Date: 20131016

File: 566-02-3191

Citation: 2013 PSLRB 128

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

ROBERT GARDINER

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

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

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Joseph W. Potter, adjudicator

For the Grievor: Sheryl Ferguson, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

For the Employer: Lesa Brown, counsel

Heard at Kingston, Ontario,
September 24, 2013.

I. Individual grievance referred to adjudication

[1] This decision deals with an individual grievance filed by Robert Gardiner ("the grievor") on May 11, 2009. The grievance reads as follows:

. . .

I did not receive shift premiums for overtime hours worked from Jan-Mar 2009 as I am entitled to as per Article 25.01 and 25.02 of the CBA

[Sic throughout]

. . .

[2] The corrective action reads as follows:

. . .

Reimbursement of unpaid shift premiums for Jan-Mar 2009 for a total of $543.00.

. . .

[3] At the outset of the hearing, the parties stated that they were in agreement with the majority of the facts surrounding this case, and they presented an agreed statement of facts. Additional facts not agreed on would be established through witnesses.

[4] The agreed statement of facts reads as follows:

. . .

1. The grievor, Robert Gardiner, is an employee of Correctional Services [sic] of Canada.

2. At all material times, the grievor was employed as a CX-01 Correctional Officer at Kingston Penitentiary.

3. The applicable Collective Agreement is the Agreement between the Treasury Board and the Union of Canadian Correctional Officers, which expired on May 31, 2010.

4. At all material times, the grievor's hours of work were scheduled on a regular basis for forty (40) hours per week, Monday to Friday.

5. At all material times, the grievor was scheduled on a daily basis to work eight (8) hours per day.

> *6. Each month, during the period from January 2009 to March 2009, the grievor was regularly scheduled to work either 7:00 am – 3:00 pm or 8:00 am – 4:00 pm.*
>
> *7. During the period from January 2009 to March 2009, the grievor worked overtime hours for which he was paid at the appropriate overtime rate.*
>
> *8. The grievor was not paid the shift premium or the weekend premium for any of the overtime hours he worked during this period.*
>
> *9. The grievor is seeking payment of the shift premium or weekend premium for the overtime hours he worked during this period.*

. . .

II. Summary of the evidence

[5] The grievor testified that before filing the grievance, he had worked a number of overtime shifts on weekends and that he had received the shift and weekend premiums under clauses 25.01 and 25.02 of the applicable collective agreement (Exhibit G-1).

[6] On February 3, 2009, the grievor sent an email to his contact in pay administration, stating that he was short $58.00 on his shift differential entitlements for overtime hours he had worked (Exhibit G-2).

[7] On February 12, 2009, he received a reply from pay administration, agreeing that he was owed $58.00. The grievor testified that he received the compensation he requested.

[8] Some five days later, on February 17, 2009, the grievor received an email from pay administration, stating that he would no longer receive the shift differential because he was not a shift worker (Exhibit G-5). The email was sent as a result of an earlier email from National Headquarters at the Correctional Service of Canada ("the employer"), which reads in part as follows (Exhibit E-1):

. . .

> *Article [sic] 25.01 (Shift Premium), applies to all employees who meet the definition of a shift worker, as set out in clause 21.02 of the Collective Agreement. In other words, the article in question does not apply to day workers.*

. . .

[9] The grievor stated that when he received that message from pay administration, he went to see his union representative, and the grievance was filed in May 2009. No recovery action was undertaken for the shift differential payment that he had already received.

III. Summary of the arguments

A. For the grievor

[10] The grievor had been receiving the shift and weekend premiums for overtime work, as per the provisions of clauses 25.01 and 25.02 of the collective agreement between the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the collective agreement"), up to February 17, 2009, when he was told that the practice would stop.

[11] Clause 21.01 of the collective agreement defines what constitutes day work, and clause 21.02 defines what constitutes shift work. The grievor's hours of work conformed to clause 21.02, so he was a shift worker by definition.

[12] Clauses 25.01 and 25.02 of the collective agreement apply to "[a]n employee working on shifts" and therefore apply to the grievor.

[13] In the alternative, the grievor argued that he was not informed of the employer's change of practice until he was partway through the period in question. The grievor had been required to work overtime shifts between 15:00 and 07:00 as well as on Saturdays and Sundays and was entitled to the negotiated benefits. Those benefits were negotiated by the parties to compensate employees for the impact such shifts had on their lives.

[14] To apply the employer's argument would result in the grievor being paid less than his colleagues for the same shift.

[15] The issue of estoppel applies as notice to the grievor was given partway through his work schedule of January to March 2009.

[16] The grievor's representative cited these cases: *Barnes and Solowich v. Treasury Board (Ministry of Transport)*, PSSRB File Nos. 166-02-1828 and 1829 (19750602); *Samborsky v. Treasury Board (Solicitor General – Correctional Service Canada)*, PSSRB

File Nos. 166-02-19803 and 19805 (19900827); *Munroe v. Treasury Board (Correctional Service of Canada)*, 2010 PSLRB 56; and *Turner v. Treasury Board (Department of National Defence)*, 2005 PSLRB 162, and Brown and Beatty, *Canadian Labour Arbitration*, 4th Ed., at 4:2000, "Interpretation of Collective Agreements," and 2:2200, "Estoppel."

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

[17] Clauses 25.01 and 25.02 of the collective agreement clearly state that only employees who work shifts are entitled to receive the premiums.

[18] Clauses 21.01 and 21.02 of the collective agreement contemplate two types of workers, namely, those who work five consecutive days, and those who work on a rotating basis.

[19] Paragraphs 4 and 5 of the agreed statement of facts show that the grievor was scheduled on a regular basis, 40 hours per week, 8 hours per day.

[20] The words "working on shifts," found in clauses 25.01 and 25.02 of the collective agreement, have to have some meaning; otherwise, all employees working during the time specified in each clause would receive the premium, which would negate the wording.

[21] The grievor worked five days per week with two consecutive days of rest. Therefore, under clause 21.01 of the collective agreement, he was a day worker. He did not work shifts.

[22] The grievor argued that inequities would be created by not paying him for the shifts, but premiums are paid to shift workers to compensate them for the inconvenience of regularly being on shift work. The grievor was not inconvenienced.

[23] Past practice should not be considered when examining clear language. The evidence shows that paying the grievor shift premiums was an administrative error, and in Exhibit G-5, the pay administration clerk wrote that she was the only one paying the premiums, so they did not apply service-wide.

[24] The test for estoppel has not been met. It was simply an administrative error made by one clerk at one of the employer's institutions. Furthermore, there was no evidence of the Treasury Board making any representations on this interpretation.

[25] The following cases were cited: *Chafe et al. v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112; and *Palmer v. Treasury Board (Department of National Defence)*, 2005 PSLRB 34.

IV. Reasons

[26] Article 25 ("Shift Premium") is the collective agreement provision in dispute. There are two clauses contained within the article. They read as follows (Exhibit G-1):

> ***25.01 Shift Premium***
>
> *An employee working on shifts will receive a shift premium of two dollars ($2.00) per hour for all hours worked, including overtime hours, between 3:00 p.m. and 7:00 a.m. The shift premium will not be paid for hours worked between 7:00 a.m. and 3:00 p.m.*
>
> ***25.02 Weekend Premium***
>
> *An employee working on shifts during a weekend will receive an additional premium of two dollars ($2.00) per hour for all hours worked, including overtime hours, on Saturday and/or Sunday.*

[27] It was not in dispute that the grievor had worked overtime hours during the time frames specified in clauses 25.01 and 25.02 of the collective agreement. The employer stated that the grievor did not qualify for either premium because he was not "working on shifts," which is a prerequisite to qualifying for those premiums.

[28] The agreed statement of facts, at paragraphs 4 and 5, states as follows:

> *4. At all material times, the grievor's hours of work were scheduled on a regular basis for forty (40) hours per week, Monday to Friday.*
>
> *5. At all material times, the grievor was scheduled on a daily basis to work eight (8) hours per day.*

[29] The grievor argued that he conformed to the definition of shift work, as per clause 21.02 of the collective agreement, and therefore, he qualified for the premiums under clauses 25.01 and 25.02.

[30] The employer argued that the grievor conformed to the definition of day work, as per clause 21.01 of the collective agreement, and therefore was excluded from receiving the premiums.

[31] Clause 21.01 of the collective agreement reads as follows (Exhibit G-1):

> ***Day Work***
>
> *21.01 When hours of work are scheduled for employees on a regular basis, they shall be scheduled so that employees:*
>
> *(a) on a weekly basis, work forty (40) hours and five (5) days per week, and obtain two (2) consecutive days of rest,*
>
> *(b) on a daily basis, work eight (8) hours per day.*

[32] Clause 21.02 of the collective agreement reads in part as follows (Exhibit G-1):

> ***Shift Work***
>
> *21.02 When hours of work are scheduled for employees on a rotating or regular 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.*
>
> . . .
>
> Note: In *Munroe* the decision quotes clause 21.02 of the collective agreement dated June 26, 2006 between these two parties as reading “When hours of work are scheduled for employees on a rotating or irregular basis…”. The language in this collective agreement, reads as I have cited it, namely “…on a rotating or regular basis…” This may be an error on the parties part, as the word “irregular” would make more sense. Nevertheless my decision is based on the current collective agreement language.

[33] Paragraph 4 of the agreed statement of facts addresses the issue of the grievor’s “normal” hours of work and states that the grievor was scheduled on a regular basis for 40 hours per week, Monday to Friday. He was not scheduled to work an average of 40 hours per week, as would be required to meet the definition of clause 21.02(a)(i) of the collective agreement. Furthermore, paragraph 5 of the agreed statement of facts states that the grievor was scheduled to work 8 hours per day, not 8.5 hours per day, as required under clause 21.02(a)(ii) to be considered a shift worker. Therefore, the

grievor's "normal" work schedule does not meet the definition of shift work. With respect to the hours that he works normally, the grievor is clearly a day worker.

[34] The grievor does meet the definition contained in clause 21.01 of the collective agreement in that he works 40 hours per week over 5 days (Monday to Friday). In addition, he works 8 hours per day.

[35] Given that fact, the grievor is not eligible for the premiums under article 25 of the collective agreement for the hours he works normally.

[36] The issue in this case is whether or not the grievor working overtime hours during hours that are not day work hours "transforms" him from a day worker to, for that period, one "working on shifts" as is required by the wording of clauses 25.01 and 25.02. I have concluded that it does not.

[37] The employer stated that the words "working on shifts" have to be given some meaning. I agree. The grievor is advancing an interpretation that has the clause read "all employees who work during hours between 3p.m. and 7a.m. receive the premium". If it were meant to apply to everyone the focus would be the hours worked and there would be no qualifier related to "working on shifts".

[38] I find that a day worker who works an overtime shift during hours that would otherwise be considered to be "a shift" is not, by virtue of that fact, transformed into a shift worker for that one shift.

[39] The grievor advanced an alternative argument, which was that estoppel would apply in this case as he was informed partway through his work period that the practice of paying shift and weekend premiums would cease.

[40] *Chafe et al.*, at paragraphs 75 and 76, states as follows:

. . .

> *[75] Estoppel requires at the very least two facts:*
>
> > *a. one party to a contract makes a representation to the other party that it will not insist upon a particular right available to it under that contract, and*
> >
> > *b. the other party changes its position in reliance upon that representation . . . .*

> *[76] Estoppel can only affect* <u>*the parties*</u> *to a contract. In this case the parties to the contract are the Treasury Board and the bargaining agent. The first difficulty with the argument made on behalf of the grievors is that there was no evidence that the Treasury Board or the employer (as opposed to its local managers) said or did anything to the effect that it would interpret article 27 of the collective agreement in the manner contended for by the grievors. . . .*
>
> [Emphasis in the original]

[41] Similarly in this case, there was no evidence that the Treasury Board had made representations that it would interpret article 25 of the collective agreement in the manner contended by the grievor. Even though local management might have interpreted article 25 one way (whether or not by mistake), it does not mean that that was a Treasury Board representation.

[42] In *Palmer*, at para 31, I wrote: "The fact that Mr. Palmer worked on a 12-hour shift does not mean that he qualifies for receipt of a shift premium. Rather, he must work on a 12-hour shift schedule to receive this benefit, and he did not". Similarly, I find clauses 25.01 and 25.02 apply to shift workers and Mr. Gardiner was not a shift worker as that term is known in the collective agreement.

[43] The grievor's cited case law is, I find, not applicable in this case. *Barnes* is a different issue (getting paid shift premium for what clearly was a day shift); *Samborsky* is based on different collective agreement language; *Turner* is an expedited decision and not to be used as precedent and in *Munroe*, the grievor was clearly a shift worker and the issue was different.

[44] Furthermore, there is no evidence that paying shift premiums to day workers was a widespread practice. In fact, as noted in Exhibit G-5, the pay administration clerk stated that she was the only person paying the premiums. It was a case of a mistaken application of a collective agreement provision, and the mistake was corrected.

[45] Finally, the fact that no recovery action was undertaken is not determinative of the issue. The collective agreement language, I believe, is clear. The grievor was not entitled to the premiums in article 25.

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

V. Order

[47] The grievance is denied.

October 16, 2013.

Joseph W. Potter,
adjudicator