Date: 20061120

Files: 566-02-211 to 213

Citation: 2006 PSLRB 127

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

GERALD WRY, GAVEN LEWIS and DANIEL AMUNDSON

Grievors

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Wry et al. v. Treasury Board (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Dan Butler, adjudicator

For the Grievor: J. Mancini, Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada - CSN

For the Employer: H. Newman, counsel

Heard at Moncton, New Brunswick,
September 22, 2006.

Individual grievance referred to adjudication

[1] In November 2005, Messrs. Wry, Lewis and Amundson ("the grievors"), employed as correctional officers at the Dorchester Institution of the Correctional Service of Canada (CSC), each filed an individual grievance alleging a violation of the collective agreement between Treasury Board ("the employer") and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada – CSN ("UCCO-SACC-CSN") which expired May 31, 2002. The grievances challenged the employer's failure to pay overtime and certain travelling and meal expenses in respect of the grievors' attendance under summons at an adjudication hearing on October 18, 2005.

[2] The three grievances and the required corrective action read as follows:

> **Board File No. 566-02-211 Gerald Wry**
>
> *I grieve Management's refusal to honor my claim for overtime and mileage which I filed in accordance with Article 23.01 of my Collective Agreement. I attended the Adjudication Hearing for Tim Rose on 2005-10-18 by order of a Summons to Attend issued by Yvon Tarte, Chairperson of the Public Service Labour Relations Board in accordance with the Public Service Labour Relations Act which confers upon him the legal authority to sommon witnesses.*
>
> [Corrective action]
>
> *Compensation as claimed for five hours at the applicable overtime rate (5 x 1.75)*
>
> *Mileage expense – 125 Km @ 49.5C per KM*
>
> *That I be made whole.*
>
> **Board File No. 566-02-212 Gaven Lewis**
>
> *I received a subpoena to attend a hearing as a witness on 18 Oct. 05., which was my second rest day. I then was denied pay, travelling expenses, meal for 18 Oct. 05.*
>
> [Corrective action]
>
> *In accordance with section 23 and section 30.17(c)(v) of the collective agreement, between Treasury Board and the Union of Canadian Correctional Officer.*
>
> *To be paid my overtime, travelling expenses, meal for the 18 Oct. 05.*

Board File No. 566-02-213 Daniel Amundson

> *I grieve Management's refusal to honor my claim for overtime, transportation, meals and parking which I filed in accordance with Article 23.01 of my Collective Agreement. I attended the Adjudication Hearing for Tim Rose on 2005-10-18 by order of a Summons To Attend issued by Yvon Tarte, Chairperson of the Public Service Labour Relations Board in accordance with the Public Service Labour Relations Act which confers upon him the legal authority to summon witnesses.*
>
> [Corrective action]
>
> *Compensation as claimed for six hours at the applicable overtime rate (6 x 1.75);*
>
> *Mileage expense – 150 Km @ 49.5C per KM*
>
> *One lunch @ $11.85*
>
> *Parking at $4.50*
>
> [*Sic* throughout]

[3] Following denial of their grievances by the employer, the grievors each referred the matter to adjudication under paragraph 209(1)(*a*) of the *Public Service Labour Relations Act* ("the *Act*"), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22. The references to adjudication were received by the Public Service Labour Relations Board ("the Board") on March 27, 2006.

[4] I have been appointed by the Chairperson of the Board, under paragraph 223(2)(*d*) of the *Act*, to hear and determine these references as an adjudicator.

[5] At the hearing, both parties asked that I remain seized of this matter following issuance of a decision in the event that the parties encounter difficulties in implementing corrective action, should I order corrective action. I agreed to this procedure.

Summary of the evidence

[6] The grievors and the employer agreed at the outset of the hearing to rely on the three individual grievance forms and the employer's responses to these grievances (all on file) as the factual basis for this hearing. Neither party led additional evidence through witnesses. The only exhibit admitted at the hearing was the collective agreement between the employer and the UCCO-SACC-CSN, Group: Correctional Services (Non-Supervisory and Supervisory), that expired May 31, 2002 (Exhibit G-1).

[7] The agreed facts are brief. The grievors attended an adjudication hearing on October 18, 2005, in the matter subsequently decided in *Rose v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 17, under summonses issued by the Chairperson of the Board at the request of the grievor in that case. October 18, 2005, was a scheduled day of rest for each of the three grievors in the current case. Following the hearing, the grievors requested payment of overtime for October 18, 2005, and reimbursement of certain travel and meal expenses incurred on that date. The employer denied the requests on the grounds that clause 23.01 (Court Duty) of the collective agreement cited by the grievors as the authority for their request did not apply to the situation faced by the grievors on October 18, 2005. The grievors challenged the employer's determination through the grievance procedure, but were unsuccessful.

Summary of the arguments

For the grievors

[8] The grievors took note of the adjudicator's ruling in *Stevens et al. v. Treasury Board (Solicitor General Canada – Correctional Service)*, 2004 PSSRB 34, which the employer presents as being "on all fours" with the case now before me and as a "highly persuasive" precedent for the purposes of my ruling.

[9] Messrs. Brown and Beatty (*Canadian Labour Arbitration*, 4th ed., at para 2:3220 and 1:3100) outline the relevant arbitral doctrine concerning the weight to be assigned to another decision on the same collective agreement interpretation issue. From this doctrine, the grievors conclude that, to argue their case successfully, they ought to demonstrate that the adjudicator in *Stevens et al.* was clearly wrong when he found in similar factual circumstances that clause 23.01 (Court Duty) does not apply to a situation where employees attend an adjudication hearing under summons on a day of rest. The grievors contend that the adjudicator was, in fact, clearly wrong.

[10] The adjudicator in *Stevens et al.* made a determination that is impossible in law, by ignoring the first rule that arbitrators implicitly follow in every case: i.e. the rules of the English language and the basic rules of English grammar. The adjudicator did not properly contemplate the distinctions between the leave provisions found in clauses 14.06 and 30.17 of the collective agreement and the court duty provisions found in clause 23.01:

. . .

Adjudication

14.06 *When operational requirements permit, the Employer will grant leave with pay to an employee who is:*

(a) a party to the adjudication,

(b) the representative of an employee who is a party to an adjudication,

and

(c) a witness called by an employee who is a party to an adjudication.

. . .

ARTICLE 23

COURT DUTY

23.01 *An employee, who is required by subpoena or summons to attend as a witness, or a defendant, or a plaintiff in an action against an inmate or any other person, in any of the proceedings specified in Clause "30.17", sub-clause "C" of this Agreement, as a result of the employee's actions in the performance of his or her authorized duties, shall be considered on duty and shall be paid at the applicable rate of pay and shall be reimbursed for reasonable expenses incurred for transportation, meals and lodging as normally defined by the Employer.*

. . .

Court Leave

30.17 *The Employer shall grant leave with pay to an employee for the period of time he or she is required:*

(a) to be available for jury selection;

(b) to serve on a jury;

(c) by subpoena or summons to attend as a witness in any proceeding held:

(i) in or under the authority of a court of justice or before a grand jury,

(ii) before a court, judge, justice, magistrate or coroner,

> *(iii) before the Senate or House of Commons of Canada or a committee of the Senate or House of Commons otherwise than in the performance of the duties of the employee's position,*
>
> *(iv) before a legislative council, legislative assembly or house of assembly, or any committee thereof that is authorized by law to compel the attendance of witnesses before it,*
>
> *or*
>
> *(v) before an arbitrator or umpire or a person or body of persons authorized by law to make an inquiry and to compel the attendance of witnesses before it.*
>
> . . .

[11] There is apparently no dispute between the parties in the circumstances of this case that an adjudication hearing can comprise a proceeding ". . . before an arbitrator or umpire or a person or body of persons authorized by law to make an inquiry and to compel the attendance of witnesses before it" under clause 30.17(c)(v). By virtue of the cross-reference to clause 30.17(c) in clause 23.01 (Court Duty), adjudication hearings as well as the other types of proceedings listed under clause 30.17(c) are brought within the intended ambit of court duty, provided the conditions outlined in clause 23.01 are met. The main condition is that the employee who claims court duty is compelled under summons as a witness ". . . in an action against an inmate or any other person . . . ." An adjudication hearing is such an action. "Any other person" means anything under the sun, including another employee who is a party to an adjudication. Thus, according to clause 23.01, an employee summoned as a witness to an adjudication hearing for another employee ". . . shall be considered on duty and shall be paid at the applicable rate of pay and shall be reimbursed for reasonable expenses incurred for transportation, meals and lodging as normally defined by the Employer".

[12] Court duty is different from leave under either clauses 14.06(c) or 30.17(c). "On duty" status in a court duty situation under clause 23.01 confers possible entitlements to premium compensation and payment of expenses not normally available under either of the two leave provisions.

[13] If an employee is scheduled to work on the day he or she is summoned to appear as a witness in an adjudication hearing, he or she must apply for leave to be

away from work under either clause 14.06(c) or 30.17(c)(v). When an adjudication hearing day falls on an employee's day of rest (i.e. when the employee is not on duty), there is no need to apply, or possibility of applying for, leave. Neither clause 14.06(c) nor 30.17(c)(v) comes into play. Instead, the parties intended that an employee on a day of rest be deemed on duty under clause 23.01 (Court Duty), and compensated and reimbursed for expenses accordingly.

[14] The parties intended that the benefits of court duty apply in the special circumstances of ". . . an action against an inmate or any other person. . . ." Unfortunately, the adjudicator in *Stevens et al.* interpreted "an action" in a very particular way:

. . .

> *[20] As can be seen by the text of Article 23, to qualify under Article 23 and be considered on duty, an employee has to be required by subpoena to attend in an action against an inmate or any other person in any of the proceedings specified in subclause 30.17(c) of the agreement. Can it be that an arbitration hearing such as in the Dosanjh v. Treasury Board (Solicitor General Canada - Correctional Service) (supra) hearing is an action as described in Article 23?*
>
> *[21] It is a standard rule of interpretation of a collective agreement that each word should be given some meaning to avoid redundancy. It follows that it cannot be all the proceedings specified in subclause 30.17(c) of the agreement, as it is clearly specified in Article 23 that it has to be "an action against an inmate or any other person". In the French text it states: « un procès contre un détenu ou toute autre personne. » By adding the condition that it has to be an action . (« un procès .»), the parties clearly wanted to make a distinction so that employees would be considered on duty and would be paid for the time that they attended such proceedings even if they were off duty for that period.*
>
> *[22] I agree with Mr. Newman that the proceedings described in Article 23 would be of the nature of an inquiry after an inmate or a guard has been charged. An action against ., (un procès contre .) is a different procedure than an adjudication hearing where a former employee is grieving his termination. I do find with the evidence before me, that the adjudication hearing Dosanjh v. Treasury Board (Solicitor General Canada - Correctional Service) (supra) is a proceeding before a person described in paragraph 30.17(c)(v) but is not an action (« un procès ») against an inmate or any person, as in Article 23.*

. . .

[*Sic* throughout]

[15] By restricting the type of "action" covered by clause 23.01 (Court Leave) to one where an inmate or guard has been charged, the adjudicator, in effect, interpreted the phrase ". . . in any of the proceedings specified in clause "30.17", subclause "C" " as if it read "after an inmate or guard has been charged". Many, if not most, of the types of proceedings listed under subclause 30.17(c) never involve charges against an inmate or guard, yet clause 23.01 (Court Duty) clearly cross-references "any of the proceedings [emphasis added]" listed in clause 30.17(c). Interpreting the plain English of this cross-reference, it can only mean that the parties intended that "any of the proceedings [emphasis added]" refer to all of the proceedings listed under clause 30.17(c)(v) where an employee attends under summons and is not in a leave situation. By failing to give the plain English meaning to "any of the proceedings [emphasis added]", the adjudicator was clearly wrong. He has given a limited interpretation to the type of "action" contemplated in the first part of clause 23.01 that is impossible given the subsequent reference to "any of the proceedings [emphasis added]" listed in subclause 30.17(c). Simply put, some of the elements of clause 30.17(c) cannot be ". . . an action against an inmate or any other person. . .", yet the parties have specified that "any of the proceedings" listed in clause 30.17(c) can trigger a court duty situation.

[16] To illustrate their argument, the grievors described the different types of proceedings listed in clause 30.17(c) that do not, or cannot, involve charges against an inmate or guard.

[17] The grievors asked that I rule that the adjudicator in *Stevens et al.* was clearly wrong in finding that an adjudication hearing is not among the types of "action" for which court duty is a possibility. On the basis of their interpretation of clause 23.01 (Court Duty), and its cross-reference to clause 30.17(c), they asked that I grant their grievances.

For the employer

[18] The employer pointed to the possible effects of a decision granting what the grievors sought. If the grievors' interpretation of clause 23.01 (Court Duty) prevails, the bargaining agent could arrange affairs in every adjudication case so that witnesses who are on their days of rest are summoned to attend, and thus become entitled to "on

duty" status in every situation, whether or not they actually testify. As "on duty" status under clause 23.01 is more advantageous than leave status, the bargaining agent would have no need or reason to rely on the leave provisions expressed in clauses 14.06 and 30.17 of the collective agreement for its witnesses in these circumstances. By seeking summonses, the bargaining agent could render the leave provisions redundant. The employer argued that the parties did not intend such a situation.

[19] My decision in this case, however, need not rely on predicting the possible effects of a decision that adopts the grievor's reasoning. Instead, the test is whether the grievors have persuaded me that the adjudicator's ruling in *Stevens et al.* was clearly wrong.

[20] On the question of the significance that I should give to the adjudicator's ruling in *Stevens et al.*, the employer referred me to excerpts from three adjudication decisions: *Larivee v. Treasury Board (Department of the Environment – Parks Canada)*, PSSRB File No. 166-02-10885 (1982) (QL), *MacArthur v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-18414 (1989) (QL), and *Breau v. Treasury Board (Justice Canada)*, 2003 PSSRB 65. Drawing on these decisions, the employer argued that I would have to find that the adjudicator's ruling in *Stevens et al.* was unreasonable, untenable, unsupportable in law, clearly wrong or manifestly wrong before I take a different path. As a matter of policy, I should be reluctant to deviate from a recent decision involving the same parties and the same issue, especially where there has been no application for judicial review of the decision before the Federal Court.

[21] Had the decision in the adjudicator's ruling in *Stevens et al.* been referred to the Federal Court, the standard of review would have been that of "patent unreasonableness" or that the decision was "clearly irrational". The employer does not know why the grievor in *Stevens et al.* did not proceed to the Federal Court. It conjectures that the grievor's bargaining agent understood that the decision could not be attacked at the appropriate standard of review. In the current case, the bargaining agent is seeking to do what it did not do directly after *Stevens et al.* was issued. For policy reasons, I should not encourage this way of proceeding. I should not be put in the position of acting as the Federal Court. I should, nonetheless, take "a more distant perspective", because I am not, in effect, hearing this issue at first instance. The test is not whether the grievor's argument is relatively more attractive or whether, on balance, I prefer the grievors' interpretation. I should only deviate from *Stevens et al.* if I form

the clear conviction that the adjudicator was unreasonable or clearly wrong. In policy terms, it is appropriately rare that one adjudicator deviates from another.

[22] In any event, the adjudicator's decision in *Stevens et al.* was a good decision that made sense in law and in policy.

[23] Under the grievors' argument, all you have to do is show that a proceeding falls under clause 30.17(c) and court duty under clause 23.01 will necessarily result. This is not what the parties say in their collective agreement, and not what the adjudicator found in *Stevens et al.* Clause 23.01 is qualified. First, there must be a summons or subpoena that compels the attendance of an employee as a witness, defendant or plaintiff. Second, and critically, there must be ". . . an action against an inmate or any other person . . . ." The second qualification is met, for example, where an employee is summoned to a disciplinary court in a prison, to a proceeding where an inmate sues a correctional officer, to a court considering a charge of assault, or to a judicial inquiry. In these types of special cases, it is in the interest of both the employer and the bargaining agent to provide the additional benefits contemplated by clause 23.01 (Court Duty). The employer and the bargaining agent wanted special protections for employees in those types of circumstances particular to the work of correctional officers. This is why they designed clause 23.01, a clause that, to the best of the employer's knowledge, does not appear in other collective agreements. It was not the intent of the parties that this special benefit apply to an ordinary adjudication hearing. There is no reason why, in respect of ordinary adjudication hearings, correctional officers should have access to benefits that are not available to other classes of employees.

[24] In the wording of the second qualification, ". . . an action against an inmate or any other person . . . .", the *eiusdem generis* rule requires that "any other person" be interpreted as modifying "an inmate". It is not wide open. The type of action that qualifies for court duty under clause 23.01 must involve an inmate or "any other person" of a similar nature.

[25] It was clearly open to the adjudicator in *Stevens et al.* to find that court duty is limited to those particular "actions" that arise in the work of correctional officers. The reasoning expressed in paragraphs 21 and 22 of his decision is correct and consistent with the intent of the parties. Even if I should feel that there is some ambiguity in the wording of clause 23.01 (Court Duty), I cannot find that the adjudicator in *Stevens et*

al. was clearly wrong or that his reasoning was egregiously flawed. His decision must be given considerable deference and latitude.

[26] On this basis, the grievances should be dismissed.

Reply of the grievors

[27] I should read no significance into the fact that the decision in *Stevens et al.* was not subject to judicial review. In this jurisdiction, a grievance belongs to the individual grievor. That grievor may not want to go to judicial review.

[28] The grievors rejected the employer's argument that their interpretation of clause 23.01 (Court Duty) would provide to them a special set of benefits not available to others. Through clause 23.01, the parties have treated adjudication hearings exactly the way they treat the everyday work of correctional officers. They have reproduced the regime from the shop floor to the adjudication hearing. This approach corrects the fundamentally unfair situation where an employee only receives pay to attend an adjudication hearing where he applies to take leave. Treating attendance at a hearing on a day of rest in the same way is not an extraordinary benefit, but rather a reasonable and balanced response to situations that correctional officers face ". . . in the performance of [their] authorized duties . . . ."

[29] If the employer were right about its interpretation of clause 23.01 (Court Duty), there would have been no need to incorporate a cross-reference to clause 30.17(c). The reference is there, however, and I must give it the plain meaning that the parties intended.

[30] Drawing from *Canadian Labour Arbitration* (para 2:3220 and 1:3100), I must come to a decision independently of *Stevens et al.* I must evaluate the case presented by the grievors on its merits, and should not accord it deference as if in a judicial review process. The grievors accept that I should not discard *Stevens et al.* without care, but I can set it aside if I find that it was wrong. I do not have to find that its reasoning was patently unreasonable or meets any of the other high-threshold qualifiers suggested by the employer.

Reasons

[31] The facts in these references to adjudication, summarized above, are not in dispute. The issue before me is commonly understood by the parties: Did the employer

violate clause 23.01 (Court Duty) when it denied the grievors' payment of overtime and reimbursement of certain expenses on the occasion of their attendance under summons at an adjudication hearing on October 18, 2005?

[32] I note that one of the three grievors, Mr. Lewis, also based the claim stated in his grievance on clause 30.17 (Court Leave). At the hearing, it became apparent that he was not pursuing an entitlement under clause 30.17 additional to or different from the benefit that allegedly arises under clause 23.01 (Court Duty). Clause 30.17 comes into play in this matter only by virtue of being cross-referenced in clause 23.01, and is not independently at issue.

[33] Both parties acknowledge that *Stevens et al.*, involving the same employer and bargaining agent, the same provisions of the collective agreement, and closely similar facts, plays an important role in this case. Neither party sought to distinguish the circumstances of the current references to adjudication in any meaningful way from those in *Stevens et al.*

[34] What is most certainly at dispute between the parties is whether the adjudicator in *Stevens et al.* properly interpreted clause 23.01 (Court Duty). The grievors argue that the adjudicator was, quite simply, wrong. The employer contends the opposite. The employer urges me not to reach a conclusion about the interpretation of clause 23.01 different from *Stevens et al.* unless I have been strongly persuaded by the grievors that there was something quite wrong in the reasons given in that decision.

[35] No application for judicial review was made against *Stevens et al.* In the absence of such an application, the employer in this case cautions that the grievors should not now ask me, in effect, to review *Stevens et al.* in the place of the appropriate judicial body, the Federal Court. I understand the reasons for this concern. I attach, however, limited significance to the fact that the grievors in *Stevens et al.* did not seek judicial review. As the current grievors have argued, there may be various reasons why the employees or the bargaining agent in *Stevens et al.* declined the opportunity to proceed to the Federal Court.

[36] The reality nevertheless remains that the decision in *Stevens et al.* stands unchallenged at this time and, given the attention accorded to it by the parties at this hearing, looms very large in the case before me. Should it be given deference? If so, how much deference should I accord it?

[37] I must note, first and foremost, that this hearing is not a substitute for the appropriate judicial review process. I am not standing in the stead of the Federal Court, and am not bound to apply a standard of review that the Court might have, or would have, adopted if it had been asked to examine *Stevens et al.* Stated simply, it is not my role to determine whether *Stevens* et al. should continue to stand or be set aside.

[38] My role, instead, is to determine the merits of the grievances before me, relying on the provisions of the collective agreement and the submissions of the parties. Those submissions obviously lead me to consider the same words in the collective agreement and the same linkages between clauses that the adjudicator in *Stevens et al.* had to sort through. In this task, I cannot ignore how *Stevens et al.* answered the question, but I can reach a different conclusion. In such an event, it might be inferred that I have found *Stevens et al.* to be wrong, but that would not be my intent. I believe that it is possible to come to a different finding than a previous decision for several possible reasons. If this happens, it is for the Federal Court to decide whether my reasoning is right or wrong, should a party ask it to do so.

[39] For this reason, I prefer not to comment at length on the arguments made by the grievors and the employer about the degree of deference to be given to the decision in *Stevens et al.* To be sure, the parties themselves were not highly disciplined in the terms they used to describe the appropriate threshold during argument. Both, at points, commonly used the expression “clearly wrong”. At other times, they diverged in their terminology to a weaker term in the case of the grievors (i.e. “wrong”), and to various stronger terms in the case of the employer (e.g. “unreasonable”, “untenable” or “egregiously flawed”).

[40] Whatever the appropriate term may be, it is obvious to me that I must provide a sound rationale for my decision, particularly should I depart from the conclusions in *Stevens et al.* Case law from the former Board cited by the employer outlines the policy reasons why prior decisions are, and generally should be, considered persuasive. The extracts from *Canadian Labour Arbitration* offered by the grievors describe attitudes among private arbitrators that are not entirely dissimilar. I am happy to associate myself with the sources offered by both parties.

[41] The basis of my decision must begin with the words found in clause 23.01 (Court Duty):

> ***23.01*** *An employee, who is required by subpoena or summons to attend as a witness, or a defendant, or a plaintiff in an action against an inmate or any other person, in any of the proceedings specified in Clause "30.17", sub-clause "C" of this Agreement, as a result of the employee's actions in the performance of his or her authorized duties, shall be considered on duty and shall be paid at the applicable rate of pay and shall be reimbursed for reasonable expenses incurred for transportation, meals and lodging as normally defined by the Employer.*

Under the normal rules of interpretation, I must give plain meaning to these words on their face, unless I uncover an ambiguity or conflict.

[42] The French text of clause 23.01 was reported in *Stevens et al.* and referred to by the adjudicator in his reasoning:

> ***23.01*** *L'employé-e qui est tenu d'assister, sur assignation ou citation, comme témoin, défendeur ou plaignant à un procès contre un détenu ou toute autre personne dans quelconque procédure précisée au paragraphe 30.17, sous-alinéa « C » de la présente convention, en raison des actions de l'employé-e au cours de l'exercice de ses fonctions autorisées, doit être considéré comme étant en fonction et être rémunéré au taux de traitement applicable, et doit être remboursé de ses dépenses raisonnables de transport, de repas et de logement, déterminées habituellement par l'Employeur.*

[43] I am satisfied that there is no need to determine whether an adjudication hearing is among the classes of proceedings listed in clause 30.17(c), which is cross-referenced in clause 23.01. During the hearing, the employer did not dispute that an adjudication hearing is, or could be found, in this list, specifically in paragraph 30.17(c)(v):

> ***30.17*** *The Employer shall grant leave with pay to an employee for the period of time he or she is required:*
>
> . . .
>
> *(c) by subpoena or summons to attend as a witness in any proceeding held:*
>
> . . .
>
> *(v) before an arbitrator or umpire or a person or body of persons authorized by law to make an inquiry and to compel the attendance of witnesses before it.*

[44] The critical issue is whether an adjudication hearing can be ". . . an action against an inmate or any other person . . . ." within the meaning of clause 23.01. The adjudicator in *Stevens et al.* answered this issue in the negative. He found, at para 22, that:

> [22] . . . *An action against ., (un procès contre .) is a different procedure than an adjudication hearing where a former employee is grieving his termination. I do find . . . that the adjudication hearing . . . is a proceeding before a person described in paragraph 30.17(c)(v) but is not an action (« un procès ») against an inmate or any person, as in Article 23.*
>
> [*Sic* throughout]

[45] Two elements require closer scutiny: the noun "action" and the modifying phrase "against an inmate or any other person". As the parties have not explicitly defined the terms used here in their collective agreement, I have looked to standard reference sources for assistance.

[46] *The New Shorter Oxford English Dictionary* (1993) defines the word "action" as, *inter alia*:

> *The taking of legal steps to establish a claim or obtain remedy; the right to institute a legal process . . . . A legal process or suit.*

In this ordinary sense of the word, there is, in my view, no strong reason why an adjudication hearing should not be viewed as an "action". An adjudication hearing is a process provided under law by which a party makes a claim or pursues a remedy. Similarly, I do not find that the French word "procès" necessarily has an exclusionary effect. The latter, according to *Le Nouveau Petit Robert*, means:

> *Litige soumis, par les parties, à une jurisdiction ⇨ affaire, instance, procèdure.* Procès civil, Procès criminel, politique. . . .

"Litige", in turn, is defined as:

> *Contestation donnat matière à un process.* Litiges soumis aux tribunaux ⇨ *affaire, cause, procès . . . .*

[47] If an adjudication hearing is an "action", is it an action ". . . against an inmate or any other person . . . ."? The grievors in this case attended the adjudication hearing in

the matter decided in *Rose* as witnesses under summons. Was *Rose* an action ". . . against an inmate or any other person . . . ."? In *Rose*, a correctional officer grieved the termination of his employment as a result of his involvement in a security incident involving an inmate. The two parties were Timothy Rose and the employer on behalf of the CSC. The action was taken by Mr. Rose against the decision of his employer. In my view, for this action to qualify as an action ". . . against an inmate or any other person . . . .", I must find that the employer, the party against whom the action was taken, is "another person" within the meaning of this phrase in clause 23.01.

[48] The grievor argues that the phrase "any other person" has a wide open meaning and can include anyone "under the sun" or any entity. The employer counterargues that the words must be given restricted meaning under the *eiusdem generis* rule of statutory interpretation. The "other person" must be a person of a similar nature to "an inmate", the noun that the phrase "or any other person" modifies.

[49] I understand the *eiusdem generis* rule to mean that, where general words follow a specific word(s), the general words should be interpreted in light of the specific word. They should be seen to be "of the same kind" as the specific word(s).

[50] I believe that it stretches the imagination to hold that the parties intended the words "any other person" to mean anyone or any entity "under the sun", as the grievors have argued. The meaning of the term must make sense within the context of clause 23.01 and the wider architecture of the collective agreement. From this perspective, should I apply the *eiusdem generis* rule, I must determine whether the employer is a person of a similar nature to, or of the same kind as, "an inmate" within the context of clause 23.01, bearing in mind the relationship of clause 23.01 to the rest of the collective agreement.

[51] I have been told by the employer that the provision for court duty in clause 23.01 is not found in other collective agreements for other classes of employees. While I have not conducted a comprehensive survey to verify this point, I have no reason to challenge the statement - the grievors did not. The employer has argued that clause 23.01 exists for reasons specific to the context of work performed by correctional officers. The clause is present in the collective agreement as a unique feature in addition to the provision for court leave found in clause 30.17, the latter being an entitlement that *is* available to other classes of employees. I accept these points as persuasive support for the view that the parties intended the wording of clause 23.01,

including the phrase “an action against . . . or any other person”, to apply to something specific to the work of correctional officers or specific to their workplace. They intended that there are certain types of proceedings that correctional officers may be compelled to attend, specific to their work, that merit the special benefits associated with being accorded “on duty” status. The link to the specific nature of the work or workplace is modestly reinforced by the presence of the further words “as a result of the employee's actions in the performance of his or her authorized duties” in clause 23.01, although I do not find that these words in and of themselves determine the issue.

[52] In the specific context of the work of correctional officers or of their workplace, I am not convinced that the employer, acting as a party to an adjudication hearing where an employee is challenging the termination of his employment, can be interpreted as being an “other person” within the meaning of the clause 23.01 phrase “an action against an inmate or any other person”. There is nothing in a reference to adjudication contesting a disciplinary termination that, per se, is specific to the work of correctional officers or their workplace. Clearly, the details and circumstances of a reference might well reflect conditions specific to corrections work, but the action of referring a termination decision to adjudication itself is not. In addition, were I to apply the *eiusdem generis* rule as urged by the employer, I believe it would be difficult to find that the employer in this context is another person of a similar nature to, or of the same kind as, “an inmate”.

[53] It does, in my opinion, remain possible that an action against the employer could qualify in some other circumstances specific to the correctional workplace, as, perhaps, in the situation of a civil suit launched by an inmate against CSC management exercising the powers of the employer. Whether any such action could involve an adjudication hearing that qualifies as “an action” for the purposes of clause 23.01 remains an open question.

[54] For the foregoing reasons, I find that the adjudication hearing in *Rose* was not “. . . an action against an inmate or any other person . . . .” within the meaning of clause 23.01.

[55] The grievors have argued that the cross-reference to “. . . <u>any</u> of the proceedings specified in Clause "30.17", sub-clause "C" of this Agreement . . . . [emphasis added]” must mean, in the ordinary construction of the English language, that attendance at all

of the proceedings listed in clause 30.17(c), including adjudication hearings under clause 30.17(c)(v), can trigger court-duty status. In my view, the presence of the word "any" in the cross-reference probably does create some confusion. I do not accept, however, that there is sufficient reason in the presence of this word alone to conclude that the parties intended that attendance as a witness under summons at any and all of the classes of proceedings outlined in clause 30.17(c) gives rise to an entitlement under clause 23.01. I must give meaning to the conditional or modifying phrase "an action against an inmate or any other person" in clause 23.01. Were I to accept the grievors' argument, I believe I would be reading clause 23.01 as if this phrase were not included or had no significance. I believe that the most reasonable interpretation of the cross-reference to ". . . any of the proceedings specified in Clause "30.17", sub-clause "C" of this Agreement . . . .", which is consistent with what I take to be the intent of the parties, is that the action triggering court duty must also be "a proceeding listed in subclause 30.17(c)(v) [emphasis added]". The cross-reference is a device used by the parties for simplicity. Its wording might be clearer, but I cannot give the words that do appear the significance argued by the grievors.

[56] As I have found that the adjudication hearing in *Rose* was not ". . . an action against an inmate or any other person . . . ." within the meaning of clause 23.01, I must find that the employer did not violate the collective agreement when it denied the grievors compensation and reimbursement of expenses in respect of their attendance under summons as witnesses at the hearing in *Rose*.

[57] With this finding, I come to the same result as the adjudicator in *Stevens et al.*, though, I believe, for somewhat different reasons.

[58] I wish to note, as an aside, that I am not unsympathetic to the proposition that there may be something unfair in requiring an employee to attend an adjudication hearing on a day of rest, under summons, without compensation or reimbursement of expenses. It is not, however, my role to decide this matter as an equity issue, but rather one of interpretation of the collective agreement language expressing the intent of the parties. Should the parties agree that attendance at an adjudication hearing of the type examined in *Stevens et al.* or *Rose* should qualify for "on duty" status in some or all circumstances, they may wish to address this matter in collective bargaining.

[59] I would further note, as a matter of information, that summonses issued by the Board under the *Act* in place since April 1, 2005, refer to the following requirement under section 248:

> ***248.*** *A person who is summoned by the Board, an arbitration board, a public interest commission or an adjudicator to attend as a witness at any proceeding under this Act is entitled to receive fees and allowances for so attending equal to those to which the person would be entitled if summoned to attend before the Federal Court.*

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

(The Order appears on the next page)

Order

[61] The grievances are denied.

November 20, 2006.

Dan Butler,
adjudicator