Date: 20091029

File: 166-02-36553

Citation: 2009 PSLRB 142

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

JASON FOOTE

Grievor

and

TREASURY BOARD
(Department of Public Works and Government Services)

Employer

Indexed as
Foote v. Treasury Board (Department of Public Works and Government Services)

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

REASONS FOR DECISION

Before: George Filliter, adjudicator

For the Grievor: Douglas Hill, Public Service Alliance of Canada

For the Employer: Caroline Engmann, counsel

Heard at Moncton, New Brunswick,
October 6, 2009.

I. Grievance referred to adjudication

[1] Jason Foote ("the grievor") has been employed by the Department of Public Works and Government Services ("the employer") since 2001. The grievor filed a grievance in which he claims that the employer denied him the opportunity to work overtime, contrary to clause 28.05(a) of the Program and Administration Services Collective Agreement between the Treasury Board and the Public Service Alliance of Canada (PSAC), expiry date June 20, 2003 ("the collective agreement").

[2] I must decide whether the introduction of a policy by the employer that does not allow employees the opportunity to work overtime unless they have met a defined production level in the month preceding contravenes the relevant provisions of the collective agreement.

[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*, 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.

II. Procedural issue

[4] At the outset of the hearing, counsel for the grievor indicated that this grievance was a continuing grievance and that the remedy being requested was for compensation up to July 2007, when the grievor left the position in question. Counsel for the employer indicated that that was a surprise to her.

[5] After submissions on the continuing nature of the grievance, and with the consent of both parties, I ruled that the matter of the alleged violation of the collective agreement would proceed without adjournment. If I concluded that the collective agreement had in fact been violated, and the parties were unable to agree on an appropriate remedy, then a further hearing date would be set, where the appropriate remedy could be argued.

III. Summary of the evidence

[6] At the beginning of the hearing, both counsel introduced an agreed statement of facts and consented to the introduction of several documents as exhibits. The agreed statement of facts reads as follows:

1. *At the time of presenting his grievance, the grievor Jason Foote, occupied a Pension Counsellor position at the CR-05 group and level in the Superannuation Sector of PWGSC.*

2. *At all relevant times, the grievor was covered by the Program and Administration Services Collective Agreement between Treasury Board and the Public Service Alliance of Canada (expiry date of June 20, 2003). This agreement provided for the distribution of overtime work as follows (Article 28) (Document #1):*

   > *28.05(a) Subject to the operational requirements, the Employer shall make every reasonable effort to avoid excessive overtime and to offer overtime work on an equitable basis among readily available qualified employees.*

3. *In January 2004, the Employer established a plan to address backlogged work at the Program Service Delivery Division through the use of overtime. General staff meetings were held to apprise employees of this management plan. Following these meetings, a memorandum dated January 8, 2004 was issued to all staff within the Division indicating that a plan had been established to address backlogged work through overtime. (Document #2).*

4. *In March 2004, the grievor worked 30 hours over time and completed 17.8 production standard hours of work.*

5. *On May 18, 2004 the grievor filed a grievance which reads as follows (Document #3):*

   > *I grieve that the employer has continually offered overtime based on employee's production results and is continuing to do so. The past and the on going offering of overtime work based on an employees production are violations of Article 28 – Overtime of the Program and Administrative (all employee) collective agreement and any other Articles related thereto.*
   >
   > *I reserve the right in support of this grievance to introduce any other Article of the collective agreement related thereto.*

He requested the following corrective measures:

> *That the employer respect Article 28 – Overtime of the Program and Administrative (all employees) collective agreement and cease and desist offering overtime work based on employee's production results. That the employer compensates me at the appropriate overtime rate for all missed overtime opportunities from the first day the employer used this improper method of distributing overtime work. That the employer compensates me at the appropriate overtime rate for all future missed overtime opportunities due to the continual use of this improper method of distributing overtime work. That I be made whole.*

6. *Management denied the grievance at each level of the grievance process. (Document #4)*

7. *The grievance was referred to adjudication on September 9th, 2005.*

8. *Currently, the grievor is employed in an indeterminate position as a CR-04 Account Integrity Specialist with Public Works and Government Services Canada (PWGSC) in Shediac N.B. and is on leave.*

[*Sic* throughout]

[7] In addition to the agreed statement of facts, each party called two witnesses and introduced further documentary evidence in support of their respective positions. The grievor was called, and so was Edward Lane, First Vice-president of Local 60018 of the Government Services Union, a component of the PSAC. The employer called Adeline Matchett, who held the position of Manager of the Operations Group at the relevant time and Ivan Jefferies, who held the positions of Team Mentor and then Team Leader and who had worked with the grievor.

[8] Ms. Matchett testified that, in 2003, she recognized that a backlog of work needed to be addressed. On January 5, 2004, Ms. Matchett sent a memo (Exhibit 21) to her director, Michel Doiron, in which she outlined a rationalization for the use of overtime to address the backlog identified the year before.

[9] The memo's purpose was to request approval for funding the overtime from Mr. Doiron. In the memo, Ms. Matchett indicated that she felt that a total of 5250.5 hours

of overtime would be necessary to address the identified backlog. Of that total, she identified 1918.5 hours of overtime for the Ontario Region. The grievor was assigned to perform work in the Ontario Region. To justify that request, Ms. Matchett proposed a number of conditions, to which Mr. Doiron eventually agreed.

[10] The overtime was introduced to staff in a memo January 8, 2004 (Exhibit 9). Although that memo did not specifically state the conditions that had to be met, Ms. Matchett testified that management conducted meetings before introducing the overtime and that it explained the conditions to staff. According to her uncontested evidence, the guidelines set forth in her memo to Mr. Doiron (Exhibit 21) were explained to staff. The grievor does not take issue with that point.

[11] In any event, the following guidelines were adopted as prerequisites to being offered overtime:

> - *to be eligible to work this overtime, counsellors must have a minimum average of 60 Production Standard Hours (PSH),*
>
> - *on a monthly basis, individual Production Standard Hours (PSH) on overtime will be monitored, through the use of an overtime control log, to ensure that PSH is equivalent or greater than the number of hours overtime [sic] claimed. In cases where it is not, overtime will not be offered for the following month.*
>
> - *to limit burnout, the maximum monthly hours permitted for any one counsellor will be 31.5 hours,*
>
> - *overtime will not be permitted for those employees who are undergoing the 4 week Initial Benefit course.*

[12] There was no dispute that the grievor and others performed task-oriented work. In other words, each employee was assigned certain tasks to complete, and only when the tasks were completed were the employees credited with the appropriate number of Production Standard Hours ("PSH") as determined by the employer. Ms. Matchett testified that, in any given month, an employee would normally work approximately 150 hours (37.5 hours a week multiplied by four weeks in a month) and that the minimum expected PSH total was 60 hours.

[13] There was also no dispute that, for the most part, the grievor was not able to achieve the 60 PHS monthly minimum. In fact, in March 2004, the grievor was able to

achieve only 17.8 PSH of work. Ms. Matchett testified and explained paragraph 4 of the agreed statement of facts. Her evidence, which was not contradicted, was that the 17.8 PSH of work were what the grievor had achieved after working approximately 150 regular hours during that month plus the 30 hours of overtime that he was assigned. However, during cross examination Ms. Matchett admitted that the grievor was qualified in his position. She did however indicate that the grievor was not productive.

[14] Other than the 30 hours of overtime that the grievor was assigned in March 2004, the employer did not assign him any overtime. That was the case even though, in May 2004, the grievor sent an email to the employer indicating that he wished to work overtime (Exhibit 19).

[15] Much evidence was adduced during the hearing about the grievor's inability to meet the employer's required production standards. In fact, three of the grievor's performance reviews were introduced into evidence (Exhibits 15, 16 and 17). Each review states that the grievor's productivity level was less than the average. Additionally, the employer introduced evidence indicating that a program had been put in place to assist the grievor. Suffice it to say that, in my opinion, most of that evidence was not of much assistance in considering the issue before me.

[16] I conclude that, for whatever reason, the grievor was not able to meet the employer's required production standards, and as a result, he was not offered any overtime.

IV. Issue to be decided

[17] The issue before me is easily stated. I must determine if the employer's introduction of production standards as a determining factor in assigning overtime violated the provisions of clause 28.05(a) of the collective agreement.

V. Positions of the parties

A. The grievor

[18] The grievor takes the position that the employer's introduction of production standards as a determining factor in assigning overtime amounts to an arbitrary modifier of the collective agreement. The grievor submits that, by introducing that arbitrary modifier, the employer did not offer overtime on an ". . . equitable basis among readily available qualified employees," as required by the collective agreement.

[19] In other words, the grievor states that the practice amended the terms of the collective agreement. In making his submission, the grievor states that such an amendment can be made only at the collective bargaining table. In support of his position, the grievor referred me to the following authorities: *Bunyan et al. v. Treasury Board (Department of Human Resources and Skills Development*), 2007 PSLRB 85; *Zelisko and Audia v. Treasury Board (Citizenship and Immigration Canada)*, 2003 PSSRB 67; and Brown and Beatty, *Canadian Labour Arbitration*, at sections 5:3222, 2:1423 and 2:1422.

B. The employer

[20] The employer, on the other hand, submits that it is within management's rights to organize its workforce and that the employer's introduction of production standards as a determining factor in assigning overtime did not contravene the terms of the collective agreement. Counsel for the employer reminded me that, in interpreting the collective agreement, I must consider the intent of the parties. Counsel for the employer rhetorically asked the following question: "Would the parties have intended that an employee who is unable to meet production standards be entitled to opportunities to work overtime?" The employer further submits that overtime is not an employee's right.

[21] Essentially, the employer's position is that requiring an acceptable level of productivity is a reasonable approach to ensure business efficacy. Furthermore, that requirement does not affect the equitable distribution of overtime as any employee who cannot meet the productivity levels has no right to overtime.

[22] In support of the employer's submissions, counsel for the employer referred me to the following authorities: *Ball et al. v. Treasury Board (Canada Post)*, PSSRB File Nos. 166-02-12997 to 13014 and 13017 to 13051 (19850325); and *Canadian Labour Arbitration*, at sections 4:2100, 5:000, 5:3220 and 5:3224.

VI. Analysis

[23] It is of use to set out the terms of clause 28.05(a) of the collective agreement, which states the following:

28.05 Assignment of Overtime Work

> *(a) Subject to the operational requirements, the Employer shall make every reasonable effort to avoid excessive overtime and to offer overtime work on an equitable basis among readily available qualified employees.*

[24] Several courts have provided guidance to decision makers on contract interpretation. I agree with the employer's submission that the approach that I should take is to determine the parties' true intent at the time they entered into the contract. To accomplish that task, I must first refer to the meaning of the words as used by the contracting parties (see *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, and *Jerry MacNeil Architects Ltd. v. Roman Catholic Archbishop of Moncton et al.*, 2001 NBQB 135).

[25] In considering this issue, I must also take into account the context in which the words are used (see *Stenstrom v. McCain Foods Ltd.,* 2000 NBCA 13, and *Robichaud et al. v. Pharmacie Acadienne de Beresford Ltée et al.*, 2008 NBCA 12, at para 18).

[26] The use of that approach by labour arbitrators has found favour with many courts, specifically the New Brunswick Court of Appeal. The adjudicator in *Irving Pulp & Paper Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 30*, 2002 NBCA 30, in a well-reasoned decision, stated as follows:

. . .

> *[10] It is accepted that the task of interpreting a collective agreement is no different than that faced by other adjudicators in construing statutes or private contracts: see D.J.M. Brown & D.M. Beatty,* Canadian Labour Arbitration *(3rd Ed.), looseleaf (Aurora, Ont.: Canada Law Book, Inc., 2001) at 4-35. In the contractual context, you begin with the proposition that the fundamental object of the interpretative exercise is to ascertain the intention of the parties. In turn the presumption is that the parties are assumed to have intended what they have said and that the meaning of a provision of a collective agreement is to be first sought in the express provisions. In searching for the parties' intention, text writers indicate that arbitrators have generally assumed that the provision in question should be construed in its normal or ordinary sense unless the interpretation would lead to an absurdity or inconsistency with other provisions of the collective agreement: see* Canadian Labour Arbitration *at 4-38. In short, the words of a collective agreement are to be given their ordinary and plain meaning unless there is a valid reason for adopting another. At the same time, words must be read in their immediate context and in the context of*

> *the agreement as a whole. Otherwise, the plain meaning interpretation may conflict with another provision.*
>
> . . .

[27] So, starting with the assumption that the parties intended what they said and that the meaning of the collective agreement is to be sought in its express provisions, I must determine the meaning of the phrase ". . . an equitable basis among readily available qualified employees."

[28] In determining the plain and ordinary meaning, the starting point is that the parties are presumed to have intended what they have said. Occasionally, an arbitrator or adjudicator may be required to imply a term. However, that occurs only when it is necessary to give the collective agreement "business or collective agreement efficacy" and only if it is determined that the parties would have agreed to the implied term without hesitation had they been apprised of the deficiency (see Brown and Beatty, at 4:2100).

[29] In my view, clause 28.05(a) of the collective agreement is not deficient and can be interpreted without the necessity of implying a term. In fact, another adjudicator of this Board has already addressed the question, and I adopt his views. The adjudicator in *Bunyan et al.* considered the word "equitable" in the context of the very article before me. He referred to the *Canadian Oxford Dictionary, Second Edition*, 2004, which defines the word as "just or characterized by fairness." In his review, he concluded, as do I, that the recurring theme in the word "equitable" is fairness.

[30] So, in the application of the procedure adopted by the employer in this case, which is the requirement that an employee attain certain productivity levels to be assigned overtime work, has the principle of fairness been applied?

[31] That same adjudicator had to determine if the employer's decision to restrict offering overtime to employees by not offering it to employees who worked in sections that did not meet the corporate production goals was "equitable." Although the fact situation before him was different from the one before me, the learned adjudicator concluded that such restrictions were not only unfair, they were also untenable. The learned adjudicator stated the following:

. . .

> ***88*** *To support the proposition that it would be fair to add restrictive provisions to collective agreement provisions such as office production is a slippery slope. For if one can add an arbitrary modifier such as minimal acceptable office productivity to create an entitlement to individual overtime, one could also add such notions as being discipline free, having one or more fully satisfactory appraisals, being at or below average use of sick leave, etc. As the employer well knows, any such change to existing collective agreement terms can only be achieved at the bargaining table.*
>
> . . .

[32] As noted, the fact situation in the matter before the adjudicator in *Bunyan et al.* was different from the one before me. However, I am of the view that the admonitions of the learned adjudicator concerning the "slippery slope" are of equal importance in this case.

[33] Ms. Matchett, who developed the criteria, gave evidence that the production standards that became a determining factor in assigning overtime were created to maximize the use of overtime. Indeed, in her memo to Mr. Doiron, she stated that "[t]o ensure we maximize the use of overtime in the region we determined that overtime would be based on the following criteria. . . ."

[34] The criterion that Mr. Doiron accepted and that became the determining factor in assigning overtime was, in my view, arbitrary. Ms. Matchett explained that the amount of 31.5 hours, set as the maximum number of overtime hours to be assigned to any employee in any month, was designed to limit the possibility of employee burnout. However, other than that, no explanation was given of how the other criteria were calculated.

[35] I was left with the impression that no scientific or indeed business rationale was behind the standards other than the stated desire to "maximize the use of overtime." I am not prepared to accept that the terms of clause 28.05 (a) of the collective agreement that require overtime work to be assigned ". . . on an equitable basis among readily available qualified employees" allow for the employer to impose such criteria.

[36] I conclude that the grievor, whom the employer admitted was a qualified employee, albeit not the most efficient, was denied overtime opportunities based on production-hour standards that were arbitrarily developed. This conclusion is confirmed by the replies in the three-level grievance process, each of which alludes to

the fact that the grievor had ". . . failed to meet management's expectations . . . and were not given the opportunity to perform overtime work after the end of March 2004" (see Exhibit 3 - Grievance Reply of Ms. Matchett). Therefore, I conclude that the grievor was not treated equitably, in contravention of clause 28.05(a) of the collective agreement.

[37] In reaching this conclusion, I am cognizant of management's prevailing rights to organize the workforce unless otherwise limited by the terms of a collective agreement. In my view, clause 28.05(a) of the collective agreement is in fact a limitation on the otherwise unfettered right of management to assign overtime to employees.

[38] Having come to this conclusion, I now need to consider whether this interpretation leads to an absurdity or inconsistency with other provisions of the collective agreement. Put another way, is the interpretation of the words read in their immediate context and in the context of the agreement as a whole in conflict with other provisions of the collective agreement?

[39] Neither party suggested that any interpretation that I might have for clause 28.05(a) of the collective agreement would be in conflict with any other provision. Additionally, on my own independent review of the collective agreement, I am convinced that my interpretation does not conflict with any other provision.

VII. <u>Reasons</u>

[40] For all of the reasons stated above, I conclude that the grievance is founded and declare that the employer has violated the terms of clause 28.05(a) of the collective agreement.

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

(The Order appears on the next page)

VIII. Order

[42] The grievance is allowed.

[43] The parties agree I will determine this matter in a declaratory manner, leaving the remedy to them to determine. However, I remain seized for a period of 30 days should the parties be unable to agree on the remedy.

October 29, 2009.

George Filliter,
adjudicator