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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

LISTOWEL MEMORIAL HOSPITAL

- The Employer

-and-

LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220

- The Union

AND IN THE MATTER OF a grievance of Dana McKenna

Arbitration Board:

Howard Snow	- Chair
Michael Riddell	- Employer Nominee
Robert W. Stewart	- Union Nominee

Appearances:

On behalf of the Employer:

D. Brent Labord	- Counsel
Kevin Sholdice	- Supervisor, Ambulance Service
LeRoy Winger	- Director of Administrative Services

On behalf of the Union:

Greg Campbell	- Counsel
Audrey McKay	- Business Representative
Elizabeth Lannin	- Chairperson, Full-Time Bargaining Unit
Dana McKenna	- Grievor

Hearings held November 25, 1996, and February 25, 1997, in Kitchener, Ontario.

AWARD

I. INTRODUCTION

During the fall and winter of 1995 Dana McKenna (the grievor) worked as an Emergency Medical Care Attendant, or ambulance attendant, for Listowel Memorial Hospital. She was assigned to work on December 27 and 28, but on or about December 18, 1995 the Employer reassigned these two shifts to other part-time employees. The Union alleges that the Employer's removal of the shifts from the grievor's schedule was unreasonable, arbitrary and unfair.

II. THE EVIDENCE

Listowel Memorial Hospital operates an ambulance service from a location physically separated from the main hospital building. The ambulance service is staffed by four full-time ambulance attendants and approximately ten part-time ambulance attendants. In the relevant period the grievor worked as a part-time ambulance attendant for the Employer. She also worked as a part-time ambulance attendant for two other employers.

In the summer of 1995 one of the full-time ambulance attendants, Brenda Dobson (also known as Brenda Neabel) began a maternity leave. The collective agreement called for the Employer to post temporary full-time vacancies. Rather than post the position, the Employer, with the agreement of the Union and the affected employees, filled Ms Dobson's vacant position in another manner. It was agreed that those part-time ambulance attendants who did not have other full-time employment would each be offered, in the order of their seniority, four consecutive weeks of work. There were five such part-time employees; the

grievor was the most junior. As the junior employee, the grievor began her four weeks on Monday, December 18, 1995.

The Employer's practice had been to post six-week schedules. Under the collective agreement the schedules were to be posted fourteen days in advance. The six-week schedule covering Monday November 20 through Sunday December 31 was posted about two weeks prior to November 20. On that posted schedule the grievor was scheduled to work both Wednesday December 27 and Thursday December 28. She was not scheduled for work on December 25, 26, 29, 30 or 31.

On or about December 18 Kevin Sholdice, the supervisor of the ambulance service, was preparing the six-week schedule to begin January 1, 1996. Mr. Sholdice approached the grievor and indicated that there was a difficulty with the December 27 and 28 shifts. Under the full-time collective agreement the Employer was required to provide five consecutive days off covering either Christmas Day or New Year's Day. Mr. Sholdice's practice was to rotate those days off so that a full-time employee who worked Christmas in one year would be off work the following Christmas. Ms Dobson, whom the grievor was replacing, had worked Christmas and had New Year's off the previous year. Mr. Sholdice thus wished to schedule the grievor off work for five consecutive days over Christmas, and thereby maintain the normal rotation among the full-time employees. In addition, the grievor had worked Christmas the previous year and if her holiday was rotated she would have Christmas off from work, which would coincide with Ms Dobson's holiday schedule.

Kevin Sholdice raised the issue with the grievor. While his evidence and the evidence of the grievor differed on some details, it was clear that he raised with the grievor his concern about the need to schedule the grievor off work for five days during the Christmas period. While the grievor originally thought this was an offer which she could accept or reject, the point

was soon clarified when Mr. Sholdice told the grievor that the December 27 and 28 shifts were removed from her schedule and were reassigned to other part-time employees. Mr. Sholdice advised the grievor that she might work the New Year's period (January 1, 2 and 3) but the grievor indicated to Mr. Sholdice that she hoped to take a holiday with her fiancé over New Year's, that she did not wish to work January 1, 2 or 3, and that she preferred to take her holiday at New Year's. The grievor was not assigned any shifts on January 1, 2 or 3 and did not work any of those three days.

The full-time collective agreement required the Employer to provide five consecutive days off at either Christmas or New Year's. When a part-time ambulance attendant works on a temporary basis filling a full-time vacancy, the employment of the part-time attendant is regulated by the part-time collective agreement. There was no requirement in the part-time collective agreement to schedule the grievor for five days off work.

However Mr. Sholdice, the ambulance supervisor, testified that when he served as a Union negotiator in the 1980's the Union had raised in negotiations with the Employer a request that part-time employees be scheduled for the five days off in the same way as full-time employees. His evidence, which was uncontradicted, was that the Employer declined to commit itself to provide five days off through precise language to be included in the collective agreement. However, the Employer had advised the Union that it would endeavour to provide five consecutive days off work at either Christmas or New Year's for the part-time employees.

Mr. Sholdice testified that he was responsible for scheduling ambulance attendants and in that capacity he did his best to fulfil this Employer undertaking. Thus he said he tried to schedule part-time attendants for five consecutive days off work at either Christmas or New Year's. He indicated that it was usually possible to do so. As an example, in 1995 he

scheduled all full-time and all part-time employees for five consecutive days off at either Christmas or New Year's. The one exception was Mr. Sholdice himself, but he was not covered by the full-time collective agreement nor by the Employer undertaking with respect to part-time employees. Mr. Sholdice also noted that one employee had been scheduled for five consecutive days off but had later switched one of his shifts and had not actually taken five consecutive days off.

Both the grievor and Elizabeth Lannin, the chairperson of the Union's full time bargaining unit, testified that they were not aware of the undertaking or of the Employer's practice of scheduling part-time employees for five days off work.

In general terms the part-time ambulance attendants working for the Employer desired additional hours. In particular, the grievor indicated that she wanted a full-time job but at the time of the grievance she worked at three part-time jobs. She testified that she would have preferred to have worked December 27 and 28. She indicated that she had refused offers of work for both December 27 and 28 from her other employers after the schedule had been posted. When the December 27 and 28 shifts were removed from her schedule, it was too late to secure alternate employment on those two days with her other employers.

There were three other points in the evidence which should be noted.

First, if the grievor had worked on December 27 and 28 she would have worked twelve days in the four weeks immediately prior to New Year's Day. She would thus have been entitled to public holiday, or statutory holiday, pay for January 1. With the removal of those two shifts the grievor worked only ten days in the four weeks prior to January 1 and thus was not eligible for holiday pay on January 1.

Secondly, although the practice had been to post six week schedules, the evidence indicated that frequently there were a large number of changes made to the posted schedules.

Finally, in cross-examination Mr. Sholdice agreed with a suggestion that the decision regarding removal of the shifts on December 27 and 28 was arbitrary in its effect.

III. COLLECTIVE AGREEMENT

The following are the relevant portions of the part-time collective agreement:

> ARTICLE 5 - MANAGEMENT FUNCTIONS
>
> 5.01 The Union acknowledges that it is the function of the Hospital to:
>
> (a) maintain order, discipline and efficiency;
>
> (b) hire, classify, transfer, promote, and to discharge or discipline employees for just cause;
>
> (c) make rules and regulations governing the conduct of employees;
>
> (d) generally to manage the operation of the Hospital in accordance with its responsibilities.
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> . . .
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> ARTICLE 10 - SENIORITY AND JOB SECURITY
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> . . .
>
> 10.06 Temporary full-time vacancies, the duration of which is expected to exceed three (3) months, will be posted for application by part-time employees and will be filled in accordance with Article 10.07.
>
> Part-time employees filling such temporary full-time positions will be covered by the part-time Collective Agreement and will not be considered for another temporary full-time position for a period of six (6) months following completion of the temporary full-time position, unless no other part-time employee applies for such other temporary full-time vacancy. All other temporary vacancies may be filled at the discretion of the Hospital.
>
> ARTICLE 12 - PAID HOLIDAYS
>
> 12.01 . . .
>
> Holiday pay shall be paid in accordance with The Employment Standards Act.
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> . . .

ARTICLE 14 - HOURS OF WORK

. . .

14.04 Except in extenuating circumstances, an employee must notify the Hospital at least 1 hour prior to the day shift, 3 hours prior to the evening shift and 5 hours prior to the night shift, if he/she is unable to report for work as scheduled.

14.05 The Hospital will endeavour to provide employees with 4 hours notice of cancellation of their shift.

. . .

14.16 For information purposes, schedules based on the employees availability will be posted no later than fourteen (14) days in advance and shall cover no less than a four (4) week period.

In addition, the following section of the full-time collective agreement was referred to by the parties:

ARTICLE 14 - HOURS OF WORK

. . .

14.04 Scheduling Regulations

. . .

(e) An employee will be scheduled off work for not less than five (5) consecutive days at either the Christmas or New Year's season. The normal scheduling conditions shall be waived to accommodate this special arrangement between December 15th and January 15th. This applies only to bargaining unit employees normally required to work on weekends or on Paid Holidays.

IV. POSITION OF THE UNION

The grievor wished to work on December 27 and 28. She had been assigned to work those days on the posted schedule. She had relied on those days to her detriment when she declined work with her other employers. She should have been entitled to rely on the schedule and plan her work.

The Union noted that it was not until December 18 that any difficulty was raised with the grievor being scheduled to work on December 27 and 28. The difficulty related to the five

consecutive days off practice. As a result the Employer removed those shifts from her schedule.

The grievor wished to accommodate the five-day rule by being off work January 1, 2 or 3. As she had not been scheduled to work on December 29, 30 or 31, her plan would have given her "five consecutive days off" over New Year's. The Employer rejected this proposal and indicated that she would not be scheduled to work at Christmas as she was working Ms Dobson's schedule and Ms Dobson would not have been scheduled to work for five consecutive days at Christmas, as opposed to New Year's. The December 27 and 28 days were then reassigned to other part-time employees.

While Article 14.04 (e) of the full-time agreement requires five days off for full-time employees, the grievor was covered by the part-time agreement. There was no similar five-day rule in the part-time collective agreement. If there was a rule or an Employer undertaking which required the Employer to endeavour to provide five days off, it was surely intended as a benefit for employees and not as a detriment. The effect of the practice was clearly detrimental to the grievor in this instance.

Because the grievor had not worked December 27 and 28, the grievor also lost holiday pay for January 1.

For all these reasons, the Union submitted that the removal of the scheduled shifts was unreasonable.

The Union sought the following:

1. A declaration that the Employer lacked authority and was unreasonable when it cancelled the grievor's shifts for December 27 and 28;

2) A declaration that, absent the loss of the shifts on December 27 and 28, the grievor would have received statutory holiday pay;

3) An order that the grievor be compensated for the three days; and that

4) The Arbitration Board remain seized to deal with any problems of implementation.

The Union relied on the following: *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association* (1980), 26 L.A.C. (2d) 117 (Saltman); *Re Corporation of City of Toronto and Canadian Union of Public Employees, Local 43* (1991), 19 L.A.C. (4th) 412 (Davis); and Williston and Rolls, *The Conduct of an Action* (regarding the rule in *Browne v. Dunn*).

V. POSITION OF THE EMPLOYER

The Employer referred first to the part-time collective agreement. The Employer noted its general authority to manage under Article 5.01 and further noted that under Article 14.16 the schedules were posted "for information purposes". The collective agreement contained no prohibition against changing schedules; in fact, changes in the schedule were common and were expressly contemplated by the collective agreement. Article 14.04 dealt with employee changes to the schedule and Article 14.05 dealt with Employer changes to the schedule. When it changed the schedule, the Employer had met the requirements of Article 14.05 by providing in excess of four hours notice.

In this instance the Employer had been endeavouring to follow its obligations. The Employer had an express contractual obligation to schedule full-time employees for five consecutive days off work. The Employer had provided an undertaking to the Union during bargaining that the Employer would endeavour to do the same for part-time employees. Thus the Employer had a commitment to the Union to endeavour to schedule part-time

employees, such as the grievor, for five consecutive days off work.

In this situation the grievor was temporarily filling Ms Dobson's position and was working what would otherwise have been Ms Dobson's schedule. When Mr. Sholdice realized that Ms Dobson would have been scheduled for five consecutive days off work over Christmas, he promptly advised the grievor. The grievor was treated in the same way that Ms Dobson would have been treated. In this situation both Ms Dobson and the grievor had worked Christmas the previous year and, under the practice of alternating holidays, both would normally have received Christmas off work.

When the Employer removed the December 27 and 28 shifts there was a suggestion by Mr. Sholdice that the grievor could work January 1, 2 and 3. The grievor did not want those shifts, was not scheduled for them, and did not work them. Nevertheless, in taking away two days in order to ensure the five days off, the Employer had offered three additional days of work, one of which was a statutory holiday and would have attracted premium pay. There was no indication that the grievor was unable to work on January 1, 2 or 3 - she had not been scheduled to work by any of her other employers - she simply did not wish to work on those days.

The Employer action was taken specifically to comply with the "five-days off" practice. As a part-time employee the grievor would be scheduled for five days off over Christmas. As the person temporarily replacing Ms Dobson, the grievor was treated in the same way as Ms Dobson would have been treated, that is scheduled for five days off at Christmas. Thus the Employer's action in this instance honoured its obligations and was not arbitrary, discriminatory or done in bad faith.

In assessing the reasonableness or good faith of the impugned action, the Employer

submitted that it was necessary to assess the impact of this practice across the bargaining unit. The impact was reasonable, and the practice done in good faith. The Employer's action was taken as a result of a request which the Union had originally raised in collective bargaining, a request which had led to the Employer undertaking. In effect, the grievor said her rights should take precedence over the rights secured by the Union for the bargaining unit as a whole. However, in assessing this decision, the Employer submitted that this Board should take a broad-based look and not simply examine the effect upon the grievor.

The Employer also submitted that this matter fell solely under the Management Rights clause and that, as it was a matter of management rights, the Employer had no obligation to act fairly. Thus the Employer submitted that there was no violation of the collective agreement and the grievance should be dismissed.

The Employer relied on the following: *Re Thompson General Hospital and United Food & Commercial Workers, Local 832* (1992), 25 L.A.C. (4th) 423 (Yost); R*e Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association et al.* (1981), 33 O. R. (2d) 476 (C. A.); *The Corporation of the City of Etobicoke and The City of Etobicoke Civic Employees' Local Union No. 185* (July 19, 1988), unreported (Dunn); and *Canada Packers Inc. and United Food and Commercial Workers International Union, Local 175* (July 5, 1991), unreported (Hinnegan).

VI. CONCLUSIONS

It is clear from the terms of the part-time collective agreement, and it was acknowledged by the parties at the hearing, that the grievor was covered by the part-time agreement when she temporarily replaced Ms Dobson, a full-time employee. Although the manner in which the grievor was selected to replace Ms Dobson during a portion of Ms Dobson's leave was not

in accordance with Article 10.06 of the part-time agreement, this was done with the agreement of the Union. Thus the scheduling provisions in the part-time agreement applied to the grievor during the relevant period. As she was a part-time employee, there was no collective agreement obligation upon the Employer to provide the grievor with five consecutive days off work during the Christmas and New Year's season.

Under the part-time agreement, the only express restriction upon the Employer in making shift changes was to "endeavour to provide . . . 4 hours notice of cancellation . . ." (Article 14.05). There was nothing in the agreement made between the Union and the Employer regarding the filling of this temporary vacancy that restricted the Employer in changing or cancelling shifts.

The Union submitted that the Employer's decision was unreasonable. The Employer asserted it had made a reasonable decision.

The Union further submitted that an unreasonable decision was a violation of the agreement, as there was an implied duty upon the Employer to act in a reasonable manner in administering the scheduling provisions of the collective agreement. The Employer, however, submitted that the reassignment fell solely under the Management Rights article and that in such a situation there was no implied duty upon the Employer to act reasonably.

This issue of the "reasonable" administration of a collective agreement has divided arbitrators, and the parties to collective bargaining, for many years. The question has not been clearly resolved. In some cases arbitrators have found an implied duty upon the employer to act reasonably; other arbitrators have concluded there is no such duty. There is however judicial authority (*Re Metropolitan Toronto Police, supra*) which suggests an important consideration is whether the Employer has acted under the authority of its

management rights as opposed to acting under the authority of another article in the collective agreement; when an employer acts under the management rights article the decision in that case suggests there is no duty to act reasonably.

The question of whether the decision was reasonable was the primary focus of both parties' argument and we begin with this matter. If we conclude that the decision was reasonable, then the issue of whether the Employer had a duty to act reasonably in this instance does not have to be addressed; if we conclude the decision was not reasonable then we will have to deal with the question of whether that unreasonable decision was a violation of an implied duty imposed upon the Employer in the collective agreement.

The two questions are thus as follows:

1. *Was the Employer's decision reasonable?* and,
2. *If not, was the decision a violation of an implied duty in the collective agreement?*

We begin with the first question.

1. *Was the Employer's decision reasonable*?

The application of the concept of reasonableness to an Employer decision requires an examination at two levels:

a) Was the decision based on legitimate business considerations, and only on those legitimate business considerations?

b) Was the decision one which a reasonable person standing in the place of the Employer might have made? On this question, we note that there is often a range of reasonable decisions which an Employer might make in any given situation and the issue before us is not whether we agree with the Employer's precise decision, but

rather whether the Employer's decision falls within that range of reasonable decisions.

We deal with each of those questions in turn.

a) Was the decision based on legitimate business considerations, and only on those legitimate business considerations?

The reason given for removing the December 27 and 28 shifts from the grievor's schedule and reassigning them to other part-time employees was the practice of providing five consecutive days off. We first evaluate that as a business reason and then consider whether it was the reason for the decision.

The uncontradicted evidence of Mr. Sholdice was that during bargaining the Union had requested that the Employer provide a guarantee of five days off work for part-time employees similar to that for full-time employees. The Employer had declined to include a written guarantee in the part-time collective agreement, but it did undertake to do its best to schedule part-time employees in a manner similar to the full-time employees. Again, Mr. Sholdice's uncontradicted evidence was that in the ambulance service for which he does the scheduling he has done his best to provide part-time employees with five consecutive days off at either Christmas or New Year's, alternating from one year to the next.

Although neither the grievor nor Ms Lannin were aware of the Employer undertaking or of Mr. Sholdice's approach to scheduling, their lack of awareness does not mean there was no such undertaking nor does it mean there was no such scheduling practice. Ms Lannin, the chairperson of the Union's full-time unit, worked in the main hospital building which is separate from the ambulance service. It is not surprising that she would have been unaware of the details of Mr. Sholdice's scheduling of the part-time ambulance attendants. With

respect to the original Employer undertaking, Ms Lannin had not been involved in those negotiations. As for the grievor, she was a junior part-time employee and there was no special reason for her to have been aware of this matter. Thus, although Ms Lannin and the grievor were not aware of them, we find both that an undertaking was made by the Employer to the Union during bargaining and that there was a practice of scheduling part-time ambulance attendants for five consecutive days off work during the holiday period.

In our view, the fulfilment of an undertaking to provide five days off work made to the Union in bargaining would be a legitimate business consideration.

Was the five days off practice the reason for the Employer decision to cancel the grievor's two shifts and reassign them to other employees?

The Employer decision had the effect of disentitling the grievor from statutory holiday pay for New Year's Day (January 1) and in so doing the decision appears to have caused both the grievor and the Union to have become suspicious as to the Employer's reasons for reassigning the shifts. However, there was no evidence from which we could conclude that saving holiday pay was a motive for making this decision. There was no indication in the evidence that the Employer decision was based on any factor other than the five days off practice. Thus we conclude that the decision was based on a legitimate business consideration, and solely on a legitimate business consideration.

b) Was the decision one which a reasonable person standing in the place of the Employer might have made?

We now turn to the second aspect of the reasonableness examination - was the decision one which a reasonable person standing in the place of the Employer might have made?

The Employer has a commitment to its full-time employees to provide five consecutive days off work during the holiday season. Ms Dobson, had she been working, would have been entitled to five consecutive days off work. The practice had been to alternate the days off - that is in one year the days off would be over Christmas and the next year the five days off would be over New Year's Day. Ms Dobson would have been entitled to five days off work at Christmas time.

Mr. Sholdice endeavoured to provide alternating holidays for the part-time employees as well as the full-time employees. Applying this approach, as a part-time employee the grievor would ordinarily have been scheduled for her five days off work over Christmas in 1995.

Thus whether one views the situation as scheduling of Ms Dobson or as scheduling of the grievor, the expectation would be that the scheduling would include five consecutive days off and that the five consecutive days off would be scheduled over Christmas. That is precisely the decision that the Employer made. The Employer decided that the grievor should be scheduled for five consecutive days off over Christmas. In our view, that decision was one which another person standing in the place of the Employer, or in the place of Mr. Sholdice, could reasonably make.

The grievor had, of course, originally been scheduled to work December 27 and 28 but her shifts on those two days were cancelled and reassigned to other workers. Does the fact that she was originally scheduled and her shifts were cancelled and reassigned to others, rather than having been originally assigned to others, change the outcome?

First, we note that there is nothing in the collective agreement which makes Employer schedule changes subject to any specific requirements beyond providing 4 hours notice. The Employer provided notice in excess of that amount. Secondly, the evidence indicated that

shift changes occur on a regular basis, and that over a six week schedule many changes take place. Finally, we note that there was nothing in the way in which the grievor was chosen to fill Ms Dobson's vacancy over the holiday period which would lead to any change in the Employer's obligations; nothing suggested the grievor was to have been treated more favourably than other employees. Thus we conclude the fact that the two shifts were originally assigned to the grievor and then cancelled and reassigned to others, rather than having been originally assigned to others, does not change the outcome.

It follows that we conclude the decision in this case was a reasonable decision.

As noted, Mr. Sholdice indicated that the effect of his decision on the grievor was arbitrary. If Mr. Sholdice meant that the impact of the decision on the grievor was unpredictable, and thus in some sense arbitrary, we agree. However, he also testified as to the legitimacy of the requirement to schedule employees for five days off. We did not understand Mr. Sholdice to have meant that his decision to follow the five day policy was an arbitrary decision. In any event, we conclude his decision was not arbitrary.

Although the issue of good faith was mentioned during the hearing it was not pursued by the Union in argument and we find no evidence from which we could conclude that there was bad faith in this reassignment.

We repeat that while the Union submitted the Employer was under an obligation to act reasonably, the Employer submitted it did not have an obligation to act reasonably in this situation. In light of our conclusions so far, it is not necessary for us to address the second question of whether the Employer had an obligation to act reasonably, and we have not pursued it.

In summary, we have concluded that the Employer's decision to remove the previously scheduled shifts for December 27 and 28 from the grievor and reassign them to other employees was a reasonable one, not arbitrary, nor done in bad faith. It follows that the Employer did not violate the collective agreement.

For the reasons given above, the grievance is denied.

Dated in London, Ontario, this _____ day of May, 1997.

_____

Howard Snow, Chair

I concur / I dissent _____

Michael Riddell, Employer Nominee

I concur / I dissent _____

Robert W. Stewart, Union Nominee