Date: 20080325

Files: 566-33-401 to 405

Citation: 2008 PSLRB 17

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

KEN ARSENAULT ET AL.

Grievors

and

PARKS CANADA AGENCY

Employer

Indexed as
Arsenault et al. v. Parks Canada Agency

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Barry D. Done, adjudicator

For the Grievors: Jacek Janczur, Public Service Alliance of Canada

For the Employer: Neil McGraw, counsel

Heard at Halifax, Nova Scotia,
March 27 and 28, 2007.

I. Individual grievances referred to adjudication

[1] On August 22, 2005, Ken Arsenault, Mike Burke, Jim Clements, Mary Kendall and Joe Rosta submitted identically-worded grievances:

. . .

> *I grieve the employer's actions of not paying me for hours I have worked as per my collective agreement and all other Park policies.*

. . .

[2] At the hearing, following a brief and unsuccessful attempt to settle all five grievances, the parties elected to proceed by way of a combination of agreed facts (A) and exhibits (B), without calling witnesses. Of the five grievors, only Mr. Clements and Ms. Kendall attended the hearing.

II. Summary of the evidence

A. Agreed Facts

[3] The parties agreed to the following facts:

1. All five grievors are employed as bus drivers at the Fortress of Louisbourg.
2. Their classification is GL-MDO-05.
3. They work a variable shift schedule (VSSA).
4. Their shifts are not of equal length.
5. Their regular pay is based on 80 hours of work performed over 2 weeks.
6. When the employer computes regular pay for a biweekly period that includes a designated paid holiday (DPH), the employer counts actual hours worked for those who worked on the DPH and attributes scheduled hours for those who did not work on the DPH.

B. Exhibits (6)

[4] As was the case with the grievance wording, essentially the same documents were submitted on behalf of each of the five grievors. These documents consisted of five packages of five pages each containing the following:

- Page 1: The June and July 2005 work schedules.
- Page 2: The August 2005 work schedule.
- Page 3: A payroll register for the period of June 30 to July 27, 2005.
- Page 4: A payroll register for the period of July 28 to August 24, 2005.
- Page 5: A "Time Worked and Extra Duty Report" from July 28 to August 10, 2005.

[5] The final exhibit (Exhibit 6) was the collective agreement between the Parks Canada Agency and the Public Service Alliance of Canada ("the collective agreement") with an expiry date of August 4, 2007.

III. Summary of the arguments

A. For the grievors

[6] The issue to be determined is how to administer the pay regime when a DPH falls within the biweekly period.

[7] That issue has been decided both by the Public Service Labour Relations Board and by its predecessor.

[8] If a person works on a DPH, he or she is entitled both to regular pay and to premium pay at the applicable overtime rate.

[9] When, in accordance with agreed fact number 6, an employee does not work on a DPH and the employer attributes scheduled hours in excess of eight hours, employees are deemed to be in an over payment situation. In that instance, the employer violates the collective agreement by attributing a number other than eight hours to a shift. To do so is inconsistent with the following decisions: *Breau et al. v. Treasury Board (Justice Canada)*, 2003 PSSRB 65; *King v. Treasury Board (Revenue Canada – Customs and Excise),* PSSRB File Nos. 166-02-28332 and 166-02-28333 (19990819); and *Mackie v. Treasury Board (National Defence),* 2003 PSSRB 103.

[10] Exhibit 3, the package of documents related to Mr. Clements, illustrates the deemed overpayment and the recovery situation. From June 30 to July 13, 2005, which includes the Canada Day DPH, Mr. Clements worked 80 hours. Mr. Clements worked and was paid for nine hours on that DPH. However, clause 22.14(d)(i) of the collective agreement provides that "a Designated Paid Holiday shall account for eight hours." The result was that one hour of leave was recovered from Mr. Clements for what the employer considered to be an overpayment.

[11] That practice is wrong and fails to distinguish between actual and notional hours worked. Consistent with clauses 22.14(d)(i) and 22.05(a) of the collective agreement, the employer should only attribute eight hours to each day worked.

[12] Clause 22.13(a) of the collective agreement acknowledges that scheduled hours of work may not correspond to normal hours of work. Employees are not paid on a day-by-day basis or even on an hourly basis but on the basis of 80 hours for two weeks of work. Every shift worked should be accounted for with one-tenth of the total biweekly hours and not with the hours attributed to the shift.

[13] Those who work a VSSA have their hours accounted for in one way and paid for in another way.

[14] A further example - that of Ms. Kendall - illustrates the flaw in the employer's pay method. Ms. Kendall was scheduled to work 10 hours on the August DPH. She was paid for 80 hours of work for the pay period that included that DPH, but Ms. Kendall did not work on the DPH. Like Mr. Clements, Ms. Kendall was deemed to be in an overpayment situation because she was paid for 10 hours of work for a DPH rather than 8 hours. Again, like Mr. Clements, two hours (in her case) were recovered from Ms. Kendall's leave credits.

[15] As shown in the package of documents related to Mr. Arsenault (Exhibit 1), this is a case of VSSA employees being paid less than non-VSSA employees. Due to a recovery of 1 hour of leave, Mr. Arsenault was paid for 79 hours of work, not 80.

B. For the employer

[16] The cases cited by the grievors' representative are different from these grievances since unlike the grievors' situation where employees are paid for the hours that they actually work those cases involve a fiction where biweekly pay did not reflect the actual hours worked.

[17] The grievors are not paid for individual days but for working 80 hours over 2 weeks. When hours worked are less than 80, a recovery must be made.

[18] Clause 22.14(d)(i) of the collective agreement provides for eight hours of work for a DPH. Applying the grievors' logic, the value of a DPH would vary depending on how many hours of work were scheduled. In other words, those who did not work on a DPH would be off work for different lengths of time, one perhaps 8 hours, another perhaps 12. That would create an inequity, and in the case of the five grievors, three would be overpaid.

[19] The collective agreement (Exhibit 6) makes no reference to notional hours, to counting each day worked as one-tenth of the biweekly 80 hours, or to counting each day as 8 hours.

[20] The only issue to be determined is whether the numbers in Exhibits 1 to 5 add up or, in other words, whether the grievors were paid for the hours that they worked.

C. Reply for the grievors

[21] Mr. Arsenault worked 80 hours plus 9 hours on a DPH (Exhibit 1). He should have been paid for 80 hours at regular pay and 9 hours at premium (time and one-half) pay, for a total of 93 hours, which he was. However, the employer recovered one hour as leave. Due to a DPH accounting for only eight hours, he was not paid for the hours that he actually worked.

IV. Reasons

[22] The burden of proof in these grievances rests with the bargaining agent. What must be proven is the allegation set out in the grievances that the grievors have not been paid as per the collective agreement (Exhibit 6) and Parks Canada Agency policies.

[23] No Parks Canada Agency policy was entered as an exhibit nor was there any reference to a Parks Canada Agency policy in the grievors' submissions. That leaves me with an allegation that there has been a violation of the collective agreement. Surprisingly, the grievances themselves do not identify which clause or clauses have been violated or misapplied. Indeed, the only clauses referred to in the grievors' submissions deal neither with any pay entitlement nor even with any pay methodology, but rather with matters related to hours of work, such as:

- the normal work week;
- a limitation on the consequences of implementing a VSSA;
- daily scheduled hours; and
- how many hours a DPH shall account for.

[24] The clauses of the collective agreement referred to are:

> ***22.05***
>
> *(a) Except as provided for in clause 22.10, the normal work week shall be thirty-seven decimal five (37.5) or forty (40) hours (in accordance with the Hours of Work Code), exclusive of lunch periods, comprising five (5) days of seven decimal five (7.5) or eight (8) consecutive hours (in accordance with the Hours of Work Code) each, Monday to Friday. The work day shall be scheduled to fall within a nine (9)-hour period between 6:00 a.m. to 6:00 p.m., unless otherwise agreed in consultation between the Alliance and the Agency at the appropriate level.*
>
> ***22.12*** *Notwithstanding anything to the contrary contained in this Agreement, the implementation of any variation in hours shall not result in any additional overtime work or additional payment by reason only of such variation, nor shall it be deemed to prohibit the right of the Agency to schedule any hours of work permitted by the terms of this Agreement.*
>
> ***22.13***
>
> *(a) The scheduled hours of work of any day, may exceed or be less that seven decimal five (7.5) or eight (8) hours (in accordance with the Hours of Work Code); starting and finishing times, meal breaks and rest periods shall be determined according to operational*

> *requirements as determined by the Agency and the daily hours of work shall be consecutive.*
>
> ***22.14*** *For greater certainty, the following provisions of this Agreement shall be administered as provided herein:*
>
> . . .
>
> ***(d) Designated Paid Holidays (clause 27.05)***
>
> *(i) A Designated Paid Holiday shall account for seven decimal five (7.5) or eight (8) hours (in accordance with the Hours of Work Code).*
>
> . . .

[25] As mentioned earlier, no witnesses were called nor were the two grievors who attended the hearing. Customarily, in these circumstances, when only the agreed facts and exhibits entered on consent can tell the story and leave an adjudicator in no doubt as to what has taken place, the facts and the contents of the exhibits are reviewed painstakingly.

[26] Alas, such was not the case here.

[27] In fact, only very brief and passing references were made to a small portion of only two of the five packages of exhibits, which were the July and August schedules for Mr. Clements and Ms. Kendall.

[28] Absent some explanation or elaboration, I am unable to discern the meaning of many of the documents, let alone their significance and how or even if they support the grievances. While I cannot say that they do not prove the issue in dispute, nor can I say that even after much thought and rereading that they do. At the end of the day I am left in the unfortunate position of having many more questions than answers.

[29] The discharge of the burden of proof goes far beyond entering documents that on their face are, at best, unclear. The onus of proof is on the bargaining agent to clearly demonstrate, on the balance of probabilities, that what has been alleged actually took place. While tempted, I do not believe that it would be prudent for me to speculate as to the meaning of the documents.

[30] There appears to be some inconsistency in the collective agreement between clause 58.02(a) and clauses 22.14(d)(i) and (ii):

> ***58.02*** *An employee is entitled to be paid for services rendered at:*
>
> *(a) the pay specified in Appendix "A", for the classification of the position to which the employee is appointed, if the classification coincides with that prescribed in the employee's letter of offer;*
>
> ***22.14*** *For greater certainty, the following provisions of this Agreement shall be administered as provided herein:*
>
> . . .
>
> ***(d) Designated Paid Holidays (clause 27.05)***
>
> *(i) A Designated Paid Holiday shall account for seven decimal five (7.5) or eight (8) hours (in accordance with the Hours of Work Code).*
>
> *(ii) When an employee works on a Designated Paid Holiday, the employee shall be compensated, in addition to the pay for the hours specified in sub-paragraph (i), at time and one-half (1 1/2) up to his or her regular scheduled hours worked and at double (2) time for all hours worked in excess of his or her regular scheduled hours.*

[31] Clause 58.02 of the collective agreement seems trite in that it states that an employee is entitled to be paid for the services he or she rendered.

[32] And yet it seems clear from the "Time Worked and Extra Duty Reports" for Mr. Burke, Mr. Clements and Mr. Rosta that they were not. On the August DPH, each grievor worked nine hours. That is beyond doubt. Equally beyond doubt is the fact that they were only paid for eight of those hours. Clearly, someone changed their hours on the schedule and the "Time Worked Sheet" to read eight hours. To make up for a perceived 1-hour shortfall in the 80 hours over 2 weeks, it is also clear that under code 110, 1 hour of leave was recovered from each grievor.

[33] Why is there a need to recover leave from 3 employees who have clearly worked their 80 hours already, including 9 on the August 2005 DPH?

[34] That brings me to the application of clauses 22.14(d)(i) and (ii) of the collective agreement. The clauses seem clear to me. It was not argued that they are in some way ambiguous.

[35] Clearly, those provisions are in direct conflict with clause 58.02(a) of the collective agreement.

[36] Clause 22.14(d)(i) of the collective agreement says that a DPH shall account for eight hours in the grievors' case. Looking at clause 22.14(d)(ii), the conflict becomes obvious.

[37] Mr. Burke, Mr. Clements and Mr. Rosta worked on the August DPH. They are entitled to be paid in addition to the pay for the hours (in this case eight) specified in clause 22.14(d)(i) of the collective agreement at time and one-half up to their regular scheduled hours worked. [Emphasis added] Clearly, an employee who works on a DPH is entitled to be compensated for the hours specified in subparagraph (i). The hours that are specified in subparagraph (i) for these grievors is eight.

[38] It is beyond my jurisdiction to change collective agreement language. Had the words provided that employees shall be compensated for the hours that they worked, that would have been a different matter. They do not!

[39] There is no issue regarding the amount of premium pay that was paid.

[40] Applying the customary rules of construction, where terms used are clear and not ambiguous, there is no need to attempt to discern the true intent of the parties. In those cases the adjudicator is to give the words chosen by the parties their plain and ordinary meaning. Having done so, I must conclude that the parties agreed to limit the number of hours that employees would be paid for working on a DPH regardless of how many hours they actually worked. The agreement is set out at clause 22.11 of the collective agreement under the title "Terms and Conditions Governing the Administration of Variable Hours of Work Schedule":

> ***22.11*** *The terms and conditions governing the administration of variable hours of work implemented pursuant to clauses 22.05(b), 22.07, and 22.10(e) are specified in clauses 22.11 to 22.14. This Agreement is modified by these provisions to the extent specified herein.*

[41] The parties intended that clauses 22.11(d)(i) and (ii) would modify the collective agreement, and they have. Hours worked in excess of eight on a DPH are not to be compensated, other than for calculating premium pay. That was the agreement struck at the bargaining table.

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

(The Order appears on the next page)

V. Order

[43] The grievances are dismissed.

March 25, 2008.

Barry D. Done,
adjudicator