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Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

ROXANNE CAMPBELL, MIKE CARDINAL AND KEVIN HITCHCOCK

Grievors

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Campbell et al. v. Treasury Board (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievors: Marie-Pier Dupuis-Langis, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

For the Employer: Pierre Marc Champagne, counsel

Heard at Kingston, Ontario,
April 23 to 25, 2012.

I. Individual grievances referred to adjudication

[1] At the time of their grievances, Roxanne Campbell, Mike Cardinal and Kevin Hitchcock ("the grievors") were correctional officers employed by the Correctional Service of Canada ("the employer" or CSC) in the Ontario Region. Ms. Campbell and Mr. Hitchcock worked at Joyceville Institution and Mr. Cardinal at Millhaven Institution. The grievors alleged that the employer violated the designated paid holidays (DPH) and other provisions of the collective agreement signed on June 26, 2006 by the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the union") ("the collective agreement").

[2] According to clause 26.01 of the collective agreement, employees are entitled to a maximum of 12 DPHs per year. Within a typical Monday to Friday, 8 hours per day work environment, employees are automatically off work on a DPH, and they enjoy their time off. The reality for correctional officers is quite different. A penitentiary operates 24 hours per day, 7 days per week with a complement of staff that can be reduced on a holiday but not below a certain level. For obvious reasons, the CSC cannot allow most of its employees to be off, for example, on New Year's Day or Labour Day.

[3] The grievors worked modified hours on rotating shifts. Ms. Campbell and Mr. Cardinal worked 12.75-hour shifts and Mr. Hitchcock 16-hour shifts. According to article 34 of the collective agreement, a DPH must account for the normal daily hours specified in the collective agreement. Clause 21.02 states that the normal daily hours for employees working on a rotating or irregular basis are 8.5 hours. As a consequence, when the employer books off employees on a DPH, it believes that they are in a deficit of hours worked. For Mr. Cardinal or Ms. Campbell, that meant a deficit of 4.25 hours per DPH and for Mr. Hitchcock, 7.5 hours.

[4] Mr. Cardinal grieved the employer's decision to deduct those hours from him for the July 1, 2009 holiday. Ms. Campbell grieved the employer's decision to deduct those hours from her for the July 1, 2007 holiday. Mr. Hitchcock filed two grievances. In his first grievance, he grieved the employer's decision not to schedule him for work on Easter Monday, 2010. In his second grievance, he grieved the deduction of time for the difference between the value of a DPH and the number of hours he would have worked that day.

[5] These grievances raise the question of the employer's right to unilaterally book off employees on a DPH and the question of its right to claim hours from employees after a DPH.

II. Summary of the evidence

[6] The parties adduced 12 documents in evidence, including 3 joint statements of facts. Those statements reflect their agreement on some of the facts related to the grievances. The grievors testified. The employer called Shauna Dickie and John Kearney as witnesses. Ms. Dickie is a correctional manager responsible for the scheduling and deployment of correctional officers at Millhaven Institution. Mr. Kearney is Director of Labour Relations Policy for the CSC.

[7] The grievors testified that they know their schedules, including their hours and days of work, at the beginning of the year, which helps them plan their personal lives. When they have the choice, they pick the schedule arrangements that best fit their personal situations. Because Mr. Hitchcock lives very far from the workplace, he chose a 16-hour day schedule, which requires him to drive half the mileage that an 8-hour day schedule would involve. Mr. Cardinal and Ms. Campbell chose the 12.75-hour day schedule, which allows them to better balance their work and family responsibilities. The grievors each testified that any change to their originally planned work schedule created problems in their personal lives, which needed to be adapted to that change.

[8] The parties agreed that, as per clause 26.03 of the collective agreement, when an employee is on a rest day on a DPH, the DPH is deemed to be the employee's first day of work after the DPH. According to that rule, Ms. Campbell was deemed on a DPH for the July 2 to 3, 2007 night shift; Mr. Cardinal was deemed on a DPH on July 3, 2009; and Mr. Hitchcock was deemed on a DPH on April 7, 2010. According to their original schedules, the grievors believed that, at the beginning of the year, they were to work on those dates.

[9] Approximately 14 days before those DPHs, the employer informed each grievor that they would be "statted off" and that they would not be expected to come to work on their deemed DPHs. They all testified that they were available and interested to work on those days but that they could not because they were ordered not to come to work. Shortly after, the employer requested that the grievors compensate it for the

difference between how it valued a DPH and the number of hours that the grievors were scheduled to work on those days.

[10] The employer claimed 4.75 hours from Ms. Campbell, 3.25 hours from Mr. Cardinal and 7.5 hours from Mr. Hitchcock. In Mr. Cardinal's case, the claim should have been for 4.75 hours. None of the witnesses could explain why the employer claimed 3.25 hours from him. Further to *Attorney General of Canada v. Garrah,* 2010 FC 1192, the employer reduced the claims by half an hour since that case established that a DPH for employees on variable shifts is worth 8.5 hours. Before that decision, the employer interpretation was that a DPH was worth 8.0 hours. Those numbers are not at issue between the parties. At issue is whether the employer can "stat an employee off", and, if it can, whether the grievors owe hours to the employer as a consequence of having been "statted off" on those days. The evidence showed that Ms. Campbell has not yet reimbursed the hours claimed, that the employer recovered the hours from Mr. Cardinal's paycheque in early 2010 and that Mr. Hitchcock worked the hours claimed by the employer.

[11] The grievors testified that they would need to amend their work schedules to reimburse the employer for those hours. Working part of an extra shift implies rearranging personal and family life and incurring extra expenses to commute to work. Particularly for Mr. Hitchcock, it means a lot of extra mileage.

[12] The employer adduced in evidence its 2007 DPH policy. The policy states that employees who do not work on a DPH must cover the difference between what the collective agreement entitles them to be paid and what they were scheduled to work. Employees can pay back the difference with annual leave, leave without pay or by making up the time. The decision on how and when the time will be made up is made locally. No evidence was adduced at the hearing that the local application of that part of the policy created a problem. At the end of each quarter, an employee who has not made up the time must reimburse the employer by means of annual leave or leave without pay. For a DPH in December and when Easter falls in March, employees are permitted to make up the time by the end of the next quarter.

[13] Mr. Kearney explained the work cycle of employees working 12.75-hour shifts and 16-hour shifts. For the first group, the cycle is 15 weeks, and for the second group, it is 6 weeks. Over a cycle, employees average 40 hours per week. That evidence was not contradicted by the grievors.

III. Summary of the arguments

A. For the grievors

[14] The grievors argued that the employer changed their established schedules by booking them off on a DPH. The grievors were scheduled and available to work those days. The employer should not have booked them off. Each grievor testified on the importance of their days off and on the need to know ahead of time when they work and do not work. The employer's decision to book them off on those days prejudiced them.

[15] The grievors argued that, according to article 34 of the collective agreement, the workweek for employees on modified hours of work should average, over the life of the schedule, the hours per week specified in the collective agreement, in this case, 40 hours per week. Had the grievors worked on their DPHs, which were normal working days in their cases, they would have reached that average. However, they did not because they were forced to stay home and were penalized because they work modified hours.

[16] The employer's decision to not offer work to the grievors on their DPHs was motivated by the fact that it decided to have less staff on the roster on those days. The employer did not submit anything to justify that decision to adjust downward the normal level of staff. That unilateral decision cannot deprive employees of their right to work on those days. That decision "had a vicious effect on the grievors," who ended up owing hours to the employer. For example, an employee on a 12.75-hour shift who is "statted off" for 6 of the 11 DPHs would owe the employer 25.5 hours, which does not make sense.

[17] The employer's decision to book the grievors off on their DPHs had a double effect on their initial work schedules. First, the employer changed their schedules to book them off on a day that they were supposed to work. Second, their schedules had to be changed again to allow them to work the difference in hours between the value of a DPH and their scheduled hours. Those shift schedule changes were subject to clause 21.03 of the collective agreement, which states at paragraph (a) that shift changes are to be done 14 days ahead of time. However, the new schedule must be negotiated with the union as per Appendix "K". That was never done for these cases. The employer imposed the new schedule unilaterally.

[18] The employer should not be allowed under the collective agreement to unilaterally decide to book off employees on their DPHs. It should also not be allowed to force employees to reimburse time after a DPH, which in these cases was forced on the grievors. Furthermore, according to the employer's policy, it is left to local management to decide whether employees will be able to make up the hours owed to the employer. That could ultimately mean that employees are not allowed to work their average of 40 hours per week in a given work cycle.

[19] In summary, the employer violated the collective agreement. It should have allowed the grievors to work on their DPHs and it should not have ordered them to reimburse any time after it forced them to not work.

[20] The grievors referred me to the following decisions: *Power v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-17064 (19880225); *Spears v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-14759 (19850130); *Clarkson v. Treasury Board (Canada Border Services Agency)*, 2009 PSLRB 87; *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board (Correctional Service of Canada),* 2011 PSLRB 120; *Garrah v. Treasury Board (Correctional Service of Canada),* 2009 PSLRB 148; *Public Service Alliance of Canada v. Treasury Board*, 2011 PSLRB 133; and *Bazinet v. Treasury Board (Department of Public Works and Government Services)*, 2011 PSLRB 111.

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

[21] The employer argued that it did not violate the collective agreement because it had the right to book off the grievors on a DPH and to claim that they reimburse the difference between the value of a DPH and the number of hours for which they were scheduled to work.

[22] The issue is not a question of modifying the schedule, as the grievors argued, but simply of modifying a shift to allow the application of the DPH provisions of the collective agreement. Consequently, the provisions of Appendix "K" do not apply to these grievances.

[23] The employer has no obligation to provide a fixed schedule for 52 weeks to employees. It can change shifts when it needs to. In these cases, the employer did so after giving 14 days notice to the grievors. It could happen that, as a result of a

"statted off" DPH, an employee does not average 40 hours per week, but nothing in the collective agreement guarantees a minimum number of hours of work to employees.

[24] A DPH is a paid holiday. It is paid leave granted to employees under the collective agreement. It is strange that employees claim a right to work on those days and grieve because they must book them off. A DPH does not provide the right to work on that day but rather the right to stay home with pay.

[25] The collective agreement includes 12 possible DPHs of a value of 8.5 hours each for employees working modified hours. In a full year, there is a large gap between the hours that an employee should be given for his or her DPHs and the number of scheduled hours for those DPHs. That gap must be reimbursed by employees by working those hours, taking annual leave or taking leave without pay.

[26] The employer referred me to the following decisions: *Garrah*; *White v. Treasury Board (Solicitor General - Correctional Service)*, 2003 PSSRB 40; *White v. Canada (Solicitor General)*, 2004 FC 1017; and *Wallis v. Treasury Board (Correctional Service of Canada)*, 2004 PSSRB 180. The employer also referred me to paragraph 8:3130 of Brown and Beatty, *Canadian Labour Arbitration*.

IV. Reasons

[27] As mentioned earlier in this decision, these grievances raise both the question of the employer's right to unilaterally book off employees on a DPH and the question of its right to claim hours from employees after a DPH. The grievors had the burden of proving that the employer violated the collective agreement by booking them off on a DPH and by claiming reimbursement from them for the difference between the value of a DPH and the number of hours for which they were scheduled to work. They did not or could not meet that burden since nothing in the collective agreement prevents the employer from "statting off" employees and from later "clawing back" hours from them.

[28] The following provisions of the collective agreement are relevant to the grievances or to the arguments presented by the parties:

. . .

21.02 *When hours of work are scheduled for employees on a rotating or irregular basis:*

(a) they shall be scheduled so that employees:

i. on a weekly basis, work an average of forty (40) hours,

and

ii. on a daily basis, work eight decimal five (8.5) hours per day.

. . .

21.03

a. Shift schedules shall be posted at least fourteen (14) calendar days in advance of the starting date of the new schedule in order to provide an employee with reasonable notice as to the shift he or she will be working. The shift as indicated in this schedule shall be the employee's regularly scheduled shift.

. . .

21.04 *An employee's scheduled hours of work shall not be construed as guaranteeing the employee minimum or maximum hours of work.*

. . .

26.01 *Subject to clause 26.02, the following days shall be designated paid holidays for employees:*

a. New Year's Day,
b. Good Friday,
c. Easter Monday,
d. the day fixed by proclamation of the Governor in Council for celebration of the Sovereign's Birthday,
e. Canada Day,
f. Labour Day,
g. the day fixed by proclamation of the Governor in Council as a general day of Thanksgiving
h. Remembrance Day,
i. Christmas Day,
j. Boxing Day,
k. one (1) additional day in each year that, in the opinion of the Employer, is recognized to be a provincial or civic holiday in the area in which the employee is employed or, in any area where, in the opinion of the Employer, no such additional day is recognized as a provincial or civic holiday, the first Monday in August,

l. one (1) additional day when proclaimed by an Act of Parliament as a national holiday.

. . .

26.03 *When a day designated as a holiday under clause 26.01 coincides with an employee's day of rest, the holiday shall be moved to the first (1st) scheduled working day following the employee's day of rest. When a day that is a designated holiday is so moved to a day on which the employee is on leave with pay, that day shall count as a holiday and not as a day of leave.*

. . .

26.05

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 regular daily scheduled hours of work as specified in Article 21 of this collective agreement 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.

. . .

ARTICLE 34
MODIFIED HOURS OF WORK

****
The Employer and the Union agree that the following conditions shall apply to employees for whom modified hours of work schedules are agreed upon pursuant to the relevant provisions of this collective agreement. The agreement is modified by these provisions to the extent specified herein.

****
1. General Terms

The scheduled hours of work of any day as set forth in a work schedule, may exceed or be less than the regular workday hours specified by this agreement; starting and finishing times of shifts, meal breaks and rest-breaks shall be established by agreement between the employer and the Union at the local level, and approved according to the attached letter of understanding. The daily hours of work are consecutive.

For shift workers, such schedules shall provide that an employee's normal work week shall average the weekly hours per week specified in this agreement over the life of the schedule.

> *Whenever an employee changes his or her modified hours or no longer works modified hours, all appropriate adjustments are made.*
>
> ****
>
> ***2. Leave - General***
>
> *When leave is granted, it is* [*sic*] *be granted on an hourly basis and the hours debited for each day of leave shall be the same as the hours the employee would normally have been scheduled to work on that day.*
>
> . . .
>
> ***3. Specific Application***
>
> *For greater certainty, the following provisions shall be administered as provided herein:*
>
> . . .
>
> ***Designated Paid Holidays***
>
> *a. A designated paid holiday shall account for the normal daily hours specified by this agreement.*
>
> . . .
>
> *****APPENDIX "K"***
>
> . . .
>
> *Once a schedule has been approved and implemented, it shall only be altered by the mutual consent of the local Union and management and after the subsequent review and certification by the national committee. However, in cases where a change in the security level of the institution or organizational change (e.g. number of approved posts, hours of operations for posts, classification or type of posts for deployment purposes), the schedule shall be re-submitted to the national committee to review the compliance with the above principles. The national committee shall on an annual basis, review schedules in effect in an institution to ensure continued compliance with the above principles.*
>
> . . .

A. <u>Employees being "statted off"</u>

[29] DPHs are supposed to be, as reflected by their name, days on which employees do not work and for which they are paid. Normally, employees should not be asked to work on days like New Year's Day, Christmas, Thanksgiving or Labour Day. In most

federal government workplaces, all employees are on paid leave on DPHs. In federal penitentiaries, for obvious reasons, that cannot be the case. Some employees must work to ensure that the correctional facility functions.

[30] In these grievances, the employees are asking for the right to work on a DPH. The collective agreement does not give them such a right. DPHs are supposed to be days off, but that cannot be the case all the time for all employees because of the operational needs of correctional institutions. By booking off employees on DPHs, the employer simply grants the leave it should grant as per the collective agreement. It seems to me that it is more normal to book off employees on a DPH than to ask them to work. The employer should ask them to work only if an operational need has to be filled. Otherwise, employees should not be asked to work on a DPH. Furthermore, the employer has the authority to unilaterally define the scope and level of correctional services to be provided on a DPH. It also has the authority to decide the number of officers required to provide those services and, consequently, the number of officers who will be "statted off."

[31] The grievors testified that they need to know their schedules well in advance to plan their lives. That is a legitimate request, and the method of creating the schedules meets that request. Employees know their schedules for the full year at the beginning of the year. They can easily locate the dates and the days of the DPHs on that schedule and their scheduled days of rest. Employees will know 14 days ahead of time if they are "statted off" or if they are expected to work. There is nothing wrong with such a system, which fully respects the collective agreement.

[32] When the employer books off an employee on a DPH, it does not change the pre-established schedule as per article 34 or Appendix "K" of the collective agreement. Rather, it changes that employee's shift. To make such a change, the employer must give some minimal notice. In the present grievances, the employer respected that notice period. On that point, these grievances differ from *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN*, which dealt with schedule changes.

[33] The union argued that employer's decision to not offer work to the grievors on their DPHs was motivated by the fact that it decided to have less staff on the roster on those days. For the union, that unilateral decision deprived employees of their right to work on those days. It might be true that that decision deprived some employees to

work on their DPHs. However, there was no evidence adduced at the hearing to support the allegation that that decision in any way violated the collective agreement.

[34] On the issue of the employer's right to "stat off" employees, I have found the jurisprudence submitted by the union to be unhelpful. In *Power*, the employer unilaterally scheduled annual leave which it refused to carry over to the next year. In *Spears*, the adjudicator defined what constituted a change to the shift schedule of an employee. In the present grievances, at issue is the employer's right to book off employees on DPHs. In *Clarkson*, the employer "statted off" the employee on two-days' notice and the issue in that case dealt with the results of that insufficient notice. That is not the case in these grievances. The decisions in *Public Service Alliance of Canada* and in *Bazinet* deal with the payment of overtime on a DPH, which is not at issue in these grievances.

B. Employees' hours being "clawed back"

[35] According to the collective agreement, a DPH has an 8.5-hour value for employees working modified hours. That was confirmed by the Federal Court in *Garrah*. When employees are scheduled to work more hours on a DPH than the hour value of a DPH, it is normal that they automatically owe the employer some hours of work. That principle was confirmed in *White* and in *Wallis*. On that point, in *Wallis*, at a time when a DPH had an 8-hour value, the adjudicator wrote the following, which well summarizes the jurisprudence:

. . .

> *[37] The variable hours-of-work scheme is very important for the employees. The grievor argues that the interpretation, as decided by management and Mr. Mackenzie in the* White (supra) *decision, has a perverse effect on employees working a 12-hour shift. However, it cannot provide them with a greater benefit than that provided to the employees working non-variable hours or 8-hour shifts, unless it clearly says so in the Collective Agreement. The claw back is an administrative means to ensure the equity of the scheme for other employees. It cannot be viewed as cheating the employees working the variable shift, although they may feel that way.*

. . .

[36] On the days on which they were "statted off," Ms. Campbell and Mr. Cardinal were scheduled to work 12.75 hours. Considering that a DPH has an 8.5-hour value, each of them should owe the employer 4.25 hours. However, in Mr. Cardinal's case that has been reduced to 3.25 hours, and the employer confirmed to me at the hearing that no other adjustments will be made. Those hours had to be reimbursed. The collective agreement grants each employee a possible 12 DPHs at 8.5 hours for a possible annual total of 93.5 hours of holidays, not 12 possible DPHs at 12.75 hours for a possible annual total of 140.25 hours. The same logic applies to Mr. Hitchcock, who was "statted off" on a day on which he was scheduled to work 16 hours. In his case, he owed the employer 7.5 hours.

[37] Those overpayments of work hours are a consequence of the schedule agreed to by the parties. The employer must be reasonable in the way it asks for the overpayments to be reimbursed. According to its policy and to the oral evidence adduced at the hearing, it offers the employees the opportunity to take annual leave, to take leave without pay, or to make up the time by the end of the quarter, except on occasions when DPHs happen at the end of the quarter. On those occasions, the employee must make up the time by the end of the next quarter.

[38] On the face, I find those options reasonable. The employee has the choice to replace those hours by another form of leave or to work the time. If they do not want to work part of a shift, they can take annual leave. If they do not want to spend annual leave hours, they can take leave without pay.

[39] Had the employer not given the grievors the possibility of working those hours, I might have concluded that, depending on the circumstances, the employer was not reasonable in its administration of the DPH hours. However, the grievors did not adduce any evidence that the employer did not give them any opportunities to work the clawed-back hours.

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

(The Order appears on the next page)

V. Order

[41] The grievances are dismissed.

May 10, 2012.

Renaud Paquet,
adjudicator