Date: 20110919

File: 566-02-3386

Citation: 2011 PSLRB 111

Public Service Labour Relations Act

Before an adjudicator

BETWEEN

ROCH BAZINET

Grievor

and

TREASURY BOARD
(Department of Public Works and Government Services)

Employer

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

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Joseph W. Potter, adjudicator

For the Grievor: Helen Nowak, Public Service Alliance of Canada

For the Employer: Allison Sephton, counsel

Heard at Ottawa, Ontario,
August 5, 2011.

I. Individual grievance referred to adjudication

[1] Roch Bazinet ("the grievor") is a member of the Operational Services bargaining unit and is classified HP-05 (Heating, Power and Stationary Plant Operations). He is covered by the Operational Services Group collective agreement (Exhibit E-1, tab A) between the Treasury Board ("the employer") and the Public Service Alliance of Canada ("the bargaining agent") (expiry: August 4, 2007; "the collective agreement").

[2] On November 7, 2008, the grievor grieved that the employer had failed to comply with the provisions of the collective agreement in that he had not been properly compensated for work that he had performed on a designated paid holiday (DPH). He wanted to be paid in accordance with the collective agreement. In addition, the grievor mentioned three previous adjudication decisions that supported his position. Paragraph 6 of the "Agreed Statement of Facts" (Exhibit E-1) reads as follows:

> *6. On November 7, 2008, Mr. Roch Bazinet filed an individual grievance alleging that the compensation he received when required to work on a designated paid holiday (DPH) was contrary to the provisions of Article 28, sub-clause 28.06(e) of the collective agreement and contrary to the interpretation of this language as already established by previous adjudication decisions (*King *– 166-2-28332 & 28333, T-161-99;* Breau et al. *– 2003 PSSRB 65; and* Mackie *– 2003 PSSRB 103)….*

[3] The grievor testified that he is a shift worker and that he works 200 hours over a 5-week scheduling period. His hours of work consist of 7 day shifts of 12 hours, 7 night shifts also of 12 hours and 4 shifts involving maintenance work of 8 hours.

[4] The parties submitted an "Agreed Statement of Facts" (Exhibit E-1). Paragraphs 19 to 25 set out the issue in dispute and read as follows:

> *19. The Employer's pay administration system provides annually for 26 bi-weekly paycheques. As a shift worker, Mr. Bazinet receives a bi-weekly paycheque representing compensation for 80 hours of work, regardless of how many hours he actually worked during the bi-weekly period preceding this compensation. This compensation is calculated at his hourly rate of pay for the normal work week (40 hours).*
>
> *20. As a shift worker, Mr. Bazinet may not actually work 80 hours in the two week period preceding his bi-weekly compensation. He may work more or less than 80 hours in*

this two week period, however, throughout his 5-week cycle, he works 200 hours or an average of 40 hours per week. The following examples illustrate these principles:

(a) Example A: *For the scheduled dates of August 11 – August 24, Mr. Bazinet would be paid for 80 hours, despite working 68 hours.*

(b) Example B: *For the scheduled dates of August 25 – September 7, Mr. Bazinet would be paid for 80 hours, despite working 84 hours.*

21. Article 28.06(e) of the collective agreement provides the following with respect to DPHs for shift workers:

"(i) A Designated Paid Holiday shall account for the normal daily hours of work as specified in the relevant Group Specific Appendix.

(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 sub-paragraph (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."

22. Any outstanding monies owed to Mr. Bazinet, including overtime, shift premiums, acting pay, DPH pay, etc., is paid by a supplementary (separate) paycheque together with any overtime pay and shift premiums.

23. For the DPH which occurred on August 4, 2008, where Mr. Bazinet was scheduled for and worked 12 regular scheduled hours, he was compensated via a separate paycheque in the amount of 14 hours.

24. The Employer's calculations are as follows:

+8 hours paid (under 28.06(e)(i))	*+8 hours*
+12 hours at the rate of 1.5 (under 28.06(e)(ii))	*+18 hours*
Total amount due for the DPH:	*= 26 hours*
The 12 hours already paid to the employee in the 80 hour bi-weekly paycheque is then subtracted from that amount	*- 12 hours*
Total amount of paid in the separate cheque:	14 hours

25. The grievor disputes the employer's calculations, and instead holds that the calculations adopted in the Mackie, King *and* Breau *decisions should apply. They are as follows:*

+8 hours paid (under 28.06(e)(i))	*+8 hours*

+12 hours at the rate of 1.5 (under 28.06(e)(ii))	*+18 hours*
Total amount due for the DPH:	*= 26 hours*
The 8 hours already paid to the employee in the 80 hour bi-weekly paycheque is then subtracted from that amount	*- 8 hours*
Total amount to be paid in the separate cheque:	18 hours

[*Sic* throughout]

[5] In the employer's opening statement, it advanced the argument that an adjudicator had no jurisdiction to hear this matter, as there was no violation of the collective agreement, and it was simply a pay administration matter. In contrast, the bargaining agent said that the collective agreement had been violated.

[6] The dispute boils down to how much pay Mr. Bazinet should receive for working on a 12-hour designated paid holiday (DPH). All work on a DPH is to be compensated at time and one-half and is paid on a separate pay cheque. The bargaining agent claims Mr. Bazinet should receive 18 hours pay, and the employer claims Mr. Bazinet should receive 14 hours pay. The method each uses to calculate the amount they claim is owing can be found at paragraphs 24 and 25 of the Agreed Statement of Facts, cited earlier.

II. Summary of the arguments

A. For the grievor

[7] The employer's practice of deducting four hours of pay goes against the existing case law and violates the collective agreement. The decision in *King v. Treasury Board (Revenue Canada-Customs and Excise),* PSSRB File Nos. 166-02-28332 and 28333 (19990819), was upheld by both the Federal Court and the Federal Court of Appeal. In *King*, the adjudicator supported the bargaining agent's position. That case was almost identical to this case. *Breau et al. v. Treasury Board (Justice Canada)* 2003 PSSRB 65, was also almost identical, and the bargaining agent's position was again supported. *Mackie v. Treasury Board (National Defence),* 2003 PSSRB 103 was identical in almost all aspects, and it too supported the bargaining agent's position. This case is a relitigation of *Mackie,* which frustrates the grievor. The issue has been decided.

[8] The employer alleged that the grievor was overpaid when he worked the DPH and it, therefore, was necessary to clawback 4 hours of pay. That allegation is

inaccurate. To illustrate that there was no overpayment, the grievor provided as an example two 12-hour shift workers working the DPH. Each requests time and one-half for all hours worked, which totals 36 hours of pay. If 3 employees work 8 hours each on the DPH at time and one-half, it also totals 36 hours of pay. There is no overpayment. The employer claws back 4 hours of pay, depriving the 12-hour shift workers of 4 hours of straight-time pay.

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

[9] The adjudicators' decisions in *King*, *Breau et al.* and *Mackie* were decided incorrectly, and an adjudicator is free to chart a different course because *stare decisis* (the need to honour precedents) does not apply to an administrative tribunal.

[10] It is not in dispute that the grievor was entitled to receive and that he did receive pay for 200 hours every 5 weeks. He received a supplemental cheque for working 12 hours on a DPH, which consisted of 8 hours of pay for the DPH and an additional one-half time for all hours worked (12 hours worked multiplied by 0.5 for a total of 6 hours). Therefore, his supplemental cheque was for 14 hours. The grievor requested time and one-half for all 12 hours, for a total of 18 hours, but the extra 4 hours were already factored in his paid 200 hours.

[11] In Appendix D of the collective agreement which sets out specific provisions that apply to employees in the grievor's HP group (Exhibit E-1, tab A), clause 2.05(b) reads as follows:

> ***2.05 Twelve (12) Hour Shifts and Other Variable Hours of Work***
>
> . . .
>
> *(b) Notwithstanding anything to the contrary contained in this Agreement, the implementation of any variation in hours shall not result in any additional overtime work or additional payment by reason only of such variation, nor shall it be deemed to prohibit the right of the Employer to schedule any hours of work permitted by the terms of this Agreement.*

[12] Paying the grievor the requested compensation would violate the collective agreement in that he would be paid more money than he is entitled to.

[13] Similarly, clause 30.03 of the collective agreement prohibits pyramiding benefits. Paying the extra 4 hours would violate that clause.

[14] Article 28 of the collective agreement deals with "Variable Hours of Work", and clause 28.06(e)(i) states as follows: "A designated paid holiday shall account for the normal daily hours of work as specified in the relevant Group Specific Appendix." The normal daily hours of work are eight hours.

[15] Payment for working on a DPH is found in clause 28.06(e)(ii) of the collective agreement as follows (Exhibit E-1, tab A):

> *When an employee works on a Designated Paid Holiday, the employee shall be compensated, in addition to the pay for the hours specified in sub-paragraph (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.*

[16] Employees working a variable workweek, like the grievor, are entitled to the 8 hours for the DPH plus time and one-half for working their 12-hour shift. Since their 12-hour shift is included in their regular paycheque, the supplemental cheque is the extra one-half time they receive for working the DPH. Therefore, the supplemental cheque is 8 hours for the DPH plus 6 hours for the one-half time, for a total of 14 hours. The wording of the collective agreement is clear that that is what the grievor is entitled to.

[17] The employer submitted the following decisions in support of its interpretation: *Arsenault et al. v. Parks Canada Agency*, 2008 PSLRB 17; *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 - Correctional Service)*, 2003 PSSRB 40.

C. Grievor's rebuttal

[18] The case law cited by the employer does not apply because none of the cases deals with an employee who worked a DPH. In addition, the *Arsenault et al.* case was decided incorrectly.

[19] Clause 32.07(a) of the collective agreement (Exhibit E-1, tab A) reads as follows:

> **32.07**
>
> *(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 the daily hours specified in the relevant Group Specific Appendix, 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.*

(Note: Although the grievance referenced clause 32.07, in fact this appears to apply to regularly scheduled employees. The correct reference, noted in the Agreed Statement of Facts, is clause 28.06).

[20] The grievor works 12 daily hours. Therefore, he is entitled to time and one-half for the 12 hours worked, for a total of 18 hours of pay.

III. Reasons

[21] This case is interesting in that I rendered the decision in *Mackie* in November 2003. The employer stated that the facts in *Mackie* and those of this grievance are virtually identical but that the *Mackie* decision was decided incorrectly. In support of its position, the employer cited a number of decisions, including *Arsenault et al.*, which the grievor's representative said were decided incorrectly. As an aside, this clearly demonstrates that not every final and binding decision will be deemed to have been decided correctly.

[22] At the outset of the hearing, the employer advanced the argument that I was without jurisdiction to hear this matter, as the deduction of 4 hours of pay from the grievor was simply a pay administration action and not a collective agreement interpretation issue. The bargaining agent did not agree, and I do not agree either. Both parties cited several portions of the collective agreement (Exhibit E-1) to support their viewpoints, as well as case law. In addition, the grievor specifically alleges a violation of a provision of the collective agreement. That, in my view, falls squarely within the provisions of paragraph 209(1)(*a*) of the *Public Service Labour Relations Act*, which states as follows:

> ***209.*** *(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*

> *(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award….*

[23] The employer acknowledged that it was relitigating *Mackie*, which it felt was was decided incorrectly. That decision followed the *King* and *Breau et al.* decisions, again on the same issue. In *Mackie*, I wrote as follows, starting at paragraph 24:

> *[24] In the federal public sector, the parties to a dispute can refer the matter to the Public Service Staff Relations Board (PSSRB). This independent body reviews the matter before it and issues a decision. If either party does not agree with the decision, it can challenge it. The avenue of redress is the Federal Court. The employer chose to appeal the* King (supra) *decision and the Federal Court of Appeal rejected the employer's application in a decision dated May 7, 2002.*
>
> *[25] Some 14 months later, the* Breau (supra) *decision was rendered, and once again, on the same issue, the employer's position was rejected. The employer chose not to appeal that decision.*
>
> *[26] Now, some 3 1/2 months after the* Breau (supra) *decision was rendered, I am being asked the same question, with the employer essentially saying both the* King (supra) *and* Breau (supra) *decisions were wrong, and another decision should be rendered to correct this.*
>
> *[27] While it is recognized that both the employer and the bargaining agent have the right to relitigate issues, as was stated in* Breau (supra) *". . . certainty, uniformity, stability and predictability. . . ." are extremely important elements in fostering a positive labour relations climate. For an adjudicator to go against established jurisprudence should, I believe, be done only when the trier of fact is convinced the jurisprudence was wrong. Is the established jurisprudence incorrect?*
>
> *[28] After reading both the* King (supra) *and* Breau (supra) *decisions, which detail the very complex mathematical explanation from each of the two parties as to why their position should be preferred, the phrase "the devil is in the detail" comes readily to mind. Rather than restate complex mathematical formulas which were reviewed in both the referenced cases, I will attempt to explain the reasons for my decision in a different fashion.*
>
> *[29] Before beginning that explanation, I will state that after reviewing both* Diotte (supra) *and* White (supra)*, I find that these cases are not of assistance in the present*

circumstances. Both of these cases dealt with time not worked by the grievor and the issue in the instant case is compensation for time worked by the grievor.

[30] Both parties agree that the total compensation owed to the employee for working on a DPH is 26 hours.

[31] The bargaining agent states that the employee's regular pay cheque reflects an 8-hour day, and the compensation for working on a DPH is time and one-half for the 12-hour shift. The additional amount owing the employee, over and above his regular pay cheque, is therefore 18 hours.

[32] The employer states that the employee regularly works a 12-hour shift and gets paid for such. Therefore, the additional amount owing the employee for working a 12-hour DPH is 14 hours.

[33] I believe an answer to this supposed conundrum lies in clause 28.04 of the collective agreement (Exhibit E-1). It states, in part:

> . . . the implementation of any variation in hours shall not result in any additional overtime work or additional payment by reason only of such variation. . . .
>
> *(emphasis mine)*

[34] Even though Mr. Mackie worked a 12-hour shift, he could not receive additional payment simply because he worked the variation in hours. Therefore, he has to get the same payment as someone who does not work variable hours. This means he has to get paid an amount equal to a regularly scheduled, 8-hour-a-day (40-hour-a-week) employee. Consequently, his regular bi-weekly pay cheque is no greater than someone working an 8-hour day, even though he works a 12-hour shift. In his case, the 12_hour shift will average out to an 8-hour day over the 12-week cycle.

[35] Mr. Mackie's bi-weekly pay cheque never varied. He was paid as though he worked an 8-hour day. When a DPH occurs, and he works his 12-hour shift, he is entitled to an amount over and above his regular pay cheque. Since his regular pay cheque has been equated to an 8-hour day, and the parties agree he is entitled to a global amount of 26-hours' pay, he is owed 18 additional hours for working the DPH.

[36] For this reason, I see no need to deviate from the decision in both King (supra) *and* Breau (supra)*. Accordingly,*

> *the employer is directed to compensate Mr. Mackie for the amount owing in accordance with this decision.*
>
> [Emphasis in the original]
> [*Sic* throughout]
>
> . . .

[24] As I stated in *Mackie*, I believe that it is extremely important to foster a positive labour relations climate by not reversing previous decisions on the same matter unless, to quote the Federal Court, ". . . the decision is patently unreasonable, in the sense of being 'clearly irrational' or 'simply ridiculous'." (see *Canada (Attorney General) v. King* [2000] F.C.J. No. 1987 (T.D.)(QL); upheld in [2000] FCJ 2002 FCA 178). I note that the *Mackie* decision was not appealed.

[25] Despite the employer's very able argument, I fail to see why the previous decisions on this same subject are "simply ridiculous" or "clearly irrational" and need to be reversed.

[26] A number of cases cited by the employer deal with issues other than working on a DPH and the accompanying payment. I find they are not instructive given the facts of this case. Other case law referred to by the employer deals with the interpretation of the phrase "normal daily hours" and again is not applicable to the facts of this case.

[27] The bargaining agent used the example of 3 regularly scheduled (that is, 8 hours per day) employees having to work a 24-hour DPH. Each would be entitled to time and one-half for their 8 hours worked, for a total of 36 hours. Compare this to two 12-hour employees working the same DPH at time and one-half, and the total is 36 hours. There is no overpayment, as all employees are treated equally. The employer did not rebut that example, so I fail to see the need to clawback any hours in this case. Both groups of employees work the same hours over the DPH, and the total cost to the employer is the same. Similarly, over the course of 5 weeks, both groups of employees work 200 hours and are paid accordingly. In my view, all employees are treated equally, and a clawback is not necessary.

[28] The grievor was scheduled for 12 hours of work on a DPH and is, therefore, entitled to be paid at time and one-half for his 12 hours of work.

[29] For all of the above reasons, the employer's jurisdictional objection is dismissed and I make the following order:

(The Order appears on the next page)

IV. Order

[30] The grievance is allowed.

September 19, 2011.

Joseph W. Potter,
adjudicator