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Citation: 2015 PSLREB 60

Public Service Labour Relations Act Before an adjudicator

BETWEEN

JASON FINLAY

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Indexed as
Finlay v. Deputy Head (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication

Before: Margaret T.A. Shannon, adjudicator

For the Grievor: Arianne Bouchard, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN)

For the Respondent: Joshua Alcock, counsel

Decided on the basis of written submissions,
filed January 23 and February 4, 2015.

I. Individual grievances referred to adjudication

[1] I rendered the decision in this matter on May 27, 2013 (2013 PSLRB 59; "the decision"). Subsequent to that date, the matter was referred by the grievor for judicial review. The Federal Court of Canada's decision on October 14, 2014 (*Jason Finlay v. Attorney General of Canada* (unreported, Federal Court No. T-1123-13, 20141014)), was that the matter be referred back to the former Public Service Labour Relations Board ("the former Board") for a redetermination of the amount of compensation owed to Jason Finlay ("the grievor") for premium pay.

[2] 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 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; "the *Act*") as that *Act* read immediately before that day.

II. Summary of the evidence

[3] At the time material to his grievances, Mr. Finlay was a correctional officer (CX-02) working in the 96-man unit at Kent Institution in British Columbia. The 96-man unit does not use a "spare board"; consequently, only CXs working on that unit are able to work overtime shifts on that unit. Mr. Finlay was suspended on February 3, 2011, with pay pending the outcome of a disciplinary investigation related to certain events in which he allegedly was involved while working on the unit. The process was concluded on November 30, 2011, and the grievor was then deployed to Mountain Institution, also in B.C., on December 5, 2011. On November 30, 2011, he was also advised that he would not receive financial compensation for lost premiums for the period of his administrative suspension with pay.

[4] Following a hearing of the grievances filed by Mr. Finlay, I determined that his deployment to Mountain Institution had been unwarranted disciplinary action. I ordered that he be reinstated to Kent Institution and that he be compensated for lost premiums for the period between September 6, 2011, and December 5, 2011.

[5] The grievor filed his grievance on November 30, 2011, concerning the Correctional Service of Canada's ("the employer") refusal to compensate him for missed overtime shifts, statutory holiday pay, shift differentials and weekend premiums (collectively known as premium pay). In the decision, at paragraph 130, I ordered that the grievor was to be paid shift and weekend premiums and lost overtime based on the average of such payments made to correctional officers employed in the 96-man unit at Kent Institution between September 6, 2011, and December 5, 2011. At paragraph 125 of the decision, I determined that up to November 30, 2011, the grievor had been placed on administrative duties and had been assigned to a regular day shift Monday to Friday, which would mean that up to that date, he would not have been entitled to any of the shift and weekend premiums and overtime.

[6] The Federal Court determined that the decision was insufficient to determine what amount the grievor was due by way of premium pay and for what period.

III. Summary of the arguments

A. For the grievor

[7] The first question to be answered is, for what period is the grievor entitled to premium pay? Paragraph 130 of the decision can be interpreted as referring to the period to be used to calculate the amount of his compensation for premium pay; or some other interpretation is possible, such as the period for which he is entitled to compensation for premium pay. The logical interpretation is that it is meant to refer to the period for which he is entitled to compensation for premium pay.

[8] The basis for this conclusion is that in September 2011, the employer was in possession of all the information that was required to make a decision as to the grievor's guilt and was no longer justified in relying on the "Global Agreement," of the collective agreement between the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN, with the expiry date of May 31, 2010 ("the collective agreement"), to remove him from his regular duties. The grievor should have been reinstated to his regular duties in that September and would then have been entitled to receive his normal pay based on his regular schedule, which includes shift and weekend premiums in addition to the opportunity to work overtime.

[9] Clauses 25.01 and 25.02 of the collective agreement state that the shift premium is payable on shifts between 3:00 p.m. and 7:00 a.m. and that the weekend premium is payable on all hours worked on a Saturday or Sunday. The grievor submits that the calculation of what is owed to him ought to be based on his regular schedule rather than on an average. Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, at para 2:1521, states that in the case of an unjust discharge or suspension, the first calculation is to determine what the grievor would have earned if he or she had worked normal hours for the period in question. The evidence showed that the grievor worked a 6-on-5-off, 6-on-4-off schedule and would work 3 or 4 16-hour day shifts and 2 or 3 10-hour evening shifts. In addition, he would work overtime.

[10] The overtime to which the grievor would be entitled should also be based on the actual opportunities that he missed during the relevant period rather than on an average of the payments to CXs employed in the 96-man unit. To calculate the amount owed to him for missed overtime opportunities, the employer must list all the opportunities that would have been offered to him considering his position on the overtime priority list and should consider that he would have accepted each of them. The overtime calculation should not be limited to that worked by CXs in the 96-man unit but rather should also include that worked in the Main Command and Control Post since the grievor was also trained to work in that area.

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

[11] The sole issue to be determined is the amount of compensation that the adjudicator intended to award the grievor as a result of the decision. At paragraph 130, the adjudicator ordered that the grievor be paid shift and weekend premiums and lost overtime based on the average of such payments made to CXs employed in the 96-man unit at Kent Institution between September 6, 2011, and December 5, 2011. On judicial review, the Court stated that it could not be inferred from the decision or from the order what is to be paid to Mr. Finlay and for what period.

[12] The grievor argues that he is entitled to premium pay for the period from September 6, 2011, to December 5, 2011. This suggestion is without merit. The adjudicator's decision established that the employer was initially justified in suspending the grievor with pay and that during this period, he could have been placed in a position that would have required him to work only a standard workweek,

for which there would have been no entitlement to premiums or access to overtime. It was only as of November 30, 2011, when the grievor was notified of the disposition of the disciplinary investigation that he became entitled to be returned to his prior position and to benefit from the normal employment opportunities available to CXs.

[13] The grievor acknowledged before the Federal Court that his entitlement to premium pay could not start before November 30, 2011. In its order, the Court specifically noted the parties' agreement that the Court ought to amend paragraph 130 of the decision by substituting the date of September 6, 2011, with the date of November 30, 2011.

[14] The grievor's argument is without merit that it was improper to order that the calculation of premium pay owed to him be based on the average payment made to CXs in his former unit over the relevant period. The use of averaging is common practice in arbitral jurisprudence (see *Canada Safeway Ltd. v. United Food and Commercial Workers Union, Local 401*, [1999] A.G.A.A. No. 88 (QL), at para 115; and *Firestone Steel Products of Canada v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 27*, [1974] O.L.A.A. No. 4 (QL), at para 10). It is also within the scope of authority provided to an adjudicator under subsection 228(2) of the *Act*.

[15] The grievor's proposal is unworkable that the employer must list all opportunities that would have been available to him but for his suspension. It is impossible to know what overtime he would have worked during the relevant period. The use of an average avoids this issue, is more practical to implement and recognizes the additional overtime worked by CXs outside the 96-man unit. The average, according to the adjudicator, was that of overtime worked by CXs in the 96-man unit during the period, not overtime worked in the 96-man unit.

IV. Reasons

[16] I will first address the issue of the proper period for which the grievor is entitled to be compensated for premium pay.

[17] The parties agreed before the Federal Court, during the June 4, 2014 hearing that, as noted at page 6 of the Federal Court order, the proper period is November 30, 2011, to December 5, 2011:

> *AND UPON CONSIDERING the agreement of the parties at the June 4, 2014 hearing, that the Court ought to amend paragraph 130 of the Adjudicator's decision by substituting the date of September 6, 2011 with the date of November 30, 2011, thereby identifying November 30, 2011 to December 5, 2011 as being the period for which Mr. Finlay must be compensated for premium pay.*

[18] In his submissions, the grievor indicated that the appropriate period for compensation was from September 6, 2011 to December 5, 2011. He did not, however, address the statement made in the Federal Court's order with respect to the agreement.

[19] Furthermore, at page 8 of its order, the Federal Court found that:

> *… even if the amount of compensation for premium pay that is payable to Mr. Finlay could be identified, the Court lacks jurisdiction under the* Federal Courts Act*, RSC 1985, c F-7 to amend paragraph 130 of the Adjudicator's decision in the context of a judicial review.*

[20] The Federal Court's statement and findings must be taken into account when determining the proper period for compensation. I therefore find that the proper period for which the grievor is entitled to compensation is November 30, 2011 to December 5, 2011. My findings regarding the calculation of shift premiums, weekend premiums and overtime amount follows.

[21] Given that the grievor worked a regular rotation, it should be possible for the parties to determine what line of the schedule he would have been on for those dates had he not been administratively suspended during the period from November 30, 2011, to December 5, 2011. He is entitled to whatever premium pay he would otherwise have been entitled to during this period based on his actual schedule as it should have been had he not been suspended.

[22] As to the calculation of the overtime owed to the grievor, the employer is correct that the determination of the award falls within my jurisdiction under subsection 228(2) of the *Act*, as follows:

> *Decision on grievance*
>
> ***228.*** *(2) After considering the grievance, the adjudicator or the Board, as the case may be,* ***must render a decision, make the order that the adjudicator or the Board consider***

> ***appropriate in the circumstances**, and then send a copy of the order — and, if there are written reasons for the decision, a copy of the reasons — to each party, to the representative of each party and to the bargaining agent, if any, for the bargaining unit to which the employee whose grievance it is [sic] belongs. The adjudicator must also deposit a copy of the order and, if there are written reasons for the decision, a copy of the reasons, with the Chairperson.*
>
> [Emphasis added]

[23] In determining the method for calculating overtime in a case such as this, it is essential to keep in mind that the grievor is being compensated for a lost opportunity, not for being incorrectly paid for work actually performed. The grievor submits that he would have worked all overtime shifts available. There was no evidence provided to me either at the hearing or by way of written submission to prove that this would have been the case. There is no proof of whether he was available or able to work any of the overtime shifts that occurred either in the 96-man unit or elsewhere in Kent Institution. What he has been denied, it is clear, was the opportunity to work overtime for the period from November 30, 2011, to December 5, 2011.

[24] Applying the overtime clause of the collective agreement (clause 21.10) requires the employer to make every reasonable effort to allocate overtime work on an equitable basis among readily available qualified employees and to allocate overtime work to employees at the same group and level as the position to be filled. It does not state that, as the grievor submits, the calculation should take into account his seniority. The most efficacious way of determining an equitable distribution would be to determine the total of number of overtime hours available to CX-02s assigned to the 96-man unit for the period in question divided by how many CX-02s worked that overtime. This approach will determine the average number of overtime hours worked by the CX-02s assigned to the 96-man unit for the period in question and the grievor will be compensated for the missed overtime opportunity in that amount.

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

(The Order appears on the next page)

V. Order

[26] The grievor shall be paid all shift premiums and weekend premiums that would have been due to him during the period from November 30, 2011, to December 5, 2011, as if he had worked his regular schedule in the 96-man unit at Kent Institution.

[27] The grievor shall be paid an amount equal to the average overtime amount paid to CX-02s assigned to the 96-man unit at Kent Institution for the period from November 30, 2011, to December 5, 2011.

[28] Payment of the shift premiums, weekend premiums and overtime amount, shall be paid to the grievor within 60 days of the date of this decision.

[29] I will retain jurisdiction to deal with matters arising out of this order for a period of 90 days from the date of this decision.

July 6, 2015.

Margaret T.A. Shannon,
adjudicator