

Date: 20070509

File: 166-02-36345

Citation: 2007 PSLRB 46



*Public Service
Staff Relations Act*

Before an adjudicator

BETWEEN

SIMON CLOUTIER

Grievor

and

**TREASURY BOARD
(Department of Citizenship and Immigration)**

Employer

Indexed as

Cloutier v. Treasury Board (Department of Citizenship and Immigration)

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

REASONS FOR DECISION

Before: Jean-Pierre Tessier, adjudicator

For the Grievor: Michel Morissette, counsel

For the Employer: Raymond Piché, counsel

Heard at Montréal, Quebec,
January 23 to 26 and July 10 to 13, 2006.
(P.S.L.R.B. Translation)

Grievance referred to adjudication

[1] Simon Cloutier (“the grievor”) works for the Department of Citizenship and Immigration in a position classified at the PM-03 group and level. He returned to work on May 3, 2003 after an absence of several months. On June 9, 2003, he filed a grievance contesting the fact that the employer had imposed a work schedule on him that contravened article 25 of the November 19, 2001 collective agreement between the Treasury Board and the Public Service Alliance of Canada for the Program and Administrative Services bargaining unit (“the collective agreement”).

[2] The grievor worded his grievance as follows:

[Translation]

...

I contest the inconsistency regarding the hours of work on my work schedule that makes a distinction in my case compared to my colleagues and that constitutes intimidation.

...

That the employer accord me the same treatment as my colleagues.

That this intimidation and discrimination cease.

That I should be compensated for damages suffered.

...

[3] The grievance was referred to adjudication on June 30, 2005. The parties were not available to attend a hearing before January 2006.

[4] 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.

Summary of the evidence

[5] The grievor indicated that his conditions of work provided that an employee could request to work flexible hours between 07:00 and 18:00.

[6] Before 2003 the grievor had been working from 09:30 to 18:00. On his return to work in May 2003, Julie Thibodeau, his supervisor, asked him to choose a work schedule that did not extend beyond 17:00. In light of the requirement to leave around 17:00, the grievor had no choice but to start his day at 08:30.

[7] Approximately 12 employees perform the same work as the grievor. Most of them start work around 07:30 and finish around 15:30, but others start later and leave around 18:00.

[8] The grievor had discussed the work schedule with Ms. Thibodeau. She had indicated to him that she was aware of his attendance problems and absences, and that she preferred to have him finish around 17:00 or 17:10 while there were still managers present in the workplace. Ms. Thibodeau also indicated to the grievor that in June 2003, he would have to take training courses on certain days over a two-week period, and that these courses would start at 08:30.

[9] The grievor confirmed that he had previously taken training courses when he had a schedule that started at 09:30. When he was on training, he would start at 08:30. The same applied to days when there were staff meetings, when he would have to start at 08:30.

[10] The grievor indicated that it was only in early July 2003 that the restriction against working after 17:00 was lifted. However, he was laid off on July 8, 2003.

[11] Ms. Thibodeau indicated that she had discussed the work schedule with the grievor in May 2003. She had never supervised him before, and she wanted to have some time to assess his attendance.

[12] Ms. Thibodeau said she had discussed this matter with Dianne Clément, Director of the Canada Immigration Centre where the grievor worked, and that she had agreed that the grievor's work schedule should not extend beyond 17:00 because he had had problems with attendance. Ms. Clément and Ms. Thibodeau decided that it was important to verify that the grievor was at his workstation and that he was respecting the work schedule.

[13] Ms. Thibodeau indicated that, at the time, there were two supervisors besides the director. The other supervisor started at 08:30 and left around 15:30. The director

left around 17:00 or 17:15 and she herself left around 17:00. Thus, there were no managers on duty after 17:00.

[14] The work schedule imposed on the grievor was only temporary. It ended in late June or early July 2003.

Summary of the arguments

[15] The grievor's representative pointed out that the provisions in the collective agreement regarding hours of work referred to the notion of operational requirements. Article 25.08 of the collective agreement reads as follows:

25.08 Flexible hours

Subject to operational requirements, an employee on day work shall have the right to select and request flexible hours between 7 a.m. and 6 p.m. and such request shall not be unreasonably denied.

[16] According to the grievor's representative, the employer had no reason to demand that he finish at 17:00. In the past, the grievor had finished at 18:00. There were other ways of checking whether the grievor was leaving on time, for instance with the security passes at the entrances.

[17] The grievor's representative referred to decisions dealing with the notion of operational requirements.

[18] In *Canada (Attorney General) v. Degaris*, [1994] 1 F.C. 374, the Federal Court confirmed the decision by an adjudicator who had interpreted the notion of operational requirements. The adjudicator had ruled as follows:

[Translation]

...

...The employer may only invoke operational requirements to deny an employee a benefit to which he or she is entitled under the collective agreement if, in spite of itself, it finds itself short staffed to the point of being unable to provide the level of client service that is warranted. ...

...

The Federal Court found as follows:

[Translation]

...

... *Not only was the interpretation accorded to the meaning of “operational requirements” by the adjudicator capable of support based on the words of the agreement but it was the correct and best interpretation, with many other adjudicators having said the same thing in previous cases.*

...

[19] In *Syndicat des policiers de Chicoutimi Inc. c. Corporation municipale de la ville de Chicoutimi* (19970505), AZ-97142076 (Soquij), 960604-003 (T.A. Qué.), the adjudicator who interpreted the notion of operational requirements found the following:

[Translation]

...

Whichever way you look at it, the employer demonstrated that the application of summer hours could at times create minor management problems, complications and inconveniences for management. For example, a patrol officer may be asked to replace an officer at the reception desk during the latter’s meal break. Less urgent tasks can be deferred. But essentially, the city failed to prove that the application of summer hours at the time under study would have prevented its police unit from operating with reasonable efficiency.

...

[20] The employer maintained that operational requirements would have to be assessed by management. Management has to consider client service and production, but this also encompasses human resource management.

[21] According to the employer, the decisions *Tisdelle v. Treasury Board (Employment and Immigration Canada)*, Board File No. 166-02-14712 (19860224), and *Richer v. Treasury Board (Revenue Canada — Taxation)*, Board File Nos. 166-02-10880 to 10883 (19830808), established the employer’s right to ensure that the work schedule respects operational requirements, without abrogating its obligation to justify the refusal to accept a schedule for valid reasons.

[22] According to the employer, the managers had valid reasons for setting the grievor’s work schedule. This schedule was temporary.

Reasons

[23] Ms. Thibodeau testified that she had discussed the grievor's schedule with Ms. Clément, and that they had agreed that, given the latter's previous breaches, he would have to be observed for a few weeks to determine whether he complied with his work hours. Ms. Thibodeau indicated that the work schedules of Ms. Clément and the two supervisors would not allow them to have a manager on duty after 17:00.

[24] However, as pointed out by the grievor's representative, I do not believe that the absence of a manager after 17:00 is a valid reason for refusing to grant the grievor flexible hours. The employer did not demonstrate that operational requirements prevented it from allowing the grievor to work from 09:30 to 18:00.

[25] Moreover, the evidence has demonstrated that, in the past, the grievor's work schedule had been changed from time to time in response to specific requirements. The grievor testified that he reported for work at 08:30 for staff meetings or training even when his normal schedule was from 09:30 to 17:00.

[26] I believe that the managers acted in good faith by attempting to set a work schedule for the grievor that did not go beyond 17:00. The evidence did not prove to me that their decision was intended to intimidate the grievor or to treat him differently. However, the restrictions placed on his work schedule were not justified by operational requirements. The employer should have allowed the grievor to work flexible hours as provided for in the collective agreement.

[27] The grievor indicated that the restriction against working after 17:00 had been lifted in early July 2003. The brief period of time during which flexible hours were denied him and the grievor's need to take courses that started at 08:30 in June 2003 suggest to me that he did not suffer to any significant degree as a result of this restriction. Moreover, I was presented with no evidence of resulting damage.

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

(The Order appears on the next page)

Order

[29] I declare that the employer contravened article 25.08 of the collective agreement.

May 9, 2007.

P.S.L.R.B. Translation

**Jean-Pierre Tessier,
adjudicator**