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Public Service Labour Relations and Employment Board Act and *Public Service Labour Relations Act*

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

BRADLEY EDMUNDS, ROBERT GARDINER AND ALLAN ERWIN

Grievors

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

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

In the matter of individual grievances referred to adjudication

Before: Kate Rogers, a panel of the Public Service Labour Relations and Employment Board

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

For the Employer: Allison Sephton, counsel

Heard at Kingston, Ontario,
March 3, 2015.

[1] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s.2) before November 1, 2014, is to be taken up and continue under and in conformity with the *Public Service Labour Relations Act* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

I. Individual grievances referred to adjudication

[2] Bradley Edmunds, Robert Gardiner and Allan Erwin ("the grievors") are correctional officers, classified CX-01, employed by the Correctional Service of Canada ("the employer"). At the time that they filed their grievances, they worked at Kingston Penitentiary in Kingston, Ontario, and were covered by the collective agreement between the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the union") for the Correctional Services Group with an expiry date of May 31, 2010 ("the collective agreement").

[3] On February 15, 2010, Mr. Edmunds filed a grievance that alleged as follows: "I grieve that on or about 2010-01-23 evening shift and on or about 2010-01-24 morning shift I was signed up for overtime which was subsequently hired out to those with more [overtime] hours than I." As corrective action, he requested that he be compensated at the applicable rate for the overtime shifts that he was not offered and that he be compensated for mileage at the applicable rate, in addition to any other rights under the collective agreement that he might have, including all ". . . real, moral or exemplary damages, to be applied retroactively with legal interest with prejudice to other acquired rights."

[4] Mr. Gardiner also filed a grievance on February 15, 2010, which alleged as follows: "I grieve that on or about Feb 8/2010 I was signed up for overtime in SDS and was not hired when others were hired in my place who had less hours then [*sic*] I did." At the hearing, the union clarified that the grievor intended to state, "who had more

hours" than he did. The employer did not object to the correction. As corrective action, the grievor asked that he be compensated for the missed overtime hours and the mileage that he would have been paid had he worked the overtime, in addition to any other rights that he might have under the collective agreement, as well as all ". . . real, moral or exemplary damages, to be applied retroactively with legal interest with prejudice to other acquired rights."

[5] On April 15, 2010, Mr. Erwin filed a grievance that alleged as follows: "I grieve the fact that I was not called for a 12.5 hour morning overtime shift on or about 2010 03 22. I had less overtime hours than the person who was hired." As corrective action, he asked to be compensated for the missed overtime shift at the applicable rate of pay and for mileage.

[6] The employer denied the grievances of Mr. Edmunds and Mr. Gardiner at the final level of the grievance process on September 28, 2010, and the grievance of Mr. Erwin on September 29, 2010. All three grievances were referred to adjudication on July 15, 2010, before receipt of the final-level reply.

II. Summary of the evidence

[7] The grievors testified and entered four documents in evidence, including the collective agreement. The employer called no witnesses.

[8] Mr. Gardiner testified that he was grieving that he had signed up for overtime but that someone with more hours than he had was called in to work overtime. He identified the overtime sign-up sheet that he had submitted for the week of February 8 to 14, 2010 (Exhibit G-2). He stated that, as shown on the sign-up sheet, he had indicated his availability for overtime for the entire 24-hour block on Monday, February 8, 2010. He was available on the day in question and was ready to answer the phone had he been called to come in on overtime.

[9] In cross-examination, Mr. Gardiner was asked if he agreed that he had been offered 134.5 hours of overtime between November 1, 2009, and March 31, 2010. He stated that he did not remember, but when shown the employer's record of his hours, he stated that he had no reason to dispute the document, even though he had never seen it before. He stated that he was not aware that he had been offered the second highest number of overtime hours of any CX-01 at Kingston Penitentiary at that time

but that he had no reason to question that fact. He acknowledged that he had a high availability rate for overtime. He also acknowledged that he did not know if overtime was offered on every shift. He stated that he believed that the overtime policy provided that overtime was to be offered to the person with the lowest number of accumulated hours of overtime. He agreed that if there were people with fewer overtime hours than he had, he would not be offered overtime, and he agreed that he would not necessarily have been called for overtime simply because he had indicated that he was available to work overtime.

[10] In re-examination, Mr. Gardiner stated that he had never seen the policy on overtime. He also stated that the sign-up process for overtime is part of the electronic scheduling system.

[11] Mr. Edmunds testified that his grievance concerned the fact that overtime was offered to someone with more hours than he had. He also stated that he was no longer grieving the employer's failure to call him for overtime on January 23, 2010, because he had learned that overtime was not offered on that shift. He identified the overtime sign-up sheet for the week of January 18 to 24, 2010 (Exhibit G-3). He was available for all three shifts on January 24, 2010. He explained that, although there were periods when he was not available to work overtime, at the time in question, he was ready and available to work overtime because his wife was seven months' pregnant and he believed that it would be his last opportunity to work overtime before the baby arrived.

[12] In cross-examination, Mr. Edmunds acknowledged that even though he made himself available to work overtime, there was no guarantee that overtime would be offered on the shifts in question. He also agreed that even if overtime was offered on a shift, he would not necessarily be the person to whom it was offered. However, he stated that he hoped that it would be offered equitably.

[13] Mr. Edmunds acknowledged that from October to December 2009, he was on parental leave. He was shown employer records of his accumulated overtime between November 1, 2009, and March 31, 2010, and was asked to confirm that, despite his parental leave, he had accumulated 82.25 hours of overtime. He stated that he could not remember how many hours he had accumulated but that he could not dispute the employer's records.

[14] Mr. Erwin testified that he was grieving that he was not called in for overtime on March 22, 2010. He identified the overtime sign-up sheet that he submitted that showed his availability for the morning and evening shifts on March 22, 2010 (Exhibit G-4). He stated that in 2010, he was frequently available for overtime, and that when he signed up, he made sure that he was available. He stated that there might have been periods during the year when he was not available.

[15] In cross-examination, Mr. Erwin agreed that even though he had made himself available for overtime on specific shifts, there had been no guarantee that overtime would be offered on the shifts. He also agreed that even if overtime was offered, there was no guarantee that he was the person who would be called, based on the overtime policy. He stated that he had no reason to dispute the employer's record that between November 1, 2009, and March 31, 2010, he had been offered 68.25 hours of overtime.

[16] In re-examination, he stated that he believed that the overtime policy stated that overtime would be offered to the available correctional officer with the fewest accumulated overtime hours. He also stated that he had never seen the employer's record of his overtime hours before.

III. Request to reopen the case

[17] At the conclusion of Mr. Erwin's testimony, the union representative stated that she had no further witnesses. Asked directly if she was closing her case, she stated that she was.

[18] After a brief break, the employer returned to the hearing to begin its case. At that time, counsel for the employer stated that she would not call any witnesses to testify. In response to a question from me, she explained that she was not making a motion for non-suit but was simply prepared to move directly to argument on the merits without calling evidence because she believed that the grievors had failed to present any evidence that she needed to rebut or explain.

[19] The union representative then asked to be allowed to reopen the grievors' case on the ground that she had relied on her belief that the employer would be calling witnesses important to her case. She stated that she based her belief on the list of potential witnesses that the employer's counsel had given her. However, counsel for the employer denied that she had made any undertaking to call any witnesses and

stated that in fact she had advised the union representative before the hearing began that the employer might not be calling some of the witnesses previously identified.

[20] The union representative argued that she had relied on the fact that counsel for the employer had told her that she would be calling certain witnesses and that it would be unfair not to allow the union the opportunity to reopen its case in order to call the witnesses in question. She stated that I had discretion to allow her to reopen her case and that I should exercise that discretion in her favour. She noted that the intent of labour relations is to resolve problems and that proceeding directly to argument without allowing her to call further evidence would not further the resolution of labour relations problems. She also stated labour arbitration was not intended to be legalistic and that non-lawyers should be able to present cases, which they cannot do in an overly legalistic and technical environment. She also argued that the grievors should not be penalized for her mistake.

[21] I denied the request to allow the union to reopen its case in order to call further witnesses. The union representative was very clear that she had closed her case after calling three witnesses. To allow her to reopen her case after counsel for the employer rose to begin her case would have been contrary to established procedure. And in effect, it would have denied the employer the opportunity to pursue its case in the manner it planned.

[22] The union argued that she had relied on her belief that the employer would be calling the witnesses that she needed to make her case, based on the list of potential witnesses that the employer's counsel shared with her. I do not want to discourage the parties from sharing information before the hearing, such as the lists of potential witnesses, because it is helpful to the hearing process. But the employer's counsel was emphatic that she did not make any undertaking to call any witnesses in particular and that, in fact, even before the start of the hearing, she advised the union that she would not be calling all the names on the list. Absent an undertaking to call particular witnesses, I believe that the sharing of such lists is a courtesy, not an obligation and that neither party should rely on them.

[23] I do not accept the suggestion that denying the union's request to reopen its case in these circumstances was unduly legalistic or technical. The union failed to call the evidence that it considered necessary to establish its case. It was the union's responsibility to make its case, not the employer's responsibility. On this subject, the

Federal Court's comments in *Filgueira v. Garfield Container Transport Inc.*, 2006 FC 785, are applicable:

. . .

> *[13] . . . No party, and in particular the Respondent, is obliged to call any evidence. The complainant must make out his or her case by its own evidence, using the power of a subpoena if necessary. A complainant cannot rely upon, or even hope that a Respondent will call evidence.*
>
> *[14] While it is true that the Tribunal must consider all evidence properly before it, there is no obligation upon the Tribunal to force a party to lead evidence when it chooses not to do so. A Respondent cannot be forced to tender evidence.*
>
> *[15] Thus, if at the conclusion of the case put in on behalf of the complainant, the Respondent believes that no proper case, even on a* prima facie *basis, has been made out, it is quite open to it to request that the Tribunal make its decision simply on the basis of the evidence that it has. . . .*

. . .

[24] I also do not accept the union's suggestion that it should have been accorded some latitude in the conduct of the hearing because its representative is not a lawyer. I note that the union representative is an experienced employee of the union and that she has appeared before the former Board on a number of occasions in the past. Furthermore, the matter at issue was not an esoteric point of law. The requirement that the grievors adduce the evidence necessary to make their case is a basic principle of law.

[25] For those reasons, I denied the union's request to reopen its case and directed the parties to make their arguments on the merits of the grievances before me.

IV. Summary of the arguments

A. For the union

[26] The union argued that the grievances and the employer's responses to them could be relied upon to establish the facts. The grievors identified the shifts for which they believed that they should have been offered overtime. Although they might not

always have been available for overtime, they testified that they were available for the shifts in question.

[27] Clause 21.10(a) of the collective agreement provides that overtime must be allocated on an equitable basis among readily available qualified employees. There was no evidence before me of a local agreement that would have allowed the employer to allocate overtime in a different manner. Furthermore, no overtime policy was introduced into evidence.

[28] The grievances should be allowed on the basis of the employer's response to them.

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

[29] The employer argued that the pleadings and grievance responses on the record do not constitute evidence. In *Tshibangu v. Deputy Head (Canadian Food Inspection Agency)*, 2011 PSLRB 143, the adjudicator held that the documents on the file do not constitute evidence. In *Pilon v. Canada Revenue Agency*, 2010 PSLRB 97, it was noted that adjudication is a *de novo* hearing. Therefore, facts asserted during the grievance process, including those contained in the grievance responses, must be proven at the adjudication hearing. The employer also cited *Gilkinson v. Professional Institute of the Public Service of Canada,* 2012 PSLRB 111 (a judicial review application by the grievor to the Federal Court of Appeal, file A-559-12, was dismissed when he failed to pursue it), for the proposition that opening statements, arguments and pleadings are not evidence and in particular noted the adjudicator's comments at para 53 and 54, which were as follows:

> *53. In this case, there is no evidence before me of any nature. The representative for the complainant chose to rest his case without calling witnesses, despite having summoned two, one of whom was present at the hearing and despite me asking him to reconsider that decision. Likewise, the respondent chose not call any evidence. The onus is on the complainant. I cannot shift the onus to the respondent merely because the complainant's representative chose to present his case in a certain fashion.*
>
> *54. Nor can I gather evidence myself or make assumptions of fact, except through evidence properly put before me, as stated as follows at page 9 of* National Association of Broadcast Employees and Technicians v. Baton Broadcasting *(1970), 21 L.A.C. 7:*

> . . . There is an onus on a party to call the evidence which is necessary in order to establish all the facts required for the successful presentation of that party's case . . . Unless facts are agreed upon by the parties or proved in evidence, there is no case before me.

[30] The law is clear that the grievors bore the burden of proof and had to establish a *prima facie* case. Citing *Beauregard v. Treasury Board (Agriculture Canada)*, PSSRB File Nos. 166-02-22259 to 22263 (19921022), the employer also noted there is jurisprudence from the former Board concerning motions for non-suit that addresses the requirement of the party with the burden of proof to establish a *prima facie* case.

[31] In this case, the only evidence adduced was that the grievors were available to work overtime on the dates in question. The employer argued that the grievors failed to prove that they were not called in for overtime on the dates in question and, therefore, did not even meet the initial burden of proof.

[32] Citing *Roireau and Gamache v. Treasury Board (Solicitor General Canada - Correctional Service),* 2004 PSSRB 85, and *Canada (Attorney General) v. Bucholtz*, 2011 FC 1259, the employer noted that the grievors bore the burden of providing concrete evidence of a discrepancy in the hours of overtime allocated among readily available employees that could be explained only by an inequitable distribution. As noted in *Bucholtz*, at para 57, satisfying that burden of proof is a complex task, as the grievor must ". . . compile the statistics on overtime, and show that there is a discrepancy that cannot be explained by differing availability or some other confounding factor."

[33] *Canada (Attorney General) v. McManaman,* 2013 FC 1064, and *Baldasaro and Thiessen v. Treasury Board (Correctional Service of Canada),* 2012 PSLRB 54, establish that the equitable distribution of overtime cannot be assessed on the basis of a single day but must take place over a reasonable period. In *Bucholtz,* the Federal Court referred to a three-pronged test to establish whether the allocation of overtime is equitable. That test requires that equitability be measured over a reasonable period, that the grievor's accumulated overtime hours be compared to those of similarly situated employees over the same period and that once the hours are compared, any other relevant factors must be examined to determine if the discrepancy can be explained.

[34] In this case, there is simply no evidence that would satisfy the test set out in *Bucholtz.* Therefore, the grievors have not met their burden of proof, and the grievances should be dismissed.

C. Union rebuttal

[35] The union stated that the jurisprudence cited by the employer related to cases dealing with the employer's policy on overtime, which is not in evidence. Therefore, the case law is not relevant.

[36] The union reiterated that I could rely on the information contained on the record through the grievances and the responses.

V. Reasons

[37] The grievances before me allege that the grievors were available for overtime but that they were bypassed in favour of employees with more accumulated hours of overtime. Although the grievances do not specifically allege a violation of clause 21.10 of the collective agreement, the parties agreed that it is the provision in dispute. That clause provides 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,*
>
> ****
>
> *(b) to allocate overtime work to employees at the same group and level as the position to be filled, i.e.: Correctional Officer 1 (CX-1) to Correctional Officer 1 (CX-1), Correctional Officer 2 (CX-2) to Correctional Officer 2 (CX-2) etc.;*
>
> *However, it is possible for a Local Union to agree in writing with the Institutional Warden on an [sic] another method to allocate overtime.*
>
> *and*
>
> *(c) to give employees who are required to work overtime adequate advance notice of this requirement.*

[38] It is clear that the grievors bore the onus of establishing a breach of the collective agreement. However, other than testifying that they were available for the shifts in question, they adduced no evidence to establish that overtime was offered on the shifts in question or that, if it was offered, it was allocated inequitably. Although the union argued that I could rely on the grievances and the employer's responses to them as evidence, I disagree. The grievances and the responses contain assertions that must be proven in evidence, nothing more. They are not evidence.

[39] Accordingly, there is no evidence before me that would allow me to conclude that the employer failed to allocate overtime on an equitable basis among readily available qualified employees, in violation of clause 21.10 of the collective agreement. Therefore, I must dismiss the grievances.

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

(The Order appears on the next page)

VI. Order

[41] Grievance 566-02-4076 is dismissed, and I order the file closed.

[42] Grievance 566-02-4077 is dismissed, and I order the file closed.

[43] Grievance 566-02-4078 is dismissed, and I order the file closed.

March 23, 2015.

Kate Rogers,
a panel of the Public Service Labour Relations and Employment Board