IN THE MATTER OF AN ARBITRATION

BETWEEN:

GOVERNMENT OF THE NORTHWEST TERRITORIES

(the "Employer")

AND:

PUBLIC SERVICE ALLIANCE OF CANADA
(UNION OF NORTHERN WORKERS)

(the "Union")

(Re: Special Leave Grievance #'s 17-P-02148 and 17-E-02150)

ARBITRATOR:	Irene Holden
COUNSEL:	Baljindar Rattan For the Employer
	Michael Penner For the Union
HEARING:	January 23, 2018 Yellowknife, NT
AWARD:	January 7, 2019

1592

INTRODUCTION

This arbitration award deals with the special leave provisions of the Collective Agreement between the Government of the Northwest Territories (the "Employer") and the Union of Northern Workers (the "Union"), a component of the Public Service Alliance of Canada. According to a joint statement presented at the commencement of these proceedings, the parties "are seeking an interpretation concerning the operation of Article 19" of the Collective Agreement entitled "Special Leave" – "particularly as it applies to employees scheduled to work 12 hour shifts as per Appendix A10" entitled "Health Care Practitioners".

There are two grievances involved in this dispute – a policy grievance numbered 17–P-02148 and an individual grievance numbered 17-E-02150. The fact base of the individual grievance and the way the Employer applied the special leave provisions to the circumstances in that case directly led to the policy grievance, 17-P-02148. Hence the two grievances are intertwined.

The Union is seeking declaratory relief as a remedy.

BACKGROUND

The Grievor, Allyson Leduc was a part-time nurse and held a .75% FTE ("Full Time Equivalent") nursing position at Stanton Territorial Hospital in 2017. Ms. Leduc was getting married in May of 2017 and she applied for special leave pursuant to the terms of Article 19.02(1)(b). Under this article, special leave of up to five consecutive working days "shall" be granted by the Deputy Head under two circumstances: when there is a death in the employee's immediate family and "when an employee is to be married" – the latter was the case for Ms. Leduc. Article 19 is divided into mandatory

and directory provisions. Article 19.01 and 19.02 (1) encompass the mandatory provisions of special leave and Article 19.02 (2) embody the directory provisions. Since the request for special leave in Ms. Leduc's case was a mandatory provision Article 19.02 (2) was not addressed in this award. The applicable articles to the case at hand therefore read as follows:

19.01

(1) An employee shall earn special leave credits up to a maximum of thirty (30) days at the rate of 0.023077 hours for each hour that an employee receives pay. The time to which this applies is set out in Article 17.07.

As credits are used, they may continue to be earned up to the maximum.

(2) Special leave will be taken in hours, on the basis of the employee's regularly scheduled hours of work for the day the leave is taken.

19.02 For the purpose of this article, immediate family is defined as an employee's father, mother, step-parent, brother, sister, spouse, common-law spouse, child, step-child, foster child, father-in-law, mother-in-law, grandmother, grandfather, grandchild, son-in-law, daughter-in-law, brother-in-law, sister-in-law and any relative permanently residing in the employee's household or with whom the employee presently resides.

(1) The Deputy Head shall grant special leave earned with pay for a period of up to five (5) consecutive working days:

(a) when there is a death in the employee's immediate family.

The employee may be granted up to three (3) additional days special leave for the purpose of travel;

(b) when an employee is to be married.

Specifically Ms. Leduc requested May 18, 19 and 26, 2017 as special leave for her marriage. Each of the shifts for the May dates were twelve hour shifts under the modified or compressed work week found in Appendix A10 of the Collective Agreement. Ms. Leduc queried her supervisor on May 24, 2017 about the possibility of taking two other shifts at a later date (the language in Article 19.02(1) contemplates up to "five consecutive working days") and she was advised that the days had to be consecutive according to the language of Article 19.02. She was also informed by her supervisor that the "standard working day" for Ms. Leduc's position was 7.5 hours per day and her maximum special leave entitlement was therefore 37.5 hours (5 days of 7.5 hours per day). Ms. Leduc did not testify in these proceedings but this information was provided in the documentation attached to counsels' joint statement. On behalf of Ms. Leduc, the Union grieved on July 20, 2017 –approximately 26 days beyond the 30 day timeframe within which the employee had to file the grievance (see Article 37.08 of the Collective Agreement).

On the 21st of July, 2017 the Union filed a policy grievance challenging the Employer's application of Article 19.01 and placing a 37.5 hour cap or maximum on the entitlement previously described. The Union stated in the policy grievance that this cap disadvantages an employee like Ms. Leduc who works 12 hour shifts and it quotes Article 19.01(2) which states:

> Special leave will be taken in hours, on the basis of the employee's regularly scheduled hours of work for the day the leave is taken.

Since the employee's regularly scheduled hours of work for the three days in question were twelve hours each day, it is the Union's view that Ms. Leduc should have been paid twelve hours for each day of special leave.

THE ISSUES

There are three issues which need to be addressed in this dispute: the timeliness of the grievance, the estoppel argument and the interpretive issue which is the crux of the dispute. Before dealing with the interpretive issue, the other two issues need to be addressed.

TIMELINESS

The Employer raised a preliminary issue – the timeliness of the employee's grievance. Article 37 of the Collective Agreement states that the grievance must be raised within 30 days of the date upon which the Grievor was notified of the Employer's interpretation of Article 19.01(2) in particular. The actual wording of Article 37.08 reads as follows:

> An employee may present a grievance to the first level of the procedure in the manner prescribed in Article 37.04 not later than the fifteenth (15th) calendar day after the date on which he/she is notified orally or in writing or on which he/she becomes aware of the action or circumstances giving rise to the grievance, excepting only where the grievance arises out of the interpretation or application with respect to him/her of this Collective Agreement, in which case the grievance must be presented within thirty (30) calendar days.

The employee grievance was filed 26 days beyond the 30 days referenced above.

Employer counsel stated she understood that the time limits in Article 37 were more permissive than mandatory but the time parameters "must count for something" and there must be reasons for the time limits, she argued. According to the Employer, on this basis alone the grievance should be denied. Employer counsel however

conceded that the filing of the policy grievance within the time limits lessens the weight of this argument regarding the individual grievance.

The Union in response rests its case on the fact that other decisions dealing with the same language in Article 37, particularly 37.08, have deemed the time limits as directory not mandatory. According to the Union, even if the timelines were mandatory the Employer has to be prejudiced by the grievance being filed so late. Since the Union is only seeking declaratory relief there is no cost to the Employer regarding the interpretive issue, argues the Union.

Further the policy grievance was filed within the 30 days and has thus kept the interpretive issue alive, asserts the Union. For the timeliness issue the Union relies on *Minister of Human Resources, the Government of the Northwest Territories v. the Union of Northern Workers (John Boudreau – Special Leave Entitlement)* issued on October 25, 2016 (Arbitrator Moreau); *Northwest Territories Public Employees Association v. the Commissioner of the Northwest Territories: Kevin Beemer Grievance* issued on November 10, 1987 (Arbitrator Arseneau); and *Northwest Territories (Minister of Personnel) v. Union of Northern Workers (Moerkoert Grievance)*, [2000] N.W.T.L.A.A. No. 1 (Arbitrator Joliffe). All three of these awards claim that Article 37 is directory in nature and not mandatory. Arbitrators Moreau and Joliffe follow the lead found in the Arseneau award which speaks to the issue that the absence of words such as "must" and "shall", coupled with the absence of a penalty for breaches of the timelines, makes the clause directory not imperative or mandatory.

At page 11 of his award, Arbitrator Moreau maintains that it is still necessary to review "the degree of prejudice suffered by a party due to non-compliance as a guide" (quoting author Palmer in his text *Collective Agreement Arbitration in Canada* [1978]*).* Arbitrator Moreau found that there was no prejudice in the case before him.

Just as there was no evidence of prejudice in the Moreau case, so too in the case before me. The preliminary objection regarding timeliness is dismissed for the previous reasons – the absence of imperative terms such as "must" or "shall"; no penalty for a breach of the timelines; and no evidence of prejudice suffered by the Employer due to non-compliance with the timelines. Therefore the preliminary objection is dismissed.

ESTOPPEL

The Employer called a witness to give testimony as to its practice in administering the special leave provisions. Ms. Tracy Matesic is the Manager of Surgical Services at Stanton Hospital and has administered the special leave applications for the last eight years. She testified that her methods were never challenged by the Union until now with the filing of the policy grievance.

She gave evidence that most applications under Article 19 were for emergencies at home or care for a sick family member and fell under the discretionary provisions of Article 19.02 (2) – unlike Ms. Leduc's request for leave for her marriage which falls under the mandatory provisions of Article 19.02(1). She further explained that she was not in charge of obstetrics where Ms. Leduc was working at the time of her request, but Ms. Matesic could speak to the practice.

Ms. Matesic testified regarding the master shift rotation and how it was created and posted well in advance of the applicable year for the rotation – sometimes 1.5 years in advance. She stated that full time employees typically worked thirteen and fourteen 12 hour shifts per month and an employee like Ms. Leduc at 75% of full time status would work nine to ten 12 hour shifts per month. According to Ms. Matesic the Collective Agreement is based on 7.5 or 8 hour workdays and 37.5 or 40 hour work weeks. In her view, the premise of special leave was based on these standard hours. Hence the entitlement for special leave would be a maximum of 37.5 hours for five

days. According to Article 4.02 which speaks to a proportion of benefits for part time employees, Ms. Leduc would have been entitled to 75 % of those hours so 28 hours in the witness' estimation.

Ms. Matesic confirmed that if the leave is not addressed in the appendices, in this case Appendix A 10, that it was the practice that the standard working hours would apply. It was her opinion that the Employer developed a policy by which it applied the leave provisions in a fair and transparent way.

According to the Employer this has been the practice for a long time and the Union has never complained about it until now. The Union argues that there was no evidence in this proceeding that the Union was even aware of the Employer's practice. There has to be clear representation and an acknowledgement of the position for an argument of estoppel to succeed, contends the Union. Further, its reliance on that representation was not to the Employer's detriment says the Union. There is nothing to prejudice the Employer. The standard of estoppel has not been met says the Union.

In sum, the Employer argues estoppel since the Employer's application of special leaves has been the practice for a long time. There have been no concerns expressed regarding this practice before this. If there is an issue now the issue should be dealt with at the bargaining table. The Employer relies on *Weyerhaeuser Chapleau v. IWA-Canada, Local 295*, [2001] CarswellOnt 3498 (Tacon); *The Union of Northern Workers and Government of the Northwest Territories (Use of Relief Workers),* Supplementary Award dated January 17, 2018 (Moreau).

The Union's response to the estoppel argument is that there has been no direct evidence to show that the Union was aware of the practice. Nor has the Employer been prejudiced as a result. The Union relies on *Government of the Northwest Territories v. Union of Northern Workers (Casual Employees – Statutory Holiday Pay)* dated November 23,

2017 (Joliffe); *The Minister of Human Resources (Government of the Northwest Territories) v. Union of Northern Workers (Responsibility Allowance)* dated September 14. 2015 (Joliffe); and *Public Service Alliance of Canada v. Hay River Health and Social Services Authority (Shannon Carten Sick Leave Grievance)* dated March 23, 2016 (Hodges).

The definition of estoppel taken from the second edition of Brown and Beatty's *Canadian Labour Arbitration* [1984] quoting well established civil law (see *Combe v. Combe*, [1951] AII E.R. 767 (C.A.)) reads as follows at page 82:

> The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

In the case before me, there was no evidence of any assurance that the Employer's interpretation of Article 19.01 and 19.02 (1) was to be followed. Further, there was no evidence put forth that the Union was aware of the interpretation unlike the circumstances in the supplementary award issued on January 17, 2018 by Arbitrator Moreau (see *The Union of Northern Workers and Government of the Northwest Territories (Usage of Relief Employees)* in which case the Union received reports about such usage and never raised a grievance. Arbitrator Moreau in that case accepted the estoppel argument and "estopped" the Union from enforcing certain language in the Collective Agreement "given its longstanding acquiescence to the Employer's manner and practice of assigning relief workers".

Arbitrator Moreau refers to the elements of estoppel in a footnote attributed to *Penticton (City) and CUPE, Local 608* (1978), 18 Lac (2d) 307 (Weiler) as:

(1) It made a representation, either by words or conduct, including in some circumstances, silence;
(2) The representation was intended to be acted on by the other party; that is, to affect the parties legal relations; and
(3) The other party did in fact rely on the representation, to its detriment or prejudice.

In the case before me, the elements of estoppel have not been demonstrated. There was no substantiation that the Union was aware of the practice and by its silence made a representation that the practice was acceptable. Nor is there evidence that the Employer's reliance on the acceptance of its practice was detrimental or prejudicial to the Employer – in fact in some circumstances there may have been a monetary saving by capping the leave at 37.5 standard hours when the employees were working twelve hour shifts.

For these reasons, I reject the estoppel argument.

THE MAIN ISSUE – INTERPRETATION RE THE APPLICATION OF ARTICLE 19

Article 19, the language in question and the language I am being asked to interpret, reads and is worth repeating as follows:

19.01

(1) An employee shall earn special leave credits up to a maximum of thirty (30) days at the rate pf 0.023077 hours for each hour that an employee receives pay. The time to which this applies is set out in Article 17.07.

As credits are used, they may continue to be earned up to the maximum.

(2) Special leave will be taken in hours, on the basis of the employee's regularly scheduled hours of work for the day the leave is taken.

19.02 For the purpose of this article, immediate family is defined as an employee's father, mother, step-parent, brother, sister, spouse, common-law spouse, child, step-child, foster child, father-in-law, mother-in-law, grandmother, grandfather, grandchild, son-in-law, daughter-in-law, brother-in-law, sister-in-law and any relative permanently residing in the employee's household or with whom the employee presently resides.

(1) The Deputy Head shall grant special leave earned with pay for a period of up to five (5) consecutive working days:

(a) when there is a death in the employee's immediate family.

The employee may be granted up to three (3) additional days special leave for the purpose of travel;

(b) when an employee is to be married.

(emphasis added)

The most contentious issue between the parties can be found in the highlighted clause above.

Union Argument

The Union says based on a plain and ordinary reading of Article 19.01(2) payment for special leave is based on the 12 hour shifts which are regularly scheduled at least a year in advance for the Nurses or Health Care Practitioners. To do otherwise would be to ignore the last part of Article 19.01(2) which refers to the specific shifts Ms. Leduc was scheduled to work on May 18, 19, and 26 of 2017 – the days on which special

leave was to apply. In Ms. Leduc's case she was scheduled for a 12 hour shift on each of these dates and that is what she should have been paid, asserts the Union. According to the language, the leave is based on the regularly scheduled hours (i.e., 12 hour shifts) not the standard hours.

The Union asserts that the Employer is importing a percentage of the hours because the Grievor's position is 75% of a full time position so instead of 36 hours (12 hours x 3 days) it is saying only 75% of that amount is owed. According to the Union, the Employer is also saying that based on the standard hours of work the five consecutive days found in Article 19 are capped at 37.5 hours – the standard work week. However, the Union argues that the compressed work week does not work that way. The employees according to the Union accrue these hours in a compressed way – four shifts of twelve hours each. These employees do not work a standard week and they accrue the credits in a compressed fashion – as outlined in Article 19.01(1). There is no additional cost to the Employer says the Union. The Employer is imposing another layer of reconciliation regarding benefits and leaves which is not necessary (see Article 4.02). The reconciliation takes place over the course of the year.

The Union argues that to adopt the Employer's version of how the earned credits are to be applied, one would have to ignore the latter half of the sentence found in Article 19.01 (2). The Union requests a declaration that the plain and ordinary meaning of the language prevails. If a twelve hour shift employee was approved for special leave for a particular work day the employee is entitled to special leave in hours for what they were scheduled to work on the day in question. The Union relies on the following for its arguments: G*overnment of the Northwest Territories (Casual Employees – Statutory Holiday Pay), supra*; *the Minister of Human Resources (Government of the Northwest Territories (Responsibility Allowance), supra;* and *Public Service Alliance of Canada v. Hay River Health and Social Services Authority (Shannon Carten – Sick Leave Grievance), supra.*

Employer Argument

The Employer says that based on the language of the Collective Agreement (Article 22) the hours of work for the Nurse position were deemed to be 7.5 hours per day and 1950 per year. It has been the practice for many years that in order to maintain fairness and consistency between the 12 hour shift employee and the 7.5 and 8 hour shift employee, the 12 hour shift employees get paid for a standard workday or up to a maximum of 7.5 hours per day while on special leave and a maximum of five consecutive days capped at 37.5 hours.

The Employer argues that the language is clear in Article 22 that 37.5 hours per week apply to Nurses. Nurses work the hours in accordance with the 12 hour shift schedule but the yearly hours remain at 1950. All employees are provided with a number of benefits including leaves. The same principles apply – the standard weekly hours are 37.5; the yearly hours are 1950; and the benefits are pro-rated for part-time employees (see Article 4.02). Ms. Leduc got more hours than she should have – even full-time Nurses would only get 37.5 hours as an entitlement in respect to an employee's marriage, says the Employer. The Employer urges me to look at Article 4.02 of the Collective Agreement for the pro-ration of special leave for part-time employees**.**

The Employer relies on *Canadian Labour Arbitration ("Brown and Beatty")*; *Nigel Services for Adults with Disabilities Society and CSWU, Local 1611*, [2013] CarswellBC 471 (McPhillips); *Re Victoria Order of Nurses (Algoma Branch) and Ontario Nurses Association*, [1996] CarswellOnt 6081 (Low).

ANALYSIS

Rules of Interpretation

In any interpretive case the arbitrator seeks to find the mutual intention of the parties. Many of the cases cited by either the Union or the Company in the case before me quote the rules of interpretation found in *Pacific Press and Graphic Communications International Union, Local 25-C,* [1995] B.C.C.A.AA. No. 637 (Bird). They are as follows:

1. The object of interpretation is to discover the mutual intention of the parties.
2. The primary resource for an interpretation is the collective agreement.
3. Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.
4. Extrinsic evidence may clarify but not contradict a collective agreement.
5. A very important promise is likely to be clearly and unequivocally expressed.
6. In construing two provisions, a harmonious interpretation is preferred rather than one that places them in conflict.
7. All clauses and words in a collective agreement should be given meaning, if possible.
8. Where an agreement uses different words, one presumes that the parties intended different meanings.
9. Ordinarily words in a collective agreement should be given their plain meaning.
10. Parties are presumed to know about relevant jurisprudence.

Relevant Collective Agreement Language

Searching for the mutual intention of the parties, I relied heavily on the plain and simple reading of the clauses in contention as well as a review of the Collective Agreement as a whole. As Ms. Matesic stated in these proceedings the main body of the

Collective Agreement was based on the 7.5 hour or the 8 hour day but over time shift work has been added, as well as the compressed work week for the Health Care Practitioners and many other kinds of shift work which suit the needs of various parts of the Public Service.

The Employer tried to make the language found in the main body of the Collective Agreement fair and equitable for all employees. However, that is difficult to do when you have almost the entire gamut of the Public Service embodied in the Collective Agreement. Although I reviewed the entire Collective Agreement, I shall focus on Article 19, Article 22, and Appendix A10 as the most relevant Collective Agreement language.

The Collective Agreement is structured such that the general provisions are in the main body of the Collective Agreement and modified by various appendices. Where the modifications found in the appendices differ from the general provisions in the Collective Agreement the appendices prevail. I start my review with Article 22 of the main body of the Agreement which outlines the general provisions for hours of work.

Article 22 – Hours of Work - General

Article 22 is relevant to the case before me since it defines the standard hours for the 37.5 hour work week; addresses shift work and talks about the master work schedule. The one witness, Tracy Matesic, the Manager of Surgical Services at Stanton Hospital, explained that the master work schedule for Nurses is created and can be posted more than a year and one-half in advance. Ms. Matesic was the Clinical Coordinator in Obstetrics and handled the day to day tasks including receiving leave requests. She testified that the intention of capping the special leave requests at 37.5 hours was an attempt to be fair and transparent. She further testified that the Collective Agreement is based on 7.5 or 8 hour days, and 37.5 or 40 hour weeks. She tried to level

the playing field amongst employees, if you will, by basing the special leave requests on the standard work week, not the compressed work week. This has been the practice for the eight years she has been at Stanton Hospital.

During cross examination Ms. Matesic stated that because special leave was not referenced in Appendix A10, then the practice was to follow the standard work week. Where the leave such as sick leave or vacation leave was referenced in Appendix A10 she followed the Appendix A10 provisions. When asked if a part-time or full-time Nurse asked for 5 days of special leave the most they could receive was 37.5 hours; Ms. Matesic replied "correct".

I shall now reiterate the most relevant language found in Article 22 regarding the "standard hours of work" and the modified work week and or the compressed work week. It should be noted that I have reviewed all the leave language in the Collective Agreement and each is helpful in the sense that they lend meaning and differentiation to "standard hours" versus "regularly scheduled hours". The most pertinent sections of Article 22 have been highlighted wherever the differentiation is obvious. Clearly the language of Article 22 describes the differences in the standard hours work week and the compressed work week of four 12 hour shifts.

DAY WORK

22.01

(a) Unless otherwise agreed upon by the Employer and the Union, the **standard hours of work for employees whose standard work week is 37.5 hours are:**

(i) The standard daily hours will be seven and one-half consecutive hours, between 08:30 and 17:00, each day from Monday to Friday.

(ii) The standard yearly hours will be 1950.

(iii) The standard daily hours are exclusive of a minimum half hour lunch period scheduled as close as possible to mid-day.
(iv) There shall be a paid 15-minute break in the morning and a paid 15-minute break in the afternoon.

(b) Unless otherwise agreed upon by the Employer and the Union, the standard hours of work for employees whose standard work week is 40 hours are:

(i) The standard daily hours will be eight consecutive hours, between 08:00 and 17:00, each day from Monday to Friday.
(ii) The standard yearly hours will be 2080.
(iii) The standard daily hours are exclusive of a minimum half hour lunch period scheduled as close as possible to mid-day.
(iv) There shall be a paid 15-minute break in the morning and a paid 15-minute break in the afternoon.

SHIFT WORK

22.02 **Where the employee's work is scheduled by the Employer to fall outside of the standard hours of work as defined in 22.01, the following process applies:**

(a) The Employer and the Union will agree before establishing new or revised shift hours for an operational unit. Such agreement will not be unreasonably withheld. The Employer shall give employees at least 14 days notice of any change.

(b) **The daily shift hours will be no more than sixteen (16) hours**.

(c) **The number of consecutive shift days of work shall be no more than 7 days**.

(d) The number of consecutive days of rest between shifts shall be no less than 2 days.

(e) The number of shift days in a year for which the employee is entitled to be paid is determined by dividing the standard yearly hours 1950 or 2080 by the daily shift hours.

22.03 **The Employer will post a master work schedule for employees in an operation who work shift hours.**

(a) The Employer shall:

(i) avoid excessive fluctuations in hours of work; and
(ii) post a schedule no less than 14 calendar days in advance to run for at least 28 calendar days;

(b) The Employer shall make every reasonable effort to:

(i) give employees every second Saturday and Sunday off, ensuring a minimum of 48 consecutive hours off duty;
(ii) schedule at least two consecutive days off; and
(iii) not schedule more than one shift in any 24 hour period.

(c) When an employee works two shifts in any calendar day:

(i) one of the shifts shall be deemed overtime; and
(ii) except in an emergency an employee may not work more than two consecutive shifts.

(d) An employee shall be granted alternate weekends off as often as reasonably possible with each employee receiving a minimum of every third weekend off. Overtime rates of pay shall apply to weekend hours worked by an employee on the third consecutive weekend and subsequent consecutive weekends worked thereafter. It is understood that if an employee is required to be on travel status on a weekend, it shall be deemed as a weekend worked for the purpose of this clause. The Clause does not apply to employees who are hired exclusively to work weekends or who request to exchange shifts with other employees to work weekends.

(e) The Employer agrees that there shall be no split shifts.

COMPRESSED WORK WEEK

22.08 **At the request of an employee, the Employer may agree to allow the employee to work hours from Monday to Friday inclusive which may vary from the standard daily 7.5 or 8 or weekly 37.5 or 40 hours as follows:**

(a) **Over a period of 14, 21 or 28 calendar days, the employee must work or be on approved leave or a designated paid holiday for a period equal two, three or four times the standard weekly hours**.

(b) There must be no increase in cost to the Employer and no decrease in productivity due to the selection of hours.

(c) A schedule of hours of work for the compressed work week will be agreed by the employee and the employee's supervisor. An employee who works in excess or outside of the scheduled hours established shall be compensated in accordance with the overtime provisions of this collective agreement.

(d) The hours of work may not be varied for the purpose of avoiding payment of overtime to individual employees.

(e) This arrangement may be terminated at any time, by either the employee or the Employer with at least 14 days notice.

(f) The Employer's agreement to permit an employee access to the compressed workweek shall not be unreasonably withheld.

(emphasis added)

ARTICLE 19

The next most relevant Collective Agreement language is Article 19.01 (1) and 19.01 (2) and 19.02(1) and are worth repeating. Article 19. 01 speaks to how special leave credits are accrued and how they are taken. Article 19.02 speaks to what events dictate the granting of the leave – i.e., death in the employee's family or when an employee is to be married (as in this case).

19.01

(1) An employee shall earn special leave credits up to a maximum of thirty (30) days at the rate of 0.023077 hours for each hour that an employee receives pay. The time to which this applies is set out in Article 17.07.

As credits are used, they may continue to be earned up to the maximum.

(2) Special leave will be taken in hours, on the basis of the employee's regularly scheduled hours of work for the day the leave is taken.

19.02 For the purpose of this article, immediate family is defined as an employee's father, mother, step-parent, brother, sister, spouse, common-law spouse, child, step-child, foster child, father-in-law, mother-in-law, grandmother, grandfather, grandchild, son-in-law, daughter-in-law, brother-in-law, sister-in-law and any relative permanently residing in the employee's household or with whom the employee presently resides.

(1) The Deputy Head shall grant special leave earned with pay for a period of up to five (5) consecutive working days:

(a) when there is a death in the employee's immediate family.

The employee may be granted up to three (3) additional days special leave for the purpose of travel;

(b) when an employee is to be married.

Two other leaves which include the contentious language in Article 19.01(2) can be found in Articles 18 (Vacation Leave) and 20 (Sick Leave) in the main body of the Collective Agreement. These articles read as follows:

ARTICLE 18
VACATION LEAVE

18.01

(1) For each hour that an employee receives pay he/she shall earn vacation leave at the following rates:

Years of Service	Hourly Entitlement
0-2 years	0.063462
2-7 years	0.082616
7-15 years	0.096000
15-20 years	0.115385
20 + years	0.134770

The time to which this applies is set out in Article 17.07.

(2) The accumulated service for part-time and seasonal employees shall be counted for the improved vacation leave entitlements in section (1) of this Article.

(3) Leave will be taken in hours, on the basis of the employee's regularly scheduled hours of work for the day the leave is taken.

(emphasis added)

One will find the same language for sick leave found in Article 20 from the main body of the Collective Agreement:

CREDITS

20.01

(a) An employee shall earn sick leave credits at the rate of 0.057693 hours for each hour that an employee receives pay. The time to which this applies is set out in Article 17.07.

(b) **Sick leave will be taken in hours, on the basis of the employee's regularly scheduled hours of work for the day the leave is taken.**

(emphasis added)

However, both the sick leave and vacation leave language is modified by the following in Appendix A10: Article A10.B5 and A10.B7. Article 19 is not modified. The modified Articles A10.B5 and A10.B7 read as follows:

A10.B5. VACATION LEAVE

(1) An employee working an extended work day and compressed work week shall be entitled to vacation time off equivalent to that of other employees working the 7.5 hour work day. Upon termination, vacation leave credits shall be paid out on the basis of 7.5 hour days.

(2) Earned leave will be converted into hours owed and utilized according to the scheduled shift pattern.

A10.B7. SICK LEAVE

(1) Sick leave credits shall be earned at the rate specified in Article 20 of the Agreement.

(2) Earned leave shall be converted into hours owed and utilized according to the scheduled shift pattern.

As can be seen the parties modified the general provisions found in the main body of the Collective Agreement and replaced these with the above provisions for vacation leave and sick leave only.

There were three leaves which had the contentious language in the body of the Collective Agreement – Article 18 and 20 were modified but not Article 19 which continued to have the same language as before. I have to assume that sophisticated parties such as these two would not forget about special leave if they wanted to replace the contentious clause in all three of the mandatory leaves. Regardless we are left with the language as to how Article 19.01(2) must operate.

Pertinent Clauses Found in Appendix A10

Appendix A10 is the most pertinent to Health Care Practitioners – in this case Nurses. It provides the modifications to the general provisions of the Collective Agreement. I have reiterated the most relevant clauses of Appendix A10 to the dispute at hand. The preamble is also important since it emphasizes that the Appendix clauses prevail in the event that the Appendix conflicts with a Collective Agreement provision in the main body. The preamble to Appendix A10 reads as follows:

> All of the provisions of the Collective Agreement shall apply to the employees of Government hospitals and health care facilities except as modified by this Appendix. In any case where a provision contained in this Appendix conflicts with a provision of the Collective Agreement, the provision contained in this appendix shall prevail.

Further the most pertinent section of Appendix A10 bolsters the intent of letting the contentious language remain as that found in Article 19.01(2) when it came to the application of special leave. That pertinent language can be found in A10.B3 (1) as follows and defines the hours of work in the modified work week for Health Care Practitioners:

> A10.B3 Hours of Work
>
> (1) Regular hours of work for full-time employees exclusive of meal periods shall be:
>
> (a) twelve (12) consecutive hours per day.
> (b) one thousand, nine hundred and fifty (1,950) hours per year.
> (c) a maximum of four (4) consecutive shifts.

In my view this is the definition of the regularly scheduled hours which should be applied to the dates in the special leave requests, not the standard hours of work which defines "Day Work" according to Article 22 in the main body of the Collective Agreement. Nevertheless it is the standard hours of work which are being applied to a twelve hour shift employee such as Ms. Leduc.

A10.B3 (1) references only full time employees. Ms. Matesic testified that part-time employees work twelve hour shifts – they just work fewer shifts. The definitions section of the Collective Agreement describes a part-time employee as "an employee who has been appointed to a position for which the hours of work on a continuing basis are less than the standard work day, week or month".

Article 4.02 Application

Article 4.02 speaks to the part-time employees and the proration of the allowances and benefits being dependent on "their yearly hours of work compared to the standard yearly hours of work for their position". Hence Ms. Leduc held .75% of a full-time position. The clause in question reads as follows:

> Part-time employees shall be entitled to all eligible allowances and benefits provided under this Agreement except as expressly modified by specific language in this Collective Agreement and limited by the eligibility provisions of the Public Service Health Care Plan, the Public Service Pension Plan, the Disability Insurance Plan and the Dental Plan in the same proportion as their yearly hours of work compared to the standard yearly hours of work for their position.

The Employer would have me interpret Article 4.02 of the Collective Agreement as limiting the amount of special leave for the part-time employees like Ms. Leduc. However, nothing in this article references proration of leaves. There is an automatic proration of sorts since the part-time employees would accumulate fewer credits based on the fact that they work fewer twelve hour shifts than do full time employees. However they continue to work their regularly scheduled hours of work in twelve hour shifts. Nothing in Article 4.02 speaks to a part time employee receiving less pay for special leave than the hours they worked on the dates in question. Ms. Leduc should have been paid for 36 hours for the three days in question, not 28 hours as Ms. Matesic estimated.

In sum, a complete answer to the interpretation question can be found in Appendix A10. The Appendix declares in the preamble that the provisions in the body of the Collective Agreement will apply unless modified by the language in the Appendix. Article A10.B3 defines that the regularly scheduled hours are 12 hour shifts

within four consecutive shifts for an annual total of 1950 hours. The Employer would have me believe that clause with its inherent reference to the annual standard hours for the shift is what would apply since special leave is not modified by the Appendix as sick and vacation leave were amended. However I disagree.

The parties are sophisticated parties and they obviously chose to change the language in the last clause of 19.01 for sick leave and vacation leave but not special leave. Whether that was by design or by error matters not. I can only interpret the language as it is written and based on a plain and simple reading of the language. The language does not refer to the standard hours as defined in Article 22. It refers to the regularly scheduled hours for the specific dates in question – in this case May 18, 19, and 26, 2017.

Just as in the Joliffe case (*Government of the Northwest Territories (Casual Employees-Statutory Holiday Pay), supra*) in which the Employer argued it should treat the part-time employees like casuals in the name of fairness and equitable treatment, unless the language references the two concepts then there is no basis for such an interpretation. Such an interpretation could not be based on a plain and simple read of the language before the arbitrator. I also cannot find such an interpretation within the confines of Article 4.02 and supposedly the application to special leave. Such a connection between leaves and benefits would be found in the language in Article 4.02 if that were the intent of the parties.

The Government of the Northwest Territories (Re Casual Employees – Statutory Holiday Pay, supra) stands for the premise that you cannot prorate benefits unless there is express language in the Collective Agreement to do so. The issue surrounded designated paid holidays for casuals who worked and the Employer, trying to be fair and equitable, pro-rated casual employees for statutory holidays in the same manner that it did part-time employees. Appendix A5.03(c) stated that the article dealing with

statutory holidays applied to a casual employee after fifteen calendar days of continuous employment. The issue became the payment of the holiday pay and the arbitrator found that there was no proration of the payment in the language of the Collective Agreement.

On page 15 of the award, the arbitrator states:

> In any event, I do not see that casual employment for purposes of this collective agreement can be equated with part-time employment unless I am shown a negotiated provision which directly combines or correlates the two categories, and more particularly here, for purposes of the designated paid holiday benefit.

At page 17 Arbitrator Joliffe agrees with the Union:

> …there is no language in the collective agreement to which I am referred requiring that their monies should be paid on some lesser basis, or calculated by comparison with others.
>
> It [the payment for the designated holiday pay] should not be prorated on the basis of total hours worked over a given period of time, but rather measured against the employee's actual work day, were he or she to have been working that day, but for the designated holiday, or not being scheduled.

So too with the lack of written connection between Article 4.02 and the special leave provisions, I do not find that Article 4.02 applies to the case at hand.

CONCLUSION

The grievance(s) is granted. I will leave it to the parties to determine an appropriate remedy beyond declaratory relief which this decision provides them. Perhaps an agreed to process as to how to apply special leaves would be appropriate.

Special Leave is to be granted for a death in the family and/or an employee's marriage based on the regularly scheduled hours which would have been scheduled for the days in question. In this case, the employee should have received twelve hours per day of pay times the three days equalling a total of thirty-six hours.

Awarded this 7th day of January, 2019 in the City of Vancouver, British Columbia.

Irene Holden, Arbitrator