Date: 20050822

File: 166-2-34115

Citation: 2005 PSLRB 106

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

STUART MUNGHAM

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Mungham v. Treasury Board (Correctional Service of Canada)

In the matter of a grievance referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Ian R. Mackenzie, adjudicator

For the Grievor: Michel Bouchard, UNION OF CANADIAN CORRECTIONAL OFFICERS - SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA - CSN

For the Employer: Craig Rosario, counsel

Heard at Toronto, Ontario,
June 14, 2005.

Grievance referred to adjudication

[1] Stuart Mungham is a correctional officer (CX-2) at the Fenbrook Institution in Gravenhurst, Ontario. He grieved the distribution of overtime at Fenbrook Institution on a particular shift, namely, December 30, 2003. Mr. Mungham's terms and conditions of employment are governed by the collective agreement between the Treasury Board and the UNION OF CANADIAN CORRECTIONAL OFFICERS - SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA - CSN, with an expiry date of May 31, 2002 (Codes 601 and 651) (Exhibit G-1). The grievance was referred to adjudication on April 14, 2004.

[2] On April 1, 2005, the *Public Service Labour Relations Act* (*PSLRA*), enacted by section 2 of the *Public Service Modernization Act,* S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the "former *Act*").

[3] The parties proceeded by way of an *Agreed Statement of Facts* (reproduced below), and Mr. Mungham also testified. There were no witnesses for the employer.

[4] Part of the corrective action requested in the grievance relates to staffing practices for acting correctional supervisors. The employer submitted that this was not within my jurisdiction. The grievor stated that he would not be proceeding on this part of the grievance. Accordingly, I have not considered this aspect of the grievance.

Summary of the evidence

[5] The *Agreed Statement of Facts* reads as follows:

. . .

> 1. *The grievor, Stuart Mungham, is an employee of the Correctional Service of Canada.*
>
> 2. *He is employed at Fenbrook Institution.*
>
> 3. *At the time of his grievance, the grievor was covered by the Correctional Services group collective agreement between Treasury Board and the Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN; that expired on May 31, 2002.*

4. *At the time of his grievance, the grievor was classified at the CX-2 group and level.*

5. *The grievor is a shift-worker. His hours of work are scheduled on a rotating or irregular basis. On a daily basis, the grievor works eight (8) hours per day.*

6. *On Tuesday, December 30, 2003, the grievor was scheduled to work the evening shift from 3 PM to 11 PM (Annex A – Fenbrook Institution Roll Call).*

7. *The grievor had indicated on the Overtime Availability Sign-Up sheet (Annex B) that he was available to work overtime on the day shift on December 30, 2003.*

8. *Two other CX-2's were called to work overtime on the day shift on December 30, 2003 (Annex C – Fenbrook Institution Roll Call).*

9. *At Fenbrook Institution overtime is tracked in three (3) month cycles. At the end of the three (3) month cycle all staff revert back to zero (0) accumulated overtime hours.*

10. *In determining who is to be called to work overtime the Duty Correctional Supervisor is to refer to the Fenbrook Institution Overtime Program located on the Duty Correctional Supervisor desktop computer (Annex D – Procedures Manual for Correctional Supervisors). The Duty Correctional Supervisor uses this program and the Overtime Availability Sign-Up sheet (Annex-B) to determine how many hours of overtime each employee has accumulated in the cycle (Annex E – Overtime Program for period of October to December 2003). The amount of overtime accumulated by each employee is rounded down to the nearest multiple of four (4) and is written beside their name on the Overtime Availability Sign-Up sheet (Annex-B). The Duty Correctional Supervisor is expected to call the employee with the least amount of overtime hours on the Overtime Availability Sign-Up sheet (Annex-B) first.*

11. *In the case that several employees on the Overtime Availability Sign-Up sheet (Annex-B) have the same amount of overtime hours accumulated, the Duty Correctional Supervisor is expected to start alphabetically at A and go to Z in the first and third cycles. In the second and fourth cycles the Duty Correctional Supervisor starts at Z and works backwards to A.*

> *12. On December 30, 2003, CX-2 Leslie Good was called in to work overtime as she had the least amount of overtime hours accumulated on the Overtime Availability Sign-Up sheet (Annex-B).*
>
> *13. On December 30, 2003 CX-2 Sharon Bradley was also called in to work overtime on the day shift. The grievor had the same accumulated overtime hours as CX-2 Sharon Bradley, but in accordance with established practice (fourth quarter: Z to A), should have been offered the available overtime shift before CX-2 Bradley.*
>
> *14. On January 1, 2004 the grievor submitted his grievance (Annex – F) that alleges that the Employer (duty C/S on 30 Dec/03) did not hire overtime the way that has been agreed in the Collective Agreement, Article 21.10 para (a) and the Local Institutional Hiring Policy.*
>
> *15. During the final quarter of 2003, of the thirty-two (32) CX-2's at Fenbrook Institution who worked overtime, the grievor ranked seventeenth (17th) highest in total overtime hours (25.5 overtime hours worked – Annex-D – Overtime Program for the period of October to December 2003).*
>
> *16. The corrective action requested by the grievor is: 1) to be heard at all levels; 2) that Correctional Officers not be put into Correctional Supervisor Acting positions unless they have passed a Competition and are on an active CSC Qualified List; 3) that I be compensated for the eight (8) hours at time and one-half due to the fact that I have not had a raise in nineteen (19) months and it is becoming financially straining.*
>
> *17. The grievor was offered an opportunity to work a "make-up" overtime shift in recognition of the December 30, 2003 error. This make-up shift would not have counted towards his overtime hours in the next cycle. He refused the opportunity.*
>
> . . .

[6] The employer stated that the offer of a make-up shift, as set out in paragraph 17 of the *Agreed Statement of Facts*, was still being offered.

[7] Mr. Mungham testified that he was a vice-president of his bargaining agent local at Fenbrook Institution. He also testified that the overtime policy had been in place for as long as he had been at Fenbrook Institution (five years) and that the bargaining agent considered the policy to be fair and equitable and that this was the accepted

mechanism for distribution of overtime at Fenbrook Institution. There have been no requests, by either the bargaining agent or management, to change the policy.

[8] Mr. Mungham testified that there have been some difficulties in the implementation of the policy. He said that there were three grievances in 2003 and that there are currently at least 40 grievances concerning overtime at the Fenbrook Institution. He testified that a few supervisors have not followed the policy, stating "What are they going to do to me?"

[9] Mr. Mungham testified that he was available for work on December 30, 2003. He said that, since his wife is a police officer on-call 24 hours per day, seven days per week, he was hardly ever available for overtime.

[10] Mr. Mungham also testified that the employer did not offer him the make-up shift until January 2005.

Summary of the arguments

For the grievor

[11] The grievor stated that he was relying on subclauses 21.10(a) and (b) and clause 21.12 of the collective agreement, which read as follows:

> ***21.10 Assignment of Overtime Work***
>
> *Subject to the operational requirements of the service, the Employer shall make every reasonable effort:*
>
> *(a) to allocate overtime work on an equitable basis among readily available qualified employees,*
>
> *(b) to allocate overtime work to employees at the same group and level as the position to be filled, i.e.: CX-1 to CX-1, CX-2 to CX-2, etc.;*
>
> ***21.12 Overtime Compensation***
>
> *. . . an employee is entitled to time and one-half (1 1/2) compensation for each hour of overtime worked by the employee.*

[12] The grievor submitted that the jurisprudence on the distribution of overtime was not consistent. However, it was the grievor's submission that he should be offered payment for the missed overtime opportunity and not a make-up shift. The grievor submitted that the practice of Fenbrook Institution on the distribution of overtime had been a consistent practice, over a long period of time, and accepted by both the bargaining agent and management.

[13] The grievor argued that granting an in-kind remedy (a make-up shift) would interfere with the overtime rights of other employees. The overtime calculations are reset to zero at the beginning of each quarter. If the employer gives an overtime shift to Mr. Mungham, an opportunity is being taken away from other employees. The grievor also noted that he is an executive member of the bargaining agent. In such a case, an award of damages, in the amount of the equivalent of eight hours at time and a half, is appropriate. This was because, as an executive member of the bargaining agent, Mr. Mungham should not be in a position of taking a benefit away from another member of the bargaining unit. The grievor referred me to *Canadian Labour Arbitration,* Third Edition, by Messrs. Brown and Beatty, at paragraph 2:1423.

[14] The grievor submitted that, since the time-frame within which the equitable distribution of overtime is to be achieved has passed, an in-kind remedy is not possible (*Re 3M Canada Inc. and Energy and Chemical Workers' Union, Local 294* (1984), 15 L.A.C. (3d) 316). He also submitted that damages are appropriate where there has been a pattern of persistent mistakes (*Re Bingo Press & Speciality Ltd. and Retail Wholesale Canada, C.A.W. Division, Local 462* (2002), 107 L.A.C. (4th) 337). The grievor referred to the persistent pattern of mistakes by correctional supervisors.

[15] In conclusion, the grievor submitted that he was not seeking to punish the employer. The award should normally put the grievor in the place where he would have been and must do so without overriding the rights of other employees.

For the employer

[16] The employer submitted that there has been no breach of the collective agreement. The grievor acknowledged that the distribution of overtime was equitable in the last quarter. The failure to call Mr. Mungham was an administrative error that did not result in the inequitable distribution of overtime. In that quarter, Mr. Mungham was ranked 17 out of 32 in terms of overtime hours. Equitable allocation

does not mean equal allocation and the equitable distribution should be measured over a period of much longer than one single day (*Sumanik v. Treasury Board (Ministry of Transport)*, PSSRB File No. 166-2-395 (1971)). In this case, the period at issue is a three-month cycle. There are no wide gaps in the distribution of overtime. The employer noted that, since overtime is largely voluntary at Fenbrook Institution, its equitable distribution is also dependent on availability and this enters into the equation for determining the equitable distribution.

[17] The employer also referred me to *Armand v. Treasury Board (Solicitor General Canada – Correctional Service)*, PSSRB File No. 166-2-19560 (1990) (QL), a decision that confirmed the *Sumanik* (*supra*) approach. That decision also notes that a "snapshot" approach is not appropriate for determining the equitable distribution of overtime. In *Armand* (*supra*), the collective agreement provision was very similar to the language at issue in this grievance. The employer also referred me to *Roireau and Gamache v. Treasury Board (Solicitor General Canada – Correctional Service)*, 2004 PSSRB 85.

[18] The employer submitted that all of this jurisprudence shows that the collective agreement was never violated and that there was no legal obligation on the employer's part for any corrective action. However, the employer recognizes that, in the interests of resolving the dispute, and in the interests of good labour relations, a make-up overtime shift is the appropriate remedy even though there is no legal obligation for such a remedy. The employer noted that the grievor's position was that this would take away an overtime opportunity from someone else. It is important to note that Ms. Bradley received a benefit of an overtime shift to which she was not entitled. A make-up shift would restore the balance that was upset.

[19] The employer submitted that the *3M Canada Inc.* decision (*supra*) was distinguishable because, in that case, there was a finding that the collective agreement provision was violated, whereas, in this case, there is no allegation that the collective agreement provision has been violated.

[20] The employer also submitted that there was no evidence of a pattern of mistakes at Fenbrook Institution, and for this reason the *Bingo Press & Speciality Ltd.* decision (*supra*) was not relevant. There was evidence of one administrative error and the grievor agreed that the overtime policy was an effective tool.

[21] It was the employer's position that financial compensation should not be paid for hours not worked. There is no legal obligation to offer such a remedy. In *Hayward v. Treasury Board (Solicitor General Canada – Correctional Service),* PSSRB File No. 166-2-17188 (1989) (QL), the adjudicator ordered that the next overtime assignment be given to Mr. Hayward and that that make-up shift not be used in the overall tally of overtime hours. The employer also referred me to *Brierley v. Treasury Board (Solicitor General Canada – Correctional Service)*, PSSRB File No. 166-2-15151 (1987) (QL), where the adjudicator noted that the impact upon others was limited to those in Mr. Brierley's unit (officers who have benefited from his absence from the overtime rotation).

Reply

[22] The grievor submitted that he did not acknowledge that there was an equitable distribution of overtime for the period in question, contrary to what was suggested by the employer. The grievor acknowledged that the policy was equitable, not the way in which it was administered in this case.

[23] The grievor argued that the word "equitable" in the collective agreement is an intangible word. However, equitable has been defined by the employer in its policy in a manner that is acceptable to the bargaining agent.

[24] The grievor submitted that *Sumanik* (*supra*) was talking about a period of one year. In this case, the period for the equitable allocation of overtime is three months. The grievor submitted that the employer wanted to change the goalposts by saying that, when it makes a mistake, it could take another period of time to make it equitable. In the employer's approach, there is no precision to the definition of the period for equitable distribution.

[25] The grievor noted that he has a life outside of work and activities that prevent the frequent use of overtime. It is not easy to give him such an opportunity. It is important to remember that he signed up for this opportunity.

[26] The grievor submitted that, with regard to the employer's position that a make-up shift would reset the balance, there is no certainty that it is Ms. Bradley who would miss out on the opportunity for overtime.

[27] The grievor noted that, in the *3M Canada Inc.* decision (*supra*), certain aspects of the overtime allocation policy were in the collective agreement but other aspects, such as the 12-month framework for the distribution of overtime, were established at the workplace level and not in the collective agreement.

Reasons

[28] I commend the parties for significantly shortening the length of the hearing by developing an *Agreed Statement of Facts*. This demonstrates the attention being paid to the scarce resources of all those involved.

[29] The employer has argued that there has been no breach of the collective agreement but has also submitted that a proper resolution of this matter is an in-kind remedy of another overtime opportunity for Mr. Mungham. I cannot grant a remedy if there is no breach of the collective agreement. For this reason, I have taken the employer's arguments on the appropriate remedy as being in the alternative. If the employer is successful in its argument that there has been no breach of the collective agreement, then I would have no choice but to dismiss the grievance. If I do find that there has been a breach, I can then consider what the appropriate remedy is for the breach.

[30] The collective agreement provides that the employer shall make every reasonable effort to allocate overtime work on an equitable basis (clause 21.10). The employer has developed and applies an overtime policy for the distribution of overtime (the "Fenbrook Institution Overtime Program"). The arbitrability of overtime policies has not been consistently addressed in adjudication jurisprudence under the former *Act*. In *Armand* (*supra*), the adjudicator concluded that the overtime policy did not form part of the collective agreement and was therefore not capable of being interpreted by the adjudicator. In that case, the bargaining agent had argued that the overtime policy was incorporated into the collective agreement through the managerial responsibilities clause of the collective agreement. In *Hayward* (*supra*), the adjudicator took jurisdiction over the overtime policy without discussion. In *Brierley* (*supra*), the issue was the determination by the employer that the grievor was ineligible for overtime under the collective agreement. However, the comments on the overtime policy are instructive:

. . .

> *No dispute was raised as to the traditional method in use at Joyceville for allocating available overtime amongst correctional officers. No challenge was made by the grievor as to the monthly point system and the method of offering overtime first to those with the fewest points from the preceding month. I conclude, therefore, that the grievor accepts the system, itself, as being equitable. . . .*

. . .

[31] This suggests that the overtime policy represents the common understanding of how overtime is to be allocated equitably, as required under the collective agreement. Although the document does not form part of the agreement, it is relevant to its interpretation and application (see *Canadian Labour Arbitration* (*supra*), paragraph 4:1220). The procedures manual (Annex "D" of the *Agreed Statement of Facts*) states that, should the use of overtime become necessary, ". . . the Duty CS shall ensure that all overtime is hired in a cost effective manner and further that all overtime hours are distributed evenly amongst staff. . . ." The employer has limited its discretion to assign overtime hours by this policy. There was testimony from Mr. Mungham that the bargaining agent accepted this policy as the method of equitable allocation of overtime opportunities. There was evidence that this policy is used on a regular basis, notwithstanding that there may be other grievances outstanding. In this way, the overtime policy represents the common understanding of what equitable allocation of overtime means. I therefore find that the overtime policy is binding on the employer. There was no dispute that, according to the policy, Mr. Mungham should have been given the overtime assignment on December 30, 2003. I therefore find that there was a breach of the collective agreement.

[32] It is clear from the jurisprudence and common sense that the default remedy for such a breach of the collective agreement should be another overtime opportunity. As succinctly stated in *Brierley* (*supra*):

. . .

> *. . . it is generally accepted that an in kind award which allows an employee to make up for lost opportunities is preferable if it will restore the grievor to his/her original position without unduly or adversely affecting the lives or rights of others.*

. . .

[33] The exception to an in-kind remedy, as noted in *Brierley* (*supra*), occurs when such a remedy would adversely affect the rights of others. The jurisprudence of adjudicators under the former *Act* has mirrored the analysis in the *3M Canada Inc.* case (*supra*) cited by the grievor. In *Del Monte v. Treasury Board (Employment and Immigration)*, PSSRB File No. 166-2-15071 (1985) (QL), the adjudicator held that an in-kind remedy would not be appropriate for some of the overtime dates at issue because it ". . . would have an undesirable impact upon the lives and schedules of other workers . . . ." In *Aiken et al. v. Treasury Board (Employment & Immigration Canada),* PSSRB File Nos. 166-2-14761 to 14767 (1985) (QL), the adjudicator relied on the decision in *3M Canada Inc.* (*supra*) to justify a monetary award. One of the factors on which he relied was that granting preferential status to the grievors could ". . . affect or displace other innocent staff."

[34] In this case, granting Mr. Mungham an opportunity for overtime might well affect the rights of another employee. The system designed by the employer for the allocation of overtime is based on a quarterly cycle. The calculation for the distribution of overtime hours for each employee is reset at the beginning of each quarter. If Mr. Mungham were offered a make-up shift, then he would be depriving another officer of an opportunity to work overtime. There is no guarantee that it would be Ms. Bradley, the beneficiary of the employer's error, who would be the one affected. In *Brierley* (*supra*), the adjudicator ordered an in-kind remedy because the impact was limited to officers in the grievor's work unit and these officers benefited from the grievor's enforced absence from the normal overtime rotation. This is not the case here, since only one officer benefited from the error in not assigning Mr. Mungham to the overtime shift. In *Hayward* (*supra*), an in-kind remedy was awarded. However, in that case the employer's overtime policy had a "catch-up" clause. There was no evidence of such clause in the Fenbrook Institution Overtime Program. In *Sumanik* (*supra*), there was no overtime policy; therefore, the general provision of equitable allocation as set out in the collective agreement applied. This is not the case here. I therefore conclude that, in all the circumstances, a monetary award is appropriate.

[35] The grievor argued that a monetary award was necessary also because of a persistent failure by the employer to apply the Fenbrook Institution Overtime Program properly. The evidence did not show such a persistent failure on the part of the employer. In any event, I am not convinced that this should be a factor, given its

almost punitive nature. If there are allegations of persistent breaches of the collective agreement, the answer is to file grievances against those breaches. Mr. Mungham testified that grievances have been filed.

[36] The grievor also suggested that I should take into account his status as a bargaining agent official in granting a monetary award. The status of an employee should have no effect on the remedy awarded, and I have not considered this factor in coming to my decision.

[37] In conclusion, I find that the collective agreement was breached when Mr. Mungham was not offered an overtime assignment on December 30, 2003. In all the circumstances, the appropriate remedy is a monetary award. The employer did not dispute that the value of the missed overtime was eight hours. I therefore award the monetary equivalent of eight hours of overtime at the applicable rate, pursuant to the collective agreement (time and a half).

[38] For all of the above reasons, I make the following order:

(The Order appears on the next page.)

Order

[39] The grievance is allowed. I order that Mr. Mungham be compensated at the appropriate collective agreement rate of time and a half for eight hours of overtime.

August 22, 2005.

Ian R. Mackenzie,
adjudicator