Date: 20111123

File: 569-02-40

Citation: **2011 PSLRB 133**

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

and

TREASURY BOARD

Employer

Indexed as
Public Service Alliance of Canada v. Treasury Board

In the matter of a policy grievance referred to adjudication

REASONS FOR DECISION

Before: Michele A. Pineau, adjudicator

For the Bargaining Agent: Kim Patenaude, counsel

For the Employer: Sean F. Kelly, counsel

Heard at Ottawa, Ontario,
May 18, 2011.

I. Policy grievance referred to adjudication

[1] On June 26, 2007, the Public Service Alliance of Canada ("the bargaining agent") filed a policy grievance pursuant to section 220 of the *Public Service Labour Relations Act* (*PSLRA*) alleging that the Treasury Board ("the employer") had, by way of a memo, changed the compensation of employees working variable shift schedules who are required to work on a designated paid holiday.

[2] The grievance reads as follows:

> *Statement of each act or omission or other matter giving rise to the grievance:*
>
> *On June 1, 2007, employees of Environment Canada received a copy of a Memorandum issued by Environment Canada to its Compensation Advisors (attached). This Memorandum purports to "clarify" compensation for employees working variable shift schedules pursuant to the Technical Services group who are required to work on a designated paid holiday.*
>
> *The information contained in this Memorandum is contrary to the provisions of the Technical Services collective agreement, and contrary to the interpretation of this language as already established by previous adjudication decision (King – 166-2-28332 & 28333, T-161-99; Breau et al – 2003 PSSRB 65; Mackie – 2003 PSSRB 103).*
>
> *Corrective action requested:*
>
> *The bargaining agent seeks an order:*
>
> *declaring that the employer has violated Article 25 of the Technical Services collective agreement;*
>
> *declaring the correct interpretation, application and administration of Article 25 of the Technical Services collective agreement;*
>
> *requiring the employer to interpret, apply and administer the Technical Services collective agreement in conformity with the interpretation that has already been established by previous decisions of the Board and the Federal Court.*

[3] The parties submitted an agreed statement of facts; the relevant parts setting out the dispute read as follows:

. . .

9. A shift worker's normal hours of work are scheduled so that employees work:

i. An average of 37.5 hours per week and an average of 5 days per week; and

ii. 7.5 hours per day.

10. A shift worker's schedule provides an average of 37.5 hours of work per week over the life of the schedule.

11. The Employer's pay administration system provides annually for 26 by-weekly paycheques. Shift workers receive by-weekly paycheques representing compensation for 75 hours of work regardless of how many hours they actually work during the bi-weekly period preceding this compensation. The compensation is calculated by the employee's hourly rate of pay for the normal work week (37.5 hours) and the normal work day (7.5 hours).

12. A shift worker may not actually work 75 hours in the two week period preceding their by-weekly compensation. A shift worker may work more or less than 75 hours in this two week period, however, over the life of his or her schedule; he or she works an average of 37.5 hours per week or the same number of hours as a regular employe over the same period of time. The following examples illustrate these principles:

Example A: If a 14-day pay period included in the above-referenced days 1 to 14, the employee would be paid 75 hours, despite working 88.75 hours.

Example B: If a 14-day pay period included in the above-referenced days 15 to 28, the employee would be paid for 75 hours, despite working 61.25 hours.

13. Clause 23.13(d) of the Collective Agreement provides the following with respect to Designated Paid Holidays for shift workers:

A designated paid holiday shall account for seven and one half (7½) hours.

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 (1½) 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.

> *14. Any outstanding monies owed to a shift worker relating to the work performed on a designated paid holiday is paid to the shift worker by a separate paycheque together with any overtime pay and shift premiums.*
>
> *15. For example, in accordance with the memorandum dated May 5, 2007, if a designated paid holiday fell on the above-referenced Day 25 (i.e. 12.25 regular scheduled hours) and the employees worked those 12.25 hours, he/she would be provided a separate paycheque in the amount of 13.625 hours. The Employer's calculations are as follows:*
>
> > *+7.5 hours at straight time*
> > *+7.5 hours +12.25 hours at the rate of 1.5*
> > *+18.375 hours*
> >
> > *Total amount due for the Designated Paid Holiday:*
> > *= 25.875 hours*
> >
> > *The 12.25 hours already paid to the employee in the 75 hour bi-weekly paycheque is then subtracted from that amount*
> > *-12.25 hours*
> >
> > *Total amount of paid in the separate cheque:*
> > *13.625 hours*

[*Sic* throughout]

II. The bargaining agent's arguments

[4] The bargaining agent argues that the employer's memo reduces the premium pay to which employees are entitled on a designated paid holiday and that it is contrary to clause 25.09 of the collective agreement and the precedents set in the *King, Mackie* and *Breau et al.* decisions. The full citations for those decisions are: *King v. Treasury Board (Revenue Canada – Customs and Excise)*, PSSRB File Nos. 166-02-28332 and 28333 (19990819); *Breau et al. v. Treasury Board (Justice Canada)*, 2003 PSSRB 65; and *Mackie v. Treasury Board (National Defence)*, 2003 PSSRB 103. The collective agreement is between the bargaining agent and the employer for the Technical Services Group (expiry date: June 21, 2007; "the collective agreement").

[5] Furthermore, the employer is attempting to relitigate an issue that has been consistently decided by three Public Service Labour Relations Board ("the Board") adjudicators and confirmed by the Federal Court. Although the language of the

collective agreement at issue are not identical to the provisions interpreted in *King, Mackie* and *Breau et al.*, the principle is the same, that is, the amount of premium pay a shift employee is entitled to receive if he or she works on a designated paid holiday.

[6] The bargaining agent submits that employees on variable shift schedules are paid on the basis of hours notionally worked rather than hours actually worked during a given shift schedule. When calculating premium pay for work on a designated paid holiday, the employer should only subtract 7.5 hours, which represents the hours normally worked for pay purposes and not the hours actually worked on that day.

[7] Employees not on a variable shift schedule are paid for designated paid holidays even though they do not work on those days. The value of this benefit should apply equally to employees required to work on designated paid holidays. Accordingly, they should be credited for holidays in the same way as employees not required to work. They should receive premium pay at time and one-half for the hours they actually work on that day.

[8] The bargaining agent argues that the value of each workday must be calculated as if the employee were on a regular work schedule, that is, 7.5 hours. The bargaining agent takes issue with the employer's interpretation that the hours actually worked on a designated paid holiday should be subtracted from the entitlement for premium pay, that is, between 8 and 12.25 hours. This interpretation is in keeping with the principle decided in *King, Mackie* and *Breau et al.*.

III. The employer's arguments

[9] The employer argues that shift workers work rotating and irregular hours and that they are paid for 75 hours biweekly regardless of hours actually worked. The employer's position is that employees working on a designated paid holiday are entitled to premium pay only for the hours worked in excess of the regularly scheduled hours for that day, as they have already been compensated for the day through a biweekly paycheque.

[10] The employer cites *Arsenault et al. v. Parks Canada Agency*, 2008 PSLRB 17, as the most recent and relevant decision in support of its position since the provisions analyzed in that decision are identical to those at issue in this case. *Arsenault* involved the same bargaining agent and the same employer. The employer argues that several

other recent decisions that postdate *King, Mackie* and *Breau* also support its position, namely, *White v. Treasury Board (Solicitor General - Correctional Service)*, 2003 PSSRB 40 (upheld in 2004 FC 1017), *Diotte v. Treasury Board (Solicitor-General – Correctional Service of Canada)*, 2003 PSSRB 74, *Wallis v. Treasury Board (Correctional Service of Canada)*, 2004 PSSRB 180, *Clarkson v. Treasury Board (Canada Border Services Agency)*, 2009 PSLRB 87, and *Garrah v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 148 (upheld in 2010 FC 1192).

[11] The employer argues that those recent cases no longer support the bargaining agent's position and confirm that the value of a designated paid holiday is not in the regularly scheduled hours but in either regular compensation under the compensation agreement or the normal daily hours. As an adjudicator, I am not bound by those decisions; however, I should deviate from them only if they are clearly wrong. The employer further argues that, were I to allow the grievance, I would be ignoring the clear language of the collective agreement.

[12] The employer argues that the language of the collective agreement is clear and unambiguous and that the true intent of the parties to it was to remunerate variable shift workers who work on a designated paid holiday at 7.5 hours at straight time, irrespective of an employee's regular scheduled hours plus premium pay. This approach is also consistent with the remuneration of non-variable shift workers who are paid 7.5 hours plus the applicable premium pay when they work on a designated paid holiday. The collective agreement does not provide variable shift workers with a greater benefit than that provided to employees working non-variable hours. Were the value of a designated paid holiday to vary according to the regularly scheduled hours worked, as proposed by the bargaining agent, the effect would be to create additional payments, contrary to clause 25.11.

[13] The employer concludes that *King, Mackie* and *Breau et al.* are no longer good law and that they are contrary to the proper interpretation of the collective agreement.

IV. Reasons

[14] This grievance concerns the time value of a designated paid holiday when an employee on a variable-hour work schedule is called upon to work on that day. The bargaining agent argued that an employee is entitled to be paid a premium rate for working on a designated holiday in addition to the normal hours of work as defined by

the collective agreement. The net effect of applying that calculation of the premium rate is that, in addition to his or her daily rate of pay, an employee is entitled to time and one-half for all hours worked on that day. The employer argued that an employee on a variable-hour work schedule is entitled to be paid at 7.5 hours at straight time, plus premium pay only for the hours worked that day that are in addition to what is considered a normal workday as defined in the collective agreement.

[15] The terms and conditions that are the subject of an agreement between the parties under clause 25.09(g) of the collective agreement are stated in clauses 25.10 to 25.13 as follows:

> *25.10 The terms and conditions governing the administration of variable hours of work implemented pursuant to paragraphs 25.04(b), 25.06, and 25.09(g) are specified in clauses 25.10 to 25.13. This Agreement is modified by these provisions to the extent specified herein.*
>
> *25.11 Notwithstanding anything (according to TB website) 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.*
>
> *25.12(a) The scheduled hours of work of any day, may exceed or be less than seven and one-half (7½) hours; starting and finishing times, meal breaks and rest periods shall be determined according to operational requirements as determined by the Employer and daily hours of work shall be consecutive.*
>
> *(b) Such schedules shall provide an average of thirty-seven and one half (37½) hours of work per week over the life of the schedule.*
>
> *(i) The maximum life of a schedule for shift workers shall be six (6) months.*
>
> . . .
>
> *25.13 For greater certainty, the following provisions of this Agreement shall be administered as provided herein:*
>
> ***(a) Interpretation and Definitions (clause 2.01)***
>
> *"Daily rate of pay" - shall not apply.*

. . .

(d) Designated Paid Holidays (clause 32.05)

i. A designated paid holiday shall account for seven and one half (7½) hours.

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 (1½) up to his or her regular scheduled hours worked and at double (2) time for all hours worked in excess in his of her regular scheduled hours.

[Emphasis added]

[16] Also relevant to this dispute is clause 32.05 that refers to the terms and conditions of employees who work a normal work week, or who are not subject to a variable hours of work agreement:

32.05(a) When an employee works on a holiday, he or she shall be paid time and one-half (1½) for all hours worked up to seven and one-half (7½) hours 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.

. . .

[Emphasis added.]

[17] The collective agreement provides at clause 25.10 that it is modified by the provisions of clauses 25.10 to 25.13. This provision must be reconciled with clause 25.11, which states that that the terms and conditions governing the administration of variable hours of work are not to result in any additional payment by reason of such a variation in the work schedule.

[18] Furthermore, I am of the view that clause 25.13(d) of the collective agreement splits compensation for work on a designated paid holiday in two. The first, in clause 25.13(d)(i), is compensation for the paid holiday that is not worked, which "accounts" for 7.5 hours. Accordingly, an employee who does not work on a designated paid holiday is compensated for a 7.5 hour day. The second is the reference in clause 25.13(d)(ii) to payment when an employee works the designated paid holiday, which is a different concept from clause 25.13(d)(i). In my view, it is clear that the concept of normal daily hours of work applies only to the calculation in the first part of the clause and not to the second. Consequently, the provision is twofold:

clause 25.13(d)(i), which states an employee's pay for his or her normal daily hours of work on the designated paid holiday, and clause 25.13(d)(ii), which is the calculation of the premium pay to which an employee is entitled for the work actually done on that day. In other words, clause 25.13(d)(i) is added to clause 25.13(d)(ii), and not subtracted, as argued by the employer.

[19] The outcome is the same whether an employee works a normal workweek 37.5 hours (clause 32.05 of the collective agreement), or whether an employee works variable hours (clause 25.13(d)) that do not result in the payment of any additional overtime, other than what would be justified by the number of hours worked on the designated paid holiday.

[20] Therefore, an employee whose schedule is a normal workweek and who is called upon to work on a designated paid holiday is to be remunerated as follows:

a) Pay that the employee would have been granted had he or she not worked on the holiday: 7.5 hours.

b) Additional pay for the designated holiday at time-and-a-half for all hours worked on that day up to 7.5 hours: 11.5 hours.

[21] Therefore, an employee whose schedule is a normal workweek would be entitled to additional compensation for working on a designated paid holiday of 11.5 hours in addition to his or her normal pay for that day.

[22] Applying this logic to employees who work variable work hours results in the following:

a) Pay that the employee would have been granted in accordance with clause 25.13(d)(i) of the collective agreement: 7.5 hours.

b) Additional pay for the designated holiday at time-and-a-half for all hours worked on that day, assuming an 8-hour day: 12 hours.

[23] Therefore, in the same manner as an employee who works a normal workweek, an employee on a variable-hour work schedule is entitled to 12 hours of additional compensation for working on a designated paid holiday in addition to his or her normal pay for that day.

[24] The employer's casebook contains several cases that I consider irrelevant to the clause in dispute. *Clarkson* deals with the employer's decision on short notice to

change the employee's scheduled shift on a designated paid holiday to paid leave and with the time value of the designated paid holiday, which is not in dispute in this case. *Garrah* also deals with the unspecified time value of a designated paid holiday in the collective agreement in that case. *Murray* concerns the issue of the grievors' entitlement to pay on a designated paid holiday on which they did not work.

[25] *Stevens v. Treasury Board (Department of Transport),* 2006 PSLRB 48*; Canada (Procureur général) c. Lamothe*, 2009 CAF 2; *Chafe et al. v. Treasury Board (Department of Fisheries and Oceans),* 2010 PSLRB 112; *Tamborriello v. Treasury Board (Department of Transport)*, 2006 PSLRB 48; and *Tembec Industries Inc. v. Pulp, Paper and Woodworkers of Canada, Local 15 (Flanders Grievance),* [2010] B.C.C.A.A.A. No. 168, were presented merely for their citations of well-known rules of interpretation, as were excerpts from Brown and Beatty and Palmer and Snyder on collective agreement interpretation. The *Diotte*, *Wallis* and *White* decisions all concern the interpretation of the phrase "normal daily hours" and so in my view are inapplicable to this case. The concept of normal daily hours is quite different from the phrase "regular scheduled hours," which is found in clause 25.13 of the collective agreement. In *White*, the Federal Court stated that the two concepts are distinct and that the use of different words in a collective agreement indicates that the drafter intended a different meaning.

[26] I disagree that the decision in *Arsenault* creates a precedent for this case. In that case, the adjudicator ruled against the grievor on the grounds of lack of proof. The grievor could not explain the basis for his argument or how the documents filed in evidence sustained his case. With respect, I also believe that the adjudicator was mistaken in basing his decision on the phrase "normal hours of work" when what was really at issue was the meaning of "regular scheduled hours worked." In addition, the adjudicator did not divide the clause in two parts and unfortunately read the second part of the clause as if it read, "normal daily hours" rather than "regular scheduled hours."

[27] My findings coincide with the most recent decision on the interpretation of a very similar if not identical provision in the collective agreement by Arbitrator Potter in *Bazinet v. Treasury Board (Department of Public Works and Government Services)* 2011 PSLRB 111, which the parties brought to the Board's attention while this decision was being drafted.

[28] In that matter, the employer acknowledged that it was relitigating *Mackie*, which it felt had been incorrectly decided. In this case, the agreed statement of facts is almost identical to that presented in *Bazinet*, and the employer's arguments are virtually the same, that is, that *Mackie, King* and *Breau et al.* have been wrongly decided and the decision in *Arsenault* marks a turning point in the jurisprudence that supports its interpretation of the collective agreement. My review of the case law does not support such an argument.

[29] In keeping with the preamble to the *PSLRA* and as stated in *Mackie* and in *Bazinet*, it is important to foster a positive labour relations climate, notably by not reversing previous decisions on the same matters. The issue in dispute in this case has been litigated and decided on several occasions, and the Board's decisions have been sustained by the Federal Court. If differences still exist concerning the interpretation of the clause at issue and similar clauses in the collective agreement, the resolution of the differences lies in discussions and negotiations at the bargaining table and not before this tribunal.

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

(The Order appears on the next page)

V. Order

[31] The grievance is allowed as follows:

- I declare that the Memorandum of June 1, 2007 issued by Environment Canada to its Compensation Advisors sets out an improper interpretation and application of the collective agreement;
- I declare that the employer's interpretation violates Article 25.13(d)(ii) of the Technical Services collective agreement;
- I order the employer to interpret, apply and administer the Technical Services collective agreement in conformity with the reasons set out in this decision.

November 23, 2011.

Michele A. Pineau,
adjudicator