

IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

- and -

IN THE MATTER OF AN ARBITRATION

BETWEEN

EMRICK PLASTICS, A DIVISION OF WINDSOR MOLD INC.

- the Employer

and

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION  
AND GENERAL WORKERS UNION OF CANADA (CAW - CANADA)  
AND ITS LOCAL 195

- the Union

AND IN THE MATTER of an overtime grievance of Linda Wolfe dated May 9, 1996

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Anna Vannelli

- Counsel

Marg Dottor

- Human Resource Director

On behalf of the Union:

Debbie Fields

- National Representative

Vicki Westworth

- Chairperson

Linda Wolfe

- Grievor

Hearing held in Windsor, Ontario on October 9, 1996.

# AWARD

## I. THE FACTS

This grievance involves a dispute regarding the payment of overtime premium. The parties presented an agreed statement of facts which I summarize as follows:

Linda Wolfe, the grievor, worked the afternoon shift in the molding department during the work week of Monday April 22 through Friday April 26, 1996. On Thursday April 25 the grievor:

1. was advised that her regular shift beginning Monday April 29 would be the midnight to 8:00 a.m. shift in the decorating department; and
2. was asked to work two additional shifts on the weekend - on Saturday April 27 from 4:00 p.m. to midnight and on Sunday April 28 from 8:00 a.m. until 4:00 p.m.

She worked those additional shifts on Saturday and Sunday. On Monday April 29 she worked the midnight to 8:00 am shift, which the parties agreed was her regular assigned shift.

The grievor was paid one and one-half times her regular rate for the hours worked on Saturday. She was paid double her regular rate for the hours worked on Sunday. She was paid her regular rate for the hours worked on Monday.

The grievor worked sixteen hours between 8:00 a.m. Sunday and 8:00 a.m. Monday. Relying on Article 23.01 (b) which requires time and one-half for "all hours worked over eight (8) in any twenty-four (24) hour period," the grievor claimed payment at time and one-half the regular rate for the Monday work.

II. PROVISIONS OF THE AGREEMENT

ARTICLE 3 - MANAGEMENT RIGHTS

3.02 Subject to the provisions of this Agreement, the Company shall have the right to schedule and assign work to be performed . . .

ARTICLE 17 - HOURS OF WORK

17.01 The regular work week shall be five (5) eight-hour days, Monday through Friday inclusive.

(a) The hours of work shall be as follows:

MOLDING DEPARTMENT

Day Shift..... 8:00 a.m. - 4:00 p.m.

Afternoon Shift..... 4:00 p.m. - 12 midnight

Midnight Shift..... 12 midnight - 8:00 a.m.

DECORATING DEPARTMENT

Day Shift..... 8:00 a.m. - 4:00 p.m.

Afternoon Shift..... 4:00 p.m. - 12 midnight

Midnight Shift..... 12 midnight - 8:00 a.m.

The above hours include a twenty (20) minute paid lunch period.

...

(b) For the purposes of this Agreement the midnight shift which commences at 12:01 a.m. on Monday and ends at 8:00 a.m. on Monday shall be the first shift of the regular work week.

ARTICLE 23 - OVERTIME

23.01 (a) All overtime will be voluntary.

(b) All hours worked over eight (8) in any twenty-four (24) hour period will be paid for at the rate of time and one-half.

(c) All work performed on Saturdays will be paid for at the rate of time and one-half.

(d) All work performed on Sundays will be paid for at the rate of double time.

...

(f) In the event the Company requires employees to work either weekend or hold over overtime, employees will be asked in accordance with the following procedure:

(i) seniority employees in the classification on the shift in the department, by low hours;

...

(iv) seniority employees in the same classification on the other shifts, by low hours;

...

SCHEDULE "C"

LETTERS OF INTENT

LETTER #3: TEMPORARY SHIFT CHANGE PRIVILEGE

Employees in the same classifications on different shifts may exercise temporary shift change privileges. Both employees requesting the shift change privileges will be required to sign at least one (1) day prior to the shift change a memorandum showing the shift change and containing a waiver of any overtime premium arising because of the shift change, and a waiver of any shift premium payable because of the shift change. Any shift premium which is payable in accordance with the Collective Agreement will be paid to the employee who in fact worked the shift for which the shift premium is payable. . . .

III. POSITION OF THE UNION

The Union submitted that Article 23.01 (b) required payment at the rate of time and one-half for the second shift in a twenty-four hour period. The use of "over" eight hours meant that the employee had already worked eight hours and the hours which followed were to be paid at the higher rate.

The Union asked that I interpret the language of Article 23.01 (b) in light of the agreement as a whole. Article 3.02 allows the Employer to transfer an employee from one shift to another or from one department to another, as it had transferred the grievor from the molding department to the decorating department. That Employer right to transfer employees is expressly made subject to the provisions of the agreement. Article 23.01 (f) (iv) indicated that overtime may be offered to employees on another shift. Article 23.01 (f) (iv) applied to the grievor with respect to her work on the Sunday. When overtime is worked by an employee who normally works on another shift (such as the grievor did here) the overtime may lead to the employee working more than eight hours in a twenty-four hour period. In such a situation the agreement requires the payment of overtime premium pay.

While the Union acknowledged that there was no provision in the Agreement which said explicitly that an employee will receive overtime pay when there is a shift change, Letter #3 required a waiver of overtime premium on a voluntary shift change and thus implied that overtime premium pay might otherwise have to be paid when an employee changed shifts. The only instance of overtime premium pay resulting from a change, or switch, of regular assigned shifts during the regular work week would occur when an employee worked more than eight hours in a twenty-four hour period.

The Union noted that weekend work is overtime work and that it is voluntary. The employee does not choose the weekend overtime shift to be worked. The Employer must need the employee to work the overtime and is required to ask the employee to work at a specific time. Since the Employer agreed to the procedure under which the Employer requests volunteers, and since the persons who are asked may be working on another shift, then the Employer must be taken to have accepted the following: when overtime leads to an employee working more than eight hours in a twenty-four hour period, the hours "over" eight, the last hours worked, must be paid at the premium rate.

The Union referred to Palmer's *Collective Agreement Arbitration in Canada*, (First edition, 1978) Chapter 4, Section 2; and to *Re Houle and Treasury Board (Department of Transport)* (1978), 21 L.A.C. (2d) 103 (Mitchell).

#### IV. POSITION OF THE EMPLOYER

The Employer also submitted that I should interpret the Article in light of the Agreement as a whole.

The Employer noted that while overtime is voluntary work, the grievor's Monday work was

not voluntary. Although the grievor could not have refused to work the Monday shift, she could have refused the Sunday work which was compensated at double time. If she were to be compensated for her regular hours at premium rates it would make, or imply that, the regular hours were voluntary. The Monday regular hours cannot be converted into overtime hours in this manner.

In the alternative, the Employer submitted that the language did not require payment for the "last" eight hours. Premium pay had been paid for eight of the sixteen hours worked in the twenty-four hour period, thus meeting the requirements of the Agreement.

The Employer referred to *Re Welland Vale Mfg. Co., Ltd. and United Steelworkers, Local 2853*, [1955] 5 L.A.C. 1945 (Anderson); *Re Labatt's Ltd. and Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 304* (1980), 24 L.A.C. (2d) 312 (Burkett); and to Brown and Beatty, *Canadian Labour Arbitration*, 3rd edition, looseleaf, para 8:2100.

## V. CONCLUSIONS

The resolution of the grievance involves two separate questions:

1. Does Article 23.01(b) which specifies that  
"All hours worked over eight (8) in any twenty-four (24) hour period will be paid for at the rate of time and one-half."  
apply to the situation before me?
2. If it does apply, what does it require in terms of overtime premium payment?

There was no evidence of negotiating history or past practice. Thus I propose to look at other provisions in the parties' agreement to determine whether they assist in determining the

interpretation intended by the parties. I agree with the approach suggested in *Re Houle and Treasury Board, supra* that "In the final analysis, the rule of construction of an agreement is to determine from the meaning of the words used therein the intent of the parties. That is so because the overriding consideration should be that effect shall be given to the intention of the parties as discerned from the words used when they entered into the agreement." (page 108).

1. *Does Article 23.01(b) apply to the situation before me?*

I start by noting that the shift on Monday April 29 was the grievor's regular shift. It was her assigned shift under Article 3. As it was the regular assigned shift, it was not voluntary and thus cannot be "overtime" since Article 23.01 (a) indicates that all overtime is voluntary.

Somewhat surprisingly, simply because the Monday shift was not overtime does not mean it cannot attract the premium payment which is required to be paid under Article 23. Articles 23.01 (b) (c) and (d) do not speak of "overtime" attracting premium pay. Instead, for example, Article 23.01 (b) provides that "all hours worked over eight" will be paid at time and one-half, not simply "overtime" hours worked over eight. Articles 23.01 (c) and (d) speak of "all work performed." On its face there is nothing to restrict the application of Article 23.01 (b) to situations in which the work "over" eight hours was performed on a voluntary basis. On the contrary, the language seems to have been designed to cover all situations, whether the work over eight hours was required or voluntary.

Assume, for example, that an employee is assigned to work the afternoon shift on Monday and Tuesday but is assigned to work the day shift on Wednesday through Friday. This would result in sixteen hours of work in the twenty-four hours between 4:00 p.m. Tuesday and 4:00 p.m. Wednesday. Although all of the work is done during the employee's regular shifts and

none of the work is voluntary, I see nothing to prevent Article 23.01 (b) from applying to that situation.

This interpretation is reinforced by Letter #3 which is intended to facilitate temporary shift changes. By requiring "a waiver of overtime premium" before employees change shifts, the parties must have recognized that changing shifts might lead to overtime premium pay. The Letter must, at a minimum, have been intended to deal with changes in regular assigned shifts. An employee can simply decline any overtime work and thus would have little need to change overtime shifts. Even if employees wished to change overtime shifts, I cannot conceive that Letter #3 was intended to require, for example, two employees, each of whom had been asked to work Sunday overtime and who wished to switch their Sunday overtime shifts, to waive the Sunday overtime premium. In any event, it is sufficient for my purposes to note that I believe Letter #3 can apply to situations involving regular assigned shifts, even if it also applies to other situations.

The only situation covered by Letter #3 in which a change of regular assigned weekday shifts might attract an overtime premium payment occurs when the change causes an employee to work more than eight hours in a twenty-four hour period. While there is an aspect of employee preference in selecting the shift to which he or she wishes to change, I do not think it can be said that the work itself is voluntary, as the employees involved are simply switching their assigned shifts.

Thus, as I conclude from a review of other provisions in the agreement that Article 23.01 (b) may apply in a situation in which all the hours are assigned, I likewise conclude that Article 23.01 (b) may apply when only some of the hours are assigned hours, and the remaining hours are voluntary, or overtime, hours. In particular, I conclude that Article 23.01 (b) is applicable to the situation before me in which the grievor worked sixteen hours in the



twenty-four (24) hour period from 8:00 a.m. Sunday through 8:00 a.m. Monday, although the work on Monday was an assigned, or required, shift.

As I conclude that Article 23.01 (b) applies, I must now address the second question of what is the effect of its application.

2. *What does Article 23.01 (b) require in terms of premium payment?*

The question of interpretation in Article 23.01 (b) is as follows:

Assuming an employee worked sixteen hours in a twenty-four hour period, did the parties intend that:

1. The last hours worked in chronological order are the hours which are to receive premium pay; or,
2. The number of hours by which the total hours worked exceed eight hours are to receive premium pay?

Under the first interpretation overtime premium would be paid for the *last* eight hours; in the second interpretation overtime premium could be paid for *any* eight hours.

If all the hours were regular hours this question would not matter as eight hours would receive premium pay and eight hours receive regular pay under either interpretation. Here, however, eight hours were Sunday hours and were paid at a premium rate for another reason (Sunday work - Article 23.01 (d)) and thus the issue is of importance.

Article 23.01 (b) requires overtime premium pay for all hours worked "over" eight. Grammatically the word "over" in Article 23.01 (b) could mean either "after" or "in excess of". To determine which was intended I again propose to examine other related provisions of the agreement to see if they assist in determining the parties' intention.

Before undertaking that examination I note that the grievor also worked the afternoon shift on Saturday. Article 23.01 (b) would apply to the Saturday and Sunday shifts as the grievor worked sixteen hours in the twenty-four hour period from 4:00 p.m. Saturday to 4:00 p.m. Sunday. No issue arose with respect to that work as the grievor received premium pay for all sixteen hours worked in that twenty-four hour period. The Sunday premium was double time and no exception was taken to it - there was no suggestion that the grievor should have received only time and one-half, instead of double time pay, on Sunday. From this it appears that the parties accept that an employee is entitled to the higher premium pay in a situation where two different premium payments may be required under two different sections of Article 23.

The grievor also worked sixteen hours between 8:00 a.m. Sunday and 8:00 a.m. Monday and it is the payment for these hours which is in dispute. She received premium pay for the eight hours on Sunday which were the first eight hours worked in that period. The Sunday premium payment would not satisfy the agreement if the first, the "after," interpretation is correct, if the overtime premium payment must be paid for the *last* eight hours of work, as she was paid overtime premium for the first eight hours and received only the regular pay for the hours "after" eight hours in that period. Under the second interpretation in which the payment can be for *any* eight hours, the Sunday overtime payment would satisfy the requirements of Article 23.01 (b). Thus if the second, the "in excess of," interpretation is correct there would be no violation as she was paid an overtime premium for the first eight hours and eight hours is the number of hours by which her total hours worked were "in excess of" eight hours.

In my view, the overtime provisions in this Agreement strike a balance between the competing interests of the Employer and the employees. The Employer must ask for volunteers (Articles 23.01 (a) and (f)) and does so by first asking the persons with low hours

(Article 23.01 (f)). An employee who agrees to work is paid a premium rate (Articles 23.01 (b) (c) and (d)). It thus appears that, in most instances, the premium pay rate is intended to serve at least two purposes. It is designed, in part, to compensate the employee for the disruption in his or her life and at the same time it is designed to make the work sufficiently appealing that the Employer will be able to attract an adequate number of volunteers to do the needed work.

I noted above that the two purposes applied in most instances. At least one exception to this dual purpose for premium pay exists. I return to an example I used earlier. Assume an employee is assigned to work the afternoon shift on Monday and Tuesday but is assigned to work the day shift on Wednesday through Friday, resulting in sixteen hours of work between 4:00 p.m. Tuesday and 4:00 p.m. Wednesday. I concluded above that a premium rate would be payable. As all the work is done as part of the employee's regular shifts and none of the work is voluntary, the premium rate cannot have been designed to encourage that employee to "volunteer". However, the Article 23.01 (b) premium pay may compensate the employee for the disruption in his or her personal life which is caused by working more than eight hours in the twenty-four hour period.

Returning to the two purposes of premium pay and applying them to the case before me, premium pay would not have been designed to encourage the grievor to volunteer to work on the Monday. There was no element of voluntarism involved - it was an assigned shift. As for compensating for the disruption, I believe that the real disruption in the grievor's personal life flowed from having worked on Sunday; but the Sunday work was overtime, was voluntary and could have been declined. In addition, the Sunday work was paid at the double time rate.

A requirement to pay a premium rate for the Monday hours would fulfil neither of the two

purposes which I noted above for overtime premium pay. I am therefore inclined to the view that the word "over" in Article 23.01 (b) was intended to mean "in excess of" as opposed to "after."

It is possible that the parties contemplated a situation of premium pay where neither of the two purposes was involved, but I think it very unlikely and inconsistent with the overall approach exhibited in the Overtime Article. If the interpretation of "in excess of" is correct then, since the Employer paid the grievor a premium rate for the hours which the grievor worked "in excess of" eight in the twenty-four hour period, it would mean that the Employer did not violate the collective agreement.

I have indicated that I am inclined to the view that the parties intended "in excess of" rather than "after." While my analysis of the other provisions in the agreement dealing with overtime are suggestive of this interpretation, I acknowledge that the arguments are less direct than in the first question above and that there are reasonable arguments to be made for the other interpretation. In other words, while the examination of the Article on overtime suggests that "in excess of" was the intention of the parties, the examination alone does not lead to a clear and convincing conclusion.

However my tentative conclusion that the Employer did not violate the agreement is supported by a second approach to the problem. I believe that if the parties intended to pay overtime premium rates in a situation such as this for the first regular assigned hours of the week they could and would have said so more clearly. These Monday hours were regular assigned weekday hours and if the parties intended that they should be paid at a premium rate when worked in conjunction with Sunday hours I would have expected that result to be clearly expressed. It is not.

Finally, for a third perspective, it appears to me that if a premium rate of time and one-half were to be payable for the Monday hours in addition to the double time premium rate payable on Sunday, the practical effect is the same as requiring the Employer to pay double time and one-half for the Sunday hours and regular time for the Monday hours. I do not detect any intent that some employees who volunteered for Sunday overtime should be better off than others, nor can I perceive of any policy reason why the parties would have intended that some employees who volunteered for Sunday overtime should be better off than others, depending solely on when their shifts on the Monday occurred. Employees know when their Monday shifts will take place. They are free to accept Sunday overtime or to decline it, but I see no reason why the economic benefit to them, or the economic cost to the Employer, in the Sunday overtime work should vary depending on when the assigned Monday shifts occur.

On the basis of these three factors I conclude that the requirement for the Employer in this instance was to pay overtime premium pay for eight of the sixteen hours in question. The Employer did so. As the Employer did not violate the agreement, the grievance is denied.

Dated in London, Ontario, this \_\_\_\_\_ day of October , 1996.

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Howard Snow, Arbitrator