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Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

JOHN KING AND KAREN E. HOLZER

Grievors

and

CANADA CUSTOMS AND REVENUE AGENCY

Employer

Before: Yvon Tarte, Chairperson

For the Grievors: David Landry, Public Service Alliance of Canada

For the Employer: Stéphane Arcelin, Department of Justice

Heard at Toronto, Ontario,
September 27, 2001.

[1] The three grievances which gave rise to these references to adjudication are concerned with the interpretation of Article 43 of the collective agreement between the Canada Customs and Revenue Agency (CCRA) and the Public Service Alliance of Canada (PSAC) signed by the parties on June 23, 2000 (Exhibit G-1).

[2] Article 43, entitled "Leave with pay for family-related responsibilities" reads as follows:

> *43.01 For the purpose of this Article, family is defined as spouse (or common-law spouse resident with the employee), dependent children (including foster children or children of legal or common-law spouse), parents (including step-parents or foster parents), or any relative permanently residing in the employee's household or with whom the employee permanently resides.*
>
> *43.02 The total leave with pay which may be granted under this Article shall not exceed five (5) days in a fiscal year.*
>
> *43.03 Subject to clause 43.02, the Employer shall grant leave with pay under the following circumstances:*
>
> > *(a) up to one (1) day to take a dependent family member for medical or dental appointments, or for appointments with school authorities or adoption agencies, if the supervisor was notified of the appointment as far in advanced as possible;*
> >
> > *(b) to provide for the immediate and temporary care of a sick member of the employee's family and to provide an employee with time to make alternate care arrangements where the illness is of a longer duration;*
> >
> > *(c) to provide for the immediate and temporary care of an elderly member of the employee's family;*
> >
> > *(d) two (2) days leave with pay for needs directly related to the birth or to the adoption of the employee's child, which may be divided into two (2) periods and granted on separate days.*

Background

[3] With the agreement of the parties, Mr. King testified on behalf of both grievors. Mr. King and Ms. Holzer work variable shifts. Mr. King works an 8.5 hour shift as a Customs Officer at the Pearson International Airport whereas Ms. Holzer works a 10 hour shift at the Calgary International Airport.

[4] Subsection 25.23 of the collective agreement (Exhibit G-1) permits the establishment of Variable Shift Schedule Arrangements (VSSA) at the local level. The relevant provisions of the collective agreement are as follows:

> *25.23 Variable Shift Schedule Arrangements*
>
> *(a) Notwithstanding the provisions of clauses 25.05 and 25.13 to 25.22 inclusive, consultation may be held at the local level with a view to establishing shift schedules which may be different from those established in clauses 25.13 and 25.17. Such consultation will include all aspects of arrangements of shift schedules.*
>
> *(b) Once a mutually acceptable agreement is reached at the local level, the proposed variable shift schedule will be submitted at the respective Employer and Alliance Headquarters levels before implementation.*
>
> *(c) Both parties will endeavour to meet the preferences of the employees in regard to such arrangements.*
>
> *(d) It is understood that the flexible application of such arrangements must not be incompatible with the intent and spirit of provisions otherwise governing such arrangements. Such flexible application of this clause must respect the average hours of work over the duration of the master schedule and must be consistent with the operational requirements as determined by the Employer.*
>
> *(e) Employees covered by this clause shall be subject to the Variable Hours of Work provisions established in clauses 25.24 to 25.27, inclusive.*
>
> *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 (7½) 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 (37½) hours of work per week over the life of the schedule.

(i) The maximum live of a shift schedule shall be six (6) months.

(ii) The maximum life of other types of schedule shall be twenty-eight (28) days, except when the normal weekly and daily hours of work are varied by the Employer to allow for summer and winter hours in accordance with clause 25.10, in which case the life of a schedule shall be one (1) year.

(c) Whenever an employee changes his or her variable hours or no longer works variable hours, all appropriate adjustments will be made.

25.27 Specific Application of this Agreement

For greater certainty, the following provisions of this Agreement shall be administered as provided herein:

(a) Interpretation and Definitions (clause 2.01)

"Daily rate of pay" - shall not apply.

(b) Minimum Number of Hours Between Shifts

Paragraph 25.14(a), relating to the minimum period between the termination and commencement of the employee's next shift, shall not apply.

(c) Exchange of Shifts (clause 25.21)

On exchange of shifts between employees, the Employer shall pay as if no exchange had occurred.

(d) Overtime (clauses 28.06 and 28.07)

Overtime shall be compensated for all work performed in excess of an employee's scheduled hours of work on regular working days or on days of rest at time and three quarter (1¾).

Alternate provision

This sub-clause applies to employees in the Education and Library Science Group only.

Overtime shall be compensated for all work performed:

(a) in excess of an employee's scheduled hours of work on a scheduled working day in accordance with the provisions of this Agreement;

(b) on days of rest at time and one-half (1½) except that if the overtime is worked by the employee on two (2) or more consecutive and contiguous days of rest, the employee shall be paid at double time for each hour worked on the second and subsequent days of rest. Second and subsequent days of rest means the second and subsequent days in an unbroken series of consecutive and contiguous calendar days or rest.

(e) Designated Paid Holidays (clause 30.08)

(i) A designated paid holiday shall account for seven and one-half (7½) hours.

(ii) When an employee works on a Designated Paid Holiday, the employee shall be compensated, in addition to the pay for the hours specified in subparagraph (i), at time and one-half (1½) up to his or her regular scheduled hours worked and at double (2) time for all hours worked in excess of his or her regular scheduled hours.

(f) Travel

Overtime compensation referred to in clause 32.06 shall only be applicable on a work day for hours in excess of the employee's daily scheduled hours of work.

(g) Acting Pay

The qualifying period for acting pay as specified in paragraph 64.07(a) shall be converted to hours.

[5] VSSAs were entered into between the PSAC and the CCRA for the Pearson International Airport (Exhibit G-2) and the Calgary International Airport (Exhibit G-3). These documents set out in general terms the local agreements for the establishment of variable shift schedules. In essence the Pearson document calls for an 8 hour and 34 minute workday while the Calgary agreement calls for a 10 hour work day. Neither of the local agreements defines the word day.

[6] During the year Mr. King used up his allotted 5 days of leave for family related responsibilities under article 43 of the collective agreement. Mr. King was then required to pay back 5.35 hours. The employer justified its decision on the basis that under Article 43, employees are entitled to a maximum of five 7.5 hour days for a total of 37.5 hours. Since the grievor had missed five 8.57 hour shifts during his absences on family related leave for a total of 42.85 hours, the employer concluded that Mr. King owed it 5.35 hours (42.85 - 37.5). That amount was reclaimed by the employer (Exhibit G-4).

[7] The fact surrounding Ms. Holzer's grievances were not presented in detail since the principles involved in all cases are the same. The employer contends that Ms. Holzer is only entitled the 37.5 hours of family-related leave under article 43. Ms. Holzer on the other hand argues that her entitlement to five days of family related leave amounts to 50 hours.

[8] Mr. King also testified that he had previously received a 10 day suspension for misconduct. He had then argued that a 10 day suspension should amount to no more than 75 hours of suspension if the normal 7.5 hours work day was used. The employer replied at the final level of the grievance process in that case (Exhibit G-5) that since his work day was 8.57 hours, a ten day suspension equalled 85.7 hours and not 75.

[9] Bruce Herd is a staff relations advisor at the CCRA. He testified that all employees working under a VSSA work an average of 37.5 hours per week over a period of 56 days. Shift lengths for employees working under VSSAs vary from 7 hours to 13.5 hours.

Arguments

For the grievors

[10] Leave is defined in article 2 of the collective agreement as an "authorized absence from duty by an employee during his or her regular or normal hours of work". It therefore stands to reason that if an employee's daily regular hours of work total 8.57, a day of leave under clause 43.02 must also amount to 8.57 hours.

[11] Clause 43.02 limits the entitlement to 5 days not 37.5 hours.

[12] In clause 25.01 of the collective agreement a day is defined as "a twenty-four (24) hour period commencing at 00.00 hours". Article 25 deals with hours of work.

[13] Clause 33.01 clearly states that "when leave is granted, it will be granted on an hourly basis and the number of hours debited for each day of leave being equal to the number of hours of work scheduled for the employee for the day in question".

[14] In support of their position the grievors referred to *André Robert and Treasury Board* (Board file 166-2-14790), *Elizabeth Traicus and Treasury Board* (Board file 166-2-19016) and *Alan Phillips and Treasury Board* (Board file 166-2-20099).

For the employer

[15] The collective agreement definition of leave states simply that leave will be taken during regular working hours and nothing more. It does not state that a day of leave equals the regular hours worked by an employee.

[16] On the other hand, a normal workday is defined in clause 25.06 as 7.5 consecutive hours.

[17] The VSSA provisions of the collective agreement allow for the establishment of variable shifts but do not change the meaning of the word day nor do they define it. Under a VSSA, an employee works 300 hours over 56 days which in the end averages out to the number of hours worked by an employee on a standard 7.5 hour shift.

[18] The grievors' interpretation of article 43 violates the terms of clause 25.25 which states that the implementation of a VSSA shall not result in additional overtime or additional payment.

[19] The general clause of the collective agreement dealing with leave (33.01) requires that leave credits be converted to hours. Given that under clause 43.02 family related leave cannot exceed 5 days, it becomes obvious that the 5 days must be converted to 37.5 hours.

[20] The *Traicus* and *Phillips* cases can be distinguished on the facts from the cases at hand. The *Leonard King and Treasury Board* (Board file 166-2-15473) dealing with vacation leave supports the employer's position.

Reasons for decision

[21] These cases deal with the interpretation of the word day in article 43 of the collective agreement. Although the word day is not defined for the purposes of family related leave and although arguments can be made for both interpretations being advanced by the parties, I believe that the position taken by the grievors and their bargaining agent is the most appropriate in the circumstances.

[22] A normal interpretation of the word day as a period of 24 hours is consistent with the intent and scheme of the collective agreement. Unless otherwise specified, as in the case of earned vacation or sick leave, a day must mean just that. This view is supported by the employer's own interpretation of the 10 day suspension imposed on Mr. King. In that case the employer argued that, given the grievor's shift work, a 10 day suspension amounted to 85.4 hours and not the standard 75 hours.

[23] It is also supported by the fact that in subclause 25.27(*g*) the parties have specifically called for the conversion into hours of the acting pay qualifying period expressed in days in the collective agreement. A similar provision could easily have been inserted in the collective agreement with respect to the period of time available for family related leave.

[24] As was stated in the Phillips case (*supra*) p. 32 "... the employer's view would perpetrate an unfairness on those employees who work long shifts ...". The events giving rise to family related leave do not fit within the confines of a 7.5 hour shift.

[25] As in the *Phillips* case (*supra*) clause 45.01 dealing with marriage leave sheds some light on the question. In that case the adjudicator, at pages 32-33, stated:

> *Clause M-21.01 Marriage Leave With Pay [...] specifies that "providing an employee gives the employer at least five (5) days notice, the employee shall be granted five (5) days marriage leave with pay for the purpose of getting married". In this provision, the term "day" is used for two purposes: firstly, as the basis for notice to the employer and secondly, in describing the entitlement. It is inconceivable to me that the notice required under this provision is in effect a little over two days for those employees who are working 18-hour shifts. Surely it would be quite disruptive to the employer's operation if the entitlement in this provision could be triggered on such short notice. A more logical interpretation would be that both the entitlement in respect of marriage leave and the entitlement to leave for family-related responsibilities were intended to allow the employee sufficient time off to respond to the real needs of employees which are envisaged in these provisions. To interpret it otherwise is neither consistent with the terms of the agreement nor would it be equitable to the employees as a whole.*

[26] I should add that the *Phillips* decision (*supra*) was decided in 1991. The employer has had ample opportunity and time to clarify the meaning of the word day in the family related leave provisions of the collective agreement in subsequent rounds of collective bargaining had it wished to do so.

[27] Finally, I do not believe that this interpretation of the provisions dealing with family related leave violate clause 25.25 of the collective agreement since article 43 contemplates the granting of such leave on the basis of a 24 hour period.

[28] The grievances of Mr. King and Ms. Holzer are allowed. Any time docked from the grievors pay as a result of the employer's interpretation of clause 43.02 of the collective agreement will be returned to them.

Yvon Tarte,
Chairperson

Ottawa, November 2, 2001.