Date: 20110210

File: 166-02-36254

Citation: 2011 PSLRB 18

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

DENIS BRISEBOIS

Grievor

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
Brisebois v. Treasury Board (Department of National Defence)

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

REASONS FOR DECISION

Before: Michele A. Pineau, adjudicator

For the Grievor: David Girard, grievance and adjudication officer

For the Employer: Pierre-Marc Champagne, counsel

Heard at Montréal, Quebec,
January 20, 2011.
(PSLRB Translation)

I. Grievance referred to adjudication

[1] The grievor, Denis Brisebois, is a member of the GL group bargaining unit, represented by the Public Service Alliance of Canada ("the bargaining agent"), and is employed by the Department of National Defence ("the employer" or "the Department"). He works at the Montréal Garrison as a heavy vehicle operator and has held a GL-MDO-6 position since March 2004.

[2] On April 30, 2004, the grievor filed a grievance about the assignment of overtime, which he claims contradicts clause 29.04 of the collective agreement between the Treasury Board and the Public Service Alliance of Canada for the Operational Services Group; expiry date: August 4, 2003 ("the collective agreement"). As a remedy, the grievor asks that the employer comply with the provisions of clause 29.04.

[3] The grievance was dismissed at all three levels of the grievance process and was then referred to adjudication.

[4] Since the grievance was filed, 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 on April 1, 2005. Pursuant to section 61 of the *Public Service Modernization Act*, this reference 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 ("the former *Act*").

[5] At the beginning of the hearing, the employer objected to the scope of the grievance. It stated that its discussions with the bargaining agent before the start of the hearing revealed that the bargaining agent planned to change the grievor's grievance to a policy grievance dealing with the employer's current policy on overtime assignment. The employer pointed out that the grievance had been filed in 2004 under the former *Act*. Consequently, the bargaining agent's intended position was not based on any legal foundation.

[6] On the other hand, the bargaining agent argued that the problem with assigning overtime has persisted since the grievance was filed seven years ago and that the grievor's requested remedy, compliance with the collective agreement, is still valid. In support of its claim, the bargaining agent asked to introduce evidence of facts subsequent to the filing of the grievance. It stated that it had requested the overtime logs contemporary to the grievance but that they contained little information.

[7] I ruled during the hearing that, given the lack of a provision in the former *Act* about filing a policy grievance, the bargaining agent was required to remain within the circumstances of the grievor's individual grievance.

II. Summary of the evidence

[8] On April 16, 2004, the grievor sent a letter to his supervisor asking that his name be added to the overtime list according to operational requirements. He asked that he "[translation] be treated equitably" and that clause 29.04 of the collective agreement be respected.

[9] His supervisor, Claude Dupuis, responded as follows:

> [Translation]
>
> . . .
>
> *As requested on Friday, April 16, 2004, your name will be added to the overtime list at your equivalent level like all other staff members of the transportation subsections, Port B, Longue Pointe, have requested.*
>
> *However, the procedure for assigning overtime will remain the same, which is the most economical, efficient and safe way, distributed fairly among the qualified and readily available personnel of the transportation subsection from which the initial request originated, and then, if no personnel are available, the request will be routed to another higher-level subsection, and the same procedure is applied to all personnel at the higher level and subsection, and so on (examples: MDO-04, MDO-05 and MDO-06).*
>
> . . .

[10] The grievor has been a heavy vehicle operator since 1991. Before occupying a position classified MDO-6, he held an operator position classified MDO-4. The grievor has the skills necessary to work at the MDO-4, MDO-5 and MDO-6 levels.

[11] The MDO classification levels are differentiated based on the weight, variety and operating complexity of the heavy equipment that employees are required to operate. At the MDO-4 level, a driver must know how to drive a light truck, a staff car, an ambulance and a 24-passenger bus. At the MDO-5 level, a driver must know how to drive a tractor semi-trailer, a supply truck and a 57-passenger bus. At the MDO-6 level, a driver must know how to drive or operate a mobile crane, a lift truck, a supply truck,

a dump truck, a fuel truck, a maritime-container vehicle, a warehouse tractor, a mechanical sweeper, a floor cleaner, a motorized mower and a 5-ton truck with a trailer.

[12] An MDO-4 employee transports material located in the Department's warehouses and can be required to work anywhere in Canada. Every Saturday morning, a trip is made to the Trenton military base that is assigned to this level and that is always worked as overtime. An MDO-5 employee works mainly in the greater Montréal area and sometimes at night for a bus trip. An MDO-6 employee is restricted to moving heavy loads at the Montréal Garrison and is seldom deployed elsewhere.

[13] Overtime is assigned as follows: (1) it is first offered on a rotating basis to available employees qualified to perform the normal work of the group in question; (2) if no employee is available and qualified at that level, the work is offered to the next level; (3) if no employee is available at that level, the work is offered to the next higher level; and (4) if no employees are available, the work is assigned to a member of the military.

[14] According to Mr. Dupuis, that method of assigning overtime has always been used, and it reflects the efficient and sound management of public funds. The grievor is the first person to complain about the overtime assignment method. When the grievor asked to be placed on the overtime availability list, Mr. Dupuis added his name for work for employees at the MDO-6 level.

[15] The grievor admitted in his testimony that he does not recall whether he was available for overtime between April 16 and 30, 2004 or whether overtime was assigned. According to a report posted in the employees' break room at that time, the grievor worked 51 hours of overtime between April 1, 2004 and February 1, 2005.

III. Summary of the arguments

A. For the grievor

[16] The grievor argues that clause 29.04 of the collective agreement mentions only three criteria for assigning overtime, as follows: availability, qualification and fairness. The collective agreement does not consider efficiency or minimizing cost. By relying on factors other than the three assignment criteria, the employer violated the collective agreement. The case law is clear and consistent — under a collective agreement, when

overtime is assigned, the position levels of employees available to work that overtime must not be considered, provided that they are readily available and qualified to do the work. The employer must assign the overtime fairly between them.

[17] The grievor states that the time that has passed since he filed his grievance has caused him prejudice and that I should consider relevant evidence subsequent to the grievance on that point. The grievor argues that the employer did not prove that this case is the first time that overtime assignment has been challenged. The normal hours of work include the work normally performed at that time. Outside the normal hours of work, any driving work, regardless of level, constitutes overtime that must be accessible to all available and qualified drivers, in accordance with the provisions of the collective agreement.

[18] In support of his position, the grievor cited the following decisions: *Boss and Matuzic v. Treasury Board (Employment and Immigration)*, PSSRB File Nos. 166-02-15419 to 15421 (19880315); *Johnston et al. v. Treasury Board (Employment and Immigration)*, PSSRB File Nos. 166-02-17488 to 17490 (19880930); *Lagacé v. Treasury Board (Solicitor General - Correctional Service Canada)*, PSSRB File No. 166-02-28007 (19990222); *Leighton v. Treasury Board (Agriculture Canada)*, PSSRB File No. 166-02-17211 (19880929); and *Zelisko and Audia v. Treasury Board (Citizenship and Immigration Canada)*, 2003 PSSRB 67.

[19] The grievor asks that I allow his grievance and that I grant him the requested remedy.

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

[20] The employer argues that it is not challenging the grievor's testimony that he is generally available and qualified and that he should be considered for overtime. However, it maintains that the grievor did not prove that he was available between April 16 and 30, 2004, the period relevant to his grievance, or that overtime was assigned during that period.

[21] The employer submits that the overtime assignment method is a long-established practice, that it has never been put in writing and that it is not part of the collective agreement. Consequently, an adjudicator does not have jurisdiction to decide this grievance.

[22] The employer argues that the collective agreement has been renewed several times without objection. The bargaining agent cannot suddenly claim that overtime is assigned inequitably and that it disagrees with how the employer assigns it.

[23] The employer argues that the grievance relates to a specific period and that it must be examined with that in mind. Although the grievor seeks a policy statement on the correct interpretation of the collective agreement, the grievance must be restricted to examining the facts as they applied when the grievor filed his grievance.

[24] The employer adds that overtime is usually analyzed quarterly, annually or for a specific period. In this case, the grievor was appointed to the MDO-6 level in March 2004. He asked for his name to be added to the list of employees available for overtime on April 16, 2004 and was added on April 20, 2004. Consequently, the grievance must be limited to the overtime assigned during the two-week period before it was filed. The employer objects to evidence being considered from after that time.

[25] The employer argues that consideration of the sound management of public funds is a legitimate operational concern that does not contravene the collective agreement.

[26] The employer points out that it is generally inappropriate to assign overtime between all levels of the MDO classification because not all employees are able to perform the work of higher levels, and the tasks are not interchangeable. That means that an employee at the MDO-4 level could not work overtime at the MDO-5 and MDO-6 levels and that an MDO-5 employee could not work the overtime of an MDO-6, although the two employees at the MDO-6 level would be eligible for overtime at all levels. That method of allocating overtime would be unfair to employees at lower levels. The employer argues that I must consider the principle of the regular tasks of each level.

[27] In support of its position, the employer cited the following decisions: *Roireau and Gamache v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 85; *Hunt and Shaw v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 65; *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board (Correctional Service of Canada)*, 2010 PSLRB 85; *Fok and Granger v. Treasury Board (Department of Transport)*, 2006 PSLRB 93; *Cie minière Québec Cartier v. Quebec (Grievances arbitrator)*, [1995]

2 S.C.R. 1095; and *Alcan Smelters & Chemicals Ltd. v. C.A.S.A.W., Loc. 1* (1988), 1 L.A.C. (4th) 126.

[28] The employer asks me to dismiss the grievance or, if it is allowed, to limit the remedy to the grievance's relevant period.

IV. Reasons

[29] Clause 29.04 of the collective agreement reads as follows:

> ***29.04 Assignment of Overtime Work***
>
> *Subject to the operational requirements of the service, the Employer shall make every reasonable effort:*
>
> *(a) to allocate overtime work on an equitable basis among readily available qualified employees,*
>
> *and*
>
> *(b) to give employees who are required to work overtime adequate advance notice of this requirement.*

[30] Clause 2.01 of the collective agreement defines overtime as follows:

> . . .
>
> *(q) "overtime" means (heures supplémentaires):*
>
> > *(i) in the case of a full-time employee, authorised work in excess of the employee's scheduled hours of work;*
>
> . . .

[31] There is no disagreement that, when overtime is assigned, employees who normally perform the task are considered first. The grievor submits that those employees are given an unjustified priority, which makes the assignment of overtime unfair. The employer is of the view that that assignment method has never been questioned in the past and that it is in keeping with the spirit of the collective agreement.

[32] Therefore, the disagreement between the grievor and the employer centres on the criteria being applied when overtime is assigned. In other words, is the employer required to allocate overtime equitably among all qualified readily available employees, regardless of classification level, or can it first call on employees of the classification

that normally do the work, for reasons of efficiency and minimizing cost? The grievor has the burden of proving that the employer used criteria not set out in the collective agreement.

[33] The grievor introduced an overtime log for each classification level for a one-year period covering the date on which the grievance was filed. I note that, of the two employees in MDO-6 positions, the grievor benefitted from more overtime hours, that is, 51, compared to his colleague, who worked 17.25 hours. The three MDO-5 employees worked an average of 449.37 hours. The six MDO-4 employees worked an average of 359.6 hours.

[34] The grievor argued that the decisions in *Lagacé*, *Leighton*, *Johnston* and *Boss* support his position that I must not take financial considerations into account in the equitable assignment of overtime. In *Lagacé*, the adjudicator ruled that the employer was not justified in considering an employee's classification level before offering overtime. In that case, the employer had created two overtime lists, one at the AC-1 level and the other at the AC-2 level. There was no disagreement that an AC-1 could do the work of an AC-2 and that AC-1s were regularly assigned as AC-2s, depending on the service requirements at the start of each shift. The employer's policy was to prioritize the lower hourly rate of pay of time-and-a-half ahead of double time, while considering priorities by group. The employer also used part-time CX-1s to meet its needs before assigning overtime. The adjudicator decided that the collective agreement contained no restriction other than that an employee be qualified and available and that the position level should not be a factor in the employer's obligation to equitably assign overtime.

[35] In *Leighton*, the employee, classified PI-4, worked as a slaughterhouse supervisor. At the employer's request, he worked a half-hour of overtime daily for almost a year to ensure the ongoing inspection of the slaughterhouse during its hours of operation. In an effort to save money, the employer changed the employee's hours of work so that he no longer worked the half-hour of overtime that he had before unless exceptional circumstances arose under his supervisory duties. The daily half-hour of overtime was assigned on a rotating basis to PI-3s under the employee's supervision, and the employee was excluded from overtime. The employee provided evidence that he was qualified to perform the PI-3 tasks. The adjudicator was of the opinion that the overtime provision did not restrict the type of member of the

bargaining unit entitled to overtime and dismissed considerations such as classification and cost.

[36] In *Boss*, following a change to the work description, PM-3s were authorized to work overtime as immigration officers at the London, Ontario, airport, tasks of the PM-2 level. Apparently, an increasing number of employees were reluctant to accept promotions from the PM-2 to the PM-3 level (the supervisory level) because they would have had to give up the "bonus" that overtime represented. The adjudicator ruled that the employer was required to seek the largest possible number of candidates within a bargaining unit to whom overtime would be equitably offered, provided that the employees were qualified and readily available. Consequently, the PM-3s could not be excluded from the list of employees eligible to work overtime.

[37] In *Johnston*, the employer had for several years assigned overtime only to those employees working regularly in the unit who were responsible for preparing employment insurance benefit claims. Employees at the same level but in a different unit challenged the method for assigning overtime. Those employees demonstrated that they were able to do the work in question. Consequently, the adjudicator concluded that the grievors should not have been excluded from overtime simply because they normally worked outside the unit in which the overtime was worked.

[38] Although those decisions deal with overtime assignment, the circumstances are different enough from this case to distinguish them. In *Lagacé*, the AC-1s regularly replaced the AC-2s even when not on overtime. Consequently, if the AC-1s were able to do the work during normal work hours, they were also able to on overtime. In *Leighton*, the employee had regularly worked the half-hour of daily overtime for a long time, and the employer's new policy prohibiting him from overtime at the lower classification negatively affected his earnings. In *Boss*, the employer had changed the work description to include access to overtime because of recruitment problems. In *Johnston*, the employees demonstrated that they performed similar, if not identical, work, but in another unit.

[39] In this case, the method of assigning overtime has been in place for a long time. The bargaining agent never objected to it before this grievance was filed. According to the evidence introduced by the grievor for the period from April 1, 2004 to February 1, 2005, the employer equitably assigned overtime based on each

classification level. The grievor received the greatest number of hours for his classification level.

[40] Unlike the cited cases, and despite that they are all part of the same bargaining unit, the different driving tasks that distinguish the three classification levels are not interchangeable because they require different qualifications. Were the employer required to maintain a single overtime list, only two employees, including the grievor, would be able to perform the overtime at all levels, to the detriment of the nine other employees on the list. That new overtime assignment method would then be inequitable for the majority of employees.

[41] Furthermore, the assignment of overtime must be assessed over a reasonable period (see Brown and Beatty, *Canadian Labour Arbitration*, paragraph 5:3224). On that point, the 10-day period between when the grievor's name was placed on the list of people able to work overtime and when he filed his grievance was not long enough to determine whether he received an equitable allocation of overtime. Moreover, the grievor admitted in his testimony that he did not recall whether he had been available for overtime between April 16 and 30, 2004 or if overtime had been assigned. Consequently, the grievor did not convince me that minimizing costs was the only reason that he had not been assigned overtime between April 16 and 30, 2004 (see *Roireau and Gamache* on that point).

[42] Given my findings, it is not necessary to address the employer's argument about sound financial management.

[43] Accordingly, I find that the grievor did not discharge his burden of proving that the assignment of overtime at the Montréal Garrison was inequitable. Therefore, the grievance is dismissed.

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

(The Order appears on the next page)

V. Order

[45] The grievance is dismissed.

February 10, 2011.

PSLRB Translation

Michele A. Pineau,
adjudicator