FTR Now

The Ongoing Saga of the 24 Hour Firefighter Shift

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In recent years, one of the top demands sought by fire associations at the bargaining table and at interest arbitration has been the 24 hour shift schedule. Many municipalities have continued to vigorously resist this demand. In our *FTR Now* "Three Recent Decisions, Three Different Results – An Update on the 24 Hour Shift in the Fire Sector" (November 2011), we discussed the arbitration awards in *Quinte West* (24 hour shift rejected), *Cambridge* (24 hour shift trial awarded) and *Kingston* (24 hour shift trial ordered to continue). Since that time many municipalities have been waiting for the arbitration award involving the Town of Ajax which was litigated in early 2012.

The Town of Ajax award was released on April 4, 2013. In this *FTR Now*, we discuss the decision, and its implications for other municipalities.

HISTORY

The issue of 24 hour shifts is not new to Ontario: a handful of departments have had the shift for decades. However, as more fire associations have pressed for the 24 hour shift over the last five years, the issue has become hotly debated.

At the present time, approximately one-third of Ontario fire services which employ **full-time firefighters** (either exclusively or as part of a composite staffing model) are scheduling on the basis of a 24 hour shift schedule. At its narrowest point, the debate over 24 hour shifts hinges on the Associations' claims of improved firefighter moral, personal preference and personal health through claims of better sleeping patterns versus employer concerns regarding overall firefighter health and safety, optimal public service (including financial implications) and management's right to determine appropriate workplace schedules and staffing patterns.

In the past, arbitration awards have resulted in the creation of a workplace committee to study the feasibility and merits of implementing a 24 hour shift. Several municipalities have voluntarily entered into agreements to schedule a 24 hour shift on either a trial or permanent basis. Many others, however, have instead decided to litigate the matter at interest arbitration. As noted previously, the City of Quinte West was successful at interest arbitration in having the 24 hour shift proposal rejected (Arbitrator Starkman, November 4, 2011). In the *City of Cambridge* decision (November 8, 2011), Arbitrator Burkett ordered a 24 hour shift trial period but not a specific shift rotation. Since then, the parties have not been able to agree on a particular shift rotation, despite ongoing discussions, and if no agreement is reached it will likely be remitted back to the Burkett Board of Arbitration for determination.

TOWN OF AJAX DECISION

Before a Board of Arbitration (chaired by Arbitrator Etherington), the Ajax Fire Association argued in support of its request for a 24 hour shift schedule. It asserted this shift should be awarded as the majority of full-time firefighters (not necessarily fire services) in Ontario work a 24 hour shift. The Association also cited several general health articles pertaining to shift work and circadian rhythm, as well as a study conducted in the 1990s for the Toronto Professional Firefighters' Association (the "Glazner Report"), in support of its assertion that a 24 hour shift is safer than other shift schedules. These were essentially the same arguments that were presented before Arbitrator Starkman in *Quinte West* where the Association's request for a 24 hour shift was rejected. In addition, the Association argued that "employee preference" should be given consideration by the Board.

In response, the Town of Ajax first argued that determining the hours of work is a presumptive management right. Second, it argued that the onus fell to the Association to establish that the existing 10 hour day/14 hour night shift rotation was unhealthy, unsafe or that there was a demonstrated need for change. The Town examined the issue of comparability and demonstrated that approximately two-thirds of the fire services in Ontario still do not have 24 hour shifts and that the numbers cited by the Association (number of firefighters rather than services) are significantly influenced by a few large services, including the cities of Toronto, Mississauga and Ottawa.

The Town introduced evidence about the operational and potential financial impact of such a change, and argued that its health and safety obligations under the *Occupational Health and Safety Act* would be significantly impaired by an order granting 24 hour shifts.

For the first time in Ontario, the Town also provided expert testimony, both in the form of an opinion letter and oral evidence, from Dr. Lockley (an expert from the Division of Sleep Medicine at Harvard Medical School) relating to the potential health and safety issues arising from working extended shifts. As with any emergency planning exercise, this evidence considered the worst case scenario option; in other words, the presumption that firefighters would not get sleep for the entire duration of their shift (including their commute to and from work). His expert opinion was clear: “the 10-14 hour rotating shift schedule currently worked by the Town of Ajax firefighters is substantially better for workplace alertness and performance, and has greater health and safety benefits, than the proposed 24 hour shift.”

Ultimately, Arbitrator Etherington accepted the Association’s position and ordered the parties to strike a committee to shape the terms of a trial 24 hour shift schedule. The parties were also ordered to put into place a mechanism to study the operation of the 24 hour shift to determine its viability and how its operation might compare to the 10-14 hour shift in terms of several factors, including health and safety, employer operational concerns (such as absenteeism, overtime, training, staffing difficulties, cost, etc.), work-life balance and employee preference. Arbitrator Etherington was clear that this decision is not pre-determinative of whether the 24 hour shift will be found to be viable and effective on a permanent basis for the parties.

In reaching this conclusion, Arbitrator Etherington accepted the anecdotal evidence and submissions of “employee preference” put forward by the Association and did not address the Town’s expert evidence in a meaningful way. A significant factor for Arbitrator Etherington was also the number of firefighters in Ontario working under 24 hour shifts, and the fact that those trials and permanent schedules were generally the product of freely-bargained agreements, along with the lack of reported data with respect to those trial arrangements elsewhere. In effect, Arbitrator Etherington reversed the onus of proof and concluded that the Town did not establish that the 24 hour shift “is more hazardous than the 10-14 hour shift schedule or that it represents a threat to the health and safety of firefighters.” A thorough critique of Arbitrator Etherington’s rationale and analysis is provided by the dissent of the Town’s Nominee (Michael Riddell).

The Town of Ajax will be judicially reviewing this award. As such, the final outcome in this case has not yet been determined.

CONCLUSION

Municipalities across Ontario which have been awaiting this decision will find little guidance on the safety of the 24 hour shift. Moreover there is no easy way to reconcile this decision with the earlier decisions when considering the merits of the arguments put forward by both sides.

The 24 hour shift schedule is still far from the norm in Ontario, with only about one-third of its municipalities employing full-time firefighters using such a shift. However, it is clear that local Associations will continue to seek the 24 hour shift at interest arbitration if they are not able to obtain this shift through collective bargaining, regardless of the size of the municipality and the fire department concerned. Several cases remain ongoing at interest arbitration (in some cases the municipalities will lead oral expert evidence in opposition to the requests) as municipalities across Ontario continue to aggressively defend against these requests.

Accordingly, further clarity with respect to the treatment of this issue by the Divisional Court through the Town of Ajax judicial

review and by interest arbitration boards will be forthcoming in 2013 and into 2014. It is important, however, that municipalities continue to communicate and support each other with respect to this issue going forward.

For more information about this decision and its implications, please contact either Mark H. Mason at 416.864.7280, John W. Saunders at 416.864.7247, Michael J. Kennedy at 416.864.7305 or Michelle A. Alton at 416.864.7238.

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