Date: 20040130

Files 166-2-32069

Citation: 2004 PSSRB 4

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

COLM STOCKDALE ET AL.
(See attached list)

Grievors

and

TREASURY BOARD
(Fisheries and Oceans Canada)

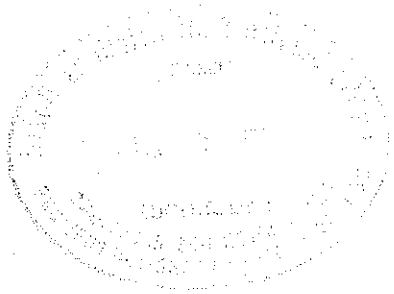
Employer

Before: Ian R. Mackenzie, Board Member

For the Grievors: Barry Done, Public Service Alliance of Canada

For the Employer: Harvey Newman, Counsel

Heard at Halifax, Nova Scotia,
November 20, 2003.



DECISION

[1] Colm Stockdale and twelve others are employees at the Maritime Search and Rescue, Joint Rescue Co-ordination Centre, in Halifax, Nova Scotia. They are employed in the GT group. They grieved the application of volunteer leave and personal needs leave provisions to their variable hours of work shift schedule, on April 25, 2002. In particular, the grievors grieved the "denial of full duration of 12 hours, i.e. a shift day, for leave granted under articles 46 and 55." The employer only allowed 7.5 hours of leave.

[2] The grievance was denied at the first level (on May 13, 2002), at the second level (on May 28, 2002) and at the final level (on February 20, 2003). The final level response from Ursula Menke, Deputy Commissioner of the Coast Guard, reads as follows:

> *...Treasury Board has defined the value of a day for employees working variable hours as being equivalent to that of a designated paid holiday. The value of a designated paid holiday for a GT as per the Technical Services agreement is of 7.5 hours. Leave entitlements under the collective agreement should be interpreted in a manner, which is consistent with an equitable entitlement to benefits for all employees. To grant you more paid leave than someone with shorter shifts or someone working a standard 7.5 hours workday would not be an equitable entitlement for all.*
>
> *Accordingly, I must deny this grievance.*

[3] The grievance was referred to adjudication on March 27, 2003.

[4] At the hearing, the parties proceeded on the basis of an agreed statement of facts. The collective agreement was filed as an exhibit (Exhibit G-1).

EVIDENCE

Agreed Statement of Facts

[5] There are 13 grievors, all employed with Coastguard Search and Rescue. The grievors are MSSOs (Maritime Search and Rescue Support Officers) at the GT-3 group and level, and Coordinators at the GT-5 group and level.

[6] The applicable collective agreement is the Technical Services Group agreement, signed on November 19, 2001, with an expiry date of June 21, 2003. This collective agreement contained two new leave day provisions that each provided one day of leave: clause 46.01 ("Volunteer Leave") and clause 55.02 ("Personal Leave").

[7] All of the grievors work 12-hour shifts under a variable shift schedule arrangement, as provided for under Article 25 of the collective agreement. Their hours of work were from 7 to 7.

[8] The volunteer leave and personal leave provisions in the collective agreement require that the leave be used during the fiscal year, and no carryover of leave is permitted. The employees covered by the collective agreement had until March 31, 2002, to use the new leave provisions.

[9] The grievors applied for the leave days with five days' notice, as required under the collective agreement. The leave days were approved and were taken as a whole shift off (12 hours).

[10] On April 8, 2002, Acting Regional Supervisor Peter Stow sent an e-mail to 19 employees (including the 13 grievors) advising them of the Treasury Board interpretation that the leave day was for 7.5 hours, as it was for designated paid holidays. Mr. Stow advised the employees that those who took 12 hours of leave must pay an additional 4.5 hours for each day to cover the shift. Recovery of the additional 4.5 hours for each leave day was taken.

ARGUMENTS

For the Grievors

[11] Barry Done, representative for the grievors, submitted that the decision in *King and Holzer*, 2001 PSSRB 117 (upheld by the Federal Court, Trial Division) was "on all fours" with the facts and language of the collective agreement provisions before me. An earlier decision (*Phillips* 2003 PSSRB 74) relied upon by Chairperson Tarte in *King and Holzer* (*supra*), was also applicable to this case. In both decisions, the adjudicators determined that since "day" was not defined by the parties in the collective agreement article at issue, "day" should be given its normal interpretation as 24 hours.

[12] Although the parties did not define "day" in the articles at issue, Mr. Done noted that the collective agreement defines "day" in the definitions article as meaning a "twenty four hour period commencing at 00:01 hour."

[13] Mr. Done submitted that in both *King and Holzer* (*supra*) and *Phillips* (*supra*), the adjudicators noted that the parties could have addressed the issue of the meaning of the word "day" in the article at issue in collective bargaining, but chose not to. For example, in Article 25 ("Variable Hours of Work") the parties have specified that a designated paid holiday "shall account for seven and one-half hours." Since the decision in *Phillips* (*supra*), the parties have had ample time to address this issue at the bargaining table.

[14] Mr. Done further submitted that to interpret the volunteer leave and personal leave provisions as the employer does would, as stated in *Phillips* (*supra*), "perpetrate an unfairness on those employees who work long shifts".

[15] The decision of Chairperson Tarte in *King and Holzer* (*supra*) was upheld by the Federal Court, and Mr. Done submitted that the Federal Court decision was binding on me. He noted that there had been no appeal of Mr. Justice Gibson's decision.

[16] Mr. Done relied on the dictionary definition of "day" as contained in the *Concise Oxford Dictionary* and *Black's Law Dictionary.*

[17] Mr. Done also relied on the definition of "leave" in the collective agreement: "authorized absence from duty by an employee during his or her regular or normal hours of work". Despite the averaging process under the variable hours of work arrangement, the normal or regular shift for the grievors is 12 hours; therefore, leave should be granted for the full 12 hours. Paragraph 37.01(b) 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." Mr. Done submitted that this confirmed that each grievor was entitled to 12 hours of leave.

[18] The requirement in the articles in question for "five days notice" also supports the bargaining agent's interpretation of "day", Mr. Done argued. Based on the employer's interpretation, an employee would only have to provide approximately three days' notice, rather than the five days specified in the article. As the adjudicator

noted in *Phillips* (*supra*), the notice period and the entitlement period should be based on the same interpretation of "day".

[19] Mr. Done submitted that the employer's interpretation would make no sense, as the only option for employees would be to come in and work for 4.5 hours, and the employer does not call for partial shifts.

[20] Mr. Done argued, in the alternative, that estoppel applied in the circumstances of these 13 grievors. The grievors applied for the leave, and it was granted in 12-hour segments. The grievors relied on that approach to their detriment. They did not find out about the employer's position on the number of hours of leave until after they had taken the leave.

For the Employer

[21] Mr. Newman noted that the grievors were all governed by the variable hours of work article of the collective agreement (Article 25). Over the life of a schedule, these employees work the same number of hours as if they had worked 37.5 hours a week. The variable hours of work schedule is not designed to do anything other than change the number of hours worked, without attracting overtime payment. The variable hours of work schedule also allows for longer periods off between shifts. Such schedules provide advantages to both the employer and the employees. When the parties negotiated the variable hours provision, they provided, in clause 25.11, that the implementation of a variable hours of work schedule was to be cost-neutral.

[22] Mr. Newman submitted that the principle of cost-neutrality in variable shift agreements is breached when adjudicators permit employees to get a greater monetary benefit than other employees who work fewer hours per day. Mr. Newman stated that an employee who worked 7.5 hours per day would be understandably chagrined if someone working a 12-hour shift received compensation for 24 hours, while they only were entitled to 7.5 hours. The taxpayer also has to pay for this enhanced compensation. In this case, there is quite a significant difference between 12 and 7.5 hours.

[23] Mr. Newman distinguished *Phillips* (*supra*), as in that case the adjudicator had been influenced in his decision by the past practice of the employer.

[24] Mr. Newman submitted that I should not adopt the interpretation of "day" in *King and Holzer* (*supra*). In that decision, the adjudicator acknowledged that arguments could be advanced on both sides. He also concluded that the interpretation of a day as 24 hours was appropriate in the circumstances of that case, and it is open to me to determine that it is not appropriate in the circumstances here. The unfairness to those on shift work of an interpretation of a day as 7.5 hours might be more apparent when the leave is family-related. This is leave that often cannot be applied for in advance and is a form of safety net for family-related matters. However, volunteer and personal needs leave can be planned for in advance and are, for all practical purposes, just extra holiday days.

[25] Mr. Newman respectfully submitted that the adjudicator in *King and Holzer* "mixed apples and oranges" when he relied on the interpretation of "day" for discipline purposes, which is different from the collective agreement interpretation. In the decision, the adjudicator was influenced by the suspension.

[26] Mr. Newman urged me to come to a different interpretation of "day" from that in *King and Holzer*. Justice Gibson in the judicial review decision found that the decision was not patently unreasonable, and he did not decide on the basis of a correctness standard. All he said was that it was open to the adjudicator to interpret the collective agreement in the way that he did. Also, *King and Holzer* relates to family-related leave, which is not one of the leave provisions before me. The principle of *stare decisis* requires that an adjudicator be careful in deviating from earlier interpretations, but it does not mean that an adjudicator is not free to differ. These grievances are not "on all fours" with the decision in *King and Holzer*, as they do not involve the same collective agreement article, nor do they have the same social impact as family-related leave. A judicial review of an adjudicator's decision does not amount to an endorsement of the adjudicator's decision; it simply says what it says, which is that it was "reasonably open" to the adjudicator to come to such a decision. Mr. Newman referred me to *Essex County Roman Catholic School Board v. Ontario English Catholic Teachers' Association (2002)*, 205 D.L.R. (4th) 700.

[27] In conclusion, Mr. Newman stated that it was important to have the interpretation issue revisited because of the tremendous financial consequences and the fact that the interpretation defies the principle of cost-neutrality. He noted that it is important to recognize the cost-neutrality principle, because it was not the intention

of the parties to provide a financial benefit to variable shift workers. Mr. Newman also referred me to *Diotte*, 2003 PSSRB 74.

Reply Argument for the Grievors

[28] In reply, Mr. Done submitted that Mr. Newman was requesting that I add words to the collective agreement, which is beyond my jurisdiction. The parties did turn their minds to the definition of "day", as evidenced by other provisions in the collective agreement. It is not open to the employer to attempt to renegotiate the collective agreement at adjudication.

Reasons for Decision

[29] These grievances involve the interpretation of "day" for the purposes of determining entitlements to volunteer leave (Article 46) and personal leave (Article 55) for variable shift workers.

[30] "Day" is defined, for the purpose of the collective agreement as:

> *"**day**" means a twenty-four (24) hour period commencing at 00:01 hour (jour).*

[31] The two leave provisions are as follows:

> ***ARTICLE 46***
>
> ***VOLUNTEER LEAVE***
>
> ***46.01** 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.*
>
> ***ARTICLE 55***
>
> ***LEAVE WITH OR WITHOUT PAY FOR OTHER REASONS***
>
> ...

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 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.

[32] The relevant terms and conditions for the administration of variable hours of work are as follows:

ARTICLE 25

HOURS OF WORK

...

Terms and Conditions Governing the Administration of Variable Hours of Work

25.10 *The terms and conditions governing the administration of variable hours of work implemented pursuant to paragraphs 25.04(b), 25.06, and 25.09(g) are specified in clauses 25.10 to 25.13. This Agreement is modified by these provisions to the extent specified herein.*

25.11 *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.*

25.12

(a) The scheduled hours of work of any day, may exceed or be less than seven and one-half (7 1/2) 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 (37 1/2) hours of work per week over the life of the schedule.

(i) The maximum life of a schedule for shift workers shall be six (6) months.

(ii) The maximum life of a schedule for Day workers 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 25.04(b), 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.

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

(a) ***Interpretation and Definitions (clause 2.01)***

...

(d) ***Designated Paid Holidays (clause 32.05)***

(i) A designated paid holiday shall account for seven and one half(7 1/2) 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 sub-paragraph (i), at time and one-half (1 1/2) 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) ***Acting Pay***

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

...

[33] The interpretation of "day" for variable shift workers has been the subject of a number of grievances before this Board. However, this is the first time that the interpretation of "day" for personal leave and volunteer leave has been before the Board.

[34] 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.

[35] 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.

[36] In *King and Holzer,* the adjudicator concluded that a normal interpretation of "day" as a 24-hour period was consistent with the intent and scheme of the collective agreement, unless otherwise specified in the agreement. He noted that earned leave, such as vacation and sick leave, was treated differently in the agreement. The same is the case in the collective agreement at issue here. This view was reinforced for the adjudicator in *King and Holzer* because the employer argued that a 10-day suspension for Mr. King amounted to 10 shifts, and not 75 hours. This interpretation was also supported by the fact that, as in this collective agreement, the parties provided for the conversion into hours of the acting pay qualifying period (paragraph 25.13(f)) but there was no similar provision for the conversion of days into hours for family leave provisions. Relying on *Phillips* (*supra*), the adjudicator also noted that the interpretation put forward by the employer would "perpetuate an unfairness" on those employees working long shifts, as the events that give rise to family related leave do not necessarily fit into the confines of a 7.5-hour shift. The adjudicator concluded as follows:

> *Finally, I do not believe that this interpretation of the provisions dealing with family related leave violate clause 25.25 of the collective agreement [no additional payment by reason only of such variation] since article 43 [family related responsibilities leave] contemplates the granting of such leave on the basis of a 24 hour period.*

[37] The Federal Court upheld the adjudicator's decision (*Canada v. Holzer* (*supra*)), finding that the decision was not patently unreasonable and that the decision was reasonably open to him. While it is true that a finding of a court that a decision is not patently unreasonable does not necessarily mean that it is the only valid interpretation (see *Essex County School Board* (*supra*)) the judgment itself can provide guidance to adjudicators in interpreting similar provisions. The judge concluded as follows:

> *... 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.*
>
> *A cursory analysis of the Leave With Pay for Family-Related Responsibilities provision of the collective agreement reveals: first, that it is a form of compassionate leave not unlike Bereavement Leave With Pay, which is specifically excepted from the general principles of clause 33.01; and second, that it is a form of an entitlement leave rather than an earned daily leave. Arguably, since it is an entitlement leave, rather than an earned daily leave, it falls outside sub-clause 33.01(a). But that provides no explanation as to why it is not treated, within the context of clause 33.01, in the same way as Bereavement Leave With Pay. I am satisfied that it is equally distinguishable from Bereavement Leave, which is for a period of five (5) consecutive calendar days, which must include the day of the funeral and which, almost inevitably, will not all be workdays in the majority of circumstances. I am satisfied that this distinction is sufficient to allow the Adjudicator to conclude as he did.*
>
> *In the result, I am satisfied that it was open to the Adjudicator to interpret "day" in the Leave With Pay for Family-Related Responsibilities provision of the collective agreement without reference to clause 33.01 of the agreement and, in so doing, to conclude that, in the Leave With Pay for Family-Related Responsibilities provision of the collective agreement, "day" means a period of twenty-four (24) consecutive hours, regardless of the number of hours that a particular employee such as either of the Respondents might have worked in that "day". In the further result, it was open to the Adjudicator to conclude that it was contrary to*

> *the collective agreement for the employer to have "docked" from the grievors, here the Respondents, pay for hours taken by either of them, in excess of 37.5 hours, as leave with pay for family-related responsibilities.*

[38] 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.

[39] In its response to the grievances, the employer stated that the value of "a day" for variable shift employees is equivalent to that of a designated paid holiday. A reading of the collective agreement does not support this interpretation. The variable shift provisions specifically state that a designated holiday "shall account for seven and one half hours" (paragraph 25.13(d)). There is not a similar provision for any of the other leave provisions in the collective agreement.

[40] At the hearing, counsel for the employer emphasized that the interpretation of "day" as a full shift violated the "cost-neutrality" principle contained in clause 25.11. This clause of the agreement is focussed on avoiding additional overtime hours and avoiding "any additional payment" as the result of variable hours of work. 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.

[41] In the response to the grievances, the employer also raised the principle of equitable treatment of all employees. The employer's position is that the granting of leave for a full shift of 12 hours is unfair to employees who work regular hours, since they only receive 7.5 hours off for the same leave entitlement. It is equally, if not more, inequitable for those employees on variable hours if only 7.5 hours of leave were to be granted. There was no evidence that the employer could accommodate partial shifts. Therefore, in order for employees on variable hours to take personal leave or

volunteer leave, they have to use additional leave credits (or unpaid leave). Employees on regular hours of work do not face the same dilemma. This means that variable shift workers are being penalized for taking leave entitlements that they have a right to take under their collective agreement.

[42] In conclusion, the grievances are allowed. The grievors are entitled to personal leave and volunteer leave for the full 12 hours of their shift. All of the grievors are therefore entitled to a return of the 4.5 hours deducted from other leave banks for each leave request.

Ian R. Mackenzie,
Board Member

OTTAWA, January 30, 2004

GRIEVANCE OF COLM STOCKDALE ET AL.

(Board file 166-2-32069)

Billard, Donnie

Burguin, Scott

Evans, Wayne

Gaillard, Christine

Leclerc, Yves

Lever, Dave

Reyno, Kevin

Rudden, Paul

Sharp, J.P.

Smith, Barry

Sperry, Wendell

Vardy, Harvey