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Files: 166-02-32950 to 32965 and
32967 to 32971

Citation: 2008 PSLRB 66

Public Service
Staff Relations Act

Before an adjudicator

BETWEEN

DEBBIE R. BOUDREAU ET AL.

Grievors

and

TREASURY BOARD
(Department of Human Resources and Skills Development)

Employer

Indexed as
Boudreau et al. v. Treasury Board (Department of Human Resources and Skills Development)

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

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievors: Amarkai Laryea, Public Service Alliance of Canada

For the Employer: Martin Desmeules, counsel

Heard at Ottawa, Ontario,
June 23, 2008.

I. Grievances referred to adjudication

[1] From January 18 to 28, 2002, Debbie R. Boudreau and the 20 other employees listed in the appendix to this decision ("the grievors") grieved that the employer violated clause 25.26(a) of the collective agreement concluded between the Treasury Board and the Public Service Alliance of Canada on November 19, 2001, for the Program and Administrative Services Group bargaining unit ("the collective agreement"). The employer replied at the final level of the grievance process on September 26, 2003. The grievors referred their grievances to adjudication on November 7, 2003.

[2] The parties requested that the grievances be held in abeyance pending mediation, which turned out to be unsuccessful. The grievors requested on April 10, 2007, that their grievances be heard. The parties were unavailable for a hearing prior to June 23, 2008.

[3] 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.

II. Summary of the evidence

[4] The parties provided a joint statement of facts, which reads as follows:

. . .

> *Treasury Board (Human Resources and Development) and The Public Service Alliance of Canada agree that the facts as set out below, relating to the grievances referenced above are not in dispute. In addition, the parties agree not to file any additional evidence at the hearing and they will not call any witnesses at the hearing.*
>
> *[1] The grievances cover 21 employees from the New-Brunswick region. More specifically, they are employees of the National Services Unit in Bathurst. They occupy positions classified in the CR and the AS groups. They are part of the Program and Administrative Services Collective Agreement that expired on June 20, 2003 (Tab 2 & Tab 3).*
>
> *[2] On January 1983, [sic] Calixte Losier, Manager, Personnel Services sent a memorandum to the Chiefs and*

> *Supervisors of the region on hours of work and alternate working arrangements (Tab 4).*
>
> *[3] On November 19, 2001, management advised the employees that starting January 7, 2002, variable hours of work would have to be scheduled between 7:00am and 6:00pm (Tab 5). At that time, the grievors were working variable hour schedules outside the 7:00am and 6:00pm parameter.*
>
> *[4] The grievances details are: "The new directive effective January 7, 2001* [*sic*] *concerning the starting and the finishing times for the daily hours of work does not respect clause 25.26 a) of the terms and conditions governing the administration of variable hours of work as stated in my collective agreement".*
>
> *[5] The corrective measure requested are: "I request that management remove this directive and continues, as in the past, to accept the requests of variable hours based on operation requirements as determined by the employer.*"

[5] Beginning in 1983, the collective agreement was interpreted by the employer in such a way that an employee's workday could start before 7:00 a.m. or end after 6:00 p.m. for employees working variable hours. This interpretation was issued in a memorandum signed by Calixte Losier, Manager, Personnel Services, Employment and Immigration Canada, and dated January 18, 1983, which reads as follows:

. . .

> *During the last LMCC meeting, it was agreed that you would be advised that, according to the provisions related to Alternate Working Arrangement, employees have a right to request alternate working schedules outside normal working hours which have been established from 7:00 a.m. to 6:00 p.m. Monday through Friday. This is also applicable to Saturday and Sunday.*
>
> *We must bear in mind, however, that although the employees have the right to request the above, Management reserves the right to refuse or accept such a request based on operational requirements and availability of work.*
>
> *The purpose of this memo is not to change, in any way, the policy that was issued in May which stated that alternate working arrangements are more suitable between the hours of 7:00 a.m. and 6:00 p.m. Monday through Friday.*
>
> *Some of your employees could nevertheless request alternate working schedules outside those normal working hours. In*

> *such cases, you must accept the request explaining to the employee that the final decision will be rendered by Management. You must then bring the matter to your manager's attention who will decide on whether or not to grant the request. Should the request be denied, Management must give the reasons for its decision to the employee.*
>
> . . .

[6] On November 19, 2001, Jeanne Lanteigne, Manager, Human Resources Services, Chaleur-Péninsule District, Human Resources Development Canada, sent an email to managers stating that variable hours of work would have to be scheduled between 7:00 a.m. and 6:00 p.m. The email reads as follows:

> . . .
>
> *As a result of consultation and research, it has been determined that the hours of work starting before 7:00 a.m. and finishing after 6:00 p.m. do not respect the clauses of the collective agreement relating to day work. Different daily work schedules are possible for shift work of where it has been established by the employer, after consultation with the union, that different working hours are necessary to meet the needs of the public and/or for the efficient operation of the service.*
>
> *Therefore, effective January 7, 2002, daily hours of work for employees who are either on regular or AWA schedules will have to be established between 7:00 a.m. and 6:00 p.m. The purpose of this transition period is to allow employees to make any arrangements that may be necessary to comply with this requirement.*
>
> . . .

[7] Even if the grievors alleged a violation of clause 25.26(a) of the collective agreement, the following clauses also need to be looked at :

> ***Article 25***
> ***Hours of Work***
>
> . . .
>
> ***Day Work***
>
> ***25.06*** *Except as provided for in clauses 25.09, 25.10 and 25.11:*

(a) the normal work week shall be thirty-seven and one-half (37 1/2) hours from Monday to Friday inclusive,

and

(b) the normal work day shall be seven and one-half (7 1/2) consecutive hours, exclusive of a lunch period, between the hours of 7 a.m. and 6 p.m.

. . .

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.

25.09 Variable Hours

(a) Notwithstanding the provisions of clause 25.06, upon request of an employee and the concurrence of the Employer, an employee may complete the weekly hours of employment in a period of other than five (5) full days provided that over a period of fourteen (14), twenty-one (21) or twenty-eight (28) calendar days, the employee works an average of thirty-seven and one-half (37 1/2) hours per week.

(b) In every fourteen (14), twenty-one (21) or twenty-eight (28) day period, the employee shall be granted days of rest on such days as are not scheduled as a normal work day for the employee.

(c) Employees covered by this clause shall be subject to the variable hours of work provisions established in clauses 25.24 to 25.27.

. . .

Terms and Conditions Governing the Administration of Variable Hours of Work

25.24 *The terms and conditions governing the administration of variable hours of work implemented pursuant to clauses 25.09, 25.10 and 25.23 are specified in clauses 25.24 to 25.27, inclusive. This Agreement is modified by these provisions to the extent specified herein.*

. . .

> ***25.26***
>
> *(a) The scheduled hours of work of any day as set forth in a variable schedule specified in clause 25.24, may exceed or be less than seven and one-half (7 1/2) hours; starting and finishing times, meal breaks and rest periods shall be determined according to operational requirements as determined by the Employer and the daily hours of work shall be consecutive.*
>
> *(b) Such schedules shall provide an average of thirty-seven and one-half (37 1/2) hours of work per week over the life of the schedule.*
>
> . . .

III. Summary of the arguments

A. For the grievors

[8] Starting in 1983, the grievors were allowed to work variable hours without the restriction of having to work between 7:00 a.m. and 6:00 p.m. In November 2001, the employer advised them that starting in January 2002, their variable hours would have to be worked between 7:00 a.m. and 6:00 p.m. That directive from the employer contravened the collective agreement.

[9] In her November 2001 email, Ms. Lanteigne did not invoke operational requirements but simply stated that the variable hours being worked violated clause 25.06 of the collective agreement because they were outside 7:00 a.m. to 6:00 p.m. That interpretation of the collective agreement is wrong. The collective agreement does not impose such a restriction.

[10] Clause 25.06 of the collective agreement is the default regime. Clause 25.09 is an exception to that regime. As the wording of clauses 25.06 and 25.09 indicates, the content of clause 25.06 does not apply to clause 25.09. If that were the case, clause 25.09 would stipulate, as does clause 25.08, a restriction to ". . . between 7:00 a.m. and 6:00 p.m. . . ."

[11] Also, clause 25.26 of the collective agreement, which specifies the rules governing variable hours, contains no restriction regarding the ". . . between 7:00 a.m. and 6:00 p.m. . . " period.

[12] The employer is estopped from taking a position contrary to a past practice that took place for a period of close to 20 years.

[13] The November 2001 directive should be rescinded, and the employer should consider, subject to operational requirements, requests for variable hours outside the 7:00 a.m. to 6:00 p.m. period.

B. <u>For the employer</u>

[14] Variable hours of work are not a benefit guaranteed to employees but rather a perk, authorized at the discretion of the employer. As clause 25.09(a) of the collective agreement stipulates, variable hours are authorized on the request of an employee and the concurrence of the employer. As in clause 25.08, there is no conditional obligation imposed on the employer. The employer may accept or refuse variable hours at its discretion.

[15] In her November 2001 email, Ms. Lanteigne indicated that the employer no longer concurred with the variable hours then being worked. That is sufficient to dismiss the claims made by the grievors.

[16] The employer agrees with the grievors that clause 25.06 of the collective agreement represents the general rule and that clause 25.09 is an exception to that rule. However, the exception must be interpreted narrowly and strictly. In clause 25.09, the exception is to the effect that an employee can work a different number of hours per week or per day as long as on a longer work cycle, he or she averages 37.5 hours per week. It does not remove the obligation contained in clause 25.06 that hours of work should be between 7:00 a.m. and 6:00 p.m.

[17] The employer does not recognize Mr. Losier's 1983 interpretation of the collective agreement. That interpretation was erroneous. Rather, the employer's interpretation is expressed in the replies it provided at each level of the grievance process.

[18] The grievors' argument of estoppel does not hold. No jurisprudence was tabled to that effect. Past practice could be used to make an argument but only in the presence of ambiguous wording in the collective agreement. Furthermore, there is a total lack of evidence that detrimental reliance occurred, nor was reference made to that issue during negotiations.

[19] To support its arguments, the employer referred me to *Canada v. Boyachok*, [1981] 1 F.C. 344 (C.A.). The employer also referred me to paragraphs 2:2211, 2:2215, 2:2220, 2:2221 and 3:4430 of Brown and Beatty, *Canadian Labour Arbitration,* 4th ed.

IV. Reasons

[20] The main question to be addressed in these grievances is whether the employer was right in interpreting the clauses in the collective agreement on variable hours to the effect that variable hours must be worked between 7:00 a.m. and 6:00 p.m.

[21] Clause 25.06 of the collective agreement is the general rule governing hours of work. However, exceptions to the general rule are possible, as stated in clause 25.09 ("Variable Hours"). The opening words of that clause confirm that variable hours are an exception to the rule : "Notwithstanding the provisions of clause 25.06 . . . ."

[22] *The New Shorter Oxford English Dictionary* (1993), defines "notwithstanding" as: "In spite of, without regard to or prevention by." *Black's Law Dictionary*, 8th ed., defines "notwithstanding" as: "Despite, in spite of."

[23] It seems clear to me that the collective agreement's restriction of a normal workday between the hours of 7:00 a.m. and 6:00 p.m. does not apply to working variable hours, as it is clear that the rule of working seven and one-half hours per day, which is also included in clause 25.06(b) of the collective agreement, does not apply.

[24] Furthermore, clause 25.26(a) of the collective agreement specifies that starting and finishing times shall be determined according to operational requirements. There is no mention that starting and finishing times cannot be outside 7:00 a.m. to 6:00 p.m. period.

[25] If the employer and the grievors' bargaining agent intended to impose restrictions on when an employee could work his or her variable hours, they would have mentioned it in the collective agreement, as in clause 25.08 for flexible hours. However, they did not mention it, either in clause 25.09 or in clause 25.26(a).

[26] On the main question posed by these grievances, I conclude that the employer erred in interpreting the collective agreement the way that it did in the November 2001 email. Nothing in the collective agreement prevents variable hours from being worked outside the 7:00 a.m. to 6:00 p.m. period.

[27] However, I do not agree with the grievors that the decision on whether to allow an employee to work variable hours must be based on operational requirements. It is the prerogative of the employer whether to allow a request of an employee for variable hours of work. The employer is fully entitled to refuse such requests for motives other than operational requirements.

[28] In *Boyachok*, the Federal Court of Appeal established that the adjudicator, faced with a comparable wording in the collective agreement, ". . . erred in questioning the validity of the reasons given by the employer at all levels for subsequently revoking its concurrence. . . ." When applied to this case that decision means that the employer is fully entitled to refuse variable hours to an employee and that an adjudicator does not have the authority to question its motives. However, that does not prevent me from ruling that the employer's interpretation of the collective agreement, in this case, was erroneous.

[29] The practical impact of my decision will be that when the employer is presented with a request from an employee for variable hours of work, the employer is not allowed to consider, when it accepts or refuses the request, that it contravenes the collective agreement if part of the requested hours fall outside the 7:00 a.m. to 6:00 p.m. period.

[30] Considering my decision on the main issue, it is not necessary to comment on the arguments presented by the parties on estoppel and past practice.

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

(The Order appears on the next page)

V. Order

[32] The grievances are allowed in part.

[33] I declare that the employer contravened the collective agreement in preventing employees working on variable hours from working outside 7:00 a.m. to 6:00 p.m. period, irrespective of operational requirements.

[34] The employer is not allowed to consider that a request for variable hours of work falling partly outside the 7:00 a.m. to 6:00 p.m. period contravenes the collective agreement.

August 12, 2008

Renaud Paquet,
Adjudicator

PSLRB File No.	**Grievor**
166-02-32950	Boudreau, Debbie R.
166-02-32951	Boudreau, Sylvie I.
166-02-32952	Causey, Bev
166-02-32953	Doucet, Danny
166-02-32954	Guitard, Angella M.
166-02-32955	Hains, Isabelle
166-02-32956	Landry, Clarence
166-02-32957	Lebans, Bonnie E.
166-02-32958	Mazerolle, Huguette
166-02-32959	Morrison, Katherine
166-02-32960	Noel, Janice
166-02-32961	Pitre, Gisèle
166-02-32962	Pitre, Lilianne
166-02-32963	Ramsay, Margaret (Peggy)
166-02-32964	Regnier, Ronald
166-02-32965	Ross, Helen
166-02-32967	Roy-Burke, Jocelyne
166-02-32968	Savoie, Donald
166-02-32969	St-Pierre, Donald
166-02-32970	Smith, Darlene A.
166-02-32971	Theriault, Stanley