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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

ARCHIE CAMPBELL, JOHN MUIR, KARL RADTKE, AND CLARENCE WELTON

Grievors

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
Campbell v. Treasury Board (Department of National Defence)

In the matter of individual grievances referred to adjudication

Before: Marie-Claire Perrault, a panel of the Public Service Labour Relations and Employment Board

For the Grievors: Jacek Janczur, Public Service Alliance of Canada

For the Employer: Karen Clifford, counsel

Decided on the basis of written submissions,
filed February 25, March 27, April 10, and May 8, 2015.

I. Individual grievance referred to adjudication

[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 396 of the *Economic Action Plan 2013 Act, No. 2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) as that Act read immediately before that day.

[2] The grievor, Archie Campbell, filed a grievance with the Department of National Defence ("the employer") on January 12, 2011, for the payment of a shift premium that he alleges was wrongly denied. The bargaining agent representing him, the Public Service Alliance of Canada (PSAC), referred the grievance to the former Board on August 26, 2011. It also referred the grievances of three other grievors, John Muir, Karl Radtke, and Clarence Welton (collectively with Mr. Campbell, "the grievors"). Separate files were created for each grievor, but since each grievance was the same, a single decision will be rendered for the four files.

[3] After several attempts to schedule hearings, the parties agreed to proceed by way of written submissions based on an agreed statement of facts.

[4] For the reasons that follow, the grievances are allowed. For a six-week period, the employer created a shift schedule as defined in the collective agreement between the Treasury Board and the Public Service Alliance of Canada for the Operations Group (all employees), expiry date August 4, 2011 ("the collective agreement"). The grievors are entitled to shift premium pay for hours worked after 4 p.m.

II. Summary of the evidence

[5] The grievors, the PSAC, and the employer agreed to the following facts:

> 1. *At the time of the grievance, the grievors were all drivers for the Department of National Defence. With the exception of Mr. Campbell, they were all classified at the*

GL-MDO-05 group and level. Mr. Campbell was substantively a GL-MDO-04; however, he was paid acting pay at the GL-MDO-05 group and level for the time frame of concern to this grievance because he had the necessary qualifications to drive a bus and a transport truck.

2. *The work location for the grievors was CFB Petawawa, which is located outside of Ottawa, Ontario.*

...

4. *Prior to November 2010, the grievors' scheduled hours were 0700-1530 hours, Monday to Friday.*

5. *On 4 October 2010, a meeting was held between the four grievors and Lt. Larosée, during which the drivers were advised that they would be tasked to pick up soldiers returning on ROTO flights from Afghanistan. The employees were asked if they would consider working from 1530-2400 hours from 11 November-23 December 2010, to which they replied they would not.*

6. *On 22 October 2010 a notice was posted from the employer indicating that those involved in driving for the ROTO flights would have their hours of work changed to 1530-2400 hours from 11 November-23 December 2010. A memo was issued on 26 October 2010 specifying which employees were tasked with the ROTO flights.*

7. *Effective 11 November 2010, the grievors commenced a temporary change to their hours of work. For the period of 11 November-23 December 2010, they worked from 1530-2400 hours, Monday to Friday.*

8. *There is a difference between GL-MDO-05's and GL-MDO-04s, both in terms of the size of the vehicle they can operate, and the qualifications they hold in order to do so. GL MDO 04's work in "Light Section" and GL-MDO-05s work in "Heavy Section".*

9. *For the time period in question, Base Transport continued to employ GL-MD-04s who remained at their normal hours of work; i.e. 0700 to 1530 hours. These employees did not meet flights.*

10. *Only GL-MD-05s had their hours of work changed.* [There were two other GL-MDO-05s whose hours of work were not changed].

11. *While the GL-MDO-05s grievors did have their hours of work changed, they remained Monday - Friday workers; no weekend work required.*

> *12. In November 2010, discussions took place between Human Resources and management regarding whether or not this change in hours constituted a shift and thereby entitled the employees to a shift premium. In the final email dated 22 November, the unit decided that this was a change in working hours and that this change did not meet the definition of a shift (found in clause 25.01(d) of the collective agreement), and therefore the employees would not be entitled to a shift premium.*
>
> *...*

III. Relevant provisions of the collective agreement

[6] The issue is whether the grievors are entitled to a shift premium. For that to be so, they must meet two conditions: they must work shifts, and they must work before 8 a.m. or after 4 p.m.

[7] The collective agreement defines "shift work" as follows at clause 25.01(d):

> *(d) a **"shift"** means the rotation through two (2) or more periods of eight (8) hours or longer where the Employer requires coverage of sixteen (16) hours or more each day; or, where the Employer requires the employee to work on a non-rotating and indefinite basis on evening or night duty of which half (1/2) or more of the hours are scheduled between 1800 hours and 0600 hours.*
>
> [Emphasis in the original]

[8] Shift premium pay is provided for in the following terms:

> ***27.01 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 4:00 p.m. and 8:00 a.m. The shift premium will not be paid for hours worked between 8:00 a.m. and 4:00 p.m.*

IV. Summary of the arguments

A. For the grievors

[9] For the duration of the assignment, Base Transport at Petawawa, Ontario, was operating 17 hours daily, thus meeting the first criterion of the shift definition. There was a rotation since the grievors' hours of work changed from 7 a.m. to 3:30 p.m. to 3:30 p.m. to midnight.

[10] The second criterion of the shift definition is also met. The employer imposed the new schedule. Thus, it required the grievors to work evenings, during which more than half the hours were worked after 6 p.m.

[11] The change was for a definite period, but the grievors argue that the length of the change, especially just before the Christmas holidays, was significantly disruptive and of sufficient duration to be considered indefinite.

[12] The grievors offer as support for their arguments two decisions of former boards, *Chafe v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112, and *Samborsky v. Treasury Board (Solicitor General Canada - Correctional Service)*, PSSRB File Nos. 166-02-19803 to 19805 (19900827).

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

[13] The change to the grievors' work hours was simply that: a change contemplated by clauses 25.04 and 25.05 of the collective agreement, which read as follows:

> ***25.04*** *The Employer will review with the local Alliance representative(s) any change in hours of work which the Employer proposes to institute, when such change will affect the majority of the employees governed by the schedule. In all cases following such reviews, the Employer will, where practical, accommodate such employee representations as may have been conveyed by the Alliance representative(s) during the meeting.*
>
> *By mutual agreement, in writing, the Employer and the local Alliance representative(s) may waive the application of change of shift with no notice provisions.*
>
> ***25.05*** *Scheduled of* [sic] *hours of work shall be posted at least fifteen (15) calendar days in advance of the starting date of the new schedule, and the Employer shall, where practical, arrange schedules which will remain in effect for a period of not less than twenty-eight (28) calendar days. The Employer shall also endeavour, as a matter of policy, to give an employee at least two (2) consecutive days of rest at a time. Such two (2) consecutive days of rest may be separated by a designated paid holiday, and the consecutive days of rest may be in separate calendar weeks.*

[14] Contrary to the grievors' argument, the work was not rotating; nor was it indefinite. The grievors were given a six-week schedule to meet operational requirements. There was no alternation of the schedule, which is suggested by the

notion of "… rotation through two (2) or more periods of eight (8) hours…". There was a single new schedule, not a rotation. If the second criterion is considered, a six-week definite period cannot be considered indefinite.

[15] The employer also invokes its right to set its employees' schedules under the group-specific provisions in Appendix B of the collective agreement.

[16] The employer argues that the parties are bound by the language of the collective agreement. It offers as an example new wording in the subsequent collective agreement negotiated by the parties (albeit for another group) such that employees whose hours of work do not meet the definition of shift work stated at clause 25.01(d) are nevertheless entitled to a shift premium if their hours of work begin before 6 a.m. or end after 6 p.m.

[17] In short, the grievors' work schedule does not meet the requirements of the definition of "shift" and therefore cannot entitle them to a shift premium.

C. The grievors' reply

[18] The grievors reiterate that what occurred was a "rotation" — one state of affairs was replaced temporarily by another arrangement.

[19] However, if the work is done on a non-rotating basis, it can be qualified as "indefinite", i.e., of significant duration. To prevent the shift premium from applying, the employer can simply provide a date far into the future, thus creating a definite period, no matter how lengthy.

[20] Employees can work a normal workday, approximately between 8 a.m. and 4 p.m. If they work regularly outside those hours, or if they work shifts such that shift coverage of 16 hours or more means that they work a significant number of hours outside the regular hours, the collective agreement provides compensation. That reasoning should be applied in this case.

V. Reasons

[21] The parties disagree as to whether the grievors are entitled to a shift premium for a six-week period during which their regular day hours were changed to a new late afternoon and evening schedule. The parties presented little case law on that specific

topic. Both *Samborsky* and *Chafe* were decided before the collective agreement included the definition of "shift".

[22] The construction of the collective agreement requires an application of the following principles of interpretation — words must be given their ordinary meaning, within the larger context of the clauses and the collective agreement in which they are found, having regard to the purpose of the clauses and the collective agreement. (See, generally, *Professional Institute of the Public Service of Canada v. National Research Council of Canada*, 2013 PSLRB 88 at para. 62.) From that perspective, two components of the relevant provisions must be considered: the definition of "shift", and the purpose of the shift premium. I will start with the latter, as it provides the context within which the word "shift" will be interpreted.

[23] In a decision issued in 2006 (*Appleton v. Treasury Board (Department of National Defence)*, 2006 PSLRB 83), again before the term "shift" was defined in the collective agreement, the adjudicator had to decide what warranted the entitlement to a shift premium, and he stated as follows at paragraphs 20 and 21:

> *[20] I begin with the plain language of clause 27.01. However, I do think that one ought to utilize a purposive interpretation. In this regard, I take the employer's point that one needs to look to the context to see if the words are being used in some sense other than their ordinary and dictionary meaning. This is stated in* Canadian Labour Arbitration *at para. 4:2110. Messrs. Brown and Beatty add another purposive qualification to their contextual one with the words ". . . unless to do so would lead to some absurdity. . . ." With these two qualifications in mind, I am persuaded that the focus should not be on the word "shift", but on the phrase "working on shifts", so as to avoid the absurdity of an interpretation that renders meaningless that phrase. Surely all employees are not "working on shifts" within the context of the collective agreement such as to warrant a shift premium for all who happen to work half an hour to an hour before 8:00 a.m. <u>What is the additional substantial burden on an employee's life, in these situations, such as to warrant extra pay by way of a shift premium?</u>*
>
> *[21] I read* Samborsky *in this light. In that case, under the language that preceded clause 27.01 of the collective agreement, Bruno Samborsky was scheduled, with no shift premium, to work 1:00 p.m. to 9:00 p.m., Monday to Friday, as a Visits and Correspondence Officer at the Regional Psychiatric Centre in Abbotsford. His complaint was that these new hours of work ". . . eliminated the attendance of*

> *any evening activity, and in essence, his total social life suffered. . . ." (*Samborsky *at p. 5). The adjudicator rejected the employer's contention that, as the grievor was working a regular shift, it must be considered day work. I understand* Samborsky *to be grounded on the proposition that Bruno Samborsky's lost evenings of social life deserved some compensation in terms of a shift premium. In the context of that case, it is clear to me that the adjudicator's resort to the interpretation of "shift" on the footing of giving it its ordinary or dictionary meaning produces a sensible outcome.*
>
> [Emphasis added]

[24] In the end, the rationale for the shift premium comes from the fact that by scheduling alternating work periods extending over a 16-hour period, the employer is creating a schedule that includes less-desirable hours of work for which there should be compensation.

[25] By defining "shift" in the collective agreement, the parties solved the uncertainty that was obvious in *Samborsky*, *Chafe*, and *Appleton*. The issue here is whether the grievors' work satisfies one or the other criterion of the definition of "shift" found in the collective agreement.

[26] I cannot agree with the grievors' alternative argument that the word "definite" can somehow mean "indefinite". I agree with the employer that plain language cannot be distorted to that point.

[27] However, I believe that the grievors' situation does correspond to the first criterion: "… rotation through two (2) or more periods of eight (8) hours or longer where the Employer requires coverage of sixteen (16) hours or more each day …".

[28] I was provided with dictionary definitions of "rotation" and "*roulement*". I have reproduced below the dictionary definitions that I think correspond best to the essence of shift work:

> *Roulement : [...] alternance de personnes qui se relayent, se remplacent dans un travail*. [from *Nouveau Petit Robert,* edition 2001]
>
> *Rotation : ... a regular succession of members of a group through positions or duties*. [from the *Canadian Oxford Dictionary*, 2nd edition, 2004]

[29] I will now consider the reality of what happened in this case, keeping in mind the purpose of the shift premium as identified earlier in this decision.

[30] The grievors worked as vehicle operators with a 7 a.m. to 3:30 p.m. schedule that applied to operators classified as both GL-MDO-04 and GL-MDO-05. Both teams operate vehicles to transport goods and people. At one point, the employer imposed a second shift, from 3:30 p.m. to midnight for a six-week period, to meet the operational requirements of transporting returning military personnel. Given the requirements of that transport, only those classified as GL-MDO-05 were qualified to work that shift. Those classified as GL-MDO-04 continued with their regular day schedule.

[31] The employer required 16 hours of coverage for transport purposes. There were two shifts of alternating teams of eight hours each that did not overlap. Alternating teams suffices to cover the rotational aspect, according to the dictionary definition of rotation. In short, the temporary situation corresponded to the collective agreement definition of "shift". Since the work schedule corresponded to a shift schedule, those working hours outside the 8 a.m. to 4 p.m. window were entitled to the shift premium provided in clause 27.01.

[32] Moreover, and this supports my conclusion that a shift premium should apply, the newly created shift was significantly disruptive to the grievors' lives for a period of six weeks, just before Christmas. Instead of ending at 3:30 p.m. every day, they worked until midnight, Monday to Friday. That situation certainly illustrates the compensatory purpose of a shift premium.

[33] I am further comforted by the fact that this was actually the employer's first reasoning or at least the advice its labour relations people had given, which is found in Appendix D to the agreed statement of facts: "Yes, the employees are entitled to Shift Premium because the work day [*sic*] at Tn Coy is now from 0700-2400 – which is 17 hours – meeting the definition of a 'shift' – 2 or more periods of 8 hours covering 16 hours."

[34] After receiving that advice, management further discussed the matter and concluded that it was not shift work but simply a schedule change since there was no "rotation". One team could not be substituted for the other. I find that a too narrow definition of "shift", given that both teams had the same duties, i.e., transport, and that providing transport was necessary for 17 hours at a time.

[35] I take the word "rotation" to mean alternating between 2 teams, each working 8 hours, for a total of 16 hours (plus 2 half-hour unpaid meal periods). My view is that for a six-week period, from November 11, 2010, to December 23, 2010, transport services at CFB Petawawa operated on the basis of two shifts. The grievors are entitled to shift premium pay from 4 p.m. to midnight for that period.

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

(The Order appears on the next page)

VI. Order

[37] The grievances are allowed.

[38] I award the grievors shift premium pay, payable for the hours worked from 4 p.m. to midnight, for the entire period at issue, from November 11, 2010 to December 23, 2010.

December 30, 2015.

Marie-Claire Perrault,
a panel of the Public Service Labour Relations and Employment Board