**Date:** 20060704

**Files:** 166-02-32231 and
33206 to 33247

**Citation: 2006 PSLRB 83**

*Public Service*
*Staff Relations Act*

Before an adjudicator

BETWEEN

**WILLIAM A. APPLETON ET AL.**

Grievors

and

**TREASURY BOARD**
**(Department of National Defence)**

Employer

Indexed as
*Appleton et al. v. Treasury Board (Department of National Defence)*

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

**REASONS FOR DECISION**

***Before:*** Ken Norman, adjudicator

***For the Grievors:*** Carolyn LeCheminant-Chandy, Public Service Alliance of Canada

***For the Employer:*** Catherine Chagnon, Treasury Board Secretariat, and Anna Purkey, articling student

(Decided without an oral hearing)

Grievances referred to adjudication

[1] Between May 8, 2002, and April 9, 2003, the grievors (see list of names at the end of the decision) grieved the employer's interpretation of article 27 (Shift and Weekend Premiums) of the collective agreement signed by the Treasury Board and the Public Service Alliance of Canada on November 19, 2001, for the Operational Services Group bargaining unit (the "collective agreement"). More specifically, the grievors are claiming payment of a shift premium for hours worked between 4:00 p.m. and 8:00 a.m., pursuant to clause 27.01 of the collective agreement. Clause 27.01 provides as follows:

> ***27.01 Shift Premium***
>
> *An employee working on shifts will receive a shift premium of one dollar and seventy-five cents ($1.75) per hour for all hours worked, including overtime hours, between 4:00 p.m. and 8:00 a.m. The shift premium will not be paid for hours worked between 8:00 a.m. and 4:00 p.m.*
>
> ***Effective August 5, 2002***
>
> *An employee working on shifts will receive a shift premium of two dollars ($2.00) per hour for all hours worked, including overtime hours, between 4:00 p.m. and 8:00 a.m. The shift premium will not be paid for hours worked between 8:00 a.m. and 4:00 p.m.*

[2] 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*, these references 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.

[3] The parties requested to proceed by way of an agreed statement of facts and written submissions. That process was concluded on May 4, 2006.

Agreed Statement of Facts

[4] On April 18, 2006, the parties filed their *Agreed Statement of Facts*, which reads as follows:

> . . .
>
> 1. *These grievances involve the interpretation of the Operational Services Collective Agreement signed*

*November 19, 2001 that expired August 4, 2003 which governs the terms and conditions of the employment of the grievors;*

2. *The grievors work a Monday to Friday workweek.*

3. *Scheduled hours of work prior to filing the grievances for the grievors were:*

   - *Mr. Appelton's hours of work were from 7:00 a.m. to 3:30 p.m. and this schedule remained constant since at least November of 2001;*

   - *Mr. Olender and all other grievors (except Ms. Moar) hours of work were from 7:30 a.m. to 4:00 p.m.;*

   - *Ms. Moar's hours of work were from 7:00 a.m. to 3:30 p.m;*

*. . .*

4. *The grievors are classified as GL, HP or GS. . . .*

5. *The grievances relate to the application of article 27.01 Shift Premium and the non-payment of a shift premium to the grievors for hours worked outside the 8:00 a.m. to 4:00 p.m. period.*

6. *The employer took the position that all grievors were not entitled to the payment of a shift premium under Article 27.01 for hours of work which fell outside the hours of 8:00 a.m. and 4:00 p.m.*

7. *The parties agree that, should the bargaining agent be successful in these grievances, and should the board decide not to grant a remedy retroactive to November 19, 2001 pursuant to paragraph 6 of DGER/DGRT Interpretation Bulletin, date: April 2003, subject: Collective Agreement Interpretation- Entitlement to Shift Premium, the adjudicator will remain seized regarding an appropriate remedy should the parties be unable to agree upon the appropriate remedy.*

8. *The parties agree that the following documents may be used as evidence to present their arguments:*

o *DGER/DGRT Interpretation Bulletin, date: April 2003, subject: Collective Agreement Interpretation– Entitlement to Shift Premium;*

o *Information, Treasury Board of Canada Secretariat, date: November 1, 2002;*

- *Agreement between the Treasury Board and the Public Service Alliance of Canada, Group: Operational Services, expiry date: 4 August 2003.*

- *Agreement between the Treasury Board and the Public Service Alliance of Canada, Group: Operational Services, expiry date: 4 August 2000.*

- *Agreement between the Treasury Board and the Public Service Alliance of Canada, Group: Education and Library Science, expiry date: 30 June 2003.*

- *Agreement between the Treasury Board and the Public Service Alliance of Canada, Group: Technical Services, expiry date: 21 June 2003.*

- *Agreement between the Treasury Board and the Public Service Alliance of Canada, Group: Program and Administrative Services, expiry date: 20 June 2003.*

. . .

[*Sic* throughout]

Summary of the arguments

The grievors' arguments

[5] The grievors' contention is that clause 27.01 of the collective agreement is clear and unambiguous. Unlike other collective agreements between their bargaining agent and the employer, there is no language excluding day workers from eligibility for a shift premium. Nor does the collective agreement define "day worker". Rather, clause 27.01 simply stipulates that employees working on shifts will receive a shift premium. However, it states that ". . . The shift premium will not be paid for hours worked between 8:00 a.m. and 4:00 p.m." This clause clearly applies to the grievors, as they all worked varying hours starting from 7:00 a.m. to 7:30 a.m.

[6] The history of clause 27.01 is that, under the previous collective agreement, expiring on August 4, 2000, in order to be eligible for the shift premium, half or more of the hours worked had to be regularly scheduled between the hours of 4:00 p.m. and 8:00 a.m. This requirement is not to be found in the succeeding collective agreement, under which these grievances have been filed.

[7] Given that the collective agreement does not define "shift", the term should be afforded an interpretation that is consistent with past adjudication decisions and with the plain and ordinary meaning of a "shift": any period of work established by the

employer, provided that the hours do not contravene the collective agreement or the law (see *Edwards v. Treasury Board (Transport Canada),* PSSRB File No. 166-02-17886 (1989) (QL) at p. 10, and *Samborsky v. Treasury Board (Solicitor General – Correctional Service Canada),* PSSRB File Nos. 166-02-19803 to 19805 (1990) (QL) at pp. 7 and 9).

[8] Support for such a definition of "shift" is to be found in the manner in which the parties to the collective agreement have used the terms "shift" and "hours of work" interchangeably. For example, clause 2.04 of Appendix B (General Labour & Trades Group Specific Provisions and Rates of Pay) to the collective agreement (Appendix B) first speaks of "hours of work" and then of "shift", with the obvious intent that they mean the same thing.

[9] With regard to remedy, should these grievances be sustained, the grievors argue that the order should reach back to November 19, 2001, as these are continuing grievances and the employer ought to be deemed to have waived its right to argue otherwise (see the DGER Interpretation Bulletin No. 001/2003, entitled "Collective Agreement Interpretation – Entitlement to Shift Premium" (the "interpretation bulletin") at p. 4).

The employer's arguments

[10] The employer's interpretation of clause 27.01 acknowledges that the language of a collective agreement should be read in its normal and ordinary sense, unless, however, ". . . the context reveals that the words were used in some other sense. . . ." (Brown and Beatty, *Canadian Labour Arbitration*, 3rd ed., at para. 4:2110). The employer focuses on the phrase "working on shifts", urging a contextual reading that avoids rendering meaningless the phrase "working on shifts". On this footing, *Samborsky* is distinguishable.

[11] The purpose of a shift premium is to compensate employees who work during hours outside of normal or regular working hours or, in other words, "straight days" (*Cue Datawest Ltd. v. Office of Technical Employees Union, Local 15,* [1997] B.C.C.A.A.A. No. 643 (QL) at para. 36, and *Evangelho et al. v. Treasury Board (Agriculture Canada),* PSSRB File Nos. 166-02-22737 to 22741 (1993) (QL) at p. 8).

[12] That the collective agreement does not define "day work" is no impediment to the employer's position in this case, as it has the residual right, under clause 6.01, to adopt an interpretation of clause 27.01 that coincides with its published unilateral

definition of shift premium applying only to "non-day workers" in the interpretation bulletin at pt. 3. The defined "day work" hours of 7:00 a.m. to 6:00 p.m. are the same as in the Treasury Board Secretariat's policy on flexible hours of work (the "flexible hours of work policy"). In sum, in the absence of a definition in clause 27.01 of the collective agreement, management may provide one (*Canadian Labour Arbitration* at paras. 4:2310, 5:000 and 5:3110).

[13] By way of rebuttal, as to the grievors' argument concerning clause 2.04 of Appendix B, the employer notes that this clause applies to employees on rotating schedules, as set out in subclause 25.02(b) of the collective agreement. Therefore, clause 2.04 of Appendix B has no application to the situation at hand, where the grievors have "normal hours of work" where they are "day workers".

[14] With regard to remedy, should these grievances be sustained, the employer submits that the 25-day time limit set out in clause 18.10 of the collective agreement applies (see *Létourneau et al. v. Canada Customs and Revenue Agency,* 2003 PSSRB 81 at para. 39, following *Canada (National Film Board) v. Coallier,* [1983] F.C.J. No. 813 (C.A.) (QL)). The doctrine of waiver requires that the employer be shown to have had ". . . both knowledge of and an intention to forego the exercise of a right. . . ." (*Canadian Labour Arbitration* at para. 2:3130). The interpretation bulletin does apply retroactively, but only with regard to the employer's interpretation as set out in the interpretation bulletin.

<u>The grievors' rebuttal arguments</u>

[15] The grievors' rebuttal distinguishes cases relied on by the employer. *Cue Datawest Ltd.* rests on the footing that employees who were on shifts were specifically defined in that case. And, the arbitrator heard extrinsic evidence. *Evangelho* involved a collective agreement that did define day worker.

[16] With regard to the management's residual rights argument of the employer, the grievors comment that such position is contrary to the method followed in three other collective agreements between their bargaining agent and the employer, where there is language specifically excluding categories of workers, such as an agreed-upon category of "day workers", or specifically defining a "shift worker".

[17] With regard to the flexible hours of work policy, the grievors object to its relevance, as it is not cited in the *Agreed Statement of Facts*. Therefore, there is no room for the assertion that the grievors were aware of it.

[18] With regard to the pertinence of clause 2.04 of Appendix B, the grievors comment that the language of that clause does not make it plain that it applies only to employees on rotating schedules as set out in subclause 25.02(b) of the collective agreement.

[19] Finally, the interpretation bulletin indicates that shift schedules are ". . . regular, rotational or variable. . . ." (see pt. 3). On the following page, the interpretation bulletin grants a shift premium to an employee under the collective agreement regularly scheduled to work 6:00 a.m. to 2:00 p.m.

Reasons

[20] I begin with the plain language of clause 27.01. However, I do think that one ought to utilize a purposive interpretation. In this regard, I take the employer's point that one needs to look to the context to see if the words are being used in some sense other than their ordinary and dictionary meaning. This is stated in *Canadian Labour Arbitration* at para. 4:2110. Messrs. Brown and Beatty add another purposive qualification to their contextual one with the words ". . . unless to do so would lead to some absurdity. . . ." With these two qualifications in mind, I am persuaded that the focus should not be on the word "shift", but on the phrase "working on shifts", so as to avoid the absurdity of an interpretation that renders meaningless that phrase. Surely all employees are not "working on shifts" within the context of the collective agreement such as to warrant a shift premium for all who happen to work half an hour to an hour before 8:00 a.m. What is the additional substantial burden on an employee's life, in these situations, such as to warrant extra pay by way of a shift premium?

[21] I read *Samborsky* in this light. In that case, under the language that preceded clause 27.01 of the collective agreement, Bruno Samborsky was scheduled, with no shift premium, to work 1:00 p.m. to 9:00 p.m., Monday to Friday, as a Visits and Correspondence Officer at the Regional Psychiatric Centre in Abbotsford. His complaint was that these new hours of work ". . . eliminated the attendance of any evening activity, and in essence, his total social life suffered. . . ." (*Samborsky* at p. 5). The adjudicator rejected the employer's contention that, as the grievor was working a

regular shift, it must be considered day work. I understand *Samborsky* to be grounded on the proposition that Bruno Samborsky's lost evenings of social life deserved some compensation in terms of a shift premium. In the context of that case, it is clear to me that the adjudicator's resort to the interpretation of "shift" on the footing of giving it its ordinary or dictionary meaning produces a sensible outcome.

[22] Though *Cue Datawest Ltd.* and *Evangelho* are distinguishable, they lend some support to the purposive approach that I have taken to the phrase "working on shifts". Employees who work day hours, such as these grievors, do not have legitimate complaints akin to Bruno Samborsky's about substantial life style impact when they are scheduled to begin work with varying hours starting from 7:00 a.m. to 7:30 a.m.

[23] There is nothing in the specific definitions in other collective agreements between the grievors' bargaining agent and the employer that persuades me to give a reading to clause 27.01 of the collective agreement that makes no sense to me.

[24] I accept the employer's contention that it has the residual right, under clause 6.01 of the collective agreement, to adopt an interpretation of clause 27.01 that coincides with its published definition of "shift premium", in the interpretation bulletin at pt. 3, as applying only to "non-day workers". I do not see any impediment to such an approach in the specific definitions in other collective agreements between the grievors' bargaining agent and the employer.

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

*(The Order appears on the next page)*

Order

[26] The grievances are dismissed.

July 4, 2006.

**Ken Norman,**
**adjudicator**

**List of Grievors**

| PSSRB File No. | Grievor | Group/Level |
|---|---|---|
| 166-02-32231 | William A. Appleton | GS-BUS-2 |
| 166-02-33206 | Stanley R. Olender | GL-ELE-2 |
| 166-02-33207 | Robert D. McLaren | GL-ELE-3 |
| 166-02-33208 | David Allan Sinclair | GL-ELE-2 |
| 166-02-33209 | Fred Shalapata | GL-ELE-2 |
| 166-02-33210 | Jack Olynick | GL-ELE-4 |
| 166-02-33211 | Kenneth J. Pember | GL-COI-9 |
| 166-02-33212 | Robert Haines | HP-3 |
| 166-02-33213 | Rudy Klassen | GL-PCF-6 |
| 166-02-33214 | David R. Godfrey | GL-PCF-6 |
| 166-02-33215 | George B. Duncan | GL-WOW-9 |
| 166-02-33216 | Garnet W. Sinclair | GL-WOW-9 |
| 166-02-33217 | Barry P. Saurette | GL-WOW-9 |
| 166-02-33218 | Ron Rivard | GL-COI-11 |
| 166-02-33219 | Joanne R. Peloquin | GS-STS-3 |
| 166-02-33220 | Lenore Morrissette | GS-STS-4 |
| 166-02-33221 | Marcel Ruest | GS-STS-5 |
| 166-02-33222 | Clark J. Moulaison | HP-6 |
| 166-02-33223 | Alden Berg | GL-MAM-10 |
| 166-02-33224 | Ronald Strong | GL-MAM-10 |
| 166-02-33225 | John A. Larkin | GL-EIM-10 |
| 166-02-33226 | William M. Baetsen | GL-EIM-10 |
| 166-02-33227 | Mel Marsh | GL-EIM-11 |

| | | |
|---|---|---|
| 166-02-33228 | David W. Remillard | GL-EIM-10 |
| 166-02-33229 | James E. Wainwright | GL-ELE-3 |
| 166-02-33230 | Wayne Ledwos | GL-EIM-10 |
| 166-02-33231 | Lloyd Tokle | GL-COI-11 |
| 166-02-33232 | Alex R. Pudlo | GL-PIP-9 |
| 166-02-33233 | Bruce McEwan | GL-PIP-9 |
| 166-02-33234 | Richard Larose | GL-PIP-9 |
| 166-02-33235 | Chris Egli | GL-MAM-6 |
| 166-02-33236 | Rick Shersty | GL-MAM-9 |
| 166-02-33237 | Robert Paul | GL-MAM-9 |
| 166-02-33238 | Donald E. Zornik | GL-PIP-9 |
| 166-02-33239 | Christopher Young | GL-PIP-9 |
| 166-02-33240 | Robert Leclerc | GL-MAN-6 |
| 166-02-33241 | Glen A. McEwan | GL-PIP-9 |
| 166-02-33242 | Bruce A. Olender | GL-EIM-10 |
| 166-02-33243 | Barry J. McLellan | GL-PIP-9 |
| 166-02-33244 | Arthur Brian Grant | GL-COI-10 |
| 166-02-33245 | Darcy Wallin | GL-COI-10 |
| 166-02-33246 | Steven J. Laird | GL-ELE-3 |
| 166-02-33247 | Elaine Moar | GS-BUS-2 |