IN THE MATTER OF AN ARBITRATION

BETWEEN:

Centre de counselling de Sudbury,

Employer,

- and -

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers),

Union

BEFORE: Michael Bendel, Arbitrator

APPEARANCES: For the Union:

Lynne Descary, Staff Representative
Terri Rinta, Local 2020 Staff
Lise Plante, grievor

For the Employer:

Geoff Jeffery, Counsel
Carole Lamoureux, Executive Director

Heard in Sudbury, Ontario, on March 26, 2018. Written submissions completed on May 23, 2018.

ARBITRAL AWARD

I

The grievance of Lise Plante challenges the employer's change to her scheduled hours of work and her compensation for working the changed hours.

The parties have filed a Statement of Agreed Facts, which reads as follows:

> 1. The Grievor, Ms. Plante, is a long-term full-time employee of the Employer and holds the position of registered Psychotherapist.
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> 2. The Employer and the Union are a party [sic] to the Collective Agreement […].
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> 3. Article 18 of the Collective Agreement relates to "Hours of Work".
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> 4. Ms. Plante's hours of work are Monday to Friday, 8:30 [a.m.] to 4:30 p.m.
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> 5. For many years, the Employer has operated the Partner Assault Response program ("PAR"). Ms. Plante has facilitated the PAR program for women throughout this period.
>
> 6. Prior to the current Collective Agreement, Ms. Plante would facilitate this program in the evenings, approximately 5 p.m. to 7 p.m. and accumulate flex time in doing so.
>
> 7. In the past, the practice would be that, on days when Ms. Plante was required to facilitate the PAR program, she would work 8:30 a.m. to 4:30 p.m. and would stay the additional hours required to complete the program, typically until approximately 8 to 8:30 p.m. and would accumulate flex time in doing so.
>
> 8. Pursuant to the Memorandum of Settlement between the parties for the Collective Agreement […], the Employer gave notice of its intention to schedule programming, including the PAR program, between 8:30 a.m. and 4:30 p.m.
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> 9. Between January 30 to March 27, 2018, the PAR Women's program was offered on Tuesdays from 2:00 p.m. to 4:00 p.m.
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> 10. In early January 2018, after the return to work, employees working in the PAR program informed the Employer of their view that scheduling PAR only during the day would not work.

11. In late January or early February 2018, the ongoing discussions between the Employer and the Ministry of the Attorney General resulted in the Ministry informing the Employer that it would require the Employer to continue to offer the PAR program in the evenings.

12. On 8 February 2018, the Employer informed the employees, including the Grievor, that facilitators working the PAR program would be scheduled to work 12:30 p.m. to 8:30 p.m. with a one-hour break, for a total of seven working hours on days that the PAR program was scheduled.

13. On 20 February 2018, Ms. Plante filed the instant grievance […].

14. As a result of the Ministry's directive, a new schedule was developed for the PAR Women's program for the 2018 year. The PAR consists of 12 sessions, held weekly for two hours each. The schedule for PAR Women's programs for 2018 is as follows:

> April 3 to June 19, 2018: Tuesdays from 5:00 to 7:00 p.m. (12 sessions)
> June 19, 2019 [sic] 4:00 to 5:00 p.m. (make-up session)
>
> September 18 to December 4, 2018: Tuesday from 5:00 to 7:00 p.m. (12 sessions)
> December 4, 2018: 4:00 to 5:00 p.m. (make-up session)

15. In addition, Ms. Plante is occasionally required to facilitate workshops and group sessions for the Violence Against Women Intervention Program. These programs may sometimes be scheduled in the evenings. When this occurs, Ms. Plante would be scheduled to work 12:30 to 8:30 p.m. These sessions are typically scheduled for two hours (5:00 to 7:00 p.m.), one evening per week, for three consecutive weeks.

16. As a result of the schedule to be implemented by the Employer (which is the subject of this grievance arbitration), starting April 2018 the Employer would require Ms. Plante to work 12:30 p.m. to 8:30 p.m. on the days upon which the 24 PAR program sessions are scheduled in 2018 and on days on which occasional workshops and group sessions may be scheduled in the evening. Every other working day, she will be scheduled to work 8:30 a.m. to 4:30 p.m.

The following provisions of the collective agreement were cited in the parties' submissions:

ARTICLE 3 - MANAGEMENT RIGHTS

3.01 The Union acknowledges that it is the exclusive function of the Employer to:

a) maintain order and efficiency; and to this end, make and alter from time to time reasonable rules to be observed by the employee;

b) hire, discharge, discipline, assign, promote, demote, lay off, recall and transfer employees and grant an employee a promotion, subject to the terms of this Agreement.

c) generally; manage the operations in which the Employer is engaged and, without restricting the generality of the foregoing, determine the nature of the work to be undertaken and methods of operation.

3.02 The Employer shall not exercise its right to direct the working force in a discriminatory manner or in a manner inconsistent with the terms of the Collective Agreement.

…

ARTICLE 18 - HOURS OF WORK

18.01 The following sections and paragraphs are intended to define the normal hours of work and shall not be construed as a guarantee of hours of work per day, per week [sic].

The normal work week shall consist of thirty-five (35) hours per week, seven (7) hours per day, Monday to Friday, inclusive. The normal hours of work shall be from 8:30 a.m. to 4:30 p.m. with a one (1) hour lunch break. The employee's daily schedule may vary, subject to the agreement of the immediate Supervisor. During the period from July 1st to August 31st, the normal hours of work shall be varied to provide for five (5) to six and one-half (6 ½) hour days between 8:30 a.m. and 4:00 p.m. The employee's daily schedule may vary, subject to the agreement of the immediate Supervisor.

…

ARTICLE 19 - FLEX TIME

19.01 Overtime is not permitted. Hours worked in excess of the normal hours of work, seven (7) hours in a day or thirty-five (35) in a week, shall be considered flex time.

19.02 Each employee shall be responsible for managing their [sic] hours of work in consultation with his [sic] immediate supervisor, in an effort to balance the work schedule and ensure the professional delivery of service and to meet client needs and the needs of the program.

19.03 Employees must take any accumulated flex time during the month in which the flex time was accumulated, but in any event, flex time must be taken by the end of the tenth (10th) work day of the following month.

II

In its written submissions, the union maintained that the hours of work provisions of the collective agreement restricted the employer's power to change working hours or shifts. Where a collective agreement provided for "normal" or "regular" hours of work, the employer could only deviate from those hours on a temporary or occasional basis. The management rights recognized in Article 3 had to be read as being subject to the specific provisions establishing normal hours of work. The employer's plan to implement a new shift schedule for the grievor was not consistent with Article 18. The union referred to Re Quebec & Ontario Paper Co. and Canadian Paperworkers Union, Local 101 (1992), 24 L.A.C. (4th) 163 (MacDowell), Re Tiercon Industries Inc., Plastics Division, and Union of Needletrades, Industrial and Textile Employees, Local Union 314 (2002), 112 L.A.C. (4th) 348 (Bendel), and Brown & Beatty, Canadian Labour Arbitration, 4th edition, section 5:3110.

The union added that Article 18 had to be read in the context of other provisions of the agreement, particularly Article 19, dealing with "flex time". It noted that the prohibition on overtime compensation established in Article 19 was bargained for, even though it was inconsistent with the Employment Standards Act, 2000, S.O. 2000, c. 41, as amended. The employer's interpretation of Article 18 would effectively render Article 19 meaningless, it argued, which should lead the arbitrator to reject that interpretation.

In the alternative, the union argued that the employer was estopped from imposing a change of shift schedule. This was a mature collective agreement, first negotiated in 1987, and for all that time employees working beyond 4:30 p.m. had accumulated flex time. The employer had never previously imposed a later starting time on such employees so as to have them work late without being entitled to flex time. This long-standing practice constituted a representation by the employer as to the manner in which it would schedule and compensate employees who were required to work beyond 4:30 p.m. It would be unjust for the employer to resile from that practice. The union referred to Re Coca-Cola Bottling Co. and United Food and Commercial Workers International Union, Local 393W (2003), 117 L.A.C. (4th) 238 (Marcotte).

In the further alternative, the union argued that the employer's changes to its policy regarding hours of work were arbitrary and unreasonable. The employer's exercise of its management powers was subject to an underlying requirement of bona fides. Having failed to provide a bona fide reason for departing from its long-standing practice, the employer should not be allowed to effect any such change. The union referred to Brown & Beatty, supra, at section 5:2300.

In its submissions, the employer observed that the requirement to offer the PAR program in the evening was not known to the employer at the time of the negotiation of the collective agreement. It was only in late January or early February 2018 that the employer learned that this would be a requirement of the Ministry of the Attorney General. It also observed that, of the remaining working days in 2018, the grievor would be required to work after 4:30 p.m. on only 24 occasions, which would represent 12.3% of her working days.

Under the language of the collective agreement, the employer argued, it had the authority to schedule the grievor's work to start at 12:30 p.m. and end at 8:30 p.m. Her "normal" hours would still be 8:30 a.m. to 4:30 p.m. The use of the word "normal" meant that in usual, typical or expected situations the hours worked would be from 8:30 a.m. until 4:30 p.m. It did not mean that every shift had to be from 8:30 a.m. to 4:30 p.m. In any event, since the words of a collective agreement had to be read in the context of the agreement as a whole, the cases relied on by the union were of limited assistance in interpreting Article 18.

Turning to the words used in Article 18.01, the employer argued that the opening sentence supported its view that the agreement allowed the parties to adjust hours of work in order to meet the needs of clients. By stating that the designation of normal hours did not constitute a guarantee that employees would work those hours, it implicitly authorized the employer to reduce employees' hours, which, in turn, implied that it could deviate from the agreed starting and quitting times. In addition, the provision that an "employee's daily schedule may vary, subject to the agreement of the immediate Supervisor", when read together with the provision in Article 19.02 that employees were responsible for managing their hours of work so as to meet client needs, allowed for a departure from the designated normal hours at the initiative of the employer. Moreover, the language of Article 19.01, by defining normal hours of work as a daily or weekly number and by failing to refer to starting and quitting times, suggested that starting and quitting times could be more easily varied. All these provisions supported the view that the employer retained the power to schedule employees in a manner that was necessary to meet the needs of the clients. The employer added that Article 3.01 (c) confirmed the existence of this power. The employer referred to Brown & Beatty, supra, at section 5:3122, Teamsters Local Union 938 v. Robinson Solutions (Oshawa) Inc. (Work Hours Reduction Grievance), [2014] O.L.A.A. No. 472 (Harris), Re Mobile Climate Control and United Food and Commercial Workers, Local 175 (2011), 206 L.A.C. (4th) 311 (Trachuk), Re Metroland Printing and G.C.I.U., Local 500M (1991), 22 L.A.C. (4th) 85 (Gorsky), Peel (Regional Municipality) Department of Health Services v. Canadian Union of Public Employees, Local 966 (Scheduling Grievance), [2013] O.L.A.A. No. 75 (Slotnick), and Re Paintplas (1989) Inc. and I.A.M., Local 2524, [1993] O.L.A.A. No. 1027 (Emrich).

The employer also rejected the union's argument that it was estopped from changing the grievor's starting and quitting times. In addition to observing that the union's argument was based, in part, on facts that had not been agreed to, the employer denied that any of its conduct could be interpreted as a "representation".

Finally, the employer denied that there was anything arbitrary or unreasonable in its scheduling of the grievor. Its decision was plainly designed to maintain an important service to its clients while avoiding unnecessary costs.

III

The union has made clear, both at the hearing and in its written submissions, that the grievor would happily work until 8:30 p.m. on the days designated by the employer if she were allowed to treat the hours worked after 4:30 p.m. as “flex time”. Flex time, provided for in Article 19, allows employees who work more than seven hours in a day (or more than 35 hours in a week) to be relieved of other professional commitments so as to ensure that the hours worked during the month do not exceed the “normal” hours established in Article 18.01, i.e. 35 hours per week, seven days a week, Monday to Friday.

However, it appears to be agreed between the parties that the grievor has no right to flex time on days she works the 12:30 p.m. to 8:30 p.m. shift since flex time is accumulated only where an employee works “in excess of the normal hours of work, seven (7) hours in a day or thirty-five (35) in a week” (Article 19.01), which does not happen if the grievor is assigned to work from 12:30 p.m. to 8:30 p.m. on such days. At the same time, the grievor and the union have made clear that their preference would be for the employer to revert to its past practice (as recorded in paragraph 7 of the Statement of Agreed Facts), namely to schedule the grievor to work, on such days, from 8:30 a.m. to 4:30 p.m. and to treat the hours worked later that day as flex time, which would enable her to be relieved of other professional commitments on other days.

While that schedule would satisfy the union and the grievor, it would not be acceptable to the employer since it would deprive the employer of a measure of control over the scheduling of the grievor's work.

I intend to examine first the union's claim that the employer is estopped from requiring the grievor to work the 12:30 p.m. to 8:30 p.m. shift. The estoppel arises, according to the union, from the employer's consistent past practice of scheduling employees to work from 8:30 p.m. to 4:30 p.m., on days when they had evening work to perform, and treating the hours worked after 4:30 p.m. as flex time.

I am satisfied that there can be no estoppel in this situation. The only basis asserted by the union is that, in the past, the employer has scheduled employees, in such circumstances, to start work at 8:30 a.m. However, there is no evidence that the employer has ever stated or even implied that it would continue such a practice indefinitely. Where an employer has a discretion under a collective agreement, arbitrators have not interpreted the consistent exercise of that discretion, even on a long-term basis, as a representation that it will continue to exercise the discretion in that manner. See, for example, Re Tiercon Industries Inc., supra, at paragraph 15:

> I am unable to find any authority for the proposition that the consistent exercise of a discretion constitutes a representation as to how that discretion will be exercised in the future where the discretion has been exercised in full conformity with the terms of the collective agreement.

It follows that the union cannot achieve the scheduling sought by the grievor by means of estoppel.

The next question I wish to examine is whether the employer is precluded, by Article 18 of the collective agreement, from scheduling the grievor to work from 12:30 p.m. to 8:30 p.m. on the days in question. Article 18.01, it will be recalled, states, in part, that "[t]he normal hours of work shall be from 8:30 a.m. to 4:30 p.m. with a one (1) hour lunch break." The employer claims that its occasional departure from the "normal hours of work" in the interests of meeting client needs is implicitly allowed by Article 18.01.

Arbitrators have consistently held that provisions such as Article 18.01 allow an employer only limited room for manoeuvre. Provisions such as these exist not solely for the purpose of defining the hours beyond which overtime compensation is due, but primarily for the purpose of restricting the employer's prerogative as regards scheduling. While the designation of "normal hours" in an agreement implicitly acknowledges that employees might be required to work "abnormal hours", these provisions are not a mere "pious hope" that employees will be scheduled to work the normal hours. Every employee in the bargaining unit is entitled to the benefit of such a provision, and an employer cannot therefore justify its departure from that norm for one employee by pointing to its faithful compliance with it for everyone else in the bargaining unit. Employers may depart from the normal hours, depending on the specific terms of the collective agreement, in response to sporadic "operational problems or vagaries of the marketplace", for example: see Re Quebec & Ontario Paper Co., supra, at paragraph 23. However, where departures are "pre-arranged, uniform, continuous, routine and systematic", the agreement will generally be held to prohibit them: ibid. None of the awards cited by the employer in its submissions calls into question this interpretation of provisions such as Article 18.01.

I am also satisfied that neither Article 3.01 (c) nor Article 19, relied on by the employer in its submissions, would warrant a different interpretation of Article 18.01. Article 18.01 deals directly and specifically with the question of the daily and weekly scheduling of employees. There is a fundamental rule of contract interpretation that specific provisions override general provisions: see, e.g., Palmer & Snyder, Collective Agreement Arbitration in Canada, Fourth Edition, at page 30:

> It is a general rule of interpretation that a specific provision takes precedence over a general one. Among other things, this principle means that the preamble cannot override a specific provision of the agreement, and explains why a management rights clause cannot be used to undermine or negate specific provisions of the agreement.

It would therefore not be legitimate to allow the clear and specific meaning of Article 18.01 to be diluted or negated by anything in Article 3.01 (c) or Article 19 or by any inferences arising from those provisions.

Given my conclusion on the interpretation of Article 18.01, it is not necessary for me to examine the union's further claim that the employer has acted unreasonably or arbitrarily in its scheduling of the grievor.

The grievance must therefore be allowed.

Although the union has asked me to order the employer to schedule the grievor, on the days that she has evening sessions with clients, from 8:30 a.m. to 4:30 p.m. and to recognize her entitlement to flex time for the work performed in the evening, I am satisfied, as I endeavoured to explain earlier in this award, that I have no authority to make any such order. While I can state that scheduling her to work from 12:30 p.m. to 8:30 p.m. is prohibited by the agreement, the solution sought by the union is not one compelled by the agreement and I have no authority to impose it.

The grievance is therefore allowed. I declare that scheduling of the grievor from 12:30 p.m. to 8:30 p.m. on the days in question is prohibited by Article 18.01, and I order the employer to cease assigning her to that shift.

DATED at Thornhill, Ontario, this 5th day of June 2018.

Michael Bendel,
Arbitrator