Date: 20090715

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Citation: 2009 PSLRB 87

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

MICHAEL G. CLARKSON

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Clarkson v. Treasury Board (Canada Border Services Agency)

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

REASONS FOR DECISION

Before: Georges Nadeau, adjudicator

For the Grievor: Andrew Raven, counsel

For the Employer: Shelley C. Quinn and Susan Keenan, counsel

Heard at Toronto, Ontario,
February 4 and 5, 2009.

I. Grievances referred to adjudication

[1] Michael G. Clarkson ("the grievor") is employed with the Canada Border Services Agency and works a variable shift schedule. In 2005, he filed two grievances. The first grievance concerned the employer's decision, on short notice, to change one of his shifts scheduled on a designated paid holiday to paid leave. He requested that he be remunerated as if he had worked his scheduled shift, that the employer cease its practice of placing employees on paid leave on designated paid holidays and that he be made whole. The second grievance concerned the pay premium for a change to the shift schedule. He requested that he be paid the short-shift-change premium immediately following the designated paid holiday for which his scheduled shift had been changed to paid leave on January 3, 2005.

[2] The collective agreement applicable to the grievances was signed by the Canada Customs and Revenue Agency and the Public Service Alliance of Canada on March 22, 2002, for the Program Delivery and Administrative Services group bargaining unit ("the collective agreement"). On December 12, 2003, portions of the Canada Customs and Revenue Agency were transferred to the Canada Border Services Agency. The relevant clauses of the collective agreement are the following:

. . .

ARTICLE 2

INTERPRETATION AND DEFINITIONS

2.01 *For the purpose of this Agreement:*

. . .

"holiday" (jour férié) means:

(i) *the twenty-four (24)-hour period commencing at 00:01 hours of a day designated as a paid holiday in this Agreement,*

(ii) *however, for the purpose of administration of a shift that does not commence and end on the same day, such shift shall be deemed to have been entirely worked:*

(A) *on the day it commenced where half (1/2) or more of the hours worked fall on that day,*

or

(B) on the day it terminates where more than half (1/2) of the hours worked fall on that day,

. . .

ARTICLE 25

HOURS OF WORK

General

25.01 *For the purpose of this Article:*

. . .

(b) the day is a twenty-four (24)-hour period commencing at 00:00 hours.

. . .

Shift Work

. . .

25.20

(a) An employee who is required to change his or her scheduled shift without receiving at least seven (7) days' notice in advance of the starting time of such change in his or her scheduled shift, shall be paid for the first shift worked on the revised schedule at the rate of time and one-half (1 1/2) for the first seven and one-half (7 1/2) hours and double time thereafter. Subsequent shifts worked on the revised schedule shall be paid for at straight time, subject to Article 28, Overtime.

. . .

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.*

. . .

25.27 Specific Application of this Agreement

For greater certainty, the following provisions of this Agreement shall be administered as provided herein:

. . .

(e) ***Designated Paid Holidays (clause 30.08)***

(i) A designated paid holiday shall account for seven and one-half (7 1/2) hours.

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

. . .

ARTICLE 30

DESIGNATED PAID HOLIDAYS

. . .

30.02 Subject to clause 30.03, the following days shall be designated paid holidays for employees:

(a) New Year's Day,

. . .

30.04 Designated Holiday Coinciding With a Day of Paid Leave

Where a day that is a designated holiday for an employee coincides with a day of leave with pay, that day shall count as a holiday and not as a day of leave.

30.05 Designated Holiday Coinciding With a Day of Rest

(a) When a day designated as a holiday under clause 30.02 coincides with an employee's day of rest, the holiday shall be moved to the first scheduled working day following the employee's day of rest. When a day that is a designated holiday is so moved to a day on which the employee is on leave with pay, that day shall count as a holiday and not as a day of leave.

. . .

Work Performed on a Designated Holiday

. . .

> ***30.08***
>
> *(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 seven and one-half (7 1/2) hours 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,*
>
> *or*
>
> *(b) upon request, and with the approval of the Employer, the employee may be granted:*
>
> *(i) a day of leave with pay (straight-time rate of pay) at a later date in lieu of the holiday,*
>
> *and*
>
> *(ii) pay at one and one-half (1 1/2) times the straight-time rate of pay for all hours worked up to seven and one-half (7 1/2) hours,*
>
> *and*
>
> *(iii) pay at two (2) times the straight-time rate of pay for all hours worked by him or her on the holiday in excess of seven and one-half (7 1/2) hours.*

. . .

[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.

[4] The hearing initially scheduled was postponed at the grievor's request. The parties were not available for a hearing before February 2009.

II. Summary of the evidence

[5] The parties agreed to the following statement of facts (Exhibit CU-4):

. . .

1. *At the material time, the grievor, Michael Clarkson, was employed as a Customs Officer (PM-03) at the Blue Water Bridge (Commercial Operations) in Sarnia, Ontario.*

2. *The relevant collective agreement is the Program and Administrative Services collective agreement between the Canada Customs and Revenue Agency and the Public Service Alliance of Canada, signed on March 22, 2002 and expiring on October 31, 2003.*

3. *The grievor works on a Variable Shift Schedule Arrangement ("VSSA") that was approved by both the union and management. According to the VSSA, the grievor works a 56-day schedule consisting of 300 working hours. The grievor's standard shifts are 11.5 hours in length.*

4. *The grievor was scheduled for a day of rest on January 1, 2005, which coincided with a Designated Paid Holiday ("DPH"). The grievor's first scheduled shift after this day of rest was from 20:00 hours on January 2 to 8:00 hours on January 3, 2005, which became his DPH in accordance with article 30.05.*

5. *On December 30, 2004, management advised the grievor by phone that, due to low expected volume on the January 2-3, 2005 shift, he was not required to report for his scheduled shift ("H'ed").*

6. *"H'ing" is the term used to describe situations in which management informs employees that their services are not required on a DPH. As such, these employees are instructed not to report for work on their scheduled shift, and are compensated for 7.5 hours.*

7. *The grievor received compensation for 7.5 hours for the DPH on which he was "H'ed", and was required to account for the remaining 4.0 hours of his shift with some other type of leave or by working those hours upon his return to the workplace. The grievor worked these 4.0 hours on January 23, 2005.*

8. *The grievor filed two grievances.*

    a) *The first grievance, dated January 7, 2007 (05-3942-72682) read as follows:*

        I grieve the fact that I was "H'ed" on my stat holiday (New Year=s Day), on my shift Jan. 3, 2005, on short notice.

And requested the following redress:

> *That I be financially remunerated as if I had worked my shift and that involuntary "H'ing" of STAT holidays ceases to happen and that I be made whole.*
>
> b) *The second grievance, dated January 18, 2005 (05-3942-72740) read as follows:*
>
> *I grieve that I was denied my short shift change for the four hours immediately following my statutory holiday which I was "H'ed" on Jan. 3, 2005.*
>
> *And requested the following redress:*
>
> *That I be paid the short shift change that I was denied and that I be made whole.*
>
> [*Sic* throughout]

[6] The grievor testified on his own behalf. Counsel for the employer called Gerald C. MacKinnon as a witness.

[7] The grievor is a customs inspector at the Blue Water Bridge in Sarnia, Ontario, where he works in Commercial Operations. He works a variable shift schedule comprising 12-hour shifts that include a 30-minute lunch period. He works five days one week and two days the following week. Shifts are set between 08:00 and 20:00 and 20:00 and 08:00.

[8] The grievor testified that, on December 30, 2004, his day of rest, Robert B. Crozier, a superintendent with the Canada Border Services Agency, called him and advised him that his shift scheduled to start at 20:00 on January 2, 2005 had been changed to paid leave for 7.5 hours and that he owed the employer the remaining 4 hours of work. He does not recall ever having had a scheduled shift changed to paid leave before then. He was not told why his shift was chosen to be changed to paid leave. He requested to report to work on January 3, 2005 between 04:00 and 08:00 to complete the remaining four hours. Mr. Crozier replied in the negative. The grievor eventually worked the four hours on January 23, 2005.

[9] Mr. MacKinnon is Chief of Commercial Operations for the St. Clair District of the Canada Border Services Agency. He explained that Commercial Operations deals with the importation of commercial goods into Canada. The Sarnia Blue Water Bridge is the second busiest crossing in Canada. Commercial traffic fluctuates from day to day; weekdays are busier than weekends and weeknights. He also indicated that commercial

traffic decreases on statutory holidays, because of specific events such as the SARS outbreak or September 11, 2001, or relative to the value of the Canadian dollar or other economic issues. He indicated that commercial traffic slows during the last two weeks of December and the first two weeks of January each year.

[10] Mr. MacKinnon indicated that it was his practice to change scheduled shifts to paid leave regardless of whether the affected employees are superintendents or officers. He was asked to comment on the grievor's testimony that his scheduled shifts had never before been changed to paid leave. Mr. MacKinnon indicated that determining whose scheduled shift to change to paid leave is done based on the superintendents' advice and that the schedules of the current and previous years are used to ensure fairness.

[11] Mr. MacKinnon testified that an email had been sent in mid-November 2004 asking all officers to indicate whether they wanted their scheduled shifts changed to paid leave in December 2004 or January 2005 (Exhibit CE-1). The officers were advised that, if too few volunteered, the employer would change scheduled shifts to paid leave as it saw fit. The officers were given a specific date by which to reply. The administrative superintendent would then count how many had volunteered or were on long-term leave, consider any scheduled training and examine the previous year's shift reports.

[12] Mr. MacKinnon indicated that, during the 2004-2005 holiday season, it was necessary to change scheduled shifts to paid leave because too many employees were scheduled to work. He informed the administrative superintendent. It was determined that Commercial Operations could operate with three employees.

[13] Mr. MacKinnon confirmed that the grievor had asked for a short-shift-change premium and that it was denied because his case was not considered a shift change. The grievor's scheduled shift was changed to paid leave, and he was paid 7.5 hours for that day. Informing the grievor that he did not have to report to work was not a shift change.

[14] Mr. MacKinnon submitted the *Commercial Shift Report* for January 3, 2005 (Exhibit CE-2) and the *Commercial Schedule Agreement Incorporating a Hybrid VSSA & Non-VSSA Commercial Customs Officer Schedule* for the Blue Water Bridge (Exhibit CE-3) ("the commercial schedule agreement").

[15] In cross-examination, Mr. MacKinnon indicated that the commercial schedule agreement was not strictly a variable shift schedule agreement but rather a document signed by the bargaining agent and management. He indicated that some guidelines had been developed over the years on the practice of replacing employees' scheduled shifts with paid leave and that those guidelines were reflected in emails describing the practice. However, there was no actual policy.

[16] Mr. MacKinnon indicated that the volume of commercial traffic returns to normal after the holiday season. He did not have records detailing how many scheduled shifts were changed to paid leave. He delegated to the administrative superintendent the responsibility of changing scheduled shifts to paid leave. The decision to change the grievor's scheduled shift to paid leave was reached two to three days before the designated paid holiday in question. Mr. MacKinnon also indicated that very few students work over the holiday season. He estimated that the number of employees whose scheduled shifts were changed to paid leave on January 3 may have been two or three, but he was not sure. The decision to change the grievor's scheduled shift to paid leave would have been made based on the overtime hours that he had worked and based on the number of times that his scheduled shifts had previously been changed to paid leave.

[17] Mr. MacKinnon was asked to provide the emails on the practice of changing scheduled shifts to paid leave to which he had referred earlier in cross-examination. He provided three (Exhibits CU-5, 6 and 7).

[18] Mr. MacKinnon confirmed that, because of the decision to change the grievor's scheduled shift to paid leave, the grievor was required to make up the remaining four hours on another day. He worked those four hours on January 23, 2005, after obtaining approval.

III. Summary of the arguments

A. For the grievor

[19] Counsel for the grievor suggested that this case raises two issues. The first is whether the employer gave proper notice of a shift change in accordance with clause 25.20 of the collective agreement. The second is whether it was appropriate for the employer to require the grievor to work the extra four hours or to request leave for

that time because of its decision to change the grievor's scheduled shift to paid leave on a designated paid holiday.

[20] Counsel for the grievor noted that the grievor works a 12-hour shift and that his schedule for 2005 had January 1 as a day of rest. Under clause 30.05 of the collective agreement, that designated paid holiday was moved to the next scheduled shift, which was January 3, 2005, and he was scheduled to work from 20:00 on January 2, 2005 to 08:00 on January 3, 2005.

[21] On December 30, 2004, the grievor was advised that his scheduled shift would be changed to paid leave. He was told that he was not to show up for work and that he would be paid for 7.5 hours. He was also told that he would have to make up the remaining four hours. He worked the four hours on January 23, 2005.

[22] Aside from the issue of notice, a question raised by the grievances is whether it was appropriate for the employer to insist that the grievor work the remaining 4 hours or whether he was entitled to be paid for the entire 11.5-hour shift as a designated paid holiday.

[23] On the issue of notice, counsel for the grievor indicated that cases involving shift changes are dealt with differently if the collective agreement contains provisions dealing with a change to the shift schedule or a change to a scheduled shift. In this case, the collective agreement covers a change to a scheduled shift.

[24] Clause 25.20 of the collective agreement provides that an employee who is required to change his or her scheduled shift without receiving notice at least seven days before the starting time of that shift shall be compensated according to the specified premium rate.

[25] In this case, the grievor was given less than three days' notice to not report for his scheduled shift on January 2, 2005. While it is true that the grievor's scheduled shift was not changed from a working day to a day of rest, it was nevertheless changed by the employer to paid leave. The grievor was required to account for the remaining four hours of his scheduled shift, but he was not permitted to work on that day.

[26] After some discussion with management, it was eventually agreed that the grievor could work the remaining four hours on January 23, 2005. That amounted to a change to his scheduled shift that was made with less than seven days' notice.

Accordingly, the grievor is entitled to compensation for the four hours that he worked on January 23, 2005 at the rate of time and one-half, in accordance with clause 25.20(a) of the collective agreement.

[27] Counsel for the grievor emphasized that "as early as November" the employer was aware that too many employees were scheduled to work on New Year's Day 2005. It was not a surprise.

[28] Counsel for the grievor noted that *Canada (Treasury Board) v. C.A.T.C.A.* (1986), 70 N.R. 151 (F.C.A.), should be distinguished because it deals with a change to a shift cycle and not with a change to a scheduled shift.

[29] Counsel for the grievor noted that, in *Cloutier et al. v. Canada Revenue Agency*, 2009 PSLRB 3, an adjudicator recognized that being sent home is a change of shift.

[30] Counsel for the grievor also noted that, in *Crawford v. Treasury Board,* PSSRB File No. 168-02-37 (19731120), the Public Service Staff Relations Board ruled that changes in shift schedules encompassed both changes in shift patterns and individual changes in the context of a shift. This is what happened to the grievor in this case. He did not receive proper notice of the change. Again, it was not an unforeseen event. Not only was the grievor not given notice, he was also required to work four hours on January 23, 2005.

[31] On the second issue, counsel for the grievor argued that, since the employer had decided to change the grievor's scheduled shift to paid leave on a designated paid holiday, the employer should have granted the entire shift as paid leave, not just a portion of it. The collective agreement does not specify a time value for a designated paid holiday when an employee is scheduled to work and is then directed by the employer not to report for work.

[32] While clause 25.27(e) of the collective agreement specifies that employees who work on a designated paid holiday are entitled to 7.5 hours' pay, it does not establish the time value of a designated paid holiday for the purposes of other clauses of the collective agreement.

[33] Counsel for the grievor argued that, unless the collective agreement expressly provides otherwise, the word "day" means a 24-hour period. In support of his argument, counsel for the grievor submitted *King and Holzer v. Canada Customs and*

Revenue Agency, 2001 PSSRB 117, and *Canada (Attorney General) v. King,* 2003 FCT 593. Counsel for the grievor noted that, in accordance with those decisions, clause 25.01(b) of the collective agreement defines a "day" as a 24-hour period for the purposes of article 25, which pertains to hours of work. It also defines a "holiday" as a 24-hour period commencing at midnight of a day designated as a paid holiday.

[34] Contrary to other collective agreements that specify that a day shall be 7.5 hours in all circumstances, the collective agreement in this case sets out different meanings of "day" for different clauses of the collective agreement.

[35] Counsel for the grievor also noted that clause 30.05(a) of the collective agreement provides that all hours worked on a designated paid holiday that has been moved shall be deemed as worked on a holiday. Similarly, clause 30.04 provides that, when a designated paid holiday falls on a day of leave with pay, the day of leave will count as a holiday.

[36] Clause 25.27(e) of the collective agreement is a clarifying provision and applies only to clause 30.08, which deals with remuneration when an employee works on a designated paid holiday. Clause 30.08 simply provides that employees working on holidays are to be paid at time and one-half for the first 7.5 hours and double time after that in addition to the pay that they would have received had they not worked on the holiday. Since clause 30.08 does not contemplate situations where employees are scheduled to work longer shifts, clause 25.27(e) provides for a different formula, as follows: 7.5 hours at straight time, plus time and one-half for all hours worked up to the regular scheduled hours and double time for hours in excess of the regular scheduled hours. The need for this clarification was made clear in *King v. Treasury Board (Revenue Canada – Customs and Excise)*, PSSRB File Nos. 166-02-28332 and 28333 (19990819). In *Arsenault et al. v. Parks Canada Agency*, 2008 PSLRB 17, it was also made clear that clause 25.27(e) applies only to matters of compensation for time worked.

[37] Counsel for the grievor submitted that, when employees' scheduled shifts are changed to days of rest on a designated paid holiday, there is neither an issue of compensation for working on a designated paid holiday nor an issue invoking the leave provisions of the collective agreement. In this case, the grievor's scheduled shift was changed to paid leave on a designated paid holiday, and a holiday is defined under article 2 as a 24-hour period.

[38] Counsel for the grievor argued that, when the employer changes an employee's scheduled shift to paid leave on a designated paid holiday, the employer must provide the employee with paid leave for any and all hours that the employee was initially scheduled to work on that holiday.

[39] In support of his arguments, counsel for the grievor referred again to *King v. Treasury Board (Revenue Canada – Customs and Excise)*, in which an adjudicator ruled that scheduled hours should mean hours actually scheduled. Clause 25.27(e) was added to the collective agreement during the collective bargaining that followed that decision.

[40] Counsel for the grievor also mentioned *King and Holzer* and *Phillips v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-20099 (19910425), pointing out that the normal interpretation of a "day" is a 24-hour period. He further noted that the Federal Court upheld the latter decision, which involves marriage leave. In *Breau et al. v. Treasury Board (Justice Canada)*, 2003 PSSRB 65, *Mackie v. Treasury Board (National Defence)*, 2003 PSSRB 103, *Stockdale et al. v. Treasury Board (Fisheries and Oceans Canada)*, 2004 PSSRB 4, and *Breitenmoser et al. v. Treasury Board (Solicitor General Canada – Correctional Service, Citizenship and Immigration Canada, Human Resources Development Canada, National Defence)*, 2004 PSSRB 103, adjudicators adopted a similar approach to the notion of a "day." Counsel for the grievor added that *Breitenmoser et al.* mentions that the conversion of a designated paid holiday to 7.5 or 8 hours (as discussed in that decision) should be overturned because it had not been argued at adjudication.

[41] Counsel for the grievor distinguished *Diotte v. Treasury Board (Solicitor General – Correctional Service of Canada)*, 2003 PSSRB 74, *Wallis v. Treasury Board (Correctional Service of Canada),* 2004 PSSRB 180, and *White v. Treasury Board (Solicitor General Canada – Correctional Service),* 2003 PSSRB 40, as they all turned on the specific language of other collective agreements.

[42] Counsel for the grievor argued that clause 25.27(e) of the collective agreement does not apply to an employee whose scheduled shift is changed to paid leave. Under clause 30.04, had the grievor decided to take annual leave, and had that day coincided with a designated paid holiday, his leave balances would have been credited 11.5 hours since the designated paid holiday counts as a full day.

[43] Counsel for the grievor argued that the grievor's situation should be distinguished from a situation in which an employee requests annual leave. When an employee wishes to take a day of annual leave, the employer will debit the employee's leave balances by the numbers of hours not worked.

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

[44] Counsel for the employer argued that all the cases submitted by the grievor's counsel are based on different collective agreements and are distinguishable because they do not deal with a clause specifying that a designated paid holiday shall account for 7.5 hours.

[45] Counsel for the employer highlighted paragraph 3 of the agreed statement of facts (Exhibit CU-4), which states that the grievor and his colleagues must work 300 hours over the course of a 56-day variable shift schedule and that the length of a shift is 11.5 hours. Thus, the grievor must work 26 full shifts over the course of 56 days. Counsel for the employer added that the commercial schedule agreement (CE-3, page 3) provides for "zero time balancing," which means that an employee in the grievor's case must work or account for 300 hours over 56 days.

[46] Had the grievor worked on January 3, 2005, the 11.5 hours of that scheduled shift would have been accounted for out of the 300 hours he worked within that period. The collective agreement states that, when an employee takes leave on a designated paid holiday, the holiday shall account for 7.5 hours, in accordance with clause 25.27(e). The employer adds those 7.5 hours to the total of hours worked during the 56-day schedule. Because the grievor is a variable shift worker, he must account for the remaining four hours of his changed scheduled shift as a result of the "zero time balancing" requirement of the commercial schedule agreement.

[47] Counsel for the employer suggested that counsel for the grievor was asking me to read words into article 25 of the collective agreement that are not there and asserted that clause 25.27(e) applies only if an employee actually works. As a result, counsel for the grievor is asking that a clause written exclusively for designated paid holidays be ignored.

[48] Counsel for the employer argued that, contrary to the position put forward by the grievor's counsel, the two provisions that form clause 25.27(e) of the collective agreement are distinct. If the parties to the collective agreement had wanted the first

provision to apply only when an employee works, they would have joined the two provisions together; they are different.

[49] The definition of "holiday" in clause 2.01 of the collective agreement is intended to ensure that all employees have the benefit of a designated paid holiday in all cases. The second part of the definition applies to shift workers, whose days start on one calendar day and finish on another. That is why "holiday" is defined in the collective agreement.

[50] Counsel for the employer indicated that one should not be persuaded by a complex and convoluted argument that a general definition of the notion of a "holiday" that sets out the rules about holidays (i.e., when they start and end) can modify what is a very specific and clear provision in the collective agreement. A designated paid holiday is of 7.5 hours' duration.

[51] Counsel for the employer submitted *Murray and Shaver v. Treasury Board (Transport Canada),* PSSRB File Nos. 166-02-26588 to 26592 (19960301), which decided that all employees, both day and variable shift workers, should be treated the same. Counsel for the employer reiterated that the collective agreement clearly sets out that the designated paid holiday of a variable shift worker should not account for more time than that of a day worker.

[52] On the issue of shift change, counsel for the employer argued that placing an employee on paid leave does not constitute a change to a scheduled shift. A change to a scheduled shift would have occurred if the employer had told the grievor to come in at 16:00 when he had initially been scheduled to start at 08:00. If one looks closely at clause 25.20 of the collective agreement, the starting time is the guide. For the grievor to be told to come in at 16:00, the employer would have to give him seven days' notice, i.e., notice of a minimum of seven days before the scheduled 16:00 start time. Counsel for the employer argued that, when someone is placed on paid leave, there is no start time; there is no obligation to give seven days' notice because clause 25.20 does not apply.

[53] Counsel for the employer noted that, in *Spears v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-14759 (19850130), the employee had agreed to work on a designated paid holiday. He was paid for 7.5 hours in addition to the premium of time and one-half for all hours worked on a designated paid holiday. Despite his

regular pay and the premium, an employee wanted more since he had been informed of the schedule change only one day in advance. He was claiming the shift change premium in addition to the remuneration that he had received. An adjudicator found that the situation did not qualify as a shift change. A change in a shift schedule involves the substitution of a shift already scheduled. This case does not involve a shift change.

[54] Counsel for the employer referred to *Vaillancourt v. Canadian Food Inspection Agency*, 2004 PSSRB 44. Ms. Vaillancourt was asked to report to a different work location at a slightly different time than her usual reporting time. It was a temporary change to her work schedule. The employee believed that she ought to have been given more notice. However, an adjudicator ruled that there was no change to the employee's shift schedule as one scheduled shift was not replaced with another. In the grievor's case, he was not asked to report to work; he was asked to stay home.

[55] Both *Spears* and *Vaillancourt* support the employer's position. The facts in this case are even stronger as the grievor's life was not disrupted. He was told to stay home. There was no change in his scheduled shift.

[56] Counsel for the employer also referred me to *Saunders v. Treasury Board (National Defence*), PSSRB File No. 166-02-14581 (19850115), *Bernardt et al. v. Treasury Board (Revenue Canada – Customs and Excise)*, PSSRB File Nos. 166-02-18971 to 18976 (19891107), *Toomey and Bygott v. Treasury Board (Transport Canada)*, PSSRB File Nos. 166-02-21925 and 21926 (19920424), and *Guérin et al. v. House of Commons*, PSSRB File No. 466-H-224 (19940518).

C. <u>Grievor's rebuttal</u>

[57] In rebuttal, counsel for the grievor submitted that clause 30.04 of the collective agreement clearly states that, if a holiday falls on a day of leave with pay, the holiday replaces the day of leave. Counsel for the grievor asked the following: "How can that be, if the employer is right?" That clause is inconsistent with the arguments put forward by counsel for the employer.

[58] Counsel for the grievor argued that one must examine the collective agreement. While the grievor has to account for 300 hours over a 56-day variable shift schedule, those 300 hours can be replaced by leave. *King and Holzer* found that, when an

employer changes a scheduled shift to paid leave, the leave accounts for the entire scheduled shift.

[59] Counsel for the grievor argued that counsel for the employer did not address the argument on the purpose of the changes brought about by clause 25.27(e) of the collective agreement. Clause 25.24 makes it quite clear that the terms and conditions governing the administration of variable hours of work are specified in clauses 25.24 to 25.27 inclusive and that the collective agreement is modified by those provisions to the extent specified in them. Clause 25.27(e) indicates that it is modifying clause 30.08. Clause 30.08 strictly provides for situations where an employee works on a designated paid holiday; it mentions nothing about the value of that holiday in hours. Clause 30.08 does not purport to define a "holiday." The clause that does so is clause 2.01, which defines a "holiday" as a 24-hour period. Many cases attach importance to the definition of a "day," and counsel for the employer has ignored them. If the parties to the collective agreement had wanted to change the definition of a "day," they would have amended the definition. Referring to *Wallis* and *White*, counsel for the grievor argued that, if the employer wanted a holiday to be 7.5 hours in length, it would have insisted for a definition of a designated paid holiday as was done in the collective agreement applicable to those cases.

[60] Counsel for the grievor noted that both parties had referred to *Murray and Shaver*. That case is completely different from this case. It is clear that that decision dealt with an appendix to a collective agreement that specified daily rates of pay. Clause 25.27(e) of the collective agreement in this case deals only with situations where an employee actually works.

[61] On the issue of notice, counsel for the grievor noted that some senior managers recognized that clause 25.20 of the collective agreement applies when an employee's scheduled shift is changed to paid leave (Exhibit CU-5).

[62] Counsel for the grievor asked why the grievor's situation was not a shift change, since the grievor was asked to work the remaining four hours on January 23, 2005.

[63] Counsel for the grievor argued that *Spears* does not contradict *Crawford* because the language of the collective agreement applicable to each of those cases was different. In *Vaillancourt*, the collective agreement referred to a change to the shift schedule and not to a change to a scheduled shift.

IV. Reasons

[64] On the issue of notice, the requirement under clause 25.20 of the collective agreement is that an employee ". . . required to change his or her scheduled shift without receiving at least seven (7) days' notice in advance of the starting time of such change in his or her scheduled shift . . ." is to be paid ". . . for the first shift worked on the revised schedule at the rate of time and one-half (1 1/2) for the first seven and one- half (7 1/2) hours and double time thereafter. . . ." It is generally accepted that the purpose of such clauses pertaining to notice is to bring some stability to employees working on shifts.

[65] In this case, the evidence is clear that the grievor was required to change his scheduled shift. It is also clear that notice of the change was given on December 30, 2004, less than seven days before the starting time of his scheduled shift. Whether the change involves a change to the starting time or the elimination of the shift altogether is immaterial. The shift, which had been scheduled from 20:00 on January 2, 2005 to 08:00 on January 3, 2005, was changed and became 7.5 hours' paid leave, accompanied by an obligation to either request 4 hours' annual leave or to work 4 hours at a later date. The fact that the employer split the shift in two — 7.5 hours that were considered paid leave and another 4 hours that were to be worked at another time or covered by annual leave — weakens the employer's position that placing the grievor on paid leave after scheduling him to work is not a change to a scheduled shift. *Spears* concluded that a change to a shift schedule involves the substitution of a shift for one already scheduled. That is exactly what occurred here; the grievor had to work a revised shift of four hours on January 23, 2005. Therefore, the grievor should be compensated for the difference between the normal rate and the shift-change-premium rate of time and one-half for that four-hour shift.

[66] As for the issue of whether the employer was entitled to insist that the grievor work or request leave for the remaining four hours of the shift originally scheduled, I am of the view that closer examination of the collective agreement resolves the issue. Clause 2.01 defines a "holiday" as the ". . . twenty-four (24)-hour period commencing at 00:01 hours of a day designated as a paid holiday in this Agreement . . . ." It adds that ". . . for the purpose of administration of a shift that does not commence and end on the same day, such shift shall be deemed to have been entirely worked . . ." on the day it commenced or on the day it terminated, depending on which day more time is worked.

[67] Further, article 30 of the collective agreement deals with designated paid holidays. Its subheading, "Work performed on a Designated Holiday," encompasses three clauses (30.06, 30.07 and 30.08). Clause 30.08 provides specifically and only for the compensation to be paid to employees who work on a "holiday."

[68] Counsel for the employer relied on clause 25.27(e)(i) of the collective agreement in support of the position that paid leave on a designated paid holiday counts only for 7.5 hours. While at first glance that proposal may seem appealing, it does not withstand close scrutiny of the wording of clauses 25.27(e)(i) and 30.08 in full.

[69] Clause 25.27(e)(i) of the collective agreement is not meant to alter the application of the complete agreement; it is there only to clarify the application of clause 30.08:

> ***25.27 Specific Application of this Agreement***
>
> *For greater certainty, the following provisions of this Agreement shall be administered as provided herein:*
>
> . . .
>
> *(e)* ***Designated Paid Holidays (clause 30.08)***
>
> *(i) A designated paid holiday shall account for seven and one-half (7 1/2) hours.*
>
> . . .

[70] As I indicated earlier, clause 30.08 of the collective agreement deals only with the compensation of employees who work on a designated paid holiday. This clause does not establish the length of a paid leave when an employee does not work a shift originally scheduled on a designated paid holiday.

[71] In this case, the grievor was initially scheduled to work an 11.5-hour shift on the day for which he was eventually placed on paid leave. The definition of "holiday" found in clause 2.01 of the collective agreement stipulates that a holiday is a 24-hour period. As clause 30.02 designates January 1 as a designated paid holiday (the holiday that was moved to January 3, 2005 under the circumstances), it follows that the employer's direction that the grievor stay home on that designated paid holiday should result in the grievor being paid for the entire shift originally scheduled for that day.

[72] Cases that have dealt with the notion of leave, where the collective agreement did not specify the length of the leave, have concluded that it is for the period normally scheduled; see *King and Holzer*, *Stockdale et al.* and *Phillips.*

[73] I also note that counsel for the employer presented no evidence that would lead me to conclude that placing the grievor on paid leave for the duration of his original shift would have resulted in additional overtime cost or additional payments in violation of the collective agreement. His services were not required on that day, none of his colleagues had to replace him and he would have received no additional payment as a result.

[74] *Murray and Shaver* is not of much assistance to the employer because an adjudicator in that case concluded that the employees were entitled to the daily rate of pay for the designated paid holiday. In this case, clause 25.27(a) of the collective agreement specifies that the "daily rate of pay" does not apply to employees with variable hours of work, as is the grievor's case.

[75] Counsel for the employer argued that the definition of a "holiday" is intended to ensure that all employees have the benefit of a designated paid holiday regardless of their shifts. That is precisely what a correct application of the collective agreement will achieve. Regardless of the duration of their shifts, employees are entitled to a day off.

[76] I also note that, had the grievor requested leave for the remaining four hours of his original shift, the leave would have coincided with a designated paid holiday. However, clause 30.04 of the collective agreement provides that, when a day of leave with pay coincides with a designated paid holiday, the day shall count as a designated holiday and not as a day of leave.

[77] I also note that counsel for the employer cited *White, Diotte* and *Wallis.* Those decisions are all distinguishable from this case because the collective agreements in those cases provided that a designated paid holiday would account for the normal hours specified by the agreement. Such language leads to a conclusion different from the one that is drawn from the collective agreement applicable to the grievor.

[78] As for the other decisions cited by counsel for the employer, I did not find them useful in determining either issue in this case since they dealt with substantially different situations. *Saunders* dealt with the issue of whether overtime is an alteration

to a shift schedule. *C.A.T.C.A.* dealt with the right to work on a holiday. *Bernhardt et al.* dealt with what constitutes a notice of change and issues of credibility. *Toomey and Bygott* and *Guérin et al.* dealt with the right to work on a designated paid holiday. *Vaillancourt* dealt with the issue of whether a slight change to hours of work constitutes a change to a shift schedule.

[79] Consequently, I conclude on the second issue that the employer should have placed the grievor on paid leave for his complete shift originally scheduled from 20:00 on January 2, 2005 to 08:00 on January 3, 2005. Therefore, the employer is ordered to pay the grievor four hours' pay at the straight-time rate applicable for designated paid holidays.

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

(The Order appears on the next page)

V. Order

[81] The grievances are allowed.

[82] The employer is ordered to pay the grievor four hours' pay at the straight-time rate for the missing remuneration for the paid designated holiday moved to January 3, 2005.

[83] The employer is ordered to pay the grievor the difference between the normal rate of pay and the shift-change-premium rate of time and one-half for the four hours worked on January 23, 2005.

July 15, 2009.

Georges Nadeau,
adjudicator