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Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

ANDREW WALLIS

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Before: Sylvie Matteau, Deputy Chairperson

For the Grievor: John Mancini, UCCO-SACC-CSN

For the Employer: Jennifer Champagne, Counsel

Heard at Moncton, New Brunswick,
November 24, 2004.

[1] Mr. Andrew Wallis, the grievor, has been a correctional officer (CX-2) at the Westmorland Institution in Dorchester, New Brunswick, since 1999. Between 1997 and 1999, he was employed with the Correctional Service of Canada at the Springhill Institution.

[2] On September 5, 2002, Mr. Wallis filed a grievance asking that "CX staff at Westmorland be granted a [statutory] holiday of 12 hours with no penalty". He explained in his grievance that CX employees are subject to variable hours of work. They work 12-hour shifts on a rotational basis and, as such, they should benefit from a full 12-hour statutory holiday, as outlined in the Collective Agreement between the Treasury Board and the Union of Canadian Correctional Officers, expiring May 31, 2002.

[3] The employer maintains that statutory holidays should be the same for all employees and in accordance with article 21 of the Collective Agreement. Any variance in the latter should be expressly provided for. As a result, the employer collects back (claw back) four hours from employees working a 12-hour shift when they don't work on those days. Furthermore, this issue has been decided in favour of the employer's interpretation of the Collective Agreement in this Board's decision in *White v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2003 PSSRB 40, confirmed by Justice MacKay of the Federal Court in *White v. Canada (Treasury Board)*, 2004 FC 1017.

[4] Mr. Wallis testified on his own behalf and Mr. Claude Arseneault testified on behalf of the employer. The Collective Agreement was filed as Exhibit G-1.

The Circumstances

[5] The grievor explained that he works on a variable-hour schedule. His shifts are regularly 12 hours.

[6] On Labour Day, September 3, 2002, he was "statted off" (meaning he was not required to work his regular 12-hour shift on that statutory holiday). As a result, he did not report to work for his shift and four hours were clawed back in excess of the eight-hour "normal" work day. These clawed-back hours were recorded and he was given an option to "repay" the four hours.

[7] In his opinion, for employees working a 12-hour shift, the way the employer claws back four hours in the case of a statutory holiday is equivalent to a penalty. The employer does not give the employee an opportunity to pay back these hours on that same day as can be the case in other institutions. An arrangement has to be made in order that the time is paid back from the vacation or sick-leave bank; the hours can quickly add up.

[8] In answering questions from his representative, the grievor stated that his "normal daily hours" are 12 hours; that his "normal work day" is 12 hours; that his "hours regularly scheduled" are 12 hours; that his "scheduled day of work" is 12 hours; that his "schedule of working hours" is 12 hours; that his "regularly scheduled shift" on September 3, 2002, would have been 12 hours, a full-day shift from 07h00 to 19h00.

[9] Mr. Wallis also indicated that a "day of rest" is defined as the time frame from the last shift to the next, in other words, 24 hours. Finally, he indicated that overtime for all CX correctional officers is anything over 12 hours of work.

[10] Mr. Arseneault, a CX-3 since 1998 and currently responsible for the work rosters at Westmorland, explained that all CX correctional officers at the Institution work a 12-hour shift on a rotation of four days of work and five days off, in clusters of four shifts for 30 weeks. This represents an average of 37.5 hours per week. An adjustment is made by way of a 9-hour shift every 30 weeks to maintain that average. Salary is paid bi-weekly, based on that average of 37.5 hours per week. Overtime or other adjustments are paid separately.

[11] He also testified that when an employee is off for a day of rest on any designated paid holiday, such as Labour Day, the next day of work will be his or her designated paid holiday and will be paid as such, for all hours worked. In this case, as appears from the Westmorland main roster (Exhibit E-1), the grievor was indeed "statted off" on that day. He confirmed that, as a result, the grievor was asked not to work the full 12 hours and that four hours were recorded for "claw back" purposes. This is so because the interpretation of the Collective Agreement, across the country, is that the "normal day" for shift workers is one of eight hours; the designated paid holiday is therefore eight hours. That is the reason for the claw back.

[12] He also explained that on those designated paid holidays, the staff is reduced and tasks are assigned differently; this is a cost-cutting measure. Under cross-examination, Mr. Arseneault explained that the roster is produced by computer, according to a formula agreed upon by management and the union. It is prepared a year ahead of time and is posted for the employees. They can consult it at least six months ahead of time. His task is to ensure that it is posted and that he records the claw backs.

[13] He also confirmed that on September 3, 2002, CX employees were scheduled to work a 12-hour shift. He agreed that "regular hours of work" for all CX employees are 12 hours; that a "full shift worked" is 12 hours; that a "regular shift schedule" is 12 hours as well as "regularly scheduled hours of work"; that "normal daily hours" for this group are 12 hours as well as a "scheduled day of work" and a "normal working day" and, finally, that overtime is anything over the scheduled shift of 12 hours.

[14] Relevant articles of the Collective Agreement read as follows :

ARTICLE 2
INTERPRETATION AND DEFINITIONS

2.01 For the purpose of this Agreement:

(...)

*(i) "**holiday**" means (jour férié):*

(i) the twenty-four (24)-hour period commencing at 00:01 hours of a day designated as a paid holiday in this Agreement;

(ii) however, for the purpose of administration of a shift that does not commence and end on the same day, such shift shall be deemed to have been entirely worked:

(A) on the day it commenced where half (1/2) or more of the hours worked fall on that day,

or

(B) on the day it terminates where more than half (1/2) of the hours worked fall on that day;

ARTICLE 34
VARIABLE HOURS OF WORK

The Employer and the bargaining agent agree that the following conditions shall apply to employees for whom variable hours of work schedules are approved pursuant to the relevant provisions of this collective agreement. The agreement is modified by these provisions to the extent specified herein.

It is agreed that the implementation of any such variation in hours shall not result in any additional expenditure or cost by reason only of such variation.

1. General Terms

The scheduled hours of work of any day as set forth in a work schedule, may exceed or be less than the regular workday hours specified by this agreement; 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.

For shift workers, such schedules shall provide that an employee's normal work week shall average the weekly hours per week specified in this agreement over the life of the schedule. The maximum life of a schedule shall be six (6) months.

For day workers, such schedules shall provide that an employee's normal work week shall average the weekly hours per week specified in this agreement over the life of the schedule. The maximum life of a schedule shall be twenty-eight (28) days.

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

(...)

5. Specific Application

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

Interpretation and Definitions

*"**Daily rate of pay**" - shall not apply.*

(...)

Designated Paid Holidays

(a) A designated paid holiday shall account for the normal daily hours specified by this agreement.

(b) When an employee works on a Designated Paid Holiday, the employee shall be compensated, in addition to the normal daily hours of pay specified by this agreement, time and one-half (1 1/2) up to his or her regular scheduled hours worked and double (2) time for all hours worked in excess of his or her regular scheduled hours.

Hours of Work

Day Work

21.01 *When hours of work are scheduled for employees on a regular basis, they shall be scheduled so that employees:*

(a) on a weekly basis, work thirty-seven and one-half (37 1/2) hours and five (5) days per week, and obtain two (2) consecutive days of rest,

(b) on a daily basis, work seven and one-half (7 1/2) hours per day.

Shift Work

21.02 *When, because of the operational requirements of the service, hours of work are scheduled for employees on a rotating or irregular basis:*

(a) they shall be scheduled so that employees:

(i) on a weekly basis, work an average of thirty-seven and one-half (37 1/2) hours,

and

(ii) on a daily basis, work eight (8) hours per day.

(...)

21.04 *An employee's scheduled hours of work shall not be construed as guaranteeing the employee minimum or maximum hours of work.*

(...)

26.05 *When an employee works on a holiday, he or she shall be paid time and one-half (1 1/2) for all hours worked up to the regular daily scheduled hours of work as specified in Article 21 of this collective agreement and double (2) time thereafter, in addition to the pay that the employee would have been granted had he or she not worked on the holiday.*

Arguments

For the grievor

[15] The representative of the grievor argues that the expression "normal daily hours" found in paragraph (a) of clause 34.5 of the Collective Agreement does not mean something different from "regular scheduled hours worked", contrary to the decision issued by Board Member Ian Mackenzie, in *White (supra).* The "normal daily hours" to be attached to the case of Mr. Wallis, as his testimony and that of Mr. Arseneault have established, is 12 hours.

[16] In the *White (supra)* case, Mr. Mackenzie has applied the normal rules of interpretation generally accepted by law, that is, if the text refers to two different expressions, then they should mean something different. Paragraph 34 of his decision reads as follows:

> *"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.*

[17] However, Mr. Mancini submits that this interpretation is wrong and that every Collective Agreement must be read as a whole, so as to provide an interpretation that holds together as a whole. In this case the "normal daily hours" for all CX employees are 12 and so should "normal daily hours specified by this agreement" be, as far as they are concerned.

[18] In support of this argument, he points out that all CX employees at the Westmorland Institution work a 12-hour shift, unlike the employees of the Renous Institution, where Mr. White worked at the time of his grievance, who alternate between an 8-hour shift and a 12-hour shift over a two-week period.

[19] In support of this interpretation, he points out that article 34 was incorporated in the agreement later on and should be read as a modification of the Collective Agreement. When article 34 was added, it was intended to provide an advantageous situation for both the employees and the employer. It should not affect other rights granted under other provisions of the Collective Agreement like the benefit of a full

designated paid holiday. It should not be more costly to the employer and in fact is not more costly to the employer.

[20] Mr. Mancini then referred to numerous dispositions of the Collective Agreement to demonstrate that the expressions "regular" or "normal" hours are used indiscriminately throughout. Therefore, it cannot be concluded that the use of these expressions in the article, which concerns the designated paid holidays, must necessarily mean something different. They do not elsewhere in the Collective Agreement. They are interchangeable.

[21] Moreover, he points out that when the parties meant to make a distinction, they specifically referred to article 21, as is the case for articles 24 and 27, as well as in paragraph 27.05(b) and clauses 26.05, and 35.01 of the Collective Agreement. The rule of interpretation should conclude that if the parties determined when to refer to article 21 and its definition of "normal hours", then where they did not refer to article 21, they did not intend it to apply.

[22] If the employer is allowed to fraction the day in such a manner the result is a claw back. The employee is paid time and a half for eight hours and then owes four hours. The employer cannot unilaterally decide that the designated paid holiday for employees working regularly or normally 12 hours is to be eight hours when "statted off". There is no such agreement to fraction the day on the part of the union.

[23] With the adoption of article 34 and the following agreement between the parties to adopt the 12-hour shift for CX employees, their regular shift and normal hours worked became 12 hours and all obligations or benefits accorded elsewhere in the Collective Agreement should take that into account. Employees should not feel cheated of four hours.

[24] Mr. Mancini referred to many authorities including sections 11, 14 and 28 of the *Interpretation Act* (R.S.C. chap. I-23). He also referred to *Canadian Labour Arbitration* by Messrs. Brown and Beatty, Third Edition, as well as the case of *King & Holzer v. Canada Customs and Revenue Agency*, 2001 PSSRB 117. Mr. Mancini is asking that the same rules that applied to the latter case be applied in this case. In his opinion, neither the *White (supra)* nor the *Diotte v. Treasury Board (Correctional Service of Canada)*, 2003 PSSRB 74, cases apply, as suggested by the employer.

For the employer

[25] The employer's representative argued that this case is similar to the situation decided in *White (supra).* That decision should stand and apply in the present case, which involves the same Collective Agreement and the same disposition. Furthermore, it presents the same factual scenario. Among other things, the schedule is the same 12 hours and the rotation is also four work days to five rest days, all for the same average 37.5 hours per week.

[26] This decision has even been confirmed by the Federal Court. In the interest of consistency, it should be followed, as there is no reason in the case of Mr. Wallis to change the interpretation of that same disposition.

[27] Ms. Champagne also referred to the decision in *Diotte (supra),* where the circumstances were very similar to those in the present case. She concludes that, clearly, this issue has been decided.

[28] Furthermore, Ms. Champagne referred to the second paragraph of the preamble of article 34 and added that the scheme of variable hours was designed to allow longer periods of rest between shifts at no additional cost to the employer. There would be a difference between paying a designated paid holiday of 12 hours and one of eight hours. There are 11 of them in this Collective Agreement.

[29] She also points out that these designated paid holidays existed prior to the adoption of article 34. Article 34 contains specific provisions on designated paid holidays. It should be read in recognition of its taking into account what was already in existence in the Collective Agreement. These provisions do not refer to a different definition of the working day to be paid; on the contrary they refer to the "normal daily hours specified in the Collective Agreement", not to the specific employee's regular or normal hours. Had it been the intention of the parties to pay 12 hours, it would have been specified clearly.

[30] The multitude of different expressions used in the Collective Agreement does not allow for an identical interpretation, as argued by the grievor. The interpretation has to be made in the context of the provision at play.

[31] The *Interpretation Act* does not shed any light on this debate; a Collective Agreement is not to be interpreted as regulations should be. The parties are solely

accountable for the wording and interpretation of a Collective Agreement. Finally, Ms. Champagne points out that the *King & Holzer (supra)* decision is not of assistance either, as it concerns "leave with pay for family-related responsibilities".

Decision

[32] The issue arising from this case has been examined in both the *White (supra)* and the *Diotte (supra)* cases. The former has been reviewed by the Federal Court and it found that the interpretation was not unreasonable. In examining these two decisions, I find that the circumstances are similar to the ones found in Mr. Wallis's case, that the provision in question is the same and that the arguments presented in both cases are generally the same as the ones presented here by the grievor.

[33] The grievor's representative has offered arguments regarding the rules of interpretation that should be applied in the circumstances. However, I find them of no assistance in interpreting this provision of the Collective Agreement. Indeed, to accept the argument of the grievor on this point would mean that the interpretation of the Collective Agreement, meant to cover all employees in the bargaining unit equally, would vary from institution to institution.

[34] As such, the fact that in the case of the Westmorland Institution, all CX employees regularly work a 12-hour shift, unlike their colleagues of the Renous Institution, where Mr. White worked at the time of his grievance, should not affect the interpretation of the Collective Agreement.

[35] In this regard, the question would be: do the provisions with respect to the designated paid holiday found in the new section regarding variable hours of work (article 34) refer to the definition found in clause 21.02 of the collective agreement when referring to "normal daily hours of pay specified by this agreement"? The answer has to be yes. Article 34 clearly refers to the "normal daily hours". They are specified in the agreement under article 21. They are eight hours for employees working variable hours under clause 21.02. Article 34 does not provide for a specific definition and does not exclude the definition found in article 21, as it did for the "daily rate of pay". It does not either refer to the "normal daily hours of each particular employee".

[36] The preamble to article 34 is clear: "The agreement is modified by these provisions to the extent specified *herein.*" What is not specifically modified by

article 34 remains the same. According to article 34, the general provisions of the Collective Agreement prevail, unless specifically modified.

[37] The variable hours-of-work scheme is very important for the employees. The grievor argues that the interpretation, as decided by management and Mr. Mackenzie in the *White (supra)* decision, has a perverse effect on employees working a 12-hour shift. However, it cannot provide them with a greater benefit than that provided to the employees working non-variable hours or 8-hour shifts, unless it clearly says so in the Collective Agreement. The claw back is an administrative means to ensure the equity of the scheme for other employees. It cannot be viewed as cheating the employees working the variable shift, although they may feel that way.

[38] The Federal Court did reflect on this issue of the unintended effect of the *White (supra)* decision. In paragraph 11 of his decision, Justice MacKay writes: "If the interpretation prevailed, then the provisions under the Collective Agreement for increased pay for working on a holiday would result in anomalous differences between those on a regular schedule and those on a 12-hour shift." He concludes in the following paragraph that "if those results were to follow, that, in itself, would not persuade me that the adjudicator's decision was patently unreasonable. That is the standard that has to be met..."

[39] I see no reason to interpret article 34 of this Collective Agreement differently from the way in which it was interpreted in the *White (supra)* case.

[40] The grievance is denied.

Sylvie Matteau
Deputy Chairperson

OTTAWA, December 22, 2004