CITATION: Royal Ottawa Health Care Group v. OPSEU, 2025 ONSC 1337
DIVISIONAL COURT FILE NO.: 2911/24
DATE: 20250303

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

RSJ Edwards, O'Brien, and L. Bale J.J.

BETWEEN:	
Royal Ottawa Health Care Group – Brockville Mental Health Centre Applicant	*Stephen Bird*, for the Applicant
– and –	
Ontario Public Service Employees' Union Respondent	*Colleen Bauman*, for the Respondent
	HEARD by videoconference at Ottawa: February 4, 2025

O'BRIEN J.:

REASONS FOR DECISION

Overview

[1] The applicant hospital seeks judicial review of the decision of labour arbitrator Judith Allen dated July 17, 2024. The arbitrator's decision upheld grievances filed by the respondent union on behalf of two bargaining unit members who were switchboard operators at the hospital. The grievances were about the interpretation of a collective agreement provision regarding full-time employees working on statutory holidays for premium pay.

[2] The arbitrator found that the hospital breached the collective agreement between the parties by modifying the grievors' normal work schedules on statutory holidays and replacing them with part-time or casual workers. She interpreted the relevant provisions of the collective agreement as allowing full-time employees who would be regularly scheduled on the holiday to either take the paid holiday or to work the holiday and receive additional premium pay.

[3] In coming to this conclusion, the arbitrator considered the collective agreement as a whole. She also considered the way the relevant provision of the collective agreement was being applied in other departments of the hospital. Other than the two switchboard operators, all full-time employees the hospital wanted to replace on holidays (with part-time or casual employees) were permitted to either take the holiday with pay or work the holiday for additional premium pay.

[4] The hospital submits the arbitrator's decision was unreasonable because (1) she relied on past practice without applying the test for admissibility of past practice evidence; and (2) she reached an unreasonable result considering the clear and unambiguous language of the collective agreement. In its factum, the hospital also argued the arbitrator was not entitled to consider provisions of the collective agreement not brought to her attention by the parties. However, in oral argument, counsel rightly conceded the arbitrator was entitled to interpret the collective agreement as a whole.

[5] I would dismiss the application. It was open to the arbitrator to admit contextual evidence of the current practice elsewhere in the hospital. There may have been more than one acceptable interpretation of the collective agreement open to the arbitrator. But the arbitrator's reasons were transparent, intelligible, and justified in respect of the facts and the law. For the reasons that follow, I would not interfere with the arbitrator's decision.

Standard of Review

[6] There is no dispute that the standard of review for the arbitrator's decision is reasonableness: *Canada (Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4. S.C.R. 653, at para. 10. A decision will be reasonable if it is based on an internally coherent and rational analysis and if it is justified in relation to the constellation of relevant law and facts: *Vavilov,* at para. 85. Reviewing courts should be attentive to the application by decision-makers of specialized knowledge and expertise: *Vavilov*, at para. 93; *Turkiewicz (Tomasz Turkiewicz Custom Masonry Homes) v. Bricklayers, Masons Independent Union of Canada, Local 1*, 2022 ONCA 780, 476 D.L.R. (4th) 421, at para. 61. Labour relations is a "complex and sensitive field" for which labour arbitrators have specialized expertise: *EllisDon Corporation v. Ontario Sheet Metal Workers' and Roofers' Conference and International Brotherhood of Electrical Workers, Local 586*, 2014 ONCA 801, 123 O.R. (3d) 253, at para. 40, quoting *International Brotherhood of Electrical Workers, Local 1739 v. International Brotherhood of Electrical Workers* (2007), 86 O.R. (3d) 508 (S.C.), at para. 47. The interpretation of a collective agreement lies at the heart of that expertise.

Did the arbitrator err in admitting evidence of past practice?

[7] The hospital submits the arbitrator erred by admitting evidence of past practice without considering and applying the test that governs its admissibility. In the hospital's submission, past practice may only be used as an interpretive aid if there is an ambiguous provision in the collective agreement. There is also an established test in labour law, set out in the leading case of *International Association of Machinists, Local 1740 and John Bertram & Sons Co. Ltd* (1967), 18 L.A.C. 362 (Ont. Arb. Bd.), which was not applied.

[8] In my view, the arbitrator was entitled to admit evidence of the interpretation of the collective agreement in other departments of the hospital. The arbitrator cited *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, for the principle that contractual interpretation requires looking at the language of the collective agreement as a whole and in context. *Sattva* adopts an approach to contract interpretation "which directs courts to have regard for the surrounding circumstances of the contract – often referred to as the factual matrix.": *Sattva*, at para. 46. According to *Sattva*, it is important to look to context because: "The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean": *Sattva*, at para. 48, citing Lord Hoffman in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.). *Sattva* also cautions, at para. 57, that while the surrounding circumstances should be considered, "they must never be allowed to overwhelm the words of [the] agreement."

[9] The arbitrator treated the evidence submitted by the union as contextual evidence she could consider because she expressly found it did not constitute past practice. She stated at para. 17 of her reasons:

> Since the Union has not attempted to adduce extrinsic evidence, or tried to rely upon an estoppel, or rely upon a past practice, I need not deal with any of the other specific case law introduced by the Employer. The principles of interpretation in those cases are not in dispute.

[10] The arbitrator went on to find, at para. 24, that "there is no 'past practice' evidence." She explained that, other than the two switchboard operators, the parties agreed that full-time employees who were replaced in the hospital were entitled to either take the holiday or work it for premium pay.

[11] Although the hospital submits the evidence at issue here constituted "past practice", it has not identified any specific markers of "past practice" evidence. Counsel acknowledges there may be a fine line between contextual evidence and evidence of past practice. I conclude it was open to the arbitrator in this case to treat the evidence as contextual.

[12] The union's evidence was focused on an ongoing, contemporaneous practice, that was in place at the time the collective agreement was entered into, rather than a "past" practice. The uncontested evidence of the union's witness was that in all other departments of the hospital, where a statutory holiday would otherwise be covered by a replacement worker, the full-time employee was entitled to work on the holiday for premium pay. The arbitrator found at para. 24 of her reasons that the parties agreed that this practice had been in place since at least 2019 (except for the two switchboard operators). It was therefore context known to the parties when the collective agreement was reached on February 16, 2024.

[13] The question of whether a set of circumstances constitutes part of the factual matrix is a question of fact: *Spina v. Shoppers Drug Mart Inc.*, 2023 ONSC 1086, at para. 703. Here, it was reasonable for the arbitrator to conclude the practice elsewhere in the hospital at the time the collective agreement was entered into constituted surrounding circumstances relevant to the

interpretation of the collective agreement. The arbitrator therefore was not required to apply the test for the admission of "past practice" evidence.

Did the arbitrator reach an unreasonable result?

[14] The hospital submits the arbitrator's interpretation of the collective agreement was unreasonable because the words "required to work" in the key provision has a clear meaning. According to the hospital, it means "obligated, scheduled or ordered to work."

[15] The central provision is article 20.02(a) of the collective agreement. For context, article 20.01 first provides the entitlement of full-time employees to statutory holidays. It states:

> 20.01 A regular full-time employee shall be entitled to the following paid holidays each year: January 1 (New Year's Day), Easter Monday, July 1 (Canada Day), […]

[16] The relevant part of article 20.02(a) then provides that a regular full-time employee who is required to work on one of the designated holidays shall be paid premium pay:

> 20.02 (Applicable to Regular Full-Time Employees)
>
> (a) An employee required to work on any of the designated holidays listed in the Collective Agreement shall be paid at the rate of time and one half (1½) her regular straight time rate of pay for all hours worked on such holiday, subject to Article 20.03.

[17] I disagree that there is only one meaning of the words "required to work" in the context of this collective agreement as applied by these parties. In addition to considering how the provision was applied through the rest of the hospital, the arbitrator looked to other articles of the collective agreement. These included articles that defined full-time employees as those who were "regularly scheduled to work full-time hours." Considering full-time employees, the subject of the disputed clause, were regularly scheduled to work full-time hours, the arbitrator concluded that "required to work" referred to a full-time employee who was regularly scheduled to work and chose to do so.

[18] The interpretation adopted by the arbitrator may not have been the only one available to her. But I disagree with the hospital that "required to work" has a single meaning. Indeed, in *Ottawa Hospital v. Ontario Nurses' Association*, 2018 CanLII 34647 (Ont. Arb. Bd.), which the hospital relies on, the arbitrator's discussion reveals a possible range of meanings. At p. 13 of that case, Arbitrator Slotnick reproduced a passage from *Re Durham (Reg. Municipality) and ONA (Ninacs-Gomes)*, 2009 CarswellOnt 10486 (Arb. Bd.), stating "The word 'required' is a word which has two related but different meanings. It takes its meaning from the context in which it is used. 'Required' can mean needed, necessary, or essential, as in a prerequisite. It can also mean obligatory, compulsory or mandatory."

[19] In *Ottawa Hospital*, the hospital had asked a nurse to work a day shift in return for giving up a later scheduled night shift. The collective agreement called for payment of time-and-a-half

where the nurse was "required to work" on a scheduled day off. The arbitrator rejected the hospital's argument that the nurse was not "required to work," since she had made the choice to do so. Instead, "required to work," understood in context, meant that changes initiated by the hospital, even if voluntarily accepted by the nurse, attracted a premium, while changes initiated by a nurse did not.

[20] *Teamsters Local Union No. 647 v. Logistics in Motion* (2023), 350 L.A.C. (4th) 75 (Ont. Arb. Bd.) similarly emphasized the range of meanings attributable to "required" work. The question there was whether the employer was entitled to impose mandatory on-call work. While the arbitrator concluded that the collective agreement allowed the employer to do so, he disagreed that the word "required," in the context of the relevant provision, made the on-call work mandatory. He emphasized that "the word 'required' allows for different meanings in different contexts, and the list of possibly synonyms…is far from exhaustive": at para. 26.

[21] None of the cases provided to the court are on all fours with the present case. What they demonstrate is that "required to work" may be read in a nuanced fashion, in the context of the particular collective agreement and circumstances between the parties.

[22] Overall, the arbitrator explained her reasoning. She looked at the definition of "full-time employees" and interpreted the collective agreement, in the context of its application by the same parties elsewhere in the hospital, as meaning the employee should be paid premium pay where the employee would be regularly scheduled to work that day and the work was required that day. The reasoning was transparent, intelligible, and justified. The interpretation was available to the arbitrator and reflected her specialized expertise. I find it was reasonable.

Disposition

[23] The application is dismissed. In accordance with the agreement between the parties, the hospital shall pay costs of $5,500 all-inclusive to the union.

_____
O'Brien J.

I agree _____
R.S.J. Edwards

I agree _____
L. Bale J.

Released: March 3, 2025

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