Date: 20110922

File: 566-02-2072

Citation: 2011 PSLRB 113

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

DAVID TROTTIER

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Trottier 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: Sheryl Ferguson, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

For the Employer: Michel Girard, counsel

Heard at Kingston, Ontario,
August 31, 2011.

Individual grievance referred to adjudication

[1] On February 6, 2008, David Trottier ("the grievor") filed a grievance alleging that the Correctional Service of Canada ("the employer") violated the overtime allocation provisions of the collective agreement signed by the Treasury Board and the Union of Canadian Correctional Officers — Syndicat des agents correctionnels du Canada — CSN ("the bargaining agent") for the Correctional Services (CX) bargaining unit on June 26, 2006 ("the collective agreement"). The grievor is a correctional officer, level 1 (CX-01), and works at the Collins Bay Institution (CBI) in Kingston, Ontario.

[2] The grievor alleged that the employer violated the collective agreement on January 25, 2008 when it did not offer him a full overtime shift. Instead, the grievor worked overtime only from 15:00 to 18:45, even though he was available to work overtime for the entire evening shift, which ended at 23:00.

Summary of the evidence

[3] The grievor testified. He also called Alfred Elliott, a correctional officer, as a witness. When the grievance was filed, Mr. Elliot was the grievance coordinator for the bargaining agent at the CBI. The employer called Cynthia Stacey as a witness; she was a correctional manager at the CBI at the time of the grievance. On January 25, 2008, she was in charge of making the schedule, filling the vacancies and, if needed, calling correctional officers to work overtime for the evening shift.

[4] At the time of the grievance, a procedure was in place at the CBI for allocating overtime, which procedure was developed and followed by the employer. That procedure was outlined in an email sent in December 2005 by the CBI Deputy Warden to all correctional supervisors. In it, the Deputy Warden mentioned that it was imperative that each and every correctional supervisor adhere to the procedure.

[5] According to the CBI procedure, overtime was allocated to available correctional officers at the applicable rate based on rank. Officers at the CX-01 group and level were called in priority to work overtime at that level. The employer offered overtime first to correctional officers who would be paid at time and one-half. Officers were allocated two hours after beginning their shifts to record their availability for working overtime on the next shift. An overtime hiring list was prepared every Sunday night with the names and ranks of every officer and the shifts for which they had already indicated their availability to work overtime. The overtime hiring list was continuously

updated as officers' availabilities could change. The number of hours of overtime already worked in a quarter was also continuously updated. The overtime hiring list also included each officer's regular shift and hours, the dates of each officer's days of rest and each officer's phone number. Officers started a quarter with zero hours of overtime and, from there, every hour of overtime worked was compiled. The quarters were as follows: January 1 to March 31, April 1 to June 30, July 1 to September 30, and October 1 to December 31.

[6] At the CBI, overtime was offered to readily available officers, starting with the officer who had worked the fewest hours of overtime that quarter. As mentioned earlier, officers paid at time and one-half would be called first. If none were available, the correctional manager would then call officers who would be paid at double time.

[7] There is no dispute between the parties that the detailed procedure described above was in place and that it was well established at the CBI at the time of the grievance.

[8] For the week of January 21 to January 27, 2008, the grievor indicated that he was available to work overtime on the evening shifts of January 25, 26 and 27. His regular shift for those three days was from 07:30 to 15:30. His days of rest for that week were January 21, 22 and 23. On January 25, 2008, the grievor was assigned during his regular shift to an escorted temporary absence (ETA). He was part of a team that escorted an inmate from the CBI for a visit of approximately three hours in Toronto. The grievor testified that the escort left the CBI at around 09:00 or 10:00.

[9] After departing for Toronto, the grievor received a call from Ms. Stacey offering him overtime for the evening shift that day. The grievor accepted the offer. At that moment, Ms. Stacey knew that the grievor was outside the institution working on an ETA to Toronto and the grievor knew that she was aware of this. However, Ms. Stacey testified that she is not very "geographically inclined" and did not know when the grievor would be back from Toronto.

[10] The grievor returned from the ETA at 18:45, after his regular shift, which ended at 15:30. The employer paid the grievor overtime for the time he worked after 15:30 but sent him home when he returned from the ETA. Ms. Stacey made the decision to not keep the grievor on overtime for the remainder of the evening shift because she would otherwise have been overstaffed. Earlier that day, when she had called officers

to work overtime, she had not been sure when the grievor would return from the ETA, and whether he would be available for the evening shift. Among the level 1 officers kept on the overtime shift that evening were two officers paid at double time and one officer with 15.75 hours of overtime already worked that quarter. Prior to the shift in question, the grievor had not worked any overtime hours during the quarter.

[11] Ms. Stacey testified on the practice followed at the CBI when a correctional manager is faced with too many people called to work overtime on a shift. The manager would follow the same logic used when offering overtime, which would be to first send home the last officer called to work overtime. In this case, it would have been one of the officers working at double time. No testimony was offered to explain why this was not done in this case.

[12] The grievor testified that Ms. Stacey apologized to him on January 26, 2008 for not keeping him on shift the day before, even though other officers had been kept on shift who were paid at double time or who had worked more hours than him that quarter. Ms. Stacey testified that she did not remember apologizing to the grievor, but the employer admitted that she did in its second-level grievance reply. Of particular interest to this decision is that the employer also wrote the following in that reply:

. . .

> *Also, as per Collins Bay Overtime Policy a point system will be used (one point per hour) – if a staff member that gets hired or refuses a full shift would get an '8' point; half a shift '4'; etc. Points will continue to be cumulative for the quarter.*
>
> . . .
>
> *It was also noted that there were other officers who were also on overtime, that remained on shift, who had accumulated either more overtime hours, or were on double time when you were in time and one half. This erroneous practice has been discussed with the Correctional Managers. It was also noted that the Correctional Manager who made the decision to send you home, had apologised to you the next day when she noted the result of her decision.*
>
> [*Sic* throughout]

[13] In its first-level reply, the employer mentioned that, as of February 18, 2008, the grievor had worked 22.25 hours of overtime since the beginning of the quarter, compared to 11.47 hours for the average of all level 1 officers. The employer also

adduced in evidence a document showing that, at the end of the first quarter of 2008, the grievor had worked more overtime hours in the quarter than most level 1 officers.

[14] It is not clear from the evidence adduced at the hearing whether the grievor was paid overtime to 18:45 or to 19:00 on January 25, 2008. Furthermore, in his grievance, the grievor claimed four and three-quarter hours of overtime, but the overtime shift would have ended at 23:00. The parties could not clarify the source of that difference at the hearing.

Summary of the arguments

[15] The grievor argued that the employer violated the collective agreement when it did not keep him on for the full overtime shift on January 25, 2008. The grievor was offered overtime for that shift, which he accepted. When the employer realized that there were too many employees on staff, it should not have sent the grievor home because he should have been offered overtime before employees with more overtime hours than him in the quarter or before employees paid double time for that overtime shift. The grievor argued that the correctional manager already knew that the grievor would not be at the CBI by the end of his regular day shift when she offered him the overtime work on the evening shift of January 25, 2008. By sending the grievor home at 18:45 because he was not available for the beginning of the evening shift, the correctional manager violated the collective agreement. She did not distribute overtime equitably.

[16] The grievor referred me to the following decisions: *Mungham v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 106; *Sumanik v. Treasury Board (Ministry of Transport)*, PSSRB File No. 166-02-395 (19710927); *Hunt and Shaw v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 65; *Lauzon v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 126; and *Weeks v. Treasury Board (Correctional Service of Canada)*, 2010 PSLRB 132.

[17] The employer argued that it did not violate the collective agreement when it ended the grievor's overtime shift at 18:45 on January 25, 2008. The grievor was not readily available to work overtime on the evening shift because he was outside the penitentiary on an ETA at the beginning of the evening shift. The correctional manager had to fill a vacancy at the beginning of the shift, and she did not know when the grievor would return. The overtime needs for the evening shift evolved between the

time that the correctional manager offered overtime to the grievor and the evening shift. When the grievor arrived from his ETA, there was no more need for him to work overtime, and the employer had the right to end his overtime shift.

[18] The employer also argued that there was no formal overtime policy or signed agreement with the local union on how to distribute overtime. A practice is not part of the collective agreement. If the employer does not respect it, that does not constitute a breach of the collective agreement. If the employer made a mistake applying its own policy, it is not a case of promissory estoppel.

[19] The employer also argued that, at the end of the quarter, the situation had been rectified since the grievor ended up with more hours of overtime than the average for all level 1 correctional officers. The grievor cannot argue that he was not equitably offered overtime since he worked more overtime hours than most of his colleagues.

[20] The employer referred me to the following decisions: *Armand v. Treasury Board (Solicitor General Canada — Correctional Service)*, PSSRB File No. 166-02-19560 (19900629); *Eaton v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-19366 (19900409); *Jefferies et al. v. Treasury Board (Canadian Food Inspection Agency)*, 2003 PSSRB 55; and *Chafe et al. v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112.

Reasons

[21] The grievor grieved that, on January 25, 2008, the employer violated the collective agreement when it did not offer him a full overtime shift, even though he was available to work it. The relevant provisions of the collective agreement read as follows:

. . .

> ***21.10 Assignment of Overtime Work***
>
> *The Employer shall make every reasonable effort:*
>
> *(a) to allocate overtime work on an equitable basis among readily available qualified employees,*
>
> *(b) to allocate overtime work to employees at the same group and level as the position to be filled, i.e.: Correctional Officer 1 (CX-1) to Correctional Officer 1*

> *(CX-1), Correctional Officer 2 (CX-2) to Correctional Officer 2 (CX-2) etc.;*
>
> *However, it is possible for a Local Union to agree in writing with the Institutional Warden on an* [*sic*] *another method to allocate overtime.*
>
> . . .

[22] The facts of this case are not contested. During his regular shift on January 25, 2008, the grievor was assigned to an ETA and escorted an inmate from the CBI for a visit of approximately three hours in Toronto. After departing for Toronto, the grievor was offered overtime for the evening shift by Ms. Stacey. He accepted. When he returned from the ETA at 18:45, Ms. Stacey ended his overtime shift because she was overstaffed. Ms. Stacey had called other officers to work that overtime shift because she had not been sure that the grievor would be back in time from his ETA.

[23] In January 2008 at the CBI, a procedure was in place for allocating overtime. The employer had developed it, and the evidence showed that all correctional managers had been required to apply it since at least 2005. The employer admitted that the procedure was not adhered to on the evening of January 25, 2008 and that Ms. Stacey erred when she ended the grievor's overtime shift. Ms. Stacey apologized to the grievor for her error. Furthermore, in its second-level grievance reply, the employer admitted that it made an error. That error was that other officers worked the overtime at double time or had more overtime hours than the grievor, while he was sent home. According to the CBI procedure, the grievor should have been kept on overtime for the entire evening shift, and one of the two officers paid at double time should have been sent home when the grievor returned from the ETA at 18:45.

[24] According to the employer, Ms. Stacey's error was corrected by the end of the quarter, since the grievor worked more overtime hours than his colleagues. According to the grievor, the error was a violation of the collective agreement because overtime was not distributed equitably on January 25, 2008.

[25] The employer referred me to *Jefferies* and to *Chafe* on the issue of estoppel. I agree with the comments made on estoppel by the adjudicators in both decisions. However, the grievor did not argue that estoppel applied, and I agree with the employer that it does not apply to this case. The employer also referred me to *Eaton,* in which the grievor refused overtime because she was not available, due to being on

leave to meet with a medical specialist in another town. That situation is far removed from this case, in which the grievor was on assigned duty for the employer when the overtime shift began. In fact, the grievor directly informed the employer that he was available to continue his overtime shift at 18:45 on January 25, 2008. Before then, he was already working overtime on another task, which, I must mention, was at the employer's request.

[26] There is no issue between the parties that at the CBI, a procedure was in place for allocating overtime. By putting that procedure in place, and by ordering all correctional managers to adhere to it, the employer established equitability on a daily basis, by updating the number of hours each officer worked in the quarter, before offering overtime to available employees. Faced with a comparable procedure for allocating overtime at the Fenbrook Institution, the adjudicator in *Mungham* wrote the following:

. . .

> *[31] This suggests that the overtime policy represents the common understanding of how overtime is to be allocated equitably, as required under the collective agreement. Although the document does not form part of the agreement, it is relevant to its interpretation and application (see* Canadian Labour Arbitration (supra), *paragraph 4:1220). The procedures manual (Annex "D" of the* Agreed Statement of Facts*) states that, should the use of overtime become necessary, ". . . the Duty CS shall ensure that all overtime is hired in a cost effective manner and further that all overtime hours are distributed evenly amongst staff. . . ." The employer has limited its discretion to assign overtime hours by this policy. There was testimony from Mr. Mungham that the bargaining agent accepted this policy as the method of equitable allocation of overtime opportunities. There was evidence that this policy is used on a regular basis, notwithstanding that there may be other grievances outstanding. In this way, the overtime policy represents the common understanding of what equitable allocation of overtime means. I therefore find that the overtime policy is binding on the employer. There was no dispute that, according to the policy, Mr. Mungham should have been given the overtime assignment on December 30, 2003. I therefore find that there was a breach of the collective agreement.*

. . .

[27] In this case, as in *Hunt and Shaw*, the employer presented evidence that it considered that equitability was applied daily. Surprisingly, the employer later argued that overtime allocation should be examined at the end of the quarter. As I wrote in *Hunt and Shaw*, since it has had an overtime allocation procedure in place for a significant period (at least since 2005), the employer has limited its discretion to assigning overtime hours only according to the procedure, as long as it does not contravene the collective agreement. That procedure has become the official interpretation of what equitable allocation of overtime means at the CBI. This was also confirmed in *Lauzon,* which involved overtime allocation at the CBI in 2007.

[28] The employer clearly violated its own well-established policy of allocating overtime. By doing so, it violated the collective agreement. As the adjudicators did in *Mungham* and in *Hunt and Shaw*, I reject the employer's argument that, because the grievor worked more overtime hours during the quarter than his colleagues, he was allocated overtime equitably. To accept the employer's argument would mean that an employee who had declared himself or herself available for only one eight-hour shift in a quarter, could conceivably claim in a grievance that he or she had been treated inequitably in the distribution of overtime in comparison to other officers who had declared a much greater availability and were consequently assigned more overtime shifts by the employer. That simply does not make sense. Among other factors, availability directly influences the odds of an officer being offered overtime. In fact, on this very point, I would refer the employer to its following argument in *Weeks,* at paragraph 38:

> *[38] Counsel suggested that it is possible to determine equitability only by comparing things that are comparable. It would be illogical to compare an employee with very few overtime hours worked because he or she did not want to work overtime with an employee who is always available. Therefore, it is not enough to provide a set of numbers for comparison purposes without taking into account all the variables that might explain why some employees have worked more overtime than others, such as availability, shifts or leave or the voluntary nature of the overtime or exceptional circumstances.*

[29] It is not true that the grievor was not readily available to work overtime on the evening shift of January 25, 2008. In fact, the grievor had already worked almost half that shift on overtime when he was sent home at 18:45 on his return from the ETA. To respect its own overtime procedure and the collective agreement, the employer should

have sent another officer home who was lower on the overtime priority hiring list and should have kept the grievor for the remainder of the overtime shift.

[30] The parties did not argue remedy if I were to allow the grievance. However, as illustrated by some of the decisions submitted by the grievor, it has been the practice over the last few years that the remedy is that the employer should pay successful grievors the overtime that they would have earned had they been called for overtime. I agree with that approach.

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

(The Order appears on the next page)

Order

[32] The grievance is allowed.

[33] The employer must pay the grievor time and one-half for all unpaid hours between 15:45 and 23:00 on January 25, 2008.

[34] I will remain seized of the grievance for a period of 60 days from the date of this decision to intervene if the parties cannot agree on the amount to be paid to the grievor.

September 22, 2011.

Renaud Paquet,
adjudicator