Date: 20031124

File: 166-2-32060

Citation: 2003 PSSRB 103

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

JOHN MACKIE

Grievor

and

TREASURY BOARD
(National Defence)

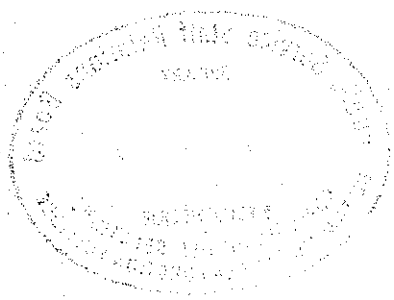
Employer

Before: Joseph W. Potter, Vice-Chairperson

For the Grievor: Edith Bramwell, Public Service Alliance of Canada

For the Employer: Richard Fader, Counsel
Hasna Farah, Articling Student

Heard at Ottawa, Ontario,
November 4, 2003.



DECISION

[1] John Mackie is a member of the Operational Services – Table 2 group and is classified as an HP-4 (Heating, Power and Stationary Plant Operations). He is covered by the Table 2 collective agreement (Exhibit E-1).

[2] On March 20, 2002, Mr. Mackie grieved that the employer had failed to comply with the provisions of the collective agreement in that he had not been properly compensated for work he performed on a designated paid holiday. He requested full redress, retroactive to July 1, 2001.

[3] Mr. Mackie's regular scheduled shift consists of 12 hours of work. He is scheduled to work a 12-week cycle and, over the course of that period, is scheduled to work a total of 480 hours. This equates to the hours an employee who regularly works 8 hours a day would work over the same period.

[4] Mr. Mackie works what is termed "Variable Hours of Work" and he is subject to the provisions of Article 28 of the collective agreement (Exhibit E-1).

[5] Two provisions of note in the applicable collective agreement are clauses 28.04 and 28.06(e). They read:

> ***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, 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.*
>
> ***28.06 (e) Designated Paid Holidays***
>
> > *(i) A designated paid holiday shall account for the normal daily hours of work as specified in the relevant Group Specific Appendix.*
> >
> > *(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.*

[6] This dispute centers on the application of clause 28.06(e). There are twelve (12) designated paid holidays (DPH) in the collective agreement and Mr. Mackie will work on

each of these DPH's (or the day the holiday is moved to pursuant to clause 32.04 of the collective agreement).

[7] Mr. Mackie receives a bi-weekly pay cheque in the same amount every time he is paid, regardless of whether or not a DPH occurred during that two-week period (Exhibits G-1 and G-2). If a DPH occurred in the pay period, a separate cheque is issued to Mr. Mackie at the end of the month covering the premium pay he received for working the DPH (Exhibit G-3).

[8] All shifts that Mr. Mackie works are 12 hours in duration, regardless of whether it is a DPH or not. Mr. Mackie feels that the application of clause 28.06(e) entitles him to his regular pay for the DPH under (i), then time and one-half for the hours worked, which is 18 hours under (ii).

[9] The employer feels Mr. Mackie is entitled to his regular pay for the DPH plus an additional 14 hours' pay for having actually worked the DPH.

[10] This dispute boils down to whether or not there is an entitlement to an additional 4 hours of straight-time pay for each of the DPH's over the course of the year.

Argument of the Bargaining Agent

[11] The bargaining agent states that the collective agreement provision is clear. In addition to what the employee is entitled to under clause 28.06(e)(i), the employee is entitled to receive time and one-half for the hours worked on the DPH under clause 28.06(e)(ii). In the instant case, Mr. Mackie worked twelve hours on the DPH; consequently, he is entitled to an additional 18 hours' pay (12 hours x 1.5).

[12] There is no definition for the phrase "normal daily hours of work" which appears in clause 28.06(e)(i). However, when one looks at the Group Specific Appendix (page 6 of 13 in Exhibit E-1), clause 3.05, it is clear that the hours of work can be varied but "... employees work an average of forty (40) hours per week". In equating this with regularly scheduled employees, this works out to eight (8) hours per day. Consequently, the DPH is worth 8 hours per day for the employee's regular pay. The premium of 18 hours is applied once the employee works the DPH, meaning the total compensation the employee should receive for working the DPH is 26 hours' pay (8 hours' regular pay, and 18 hours' premium pay).

[13] The bargaining agent pointed out the fact that this very issue had been decided in *King and Treasury Board (Revenue Canada - Customs and Excise)* (Board files 166-2-28332 and 166-2-28333) in favour of the grievor. This decision was upheld by the Federal Court of Canada - Trial Division [2000] F.C.J. No. 1987, as well as the Federal Court of Appeal 2002 FCA 178.

[14] In addition to the *King* decision (*supra*), *Breau v. Treasury Board (Justice Canada)* 2003 PSSRB 65 dealt with exactly the same issue. In that decision, rendered on July 29, 2003, and not appealed, adjudicator Kuttner decided in favour of the grievor.

[15] The courts have already decided on this issue, and it would not be in the best interests of the parties to deviate from established law.

Argument of the Employer

[16] The global entitlement for an employee who works on the DPH is 26 hours. This is not in dispute. Every 12-week cycle, the grievor works a total of 480 hours, which is comprised of 12-hour shifts. The grievor is paid for every shift he works, so his regular pay cheque is based on 12-hour shifts.

[17] Under clause 28.06(e), the employee is entitled to receive 8 hours' pay for the DPH, plus time and one-half for the 12 hours worked for a total of 26 hours' pay. However, the employee has already received his regular pay cheque; consequently, that amount has to be deducted from the total. The bi-weekly pay cheque reflects the fact the employee worked, and was paid for, 12-hour shifts. Consequently, 12 hours have to be deducted from the 26 global hours owing, leaving a balance of 14 hours. This is the amount the employee should receive.

[18] If the employee called in sick on the DPH, he would have to submit a sick leave form for 12 hours (see *Jhonny Diotte v. Treasury Board (C.S.C.)* 2003 PSSRB 74).

[19] In *White v. Treasury Board (C.S.C.)* 2003 PSSRB 40, the grievor worked a 12-hour shift, but was "statted off" for 8 hours. He grieved, saying "when you get statted off on a 12 hour shift, you get the whole 12 hours off". Adjudicator Mackenzie found, at paragraph 35:

> *The "regular scheduled hours worked" is a reference to the hours for each shift that each employee is scheduled to work. "Normal daily hours" must therefore be something different. Clause 21.01 provides that shift work is to be scheduled so that employees, on a daily basis, work eight hours per day. This must be the "normal daily hours specified by this agreement", as there are no other daily hours for shift workers specified in the agreement.*

[20] This means when you are scheduled to work 12 hours, you owe 12 hours to the employer, and you get paid for that time. When a DPH occurs, since the employee has already been paid for the 12 hours in his regular pay cheque, and he is only entitled to a global figure of 26 hours' pay, the supplementary cheque must be worth 14 hours.

Decision

[21] The question as I see it here, in its simplest form, is how much the grievor has already received in compensation prior to being compensated for working a DPH. Both parties agree that the employee is entitled to receive a global amount of 26 hours' pay for working the 12-hour shift on a DPH. Again, in its simplest form, the bargaining agent states that the employee has been paid 8 hours' pay; therefore, he is owed another 18 hours' pay. The employer states that the employee has been paid 12 hours' pay, therefore is owed another 14 hours' pay.

[22] In *Breau* (*supra*) adjudicator Kuttner was faced with the same issue as in the instant case (although the scheduled hours of work were different). In that case, the bargaining agent argued that "(T)he matter is *res judicata*" (paragraph 10) as that very issue had been decided in *King* (*supra*) and upheld in the Federal Court of Appeal (*supra*).

[23] At paragraph 13 adjudicator Kuttner wrote:

> *¶ 13 Res judicata and the related doctrine of issue estoppel are sometimes raised as preliminary objections to the arbitrability of a matter. Here however, neither party challenges my jurisdiction to entertain these grievances and although the rubric of res judicata was used in argument, the actual substance of the argument put forward went to the degree, if at all, that I should defer to the decision of the adjudicator in King, a case parallel on the facts but involving different grievors and a different, although related, collective agreement between these same parties. 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.*

These very words apply equally to the case at hand.

[24] In the federal public sector, the parties to a dispute can refer the matter to the Public Service Staff Relations Board (PSSRB). This independent body reviews the matter before it and issues a decision. If either party does not agree with the decision, it can challenge it. The avenue of redress is the Federal Court. The employer chose to appeal the *King* (*supra*) decision and the Federal Court of Appeal rejected the employer's application in a decision dated May 7, 2002.

[25] Some 14 months later, the *Breau* (*supra*) decision was rendered, and once again, on the same issue, the employer's position was rejected. The employer chose not to appeal that decision.

[26] Now, some 3 1/2 months after the *Breau* (*supra*) decision was rendered, I am being asked the same question, with the employer essentially saying both the *King* (*supra*) and *Breau* (*supra*) decisions were wrong, and another decision should be rendered to correct this.

[27] While it is recognized that both the employer and the bargaining agent have the right to relitigate issues, as was stated in *Breau* (*supra*) "... certainty, uniformity, stability and predictability ..." are extremely important elements in fostering a positive labour relations climate. For an adjudicator to go against established jurisprudence should, I believe, be done only when the trier of fact is convinced the jurisprudence was wrong. Is the established jurisprudence incorrect?

[28] After reading both the *King* (*supra*) and *Breau* (*supra*) decisions, which detail the very complex mathematical explanation from each of the two parties as to why their position should be preferred, the phrase "the devil is in the detail" comes readily to

mind. Rather than restate complex mathematical formulas which were reviewed in both the referenced cases, I will attempt to explain the reasons for my decision in a different fashion.

[29] Before beginning that explanation, I will state that after reviewing both *Diotte* (*supra*) and *White* (*supra*), I find that these cases are not of assistance in the present circumstances. Both of these cases dealt with time not worked by the grievor and the issue in the instant case is compensation for time worked by the grievor.

[30] Both parties agree that the total compensation owed to the employee for working on a DPH is 26 hours.

[31] The bargaining agent states that the employee's regular pay cheque reflects an 8-hour day, and the compensation for working on a DPH is time and one-half for the 12-hour shift. The additional amount owing the employee, over and above his regular pay cheque, is therefore 18 hours.

[32] The employer states that the employee regularly works a 12-hour shift and gets paid for such. Therefore, the additional amount owing the employee for working a 12-hour DPH is 14 hours.

[33] I believe an answer to this supposed conundrum lies in clause 28.04 of the collective agreement (Exhibit E-1). It states, in part:

> *... the implementation of any variation in hours shall not result in any additional overtime work or additional payment by reason only of such variation ...*
>
> (emphasis mine)

[34] Even though Mr. Mackie worked a 12-hour shift, he could not receive additional payment simply because he worked the variation in hours. Therefore, he has to get the same payment as someone who does not work variable hours. This means he has to get paid an amount equal to a regularly scheduled, 8-hour-a-day (40-hour-a-week) employee. Consequently, his regular bi-weekly pay cheque is no greater than someone working an 8-hour day, even though he works a 12-hour shift. In his case, the 12-hour shift will average out to an 8-hour day over the 12-week cycle.

[35] Mr. Mackie's bi-weekly pay cheque never varied. He was paid as though he worked an 8-hour day. When a DPH occurs, and he works his 12-hour shift, he is

entitled to an amount over and above his regular pay cheque. Since his regular pay cheque has been equated to an 8-hour day, and the parties agree he is entitled to a global amount of 26 hours' pay, he is owed 18 additional hours for working the DPH.

[36] For this reason, I see no need to deviate from the decision in both *King* (*supra*) and *Breau* (*supra*). Accordingly, the employer is directed to compensate Mr. Mackie for the amount owing in accordance with this decision.

[37] In Mr. Mackie's grievance he asked for "all compensation retro to July 1, 2001". The grievance was filed on March 20, 2002. Neither party made representation before me as to the appropriate compensation if I were to sustain the grievance. Accordingly, I will remain seized of this matter for implementation purposes only if the parties advise me of the need to do so on or before February 6, 2004.

Joseph W. Potter,
Vice-Chairperson

OTTAWA, November 24, 2003.