Date: 20091009

File: 566-02-1767

Citation: 2009 PSLRB 126

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

GLENN LAUZON

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Lauzon v. Treasury Board (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievor: Michel Bouchard, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

For the Employer: Martin Desmeules, counsel

Heard at Kingston, Ontario,
September 23, 2009.

I. Individual grievance referred to adjudication

[1] On July 9, 2007, Glenn Lauzon ("the grievor") filed a grievance alleging that the Correctional Service of Canada ("the employer") violated the allocation-of-overtime provisions of the collective agreement signed by the Treasury Board and the Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN ("the bargaining agent") for the Correctional Services bargaining unit on June 26, 2006 ("the collective agreement"). At the time, the grievor was a correctional officer at the Collins Bay Institution in Kingston, Ontario.

[2] The grievor had indicated to the employer that he was available to work overtime for the midnight shift starting at 23:00 on June 26, 2007 and ending at 07:00 on June 27, 2007. There was overtime available on that shift, and the employer did not offer it to the grievor but rather to another employee. The grievor alleges that, in doing so, the employer violated clause 21.10 of the collective agreement, which reads as follows:

> ***21.10 Assignment of Overtime Work***
>
> *The Employer shall make every reasonable effort:*
>
> *(a) to allocate overtime work on an equitable basis among readily available qualified employees,*
>
> ***(b) to allocate overtime work to employees at the same group and level as the position to be filled, i.e.: Correctional Officer 1 (CX-1) to Correctional Officer 1 (CX-1), Correctional Officer 2 (CX-2) to Correctional Officer 2 (CX-2) etc.;*
>
> *However, it is possible for a Local Union to agree in writing with the Institutional Warden on an another method to allocate overtime.*
>
> *and*
>
> *(c) to give employees who are required to work overtime adequate advance notice of this requirement.*

[3] At Collins Bay Institution, there is a well-established procedure used to allocate overtime. Each week, employees record in writing their availability on the volunteer overtime report for the week. The name of every employee appears on the report. Each employee indicates, for the seven upcoming days, the days and shifts for which he or she is available for overtime. The report also includes the employee's days of rest, the

employee's phone number and the total number of overtime hours that employee has worked during the applicable quarter. Employees start a quarter with zero hours of overtime and, from there, every hour of overtime worked is compiled. The quarters are as follows: January 1 to March 31, April 1 to June 30, July 1 to September 30, and October 1 to December 31. According to the procedure, the employer first offers the overtime to the available employee who has the lowest number of overtime hours worked during the quarter, with the exception that employees compensated at time-and-one-half are called before employees compensated at double time.

[4] The employer allocated an eight-hour overtime shift, which started at 23:00 on June 26, 2007, to an employee who had more hours of overtime worked in the quarter than the grievor. The employer admitted that it did not attempt to call the grievor on that day. It also admitted that the grievor would have been paid time-and-one-half for that overtime and that the employee who was called was paid double time. The employer's decision to not call the grievor was based on the fact that the grievor's previous shift had finished at 19:45 on June 26, 2007 and that the overtime shift was to commence less than eight hours later.

II. Summary of the evidence

[5] The grievor testified. He called Alfred Elliott and Lydia Coco as witnesses. Mr. Elliott is a correctional officer at Collins Bay Institution. He is also the grievance coordinator for the bargaining agent at that institution. Ms. Coco is a correctional officer at Collins Bay Institution. The employer called Elliott Gray as a witness. Mr. Gray was a correctional manager at the time the grievance was filed.

[6] The grievor testified that he was scheduled to work at the Collins Bay Institution from 07:00 to 19:45 on June 26, 2007. However, on that day he attended training outside the workplace. The training ended at 15:00. Normally, he would have then reported to work, but instead he asked for a family-related responsibility leave for the balance of his shift. The employer approved his leave.

[7] Mr. Elliott and Ms. Coco testified that it is the employer's practice to offer overtime to available employees even if they were on family-related responsibility leave during their previous shifts. Mr. Elliott himself was in that situation on numerous occasions. Ms. Coco testified that her life partner, who is also a correctional officer, had also been in that situation. Ms. Coco's partner was on family-related responsibility

leave on a shift ending at 19:45, and he was called for overtime for a shift commencing at 23:00 on the same day.

[8] Mr. Gray testified that overtime was not offered to the grievor on June 26 for the shift commencing at 23:00 because his previous shift had ended at 19:45 on the same day. The employer does not consider that a rest period of 3 hours and 15 minutes is sufficient between two shifts. If something were to happen at an institution because the employee was too tired or not alert enough, the employer would be liable for having called an unrested employee in to work.

[9] In cross-examination, Mr. Gray explained that the overtime shift starting at 23:00 on June 26, 2007 was not a scheduled work shift for the grievor but rather a potential overtime shift to be worked during hours when he was not scheduled to work. Mr. Gray also testified that there was nothing in the Collins Bay Institution procedure on overtime allocation about bypassing an employee who does not have enough hours of rest.

III. Summary of the arguments

[10] The grievor argued that the employer violated clause 21.10 of the collective agreement by not offering him overtime on June 26, 2007 for the midnight shift. The grievor had indicated that he was available to work overtime for that shift, and he should have been offered the overtime considering that he had less hours of overtime worked in the quarter than the employee who was called.

[11] There is nothing in clause 21.10 of the collective agreement or in the well-established Collins Bay Institution overtime policy that indicates that an employee cannot be called for overtime within eight hours of his or her last shift. The employer did not verify with the grievor if he was rested enough to work overtime on June 26, 2007; it simply did not call him.

[12] The grievor is asking that the employer be ordered to pay him eight hours at time and one half for the missed overtime opportunity of June 26, 2007.

[13] The grievor referred me to the following decisions: *Mungham v. Treasury Board (Correctional Service of Canada*, 2005 PSLRB 106; *Hunt and Shaw v. Treasury Board (Correctional Service of Canada*, 2009 PSLRB 65; *Greater Sudbury Hydro Plus Inc. v. Canadian Union of Public Employees, Local 4705*, [2003] 115 L.A.C. (4th) 385; and *3M*

Canada Inc. v. Energy and Chemical Workers' Union, Local 294, [1984] 15 L.A.C. (3d) 316.

[14] The employer argued that it was entitled to not offer overtime to the grievor for the midnight shift starting June 26, 2007 at 23:00. For the employer, a shift is a shift, no matter if it is worked during regular hours or on overtime. Article 21 of the collective agreement is entitled "Hours of Work and Overtime" and should be interpreted in its entirety. Clause 21.02 is clear: the employer should make efforts not to schedule the commencement of a shift within eight hours of the completion of the previous shift. The shift for which the grievor is claiming that he should have been called for overtime commenced less than four hours after the grievor completed his previous shift. Clause 21.02 reads as follows:

> ***Shift Work***
>
> ***21.02*** *When hours of work are scheduled for employees on a rotating or irregular basis:*
>
> *(a) they shall be scheduled so that employees:*
>
> *(i) on a weekly basis, work an average of forty (40) hours,*
>
> *and*
>
> *(ii) on a daily basis, work eight decimal five (8.5) hours per day.*
>
> *(b) every reasonable effort shall be made by the Employer:*
>
> *(i) not to schedule the commencement of an employee's shift within eight (8) hours of the completion of the employee's previous shift,*
>
> . . .

[15] The employer recognized that the grievor should have been called for overtime had he had at least eight hours of rest after the end of his last shift. The employer's decision was solely based on the fact that the grievor did not have eight hours of rest after the end of his last shift.

[16] Also, in the eventuality that the adjudicator allows the grievance, the employer does not challenge the remedy proposed by the grievor (eight hours at time-and-one half).

IV. Reasons

[17] The parties recognized the legitimacy of the institution's well-established policy on the allocation of overtime. They also agreed on the facts of the grievance. The only question posed by this grievance is whether the employer violated the collective agreement by deciding not to offer overtime to the grievor for the sole reason that he had less than eight hours of rest before commencing the overtime shift.

[18] I agree with the employer that article 21 of the collective agreement covers hours of work and overtime. In fact, the first nine clauses of article 21 deal with hours of work, scheduling and meal breaks, and the last five deal with overtime allocation, overtime compensation and overtime meal allowance.

[19] However, I do not agree with the employer that the restriction contained in clause 21.02 of the collective agreement specifying an eight-hour interval between scheduled shifts applies to overtime shifts. In fact, in applying that restriction to clause 21.10, the employer decided unilaterally that the grievor was not available to work overtime.

[20] On the evening of June 26, 2007, the employer did not speak with the grievor. Rather, it decided that he was not fit for work because his previous shift had ended at 19:45. The employer was convinced that the grievor would not be rested enough to work an eight-hour overtime shift commencing at 23:00 that day. In the absence of clause 21.10 of the collective agreement or of the institution's allocation-of-overtime policy, this could have been an acceptable decision. However, in this case, it is not acceptable that the employer made such a decision.

[21] The grievor had made himself available in accordance with the overtime policy and the collective agreement. The policy does not contain any restriction about the interval of time between a regular shift and an overtime shift. Clause 21.10 of the collective agreement also does not contain a restriction. The grievor was available to work that overtime shift, and he was qualified. He did not give any indication to the employer that he was too tired or unfit to work that overtime shift. In fact, he was fully aware that his shift would end at 19:45 on June 26, 2007 when he indicated on the volunteer overtime sheet before the beginning of the week that he was available to work overtime at 23:00 on June 26.

[22] Some employees could be fit for work with only a couple of hours of rest. Others could need more than eight hours of rest. Many factors can influence an employee's need for rest to be fit for work. Furthermore, the employer does not know what an employee does with his or her own time outside the workplace. An employee could end a shift at 11:00, do some work at home the rest of the day or go fishing or play hockey in the evening and accept an overtime shift at 23:00 of the same day. The employer is entitled to an employee providing a productive shift during regular hours or on overtime. If the employer feels that the employee is too tired to work, it has the full right to send the employee home without pay. However, the employer does not have the right to make a predetermined and subjective unilateral decision that an employee is not rested enough to work.

[23] An employee covered by the collective agreement works an average of 40 hours per week. Among other things, the content of clauses 21.01 to 21.09 determines how those hours are scheduled. Clause 21.02(b)(i) imposes a restriction on the employer in scheduling hours of work, so that an employee, when it is reasonably feasible, is not forced to commence a shift within eight hours of the completion of the previous shift. A different logic is applied to overtime availability; the employee makes the decision to be available, not the employer. The employee can then decide to make himself or herself available at any time, even within the eight hours after the end of a previous shift. If the parties wanted to impose such a restriction on employees, they would have written one into clause 21.10 or into one of the other overtime clauses of article 21, but they did not.

[24] Mr. Elliott and Ms. Coco testified that it was the employer's practice to offer overtime to available employees after a leave for family-related responsibility. That evidence is irrelevant to the case because it is clear that, based on the employer's evidence and arguments, that this was not the reason for its refusal to offer overtime to the grievor.

[25] The employer did not submit any jurisprudence in support of its position, stating that there was no precedent applicable to the question submitted to me. The grievor submitted several decisions. Considering that the employer admitted that the institution's policy constituted its interpretation of the words "equitable basis" in clause 21.10 of the collective agreement and that the employer conceded the remedy requested by the grievor if the grievance were allowed, the decisions submitted by the

grievor become irrelevant. Those decisions do not deal with the question that I must decide.

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

(The Order appears on the next page)

V. Order

[27] The grievance is allowed.

[28] The employer must pay the grievor eight hours at time-and-one-half at the applicable pay rate.

October 9, 2009.

Renaud Paquet,
adjudicator