating to standby pay. Grievance denied.

g

G. Forsythe and others, for the union.
K.C. Fowlie and others, for the employer.

AWARD

h

Union grievance alleging breach of the collective agreement between the parties effective April 1, 1989 to March 31, 1992, and continuing in effect at all relevant dates, in that the employer does not pay standby pay in accordance with art. 13.01 to employees who are required to carry beepers during unpaid meal breaks. The

union requested that, as of April, 1992, all such employees be compensated in accordance with art. 13.01.

a At the outset of the hearing in this matter counsel agreed that I am properly seised of it, that I should remain seised after the issue of this award to deal with any matters arising from its application, and that all time-limits, either pre- or post-hearing, are waived.

The issue in this arbitration is whether, under this collective b agreement, the employer is obliged to pay standby pay in accordance with art. 13.01 to employees who are required to carry beepers during their unpaid meal breaks. There is no dispute that if those employees are summoned back to work and do in fact report, as they are expected to, they are paid overtime in accordance with c art. 11.06 for the time then worked, if their meal breaks cannot be rescheduled.

Article 13.01 provides:

ARTICLE 13 — STANDBY AND CALL-BACK

. . . . .

d 13.01 Employees who are required by the Employer to standby shall receive standby pay of Three Dollars and Ninety Cents ($3.90) for each standby period of four (4) hours or less and Seven Dollars and fifty Cents ($7.50) for standby periods of between four (4) and eight (8) hours.

Article 11.06 provides:

e ARTICLE 11 — HOURS OF WORK

. . . . .

11.06 Meal breaks shall be not less than thirty (30) minutes, and not more than one (1) hour, except by mutual agreement in writing. Should an employee be recalled to duty or precluded from taking a scheduled f meal break owing to the press of work and the meal break cannot be rescheduled, the difference between the meal break time taken and the originally scheduled meal break, in so far as this difference qualifies as overtime per Article 12.01, shall be compensated at the applicable overtime rate.

Article 12.01 provides:

g 12.01 All hours worked in excess of the scheduled work day (7.5 hour shift or more) or in excess of seventy-five (75) hours in a two (2) week period as defined in Article 11.01 shall be compensated at the employee's overtime rate.

h *Preliminary issue with respect to the breadth of my jurisdiction*

At the outset of the hearing counsel for the union submitted, in the alternative, that if I were to hold that employees required to wear beepers during unpaid meal breaks are not entitled to

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standby pay under art. 13.01, they are entitled to be paid overtime under art. 11.06 for all such meal breaks because they are, effectively "on duty" if they are not allowed to leave the hospital grounds and go where they wish for that period. Counsel for the employer objected that I have no jurisdiction to deal with that issue because it is not raised in the grievance document.

The grievance here is in the following letter from Linda Cormier, employee relations officer for the union, to Douglas Clarke, interim president and chief executive officer of the employer, dated May 11, 1992:

> Re: Union Policy Grievance
> Our File P-92-93
>
> This is to advise that by this letter the Union is lodging a policy grievance alleging violation of Articles 3, 11, 12, 13 and any other relevant articles of the Collective Agreement between the [parties].
>
> The Union has recently become aware that the Employer is not compensating our members in accordance with the aforementioned provisions of the collective agreement. It is our position that when employees are required to carry beepers during their unpaid meal break that they are entitled to be compensated in accordance with article 13.01.
>
> In order to rectify this injustice, the Union requests that any employee included in the bargaining unit who is required to carry a beeper be compensated in accordance with Article 13.01 and any other relevant article of the collective agreement . . .

Counsel for the employer stated that he had not learned that counsel for the union would be making the alternative submission based on art. 11.06 until the day before the hearing and that it had not been raised in the grievance procedure or with anyone on the employer side until one or two days previously. Counsel for the union did not take issue with these statements, but relied on the fact that the first paragraph of the grievance letter does mention art. 12, the second paragraph refers to "the aforementioned provisions" and the request for compensation in the third paragraph refers to "any other relevant article of the collective agreement". He noted that the grievance letter was written by a union representative, and submitted that it should not be held to a too high standard of technical correctness.

Counsel for the employer referred me to para. 2:1300 of Brown and Beatty, *Canadian Labour Arbitration*, 3rd ed., looseleaf:

> . . . once the submission [which is this case consists of the grievance] is made the arbitrator cannot of his own volition extend, amplify, or add to the issues nor substitute other issues for or in lieu of the issues defined by the submission to arbitration. However . . . if there is conduct amounting to acquiescence in the modification of the submission then the arbitration board may thereby acquire jurisdiction. In this regard a distinction must be made between a grievance which is merely lacking in particularity and one which fails to define

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> or include a matter and thereby put it in issue in the dispute. If the written grievance is merely too vague, that will not affect the arbitrator's jurisdiction and it may be cured by giving particulars, or by granting an adjournment.

a

Here, the only written exchange between the parties relevant to this issue was a letter faxed by counsel for the union to counsel for the employer on July 9th, some 15 days before the hearing. In the first paragraph he states "I write to clarify our position on the grievance." He sets out the situation as the union sees it and then concludes the second paragraph as follows: "The employee is, in fact, working for the employer during the lunch break and should be paid at the appropriate rate for the lunch break." The only reference to any particular article of the collective agreement then follows in the third paragraph:

b c

> If it is the employer's position that it will not pay employees for the time spent on call and on the premises, the employees must be free to spend their lunch break as they wish. If you wish them to wear the beepers while they are on unpaid breaks, they will do so, but if called back to work during the break, they should be paid in accordance with article 13.04.

d

This, counsel for the union said, was an error, and the reference should have been to art. 11.06.

Article 13.04 refers to call-back pay. There was no reason whatever for the employer's counsel to assume that the intended reference was to art. 11.06. Moreover, not only is art. 13.04 the article referred to, the sense of the last sentence quoted from the July 9th letter is that the union is in fact making a claim for call-back pay, rather than either standby pay under art. 13.01 or overtime under art. 11.06. As I said at the hearing, this letter does nothing to assist the union on the question of whether the claim for overtime pay is properly before me.

e f

On this jurisdictional point, I ruled at the hearing that I would not consider any claim for overtime under art. 11.06, but only the claim for standby pay under art. 13.01. My view then was, and is now, that, notwithstanding some of the broader general references, the grievance letter is quite specifically directed to standby pay under art. 13.01. The very general reference to a number of other articles, including arts. 11 and 12 which would obviously be the ones in issue in a grievance over overtime pay in this same context, does not change the thrust of the grievance. The natural, and I think intended, meaning of the reference to them is that they are articles which may bear on the interpretation and application of art. 13.01 in a determination of whether standby pay should be paid.

g h

This is a policy grievance, so even if I have erred on the side of strictness in defining the breadth of the grievance document, and

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consequently the limits of my jurisdiction, I have not denied any employee, or the union, an only chance to challenge an alleged breach or to pursue an issue under the collective agreement. In this context an adjournment to allow the employer a fair opportunity to meet a grievance quite different than it appeared on its face was not appropriate. A new grievance can be filed.

The facts

The union is the bargaining agent for a unit of technologists and technicians at the Izaak Walton Killam Hospital. They work throughout the hospital including in, for example, the X-ray department, haematology, biochemistry, the blood bank, cytogenetics, micro-biology, diagnostic imaging, respiratory therapy and cardiology and EKG. Clearly there are a number of them whose skills may be required on short notice in emergency situations.

There was an employee-initiated change in shift arrangements at the Killam Hospital in April of 1992, which appears to have indirectly given rise to this grievance. It is clear from all the evidence, however, that long before that many technicians and technologists in the bargaining unit were required to carry beepers during unpaid lunch hours, and that they have never been compensated for doing so.

Counsel for the union objected to the admission of evidence of past practice and submitted that the union which is now the bargaining agent had not been shown to have acquiesced in this practice. Michelle Shortliffe, a technologist in the haematology lab, who is president of the union local and a shop steward, and Linda Cormier, an employee representation officer with the union, testified in this connection.

Ms Shortliffe testified that she knew of no grievance on this issue prior to this one that had ever been brought to the attention of Ms Cormier, who services this local on behalf of the union. Once grievances are brought they cannot be settled without Ms Cormier's approval. Ms Cormier testified that she does not normally get involved with the grievance procedure for this bargaining unit until it reaches the level of the director of human resources. She testified that she first learned in April of 1992 that employees subject to this collective agreement were not being paid standby pay under the circumstances in issue. Her advice then was to grieve the matter.

I reserved on the question of whether the words of the collective agreement are ambiguous and admitted the evidence of past practice subject to my determination of whether or not there is ambiguity, patent or latent, in the articles in issue.

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Counsel for the employer submitted that the evidence in question was admissible not only because there is an ambiguity in the language of the collective agreement but also to support his alternative submission that the union is estopped from grieving against the established practice and way of applying the collective agreement.

In broadest outline, the employees who are the subject of this grievance previously worked 7.5-hour shifts, with a one-half hour unpaid meal break. Since April many of them work 11.25-hour shifts with three-quarters of an hour in unpaid meal breaks. This involves no change in the proportion of unpaid meal break time to paid work time.

Heather Coady, the chief technologist in diagnostic imaging, called as a witness by counsel for the employer, explained that as part of this change the employer arranged for 24-hour coverage of her lab, and, I think, others. Previously most of the technologists worked day shifts and there was a shift from 4:00 p.m. to midnight. After midnight some technologists took calls at home. I presume they would have been paid standby pay under art. 13.01. Now someone stays all night on a 12-hour shift. Thus the shift change did not introduce the situation where there is sometimes only one technician or technologist on duty available to fill a particular function, but it made the occurrence of that situation much more common, particularly at night and on weekends.

There is no dispute that where there is only one such person on duty he or she is expected to carry a beeper on unpaid meal breaks. There was much less clarity about what I have concluded is a critical question: whether in that situation the person is required to stay on the premises; "required" meaning subject to discipline if they do not.

Heather Coady testified that employees in her department are free to leave the hospital grounds on their unpaid meal breaks whether or not they are the only one on duty and consequently carrying a beeper. John Conrod, director of the respiratory therapy department, was unequivocal in his testimony that technologists in his department could not leave the hospital grounds in those circumstances. Vivian Jennings, the employer's director of human resources, testified that there is no over-all hospital policy on this. It depends on departmental requirements.

Diedre Huskilson, an X-ray technologist who was the first witness called by counsel for the union, testified that, although no one had told her explicitly that she could not leave the hospital premises when she was carrying a beeper over meal breaks because she was the only person on duty in her department, she

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assumed she was not free to leave and never did. Michelle Shortliffe testified that she had been told long ago that she was not free to leave the premises in such circumstances. When she is not carrying a beeper as the only one on duty she often does leave the hospital grounds on her unpaid meal breaks, but never when she is.

I find that some employees are required to stay on the premises under the circumstances with which I am here concerned and some are not, depending on the department; and that some, and perhaps all, of those who management says are not required to stay on the premises think they are.

In addition to their unpaid meal breaks, art. 11.01 provides that the employees involved here get two paid rest periods of 15 minutes per shift. According to the evidence of both Diedre Huskilson and Heather Coady, in at least some departments the breaks had come to be considerably longer than that. Ms Coady said that things tended to slip and every now and then management would draw the line and insist that people get back to work on time. Apparently, at least in her department, one of those occasions occurred shortly before the change in shift arrangements.

Ms Huskilson saw it somewhat differently. She said that there was "an unwritten agreement" that employees would get half-hour rather than fifteen minute breaks. She said "we carried the pager during meal breaks because the Employer gave a little". When the employer insisted on the letter of the collective agreement the employees thought they were giving more than they were receiving and decided to file this grievance.

The evidence is clear that Michelle Shortliffe at least, as a member of the bargaining committee in the last round of collective bargaining, was well aware of the fact that employees were not paid, either standby pay or overtime, when they were required to carry a beeper over their meal breaks. It is also undisputed that the matter was never raised in negotiations.

There is no evidence before me that in working out the new shift arrangements the parties turned their minds to the difference between working straight through a 7.5-hour shift and working straight through an 11.25-hour shift where, in the words of art. 11.06, "an employee [is] recalled to duty or precluded from taking a scheduled meal break owing to the press of work and the meal break cannot be rescheduled . . .".

The issue

The issue is whether the employer is obliged by art. 13.01 to pay employees standby pay for the time they are not actually working

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but are required to carry beepers during their unpaid lunch breaks. In determining that issue I must deal with the admissibility and
a relevance of the evidence of past practice, both as an aid to resolving any ambiguity and as establishing an estoppel.

Decision

I have concluded that the words of art. 13.01 are ambiguous, at least latently. It is repeated here for convenience:
b

> 13.01 Employees who are required by the Employer to standby shall receive standby pay of Three Dollars and Ninety Cents ($3.90) for each standby period of four (4) hours or less and Seven Dollars and fifty Cents ($7.50) for standby periods of between four (4) and eight (8) hours.

c Normally in the employment context the term "standby" applies to the state of holding oneself ready to work if required by the employer. If the term as used in this provision is not ambiguous on its face, it is when considered in the context of the evidence and the issue before me. I have concluded that the situation of employees
d required to stay on the employer's premises during their unpaid meal breaks is significantly different from that of employees who are free to leave, armed with a beeper.

Employees not free to leave the premises during unpaid meal breaks

e The sub-minimum wage level of the rates set out in the passage just quoted in itself indicates that the parties here cannot be taken to have intended standby pay to constitute pay for people at work. Thus it is far from clear that the term would have been intended by the parties to apply to employees who are required to remain on
f the premises over their normally unpaid lunch hours, quite apart from whether or not they are armed with a beeper. The question with respect to them, it seems to me, is not whether they are entitled to standby pay or to no pay for their meal breaks, but whether, in the terms of art. 11.06, they are "precluded from
g taking a scheduled meal break owing to the press of work" and their meal time must therefore be considered to be "hours worked" for the purposes of art. 12.01. I note, for example, that this province's general Minimum Wage Order, N.S. Reg. 130/88, provides in s. 11 that: "All time during which an employee waits for
h work on the premises of his employer at the request of the employer shall be counted as time worked". The serious question with respect to them, in other words, is whether they are entitled to standby pay or overtime.

Unfortunately perhaps, because of the way the grievance was framed only half of that question is before me. Nevertheless, I am

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not able to reach any conclusion other than that employees who are required to remain on the employer's premises over their unpaid meal breaks cannot be said to be "required by the Employer to standby . . ." and therefore they are not entitled to standby pay under art. 13.01.

I note the evidence before me was not at all complete as to which employees have been, or are, in fact required to remain on the premises over their lunch breaks when no one else is on duty in their departments. Perhaps if there is a future grievance on the issue of their entitlement to overtime it will be made clearer just which employees are in that situation.

Employees free to leave the premises during unpaid meal breaks

According to the evidence before me there are employees who are free to leave the premises during their unpaid meal breaks even when no one else is on duty in their departments, provided they are armed with a beeper.

The two subarticles following art. 13.01 offer no definition of "standby" but are addressed to the same topic. Article 13.02 speaks principally of the provision of a beeper with a range of 20 miles "to an employee designated for standby duty" and the obligation of such an employee to "be able to report for duty as quickly as possible". Article 13.03 provides:

> No compensation shall be granted for the total period of standby if the employee is unable to report for duty when required.

Clearly, those two provisions contemplate the kind of standby of which Heather Coady spoke, when she explained that, before the April change in shift arrangements, after midnight there was only someone on call to meet any requirements that might arise for the services of her lab.

Counsel for the union argued that there was no evidence of any such standby requirements for less than a full eight-hour shift, and therefore that the provision in art. 13.01 for the payment of $3.90 for standby periods of four hours or less suggested that the parties had in mind payment of the very sort of standby pay sought by the union here. I do not find that argument convincing. There was no detailed evidence one way or the other about past or present standby arrangements, so I have no idea what the parties were providing for. There might be, or might have been, gaps of just a few hours between some shifts, or situations where a lab might be left unmanned because of illness, leave for union business or whatever. I simply do not know what the parties were providing for. I must say though, that if, as suggested by union counsel, all

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the parties were providing for was standby coverage for unpaid half-hour meal breaks, compensation for a minimum of four hours' standby would be surprising.

Apart from this consideration of context, employees on an unpaid meal break who are free to leave the premises but are armed with a beeper would appear to be on standby, as that term is normally understood. This brings me to the use of extrinsic evidence to indicate, as well as to resolve, ambiguity. While I find the concept unsatisfying it is undeniably backed by authority. Brown and Beatty, *Canadian Labour Arbitration*, 3rd ed., looseleaf, state in para. 3:4400:

> ... the general rule at common law is that extrinsic evidence is not admissible to contradict, vary, add to or subtract from the terms of an agreement reduced to writing.
>
> . . . . .
>
> Although many arbitrators have accepted the common law principles and limited the introduction of extrinsic evidence accordingly, others have taken the view that the legislative provisions, such a s. 44(8) of the Ontario *Labour Relations Act*, permit the admission of parol evidence at the discretion of the arbitrator ... Where an ambiguity is patent, that is, where it appears on the face of the agreement, an arbitrator may resort to extrinsic evidence as an aid to its interpretation. Where an ambiguity is latent, that is, where it is not apparent on its face, an arbitrator may rely upon extrinsic evidence not only as an aid to resolve the ambiguity once established but also to disclose the ambiguity.

The learned authors footnote the non-labour law case of *Leitch Gold Mines Ltd. v. Texas Gulf Sulphur Co. (Inc.)* (1969), 3 D.L.R. (3d) 161, [1969] 1 O.R. 469 (Ont. C.A.), as support for the proposition quoted. They also cite half a dozen arbitration awards, including three from Nova Scotia: *Re Hermes Electronics Ltd. and I.B.E.W., Loc. 1651* (1990), 14 L.A.C. (4th) 289 (Darby); *Re CKF Inc. and C.P.U., Loc. 576* (1990), 12 L.A.C. (4th) 1 (Darby), and *Re Maritime Telegraph & Telephone Co. and Telephone Employees' Union* (1989), 8 L.A.C. (4th) 22 (Archibald). Moreover, the Ontario Court of Appeal in *Noranda Metal Industries Ltd. v. I.B.E.W., Loc. 2345* (1983), 44 O.R. (2d) 529, 84 C.L.L.C. ¶14,024, 23 A.C.W.S. (2d) 136, a case in which the issue was whether the arbitrator had erred in relying on evidence that during negotiations the parties had agreed on a special meaning for words in the collective agreement, Dubin J.A. said [at p. 536]:

> ... assuming that [the arbitrator] failed to make that finding [that the words in question were ambiguous] ... before admitting the extrinsic evidence, it was unnecessary for him to do so since he was entitled to entertain the extrinsic evidence with a view to determining whether that evidence disclosed the ambiguity in the words expressed.

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The questions, then, are whether the evidence before me of non-payment of standby pay to employees on their unpaid lunch breaks who are required to carry a beeper shows that the word "standby" may have been intended to carry a more restricted meaning than is apparent on the face of it, and whether that evidence also shows that the parties should not be taken to have intended that the provision for standby pay apply to such employees.

Counsel for the union submitted that past practice cannot be relied upon to demonstrate any such intent unless it meets the standard articulated some years ago by arbitrator P.C. Weiler in *Re Int'l Assn. of Machinists, Loc. 1740 and John Bertram & Sons Co.* (1967), 18 L.A.C. 362 at p. 368:

> . . . there should be (1) no clear preponderance in favour of one meaning, stemming from the words and structure of the collective agreement as seen in their labour relations context; (2) conduct by one party which unambiguously is based on one meaning attributed to the relevant provision; (3) acquiescence in the conduct which is either quite clearly expressed or which can be inferred from the continuance of the practice for a long period without objection; (4) evidence that members of the union or management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice.

I accept this as a useful formulation of the questions to be answered on the evidence here.

I have concluded that, in the context of the other provisions of art. 13 and in light of the past practice of the parties, there cannot be said to be a clear preponderance in favour of interpreting the term "standby" in art. 13.01 to cover employees carrying beepers on their unpaid meal breaks. Secondly, the employer's failure to pay such standby pay must certainly be said to be unambiguously based on a meaning of "standby" which does not include that situation. The acquiescence of the employees in the bargaining unit in that practice can be inferred from the continuance of the practice from as far back as any of the witnesses could remember, without grievance or other objection until April of 1992.

Counsel for the union put considerable reliance on the fact that Ms Cormier, the union's employee representation officer who services this bargaining unit, had never acquiesced in the employer not paying employees who were required to carry beepers over their unpaid meal breaks. The evidence is that she did not know of the practice until April of 1992. However, I do not accept that the *John Bertram* formulation means that a union can so easily avoid responsibility for acquiescence in a long-standing practice. Many, if not all, of the employees in the bargaining unit knew all along what the employer's practice was. Diedre Huskilson's evidence

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about the "unwritten deal" makes that quite clear. Even more clearly, Michelle Shortliffe, a union steward, and president of the union local for a year before the grievance was filed, knew of and took no objection to the practice. I think it unlikely that her predecessors in that office were not equally aware.

For these reasons I have concluded that not only the first three but also the fourth requirement that must be met before a past practice that can be relied on is met in this case.

Read in light of the past practice, the term "standby" in art. 13.01 cannot be taken to include the situation where employees are not required to stay on the hospital premises over their unpaid meal breaks, even though they are required to carry beepers. In effect the parties have agreed on a special limitation on the term "standby". Therefore the grievance fails in respect of them as well.

In light of this conclusion, it is unnecessary for me to consider the employer's estoppel argument. I will say, though, that I do not think the evidence discloses the sort of representation at the bargaining table that would support an estoppel based on a foregoing of the opportunity to negotiate, and I do not see any evidence of any other detrimental reliance by the employer on the union's failure to object to the practice in question.

Conclusions

For the reasons given this policy grievance fails. Unfortunately, the reasons are somewhat complex. Employees who are required to carry beepers over their unpaid meal breaks when no one else is on duty in their departments fall into two groups; those who are required to stay on the employer's premises through their meal breaks and those who are not.

The first group are not on standby in any accepted sense of the word, because they are at work, and there is certainly no extrinsic evidence of any special meaning of "standby" adopted by the parties that includes them. The question of whether they are entitled to be paid on an overtime or any other basis, other than standby under art. 13.01, is not before me here.

According to the ordinary use of the term the second group might well be thought to be on standby, but the context in which the term appears in their collective agreement and the evidence of past practice indicates that the parties have given it a somewhat limited meaning here, such that it does not include employees on unpaid meal breaks, even though they are armed with a beeper.

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