Date: 20040520

Files: 166-2-31579
166-2-31580

Citation: 2004 PSSRB 41

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

MARIE-ÈVE BOUCHARD AND MÉLANIE CÔTÉ

Grievors

and

TREASURY BOARD
(Agriculture and Agri-Food Canada)

Employer

Before: Sylvie Matteau, Deputy Chairperson

For the Grievors: Rachel Dugas, Public Service Alliance of Canada

For the Employer: Stéphane Hould, Counsel

(Decision rendered without hearing)

[1] With the agreement of the parties, these cases were combined and submitted to adjudication without a hearing. The parties filed a joint statement of facts, accompanied by their respective supporting evidence and arguments.

[2] The grievances relate to the interpretation of two provisions of the collective agreement relating to volunteer leave and personal leave as they are to be applied in the case of the two grievors, who work in the same service on a variable work schedule.

Evidence

[3] The facts and exhibits were presented as follows:

[Translation]

1. *The grievors are employed at Agriculture and Agri-Food Canada, Research Section, in Lennoxville, Quebec;*

2. *They hold positions as cattle attendants, GL-MAN-06;*

3. *The applicable collective agreement is the Agreement between Treasury Board and the Public Service Alliance of Canada – Operational Services Group, signed on November 19, 2001, and expiring on August 4, 2003;*

4. *This collective agreement contains two new articles allowing for one day of paid leave each fiscal year, specifically, clause 41.01 "Volunteer Leave" and clause 52.02 "Personal Leave";*

5. *The fiscal year end is March 31 of each year;*

6. *Between October 2001 and June 2002, the grievors worked 40 hours per week, or 10 hours per day according to the schedule set by the employer for the period from October 24, 2001, to June 30, 2002, for Marie-Ève Bouchard and for the period from October 22, 2001, to June 30, 2002, for Mélanie Côté;*

Exhibit S-1: Letters from Jean-Pierre Charuest dated September 27, 2001 (bundled)

7. *The work shift is from 6:00 a.m. to 5:00 p.m. (10 hours of work);*

8. *The grievors asked for volunteer leave and personal leave for various periods between January 2002 and June 2002;*

(A) Marie-Ève Bouchard requested:

- personal leave for January 4, 2002, from 6:00 a.m. to 5:00 p.m., a period a 10 hours (request of December 21, 2001), approved for 8 hours by the employer on December 28, 2001);

Exhibit S-2: Leave request of December 21, 2001

- volunteer leave for February 13, 2002, from 6:00 a.m. to 5:00 p.m., a period of 10 hours (request of February 8, 2002, approved for 8 hours by the employer on February 11, 2002);

Exhibit S-3: Leave request of February 8, 2002

- personal leave for May 24, 2002, from 8:00 a.m. to 5:00 p.m., a period of 8 hours and annual leave of 2 hours, given the interpretation of the employer who refused to pay 10 hours of personal leave (request of May 15, 2002, approved by the employer on May 16, 2002);

Exhibit S-4: Leave request of February 15, 2002

- volunteer leave for June 5, 2002, from 6:00 a.m. to 5:00 p.m., a period of 10 hours (request of May 29, 2002, approved for 8 hours by the employer on May 30, 2002);

Exhibit S-5: Leave request of May 29, 2002

(B) Mélanie Côté requested:

- volunteer leave for March 5, 2002, from 6:00 a.m. to 5:00 p.m., a period of 10 hours (request of February 19, 2002, approved for 8 hours by the employer on March 1, 2002);

Exhibit S-6: Leave request of February 19, 2002

- personal leave for March 16, 2002, from 6:00 a.m. to 5:00 p.m., a period of 10 hours (request of March 4, 2002, approved for 8 hours by the employer on April 5, 2002);

Exhibit S-7: Leave request of March 4, 2002

- personal leave for June 11, 2002, from 6:00 a.m. to 5:00 p.m., a period of 10 hours (request of May 29, 2002, approved for 8 hours by the employer on May 30, 2002);

Exhibit S-8: Leave request of May 29, 2002

- volunteer leave for June 12, 2002, from 6:00 a.m. to 5:00 p.m., a period of 10 hours (request of May 29, 2002, approved for 8 hours by the employer on May 30, 2002);

Exhibit S-8: Leave request of May 29, 2002

9. The employer approved 8 hours of leave but refused the 2 additional hours;

10. The grievors therefore filled out leave forms again for 2 additional hours for each day of leave;

11. Marie-Ève Bouchard amended her requests for leave (request of April 2002, approved by the employer on April 5, 2002; request of May 31, 2002, approved by the employer on May 31, 2002);

Exhibit S-9: Amended request of April 2002
Exhibit S-10: Amended request of May 31, 2002

12. Mélanie Côté amended her requests for leave (request of February 19, 2002, approved by the employer on March 1, 2002; request of March 4, 2002, approved by the employer on March 20, 2002; request of June 4, 2002, approved by the employer on July 9, 2002);

Exhibit S-6: Amended request of February 19, 2002;
Exhibit S-7: Amended request of March 4, 2002;
Exhibit S-8: Amended request of June 4, 2002;

13. On April 24, 2002, the grievors filed grievances 8753 and 8754:

[Translation]

"The employer is not in compliance with the articles set out in Part B of the grievance form for the group collective agreement: Operational Services: clauses 25.01, 25.02(a); 25.03, 25.04, 25.05, 34.01(a) and (b);"

14. The grievors are seeking the following corrective action:

[Translation]

"I request that the collective agreement be respected;

I request that I not be subject to any prejudice as a result of this grievance;

I request that my days of volunteer leave and personal leave be granted for the number of hours indicated on my work schedule: 6:00 a.m. to 5:00 p.m. schedule = 10 hours per day;

- I request that I be present at the hearing at all levels of the grievance process and that this be at the employer's cost;

- I request that my leave bank be credited with 4 (four) hours of annual leave that were deducted or that four (4) hours not be deducted;"

15. *The employer dismissed the grievor's grievances at the final level of the grievance process.*

[4] The parties' arguments are reproduced in their entirety, with the exception of some repetition. All decisions to which they referred were included in the file and were taken into consideration in this decision.

Grievor's arguments

[Translation]

These grievances deal with the interpretation of the concept of "day" in order to determine what benefits the grievors can receive by taking volunteer leave (clause 41.01) and personal leave (clause 52.02). The relevant clauses of the collective agreement follow:

> *41.01 Volunteer Leave: Subject to operational requirements as determined by the Employer and with an advance notice of at least five (5) working days, the employee shall be granted, in each fiscal year, one (1) day of leave with pay to work as a volunteer for a charitable or community organisation or activity, other than for activities related to the Government of Canada Workplace Charitable Campaign.*
>
> *The leave will be scheduled at times convenient to both the employee and the Employer. Nevertheless, the Employer shall make every reasonable effort to grant the leave at such times as the employee may request.*
>
> *52.02 Personal Leave: Subject to operational requirements as determined by the Employer and with an advance notice of at least five (5) working days, the employee shall be granted, in each fiscal year, one (1) day of leave with pay for reasons of a personal nature.*
>
> *The leave will be scheduled at times convenient to both the employee and the Employer. Nevertheless, the Employer shall make every reasonable effort to grant the leaves at such times as the employee may request.*

1. Res judicata*:*

Interpretation of the concept of "day" has been the subject of several grievances before the Public Service Staff Relations Board (PSSRB). This is not the first time that the interpretation of this concept has been in dispute with respect to volunteer leave and personal leave. The issue was previously decided in Stockdale et al.*, 2004 PSSRB 4 (166-2-32069).*

That case involved thirteen (13) grievors in the GT classification. They were governed by the collective agreement of the Technical Services group, which was signed on

November 19, 2001, and expired on June 21, 2003. That collective agreement contained two new leave articles, specifically, clause 46.01 "Volunteer Leave" and clause 55.02 "Personal Leave", which read as follows:

> *46.01 Volunteer Leave: Subject to operational requirements as determined by the Employer and with an advance notice of at least five (5) working days, the employee shall be granted, in each fiscal year, one (1) day of leave with pay to work as a volunteer for a charitable or community organization or activity, other than for activities related to the Government of Canada Workplace Charitable Campaign;*
>
> *The leave shall be scheduled at times convenient to both the employee and the Employer. Nevertheless, the Employer shall make every reasonable effort to grant the leaves at such times as the employee may request.*
>
> *55.02 Personal Leave: Subject to operational requirements as determined by the Employer and with an advance notice of at least five (5) working days, the employee shall be granted, in each fiscal year, one (1) day of leave with pay for reasons of a personal nature.*
>
> *The leave shall be scheduled at times convenient to both the employee and the Employer. Nevertheless, the Employer shall make every reasonable effort to grant the leaves at such times as the employee may request.*

Mr. Stockdale and the others worked 12-hour shifts under a variable shift schedule. Their work shifts were from 7:00 a.m. to 7:00 p.m.

The employer informed the grievors who requested 12 hours of leave that its interpretation of a day of leave was 7.5 hours and that the grievors were required to cover the additional 4.5 hours requested.

Comparing Stockdale et al. *to this case, we note that:*

- *It concerns the same parties to the collective agreement, namely, the Public Service Alliance of Canada and Treasury Board;*
- *The facts are practically the same, that is, employees working variable schedules where the hours exceed a "normal" day of work according to the employer;*
- *The wording of the articles dealing with volunteer and personal leave is the same;*
- *The dispute is the same, namely, the interpretation of the "day of leave" concept.*

Although the Board does not strictly apply the doctrines of res judicata *and* stare decisis, *the Board did adopt the following rule in* Francoeur *(166-2-25922), at page 7:*

> *Consequently, the doctrine of res judicata should not be applied rigidly in the field of labour relations in the federal Public Service. Nevertheless, a previous decision of a tribunal or of a member of a tribunal involving the same issue should be followed in a subsequent case* a fortiori *if it involves the*

> *same parties and the same collective agreement, except where this initial decision is manifestly wrong. (Emphasis added)*

The Board should follow the decision in Stockdale et al. *because it involves the same parties and the same wording of the articles relating to volunteer leave and personal leave.*

2. Certainty, consistency, stability and predictability with previous decisions:

Alternatively, we submit that if the Board determines there is no res judicata, *it must adhere to the reasons of Adjudicator Mackenzie in* Stockdale et al. *Based on the decision in* King and Holzer, *2001 PSSRB 117 (166-2-30346, 30638 and 30639), Adjudicator Mackenzie ruled as follows, at page 8, paragraphs 34 and 35:*

> *[...]*
>
> *The decision of this Board in* King and Holzer (supra) *involved the interpretation of "day" under the family responsibility leave provisions for a different collective agreement. The decision was upheld by the Federal Court* (Canada v. King (supra)*). Mr. Done argued that I was bound by the decision in* King and Holzer. *I cannot agree that I am bound by this decision, since it involves different leave provisions and a different collective agreement.*
>
> *However, the reasons in that decision are persuasive, as are the comments of the judge in the judicial review of that decision. The reasons are persuasive because they relate to a similar leave provision, with similar contract language. In the interests of consistency and certainty in labour relations, similar provisions should be interpreted similarly, unless there is a strong reason for changing that interpretation. It should be noted that although these grievances before me relate to a different collective agreement, the contract language is related to variable shift arrangements is identical.*

This same reasoning was explained by Adjudicator Kuttner in Breau et al, *2003 PSSRB 65 (166-2-31278 to 80), page 12, and by Vice-Chairperson Potter in* Mackie, *2003 PSSRB 103 (166-2-32060), page 5.*

3. "Day"

In King and Holzer, *Chairperson Tarte found that a normal interpretation of a "day" as a period of twenty-four (24) hours is consistent with the intent of the collective agreement, as was the case in* Stockdale et al.

In addition, in King and Holzer, *"day" is defined in the article relating to hours of work, as it is in clause 25.01 in this case, as:*

> *25.01: For the purposes of this Article:*

> *(a) "day" means a twenty-four (24) hour period commencing at 00:00 hour;*

Unless otherwise indicated in the collective agreement, as is the case with earned annual and sick leave, a day can only mean a period of 24 hours.

This interpretation was also supported in King and Holzer *by the fact that the parties had provided for the conversion into hours of the acting pay qualifying period (paragraph 25.13(f)) but that this conversion of days into hours did not exist for family-related leave. The situation was the same in* Stockdale et al. *and in* Phillips, *166-2-20099, page 32. It is also true in this case as indicated in paragraph 28.06(g). The Federal Court of Appeal - Trial Division ((2000) FCJ No. 1887) also confirmed this interpretation. Moreover, the Federal Court of Appeal (2002 FCA 178) denied the employer's application for appeal on May 7, 2002.*

In Stockdale et al., *Adjudicator Mackenzie offers further clarification at page 10 of his decision:*

> *[...]*
>
> *As with family-related leave, the personal leave and volunteer leave provisions are not "earned daily leave" and fall outside the provisions in the agreement that provide for the conversion of leave to hours (paragraph 37.01(a)). Although it may be counsel for the employer's opinion that these are "extra holiday days", the collective agreement language cannot support such a view. Volunteer leave is defined as a day of leave with pay "to work as a volunteer for a charitable or community organization or activity". Personal leave is defined as a day of leave with pay "for reasons of a personal nature". The leave does not accumulate and must be used within each fiscal year, similar to family-related leave.*

It therefore appears that volunteer leave and personal leave do not accumulate and consequently, cannot be converted into hours. There is no reason for the Board to deviate from the interpretation of Adjudicator Mackenzie in Stockdale et al., *a case that dealt with the same leave as in this instance.*

4. "Leave"

"Leave" is defined in clause 2.01, the provision that gives the definitions for the collective agreement:

> *2.01 For the purpose of this Agreement:*
>
> *(o) "leave" means authorised absence from duty by an employee during his or her regular or normal hours of work.*

Since the grievors' regular or normal hours of work are ten (10) hours per day and this concept is fully defined above, a day of leave under clauses 41.01 and 52.02 must also represent ten (10) hours.

[5] The grievors are seeking the following corrective action:

[Translation]

After rendering five decisions on the concept of "day" in Phillips, King and Holzer, Breau et al., Mackie, *and* Stockdale et al., *we are asking the Board to provide a consistent interpretation of "day" and consequently, to allow the grievors' grievances and to reimburse them for the annual leave credits they were required to debit from their leave banks.*

Employer's arguments

[Translation]

Introduction

These grievances relate to the interpretation of the new collective agreement to determine the length of a "day" of leave in the particular context of employees working a variable schedule. The issue is to interpret the provisions granting paid volunteer leave and paid leave for personal reasons. There is no question that taking this type of leave in a context of a variable schedule necessarily produces, depending on the interpretation given to "day", inequitable results for the parties, depending on the length of the shift. The employer submits that, in this case, the only interpretation of "day" that works with the sine qua non *condition for the implementation of variable hours, namely, the absence of additional costs, is that of the "normal" work day specified in the agreement, specifically, 8 hours for employees working an average of 40 hours per week.*

[...]

Arguments

Doctrine of res judicata

The bargaining agent argues that the issue in this case was previously decided in Stockdale et al., *2004 PSSRB 4. Ms. Dugas invokes the identity of the parties and the wording of the clauses considered. For these reasons, she urges the Board to adopt the approach of the adjudicator in* Francoeur, *1995 PSSRB 6, and allow the grievances in this case.*

The employer argues that the Board cannot apply the doctrine of res judicata *to this case because the case involves a different collective agreement from that examined in* Stockdale et al. (supra)*. In effect, while the doctrine of* res judicata *is not generally applied by the Board, at the very least the issue must be the same for the said doctrine to apply in law. Accordingly, an adjudicator asked to interpret clauses of a collective agreement must do so in a general context, that is, taking into consideration all of the provisions of that agreement in order to determine the intent of the parties. Even if there are identical provisions in two agreements involving the same parties, the adjudicator obviously must consider them in the context of all of the provisions specific to* each *agreement. In this case, the issue is different from the one considered by the adjudicator in* Stockdale et al. *and the adjudicator seized with this case must consider all of the provisions of the relevant agreement.*

Certainty, consistency, stability with previous decisions

In the interest of maintaining stability and certainty in labour relations, the bargaining agent alternatively asks the Board to simply adhere to the reasoning of the adjudicator in Stockdale et al., *who relied on the interpretation of "day" given in* King and Holzer, *2001 PSSRB 89. With respect, the employer argues that the adjudicator in this case should not adhere to the reasoning set out in* Stockdale et al. *because the adjudicator in that case did not give due consideration to the impact that his preferred interpretation had on the principle of the neutrality of costs in regard to the implementation of variable hours. Furthermore, the principle of stability and certainty in labour relations is not binding on the adjudicator and therefore does not restrict him to only one possible interpretation when examining similar provisions. In other words, the principle invoked by the bargaining agent does not have the consequence of establishing the "correct" interpretation in law to be applied to a "day" of leave. An adjudicator is free to reach a different interpretation from those of his predecessors or, if applicable, to change his own approach. In the context of an application for judicial review of an arbitral decision, the principle of consistency was identified and analysed in this regard by the Ontario Court of Appeal in* Essex County Roman Catholic School Board v. OECTA, *205 DLR (4th) 700. In considering its own analysis in* Lanark, *where a different interpretation of the same provision contained in the same agreement stood up to the test of "patently unreasonable", the Court reached the following conclusion (paragraphs 34 and 35):*

> *In short, Osborne J.A. was dealing only with the matter before the court – was arbitrator Picher's award patently unreasonable? He was not trying to resolve conflicts in the arbitral jurisprudence or enumerate a "correct" and, therefore, binding precedent for future arbitrations. This is evident from his observation, "**I do not think that the goal of consistency and thus predictability can trigger a correctness standard of review** (to resolve conflict in arbitral jurisprudence) when the standard of review would otherwise be patent unreasonableness" (p.441). See also: Domtar...*
>
> *In summary, since this court's decision in Lanark determined only that arbitrator Picher's award was not patently unreasonable, it remained open for a different arbitrator to make a different award, provided that is was not patently unreasonable. It follows that the Divisional Court erred by concluding that it was unreasonable for arbitrator Brown to interpret article 7.2(d) in a fashion different from the interpretation of arbitrator Picher. (Emphasis added)*

The court ultimately upheld the appeal, found that the interpretation before it, even though different from that in Lanark, *was also valid and therefore reversed the decision of the Trial Division court.*

"Day"

In terms of the length of a "day of leave", the period is not explicitly defined in the collective agreement. This period could not be 24 hours as the bargaining agent claims based on the language of the clause dealing with hours of work (25.01). This 24-hour period cannot be interpreted as intending to indicate the hours of work because the result would be ridiculous, with article 25.02(a) reading as follows with this conversion inserted: "For employees who work five (5) consecutive (periods of 24 hours) per week on a regular [...] basis...". It is clear that the intent here was rather to define

the day for the purpose of establishing the schedule as a calendar day and not to define the length of a "day" of work or leave. In the instant case, to define the length of a "day" of work, it is necessary to refer to clauses 25.02(a) and (b). By reference to Appendix B, clauses 2.02 and 2.03, the normal length of a day of work is 8 hours.

Relying on the interpretation used in King and Holzer, *the bargaining agent claims that, unless otherwise indicated, as is the case with the table for conversion into hours for "earned" leave, a day of leave must be interpreted as being 24 hours. This reasoning is based on the premise that a calendar day (24 hours) is the concept referred to by default or implicitly when parties use the word "day".*

Respectfully, this reasoning is not supported by the language used in the provisions specific to leave, and in particular in clause 34.01:

> *34.01*
> *(a) When an employee becomes subject to this Agreement, his or her earned daily leave credits shall be converted into hours. When an employee ceases to be subject to this Agreement, his or her earned hourly leave credits shall be reconverted into days, with one (1) day being equal to seven and one-half (7 1/2) hours.*
>
> *(b) 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.*
>
> *(c) Notwithstanding the above, in Article 46, Bereavement Leave with Pay, a "day" will mean a calendar day. (Emphasis added)*

On the one hand, paragraph (b) indicates that leave is granted on an hourly basis, but the parties remain silent on the quantum and there is no reference to the type of leave concerned. On the other hand, paragraph (a) states that a conversion using 7.5 hours applies to "earned" leave. This means that the parties provided for the conversion into hours of all leave, specifying that it is 7.5 hours for earned leave. If the implicit intent had been to give the meaning of a calendar day to leave other than that which is "earned", it would have been unnecessary to include paragraph (c), as it renders provisions (a) and (b) inoperative and confirms the intent to grant bereavement leave, as an exception, on the basis of 24-hour periods.

But how many hours did the parties intend to grant for the length of a day of "unearned" leave? Since it is clear that it is not the meaning of a calendar day, the only logical and fair interpretation is that of the normal number of daily hours of work, or 8 hours for employees working an average of 40 hours per week and 7.5 hours for employees working an average of 37.5 hours per week. As mentioned under the next heading, establishing a variable schedule does not alter the average weekly hours of work and, consequently, should not alter the length of leave.

Lastly, on page 9 of her notes, the bargaining agent cites Breau et al., *2003 PSSRB 65 and* Mackie, *2003 PSSRB 103, as part of a series of decisions by the Board dealing with the concept of "day". With respect, the employer submits that they deal instead with the interpretation of provisions related to pay administration, and specifically, to the*

calculation of the rate increase when employees work a holiday. Since these two decisions do not deal with the interpretation of the length of a day of leave, the employer argues that they do not shed any light on the matter before the adjudicator in this case.

Principle of the neutrality of costs

Maintaining the neutrality of costs is an essential condition to implementing variable schedules. The language of clause 28.04 is unequivocal with respect to the intent of the parties:

> *Terms and Conditions Governing the Administration of Variable Hours of Work*
>
> *28.04 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...*

The mandatory nature of this clause is clear. By using the words "notwithstanding anything to the contrary" and "shall not", the parties wanted to establish the primacy of the principle of the neutrality of costs over any language in the agreement producing a contrary effect. The adjudicator is therefore bound by that condition in the interpretation that he gives to "day" in the context of the length of leave, and he must give an interpretation that respects this principle, even if that results in a different interpretation of "day" depending on the provision considered. The principle of the neutrality of costs was recognized by the adjudicator in Diotte, *2003 PSSRB 74, para. 22.*

Establishing a variable work schedule changes the length of a normal shift, which is 8 hours according to the agreement in this case (see clauses 2.02 and 2.03 in Appendix B) in order to give the employee more days of rest. It does not alter the total number of hours of work that...

Contrary to the adjudicator's decision in Stockdale et al. (para. 40), the employer respectfully submits that granting volunteer leave or personal leave for a period longer than that granted when the employee worked a normal 8-hour shift, results in additional payment, even though said payment benefits another person. As for the reasons invoked by the adjudicator in Stockdale et al. *(para. 40), with respect, there is nothing in the language of clause 25.11 (28.04 in this case) that indicates that the additional payment must benefit the employee taking the leave.*

Replacing an employee for a period of 10 hours rather than 8 hours necessarily leads to an additional payment that the employer must defray. The only way to comply with clause 28.04 when interpreting the length of leave being considered in this case is to maintain the status quo, that is, to grant 8 hours of leave, the period that the employee received prior to the implementation of the variable schedule. This faithfully reflects the intent of the parties who could not have wanted two employees covered by the same collective agreement and performing on average the same number of hours of work weekly to receive different benefits based solely on the difference in the number of hours they work daily. In a scenario in which the variable work schedule would be established weekly based on three 12-hour shifts and one 4-hour shift (total of 40 hours), the bargaining agent would surely adopt the employer's position and not the one being

proposed in this case if the employee was granted his leave, because of operational requirements, on the day on which his 4-hour shift is scheduled.

Conclusion

For all these reasons, the employer asks the adjudicator to dismiss the grievors' grievances, since clauses 41.01 and 52.02 of the collective agreement were respected.

Reply

[6] In reply, the grievors' representative argues that:

[Translation]

1. Res judicata:

The employer states at page 5 of its arguments that "In this case, the issue is different from the one considered by the adjudicator in Stockdale et al.*....". However, the employer does not indicate how this issue is different.*

We respectfully submit that it is the same issue, namely, the interpretation of "day of leave".

2. Certainty, consistency, stability and predictability with previous decisions:

The employer argues at page 5 that in Stockdale et al.*, Adjudicator Mackenzie "did not give due consideration to the impact that his preferred interpretation had on the principle of the neutrality of costs in regard to the implementation of variable hours".*

We submit that the adjudicator clearly considered this argument, which was dismissed because it did not satisfy the Board. Moreover, Chairperson Tarte also rejected this argument in King and Holzer. *We will return to the principle of the neutrality of costs later in our reply.*

The employer also argues at page 5 that "...the principle of stability and certainty in labour relations is not binding on the adjudicator and therefore does not restrict him to only one possible interpretation when examining similar provisions". However, the employer appears to disregard the information from the Federal Court, which confirmed Chairperson Tarte's interpretation in King and Holzer. *It is no longer simply a matter of adhering to the reasoning of the Board's adjudicators but also of respecting the decision rendered by the Federal Court.*

3. "Day"

(A) Article 25.01

The employer indicates that the 24-hour period in the definition of "day" in clause 25.01 cannot be interpreted as intending to indicate the hours of work. However, the article must be read in its entirety:

ARTICLE 25

HOURS OF WORK

Exclusions

This article does not apply to the FR, LI and SC Groups.

25.01 *For the purposes of this Article:*

*(a) "**day**" means a twenty-four (24) hour period commencing at 00:00 hour;*

*(b) "**week**" means a period of seven (7) consecutive days beginning at 00:00 hour Monday morning and ending at 24:00 hours the following Sunday night.*

First, the title of clause 25.01 is clear: "Hours of Work"! There is nothing ridiculous about the interpretation proposed by the bargaining agent, since that interpretation respects the intent of the parties to the effect that day is defined within the context of the hours of work.

If the intent of the parties had been to define the concept of "day" in clause 25.01 as a calendar day, it would have been specified as was done in clause 25.05. The English version of that clause is provided as it is clearer:

> ***25.05*** *Scheduled of hours of work shall be posted at least fifteen (15) calendar days in advance of the starting of the new schedule... (Emphasis added).*

In French, this concept of "calendar day" is translated by "jour civil", which we will deal with a bit later. This means that the concept of "day" set out in clause 25.01 is not that of a calendar day, as interpreted by the employer, but in fact, a period of 24 hours and a working day during which the normal hours of work for the grievors are 10 hours.

Furthermore, the interpretation suggested by the employer, that is, to confuse the concept of "day" with the concept of "normal hours of work", would result in the definition of "week" being 7 consecutive days, or 7 days of 8 hours: a week would therefore be defined as 56 hours. This interpretation is completely unreasonable.

Clauses 41.01 and 52.02 also stipulate that the employee must give an advance notice of 5 working days. According to the employer's proposed interpretation (5 days X 8 hours), this would mean that the employee had to give advance notice of 40 hours, or slightly less than 2 days.

Lastly, if the definition of "day" provided in clause 25.01 is not applied and, in the absence of any other definition elsewhere in the collective agreement, the common meaning must be used. In reality, it is common usage to refer to a day as a 24-hour period.

(B) Clauses 2.02 and 2.03 of Appendix B:

Clause 25.02 refers to clauses 2.02 and 2.03 of Appendix B. To make things easier to understand, we have reproduced these clauses here:

> ***2.02*** *In reference to paragraph 25.02(a), Hours of Work, the standard work week is forty (40) hours per week and eight (8) hours per day.*
>
> ***2.03*** *In reference to paragraph 25.02(b), the Employer shall schedule the hours of work so that employees work eight (8) hours per day and an average of forty (40) hours and an average of five (5) days per week.*

These clauses refer to 8 hours of work per day. However, they do not apply because the grievors have a 10-hours per day work schedule, which constitutes the length of their normal hours of work. It is the following clause that applies:

> *28.05*
>
> *(a) The scheduled hours of work of any day may exceed or be less than the daily hours specified in the Group Specific Appendix; 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 work per week over the life of the schedule as specified in the Group Specific Appendix.*
>
> > *(i) The maximum life of a shift schedule shall be six (6) months.*
>
> *(c) Whenever an employee changes his or her variable hours or no longer works variable hours, all appropriate adjustments will be made.*

Since the hours of work may be greater than the hours indicated in Appendix B, the normal length of a day of work in the case of the grievors is 10 hours and consequently, when they are away on leave, the absence is authorized "during his or her regular or normal hours of work". (paragraph 2.01(o))

(C) <u>Clause 34.01 – Calendar day</u>

The employer argues on page 7 that "This reasoning is based on the premise that a calendar day (24 hours) is the concept referred to by default or implicitly when parties use the word "day". The bargaining agent's interpretation is to the effect that a "day" constitutes a 24-hour period. When the adjective "calendar" is added to the word "day", the concept of "calendar day" now means to the parties that it is a day in the calendar that includes a work day. In effect, calendar days include Saturdays, Sundays and holidays in common language, while the concept of "day" in the collective agreement refers to a work day.

This interpretation is consistent with subsection 2(2) of the PSSRB Regulations and Rules of Procedure, *1993, which is copied below in English:*

> *2(2) Where a period of time is specified in these Regulations as a number of days, the period shall be computed as being the number of days specified, exclusive of Saturdays and holidays.*

The French version reads:

> *2(2) Il n'est pas tenu compte des samedis et des jours fériés dans le calcul des délais spécifiés dans le présent règlement.*]

Moreover, only the following articles of the collective agreement refer to a "calendar day". We comment on each of these articles.

> *25.05 The schedule of work hours is posted for 15 calendar days and the schedule remains in effect for a period of 28 calendar days. It appears therefore that a "calendar day" definitely includes Saturdays, Sundays and holidays.*
>
> *25.06 The first day of rest is deemed to start immediately after midnight of the calendar day on which the employee worked or is deemed to have worked his or her last scheduled shift. This means that the day of rest could be a Saturday, Sunday or holiday.*
>
> *28.02 Upon request of an employee, an employee may complete the weekly hours of employment in a period of other than 5 full days provided that over a period of up to 28 calendar days, the employee works an average of the weekly hours specified in the relevant appendix. Here again, the wording supports the concept of a "calendar day" including Saturdays, Sundays and holidays.*
>
> *34.01(c) For bereavement leave, the word "day" means a calendar day since a death may occur on a Saturday, Sunday or holiday.*
>
> *46.02 Bereavement leave is a period of 5 calendar days, obviously including Saturdays, Sundays and holidays. In addition, the parties made the effort to determine that the employee will be paid for those days (his or her normal hours of work), which are not regularly scheduled days of rest (part of calendar days).*

In light of the above, the concept of "calendar day" does not provide any enlightenment in terms of determining the length of leave that is based on normal hours of work. It only allows the parties to distinguish between a "calendar day", which includes work days, days of rest and holidays, and a "day", which refers to a work day, and specifically, an employee's normal hours of work.

(D) <u>Article 34.01 – Hourly leave credits</u>

(i) <u>Earned day of leave:</u>

In Stockdale et al., *Adjudicator Mackenzie found, at page 11, that:*

> *As with family-related leave, the personal leave and volunteer leave provisions are not "earned daily leave" and fall outside the provisions of the agreement that provide for the conversion of leave to hours.*
>
> *[...]*
>
> *The leave does not accumulate and must be used within each fiscal year, similar to family-related leave."*

Adjudicator Mackenzie relied on the reasoning of the Federal Court, which reads as follows in Stockdale et al. *at page 9:*

> *... I was referred to nothing in the relevant collective agreement that indicates that leave with pay for family-related responsibilities is "earned daily leave" within the meaning of clause 33.01 of the collective agreement [the provision that converts earned leave from days to hours]. If leave with pay for family-related responsibilities is not "earned daily leave" but rather is a daily leave credit that is an entitlement, and I am satisfied that it is open to such an interpretation, then clause 33.01 simply does not apply to leave with pay for family-related responsibilities notwithstanding the fact that clause 33.01 and clause 43.01 both appear in Part IV, LEAVE PROVISIONS of the collective agreement.*

Note that clause 33.01, mentioned to by the Federal Court, has exactly the same wording as clause 34.01.

We submit that the Board should use the same interpretation as Adjudicator Mackenzie and respect that of the Federal Court.

(ii) <u>Unearned leave</u>:

The employer argues as follows at page 7:

> *But how many hours did the parties intend to grant for the length of a day of "unearned" leave? Since it is clear that it is not the meaning of a calendar day, the only logical and fair interpretation is that of the normal number of daily hours of work, [...]*

We are in complete agreement with this interpretation by the employer. However, the employer subsequently errs in its reasoning:

> *[...] or 8 hours for employees working an average of 40 hours per week and 7.5 hours for employees working an average of 37.5 hours per week.*

This interpretation does not stand up in light of the arguments that we have presented above with respect to clause 28.05.

4. Clause 28.04 - Principle of the neutrality of costs:

Clause 28.04 reads as follows:

> ***28.04*** *Notwithstanding anything to the contrary 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.*

The principle of the neutrality of costs was argued by the employer in King and Holzer. *Chairperson Tarte dealt with this argument, stating at page 7 of the decision:*

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

Furthermore, Adjudicator Mackenzie also ruled on the principle of the neutrality of costs at page 10 of Stockdale et al.*:*

> *An interpretation of "day" as a full shift does not violate this provision because there is no additional payment to the employee as a result of receiving a day of leave. At the end of the year, the employee will receive the same annual salary as an employee working regular hours.*

Consequently, the Board has already ruled on the wording of clauses identical to clause 28.04. There is no reason for the Board to deviate from its previous interpretation.

The employer invokes Diotte. *That case must be placed in its special context. First, it is a case where the grievor was absent on sick leave, or earned leave, which is different from volunteer leave or personal leave, or unearned leave. In addition, there is no indication in* Diotte *that the parties are dealing with the same wording as in clause 28.04 of the present collective agreement. We therefore submit that this decision should not apply because it is not similar.*

Finally, the employer presents two hypotheses at page 9:

> *- "Replacing an employee for a period of 10 hours rather than 8 hours necessarily leads to an additional payment that the employer must defray."*
>
> *- "In a scenario in which the variable work schedule would be established weekly based on three 12-hour shifts and one 4-hour shift (total of 40 hours)[...]"*

We wish to point out to the Board that these are <u>hypotheses</u>. There is no evidence in the file that the employer had to replace the grievors as a result of their taking volunteer leave or personal leave. There is no evidence in the file showing that the grievors

worked a schedule of three 12-hour shifts and one 4-hour shift. The Board must consider the evidence that it has in the file.

It is our belief that, using the bargaining agent's interpretation, the grievors would receive the same salary and the same benefits set out in the collective agreement as all other employees governed by the said collective agreement.

5. Conclusion

Given the above reply, we again ask the Board to allow the grievors' grievances and to compensate them for the annual leave credits that they were required to debit from their leave banks.

Reasons

[7] According to the parties, the issue to be decided, as in *Stockdale et al. (supra)*, is the definition of the word "day" used in the clauses relating to volunteer leave and personal leave. The case involves the same contracting parties and similar clauses. The circumstances are practically the same, except for the fact that in this case, the parties were informed of the employer's position on the interpretation of the clauses at the time of their requests for leave and not *a posteriori* as in *Stockdale et al. (supra).*

[8] A question arises, therefore, as to whether these files are subject to the doctrine of *res judicata.* Adjudicator Mackenzie also had to consider this question in *Stockdale et al. (supra)* because the issue of the definition of the word "day" had already been the subject of several other Board decisions.

[9] In his analysis of the doctrine and of the case law set out in *Francoeur (supra)*, Chairperson Yvon Tarte concluded:

> *Consequently, the doctrine of res judicata should not be applied rigidly in the field of labour relations in the federal Public Service. Nevertheless, a previous decision of a tribunal or of a member of a tribunal involving the same issue should be followed in a subsequent case* a fortiori *if it involves the same parties and the same collective agreement, except where this initial decision is manifestly wrong.*

[10] In this case, an important factor is specific to each file: the collective agreement. Therefore the doctrine of *res judicata* does not apply. Although the clauses are similar, I must examine the issues presented in the context of the particular collective agreement concerned. More precisely, I must analyse the issue in light of the agreement as a whole and not within the narrow confines of the clauses at issue only.

[11] The grievors' representative also raised the issue of ensuring that, in the interest of certainty, consistency and stability with regard to previous decisions, "similar provisions should be interpreted similarly, unless there is a strong reason for changing that interpretation", as expressed by Adjudicator Mackenzie in *Stockdale et al. (supra).* This principle has always been followed by the Board and should be respected as set out. However, no interpretation should be blindly adopted without consideration of the circumstances or documentation governing another file. All adjudicators should have the opportunity to examine the file before them independently. This does not mean that they are reviewing another adjudicator's decision. Again, it is the collective agreement at issue that must guide the decision. Each adjudicator is free to examine the documentation with a different eye, while keeping in mind the general elements of principle set out by his or her colleagues. Accordingly, I am not bound, but rather guided, by the previous decisions on this matter.

[12] I agree with Adjudicator Kuttner in *Breau et al. (supra),* whose words were reiterated by Vice-Chairperson Potter in *Mackie (supra),* when he says:

> *It is generally accepted that to deny the persuasive force of previous decisions made in similar fact circumstances and calling for the interpretation of the same or closely related collective agreement terms between the same parties would wholly undermine those values universally accepted as essential to any rational system of third-party dispute resolution: certainty, uniformity, stability and predictability. On the other hand, neither justice nor equity are to be sacrificed to these values as in our collective bargaining regime, absent a jurisdictional challenge, an arbitrator or adjudicator is statutorily bound to adjudicate a dispute upon its merits. Indeed, to do otherwise by blindly adopting the reasons for decision given in a previous dispute could arguably be viewed as an improper declining of jurisdiction.*

[13] As evidenced by their arguments, reproduced in this decision, the parties have extensively debated the concept of "day" in this case and in other files brought before the Board. In reading the decisions made in various contexts (*Stockdale et al. (supra), King and Holzer (supra), Phillips (supra), Breau et al. (supra),* and *Mackie (supra)*), I have to conclude that the Board has consistently interpreted this word in keeping with its meaning in common language unless there was a specific provision assigning it a different meaning.

[14] The examination of the collective agreement in this matter shows that the word "day" is defined in several contexts. First, article 2 is an important source because the definitions in that article must guide the interpretation of the collective agreement in its entirety, notwithstanding a specific provision. It provides definitions of "day of rest" and "holiday" but no definition of "day".

[15] "Day of rest" is defined as "a day other than a holiday on which that employee is not ordinarily required to perform the duties of his or her position other than by reason of the employee being on leave..." (paragraph 2.01(h)). "Holiday" is defined as "the twenty-four (24)-hour period commencing at 00:01 hours of a day designated as a paid holiday in this Agreement..." (subparagraph 2.01(m)(i)).

[16] Paragraph 25.01(a) provides a definition of "day" for the purposes of the application of article 25 on hours of work (a twenty-four-hour period commencing at 00:00 hours). However, article 34 on leave in general contains a definition that is specific to that section. Paragraphs (a) and (b) of clause 34.01 stipulate that leave is granted in hours. Earned daily leave credits are converted into hours and then reconverted into days equivalent to 7.5 hours when an employee ceases to be subject to this provision (paragraph 34.01(a)). The number of hours debited for each day is equal to the number of hours of work normally scheduled for the employee for the day in question (paragraph 34.01(b)).

[17] Understandably, it was useful to describe these mechanisms for accounting of leave credits. However, the present dispute involves paid leave that is not earned paid leave, that is, leave that is accumulated, such as annual or sick leave. It cannot be concluded, as the employer suggests, that all leave is subject to this regime and that these calculation mechanisms must apply to the two types of leave before us. Cumulative leave converted into hours of work is by nature different and should be the exception to the normal rule of what generally represents, in any other context, a day of leave, a 24-hour day. I am thinking here of a holiday. It is not possible to extrapolate the rules prescribed for earned leave to leave that could be designated as regular or unearned leave.

[18] Paragraph 34.01(c) deals more specifically with such unearned leave and stipulates that the paid bereavement leave in article 46 is calculated differently in that "day" has the meaning of "calendar day". This clarification might have provided some enlightenment. Since it refers only to bereavement leave, the employer sees in this

provision confirmation of its interpretation, the other types of leave having been left out when they could have been included. In conclusion, only bereavement leave is apparently a 24-hour period.

[19] There is no question that bereavement leave is specifically provided for as a 24-hour period. This means that the employee can expect not to be called back to work for any part of a day of leave granted under article 46.

[20] But what of other types of leave, such as those in this case, which are not expressly mentioned in article 34? Must we conclude that they are equivalent to 7.5 hours as specified in paragraph 34.01(b) or do they have a value of 24 hours as is the case with bereavement leave (paragraph 34.01(c)) or as was decided previously in other cases? The examination of the agreement must be completed before deciding.

[21] The definition of "calendar day" does not provide any clarification in this case, and any analogy drawn from Appendix B of the agreement is weak if the selected provision does not apply to an employee working a variable schedule. Clause 28.05 of the agreement should be considered, not clauses 2.02 and 2.03 of Appendix B.

[22] Another definition is much more useful in this debate. It is the definition of "leave" found in the article of general interpretation of the agreement, article 2:

> *2.01 For the purpose of this Agreement:*
>
> *(o) "leave" means authorised absence from duty by an employee during his or her regular or normal hours of work; (Emphasis added)*

[23] By combining the two provisions at issue with the general definition of "leave" in clause 2.01, the following result appears:

> *41.01 Volunteer Leave: Subject to operational requirements as determined by the Employer and with an advance notice of at least five (5) working days, the employee shall be granted, in each fiscal year, one (1) day of **authorised absence from duty (...) during his or her regular or normal hours of work** with pay to work as a volunteer for a charitable or community organisation or activity, other than for activities related to the Government of Canada Workplace Charitable Campaign.*
>
> *The **authorised absence from duty (...) during his or her regular or normal hours of work** will be scheduled at times*

> *convenient to both the employee and the Employer. Nevertheless, the Employer shall make every reasonable effort to grant the* ***authorised absence from duty (...) during his or her regular or normal hours of work*** *at such times as the employee may request. (Emphasis added)*

[24] When done with clause 52.02, the exercise provides the same result. Of note is the fact that the expression refers clearly to the regular or normal hours of work of the employee concerned and not to hours of work based on the regular five-day schedule of the agreement. In my view, this provides the best possible clarification of the issue.

[25] Furthermore, I find it hard to understand how two different meanings could be given to the same word in the same paragraph. "Day" is used to establish both the notice period and the length of the leave. What justification would there be for giving it a value of 24 hours in one case and, a few words later, giving it a value of a few hours? The answer is found in the use of the word "leave", which defines the timeframe within the 24-hour period.

[26] The employer argues that such an interpretation is in conflict with the provision that stipulates that implementation of variable schedules must not cause the employer any additional costs.

> *28.04 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...*

[27] Of course, additional pay would represent an additional cost for the employer while it appears from this clause that the parties were seeking to neutralise the impact of the implementation of variable schedules on employees and on the employer. This provision makes complete sense within the context of managing hours worked. However, I am now being asked to apply it within the context of the impact that leave may have on the employer's costs when a variable schedule is involved.

[28] There was no evidence submitted in this case, however, that the two grievors had to be replaced or that the employer was required to pay additional wages at any time. Nor was there any evidence that the employer was required to provide the service during a 10-hour period. The same situation occurred in *Stockdale et al. (supra).* The interpretation suggested by the grievors' representative therefore does not necessarily

have an impact on the employer's costs. I am not allowed to interpret the agreement on the basis of a hypothesis.

[29] As for the conclusion of the adjudicator in *Diotte (supra)*, who apparently accepted this argument, it was reached based on the wording of the collective agreement in that case, which clearly stipulated that the length of leave for designated paid holidays accounted for the "normal daily hours specified by this agreement", which worked very well with its provision on the neutrality of costs similar to the one in the present case. However, in this case, the length of volunteer leave and personal leave is established by paragraph 2.01(c) to correspond to the normal or regular hours of work of the employee in question.

[30] If parties determine in implementing the collective agreement negotiated that some provisions may be inequitable or inadequate to resolve certain situations, then they must resolve them at the bargaining table.

[31] In short, within the context of this collective agreement, the interpretation of the words at issue is resolved as follows: the word "day" represents a period of 24 hours unless indicated otherwise; the expression "day of leave" used in clauses 41.01 (volunteer) and 52.02 (personal) represents a period corresponding to an authorized absence from duty (...) during the regular or normal hours of work of the employee in question; and for greater clarity, the length of bereavement leave was stipulated (paragraph 34.01(c)) and corresponds to a period of 24 hours.

[32] For these reasons, the grievances are allowed. The grievors are entitled to personal leave and to volunteer leave for the whole of the hours that they are normally required to work on those days, or 10 hours, and consequently, are entitled to recover the hours that were deducted from their respective leave banks for each leave granted.

Sylvie Matteu
Deputy Chairperson

OTTAWA, May 20, 2004.

P.S.S.R.B. Translation