Date: 20120529

File: 566-34-3022

Citation: 2012 PSLRB 62

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

DIANE PILON

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Pilon v. Canada Revenue Agency

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Steven B. Katkin, adjudicator

For the Grievor: Jerry Kovacs, Public Service Alliance of Canada

For the Employer: Christine Diguer, counsel

Heard at Ottawa, Ontario,
January 13, 2012.

I. Grievance referred to adjudication

[1] Diane Pilon ("the grievor") was, at the relevant time, employed by the Canada Revenue Agency ("the employer" or CRA) in Ottawa as an account and benefits processing clerk, classified SP-03, in the Verification and Validation Section of the Data Assessment and Evaluation Programs (DAEP) Division. On October 12, 2007, she filed a grievance, stating the following: "I grieve the Employer's decision to cease my hours of work that I have worked for more than three years as per Article 25." As a corrective measure, the grievor requested that she be permitted to resume the hours that she had previously worked. The applicable collective agreement is that concluded between the then Canada Customs and Revenue Agency, now the CRA, and the Public Service Alliance of Canada ("the union") for the Program Delivery and Administrative Services Group bargaining unit, with an expiry date of October 31, 2007 ("the collective agreement"). The grievance was referred to adjudication on July 28, 2009.

[2] The relevant provisions of the collective agreement are the following:

. . .

Article 25
Hours of Work

. . .

Day Work

25.06 *Except as provided for in clauses 25.09, 25.10 and 25.11:*

(a) the normal work week shall be thirty-seven and one-half (37 1/2) hours from Monday to Friday inclusive,

and

(b) the normal work day shall be seven and one-half (7 1/2) consecutive hours, exclusive of a lunch period, between the hours of 7 a.m. and 6 p.m. except for employees in the Technical Services Group whose hours of work shall be between the hours of 6 a.m. and 6 p.m.

. . .

25.08 Flexible Hours

Subject to operational requirements, an employee on day work shall have the right to select and request flexible hours between 7 a.m. and 6 p.m. (6 a.m. and 6 p.m. for employees in the Technical Services Group) and such request shall not be unreasonably denied.

25.09 Variable Hours

(a) Notwithstanding the provisions of clause 25.06, upon request of an employee and the concurrence of the Employer, an employee

may complete the weekly hours of employment in a period of other than five (5) full days provided that over a period of fourteen (14), twenty-one (21), or twenty-eight (28) calendar days, the employee works an average of thirty-seven and one-half (37 1/2) hours per week.

(b) In every fourteen (14), twenty-one (21), or twenty-eight (28) day period, the employee shall be granted days of rest on such days as are not scheduled as a normal work day for the employee.

(c) Employees covered by this clause shall be subject to the variable hours of work provisions established in clauses 25.24 to 25.27.

. . .

Terms and Conditions Governing the Administration of Variable Hours of Work

25.24 *The terms and conditions governing the administration of variable hours of work implemented pursuant to clauses 25.09, 25.10 and 25.23 are specified in clauses 25.24 to 25.27, inclusive. This Agreement is modified by these provisions to the extent specified herein.*

25.25 *Notwithstanding anything 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.*

25.26

(a) The scheduled hours of work of any day as set forth in a variable schedule specified in clause 25.24, may exceed or be less than seven and one-half (7 1/2) hours; starting and finishing times, meal breaks and rest periods shall be determined according to operational requirements as determined by the Employer and the daily hours of work shall be consecutive.

(b) Such schedules shall provide an average of thirty-seven and one-half (37 1/2) hours of work per week over the life of the schedule.

. . .

II. Summary of the evidence

A. For the grievor

[3] The grievor testified that she has been employed by the CRA for about 30 years. For approximately the last 15 years, her workplace has been the Ottawa Technology Centre (OTC), in a building located on Gladwin Crescent ("the Gladwin facility").

[4] The grievor stated that, for approximately three years before she filed her grievance, her hours of work were from 7:00 a.m. to 5:30 p.m. At that time, she worked a "super" compressed schedule of 30 hours per week, part-time. She explained that she lived a fair distance from Ottawa and had to care for an elderly family member living in the city. She said that her schedule allowed her to finish work earlier on a specific day to care for that person.

[5] As the grievor had experienced difficulties with her attendance several times, the employer issued a document known as a "Terms and Conditions of Employment letter," in which it set out directives about attendance for her to comply with. In the first of two such letters, dated March 9, 2006 (Exhibit G-1) and signed by her then team leader, Sharon McClelland, the grievor's hours of work were specified as being from 6:45 a.m. to 5:15 p.m. The grievor stated that those hours were in effect for approximately one month, after which they were replaced by the hours outlined in paragraph 4.

[6] Following a discussion between the grievor, Ms. McClelland and her then manager, Nadine Saintôt, Ms. Saintôt confirmed the grievor's new hours of work in an email dated April 13, 2006 (Exhibit G-2), which reads as follows:

> *Following your email and the discussion we add* [*sic*] *in my office with your Team Leader, I am confirming in writing that your hours of work will have to change as per the Collective Agreement and the decision from the Assistant Director.*
>
> *As you did mention to us in the meeting that you prefer doing it that way so you won't have any problems in the future therefore we have an agreement.*
>
> *Starting the week of April 24th, 2006, your hours of work will be from 7:00 a.m. to 5:30 p.m., I ask that you please change your schedule accordingly.*
>
> *Your Terms and Conditions will also be amended to reflect those hours, you will be provided an amended copy for your signature prior to April 24th, 2006.*
>
> . . .

[7] The grievor stated that, during the period in which she worked those hours, the schedule was renewed every three months. She said that her schedule changed again with the arrival of a new manager, Louise Ouellette-Bolduc, in 2007, as confirmed in a Terms and Conditions letter dated October 2, 2007 (Exhibit G-3). It is this change which is the focus of the present grievance.

[8] The grievor said that she was convened to two meetings with Ms. Ouellette-Bolduc, the dates of which she could not recall. At the first meeting, the grievor told her manager that she had worked from 7:00 a.m. to 5:30 p.m. for a long time and that she wished to continue with

that schedule. The grievor stated that, at the second meeting, Ms. Ouellette-Bolduc informed her that the Gladwin facility's hours were from 7:00 a.m. to 5:00 p.m. and that there was no supervision in the building after 5:00 p.m. The grievor told Ms. Ouellette-Bolduc that, as a security officer was in the building after 5:00 p.m., supervision was not required.

[9] The grievor testified that her duties consisted primarily of dealing with CRA taxation centres by telephone and, rarely, with individual taxpayers. She estimated that 25 to 35% of her workday was devoted to telephone calls. She also performed some functions on a computer.

[10] In cross-examination, the grievor acknowledged that she worked part-time from 2004 to 2009. She stated that she requested the written confirmation of her hours of work arrangement with Ms. Saintôt because, based on her experience of having had many schedule changes, she did not trust the employer. She said that the second paragraph of the email referred to her preference to have the arrangement in writing. The grievor, who has some 30 years of service, conceded that Ms. Saintôt's email did not state that she could work those hours until her eventual retirement date.

[11] The grievor acknowledged that, in the second meeting, Ms. Ouellette-Bolduc told her that, at the Gladwin facility, employees could work a maximum of 9.5 hours per day. The grievor further acknowledged that Ms. Ouellette-Bolduc told her that operational requirements were such that work was not required after 5:00 p.m. Consequently, the grievor could no longer work beyond that hour.

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

[12] At the time of the hearing, Ms. Ouellette-Bolduc had been employed by the CRA for nine years. From August 2007 to November 2007, she was Manager, Verification and Validation, at the OTC. As such, she had 5 supervisors, called team leaders, reporting to her and 75 employees under her indirect supervision. Among the supervisors reporting to her was the grievor's team leader, Ms. McClelland.

[13] Ms. Ouellette-Bolduc testified that, upon assuming her duties, she met with the team leaders to review the working hours of all employees, to ensure that the coverage was sufficient to accomplish the section's work. During her meeting with Ms. McClelland, Ms. Ouellette-Bolduc learned that the grievor worked a 30-hour week part-time and a "super" compressed 28-day schedule. She was made aware that the grievor's method of recording her hours worked in the corporate system differed from the standard practice. The grievor recorded her hours as follows: Tuesdays and Thursdays, 10.5 hours per day from 7:00 a.m. to 5:30 p.m.; Wednesdays, 2 hours; and Fridays, 8.5 hours. Although the grievor input those hours into the system, she had an arrangement with her team leader whereby she did not report for work on Wednesdays

until she had accumulated 10 hours that she had recorded but not yet worked. The grievor would then come into the office to work a 10-hour day, which was not recorded. Ms. Ouellette-Bolduc informed Ms. McClelland that she would not permit the above arrangement to continue and that the grievor would have to work the hours as they were input into the system. Ms. Ouellette-Bolduc also stated that employees were not supposed to be on the job for 10 hours and that it was the DAEP division's policy to limit the maximum hours worked per day to 9.5.

[14] Ms. Ouellette-Bolduc testified that, upon reviewing the grievor's file, she noted that, although she was working part-time, no part-time work agreement was in her file. A Terms and Conditions letter was there, but Ms. Ouellette-Bolduc said that it was out of date. She testified that such a letter is used when issues have arisen with an employee. It is a flexible tool for both management and employees to ensure a complete understanding of expectations and improvement in identified areas. Ms. Ouellette-Bolduc said that, when she was a team leader, she reviewed terms and conditions letters with employees every four weeks. She stated that that method inspired dialogue and made employees aware that the letter was not filed and forgotten.

[15] Ms. Ouellette-Bolduc then examined the grievor's leave balances. She noted that the grievor often requested vacation leave for the day on which she made her request. She reviewed the grievor's schedule for the 26 weeks before she began as the manager and compared the hours on the schedule with the hours recorded on the grievor's time sheets. Ms. Ouellette-Bolduc found that the grievor worked the scheduled hours for 7 of the 26 weeks. She stated that that in itself did not demonstrate a fraudulent use of leave balances. Rather, it showed that the hours that the grievor chose were not functional. Ms. Ouellette-Bolduc also stated that, for the three to four months prior to her arrival, the grievor's compliance with her scheduled hours improved, to some degree.

[16] Ms. Ouellette-Bolduc next reviewed the grievor's hours of work. She testified that she consulted her colleagues and the Assistant Director about employees working after 5:00 p.m. at the Gladwin facility. She was told that they were unaware that any employee worked outside the facility's hours of operation, which were from 7:00 a.m. to 5:00 p.m. Ms. Ouellette-Bolduc also consulted labour relations advisors, as she had security concerns. The facility was a converted warehouse. Although a security officer was at the front desk and had a telephone, the officer had no visual contact with the rest of the building, as no cameras were in place. Ms. Ouellette-Bolduc testified that operational requirements did not demand that employees be at work after 5:00 p.m.

[17] Ms. Ouellette-Bolduc stated that her first meeting with the grievor, on September 25, 2007, was held to review and change her existing time recording arrangement, to institute a

written part-time work agreement, and to amend her Terms and Conditions letter, which was reflected in the record of discussion that Ms. Ouellette-Bolduc prepared following the meeting (Exhibit E-1, Tab 2-A). Ms. Ouellette-Bolduc pointed out a typographical error in the last line of that record, which reads as follows: "Diane was advised that this practice was to be halted as of Friday, September 28, 2007 and that the 6 hours currently owed were to be worked during the week of October 1, 2008." Ms. Ouellette-Bolduc stated that the last date should have read "October 1, 2007."

[18] Ms. Ouellette-Bolduc testified that she met with the grievor a second time on October 2, 2007 to discuss her hours of work and part-time employment. Ms. McClelland and Chris Aylward, a union representative, also attended. Ms. Ouellette-Bolduc said that she understood that the grievor had had difficulties with management before. Although she was not required to, she informed the grievor that she could have a union representative present as an observer. A record of the discussion was prepared by Ms. McClelland and revised by Ms. Ouellette-Bolduc (Exhibit E-1, Tab 2-B). Ms. Ouellette-Bolduc stated that, several days before the meeting, she provided the grievor with draft copies of the documents to be discussed. At the meeting, she provided each participant with a folder containing drafts of a part-time work agreement (Exhibit E-1, Tab 3), a terms and conditions letter (Exhibit E-1, Tab 5), the relevant collective agreement provisions (Exhibit E-1, Tab 7) and an analysis of them (Exhibit E-1, Tab 6), her decision points for the change to the grievor's work schedule (Exhibit E-1, Tab 7), and sample work schedules to show scheduling possibilities for the grievor.

[19] Ms. Ouellette-Bolduc pointed out a typographical error in item 3 of the terms and conditions letter (Exhibit E-1, Tab 5), which reads in part as follows: "Your hours of work, while at the office, are from 7:00 a.m. to 5:30 p.m. . . . ." Ms. Ouellette-Bolduc testified that, on the original document, those hours were manually changed to "7:00 a.m. to 5:00 p.m.," which both she and the grievor initialled. The grievor did not dispute that fact.

[20] The points cited in Exhibit E-1, Tab 7 by Ms. Ouellette-Bolduc in support of her decision to change the grievor's work schedule are the following:

- *Operational hours for the Gladwin facility are 07h00 to 17h00.*
- *The Verification and Validation section has no operational requirement to have staff in the section after 17h00.*
- *There is no supervisory staff scheduled to be onsite past 17h00.*
- *It is a policy of the DAEP section to limit the maximum number of work hours in a given day to 9.5 hours.*
- *Productivity declines after a certain number of hours worked in a day, Diane's production rate has been below expectations.*

- *Management has demonstrated flexibility in this area by accepting that Diane work part-time hours (30 hours/week) as well as "super" compressed hours on a 28-day schedule.*
- *According to information available in CAS, Diane has not been working a schedule including 10-hour days for a three-year period as noted in the grievance. Our review of available information shows that the 10-hour days began only in March 2006.*

[21] Ms. Ouellette-Bolduc testified that, although she understood that the grievor had been working from 7:00 a.m. to 5:30 p.m. for a lengthy period, the grievor had told her only that she worked that schedule for personal reasons. Ms. Ouellette-Bolduc stated that the grievor never told her that she had to care for an elderly person. Ms. Ouellette-Bolduc said that she told the grievor that she was flexible about working hours but that she was not prepared to make an exception to allow an employee to work outside the Gladwin facility's hours of operation.

[22] In cross-examination, Ms. Ouellette-Bolduc admitted that the grievor had been approved to work from 7:00 a.m. to 5:30 p.m. and that, based on the available information, her leaves had been authorized. She also stated that she had no knowledge of the grievor's discussion with her previous managers about hours of work and that she did not discuss the matter with those managers.

[23] With respect to her examination of the grievor's schedules, Ms. Ouellette-Bolduc said that, had she reviewed only the compressed schedule, she would have reviewed an 8-week schedule. However, the fact that the grievor worked 7 full schedules in a 26-week period raised concerns for her, namely, whether the schedule was right for the grievor, whether it affected the rest of the employees on her team and whether it impacted Ms. Ouellette-Bolduc's ability to deliver on her mandate.

[24] Ms. Ouellette-Bolduc testified that she saw no valid reason or operational requirement to have an employee sitting at his or her desk, available to respond to clients after 5:00 p.m. She reiterated that no supervision was in the building after 5:00 p.m. The security officer, although equipped with a telephone, was located at a great distance from the grievor's workplace, which was a risk in her view. Ms. Ouellette-Bolduc acknowledged that she could speak only to the security risk after her arrival in 2007.

[25] In reply to a question from the grievor's representative, Ms. Ouellette-Bolduc stated that the 7:00 a.m. to 5:00 p.m. schedule was directly related to issues of productivity, safety and health, supervision, and operational requirements. She stated that, since supervision was available during those hours, they were standard for data entry positions. Ms. Ouellette-Bolduc said that she tried to offer the grievor as much flexibility as possible.

[26] When asked why the first-level grievance response, which she signed, did not summarize her reasons for changing the grievor's schedule as set out in her decision points, Ms. Ouellette-Bolduc replied that she relied on advice from labour relations staff, to whom she had provided all the relevant documentation, including her decision points. She said that her rationale for the schedule was clearly set out in the documents that she prepared for the October 2, 2007 meeting and which had been provided to the grievor before the meeting.

[27] In re-examination, Ms. Ouellette-Bolduc stated that, in all her interactions with the grievor, the grievor told her repeatedly that she wished to have her schedule reconsidered for personal reasons, without further elaboration. She said that, in the OTC, as a large proportion of employees work compressed hours, a valid reason is required to justify an exception. Ms. Ouellette-Bolduc testified that, based on the information provided by the grievor, she was not able to make an exception.

III. Summary of the arguments

A. For the grievor

[28] The grievor acknowledged that the Gladwin facility's hours of operation are from 7:00 a.m. to 5:00 p.m.

[29] The grievor stated that the use of the term "shall" in clause 25.08 of the collective agreement indicates mandatory wording. She argued that operational requirements must be evaluated based on the evidence in each individual case.

[30] The grievor referred to *Jenks et al. v. Canada Revenue Agency*, 2010 PSLRB 27, as an example of a case in which the employer had reasonable grounds to deny the grievors in that case their request to change their start time from 7:30 a.m. to 7:00 a.m. The basis was that operational requirements were such that the core hours of work were from 7:30 a.m. to 5:00 p.m. She submitted that, in *Jenks*, the employer filed ample evidence to justify its position, including an hours of work policy and a first-aid health and safety policy in accordance with Part II of the *Canada Labour Code*, R.S.C. 1985, c. L-2, which, among other things, required the presence of at least one first-aid trained employee if an employee worked outside core hours.

[31] The grievor contended that, in this case, the employer's concern about the lack of supervision is a physical concern for employees' after-hours presence in the building rather than a concern for managing employees. She said that Ms. Ouellette-Bolduc testified that supervision meant the presence of other human beings in the workplace. The grievor stated that there was no evidence that a team leader was required to physically oversee her work. She submitted that, for three years before Ms. Ouellette-Bolduc arrived, the grievor's previous managers allowing her to work until 5:30 p.m. was sufficient evidence that her work hours fell

within the division's operational requirements. The grievor suggested that the best evidence of the reason for the change to her schedule was that employees were not required in the Gladwin facility after 5:00 p.m.

[32] As for the grievor's reasons for requesting her hours of work to end at 5:30 p.m., namely, caring for an elderly person and the distance to her residence from Ottawa, she stated that she provided those reasons to her previous managers. She added that there was no evidence that Ms. Ouellette-Bolduc asked her to provide greater detail other than personal reasons, failing which the grievor would lose the opportunity to keep her 7:00 a.m. to 5:30 p.m. schedule.

[33] The grievor argued that the employer has no right to limit the business hours specified in clause 25.08 of the collective agreement and that operational requirements could not be used to override her rights under that provision. Accordingly, the employer's denial of her request was unreasonable.

[34] The grievor characterized Ms. Saintôt's email (Exhibit G-2, reproduced earlier in paragraph 6 of this decision) as a promise of the continuance of the grievor's working hours from 7:00 a.m. to 5:30 p.m. In support of this position, the grievor cited *Prévost v. Office of the Superintendent of Financial Institutions*, 2011 PSLRB 119, and *Ontario Public Service Employees Union v. Ontario (Ministry of Labour)* (2008), 179 L.A.C. (4th) 387.

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

[35] The employer outlined that in October 2007 the employer decided that the grievor's hours of work would not be permitted to extend beyond 5:00 p.m. and that she would have to work the scheduled hours that she input into the employer's system. The employer further pointed out that the grievor was permitted to continue to work a compressed and part-time workweek and was invited to offer suggestions or alternatives to the schedule proposed by the employer.

[36] The employer emphasized that a variable-hour work schedule is not a benefit guaranteed to an employee but rather an arrangement authorized with the employer's concurrence, as stipulated in clause 25.09(a) of the collective agreement. In support, the employer cited *The Queen v. Boyachok*, [1981] 1 F.C. 344 (C.A.), and *Boudreau et al. v. Treasury Board (Department of Human Resources and Skills Development)*, 2008 PSLRB 66. The employer referred to paragraphs 27 and 28 of *Boudreau et al.*, which read as follows:

> ***27*** *However, I do not agree with the grievors that the decision on whether to allow an employee to work variable hours must be based on operational requirements. It is the*

> *prerogative of the employer whether to allow a request of an employee for variable hours of work. The employer is fully entitled to refuse such requests for motives other than operational requirements.*
>
> ***28** In* Boyachok*, the Federal Court of Appeal established that the adjudicator, faced with a comparable wording in the collective agreement, "… erred in questioning the validity of the reasons given by the employer at all levels for subsequently revoking its concurrence… " When applied to this case that decision means that the employer is fully entitled to refuse variable hours to an employee and that an adjudicator does not have the authority to question its motives. However, that does not prevent me from ruling that the employer's interpretation of the collective agreement, in this case, was erroneous.*

[37] The employer argued that *Jenks* dealt with clause 25.08 of the same collective agreement which deals with flexible hours, while this case concerns variable hours of work under clause 25.09. It further argued that an employee on a flexible work schedule does not necessarily work variable hours. The employer submitted that, even if clause 25.08 applied, it provided ample operational requirement reasons to justify its decision to change the grievor's work schedule. On that point, the employer stated that, when making her decision, Ms. Ouellette-Bolduc considered the Gladwin facility's hours of operation. After consulting her colleagues, the Assistant Director and labour relations advisors, she ascertained that no employee, including those working variable hours, worked in the facility after 5:00 p.m., except for the grievor.

[38] As for the grievor's reasons for working until 5:30 p.m., the employer pointed out that, although she testified that in 2006 she told her managers and team leaders that she lived a fair distance away and had to care for an elderly family member, Ms. Ouellette-Bolduc testified that the grievor told her only that her reasons were personal, without further detail. Accordingly, she could not make an exception for the grievor, as the grievor did not provide any justification.

[39] The employer dealt next with the grievor's argument that, in Ms. Saintôt's email (Exhibit G-2), the employer promised her that she could continue to work a 7:00 a.m. to 5:30 p.m. schedule. The employer submitted that the fact that the grievor had already worked that schedule for three years did not entitle her to continue to work it. The employer argued that the email did not constitute a promise and that, in any event, the grievor did not act on such a promise to her detriment. The employer further submitted that the grievor could not unilaterally alter the terms and conditions of her employment. As for *Ontario (Ministry of Labour)*, cited by the grievor, the employer distinguished that decision as concerning an entirely different fact situation.

[40] The employer submitted that, to the extent that clause 25.08 of the collective agreement applies, it has amply demonstrated that it had valid operational requirements for refusing the grievor's request that she be entitled to work after 5:00 p.m. at the Gladwin facility.

[41] The employer submitted that the best evidence was notes of the meetings with the grievor prepared contemporaneously and shared with her when the decision was made. The employer argued that the notes demonstrate that its decision was not arbitrary but that it was well considered and justified.

C. Grievor's rebuttal

[42] The grievor pointed out that *Jenks* included employees working compressed weeks.

[43] The grievor emphasized that it was unreasonable for Ms. Ouellette-Bolduc to not consult the grievor's previous managers, to whom, according to the evidence, the grievor had provided reasons for working until 5:30 p.m.

[44] The grievor argued that clause 25.09 of the collective agreement is not at issue as the employer had already allowed her to work compressed hours, which she did for a lengthy period. For her, the applicable collective provision is clause 25.08 because the employer unreasonably denied her requirement to work until 5:30 p.m. The grievor submitted that the employer's reasons, which were operational requirements, were insufficient.

IV. Reasons

[45] Both the grievance and the reference to adjudication referred to article 25 of the collective agreement without specifying a particular clause. Accordingly, the first issue to be determined is the applicable provision or provisions of the collective agreement. The grievor argued that it is clause 25.08, dealing with flexible hours, while the employer asserted that it is clause 25.09, governing variable hours of work. For the reasons that follow, in my view, clause 25.09 applies.

[46] The general rule for hours of work in the collective agreement is set out in clause 25.06, under the heading "Day Work." Clause 25.08, titled "Flexible Hours," provides that, subject to operational requirements, an employee on day work is entitled to request to work his or her normal daily 7.5 consecutive-hour schedule with start and finishing times between the span of 11 or 12 hours stipulated in that provision, depending on the group, i.e., 7:00 a.m. to 6:00 p.m. for some groups, or 6:00 a.m. to 6:00 p.m. for employees in the Technical Services Group. As specified in clause 25.06(a), employees on a flexible schedule must work their hours during a normal workweek of 37.5 hours from Monday to Friday.

[47] The collective agreement makes it abundantly clear that clause 25.09, which deals with variable hours of work, is an exception to the general rule set out in clause 25.06. The first reference to this fact is found in the introductory wording of clause 25.06, as follows: "Except as provided for in clauses 25.09, 25.10 and 25.11 . . . ." That clause 25.09 constitutes a separate scheme from the general rule of clause 25.06 is reinforced by its opening words, as follows: "Notwithstanding the provisions of clause 25.06 . . . ." Furthermore, clause 25.09(c) provides that "[e]mployees covered by this clause shall be subject to the variable hours of work provisions established in clauses 25.24 to 25.27." The heading of those provisions is "Terms and Conditions Governing the Administration of Variable Hours of Work." Clause 25.24 reads as follows:

> ***25.24*** *The terms and conditions governing the administration of variable hours of work implemented pursuant to clauses 25.09, 25.10 and 25.23 are specified in clauses 25.24 to 25.27, inclusive. This Agreement is modified by these provisions to the extent specified herein.*

[48] Support for the differentiation between the collective agreement provisions governing flexible and variable work schedules is found in *Boudreau.* In that case, the collective agreement language was identical to that in this matter, except for the references to special hours of work for the Technical Services Group in clauses 25.06(b) and 25.08. The issue in that case was whether variable hours of work had to be scheduled between 7:00 a.m. and 6:00 p.m., as specified in clause 25.08 of the collective agreement in that case. The union, the same as in this case, argued that such a restriction did not apply, as clause 25.09 is an exception to the general rule of clause 25.06. In agreeing with the union's argument on that point, the adjudicator reasoned as follows:

. . .

> ***23*** *It seems clear to me that the collective agreement's restriction of a normal workday between the hours of 7:00 a.m. and 6:00 p.m. does not apply to working variable hours, as it is clear that the rule of working seven and one-half hours per day, which is also included in clause 25.06(b) of the collective agreement, does not apply.*
>
> ***24*** *Furthermore, clause 25.26(a) of the collective agreement specifies that starting and finishing times shall be determined according to operational requirements. There is no mention that starting and finishing times cannot be outside* [*sic*] *7:00 a.m. to 6:00 p.m. period.*
>
> ***25*** *If the employer and the grievors' bargaining agent intended to impose restrictions on when an employee could work his or her variable hours, they would have mentioned it in the collective agreement, as in clause 25.08 for flexible*

> *hours. However, they did not mention it, either in clause 25.09 or in clause 25.26(a).*
>
> . . .

[49] Thus, the adjudicator in that case found a clear demarcation between clause 25.08 of the collective agreement, governing flexible hours, and the provisions concerning variable hours found in clause 25.09.

[50] The grievor was, the evidence discloses, on variable hours, more commonly referred to as "working a compressed." Ms. Ouellette-Bolduc testified that the grievor was on a compressed work week and that expression is used in Exhibit E-1, Tab 2-B, which are notes of a meeting with the grievor. Clearly, the "hours of work" that the grievor refers to in her grievance and which were ended by the employer and the subject of the hearing were variable hours. As the evidence adduced before me disclosed that, at all relevant times, the grievor in this case was on a variable-hour work schedule, in my view, clause 25.08 does not apply to her situation.

[51] The employer referred me to *Boyachok*. The judgment of the Federal Court of Appeal does not set out the collective agreement clause which was the object of the grievance nor the group of employees involved. Moreover, there is no reference in the decision to the issue of operational requirements, which is the focus of the matter before me. In view of the dearth of contextual background, it seems to me that this decision is of little assistance in this matter.

[52] Both parties referred to *Jenks* in support of different aspects of their respective arguments. That case, as in this case, dealt with grievances about the interpretation of clause 25.08 of the same collective agreement with respect to several hundred CRA employees working in the Hamilton and Windsor, Ontario, tax services offices. Although the summary of the evidence in that decision mentions two Windsor employees who had previously worked a compressed schedule, *Jenks* deals with employees working a flexible schedule. The employer's operational requirements were that the core hours of operation in both offices were from 7:30 a.m. to 5:00 p.m. The grievors in that case sought to change their start time to 7:00 a.m.

[53] In her argument, the grievor distinguished *Jenks* from this case in terms of the extent of the evidence adduced in both cases on the issue of operational requirements. The grievor pointed to several documents produced by the employer in *Jenks* in support of its position, including memoranda to employees about hours of work, working alone during "silent hours" (i.e., outside regular hours), and health and safety concerns. In contrast, stated the grievor, the employer in this case adduced no such documents, inferring that its evidence was insufficient to sustain its position. As each case turns on its own facts, I must weigh the evidence adduced before me on the issue of operational requirements.

[54] The grievor requested that her variable schedule be restored to that in place before Ms. Ouellette-Bolduc's change, i.e., from 7:00 a.m. to 5:30 p.m. Clause 25.26(a) of the collective agreement specifies that, among other things, starting and finishing times of scheduled hours of work ". . . shall be determined according to operational requirements as determined by the employer . . . ." In this case, the employer determined that its operational requirements were that the grievor's variable hours had to be worked within the Gladwin facility's hours of operation, namely, from 7:00 a.m. to 5:00 p.m. Moreover, the grievor conceded that those were in fact the Gladwin facility's hours of operation. Furthermore, according to Ms. Ouellette-Bolduc's uncontradicted testimony, before meeting with the grievor, she canvassed her colleagues and the Assistant Director about employees' working hours at the Gladwin facility and was informed that they were not aware of any employees working after 5:00 p.m., including those working variable hours. As reflected in the notes of the October 2, 2007 meeting, which the grievor attended, along with Mr. Aylward, Ms. Ouellette-Bolduc and Ms. McClelland, Ms. Ouellette-Bolduc mentioned all those points as reasons for changing the grievor's hours of work. In my view, that was sufficient justification within the meaning of clause 25.26(a) to allow the employer to require the grievor to finish work at 5:00 p.m. The grievor's evidence did not successfully challenge the employer's evidence on this issue.

[55] Even if, as the grievor argued, clause 25.08 is the operative provision in this case, I note that it too is subject to operational requirements. Thus my analysis on the issue of operational requirements would be the same even if clause 25.08 were in issue.

[56] I turn now to the grievor's argument that Ms. Saintôt's April 13, 2006 email to her (Exhibit G-2, set out earlier in this decision) was a promise to continue the grievor's working hours from 7:00 a.m. to 5:30 p.m. I reproduce it here for ease of reference:

> *Following your email and the discussion that we add [sic] in my office with your Team Leader, I am confirming in writing that your hours of work will have to change as per the Collective Agreement and the decision from the Assistant Director.*
>
> *As you did mention to us in the meeting you prefer doing it that way so you won't have any problems in the future therefore we have an agreement.*
>
> *Starting the week of April 24th, 2006, your hours of work will be from 7:00 a.m. to 5:30 p.m., I ask that you please change your schedule accordingly.*
>
> *Your Terms and Conditions will also be amended to reflect those hours, you will be provided an amended copy for your signature prior to April 24th, 2006.*
>
> . . .

[57] The grievor's argument is in effect one of estoppel. In *Prévost*, relied upon by the grievor, the adjudicator summarized the doctrine of estoppel as follows:

. . .

> ***113*** *Estoppel is essentially a doctrine of fairness, requiring that three conditions be satisfied. First, one of the parties, by words or conduct, makes a promise or assurance. Second, the promise or assurance is intended to affect the parties' legal relationship. Third, the party to whom the promise or assurance was made takes the other party at its word and acts on it to its detriment. Therefore, if one party acts on the promise and assurance, then the other party cannot go back on its word and act as if the promise or assurance was not made. The party raising an estoppel argument has the burden of proof.*

. . .

[58] When applying those principles to this case, Ms. Saintôt's email must be placed in context. The grievor testified that she requested that the change to her work schedule be in written form because she mistrusted the employer, due to problems she had previously experienced. In cross-examination, she stated that the second paragraph of the email referred to her preference to have the arrangement with Ms. Saintôt made in writing. The grievor, who has about 30 years of service, conceded in cross-examination that the email did not state that she could work those hours until her eventual retirement date. In my view, that is a clear indication that the grievor did not expect that arrangement to continue indefinitely. Moreover, the grievor having testified that her schedule was renewed every three months, there would have been no reason to regularly renew this arrangement had it been an irrevocable agreement.

[59] The evidence showed that the grievor had worked until 5:30 p.m. for three years prior to October 2007, sometimes part-time. However, according to Ms. Ouellette-Bolduc's uncontradicted testimony, the grievor was the only employee at the Gladwin facility who worked beyond the facility's hours of operation. Considering all the circumstances, I am of the view that the grievor did not make out an argument for estoppel. I therefore reject this argument, as the grievor failed to prove the promise to continue her hours indefinitely.

[60] The grievor argued that Ms. Ouellette-Bolduc should have contacted her previous managers to inquire as to why the grievor had requested that her hours of work end at 5:30 p.m. In her testimony, Ms. Ouellette-Bolduc acknowledged that she did not make that contact and said that, on the occasions on which the grievor had asked her to maintain her 5:30 p.m. finishing time, she stated that it was for personal reasons, without further elaboration.

[61] In the circumstances of this case, I do not believe that it was incumbent on Ms. Ouellette-Bolduc to contact the grievor's previous managers for an explanation of the reasons for the grievor's hours of work. As the initiator of the request, it seems to me that the

grievor should have provided specific reasons for requesting an exception to the Gladwin facility's hours of operation.

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

(The Order appears on the next page)

V. Order

[63] The grievance is dismissed.

May 29, 2012.

Steven B. Katkin,
adjudicator