Date: 20120713

File: 566-02-6090

Citation: 2012 PSLRB 75

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

TED MCMANAMAN

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
McManaman v. Treasury Board (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievor: 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 Moncton, New Brunswick,
June 12 and 13, 2012.

I. Individual grievance referred to adjudication

[1] In April 2011, when he filed his grievance, Ted McManaman ("the grievor") was a correctional officer, level 1 (CX-01), employed by the Correctional Service of Canada ("the employer" or CSC) at the Springhill Institution ("Springhill") in the CSC's Atlantic Region. The grievor alleged that the employer denied him an equitable distribution of overtime hours for the 2010-2011 fiscal year and that it violated clause 21.10(a) 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] Clause 21.10(a) of the collective agreement reads as follows:

> ***21.10 Assignment of Overtime Work***
>
> *The Employer shall make every reasonable effort:*
>
> *(a) to allocate overtime work on an equitable basis among readily available qualified employees. . . .*

II. Summary of the evidence

[3] The parties adduced 28 documents in evidence, including the employer's national policy on the management of overtime ("the national policy"), 22 reports generated by the CSC's computerized Scheduling and Deployment System (SDS), and 5 documents prepared by the parties to summarize some of those SDS reports. Jeff Wilkins testified for the grievor. Mr. Wilkins has been a correctional officer at Springhill for five years. Since 2010, he has also been the local union president for the correctional officers working at Springhill. Justin Simons testified for the employer. Mr. Simons has been a correctional manager at Springhill for 10 years. At the time of the grievance, he was one of the correctional managers in charge of offering overtime at Springhill.

[4] The employer manages the offering of overtime locally in each institution based on the national policy. According to the national policy, local managers are to make every reasonable effort to offer overtime on an equitable basis among readily available and qualified employees. They should also minimize costs when overtime is required. In practice, that means that officers who would be paid at time and one-half for overtime work would be offered overtime before officers who would be paid at double time. When all other criteria are met, Mr. Simons testified that he always offered

overtime to employees at time and one-half. He would offer overtime to officers at double time only if no officers were available at time and one-half. According to the national policy, local managers should also monitor the allocation of overtime to ensure it is offered equitably. If a discrepancy is identified in how overtime is offered, efforts should be made to rectify the situation before the end of the fiscal year.

[5] According to the yearly SDS report compiling overtime data for 122 officers working at Springhill, the employer offered 6371.5 hours of overtime, and officers were available to work overtime for 49 964.5 hours during fiscal year 2010-2011. On average in 2010-2011, officers at Springhill were offered 52.2 hours of overtime and were available for 409.5 hours. However, the SDS report shows that availability varied widely, with 39 officers available for 8 hours or less during the year, 40 officers available between 10 and 400 hours, 25 officers available for more than 400 hours but less than 1000 hours, and 18 officers were available between 1000 and 3052 hours during the fiscal year. The SDS report also shows a wide variance between employees in the number of overtime hours worked during the fiscal year 2010-2011.

[6] According to other SDS reports adduced in evidence, the grievor was available for a total of 120 hours for overtime work during fiscal year 2010-2011. That represents 15 8-hour shifts of availability. The grievor was available for 16 hours (2 shifts) in November 2010, 56 hours (7 shifts) in January 2011 and 48 hours (6 shifts) in February 2011. Except for one hour of mandatory overtime due to the fall time change in November 2010, the grievor was not offered any hours of overtime during fiscal year 2010-2011. The SDS reports show that overtime was offered on only 2 of the 15 days for which the grievor was available to work overtime. Those two days were January 4 and 7, 2011. Evidence was adduced by both parties on the overtime offering on those two days.

[7] On January 4, 2011, the employer assigned three correctional officers to work overtime in CX-01 posts. Those officers were “NR”, “GB” and “PB”. I will refer to them by their initials for anonymity reasons. Mr. Simons testified that Officer NR was asked to extend his shift by 1.5 hours to complete reports on issues that occurred during his regular shift. He also testified that Officer GB was asked to work 7.75 hours of overtime because there was an emergency. An inmate had just been put on a suicide watch, and an extra CX-01 was required due to the additional requirements created by the suicide watch and the fact that an officer who had been scheduled to work called

in their absence at the last minute. Mr. Wilkins testified that the employer knew of the situation in advance. Mr. Simons testified that he called GB rather than the grievor since GB lived 68 kilometers closer to Springhill than the grievor, and he urgently needed an extra CX-01. Before that shift, GB had been offered 78.5 hours of overtime during the fiscal year, and the grievor, none. GB was paid double time for that shift. Mr. Simons also testified that PB, a correctional officer at level 2 (CX-02), was called to work 8.25 hours of overtime in a post normally filled by a CX-01. According to Mr. Simons, there was a special situation that day on that post, and he felt that a CX-02 who possessed PB's skills was required to fill the post. Mr. Wilkins testified that a CX-01 was qualified to do that work that day. Mr. Simons admitted that that post is normally staffed by a CX-01.

[8] On January 7, 2011, the employer allocated Officer DD to work eight hours of overtime. Before that day, DD had been offered 236.75 hours of overtime during the year. Mr. Simons testified that the only reason he offered the overtime to DD rather than to the grievor was that DD would be paid at time and one-half for the shift and the grievor would have been paid at double time. Mr. Simons testified that he always offered overtime to officers at time and one-half before offering it to officers at double time. He added that the grievor was never available at time and one-half, only when he would have been paid at double time.

III. Summary of the arguments

A. For the grievor

[9] According to the collective agreement, the employer must make every reasonable effort to allocate overtime equitably. It has no choice; it has to. Even though the employer has a national policy on the allocation of overtime, it is obliged at all times to respect the collective agreement and to offer overtime equitably.

[10] Every time the employer offers overtime, it is obliged to offer it equitably. The employer failed to demonstrate that it fulfilled that obligation and that it made every reasonable effort to allocate overtime equitably.

[11] The grievor was not offered any overtime hours during fiscal year 2010-2011, even though he was available for 120 hours during the year. Specifically, the employer failed to offer the grievor overtime on January 4 and January 7, 2011. On those dates,

the grievor was available, and the employer offered CX-01 overtime to other officers with more overtime hours worked than the grievor or to an officer at a different level.

[12] On January 4, 2011, the grievor was available to work overtime. He had not yet been offered any overtime during the fiscal year. Even though the employer knew ahead of time of the need for CX-01s to work overtime, it decided to offer overtime to a CX-01 who lived closer to Springhill than the grievor did, which it could not do. In addition, the employer offered overtime to a CX-02 to fill a CX-01 post for which the grievor was fully qualified. That is contrary to the collective agreement.

[13] On January 7, 2011, the grievor was available to work overtime and had not yet been offered any overtime during the fiscal year. A need arose for a CX-01 to work an 8-hour overtime shift, but the employer offered it to a CX-01 who had already been offered more than 200 hours of overtime during the year. That is not equitable. It is contrary to the collective agreement to allocate overtime based on cost.

[14] The grievor requested that he be paid two eight-hour overtime shifts at double time, plus the applicable premiums and mileage, for those two missed overtime opportunities.

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

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

[16] The employer argued that it did not violate the collective agreement and that it allocated overtime on an equitable basis. The grievor did not meet his burden of proving that the employer violated the collective agreement.

[17] The employer argued that the jurisprudence referred to by the grievor does not apply to this grievance since the rules of overtime allocation changed with the implementation of the national policy in November 2009 and the abolition of the local overtime procedures on which that jurisprudence was based. The equitable distribution of overtime is no longer assessed daily but rather annually.

[18] To prove that the collective agreement had been violated, the grievor, on the basis of comparisons with other officers in the same situation, needed to prove that he was treated inequitably. He did not. In fact, the only disagreement that the grievor had with the employer was about the allocation of overtime for two days during the whole of fiscal year 2010-2011.

[19] On January 4, 2011, the employer offered an overtime shift to an employee who lived closer to Springhill than the grievor because the employer felt that it needed an officer as soon as possible for an emergency. The employer should have the discretion to make such decisions. It should also have the discretion to determine the skills that are required to fill a post as it did by calling PB for a job normally assigned to a CX-01.

[20] On January 7, 2011, the employer did not offer an overtime shift to the grievor because he would have been paid at double time, and an officer was available at time and one-half. That decision was made only for that shift. Considering that at no other time was the grievor available for overtime during the year, the employer could not correct the situation and offer him another overtime shift. I cannot conclude that an inequity occurred on the basis of one missed overtime shift. Furthermore, there is no evidence that the grievor would have accepted that shift had the employer offered it to him.

[21] The equitable allocation of overtime does not mean that an employee is entitled to any specific overtime shift. Employees are not entitled to equitability every day but rather over a longer period, in this case one year. The grievor chose not to be more available for overtime during the year. He also chose to be available only at double time. As a result, he was not offered any overtime during the year.

[22] The employer referred me to the following decisions: *Attorney General of Canada v. Bucholtz et al.*, 2011 FC 1259; *Bucholtz et al. v. Treasury Board (Correctional Service of Canada),* 2010 PSLRB 111; and *Baldasaro and Thiessen v. Treasury Board (Correctional Service of Canada),* 2012 PSLRB 54.

IV. Reasons

[23] In this grievance, the grievor stated that he was denied the equitable distribution of overtime during the fiscal year 2010-2011. After the employer disclosed all the relevant information to the grievor, he focused on possible inequitable allocations of overtime on January 4 and 7, 2011, considering that no overtime was

offered on the other days that he was available during the year. Consequently, the dispute between the parties for which I have to make a decision is limited to what happened on those two days.

[24] On January 4, three potential overtime opportunities arose for the grievor. First, NR was offered overtime to stay at work for 1.5 hours to complete a report on something that had just happened. I find that the employer was not required to ask the grievor to work that overtime to write a report on something involving NR. The report evidently needed to be written by someone with firsthand knowledge of the situation and was not work that the employer would, under the terms of the collective agreement, be required to assign to anyone but NR.

[25] For the second overtime opportunity of January 4, 2011, the employer decided to offer it to CX-02 PB rather than offering it to the grievor, who is a CX-01. Mr. Simons testified that there were special circumstances on that day that justified that the overtime be offered to a CX-02 for that post, which, by his own admission, is a CX-01 post. According to Mr. Simons, the employer called PB because it needed an officer with PB's skills to fill the post that day. Mr. Wilkins testified that a CX-01 would have been qualified to do that work and his evidence was not shaken on this point. The collective agreement is clear on the issue of offering overtime at the same level and the evidence showed that the post in issue was a CX-01 post.

[26] Considering the wording of the collective agreement, I find that the employer can assign a CX-02 to fill a CX-01 position on overtime in one of two circumstances: first, it has already made every reasonable effort to fill the position by calling on CX-01's who have indicated their availability to work overtime but finds that they are in fact not readily available, or, second, by proving that all CX-01's who have indicated their availability were not "qualified" to occupy the position during the particular shift due to specific factors in the nature of the work that they will be required to perform. I was provided with no evidence from the employer to the effect that it had made any effort to contact CX-01's for the shift in question and in fact, the evidence demonstrated that, from the outset, the employer considered them all to be unqualified for the post being offered and so only made the overtime offer to PB. That being the case, I also find that the employer provided no specific evidence to demonstrate that its evaluation of the skills required that evening was sufficient to rebut the grievor's evidence to the effect that he was qualified to perform the overtime

in the CX-01 position. The grievor has proven that he was readily available and that the overtime offered was at his group and level. It was for the employer to then discharge its burden by mounting sufficient evidence to prove that this situation was an exception to clause 21.10 in that the grievor was not qualified for the overtime being offered. The employer has failed to do so to my satisfaction.

[27] Third, the grievor could have been called for an overtime shift because an extra CX-01 was required as a result of an inmate suicide watch and last minute absences. Considering my conclusion in the previous paragraph, which covers the same shift, the grievor's claim to this overtime opportunity is moot. In any event, I do not accept the grievor's claim to the third overtime opportunity. Mr. Simons testified that he called GB rather than the grievor because of the emergency situation, and because GB could arrive faster than the grievor. Mr. Wilkins testified that the employer knew in advance of the suicide watch but provided no information regarding how far in advance it had that knowledge. I believe that Mr. Wilkins said what he remembered as being the truth on that day. On the other hand, Mr. Simons had direct information as to why the employer acted the way it did, and for that reason, I tend to give more weight to his testimony. He clearly stated that the need for an extra CX-01 arose quickly and needed to be filled immediately, which the grievor was unable to do given the distance he lives from Springhill. The grievor did not challenge that there could have been additional reasons other than the suicide watch that created the emergency. Considering all of this, I find that the employer did not violate the collective agreement in offering an overtime shift to GB rather than to the grievor on January 4, 2011. There was an emergency and the employer could reasonably conclude that the grievor was not readily available for that emergency.

[28] On January 7, 2011, the employer chose not to offer eight hours of overtime to the grievor on the sole basis that he would have been paid at double time rather than at time and one-half, as was DD, who was assigned to work the overtime shift. Before that overtime shift, DD had been offered 236.75 hours of overtime that year, and the grievor, none. The employer argued that I cannot conclude on the basis of one missed overtime opportunity that the grievor was treated inequitably. The employer argued that the decision was made for that shift only and that at no other time was the grievor available for overtime for the employer to correct the situation and to offer him another overtime shift. The employer also argued that there is no evidence that the

grievor would have agreed to work that shift. The grievor argued that overtime cannot be allocated based on cost.

[29] There is long-standing jurisprudence involving the parties on the question of overtime allocation based on cost. As early as 1971, the adjudicator in *Sumanik*, in examining a factual context similar to the present case, concluded that an employer may have in place a policy to minimize paying overtime at double time but that the policy must always be subject to its obligation to allocate overtime shifts on an equitable basis. Later, the adjudicator in *Evans v. Treasury Board (Solicitor General Canada - Correctional Service)*, PSSRB File No. 166-02-17195 (19881007), came to the same conclusion but added that, had he been convinced that prioritizing employees on their first day of rest would create an inequitable allocation of overtime, he would have allowed the grievance. In *Sturt-Smith v. Treasury Board (Solicitor General Canada),* PSSRB File No. 166-02-15137 (19860731), the adjudicator had allowed a grievance on that basis. That same interpretation was restated in more recent decisions in *Hunt and Shaw* and *Bucholtz et al*. In summary, the arbitral jurisprudence does not prevent the employer from prioritizing employees at time and one-half over employees at double time when offering overtime. However, the application of such a method must also not result in the inequitable allocation of overtime between employees. In other words, the employer's policy of prioritizing employees at time and one-half could not supplant the requirements set out in the collective agreement. The above cases were all decided on the basis of collective agreement language identical to that in issue here with one difference: the former collective agreement also made the distribution of overtime subject to operational requirements. It was on the basis of this term that the employer argued that it had the right to take the cost of overtime into account. However, its argument was rejected in all three decisions. The distribution of overtime is no longer subject to operational requirements and I fail to see any other term in clause 21.10 that could be used to argue that the employer can assign overtime based on cost.

[30] The Federal Court recently examined the question of overtime allocation in *Bucholtz et al.*, involving clause 21.10 of this collective agreement. It stated that it found no error in the adjudicator's decision, which concluded that the employer's practice of using rates of pay when allocating overtime could violate the collective agreement if it were shown through evidence to result in an inequitable distribution of overtime among readily available qualified employees. The Court then reaffirmed the

principles established by adjudicator's of the Board on the equitable distribution of overtime. Those appear at paragraph 52 of the decision, which reads as follows:

> *[52] The Court agrees with the applicant that certain principles are established by the previous Labour Board cases regarding how to assess whether an allocation of overtime is equitable:*
>
> > *i. Equitability must be measured over a reasonable period of time:*
> >
> > > *It would be wrong to think that article 15 of the collective agreement requires the employer to assign overtime equitably on a daily basis. On the contrary, it is perfectly acceptable in this situation to examine the assigning of overtime by the employer during a reasonable period:* Bérubé, *above.*
> > >
> > > *Equitability cannot be determined on a day-by-day basis but only over an extended period of time:* Lay, *above.*
> > >
> > > *I would suggest that matters such as the equitable assignment of overtime cannot be properly assessed by taking a "snap-shot" of one relatively brief period of time. This becomes particularly apparent when examining the facts of this grievance. Undoubtedly, as of the week of December 4, 1986 there was a discrepancy in overtime assignments between the grievor and Mr. Boudreau. It is equally apparent that this discrepancy was considerably narrowed, if not virtually eliminated, by the end of the quarter:* Evans v Treasury Board (Solicitor General Canada – Correctional Service), *PSSRB File No 166-2-17195 (19881007).*
> >
> > *ii. Equitability is assessed by comparing the hours allocated to the grievor to the hours allocated to similarly situated employees over that period of time:*
> >
> > > *… However, the issue here is not whether the employer called [the employee] on the days in question, but rather whether it allocated overtime work on an equitable basis. Past decisions have established that this is a factual question and adjudicators have answered this question by considering the amount of overtime worked by each employee over a reasonable period of time:* Charlebois v Treasury Board

> (Department of Veterans Affairs), *[1992] CPSSRB No 43.*
>
> . . .
>
> *iii. Once the overtime hours of the grievor and other employees are compared, the adjudicator must determine if there are any factors to explain a discrepancy between their hours such as differing availability, leave, etc:*
>
> > *Equitable assignment does not mean uniform assignment of overtime. There can be differences in the number of hours accumulated if these differences are the result of factors that are fair and accepted by the parties…There must be concrete evidence demonstrating that, after an analysis of all factors that may explain a discrepancy in the number of hours accumulated, the only factor remaining is inequity:* Roireau, *above at paragraphs 135-136.*
> >
> > *…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:* Brisebois v Treasury Board (Department of National Defence), *2011 PSLRB 18 at paragraph 41.*
>
> *[Emphasis in the original]*

[31] According to the first principle, overtime must be measured over a reasonable period, and equitability cannot be measured daily. In *Baldasaro and Thiessen*, I concluded that the employer's overtime policy respected the collective agreement because it assessed overtime equitability on a fiscal-year basis. That means that an employee does not have a right to a specific overtime shift but rather to be treated equitably on a yearly basis.

[32] According to the second principle, equitability is assessed by comparing hours allocated to similarly situated employees over a reasonable period. The Court supported that conclusion by stating that the issue was not whether the employer called an employee on a particular day but rather whether, in considering the amount

of overtime worked by each employee over a reasonable period, the evidence demonstrated a discrepancy that was not otherwise explained.

[33] According to the third principle, the adjudicator must examine if any factors explain discrepancies between overtime hours worked by employees. Those factors, such as availability, must be analyzed. The Court pointed to the *Brisebois* decision, in which the adjudicator dismissed the grievance because he was not convinced that the only reason for not assigning overtime to the grievor was to minimize costs.

[34] In *Baldasaro and Thiessen*, I concluded that the employer was not obliged, every time it offered overtime, to offer it to the officer with the lowest number of overtime hours during the year. However, I underlined that regular reviews and audits are essential to identify discrepancies and to correct situations of inequity, if necessary.

[35] On January 7, 2011, the employer's only reason for not offering overtime to the grievor was cost. The officer called at time and one-half had already been offered 236.75 hours of overtime that year. The grievor had been offered zero hours. Had he worked overtime on January 4, 2011, as per my earlier conclusion, he would have cumulated a total of 8.25 hours of overtime during the year. Mr. Simons, who made the decision not to call the grievor, was fully aware of the situation. He was not driven by equitability but rather by cost. After January 7, 2011, no more opportunities for overtime arose for the grievor since he was only available on days when no overtime was offered.

[36] The employer did not make every reasonable effort to equitably allocate overtime to the grievor on January 7, 2011. In fact, that day, it deliberately denied him an overtime shift for a reason that had nothing to do with equitability, qualifications, availability, or readiness to work. If the employer wants to have the flexibility to offer overtime on the basis of cost, regardless of any equitable distribution issues that it may create, it must obtain the bargaining agent's agreement and amend the collective agreement. In the meantime, it cannot do so if it results, as in this case, in an employee not being treated in accordance with the terms of the collective agreement.

[37] The employer argued that it did so just once, that it could not correct the situation and offer another overtime shift to the grievor, and that I should not conclude that an inequity occurred on the basis of one missed overtime shift. I disagree. The employer should have known that its method of offering overtime could

create an inequity for an employee who, as per Mr. Simons' testimony, was available to work overtime only at double time. The employer also argued that there was no evidence that the grievor would have accepted that shift if the employer had offered it to him. I disagree since the employer's evidence showed that the grievor had given notice that he was available to work overtime on January 7, 2011. That evidence was not contradicted, and I must assume that the grievor would have worked that shift had it been offered to him.

[38] The grievor asked to be paid his missed overtime opportunities (16.25 hours) at double time, plus the applicable benefits. I accept his claim. However, I do not accept the grievor's mileage claim. Mileage is not part of the remuneration that an employee receives for his or her work. Instead, it is a reimbursement for expenses incurred. No personal gains are to occur as a result of a mileage reimbursement. The payment is made as compensation for the use of a person's car. If the car is not used and the mileage not incurred, mileage expenses should simply not be paid.

[39] Some time was spent at the hearing on the issue of information sharing about overtime allocation. I did not report on it since I have no jurisdiction on that issue because there is no obligation in the collective agreement for the employer to share information with the union or with its employees on its decisions to allocate overtime. However, as I stressed at paragraph 73 of *Baldasaro and Thiessen*, more transparent reporting and discussions should take place with the union. It would take time but it would be worth the effort.

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

(The Order appears on the next page)

V. Order

[41] The grievance is allowed in part.

[42] The employer must pay the grievor 16.25 hours at double time at the applicable salary rate, plus premiums if applicable.

[43] I will remain seized of the grievance for a period of 60 days to intervene if the parties cannot agree on the amounts to be paid to the grievor.

July 13, 2012.

Renaud Paquet,
adjudicator