Lib

Date: 20041122

File: 166-34-31862

Citation: 2004 PSSRB 166

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

KULWANT (KAL) SAHOTA

Grievor

and

CANADA CUSTOMS AND REVENUE AGENCY

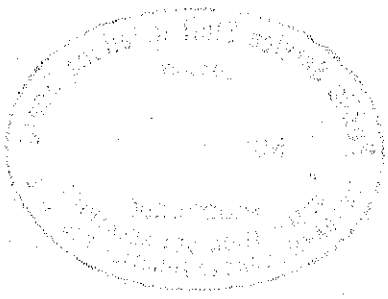
Employer

Before: John Steeves, Board Member

For the grievor: Paul Reniers, Professional Institute of the Public Service of Canada

For the employer: Harvey Newman, Counsel

Heard at Vancouver, British Columbia,
September 29, 2004.



[1] This is a decision about the calculation of entitlement for leave (with pay for family-related responsibilities) for an employee who works a compressed work week.

[2] It involves an interpretation of clause 8.06 (Compressed Work Week), clause 17.13 (Leave for Family-Related Responsibilities) and Appendix "B" (Hours of Work) of the collective agreement.

[3] It is submitted on behalf of the grievor that his leave should be calculated on the basis of the hours that he has worked on a compressed week schedule. The employer submits that the calculation should be based on the days that the grievor has worked.

[4] The parties agree that the collective agreement between the Canada Customs and Revenue Agency and the Professional Institute of the Public Service of Canada for the Audit, Commerce and Purchasing Group (codes 90541/1999, 90551/1999 and 90552/1999), that expired on June 21, 2002, contains the provisions that are applicable to this grievance.

Background

[5] The facts of this case are not in dispute.

[6] The employer is broadly responsible for the management of revenue and customs for the Government of Canada and it has offices throughout Canada. The grievor has been a Senior Technical Interpretative Analyst since 2001 or 2002 and he performs various audit functions. He commenced work with the Government of Canada in August 1987.

[7] The grievor worked a compressed work week pursuant to clause 8.06 of the collective agreement during the 2001 - 2002 fiscal year. He was on a four-week cycle of 150 hours, which averaged out to 37.5 hours per week. His normal work day was nine hours. This arrangement is an accepted application of the compressed work week provisions. The reasons for the leave are entirely appropriate and are not relevant.

[8] As below, the collective agreement provides leave for family-related responsibilities and clause states that this leave ". . . shall not exceed five (5) days in a fiscal year." A print-out of the grievor's family leave between April 1, 2001, and March 31, 2002 (exhibit 2), shows the following use of family leave:

May 16, 2001	6.5 hours
August 29, 2001	9.0 hours
August 30, 2001	9.0 hours
November 26, 2001	9.0 hours
January 21, 2002	4.0 hours
Total	37.5 hours

[9] The problem in this case arose with regard to the family leave on January 21, 2002. The grievor accepted that he had entitlement to five days of leave under the collective agreement. However, he interpreted that to mean his scheduled days under a compressed work week. That is, his position is that he can take five days of nine hours each, nine hours being his normal work day when he works a compressed work week. He took nine hours' leave on January 21, 2002, for this reason.

[10] The employer disagreed with the grievor's interpretation of the collective agreement. In its view, a "day" is seven and one-half hours and the entitlement to family leave is thirty-seven and one-half hours in a fiscal year. The employer challenged the nine hours' leave on January 21, 2002, and advised the grievor that he could only take four hours of family leave. In its view, any more would exceed the entitlement under the collective agreement.

[11] The grievor took the additional five hours away from work on January 21, 2002, as vacation. He then grieved the denial of family leave for these hours.

Collective Agreement Provisions

[12] Clause 8.06 relates to "Compressed Work Week". The relevant parts of that clause are as follows:

> ***8.06 Compressed Work Week***
>
> *Notwithstanding the provisions of this Article, upon request of an employee and the concurrence of the Employer, an employee may complete his weekly hours of employment in a period of other than five (5) full days provided that over a period of fourteen (14), twenty-one (21) or twenty-eight (28) calendar days the employee works an average of thirty-seven*

> *and one-half (37 ½) hours per week. As part of the provisions of this clause, attendance reporting shall be mutually agreed between the employee and the Employer. . .*
>
> . . .

[13] Clause 17.13 concerns family-related leave. The relevant provisions are:

> ***17.13 Leave With Pay for Family-Related Responsibilities***
>
> . . .
>
> *(c) The total leave with pay which may be granted under sub-clauses 17.12(b)(i), (ii) and (iii) shall not exceed five (5) days in a fiscal year.*
>
> . . .

[14] The parties have agreed that there is an error in clause 17.13. Subclause (c) should read ". . . sub-clauses 17.13. . . ." rather than ". . . sub-clauses 17.12. . . ."

[15] Appendix "B" of the collective agreement is also applicable and the relevant portions are:

> ***Appendix "B"***
>
> . . .
>
> ***Hours of Work***
>
> *The Employer and the Professional Institute of the Public Service of Canada agree that for those employees to whom the provisions of clause 8.06 of Article 8 "Hours of Work" apply, the provisions of the Collective Agreement which specifies [sic] days shall be converted to hours. Where the Collective Agreement refers to a "day", it shall be converted to seven and one-half (7 ½) hours.*
>
> *For greater certainty, the following provisions shall be administered as provided herein:*
>
> ***ARTICLE 2 – INTERPRETATION AND DEFINITIONS***
>
> *Clause (c) "daily rate of pay" shall not apply.*
>
> ***ARTICLES 9 & 13 – OVERTIME AND TRAVELLING TIME***
>
> *Compensation shall be only applicable on a normal work day for hours in excess of the employee's scheduled daily hours of work.*

On a day of rest, compensation shall be granted on the basis of time and one-half (1 ½) except that compensation shall be double (2) time on a Sunday.

ARTICLE 12 – DESIGNATED PAID HOLIDAYS

A designated paid holiday shall account for seven and one-half (7 ½) hours only.

ARTICLE 14 – LEAVE – GENERAL

Effective the date on which clause 8.06 of Article 8 apply or cease to apply to an employee, the accrued vacation and sick leave credits shall be converted to days or hours, as applicable.

ARTICLE 15 & 16 – VACATION LEAVE – SICK LEAVE

. . .

Arguments of the Parties

[16] The grievor relies on a number of decisions under different collective agreements involving the Public Service Alliance of Canada (PSAC). Those decisions concluded that a day of leave is equivalent to the scheduled hours of work of an employee. It is acknowledged that the collective agreement in this case is not identical. However, there is a strong correlation between the agreements, and consistency, certainty and predictability require the same result in this case.

[17] The employer accepts the conclusions of the decisions under the PSAC collective agreements. However, according to the employer, the collective agreement in this case is unique. It requires a "day" to be calculated on the basis of seven and one-half hours and not on the basis of the scheduled hours of the employee. For this reason, the decisions made under the PSAC agreements are not applicable.

Decision and Reasons

[18] The issue in this case is whether "day" in subclause 17.13(c) means seven and one-half hours, as submitted by the employer. Alternatively, does it mean the actual hours worked by an employee on a compressed work week, as submitted by the grievor? On this view, he could take five days of nine hours each.

[19] A useful beginning is to consider the language of the collective agreement in this case on its own, without regard to other decisions under other collective agreements.

[20] As described in clause 17.13, the total family leave in a fiscal year is limited to five days. This is plain enough for most employees who work the usual work week and usual hours in a day. But in this case, when an employee takes family leave while on a compressed work week and works different hours, the meaning of "day" is not obvious. I note that "day" is not defined in clause 2.01, "Interpretation and Definitions".

[21] Appendix "B" of the collective agreement states:

. . .

> *. . . for those employees to whom the provisions of clause 8.06 of Article 8 "Hours of Work" apply, the provisions of the Collective Agreement which specifies [sic] days shall be converted to hours. Where the Collective Agreement refers to a "day", it shall be converted to seven and one-half (7 ½) hours.*

. . .

[22] This language is significant. It is evidence that the parties have considered clause 8.06 as requiring a separate memorandum of agreement. Further, they have addressed how this article should be interpreted when other provisions in the agreement refer to days. Appendix "B" is not restricted to clause 8.06. Instead, it is intended to be an interpretive tool when considering that provision with other provisions. The language of Appendix "B" goes further and states that a reference to a "day" in other provisions of the agreement shall be converted to seven and one-half hours.

[23] I conclude that subclause 17.13(c) is a provision in the agreement within the meaning of Appendix "B" and it contains the term "day". Appendix "B" requires me to read clause 17.13 with Appendix "B".

[24] Appendix "B" uses the singular "day" and subclause 17.13(c) uses the plural form, "days". Subclause 2.02(b) of the collective agreement states that expressions used in the agreement, but not defined in the *Public Service Staff Relations Act*, have the same meaning as given in the *Interpretation Act*, R.S.C., 1985, c. I-21. I can see no reference in the agreement to the use of singular and plural. Subsection 33(2) of the *Interpretation Act* states that words in the singular include the plural, and words in the plural include the singular. Appendix "B" states that a day shall be converted to seven

and one-half hours. This analysis leads to a conclusion that "days" in subclause 17.03(c) includes a "day". Then Appendix "B" states that a day is seven and one-half hours.

[25] On this basis, the collective agreement in this case is to be interpreted to mean that an employee on a compressed work week is entitled to a maximum of thirty-seven and one-half hours of family-related leave in a fiscal year.

[26] Are there indications in the collective agreement that suggest a contrary interpretation?

[27] I note that there is a drafting or typographical error in Appendix "B". The phrase ". . . the provisions of the Collective Agreement which specifies [*sic*] days shall be converted to hours. . . ." is not clear. As above, I have interpreted this language to contain a typographical error and I read it to mean, ". . . the provisions of the Collective Agreement which [specify] days shall be converted to hours. . . ." A possible alternate reading is that there is no error. This approach suggests that the parties intended Appendix "B" to apply to provisions of the agreement that have language which converts days to hours. Since the purpose of Appendix "B" is to authorize this conversion, I have rejected this alternative approach. Put another way, I am not aware of provisions, other than Appendix "B", which contain this conversion.

[28] Appendix "B" states, after the above-cited language in the first paragraph, "[f]or greater certainty, the following provisions shall be administered as provided herein. . . ." Then a number of provisions are listed, as cited above, including the general leave provision, Article 14. It is submitted on behalf of the grievor that Appendix "B" should be read narrowly as applying only to the general leave provisions. With this interpretation, Appendix "B" does not apply to Article 17. I do not agree. The first paragraph of the appendix uses broad language to convert a day into hours, where a provision in a collective agreement specifies days. The focus of the language is employees for whom clause 8.06 applies. There is no limitation in this language to restrict it to general leave under Article 14 or to exclude family leave under Article 17.

[29] In my view, the list of articles in Appendix "B" is for the purpose of applying the general statement at the beginning of Appendix "B" with "greater certainty" to these articles. This greater certainty is expressed in a short narrative with each article. I acknowledge that the specific articles all seem to be earned benefits, and family leave

is not an earned benefit. However, that goes no further than demonstrating that the parties wanted to add greater certainty to earned benefits and not unearned benefits. The phrase "[f]or greater certainty" in the second paragraph does not override the general application of the first paragraph of Appendix "B".

[30] There are decisions which state that, for the purposes of family leave, a day of leave is equivalent to the scheduled hours of the employee. They, therefore, reach a different conclusion from the one I have reached above.

[31] These decisions are, in reverse chronological order, *Breitenmoser v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 103, at paragraph 32; *Bouchard v. Treasury Board (Agriculture and Agri-Food Canada)*, 2004 PSSRB 41; *Stockdale v. Treasury Board (Fisheries and Oceans Canada)*, 2004 PSSRB 4; *Canada (Attorney General) v. King*, 2003 FCT 593; *King v. Canada Customs and Revenue Agency*, 2001 PSSRB 117; and *Phillips v. Treasury Board (Transport Canada)*, PSSRB File No. 166 2 20099 (19910425) (QL).

[32] The question in the case before me is whether the reasoning in those decisions applies in this case. *Res judicata* has not been raised and that is appropriate given the differences between the parties, and other reasons. As well, there was no evidence of bargaining history, so the resolution of this case is a matter of interpretation, unassisted by any history. And the issue of cost neutrality was not raised.

[33] As I read these cases, they involve different collective agreement provisions from those in this case and, therefore, there is a different result.

[34] The clearest statement of this is in *Stockdale* (*supra*). That was a case of volunteer and personal leave which was described as similar to family-related leave because they are all unearned. The collective agreement in that case contained a conversion from days to hours, but this was for earned benefits. The adjudicator concluded that the leave provisions before him "fall outside" the provision in the agreement that converted days to hours (paragraph 38). Similarly, in *Bouchard* (*supra*), the adjudicator stated that, ". . . it is not possible to extrapolate the rules prescribed for earned leave. . . ." to unearned leave such as volunteer and personal leave.

[35] In the case before me, I cannot say that the family leave provisions fall outside the conversion language in Appendix "B". In fact, that conversion language addresses

family leave by the general inclusion of provisions that specify days. There is no issue of extrapolation, since Appendix "B" is applicable. As for the issue of earned versus unearned benefits, I can only conclude that Appendix "B" applies to both. The first paragraph speaks generally about ". . . provisions of the Collective Agreement. . . ." which specify days. Then there is the list of specific articles which relate to earned benefits. Nowhere is there an indication that Appendix "B" is restricted to earned benefits.

[36] The adjudicator in *King v. Canada Customs and Revenue Agency* (*supra*) pointed out that the acting pay provision in the collective agreement in that case included a conversion into hours. A similar provision could have "easily" been inserted in the collective agreement with respect to family leave; it was not and the grievance was allowed. In this case, there is such a conversion in the collective agreement as evidenced by Appendix "B".

[37] Another feature of some of the previous decisions is the reliance on the definition of leave. It is the same in the collective agreement in this case

> *"leave" means authorized absence from duty by an employee during the employee's regular or normal hours of work.*

[38] In *Bouchard* (*supra*), this definition was combined with the volunteer leave language to demonstrate that the object is regular and normal working hours rather than hours of work based on a regular five-day schedule (paragraphs 23 - 24). Then in *Breitenmoser* (*supra*), the adjudicator used the same definition as part of his reasoning to allow the grievance (paragraph 36). This definition is a relevant consideration, but I am not persuaded that it is sufficient to counter the clear meaning of Appendix "B". As the adjudicator stated in *Breitenmoser*, "[t]his provision must be read in conjunction with each leave provision. . . ." (paragraph 34).

[39] The previous decisions also discuss the objectives of family-related leave. In *Phillips* (*supra*), it was pointed out that family illnesses do not run on the basis of eight point four hours (the employer's position in that case and the equivalent of seven and one-half hours in this case). In that case, the grievor was a firefighter who might be working eighteen-hour shifts. The adjudicator made a comparison to marriage leave which granted five days of leave. It was "inconceivable" that an employee who was working an eighteen-hour shift would be given a little more than two days' leave. I accept that there are policy reasons for making family-related leave while on a

compressed work week consistent in terms of hours worked and hours taken on leave. However, the collective agreement describes a different position.

[40] A final point of comparison with the previous cases on this issue is that some had the benefit of a definition of "day" in the general definition section of the agreement. In *Stockdale* (*supra*), for example, the definition was ". . . a twenty-four (24) period commencing at 00.01 hour (jour)." While not determinative, this was of some assistance in reaching the conclusion that personal and volunteer leave was available for the length of the shift worked, twelve hours. The collective agreement in this case has no such definition. There is a reference to "calendar day", but this is in the bereavement leave provision (clause 17.02). To paraphrase part of the reasoning in *King v. Canada Customs and Revenue Agency* (*supra*), the parties could have easily written subclause 17.13(c) to read that family leave ". . . shall not exceed five (5) calendar days. . . ." They did not.

[41] It is also necessary to consider the Federal Court decision on the judicial review application of *King v. Canada Customs and Revenue Agency (Canada (Attorney General) v. King (supra))*. The court upheld the adjudicator's decision that family leave, while the employee is on a compressed work week, should be calculated on the basis of the hours worked, rather than days. As above, I have concluded that the case before me is different in some significant respects. Therefore, a different result is required. In any case, the court was not applying a correctness standard. For the court to state that "it was open" (paragraph 24) to the adjudicator in *King v. Canada Customs and Revenue Agency* (*supra*) to make his conclusion goes no further than a statement that the conclusion was not patently unreasonable.

[42] I accept that stability, predictability and consistency in labour relations require that similar agreement provisions should be interpreted in a similar way (*Stockdale* (*supra*), paragraph 35; *Bouchard* (*supra*), paragraph 11). On the other hand, an adjudicator is bound by statute to adjudicate a dispute upon its merits (*Breau v. Treasury Board (Justice Canada)*, 2003 PSSRB 65; *Mackie v. Treasury Board (National Defence)*, 2003 PSSRB 103). The provisions of the collective agreement are significantly different from those in the other cases.

[43] For the above reasons, the grievance is denied. In the circumstances of this case, the grievor is entitled to a maximum of thirty-seven and one-half hours family related leave while working on a compressed work week.

John Steeves,
Board Member

BURNABY, November 22, 2004.