Date: 20100423

File: 566-02-1861

Citation: 2010 PSLRB 56

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

CHRIS MUNROE

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Munroe v. Treasury Board (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievor: Michel Bouchard, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada- CSN

For the Employer: Michel Girard, counsel

Heard at Kingston, Ontario,
April 15, 2010.

Individual grievance referred to adjudication

[1] Chris Munroe ("the grievor") is a correctional officer at Bath Institution in Bath, Ontario. On April 25, 2007, he filed a grievance alleging that the Correctional Service of Canada ("the employer") violated the collective agreement, which was signed by the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN for the Correctional Services bargaining unit on June 26, 2006 ("the collective agreement").

[2] The employer asked the grievor to attend a training session from 07:00 to 15:00 on April 20, 2007. The grievor was not scheduled to work during those hours, and he was paid overtime. That day, the grievor was scheduled to start his shift at 18:30. The grievor advised the employer that he would report to work at 22:30. Considering that the collective agreement allows for eight hours off between shifts, the grievor claims that he was entitled to paid leave between 18:30 and 22:30 on April 20, 2007. The employer pretends that the grievor was not entitled to those four hours of leave, and it asked the grievor to take annual leave to account for those four hours. The grievor is asks that the employer credit him with those four hours of annual leave.

[3] The grievance involves the interpretation of clause 21.02(b) of the collective agreement, which reads as follows:

> ***21.02*** *When hours of work are scheduled for employees on a rotating or irregular basis:*
>
> *(a) they shall be scheduled so that employees:*
>
> *(i) on a weekly basis, work an average of forty (40) hours,*
>
> *and*
>
> *(ii) on a daily basis, work eight decimal five (8.5) hours per day.*
>
> *(b) every reasonable effort shall be made by the Employer:*
>
> *(i) not to schedule the commencement of an employee's shift within eight (8) hours of the completion of the employee's previous shift,*
>
> *(ii) to ensure an employee assigned to a regular shift cycle shall not be required to change his or her shift more than once during that shift cycle without his or her consent except as otherwise required by a*

> *penitentiary emergency. A change of shift followed by a return to the original shift is considered as one change;*
>
> *Shift means the employees regularly schedule hours of work in accordance with article 21.03(a) not the post to which the employee is assigned.*
>
> *and*
>
> *(iii) to avoid excessive fluctuations in hours of work;*
>
> [*Sic* throughout]
>
> . . .

Summary of the evidence

[4] The parties adduced four documents in evidence. The grievor testified. The employer called Robert Cummings and Dan Thompson as witnesses. Mr. Cummings is a correctional manager at Bath Institution. Since August 2008, Mr. Cummings has worked as a scheduling manager there. In that function, he is responsible for managing the schedule, hours of work, overtime and leaves. Mr. Thompson has been the coordinator of correctional operations at Bath Institution since 2003. He oversees the security of the institution, including the emergency response team (ERT).

[5] The grievor has been working at Bath Institution as a correctional officer since 2001. He has been a member of the Bath Institution ERT since 2006-2007. The ERT is composed of volunteer employees whom the employer selects from candidates who have demonstrated an interest. After being selected to the ERT, employees receive 10 days of specialized training. They also have to attend 10 1-day refresher or supplementary training sessions every year. The dates of those one-day training sessions are known several months in advance. Members of the ERT normally attend those days of training. If they miss a day, they can normally take the training at another time it is offered.

[6] On April 20, 2007, the grievor participated in a one-day ERT training session. The session started at 07:00 and ended at 15:00. During those hours, the grievor was not scheduled to work, and he was paid overtime for attending the training session. The grievor advised the scheduling manager that he would come to work only at 22:30, rather than 18:30 as initially scheduled, since his training ended at 15:00. The

scheduling manager indicated the following on the duty roster for that shift beside the grievor's name: "AOD 23:00." AOD means "absent on duty." That meant that the grievor was deemed at work from 18:30 to 23:00 even though he was not.

[7] The grievor thought that the employer had granted him four hours of paid rest before starting his shift on April 20, 2007. The grievor testified that the employer had previously granted those hours in similar situations. However, the employer asked him a few days later to complete an annual leave form for those four hours not worked between 18:30 and 22:30 on April 20, 2007. The grievor complied with the employer's request and completed the form on April 25, 2007. The same day, he filed this grievance.

[8] Mr. Cummings testified that correctional managers authorize AOD status at the Bath Institution. However, he has never approved AOD status for a situation comparable to that of this grievance. When asked why the correctional manager who approved AOD status for the grievor on April 20, 2007 did not testify at the hearing, the employer answered that he had retired.

Summary of the arguments

[9] The grievor argued that, according to clause 21.02(b) of the collective agreement, the employer should have granted him eight hours of rest between the end of the training session on April 20, 2007 and the beginning of his shift. Considering that the training ended at 15:00, the grievor was entitled not to work before 23:00. The employer scheduled the training. It also scheduled the grievor's hours of work. It had an obligation to accommodate him and to grant him four hours of paid time off so that he had eight hours off before beginning his shift.

[10] The grievor alleged that he had to attend the training session as a member of the ERT. Even though he was on overtime between 07:00 and 15:00, those hours cannot be considered voluntary overtime hours because of the obligation to attend the training. Those hours should be considered as scheduled hours, pursuant to the collective agreement.

[11] The grievor alleged that the employer initially granted him AOD status for four hours on April 20, 2007. The grievor based his decision not to come to work before 22:30 on the fact that he thought that he had been granted AOD status for those hours

and on the employer's past practice of granting those hours. The doctrine of estoppel applies to this case.

[12] The grievor argued that the facts of this case differ from *Lauzon v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 126.

[13] For the employer, it is important to distinguish overtime shifts from regularly scheduled shifts. Clause 21.02(b) of the collective agreement applies only to situations in which the two shifts are regularly scheduled shifts. In such a case, the employer has to make every reasonable effort not to schedule two shifts less than eight hours apart. In this case, the employer did not schedule a shift for the grievor between 07:00 and 15:00. The grievor worked overtime. This question has already been considered in *Lauzon*, where the adjudicator decided that the eight-hour restriction does not apply between an overtime shift and a regular shift.

[14] The employer admitted that the correctional manager had initially approved four hours of AOD status for the grievor between 18:30 and 22:30 on April 20, 2007. However, the correctional manager's decision was incorrect, and the assistant warden rescinded it a few days later.

Reasons

[15] This grievance raises two issues. First, I must determine if clause 21.02(b) of the collective agreement applies. Second, I must decide if the employer was obliged to respect its initial decision to grant the grievor four hours of AOD status on April 20, 2007.

[16] Clause 21.02 of the collective agreement applies to hours of work scheduled for employees working on a rotating or irregular basis. For those employees, the employer has to make every reasonable effort not to schedule the commencement of a shift within eight hours of the completion of a previous shift. That does not apply to overtime shifts but rather only to scheduled shifts. In fact, the collective agreement does not prevent an employee from working an overtime shift commencing or ending within eight hours of a scheduled shift. On that point, the adjudicator in *Lauzon* wrote the following:

. . .

> ***19*** *However, I do not agree with the employer that the restriction contained in clause 21.02 of the collective agreement specifying an eight-hour interval between scheduled shifts applies to overtime shifts. In fact, in applying that restriction to clause 21.10, the employer decided unilaterally that the grievor was not available to work overtime.*
>
> . . .
>
> ***23*** *An employee covered by the collective agreement works an average of 40 hours per week. Among other things, the content of clauses 21.01 to 21.09 determines how those hours are scheduled. Clause 21.02(b)(i) imposes a restriction on the employer in scheduling hours of work, so that an employee, when it is reasonably feasible, is not forced to commence a shift within eight hours of the completion of the previous shift. A different logic is applied to overtime availability; the employee makes the decision to be available, not the employer. The employee can then decide to make himself or herself available at any time, even within the eight hours after the end of a previous shift. If the parties wanted to impose such a restriction on employees, they would have written one into clause 21.10 or into one of the other overtime clauses of article 21, but they did not.*
>
> . . .

[17] The grievor was not forced to work overtime on April 20, 2007. He decided to attend the training knowing that he was scheduled to work that evening. Because the hours he worked between 07:00 and 15:00 on April 20, 2007 were not a regularly scheduled shift, the employer did not have to make every reasonable effort not to schedule him to begin work at 18:30, as it did. If I based my decision only on that interpretation of the collective agreement, I would deny the grievance.

[18] However, the uncontradicted evidence adduced at the hearing demonstrated that the employer had informed the grievor that he was entitled to four hours of AOD status on April 20, 2007. I agree with the grievor that the doctrine of promissory estoppel applies in this case.

[19] A claim for estoppel must satisfy the following three conditions: 1) a party made a representation, either by words or by conduct; 2) the representation was intended to be acted on by the other party; and 3) the other party did in fact rely on the representation.

[20] The employer informed the grievor that he would be considered on AOD status between 18:30 and 22:30 on April 20, 2007. The employer wrote on the duty roster that the grievor would be on AOD status for those hours. Based on that information, the grievor did not show up for work before 22:30 on April 20, 2007. Five days later, the employer claimed those four hours from the grievor. On April 20, 2007, the employer should have informed the grievor that he was not entitled to AOD status for the four hours and that, had he wanted to rest before coming into work, he should have used annual leave. Instead, the employer misinformed the grievor, and the grievor based his decision to come to work at 22:30 on the information with which he had been provided.

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

(The Order appears on the next page)

Order

[22] The grievance is allowed.

[23] The employer must credit the grievor four hours of annual leave.

April 23, 2010.

Renaud Paquet,
adjudicator