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Citation: 2009 PSLRB 152

Public Service Labour Relations Act

Before an adjudicator

BETWEEN

LANGIS VEILLEUX, SERGE ROUSSY, MICHEL DOUCET, MARIO MARTEL, BENOÎT DESCHAMBAULT, ANNIE POIRIER, PIERRE GAUTHIER, ERIC GUILLEMETTE, NOËL ROY AND MARIO ROIREAU

Grievors

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Veilleux et al. v. Treasury Board (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievors: Yvan Malo, counsel

For the Employer: Marie-Josée Bertrand, counsel

Heard at Montreal, Quebec,
October 23, 2009.
(PSLRB Translation)

I. Individual grievances referred to adjudication

[1] Between March 2006 and June 2007, Langis Veilleux, Serge Roussy, Michel Doucet, Mario Martel, Benoît Deschambault, Annie Poirier, Pierre Gauthier, Eric Guillemette, Noël Roy and Mario Roireau ("the grievors") filed grievances against the decision of the Correctional Service of Canada ("the employer") to require them to repay excessive hours of leave for designated paid holidays. The parties indicated that the applicable collective agreement was signed on April 2, 2001 for the Correctional Services Group between the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the collective agreement").

[2] In 2006 or 2007, as applicable, the employer required the grievors to repay between 9.5 and 52 hours for excessive hours of leave approved for designated paid holidays. Those hours represented the difference between the number of hours on the grievors' work schedules and the number of hours of leave resulting from a designated paid holiday. Thus, an employee with a 12-hour shift on a designated paid holiday who decides to take leave incurs a debt of 4 hours to the employer. The employer normally reconciles those hours regularly and informs employees of any hours owing, if applicable. Between 2002 and 2006, the reconciliation was not done regularly, which led to the dispute underlying these grievances.

II. Summary of the evidence

[3] Mr. Veilleux, one of the grievors, testified. Mr. Veilleux, like the other grievors, is a correctional officer. Allessandria Page, Assistant Warden, Interventions, at Cowansville Institution, also testified. The employer adduced four documents. None of the evidence adduced by either party was contested.

[4] Given that the matter to be decided is the same for all grievors but the dates, hours and days of leave differ, the parties agreed to present only Mr. Veilleux' case. My decision will also apply, with necessary adjustments, to the other grievors.

[5] The grievors did not challenge the employer's interpretation that a designated paid holiday is equal to eight hours of leave even if an employee is expected to work more than eight hours on the holiday. They acknowledged that such a situation results in an overpayment of hours.

[6] The collective agreement stipulates that correctional officers be paid for 37.5 hours weekly and 1956 hours annually. For those 1956 hours, a correctional officer at the CX-02 group and level receives an annual salary of $59,914 if, like Mr. Veilleux, the correctional officer has reached the maximum pay rate.

[7] The employer prepares the work schedules, and the correctional officers are required to comply with them. During the period covered by his grievance, Mr. Veilleux worked a variable schedule because, each week, he worked a number of hours greater or less than the 37.5 hours for which he was paid. The schedule was designed in such a way that Mr. Veilleux worked 1800 hours, or a weekly average of 37.5 hours, over a 48-week cycle.

[8] In 2002, the employer asked Mr. Veilleux to repay 12 hours of work for the difference between the number of hours of leave taken on designated paid holidays and the number of hours of leave to which he had been entitled for those same days. Mr. Veilleux repaid those 12 hours.

[9] On March 10, 2006, the employer informed Mr. Veilleux that he had to repay 28 hours for the difference between the number of hours of leave taken on designated paid holidays between 2003 and 2006 and the number of hours of leave to which he had been entitled for those same days. The employer also informed Mr. Veilleux that the 28 hours could be repaid in one of the following three ways: a deduction of 28 hours of annual leave, working 28 hours or repaying the 28 hours in cash. The employer did not indicate at what pay rate the repayment could be made or that Mr. Veilleux' T4 statements for the years in question would be adjusted based on the new calculation of his salary once the overpayments had been applied.

[10] In February 2002, the employer sent a memo to correctional officers at the CX-02 group and level at Cowansville Institution informing them of the rules for the implementation of a pilot project involving 12-hour daily shifts. The document stated that a correctional officer taking leave on a designated paid holiday must give back four hours to the employer. In February 2003, the employer and the bargaining agent signed a local agreement on the 12-hour shift. One provision of that agreement was that a correctional officer who takes leave on a designated paid holiday would be required to give back four hours to the employer.

[11] It was not until 2006 that the employer realized that some correctional officers at Cowansville Institution had received too many hours of leave for designated paid holidays between 2002 and 2006 and that those hours had not been repaid. The employer acknowledged that the delay was due to one of its representatives, who was behind in his work. When the overpaid hours were identified, the employer offered the following three options for repayment: annual leave, unpaid leave or repayment in time worked.

III. Summary of the arguments

A. For the grievors

[12] For some of the grievors, the employer is making a retroactive claim for hours over a five-year period. Those claims and the resulting deductions are illegal.

[13] The employer, by its retroactive claims, is altering the established work schedules, the number of hours offered during the reference periods and the annual salary set out in the collective agreement. Under the collective agreement, a correctional officer is paid for 1956 hours per calendar year or per leave year defined by the collective agreement (April 1 to March 31). Work schedules are set in such a way that a correctional officer is expected to work 1800 hours in a 48-week cycle. The employer's retroactive claims unilaterally alter those parameters so that, once the claims are applied, the grievors will no longer have been paid for 1956 hours or 1800 hours depending on the reference period used. Moreover, the number of hours of work will also be reduced. The employer is no longer offering the hours of work set out on the work schedule that the employer itself established.

[14] The collective agreement does not contain any provision allowing the employer to claim such overpayments of hours of work. The employer required Mr. Veilleux to pay it back retroactively for hours paid to him since 2003 but for which the employer is not offering him hours of work. The overpayment results directly from the employer's delays in calculating the hours worked. Mr. Veilleux should not have to pay for the employer's mistakes, since the employer has unilateral control over work schedules and accounting for hours worked.

[15] The grievors acknowledged the employer's right to reconcile the hours worked each year and to reclaim from them any hours overpaid during the course of the year that is ending. However, they believe that the employer is going too far by making a

retroactive claim for hours overpaid in previous years. If the employer is negligent or makes mistakes in its calculations, it must assume responsibility for them and not make the grievors pay the price for its negligence.

[16] In support of their arguments, the grievors referred me to *UCCO-SAC-CSN v. Treasury Board*, 2004 PSSRB 38, and to *Union of Canadian Correctional Officers - Syndicat des agents correctionnels - CSN v. Treasury Board*, 2007 PSLRB 120.

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

[17] The grievors' grievances do not relate to the application or interpretation of the collective agreement or to disciplinary measures. The grievors do not contest the employer's interpretation of the collective agreement but rather the employer's right to request the retroactive repayment of leave overpayments. Accordingly, under subsection 209(1) of the *Public Service Labour Relations Act*, an adjudicator does not have jurisdiction to decide these grievances.

[18] The grievors admitted that the employer may recover the hours of leave granted in excess during a given year. What they are contesting is the employer's decision to claim hours from previous years. However, the collective agreement does not contain any prescription on recovering overpayments. If the parties wanted such a prescription, they would have had to agree to it in the collective agreement.

[19] Should the adjudicator find that he has jurisdiction to decide the grievance, the employer asks him to dismiss the grievances on the grounds that it did not make any error in calculating the hours of leave to which the grievors were entitled. The grievors knew that they would have to repay the hours each time they took leave on a designated paid holiday. Indeed, Mr. Veilleux had to repay hours in 2002 for leave taken that same year. He knew that the same rule applied to subsequent years, but he decided not to discuss it with the employer. The employer definitely was late in requesting the repayment of the excess hours of leave, but Mr. Veilleux also had a responsibility to make the employer aware that he had received too many hours of leave.

[20] In support of its arguments, the employer referred me to *Ménard v. Canada (C.A.)*, [1992] 3 F.C. 521.

IV. Reasons

[21] The grievors contest the employer's decision to claim, retroactively for up to five years, overpayments resulting from the difference between the hours of leave that should have been allocated and those that were taken on designated paid holidays. The grievors acknowledge that there are indeed overpayments but contest the employer's decision to go back beyond the year that is ending. The employer admitted that it was slow to act to claim the overpayments but argued that it was still entitled to make the claims.

[22] I do not accept the employer's argument that I do not have jurisdiction over the grievances. I acknowledge that the dispute does not relate to the meaning of the provisions of the collective agreement since the grievors concede that the employer's calculations of the hours of leave owing are correct. However, I agree with the conclusions of the adjudicator in 2007 PSLRB 120 that an adjudicator has jurisdiction to examine the question of the timing of the payment of remuneration. On that point, I cite paragraph 24 of that decision:

> *24. In this case, the exercise of management discretion is the timing of the payment of remuneration owing under the collective agreement. If the employer acts unreasonably in processing payments under the collective agreement, the applicable overtime and premium provisions of the agreement will be either negated or undermined. Accordingly, there is an implied requirement that payments of remuneration under the collective agreement be made within a reasonable time.*

[23] In that decision, the adjudicator established that unreasonable delays in paying remuneration provided under the collective agreement undermine its provisions. I would add that the employer must also be reasonable in the manner in which it collects overpayments; otherwise, the provisions of the collective agreement could also be undermined.

[24] I reject the grievors' argument that the employer is contravening the collective agreement's provisions with respect to hours of work or salary for the following very simple reason: an employer does not contravene the collective agreement solely by claiming from its employees hours of leave to which they were not entitled. Of course, it could arise that, once the overpayments have been repaid, the grievors were not paid for 1956 hours during the year or 1800 hours over the 48 weeks in question. It could

also result that the grievors' work schedule was not 1956 hours during the year or 1800 hours over the 48 weeks in question, but that, too, would not represent a violation of the collective agreement. The grievors implicitly admitted as much by acknowledging the employer's right to claim repayment of overpayments for the year ending, those overpayments most often being payable in the following year.

[25] Finally, even if as a result of the application of an overpayment of hours a correctional officer does not work 1956 hours in a given year, that would still not be a violation of the collective agreement. As clause 21.04 of the collective agreement states, the work schedule provisions may not be construed as guaranteeing minimum hours of work.

[26] The evidence shows that Mr. Veilleux knew in 2002 that he had to give back hours when taking leave on a designated paid holiday. The employer had informed him of it. In addition, the employer had agreed with the bargaining agent local in 2003 that correctional officers who took leave on a designated paid holiday and who worked a 12-hour shift would be overpaid four hours of leave. The employer could naturally have acted earlier and not waited three years to claim what it was owed, but Mr. Veilleux was also negligent by not informing management that he was accumulating an overpayment of hours of leave each year.

[27] It is my opinion that both parties are jointly responsible for the problem before me. The employer was not diligent in compiling the hours of leave, and Mr. Veilleux did not inform management that he had not worked enough hours. However, when the employer discovered the overpayment situation, it acted reasonably by offering a number of repayment options. Furthermore, the grievors did not adduce any evidence that the employer did not give them a reasonable period to choose between the options offered and to repay the overpayments.

[28] Therefore, I do not allow Mr. Veilleux's grievance or those of the other nine grievors.

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

(The Order appears on the next page)

V. Order

[30] The grievances are dismissed.

November 17, 2009.

PSLRB Translation

Renaud Paquet,
adjudicator