Date: 20121119

File: 566-02-5239

Citation: 2012 PSLRB 123

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

ROBERT SCOTT REID

Grievor

and

TREASURY BOARD
(Department of Industry)

Employer

Indexed as
Reid v. Treasury Board (Department of Industry)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Stephan J. Bertrand, adjudicator

For the Grievor: Jim Shields, counsel

For the Employer: Richard Fader, counsel

Heard at Vancouver, British Colombia,
August 21 and 22, 2012.

Individual grievance referred to adjudication

[1] Robert Scott Reid ("the grievor") filed a grievance on March 5, 2010, alleging that he was improperly denied a claim for overtime under clauses 23.04 and 23.08 of the Electronics (EL) Group collective agreement between the Treasury Board and Local 2228 of the International Brotherhood of Electrical Workers, which expired on August 31, 2010 ("the collective agreement"). He sought reimbursement for the hours he had worked between 16:00 and 20:00 on February 14, 15, 21 and 22, 2010. At the time of the events in question, the grievor was a spectrum management officer, a position classified EL-05, with the Department of Industry ("the employer") in Surrey, British Colombia.

[2] The employer denied the grievor's overtime claim at all three levels of the grievance process on the basis that his employee status had been changed from non-operating to operating at the time in question and that the change to his hours of work had been made in accordance with the applicable provisions of the collective agreement.

[3] Dissatisfied with the employer's final determination, the grievor referred his grievance to adjudication on April 7, 2011.

Summary of the evidence

[4] The grievor testified that he has been employed by the employer since 2003 and that, at the relevant time, he was part of its Spectrum, Information Technologies and Telecommunications sector (SITT) for the employer's Pacific Region. The SITT is, in a nutshell, responsible for several types of regulatory processes dealing with radio communications, including licensing investigation and enforcement.

[5] The grievor indicated that, until 2010, he had always been considered a non-operating employee. However, in anticipation of the 2010 Olympic and Paralympic Winter Games, which were to be held in Vancouver, British Columbia, he was notified in early January 2010 that the employee status of all SITT employees in the EL group in the employer's Pacific Region would be changed from non-operating to operating during the Winter Games, which would result in adjustments to his shift schedules and hours of work. In the grievor's case, he was required to work from 12:00 - 20:00, referred to on the February 2010 shift schedule as an "afternoon shift," rather than his

normal non-operating hours of work of 08:00 - 16:00, on four separate occasions, namely, February 14, 15, 21 and 22, 2010.

[6] After he completed his first two 12:00 - 20:00 afternoon shifts, the grievor was informed by a co-worker that, before making changes to his shift times, the employer was required, under clause 23.08 of the collective agreement, to consult with his local. That prompted the grievor to write to his local bargaining agent representative, Christopher Davies, on February 16, 2010, and to inquire as to whether such a consultation had in fact taken place.

[7] The grievor added that, shortly after raising the issue with Mr. Davies, he completed the next two scheduled 12:00 - 20:00 shifts but was subsequently informed that he was no longer required to work any afternoon shifts and that his shifts would revert to his normal non-operating hours.

[8] The grievor subsequently presented a grievance, seeking payment at the overtime rate for hours worked between 16:00 and 20:00 for the 4 shifts in question, which he estimated represented a total of $874.

[9] Mr. Davies, who is a business representative with Local 2228 of the International Brotherhood of Electrical Workers (IBEW), testified that he first learned of the employer's intention to change the employee status of ELs from non-operating to operating during the 2010 Vancouver Winter Games while attending a Labour Management Consultative Committee meeting that was held on May 12, 2009. Before then, he had not been privy to any discussions about the Winter Games or about the need to change the employee status of ELs. At that time, it was anticipated that all Pacific Region SITT employees would be made operational from January to March 2010.

[10] On October 7, 2009, Mr. Davies received a copy of an email that the employer distributed to all Pacific Region SITT employees. The email formally advised them of the upcoming change to their status. According to Mr. Davies, no labour-management meeting was held around that time, although the employer told him that shift schedules were being prepared and that they would soon be provided. The October 7, 2009 email also conveyed the operational requirements that the employer was putting in place to meet its commitment to offer 24/7 spectrum management services during the 2010 Vancouver Winter Games.

[11] Mr. Davies also testified that he received an email from the employer on November 27, 2009 that was sent to all SITT employees participating in the 2010 Winter Games, which clarified that the change in status for employees in the EL group would convert them from non-operating to operating only between February 1 and March 26, 2010 and that shift schedules that included variable hours of work would be posted.

[12] On December 21, 2009, Mr. Davies received an email from Gary Paugh, who was at that time the employer's director of operations for the 2010 Winter Games. It included the first draft of the shift schedule for February 2010. Concerned that the schedule did not appear to provide for an equitable distribution of shifts among the employees and that it provided only a 28-shift cycle, Mr. Davies met with Mr. Paugh on January 11, 2010 to discuss those issues. However, during his testimony, Mr. Paugh indicated that, during the meeting, he undertook to revisit the February shift schedule in the near future with a view of addressing the start and finishing times of the second operating shift for the Lower Mainland District Office, located in Surrey, which was initially planned to start at 15:00 and to end at 23:00.

[13] Mr. Davies testified that Mr. Paugh subsequently provided him with a revised shift schedule for the month of February 2010 on January 18, 2010. Although that shift schedule denoted that, via pink highlights, the grievor and several other employees would be required to work 12:00 - 20:00 afternoon shifts on certain days, particularly on February 14, 15, 21 and 22, 2010 in the grievor's case, Mr. Davies testified that his understanding was that the pink highlights applied only to other staff and not the grievor or any other EL staff. In cross-examination, he admitted that the February schedule clearly highlighted some of the grievor's shifts in pink, which, according to its legend, meant a 12:00 to 20:00 shift, that he never sought any explanation or clarification from Mr. Paugh about those 12:00 - 20:00 afternoon shifts or to whom they applied, either during his meeting with Mr. Paugh or at any other time, and that nothing prevented him from raising those issues with Mr. Paugh at that time. In addition, according to an email dated February 17, 2010, Mr. Davies spoke that day with Mr. Paugh's direct supervisor, Hal Hickey, about the change in employee status of ELs, but no evidence was led to suggest that their discussion addressed the 12:00 - 20:00 afternoon shift, even though the grievor informed Mr. Davies the day before of its implementation.

[14] Although Mr. Paugh could not confirm sending Mr. Davies a written request for an official consultation meeting to discuss the change to the afternoon shift, he testified that they were regularly in contact and were discussing scheduling issues between June 2009 and January 2010. According to Mr. Paugh those frequent discussions, and particularly, his scheduling emails, which were always copied to Mr. Davies, were examples of his consultation efforts with IBEW Local 2228 during that time.

[15] According to Mr. Davies, the employer never consulted him about the implementation of a 12:00 - 20:00 afternoon shift for EL employees, which, according to him, deviated from the shift times that normally apply to operating employees under clause 23.08 of the collective agreement. That clause provides that shift times for operational employees normally start and finish as follows: 00:00 - 08:00, 08:00 - 16:00 and 16:00 - 24:00.

[16] Once the grievor brought the implementation of the 12:00 - 20:00 afternoon shift to his attention, Mr. Davies attempted to contact Mr. Paugh on or about February 16, 2010, but Mr. Paugh was unavailable. A later email from Mr. Paugh, dated February 22, 2010, revealed that all 12:00 - 20:00 afternoon shifts would cease as of February 23, 2010 and would be replaced with a 9:00 - 17:00 shift.

[17] When he testified, Philip Fleming, who was Executive Director for the 2010 Winter Games at the relevant time, indicated that, once two weeks into the Games, the SITT's workload diminished significantly, as most technical issues had been dealt with by then, and that a decision was made to stop scheduling an afternoon shift for the Surrey office because it was no longer required from an operational point of view. Mr. Paugh corroborated that point during his testimony.

[18] Mr. Davies responded to Mr. Paugh's email of February 22, 2010 on the same day, seeking his approval for overtime claims for all hours worked by EL employees after 16:00 in February 2010. However, he was not successful. He subsequently suggested that the grievor and other affected EL employees file grievances for the overtime allegedly owed them.

[19] In an email dated February 26, 2010, Mr. Paugh suggested that an agreement had been reached between himself and Mr. Davies about implementing an afternoon shift that deviated from the normal work shifts of operational employees, in great part

for the safety of those employees. According to the employer's witnesses, Mr. Paugh and Mr. Fleming, the originally planned 15:00 - 23:00 shift raised concerns from SITT employees in the Surrey office about their personal safety since that shift would have meant having to return to their vehicles or taking public transportation at late hours in an area considered unsafe. Mr. Fleming testified that, to alleviate those concerns, the employer agreed, after consulting the IBEW, to move the afternoon shift to 12:00 - 20:00. When asked in cross-examination whether he had in fact agreed to the implementation of the 12:00 - 20:00 afternoon shift for security reasons, Mr. Davies denied reaching such an agreement with Mr. Paugh before its implementation. When Mr. Paugh testified, surprisingly, neither counsel asked him to elaborate on the alleged agreement, although he did confirm the accuracy of the first three paragraphs of his February 26, 2010 email, which refers to the alleged agreement.

Summary of the arguments

[20] The parties' arguments were very succinct.

[21] According to the grievor, it is mandatory for the employer to consult with the bargaining agent before it can schedule shifts that begin more than one hour before or more than one hour after the normal operating shift times provided under clause 23.08 of the collective agreement.

[22] The grievor argued that the employer did not meet that requirement. He contended that, although other issues might have been discussed between his bargaining agent and the employer, no discussion of any change to the shift times normally allocated to operational employees ever occurred, and no written consultation request was ever sent to his bargaining agent.

[23] According to the grievor, the fact that the employer ceased to schedule ELs on 12:00 - 20:00 shifts and reverted to a 9:00 - 17:00 shift schedule on February 23, 2010, once it had been made aware of the IBEW's concerns, is proof that it violated clause 23.08 of the collective agreement.

[24] According to the grievor, the appropriate remedy should be (1) a declaration that the employer failed to consult with IBEW Local 2228, contrary to clause 23.08 of the collective agreement, and (2), the payment of 16 hours of overtime.

[25] The grievor also suggested that the employer could not rely on any consultation that it might have had with its employees to justify the type of changes contemplated by clause 23.08(c) of the collective agreement because the obligation to consult was owed to the bargaining agent rather to its members.

[26] The grievor referred me to the following authorities: *Longo Brothers Fruit Market Inc. v. United Food and Commercial Workers' Union, Local 633* (1995), 52 L.A.C. (4th) 113, *Giant Yellowknife Mines Ltd. v. C.A.S.A.W., Loc. 4* (1990), 15 L.A.C. (4th) 52, *Paynter et al. v. Canada (Treasury Board - Agriculture and Agri-Food Canada)*, PSSRB File Nos. 166-02-27186, 27378 and 27379 (19970912) and *Horner v. Treasury Board (Department of National Defence)*, 2012 PSLRB 33.

[27] According to the employer, the grievor bore the burden of establishing a violation of the collective agreement on its part, which he failed to do.

[28] The employer argued that the consultation process for the 2010 Vancouver Winter Games began several months before any changes were implemented and that the employer and representatives of the bargaining agents, including Local 2228, continued to have ongoing discussions and communications about the anticipated changes to the employees' hours of work and shifts over several months.

[29] According to the employer, the last proposed shift schedule that was distributed to the employees and forwarded to Mr. Davies included changes that had been made to address security concerns that had been brought to its attention by several stakeholders. Although questions were encouraged to be put to the employer when the shift schedule was distributed, none was posed; nor were any clarifications sought.

[30] The employer urged me to prefer Mr. Paugh's version of events about the existence of an agreement to implement the 12:00 - 20:00 afternoon shifts, which is elaborated in his email of February 26, 2010, the accuracy of which was confirmed when he testified, rather than that of Mr. Davies, who denied that such an agreement existed.

[31] Finally, the employer argued that the type of consultation contemplated by clause 28.03(c) of the collective agreement is not specified, that there is no requirement that such consultation be formally requested in writing and that a failure

to meet that obligation does not give rise to any remedy, as far as the grievor is concerned. On that point, the employer referred to me to *Spacek v. Canada Revenue Agency*, 2006 PSLRB 104, and more particularly to the following paragraphs:

. . .

> *[13] Clause 24.01 of the collective agreement reads as follows:*
>
> **24.01** The Employer shall continue to make all reasonable provisions for the occupational safety and health of employees. The Employer will welcome suggestions on the subject from the Institute and the parties undertake to consult with a view to adopting and expeditiously carrying out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury or occupational disease.
>
> . . .
>
> *[31] The jurisdiction question before me is whether clause 24.01 of the collective agreement is intended to provide a remedy ". . . in respect of an employee. . . ." If clause 24.01 does not provide a remedy in respect of an employee, an adjudicator has no jurisdiction under the former* Act *to hear and decide the grievance.*
>
> *[32] The correct interpretation of clause 24.01 of the collective agreement has been settled in a number of cases rendered under the former* Act. *In* Professional Institute of the Public Service of Canada, *the Board held that the proper remedy for breach of a consultative clause similar in wording to clause 24.01 rested under what became section 99 of the former Act. The Board characterized the clause as containing an obligation to consult.*
>
> . . .
>
> *[35] In* Kolski, *the alleged violation of the collective agreement related to language similar to the one used in clause 24.01 of the collective agreement before me. The adjudicator wrote as follows:*
>
> . . .
>
> Again, I am of the view that the allegation is without foundation. The Article is a consultation provision whereby the parties undertake to consult on measures designed to make the workplace safer. The employer's obligation is to the bargaining agent and not to an individual grievor.

. . .

> *[36] The case law is clear, and, apparently, consistent since about 1973, according to the authorities filed. Clause 24.01 of the collective agreement is a consultative clause giving rights to the bargaining agent.*

. . .

Reasons

[32] The sole issue in this case is whether the employer complied with clause 23.08(c) of the collective agreement by consulting with IBEW Local 2228 before scheduling shifts that deviated from the normal starting and finishing times for operating employees as provided by clause 23.08(a). Clause 23.08 reads in its entirety as follows:

> ***23.08 Shift Times – Operating Employees***
>
> *a. The starting and finishing times of normal shifts will be as follows:*
> *00:00 – 08:00 Local Time*
> *08:00 – 16:00 Local Time*
> *16:00 – 24:00 Local Time*
>
> *b. The Employer may schedule shifts to commence not more than one (1) hour before or one (1) hour after the times outlined above.*
> *c. Before scheduling shifts more than one (1) hour before or one (1) hour after the times listed above the Employer will consult with the Local.*
> *d. There shall be an equitable distribution of shift work among available qualified employees.*
> *e. When the scheduled shift hours are modified in accordance with paragraphs 23.08(b) and (c), then a day as defined in clause 23.01 is modified accordingly.*

[33] I agree with the employer's contention that the nature of the consultation contemplated by that provision is not clearly specified. No consultation process was established by that provision. I also agree that a consultation process began as early as May 2009, when certain changes to the affected employees' hours of work were discussed during a meeting of the Labour Management Consultative Committee and that other discussions and meetings, including the January 11, 2010 meeting of Mr. Davies and Mr. Paugh, took place over the course of the following seven months about issues covered by clause 23.08 of the collective agreement.

[34] The shift schedule that was circulated on January 18, 2010 did not purport to be final one or one that could not be changed. In fact, its first draft had already been revised following discussions with managers and employees and with Mr. Davies and was, according to the employer, aimed at addressing legitimate concerns raised by employees and managers. The fact that the shift schedule was copied to Mr. Davies in advance is indicative that the employer was willing to welcome any comments or opinions that the local had before implementing those shift changes. The employer also specified to whom questions about the shift schedule should be directed.

[35] Although the shift schedule provided that the grievor and several other employees would be required to work 12:00 - 20:00 afternoon shifts on certain days, particularly February 14, 15, 21 and 22, 2010 in the grievor's case (according to the pink highlights), Mr. Davies testified that his understanding was that the pink highlights applied only to other staff and not to the grievor or other EL staff. Considering the available evidence and the context that applied at the relevant time, that position is simply not credible. In fact, such a position was not put forward when Mr. Davies responded to Mr. Paugh's email of February 26, 2010. In addition, as I already stated, after Mr. Davies was informed of the implementation of the shifts by the grievor, he spoke with Mr. Hickey the following day, on February 17, 2010, to discuss the change in employee status of ELs. However, no evidence of any discussion about his apparent misunderstanding was introduced into evidence.

[36] Although the existence of an agreement between Mr. Davies and Mr. Paugh about the intent and purpose of the changes to the starting and finishing times of the afternoon shift could be conclusive proof of a consultation, the opposite is not necessarily an indication that none took place.

[37] When the amended Lower Mainland Staff February shift schedule was distributed on January 18, 2010, it specifically encouraged the recipients, one of which was Mr. Davies, to direct any questions about it, which clearly provided for a 12:00 - 20:00 afternoon shift in the grievor's case on four separate occasions, to Mr. Paugh. That email, when taken in its proper context, could certainly be interpreted as yet another attempt by the employer to seek or consider information, advice or comments from the employees and their bargaining agent. However, no questions appear to have been put to Mr. Paugh, not even from Mr. Davies. Although the January 18, 2010 email might not, in and of itself, constitute the best type of

consultation, nevertheless, considering the whole of the evidence and the context of the events that led to the deviation contemplated by clause 23.08(c) of the collective agreement, it was a form of consultation.

[38] This was an exceptional set of circumstances, brought about by what was described as a once-in-a-lifetime opportunity that warranted the cooperation of all stakeholders. Local 2228 was invited to be part of a dialogue that had been ongoing for months before the 2010 Vancouver Winter Games. The fact that it opted to remain silent after the revised version of the February shift schedule was distributed on January 18, 2010, even though it specifically proposed a 12:00 - 20:00 afternoon shift, and that questions were encouraged by the employer is indicative that it was not fully invested in the broader consultation process that had been ongoing for months.

[39] In my view, the intent and purpose of clause 28.03(c) of the collective agreement is to ensure that the bargaining agent or the affected local and its members are made aware of any proposed changes to the shifts of its members and that it has the opportunity to take part in a dialogue with the employer and to raise any related concerns. Given the context and the facts of this case, I believe that that purpose was achieved. The onus of proving that the employer failed to consult was on the grievor and he has not met that onus.

[40] Finally, the grievor's argument about to whom the employer's obligation was owed was interesting. He suggested that the employer could not rely on any consultation with its employees to proceed with the type of changes contemplated by clause 23.08(c) of the collective agreement because the obligation to consult was owed to the bargaining agent rather than to its members. For the same reason, even had I found that no consultation had taken place, contrary to that clause, I do not believe that the grievor would be entitled to any remedy or that I would have the jurisdiction to order such remedy, since the obligation created by clause 23.08(c) is to the bargaining agent and not to an individual grievor.

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

(The Order appears on the next page)

Order

[42] The grievance is dismissed.

November 19, 2012.

Stephan J. Bertrand,
adjudicator