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Superior Court of Justice
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Date : December 7, 2006

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FROM: Livia Sessions, Registrar – Divisional Court (416) 327-5036

RE : Divisional Court File : 228/06 City of Hamilton vs. Ontario Nurses' Association and Local 50

ENDORSEMENT OF THE PANEL

Livia Sessions,
Registrar Divisional Court

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COURT FILE NO.: 228/06
DATE: 20061207

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
CHAPNIK, LOFCHIK, AND SWINTON JJ.

BETWEEN:)	
)	
CITY OF HAMILTON)	<i>Douglas K. Gray, for the Applicant</i>
)	
)	Applicant
)	
- and -)	
)	
ONTARIO NURSES' ASSOCIATION AND ITS LOCAL 50)	<i>Elizabeth McIntyre, for the Respondent</i>
)	
)	Respondent
)	
)	
)	HEARD at Toronto: November 7, 2006

SWINTON J.:

[1] The City of Hamilton brings this application for judicial review of the arbitration award of Arbitrator Joseph B. Rose dated April 5, 2006. The issue in this application is whether the arbitrator gave a patently unreasonable interpretation to the collective agreement when he determined that part-time nurses were entitled to be paid overtime rates for their regularly scheduled Saturday shifts.

Background Facts

[2] The current collective agreement contains definitions of the terms "full-time nurse", "regular part-time nurse" and "casual part-time nurse" in Article 1.3, which states:

Full-time Nurse

A full-time nurse is a nurse who is regularly scheduled to work the normal full-time hours referred to in Article 4.

Regular Part-Time Nurse

A regular part-time nurse is a nurse who regularly works less than the normal full-time hours referred to in Article 4 and who offers to make a commitment to be available for work on a predetermined regular continuous part-time basis.

Casual Part-Time Nurse

A casual part-time nurse is a nurse who works less than a regular part-time nurse who may from time to time provide relief for any of the full-time or regular part-time nurses.

[3] Article 4.1(a) deals with "standard hours of work". It reads:

Standard Hours of Work

The standard hours of work for nurses coming within the scope of this Collective Agreement shall be thirty-five (35) hours per week, and the schedule which is to normally apply throughout each year shall be 8:30 a.m. to 4:30 p.m. or 9:00 a.m. to 5:00 p.m. daily, Monday to Friday, exclusive of a one (1) hour lunch break. ...

[4] Under the current collective agreement, entitlement to overtime is governed by Article 4.2(a), which provides:

All time worked beyond the nurse's normal work day, normal work week and on holidays as defined in Article 7 shall be considered overtime.

In the preceding collective agreement, that clause read:

Overtime is defined as time beyond the thirty-five (35) hour flexible work week described in Article 4.01. All time worked beyond the normal day, the normal work week and on holidays as defined in Article 7, shall be considered overtime.

[5] Grievances were filed under the current collective agreement claiming overtime pay for all hours worked on weekends by part-time nurses. In an Agreed Statement of Issue and Fact, the parties agreed that under the previous collective agreement part-time

nurses working regularly scheduled Saturday shifts did not receive overtime pay for working those shifts.

[6] Under the previous collective agreement, the same arbitrator had held that full-time nurses were entitled to overtime pay if they worked Saturdays (*Hamilton-Wentworth Public Health Unit v. Ontario Nurses' Association*, [2001] O.L.A.A. No. 88 (Rose)). After referring to his earlier award in his reasons in this case, the arbitrator concluded that part-time nurses were entitled to be paid overtime for work on Saturdays, as that work fell outside the normal work week provided by the collective agreement in Article 4.1. At p. 9 of his award, he stated:

What is relevant is the change made to Art. 4.2(a) of the collective agreement. The deletion of the first sentence of the clause had the effect of creating a different entitlement for overtime. By virtue of the change, the parties agreed that overtime is no longer defined as time beyond the 35 hour flex work week as described in Art. 4.1(a). A plain reading of Art. 4.2(a) indicates that all work scheduled beyond normal hours shall be considered overtime. What constitutes standard or normal is defined in Art. 4.01(a); it refers to hours beyond 8:30 a.m. to 4:30 p.m. or 9:00 a.m. to 5:00 p.m., Monday through Friday. The practice of scheduling part-time nurses on Saturdays does not override the provisions of the collective agreement. Art. 4.1(a) clearly states Saturday falls outside normal work week of Monday through Friday [*sic*]. Pursuant to Art. 4.2(a) there is an entitlement to overtime for all work scheduled beyond normal hours and days. There is no question Art. 4.2 is unusual, but that is what it says and that is what it means.

The Standard of Review

[7] Both parties agree that the standard of review is patent unreasonableness (*Lakeport Beverages v. Teamsters Local Union 938* (2005), 77 O.R. (3d) 543 (C.A.) at paras. 30-31). That standard is a very high one. As Cory and McLachlin JJ. stated in *Canada Safeway Ltd. v. R.W.D.S.U., Local 454* (1998), 160 D.L.R. (4th) 1 (S.C.C.) at para. 63:

A reviewing court cannot intervene simply because it disagrees with the reasoning of the arbitration board or because it would have reached a different conclusion. To do so would be to usurp the power of the administrative tribunal and to remove from it the ability to arrive at erroneous conclusions within its area of specialized expertise.

A court should intervene only if the decision is “clearly irrational” and evidently not in accordance with reason (at para. 61).

Analysis

[8] The City submits that the award is patently unreasonable for three reasons: the arbitrator ignored the plain meaning of Article 4.2(a); he considered only one change to Article 4.2(a) without considering other changes to the article; and the result arrived at borders on the absurd and could not have been within the contemplation of the parties.

[9] The City relies on the language in Article 4.2(a) which refers to the “nurse’s normal work day, normal work week” and submits that this must mean the individual nurse’s work week. The article states that overtime will be paid for hours worked “beyond” the nurse’s normal work day or normal work week. According to the City, this must mean work “in addition to” and not “outside of”, as the arbitrator held.

[10] The City also submits that the arbitrator erred in relying on the deletion of the first sentence from Article 4.2(a) without considering the addition of the word “nurse’s” to the article. Again, the City submits that the change in wording suggests that the inquiry must be into the work day and work week of the individual nurse.

[11] Finally, the City submits that the result reached borders on the absurd, as an employee who is only regularly scheduled to work Saturday will be paid overtime for his or her ordinary hours of work.

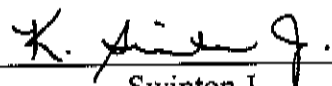
[12] Courts have repeatedly held that an arbitrator’s interpretation will only be held to be patently unreasonable if it cannot reasonably be attributed to the collective agreement language at issue (see, for example, *Canada Safeway, supra* at para. 82; *Lakeport, supra* at para. 53). In my view, the interpretation given to the collective agreement language in this case can not be said to be patently unreasonable.

[13] In this case, the arbitrator looked at Article 4.2(a) in the context of the collective agreement as a whole. Given that Article 4.2(a) refers to the “nurse’s normal work day” and “normal work week”, he concluded that the definition of what constitutes normal or standard working hours for a nurse covered by the collective agreement is set out in Article 4.1(a). He concluded that the normal work hours and work week are either 8:30 a.m. to 4:30 p.m. or 9:00 a.m. to 5:00 p.m., Monday through Friday, and a premium is, therefore, payable for Saturday work.

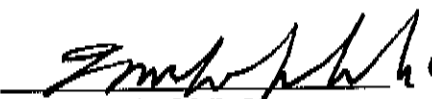
[14] The arbitrator interpreted Article 4.2(a) in a manner consistent with his award under the previous agreement, where he found that full-time nurses were entitled to overtime for hours worked outside of the standard or normal working hours. His conclusion is consistent with other arbitration cases which have concluded that the language of a collective agreement requires overtime or a premium for hours worked outside normal or regular hours (see Donald J.M. Brown, Q.C. and David M. Beatty, *Canadian Labour Arbitration*, 3rd ed.(Aurora: Canada Law Book, August, 2005), p. 5-73).

[15] In summarizing the City's argument, the arbitrator made reference to the addition of the word "nurse's" in Article 4.2(a), although he did not deal with it in his analysis. That does not render his award unreasonable; rather, it suggests that he did not find the argument persuasive, in light of his interpretation of Articles 4.1(a) and 4.2(a).

[16] As the decision was not patently unreasonable, the application for judicial review is dismissed. Costs to the respondent are fixed at \$4,500.00, the amount agreed upon by the parties.


Swinton J.


Chapnik J.


Lofchik J.

Released: December 7, 2006

COURT FILE NO.: 228/06
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**ONTARIO
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CHAPNIK, LOFCHIK AND SWINTON JJ.

B E T W E E N:

CITY OF HAMILTON

Applicant

- and -

**ONTARIO NURSES' ASSOCIATION AND ITS
LOCAL 50**

Respondent

REASONS FOR JUDGMENT

SWINTON J.

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