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Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

DAVID R. JOHNSTON, BRIAN J. KRANSON, WILLIAM ED MUMA AND JOHN W. SAWCHUK

Grievors

and

CANADIAN FOOD INSPECTION AGENCY

Employer

Indexed as
Johnston et al. v. Canadian Food Inspection Agency

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Paul Love, adjudicator

For the Grievors: Dan Fisher, Public Service Alliance of Canada

For the Employer: Doreen Mueller, counsel

Heard at Edmonton, Alberta,
February 4, 2010.

I. Individual grievances referred to adjudication

[1] David R. Johnston, Brian J. Kranson, William Ed Muma and John W. Sawchuk ("the grievors") were employed as meat hygiene inspectors by the Canadian Food Inspection Agency ("the Agency") at a Maple Leaf plant in Edmonton. They grieved the Agency's new interpretation and application of clause 26.01 (shift premium) of the collective agreement signed by the Agency and the Public Service Alliance of Canada on March 9, 2005 ("the collective agreement"). This matter comes before me as four separate grievances. Mr. Johnston's grievance claims the payment of the shift premium for three specific shifts, while the other grievors grieved the Agency's new interpretation and application of clause 26.01 as of December 1, 2006. The parties agreed that Mr. Johnston's evidence would be the evidence for all four grievors.

[2] This case involves the interpretation and application of clause 26.01 of the collective agreement, which reads as follows:

> ***26.01 Shift Premium***
>
> *An employee working on shifts, half or more of the hours of which are regularly scheduled between four (4) p.m. and eight (8) a.m., will receive a shift premium of two dollars ($2.00) per hour for all hours worked, including overtime hours, between four (4) p.m. and eight (8) a.m. The shift premium will not be paid for hours worked between eight (8) a.m. and four (4) p.m.*

[3] The grievances were referred to adjudication on April 28, 2008. A hearing tentatively scheduled for August 2009 was postponed at the request of the grievors' representative.

II. Summary of the evidence

[4] As well as Mr. Johnston testimony, I also heard from Dan Dodge, inspection manager in the Agency's Western Area. In addition to the testimony, the grievors and the Agency filed documentary evidence. The evidence is not in dispute.

[5] Mr. Johnston was employed with the Agency in the capacity of meat inspector. He has worked for the Agency and its predecessor department for 37 years. His duties include monitoring the operations of the Maple Leaf plant for compliance with acts, rules and procedures under federal law.

[6] The Agency operates two shifts at the Maple Leaf plant. The "ante-mortem shift," where the inspectors inspect live birds before slaughter, commences at 4:10 a.m. and concludes at 12:10 p.m. During this shift an inspector is expected to work 7.5 hours and has a half-hour unpaid meal break. The Agency also operates an "evisceration shift" commencing at 4:40 a.m. and ending at 12:40 p.m., where the inspectors inspect dead birds' carcasses on the processing line.

[7] Mr. Johnston testified that the "ante-mortem shift" start time was set by the Agency. Once per year Maple Leaf submits a work shift agreement setting out the proposed work schedule to the Agency. The Agency makes out the schedule for its inspectors. The 4:10 a.m. shift has been in place for some time and it was a shift that was instituted by the Agency to accommodate the operations at the Maple Leaf plant. In cross-examination, Mr. Johnston testified that generally the Agency inspectors start working about thirty minutes before Maple Leaf employees, as the Agency's work must start before the plant commences its daily operations.

[8] These grievances concern work at the Maple Leaf plant for the shift that commences at 4:10 a.m. and concludes at 12:10 p.m.

[9] Mr. Johnston testified that when he works the 4:10 a.m. shift he takes his unpaid meal break at 8:00 a.m. He said that by this point he has worked three hours and fifty minutes. He also said that half of the time worked would be three hours and forty five minutes, based on a 7.5-hour working day.

[10] The Agency paid the shift premium for this work until December 1, 2006, when Audrey Fleury, acting Manager, Human Resources for the Agency's Western Area, issued an email (Exhibit G-6):

. . .

> *It has been brought to our attention that the interpretation of the shift premium article is not being applied consistently – please see the attached document for elaboration. Also, please note that we will be correcting this effective immediately.*

. . .

Eventually this position came to the attention of Mr. Johnston as he was not paid the shift premium when he worked the "ante-mortem shift" on December 4, 5 and 6, 2006.

[11] Mr. Johnston believed that the Agency's denial of payment of the shift premium was incorrect and filed a grievance. He believes that it is unfair because if he started his shift ten minutes earlier, according to the Agency's interpretation, he would be entitled to the shift premium.

[12] The Agency's interpretation of clause 26.01 of the collective agreement is set out in the second-level decision rendered by Dr. James Marjerrison, Associate Executive Director for the Agency's Western Area, on March 23, 2007 (Exhibit G-4):

. . .

> *. . . Your regularly scheduled shift begins at 4:10 a.m. and ends at 12:10 p.m..* [*sic*] *I am satisfied that in order to receive a shift premium, 4 or more hours of this regularly scheduled shift,*[sic] *must be scheduled between 4 p.m. and 8 a.m. As only 3.83 hours of your regularly scheduled shift occurred before 8:00 a.m. you are not entitled to the Shift Premium identified in Clause 26.01.*

. . .

[13] As a result of the grievance process, the Agency partially allowed the grievances by agreeing to pay the shift premium up until March 2007. This is set out in the final-level decision rendered by Cameron Prince, the Agency's Vice-President, Operations (Exhibit G-5):

. . .

> *Based upon the information provided in your grievance presentation, I find that you are not entitled to the shift premium provided under Article 26 of your collective agreement. However, in keeping with our practice of providing reasonable notice, you will be paid the shift premium for all hours worked before 08:00 between December 01, 2006 and February 28, 2007, inclusive.*

. . .

[14] Mr. Dodge testified that, as the grievors' acting manager at the time, he would have approved Maple Leaf's request for the 4:10 a.m. shift. He indicated that as far as he knew this was the only shift of its type other than perhaps one in the Calgary area. Mr. Dodge was unaware of why the Maple Leaf plant started this early, but he indicated that this shift had been in operation at least since 1994. I note that initially Mr. Johnston was unsure as to whether the Agency in fact paid the shift premium.

Mr. Dodge stated that all the affected employees including Mr. Johnston had received the shift premium until February 28, 2007, as a result of the grievance process. I accept Mr. Dodge's evidence that the shift premium was paid for work up until February 28, 2007, for the grievors.

III. Summary of the arguments

A. For the grievors

[15] A distinction should be drawn between the "time scheduled" and the "actual time worked." The collective agreement stipulates that ". . . half or more of the hours . . ." need to be worked to qualify for the shift premium.

[16] In clause 24.04(a) of the collective agreement the normal work week is defined as follows:

> ***24.04*** *(a)* *Except as provided for in clause 24.05, the normal work week shall be thirty-seven decimal five (37.5) hours exclusive of lunch periods, comprising five (5) days of seven decimal five (7.5) hours each, Monday to Friday. The work day shall be scheduled to fall within an eight (8) hour period where the lunch period is one-half (½) hour or within an eight decimal five (8.5) hour period where the lunch period is more than one half (½) hour and not more than one (1) hour. Such work periods shall be scheduled between the hours of six (6) a.m. and six (6) p.m. unless otherwise agreed in consultation with the Alliance and the Employer at the appropriate level.*

[17] The relevant question is whether the unpaid meal break constitutes part of the hours which are regularly scheduled or whether the employees are paid for hours worked, which in this case means 7.5 hours per day.

[18] The grievors' representative argues that the grievors have met the conditions of clause 26.01 of the collective agreement when they have worked 3.75 hours prior to 8:00 a.m. That means that entitlement to the shift premium is triggered at 7:55 a.m. when an employee starts work at 4:10 a.m.

[19] The grievors' representative relies on *Piotrowski v. Canadian Food Inspection Agency*, 2001 PSSRB 94, and argues that the work performed is shift work. He says that

a "shift" is whatever period of work the Agency chooses to assign to its employees provided that the hours assigned do not contravene the collective agreement or the law: *Edwards v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-17886 (19891020). A shift is the regularly scheduled hours that an employee actually works: *Samborsky v. Treasury Board (Solicitor General – Correctional Service Canada)*, PSSRB File Nos. 166-02-19803 to 19805 (19900827).

[20] According to the grievors' representative, "shift" means those hours which are actually worked by an employee from the start of the shift to the meal break and from the end of the meal break to the end of the shift: *Edwards* and *Samborsky*.

[21] The grievors' representative also referred to clause 24.07 of the collective agreement, which reads as follows:

> ***24.07*** *The Employer shall make every reasonable effort to schedule a meal break of at least one-half (½) hour during each full shift which shall not constitute part of the work period. Such meal break shall be scheduled as close as possible to the mid-point of the shift, unless an alternate arrangement is agreed to at the appropriate level between the Employer and the employee. If an employee is not given a meal break scheduled in advance, all time from the commencement to the termination of the employee's full shift shall be deemed time worked.*

The grievors' representative indicated that clause 24.07 supported the grievors' contention that shift means only the hours worked.

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

[22] The issue is what the word "shift" means. Is "shift" the 8-hour period from start time to end time or is it, as the grievors' representative argues, the hours actually worked and paid, exclusive of meal breaks? If a "shift" is the entire period from 4:10 a.m. to 12:10 p.m. the clear application of clause 26.01 of the collective agreement means that the shift premium is not payable because there are fewer than four hours of regularly scheduled work between 4:00 p.m. and 8:00 a.m.

[23] Counsel for the Agency submits that the jurisprudence defines "shift" as the regular period of time when an employee is required to be at work. This is the clear and plain meaning of the word. The premium attaches to the period of time and not to the particular working hours of any employee. *Barnes and Solowich v. Treasury Board*

(Ministry of Transport), PSSRB File Nos. 166-02-1828 and 1829 (19750602), at page 14, decided that the shift premium attaches to the period of time scheduled and not to the particular working hours of any employee: ". . . a shift premium is . . . intended to compensate . . ." an employee for a period ". . . generally considered to be abnormal and inconvenient." According to counsel for the Agency, this purpose is consistent with the plain meaning of the word "shift."

[24] In interpreting clause 26.01 of the collective agreement it is important to give effect to the words used in the collective agreement. "Shift" has to mean something different from "hours worked"; otherwise, the parties to the collective agreement would have used the latter words.

[25] In clause 26.01 of the collective agreement, the word "shift" is tied to the words ". . . half or more of the hours which are regularly scheduled . . . ." If this condition is satisfied, the employee is paid the shift premium for all of the hours worked between 4:00 p.m. and 8:00 a.m. In this case, the grievors only actually worked 3.83 hours from 4:10 a.m. to 8:00 a.m.

[26] It was open to the Agency to correct a previously incorrect interpretation and application of the shift premium clause of the collective agreement and no estoppel can be said to arise in this case, as there was no representation relied on by the grievors to their detriment. Counsel for the Agency submits that *Legare v. Treasury Board (Revenue Canada, Customs & Excise)*, PSSRB File No. 166-02-15018 (19860626), is determinative.

[27] Counsel for the Agency argued that, although it was not necessary to do so, in this case the Agency gave reasonable notice of the change in its interpretation and application of clause 26.01 the collective agreement by delaying the impact of its interpretation for three months.

IV. Reasons

[28] The word "shift" is not defined in the collective agreement. It is apparent that the ordinary working day is 7.5 hours exclusive of lunch periods, scheduled within an 8-hour time period, as set out in clause 24.04(a) of the collective agreement. The work period, however, can be 7.5 hours or 8 hours depending on whether a meal break is scheduled in advance or not, according to clause 24.07 of the collective agreement.

[29] The working day of the Agency's inspectors working the "ante-mortem shift" at the Maple Leaf plant appears to be somewhat of an anomaly, as it does not start exactly at 4:00 a.m. However, I note that the collective agreement applies to all employees represented by the Public Service Alliance of Canada and likely was not crafted to deal with the peculiarities of work at the Maple Leaf plant. In my view, the language should not be shaped simply to address the peculiar circumstances of the Agency's employees at the Maple Leaf plant. The language is clear and plain. The uncontroverted Agency's evidence is that the "ante-mortem shift" at the Maple Leaf plant was an anomaly in comparison with other shifts worked by the Agency's employees at other facilities.

[30] If one considers first the purpose of a shift premium — to compensate employees for abnormal hours or undesirable hours as set out in *Barnes and Solowich* — it is clear that, regardless of whether an employee starts work at 4:00 a.m. or at 4:10 a.m., these are still undesirable hours of work. A purposive approach does not assist in differentiating which of the two interpretations put to me by the parties is the proper interpretation of clause 26.01 the collective agreement.

[31] I note that *Samborsky* considered the application of a shift premium which was worded in substantially similar language to clause 26.01 the collective agreement. *Samborsky*, at page 9, considered the meaning of "shift," as it was ". . . not defined in either the Master Agreement nor the group specific agreement . . .", and added:

. . .

> *. . . As a result the word ought to be given its ordinary or dictionary definition in the context in which the word occurs. The Concise Oxford Dictionary, defines "shift" as, inter alia, "the time for which [a group of employees] works". Similarly Robert's Dictionary of Industrial Relations (3rd ed) defines "shift", in its salient parts, as "a regularly scheduled period of work during the 24 hour period. . . The shift has a fixed beginning and ending each day. The term . . . [applies] to the work period. . . ."*
>
> . . .
>
> [Emphasis in the original]

[32] I find the following comment at page 6 of *Barnes and Solowich* to be helpful as well:

. . .

> *. . . Further, that a "shift" is generally understood in the industrial environment to describe regular periods of daily time during any week when an employee or employees are required to be at work is beyond any doubt. . . .*

. . .

[33] In my view, the plain meaning of "shift" is the period of time, scheduled by the Agency, during which the Agency requires an employee to remain at work. In this case, the grievors' shift is from 4:10 a.m. to 12:10 p.m.: the grievors work 7.5 hours and take a half-hour meal break. As the "ante-mortem shift" at the Maple Leaf plant does not start at or before 4:00 a.m., the grievors can never be entitled to the shift premium pursuant to clause 26.01 of the collective agreement. In my view, this is a plain and simple concept based on a plain and simple interpretation of the words and is the only correct interpretation of the shift premium clause.

[34] Moreover, words "full shift" are used in clause 24.07 of the collective agreement. This clause distinguishes between "meal breaks" and "work periods" and states that meal breaks are to be scheduled close to the mid-point of a shift. If the meal break is not scheduled ". . . all time from the commencement to the termination of the employee's full shift shall be deemed to be time worked." Defining a "shift" as the "hours actually worked" seems to contradict the plain reading of clause 24.07 of the collective agreement.

[35] The Agency was entitled to correct its interpretation and application of clause 26.01 of the collective agreement on an ongoing basis.

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

(The Order appears on the next page)

V. Order

[37] The grievances are dismissed

March 29, 2010.

Paul Love,
adjudicator