Date: 20091106

File: 566-02-1214

Citation: 2009 PSLRB 148

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

DALE GARRAH

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Garrah 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: John Mancini, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

For the Employer: Nadia Hudon, counsel

Heard at Montreal, Quebec,
October 22, 2009.

I. Individual grievance referred to adjudication

[1] Dale Garrah ("the grievor") is a correctional officer at Millhaven Institution in Kingston, Ontario. On January 11, 2007, he filed a grievance alleging that the Correctional Service of Canada ("the employer") violated 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"). The grievor challenged the employer's decision to deduct half an hour from his vacation credits leave for leave taken on a designated paid holiday, December 25, 2006. On that day, the grievor was scheduled to work 8.5 hours. For the employer, the time value of a designated paid holiday is eight hours of leave.

[2] This grievance was originally scheduled to be heard in Kingston, Ontario, on October 8, 2009. It was postponed on a request from the employer. Following written exchanges with the parties, it was decided that the case would be heard in Montreal, Quebec, on October 21 and 22, 2009, with other cases from the Quebec region dealing with the same issue. On October 19, 2009, the bargaining agent decided to withdraw the Quebec region cases. After hearing the parties on the question, I decided to maintain the hearing dates and location for this grievance with the exception that the hearing would be for one day only. Considering that simultaneous interpretation services had already been hired at the employer's request, I indicated to the parties that they were free to express themselves in the language of their choice and to use the interpretation devices if needed.

II. Summary of the evidence

[3] The grievor testified. He called Michel Bouchard as a witness. Mr. Bouchard is an advisor for the bargaining agent in the Ontario region. He was a member of the bargaining team that negotiated the collective agreement and a member of the subcommittee that addressed scheduling issues. The employer called Robert Charlton as witness. Mr. Charlton is now retired. Like Mr. Bouchard, Mr. Charlton was a member of the bargaining team and the subcommittee that addressed scheduling issues. Most of the evidence presented by the parties was not contradicted.

[4] According to the collective agreement, December 25 is a designated paid holiday. The employer approved the grievor's leave request for Monday, December 25, 2006. The grievor would have worked 8.5 hours that day. For

the employer, a designated paid holiday has a value of eight hours of leave. Consequently, the grievor should reimburse the half-hour difference with annual leave, leave without pay or half an hour of work. The grievor chose to reimburse the half-hour with annual leave. He alleges that he should not have to reimburse anything because a designated paid holiday has a value of 8.5 hours.

[5] Correctional officers work either 40 hours per week or an average of 40 hours per week. At the time of the grievance, the grievor worked on a "7-3, 7-4 schedule." Under that schedule, the grievor worked 7 consecutive days of 8.5 hours with the exception of Tuesdays when he worked 9 hours. After those 7 days, he had 3 days of rest. Then, he worked 7 more consecutive days of 8.5 hours with the same exception for the Tuesday. After those 7 days, he had 4 days of rest. On a 21-day cycle, the grievor worked 12 days of 8.5 hours and 2 days of 9 hours for a total of 120 hours, averaging 40 hours per week.

[6] The following clauses of the collective agreement are relevant to the grievance:

. . .

> ***Hours of Work***
>
> ***Day Work***
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> ***
>
> ***21.01*** *When hours of work are scheduled for employees on a regular basis, they shall be scheduled so that employees:*
>
> *(a) on a weekly basis, work forty (40) hours and five (5) days per week, and obtain two (2) consecutive days of rest,*
>
> *(b) on a daily basis, work eight (8) hours per day.*
>
> ***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.

. . .

26.05

(a) When an employee works on a holiday, he or she shall be paid time and one-half (1 1/2) for all hours worked up to the regular daily scheduled hours of work as specified in Article 21 of this collective agreement and double (2) time thereafter, in addition to the pay that the employee would have been granted had he or she not worked on the holiday.

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(b) The pay that the employee would have been granted had he or she not worked on a designated paid holiday is eight (8) hours remunerated at straight-time.

. . .

ARTICLE 34
MODIFIED HOURS OF WORK

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The Employer and the Union agree that the following conditions shall apply to employees for whom modified hours of work schedules are agreed upon pursuant to the relevant provisions of this collective agreement. The agreement is modified by these provisions to the extent specified herein.

1. General Terms

The scheduled hours of work of any day as set forth in a work schedule, may exceed or be less than the regular workday hours specified by this agreement; starting and finishing times of shifts, meal breaks and rest-breaks shall be established by agreement between the employer and the Union at the local level, and approved according to the attached letter of understanding. The daily hours of work are consecutive.

For shift workers, such schedules shall provide that an employee's normal work week shall average the weekly hours per week specified in this agreement over the life of the schedule.

. . .

> **
>
> ***2. Leave – General***
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> *When leave is granted, it is to be granted on an hourly basis and the hours debited for each day of leave shall be the same as the hours the employee would normally have been scheduled to work on that day.*
>
> . . .
>
> ***3. Specific Application***
>
> *For greater certainty, the following provisions shall be administered as provided herein:*
>
> . . .
>
> ***Designated Paid Holidays***
>
> *(a) A designated paid holiday shall account for the normal daily hours specified by this agreement.*
>
> *(b) When an employee works on a Designated Paid Holiday, the employee shall be compensated, in addition to the normal daily hours of pay specified by this agreement, time and one-half (1 1/2) up to his or her regular scheduled hours worked and double (2) time for all hours worked in excess of his or her regular scheduled hours.*
>
> ***Vacation Leave***
>
> *Employees shall earn vacation at the rates prescribed for their years of service as set forth in Article 29 of this agreement. Leave will be granted on an hourly basis and the hours debited for each day of vacation leave shall be the same as the employee would normally have been scheduled to work that day.*
>
> . . .

[7] Under the collective agreement signed by the employer and the bargaining agent for the Correctional Services bargaining unit that expired May 31, 2002 ("the old collective agreement"), correctional officers worked either 37.5 hours per week or an average of 37.5 hours per week.

[8] Under the old collective agreement, some employees also worked modified hours, which were called variable hours of work. Employees were then working 8 hours per day and an average of 37.5 hours per week. The schedule was designed in a way that employees were short one hour every eight weeks. It was corrected by having

them work an extra day every 48 weeks, but the employees did not like that arrangement. The new way of scheduling hours in the collective agreement resolved that problem.

[9] In addition to the number of weekly and daily hours of work, the parties agreed to a few other or additional changes when they renewed the old collective agreement in 2006. As far as this grievance is concerned, the most notable change was the addition of clause 26.05(b), which deals with the number hours of pay for a designated paid holiday.

[10] The employer has a national policy dated December 2006 and amended in March 2007 that explains how to administer the pay of employees not working on a designated paid holiday. The policy clearly states that such a holiday is worth eight hours of work. If an employee books such a holiday off, the employee should pay back the number of hours that he or she was scheduled to work over eight hours. For an 8.5-hour shift, the employee must pay back half an hour. The policy outlined the possible pay back options for employees.

III. Summary of the arguments

A. For the grievor

[11] The grievor's representative argued that the employer violated the collective agreement by asking the grievor to pay back half an hour for his leave on December 25, 2006. According to article 34 of the collective agreement, "[a] designated paid holiday shall account for the normal daily hours specified by this agreement." The normal daily hours of work are 8.5 hours as per clause 21.02(a)(ii) of the collective agreement. Consequently, the grievor was entitled to 8.5 hours of leave on December 25, 2006 and not to 8 hours as per the employer's decision.

[12] This question has already been examined by the Public Service Staff Relations Board ("the Board") in *White v. Treasury Board (Solicitor General - Correctional Service),* 2003 PSSRB 40; *Diotte v. Treasury Board (Solicitor General - Correctional Service)*, 2003 PSSRB 74; and in *Wallis v. Treasury Board (Correctional Service of Canada),* 2004 PSSRB 180. The Federal Court also examined the same question in *White v. Canada (Treasury Board)*, 2004 FC 1017.

[13] The three decisions from the Board and the decision of the Federal Court in *White* all reached the same conclusion: according to article 34 of the collective agreement, a designated paid holiday gives an employee a number of hours of leave equal to his or her normal daily hours of work as specified in clause 21.02. In the old collective agreement, this meant 8 hours of leave, and in the collective agreement, it means 8.5 hours of leave.

[14] In its grievance reply, the employer answered that, according to clause 26.05(b) of the collective agreement, an employee should be granted eight hours of pay for a designated paid holiday. Clause 26.05(b) does not apply to this grievance because it does not apply to employees who work modified hours. In this case, article 34 applies.

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

[15] The employer argued that modified hours of work should not result in extra benefits for an employee or in extra costs for the employer. All employees work an average of 40 hours per week. Employees working during the day work 8 hours per day, and employees on shifts, work an average of 8.5 hours per day. A designated paid holiday has a value of eight hours of leave. It cannot have a higher value for an employee who is working modified hours.

[16] This grievance should be differentiated from the decisions cited by the grievor because those decisions were issued in the context of the old collective agreement, which was amended before this grievance was filed. The old collective agreement did not include clause 26.05(b). That clause applies to all employees, including those working on modified hours, and it specifies that an employee should be paid eight hours for a designated paid holiday.

[17] The employer did not violate the collective agreement by asking the grievor to pay back half an hour for the leave that he took on December 25, 2006. The grievor was entitled to 8 hours of leave, but he was scheduled to work 8.5 hours. He must then pay back half an hour. It would be inequitable if employees working regular hours were allowed 8 hours of leave for a designated paid holiday while employees working modified hours were allowed 8.5 hours.

IV. Reasons

[18] This grievance raises a fairly simple question about the time value of a designated paid holiday. For the grievor, that value is 8.5 hours, and for the employer, it is 8 hours. To answer the question, I need first to decide which schedule applies to the grievor and second the time value for a designated paid holiday under that schedule. Once those issues have been decided, I will examine the impact of the decisions cited in this case.

[19] The employees covered by the collective agreement work a day schedule (clause 21.01) or a shift schedule (clause 21.02). There is no dispute between the parties that the grievor worked a shift schedule.

[20] The grievor worked a seven-consecutive-day schedule. For 6 of those days, he worked 8.5 hours, and for the other day (Tuesday), he worked 9 hours. Because he did not work the same number of hours every day, article 34 of the collective agreement applied to him. The grievor was working modified hours even if the "modification" was small. On Tuesdays, he exceeded the 8.5 hours of clause 21.02(a)(ii).

[21] The provisions of article 34 modify specific parts of the collective agreement. The rest of the collective agreement is not affected. Article 34 contains a clause about designated paid holidays. It can be compared to clause 26.05. Even though those provisions were cited earlier in this decision, I find it useful to cite them again.

ARTICLE 34
MODIFIED HOURS OF WORK

. . .

Designated Paid Holidays

(a) A designated paid holiday shall account for the normal daily hours specified by this agreement.

(b) When an employee works on a Designated Paid Holiday, the employee shall be compensated, in addition to the normal daily hours of pay specified by this agreement, time and one-half (1 1/2) up to his or her regular scheduled hours worked and double (2) time for all hours worked in excess of his or her regular scheduled hours.

. . .

ARTICLE 26
DESIGNATED PAID HOLIDAYS

. . .

26.05

(a) When an employee works on a holiday, he or she shall be paid time and one-half (1 1/2) for all hours worked up to the regular daily scheduled hours of work as specified in Article 21 of this collective agreement and double (2) time thereafter, in addition to the pay that the employee would have been granted had he or she not worked on the holiday.

**

(b) The pay that the employee would have been granted had he or she not worked on a designated paid holiday is eight (8) hours remunerated at straight-time.

[22] Even though clause 26.05(a) and paragraph (b) of the designated paid holiday clause of article 34 of the collective agreement are worded differently, they apply the same logic in determining an employee's pay when he or she works on a designated paid holiday. Clause 26.05(b) clarifies the last line of clause 26.05(a) in establishing eight hours as the time value of a designated paid holiday. In the designated paid holiday clause of article 34, the order is reversed, and the time value of a designated paid holiday is covered in paragraph (a) rather than in paragraph (b).

[23] If the intent of the parties to the collective agreement was to have clause 26.05(b) applied to employees on modified work schedules, they would have deleted paragraph (a) of the designated paid holiday clause of article 34, but they did not. Considering that the provisions of article 34 modify specific parts of the collective agreement and that article 34 covers the time value of a designated paid holiday, I conclude that clause 26.05(b) cannot apply to employees who work modified schedules.

[24] According to paragraph (a) of the designated paid holiday clause of article 34 of the collective agreement, a designated paid holiday shall account for the "normal daily hours" specified in the collective agreement. However, "normal daily hours" are not specifically defined in the collective agreement. The interpretation of the expression "normal daily hours" was at the centre of the decisions in *White*, *Diotte* and *Wallis*. In those cases, there was also a larger issue about the hours scheduled. In *White v.*

Treasury Board (Solicitor General-Correctional Service), the adjudicator wrote the following:

. . .

> *[35] The "regular scheduled hours worked" is a reference to the hours for each shift that each employee is scheduled to work. "Normal daily hours" must therefore be something different. Clause 21.01 provides that shift work is to be scheduled so that employees, on a daily basis, work eight hours per day. This must be the "normal daily hours specified by this agreement", as there are no other daily hours for shift workers specified in the agreement.*

. . .

[25] In that decision, the adjudicator decided that the normal daily hours were those specified in clause 21.01 of the collective agreement for shift workers. The Federal Court reviewed that decision and concluded that the adjudicator had considered the appropriate provisions of the collective agreement and that he had interpreted them in accordance with normal principles of interpretation. The Federal Court rejected the application for judicial review because the adjudicator's interpretation was not without reason and was not patently unreasonable. In *Diotte* and *Wallis*, the adjudicators also concluded that the normal daily hours were those specified in clause 21.01 for shift workers.

[26] I agree with those decisions, which have established that a designated paid holiday has a time value equal to the daily hours specified in clause 21.01 of the collective agreement for shift workers, namely, 8.5 hours a day.

[27] The employer is right in reminding me that the cited decisions interpreted the old collective agreement. However, the collective agreement in question here does not differ from the old collective agreement concerning the clauses relevant to establishing the time value of a designated paid holiday for employees working a modified shift schedule. The employer argued that clause 26.05(b) was added and that it changed the rules. I have already ruled that that clause does not apply to employees working modified hours. Therefore, the rules remained unchanged when the parties signed the collective agreement in 2006.

[28] The employer also argued that, if the grievance were allowed, it would create an inequity between employees. Those working regular hours would be entitled to 8 hours

of leave for a designated paid holiday, and those working modified hours would be entitled to 8.5 hours of leave. I would not go so far as to conclude that it creates an inequitable treatment between employees but rather an unequal treatment.

[29] As specified in article 34 of the collective agreement, there are several differences in work rules between employees working regular hours and those working modified hours. That is what the parties decided, and I must respect it. If the parties wanted to treat those two groups of employees equally, they should not have written rules that resulted in different treatment, but that is exactly what they did.

[30] In conclusion, the employer violated the collective agreement by asking the grievor to pay back one half-hour of time for leave taken on December 25, 2006. The collective agreement must be interpreted to give a leave time value of 8.5 hours for a designated paid holiday.

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

(The Order appears on the next page)

V. Order

[32] The grievance is allowed.

[33] The employer must credit the grievor's annual leave balance by one half-hour.

November 6, 2009.

Renaud Paquet,
adjudicator