Date: 20060322

File: 166-02-35170

Citation: **2006 PSLRB 32**

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

GLEN CROSS

Grievor

and

TREASURY BOARD
(Royal Canadian Mounted Police)

Employer

Indexed as
Cross v. Treasury Board (Royal Canadian Mounted Police)

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

REASONS FOR DECISION

Before: Barry Done, adjudicator

For the Grievor: Lee Bettencourt, Professional Institute of the Public Service of Canada

For the Employer: Renée Roy, counsel

Heard at Regina, Saskatchewan,
January 31, 2006.

Grievance referred to adjudication

Background

[1] The grievor, Mr. Glen Cross, began his career with the RCMP in the Depot Division in Regina, Saskatchewan in July 1988 as a GS-STS-04 stores person, working a forty-hour week. On February 17, 1997, he transferred into the Armour shop and continued in his GS-STS-04 classification. His statement of duties was rewritten and sent for review to classification but no change was made to either group or level.

[2] Again, the statement of duties was rewritten and again, there was no change to the classification. This prompted Mr. Cross to grieve his classification on May 8, 2003, and a classification committee recommended in January 2004 that Mr. Cross' position, N1299-1653, be reclassified to the PG-02 group and level with an effective date of February 17, 1997.

[3] On January 29, 2004, the recommendation of the Classification Grievance Committee was approved and on the same day a letter was sent to Mr. Cross advising him of the results of his classification grievance (Exhibit G-3). Further, a letter of offer dated April 20, 2004, was sent to Mr. Cross, confirming: his promotion to the PG-02 group and level retroactive to February 17, 1997; the salary range for the PG-02 group and level; the fact that his rate of pay was to be determined in accordance with the "terms and conditions of employment regulations"; and, most importantly for the purposes of this grievance, that his ". . . scheduled hours of work will be 37.5 hours per week . . . ." Mr. Cross signed and dated the letter of offer on April 21, 2004, having first checked off "I accept your offer of employment" (Exhibit G-4).

[4] Mr. Cross testified that he did his own rough calculations (Exhibit G-11) using collective agreements as well as contacting several individuals in the Pay and Benefits section to determine what monies he was owed as a result of his retroactive reclassification. It was the information provided at that time that gave rise to the present grievance (Exhibit G-2), presented on June 2, 2004, stating: "I have not received payment at the appropriate PG rate of pay for all hours worked. [My emphasis]".

[5] As corrective action, Mr. Cross asks: "That I receive payment at the appropriate PG rate of pay for all the hours I have worked since February 17, 1997 (the effective date of my reclassification)."

[6] The parties agreed before me that the only issue they wished to be determined is the hours of work issue, or, did the RCMP compensate Mr. Cross for having worked 40 hours per week from February 17, 1997, to April 20, 2004, although his new PG Collective Agreement (Exhibit G-1) required him to work only 37.5 hours? Mr. Cross believes that he is still owed 2.5 hours per week for 52.176 weeks per year for 7 years, or roughly nine hundred and ten hours over and above what he was paid (Exhibits G-8 and G-9) as a result of his promotion from GS-STS-04 to PG-02. The RCMP disagrees and says that it relied upon Treasury Board's advice on pay entitlement in this matter and, more specifically, the *Services Pay Directive* 1991-056(42) (the Directive) dated September 24, 1991, (Exhibit G-6), and the *Public Service Terms and Conditions of Employment Regulations* (appended as Appendix A of the Terms and Conditions of Employment Policy, Exhibit G-12) (the Regulations), which came into effect on September 1, 1990.

[7] Mr. Cross testified on his own behalf and Suzanne Marchand-Bigras, Manager of Compensation, Analysis, Statistical Data and Interpretations, Collective Bargaining Unit, Treasury Board, testified for the employer. A total of eighteen exhibits were filed –15 by the grievor and three by the employer.

[8] On April 1, 2005, the *Public Service Labour Relations Act*, 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*").

Summary of the evidence

[9] Mr. Cross testified that he was told in reply to his query about his entitlement to be paid for the difference in hours of work that those hours were "donated time" and that he would not be paid for them. When he asked what was their authority not to pay him, he was given a copy of an e-mail from Lise Lacroix, Compensation Operations Group, NCPC to Pat Trail, Team Leader, Compensation Services NWR SK, (Exhibit G-5), explaining the Directive and a copy of the Directive itself. He was told that the pay procedure would be to look at what he would have been paid as a PG-02, subtract his earnings as a GS-STS-04 and pay him the difference.

[10] A document detailing Mr. Cross' compressed work week schedule for 2000-2004 was presented (Exhibit G-7). On the 2004 schedule, above Mr. Cross' supervisor's signature, is located the following noteworthy indication: "Effective: 2004-04-20 becomes 37.5 hours/week". Mr. Cross was not cross-examined.

[11] Next to testify was Ms. Marchand-Bigras, who stated that she has held her current position since November 2006 and that part of her duties included interpreting the Regulations and the employer's policies to ensure a consistent approach. She indicated that the proper method of calculating Mr. Cross' pay entitlement was first to determine if the reclassification was a promotion. To do this, she considered section 24 of the Regulations and what constitutes a promotion. Doing the arithmetic (Exhibit E-2) proved that, indeed, it was a promotion. Then it was necessary to determine at which increment in the PG-02 rates of pay Mr. Cross should be placed. She determined that it was at the first increment, $35,969. Finally, she determined how much money was owed over seventeen periods where the rate of pay was constant, calculated what would have been paid in those periods at the PG-02 rate of pay, subtracted what was paid at the former GS-STS-04 rate of pay, and noted the difference in each period. The witness concluded by observing that "because of the way we convert hourly rate of pay into an annual salary, we do take into account that the employee is working 40 hours per week (Exhibit E-2)." To convert an hourly salary to an annual salary, one must multiply the hourly rate by the number of hours worked and by the number of weeks per year. In Mr. Cross' case $13.14/hour x 40 hours/week x 52.176 weeks/year.

[12] Her cross-examination was conducted jointly by the grievor and his representative.

[13] During cross-examination, Ms. Marchand-Bigras noted that the role of the local pay officers is to determine if there is a promotion and then prepare input on-line for the regional pay officers. She acknowledged that she had not read any documents prepared by the local pay officer and that PG-02's work a 37.5 hour week as compared to GS-STS-04's who work a 40 hour work week, as Mr. Cross did throughout the retroactive period. When asked why Mr. Cross' Statement of Earnings dated May 5 and 11, 2004 (the cheque stubs for retroactive pay) (Exhibits G-8 and G-9) refer to a 37.5 hour work week, she replied that those fields are permanent fields and that the hours attached to a classification could not be changed.

[14] Mr. Cross asked the witness whether the daily rate she used in her calculations was eight hours per day. She replied in the affirmative. Finally, he asked her whether she had used example 2 in Annex B of the Directive as a basis for her calculations, to which she replied that she had.

Summary of the arguments

A. Submission for the grievor

[15] Mr. Cross was made a PG-2 retroactive to February 17, 1997. Although the letter of offer, does not establish any retroactivity for hours of work, it specifies that the weekly hours of work are 37.5 as of April 20, 2004. Prior to April 20, 2004, the grievor had worked 2.5 hours per week more than the hours required of a PG. Article 45.02 of the PG Collective Agreement, refers to pay for services rendered as per the annual rates of pay provided in Appendix A. The Directive also states that its pay input procedures must be followed, and example 2 in its Annex B which is similar to the grievor's situation, shows that one must use the actual hours worked.

[16] The employer's witness had not read any locally prepared documents and, as the employer chose not to call any local Pay and Benefits officers the union had no opportunity to question them.

[17] The document detailing Mr. Cross' compressed work week schedule shows his weekly hours of work as 40, yet the employer had failed to compensate him for additional hours worked. On the cheque stubs for retroactive pay, the weekly hours are shown to be 37.5 when the actual hours worked were 40, as proven by Mr. Cross' Statement of Earnings dated February 18, 1998 (Exhibit G-10). Mr. Bettencourt asserted that there was no way for an employee to verify whether the calculations found on pay stubs are correct and suggested that the fair approach was for Pay and Benefits to invite employees in Mr. Cross' situation in for an interview to explain their calculations

[18] Although the grievor accepts the PG-02 rate of pay of $35,969 as provided in his collective agreement and admits that his calculations of the difference in pay and those of the employer are "pretty close" though his were admittedly only rough, the fact remains that he has yet to be paid at the proper rate of pay for the nine hundred and ten hours that he worked. Despite Ms. Marchand-Bigras' explanation, Mr. Bettencourt is not satisfied that the employer has accounted for, in his words, "the

missing 910 hours", since the formula used by the employer does not factor in the fact that Mr. Cross worked eight hours per day. The union observed that the PG-02 beginning rate has nothing to do with the GS rates of pay. In conclusion, I was referred to the decision in *Rooney v. Treasury Board (Environment Canada)*, PSSRB File No. 166-2-25979 (1995).

B. Submission for the employer

[19] Ms. Roy began by pointing out that the onus of proof in this case rests with the grievor and has not been met. In reply to Mr. Bettencourt's submission, she said the "missing" 2.5 hours are to be found in the formula used to convert hourly-paid employees to annually-paid employees. The employer has taken his forty hour work week into account. Ms. Roy compared the placing of Mr. Cross into the PG rates with the example of a promotion from a GS-STS-05 position to a PG-02 position (Exhibit E-3) and explained that, because the difference in salary in Mr. Cross' case was so substantial, he could only be placed at the first step as opposed to a GS-STS-05 who would be placed at the third step. In any case, she maintains that all calculations concerning Mr. Cross complied with the Regulations and the Treasury Board policy and that there must be one set of rules for all and those rules must not vary because of their differing impact.

[20] Ms. Roy believes that the decision in *Rooney (supra)*, is not helpful as no explanation was given for the PG rate of $18.30 per hour. There may have been an error in the calculation in that case and it was not a precedent. As well, I should not make much of the grievor's testimony about donated time since what was important was Ms. Marchand-Bigras' testimony that Mr. Cross' forty hours were taken into account. Moreover, a comparison of the employer's calculations to the calculations on the cheque stubs for retroactive pay shows that they would have been interpreted just as Ms. Marchand-Bigras had interpreted them, since the numbers were roughly the same.

[21] The problem with the grievor's approach is that he suggests that the conversion be done twice, both in the front and back end, first to calculate PG annual salary and then to convert the annual to an hourly rate. Although Mr. Bettencourt argues that example 2 in Annex B of the Directive is a formula that provides for the actual hours worked, in fact it does not do so. The reference made to the pay stubs which appear to conflict as to the hours of work (37.5 and 40) was easily explained by Ms. Marchand-

Bigras as hours that are fixed and attached to the classification and cannot be altered. Ms. Roy concluded by stating that the manner of calculation in any event is not part of the grievance and is not before me today. The sole issue which is before me is the difference in hours of work.

[22] No reply argument was made.

Reasons for decision

[23] As stated earlier, the issue that the parties have agreed is before me is the hours-of-work issue: whether Mr. Cross has been correctly remunerated retroactively considering the different hours of work. To determine that, one must consider what impact a retroactive reclassification has on collective agreement provisions, including but not limited to hours of work. Does a retroactive reclassification extend to virtually all provisions of a collective agreement, or is it limited to rates of pay only? If indeed it does impact on hours of work, as Mr. Cross believes, then how far back should retroactivity apply? To February 17, 1997, the effective date of the reclassification? To April 21, 2004, when Mr. Cross accepted the letter of offer? To January 29, 2004, when the classification committee's recommendation was confirmed? Or, as Ms. Roy contends, is there to be no impact on the hours of work?

[24] Only one case was submitted, that of the then Deputy Chairperson, Korngold Wexler, in *Rooney (supra)*. Although the facts are similar, involving a retroactive reclassification from an hourly-paid GS employee to an annually-paid PG employee, the issue was different. There, the issue was whether the difference in hours of work entitled the grievor to overtime pay. The employer paid Mr. Rooney at the straight time rate of a PG employee for the 40 hours per week that he worked during the retroactive period. The employer further recognized that as of the date of the letter offering the reclassification, Mr. Rooney's weekly hours of work were changed from 40 to 37.5.

[25] Mr. Rooney's grievance was denied, however, the following finding is noteworthy for the case at hand (p. 8):

> *. . . The provision concerning the normal hours of work is normative. Consequently, I must look at what was required of Mr. Rooney and what was the intention of the parties when they agreed to the retroactive reclassification. The*

> *provision providing for the normal hours of work cannot be changed retroactively the same way as can the rate of pay.*

[26] The *Rooney* decision *(supra)* concerns the time period from April 1, 1993, to January 18, 1994, a time when the Directive and the Regulations applied. If, as Ms. Roy argues and Ms. Marchand-Bigras testified, the objective of the Treasury Board policy is consistency, "one rule for all", to what am I to attribute the fact that Mr. Rooney was paid for having worked 40 hours, while Mr. Cross was not? There was no evidence led to the effect that the application of the rules had changed in the intervening decade (1994-2004), and Ms. Marchand-Bigras was unequivocal in her evidence that the applicable pay policies had not changed, at least since the dates of the Directive and the Regulations, which pre-date Mr. Rooney's grievance.

[27] Another perplexing consideration is the notion of control. The employer, under section 7 of the former *Act*, has exclusive control over the assignment of duties and the classification of positions. Clearly, had the position Mr. Cross transferred into on February 17, 1997, been properly classified (the duties of which according to the Classification Grievance Committee Report (Exhibit G-3) Mr. Cross' supervisor affirmed had not changed since February 17, 1997), Mr. Cross would have been required to work only those hours provided for by the PG collective agreement (37.5), rather than the hours required by the GS collective agreement (40), that should not have applied to him. Finally, in recognizing that Mr. Cross' position was not properly classified, should the RCMP have also addressed the issue of compensation for the different hours of work, as was done in Mr. Rooney's case?

[28] It seems clear to me from the evidence that the employer did not intend retroactivity to extend to the hours of work. On the contrary, the letter of offer and the document detailing his compressed work week schedule for 2000-2004 suggest the opposite. In fact, the April 20, 2004 letter of offer states: ". . . Your scheduled hours of work <u>will be</u> 37.5 hours per week . . . . [My emphasis]." This suggests a future condition, once the letter of offer is accepted: "As we require an acknowledgement of this offer, please sign and return this letter to the Public Service Staffing Unit . . . ."

[29] In addition, the document detailing Mr. Cross' compressed work week schedule for 2004, appears to be consistent with the employer's letter of offer due to the indication that only on April 20, 2004, do his hours of work become 37.5.

[30] Taken together, these documents also appear to be consistent with Pay and Benefits' interpretation of the Directive that was also transmitted to Mr. Cross (Exhibit G-5, paragraph 2):

> *When an employee is reclassified retroactively where there is a change in the hours of work, salary, and salary-related benefits such as overtime etc. are to be adjusted retroactively. The other provisions such as hours of work, leave etc... are to be adjusted from the date of the authorizing document which is the date on the letter of offer and not the effective date of the promotion.*

[31] What the employer intended to do, however, is not dispositive of the issue. A look at *Rooney (supra)* as well as the case law referred within it is helpful. There, the then Deputy Chairperson Korngold Wexler considered retroactivity in relation to the monetary versus the normative clauses, at page 6. She agrees with the findings of the adjudicator in *Arsenault v. Treasury Board (Department of National Defence),* PSSRB File No. 166-2-2109 (1976), where:

> *. . . the grievance was denied on the grounds that "when a collective agreement comes into force retroactively, only those clauses referred to as monetary clauses are retroactive" and "the normative clauses cannot be made retroactive unless explicit provision is made to this effect".* (p. 6)

[32] In *Arsenault (supra,* p. 9*)* it was found that:

> *. . . the designation of what constitutes normal working hours and what constitutes overtime comes under the category of normative clauses. . . Only these pay clauses, referred to as monetary clauses, can be retroactive.*

[33] I agree with this reasoning. Surely if hours of work can be changed retroactively, they can be decreased, as in Mr. Cross' case, or they can be increased. What would become of the PG employee who is retroactively classified in the GS group? That employee would have his hours retroactively increased. Using Mr. Cross' example, would he then owe the employer nine hundred and ten hours? The absurdity of this example, which could arise and is entirely beyond the control of the affected employee, weighs heavily in favour of the case law against making hours of work retroactive.

[34] Other than the evidence that Mr. Cross' statement of duties was rewritten twice and sent to be classified each time, there was no evidence to explain the 7 year delay in reclassifying his position. An employer ought not to be allowed to benefit from unduly delaying a process such as classification that is within its exclusive control. A concern to act in good faith behooves the employer in cases such as this to act promptly. However, I am mindful of several significant facts given in evidence that tend to diminish what seems to be the unfairness in the delay:

1. The bargaining agent is not alleging bad faith;

2. The grievor did not submit his grievance until May, 2003;

3. The grievor accepted, on April 21, 2004, the April 20, 2004, letter of offer. This offer, as stated earlier, confirms that his scheduled hours of work will be 37.5 hours per week. No mention is made that the offer includes any undertaking by the employer to back-date the hours of work. Indeed, this was acknowledged in the bargaining agent's submission.

[35] The recognition of the fact of the forty-hour work week is, as Ms. Marchand-Bigras testified, in the formula used to convert hourly-paid employees to annually-paid employees. This meets the employer's obligation under the Regulations and thus, I see no violation of the collective agreement.

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

(The Order appears on the next page)

Order

[37] The grievance is denied.

March 22, 2006.

Barry Done,
adjudicator