Date: 20040517

Files: 148-2-377 to 380

Citation: 2004 PSSRB 38

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

UCCO-SACC-CSN

Applicant

and

TREASURY BOARD

Respondent

RE: Application under section 21 alleging a breach of section 52 of the Public Service Staff Relations Act

Before: Joseph W. Potter, Vice-Chairperson

For the Applicants: John Mancini, Union Advisor, UCCO-SACC-CSN

For the Respondent: Rosalie A. Armstrong, Counsel

Heard at Moncton, New Brunswick,
May 4, 2004.

DECISION

[1] This is an application under section 21 of the *Public Service Staff Relations Act* (*PSSRA*) alleging "… that the employer, Treasury Board, has failed to maintain in force a term or condition of employment applicable to employees in the bargaining unit …". If proven, this allegation would be a breach of section 52 of the *PSSRA*.

[2] Section 21 of the *PSSRA* reads as follows:

> ***21.*** *(1) The Board shall administer this Act and exercise such powers and perform such duties as are conferred or imposed on it by, or as may be incidental to the attainment of the objects of, this Act including, without restricting the generality of the foregoing, the making of orders requiring compliance with this Act, with any regulation made hereunder or with any decision made in respect of a matter coming before it.*
>
> [...]

Section 52 of the *PSSRA* reads as follows:

> ***52.*** *Where notice to bargain collectively has been given, any term or condition of employment applicable to the employees in the bargaining unit in respect of which the notice was given that may be embodied in a collective agreement and that was in force on the day the notice was given, shall remain in force and shall be observed by the employer, the bargaining agent for the bargaining unit and the employees in the bargaining unit, except as otherwise provided by any agreement that may be entered into by the employer and the bargaining agent, until such time as ...*

[3] The complainant bargaining agent (UCCO-SACC-CSN) represents all employees in the Correctional Services Group. The complaint, dated October 18, 2002, alleges that at four (4) separate correctional facilities in the Atlantic region, employees had either their 8-hour or 12-hour day shift altered such that they were no longer compensated for their ½ hour lunch break. This matter was heard on May 4, 2004.

[4] By letter dated May 5, 2004, the complainant advised the Public Service Staff Relations Board (the Board) that it was withdrawing two of the four complaints. Specifically, the complaints involving Dorchester and Springhill institutions (Board files 148-2-378 and 148-2-380) are withdrawn and those files are closed. The complaint relating to the other two locations, namely Atlantic and Nova institutions (Board files 148-2-377 and 148-2-379) remain. This decision, therefore, applies to Board files 148-2-377 and 148-2-379 only.

[5] One witness testified on behalf of the complainant and the parties agreed that this testimony would be representative, in principle, of what took place at all four (now two) institutions. Any differences from one institution to the other, in this situation, were immaterial to the central issue to be decided.

[6] On consent, the complainant filed a copy of its notice to bargain, which was dated March 26, 2002 (Exhibit U-1), as well as a copy of the collective agreement (Exhibit U-2). The employer, on consent, tabled a copy of a memorandum titled "Unpaid Meal Breaks" dated August 14, 2002 (Exhibit E-1), as well as another memorandum dated September 27, 2002, titled "Meal Breaks" (Exhibit E-2).

[7] Since the parties were not materially at odds over what took place to prompt the filing of the complaint, the background can be stated quite succinctly.

Background

[8] The collective agreement between the Treasury Board and the Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN (UCCO-SACC-CSN) expired on May 31, 2002. Notice to bargain seeking a new collective agreement was sent by the UCCO-SACC-CSN to Treasury Board on March 26, 2002.

[9] Douglas White is a correctional officer at the Atlantic Institution in Renous, New Brunswick, and he has been there for some 17 ½ years. For Mr. White's entire time at that institution, up to September 2002, all of the day shifts were either 8 or 12 hours, with a paid ½ hour meal break included therein. The 8-hour shift was 7:00 to 15:00 hours and the 12-hour shift was 7:00 to 19:00 hours at the Atlantic Institution.

[10] Effective September 30, 2002, the 8-hour shift changed to 6:45 to 15:15 and the 12-hour shift changed to 6:45 to 19:15 at the Atlantic Institution, with an unpaid ½ hour meal break included therein.

[11] During the unpaid ½ hour lunch break, employees were not expected to work. However, for a number of reasons, it was not possible for the employees to go out to a restaurant or other such eating facility during this ½ hour unpaid break.

Argument for the complainant

[12] Section 52 of the *PSSRA* places a limitation on the employer's right to change working conditions after notice to bargain has been filed. This is common to all labour legislations, and its purpose is to not give the employer an unfair advantage while negotiations are going on.

[13] In the instant case, employees are working an extra ½ hour.

[14] Subclause 21.02(a) and clause 21.07 of the collective agreement state:

> ***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.*
>
> ***21.07*** *Except as may be required in a penitentiary emergency, the Employer shall:*
>
> *(a) permit a Correctional Officer to take a reasonable amount of time to eat a lunch or meal during any shift,*
>
> *and*
>
> *(b) notwithstanding paragraph (a) above, a Correctional Officer may be required to eat the lunch or meal at his or her work location when the nature of the duties makes it necessary.*

[15] These provisions have to mean something, and Mr. White said they meant 8 hours of work. Now, employees are at the institution for 8 ½ hours.

[16] The employer made a unilateral decision to change the hours of work, which is a violation of section 52 of the *PSSRA*.

Argument of the Employer

[17] The essence of section 52 of the *PSSRA* is that any term or condition in force prior to Notice to Bargain must remain in force until a new agreement is negotiated.

[18] The September 2002 memorandum concerns the scheduling of hours of work, and the ability for the employer to schedule hours of work was in effect prior to notice to bargain. Furthermore, a specific work schedule is not guaranteed in the collective agreement.

[19] The only limit with respect to scheduling hours of work is found in subclause 21.02(c), which reads:

> ***21.02*** *When, because of the operational requirements of the service, hours of work are scheduled for employees on a rotating or irregular basis:*
>
> […]
>
> *(c) they shall, except as otherwise required by a penitentiary emergency, be scheduled so that each shift ends not later than nine (9) hours after its commencement,*
>
> […]

[20] In the instant case, employees still work 8 hours a day, so that is not a change, and there is nothing in the collective agreement language to suggest that what Mr. Pelletier did was wrong.

[21] Article 34 of the collective agreement provides for Variable Hours of Work whereby the parties can agree to alter the regular workday hours. There is no upward cap, so the change does not violate this provision.

[22] Clauses 21.07 and 21.08 of the collective agreement oblige the employer to provide a meal break. They read:

> ***21.07*** *Except as may be required in a penitentiary emergency, the Employer shall:*
>
> *(a) permit a Correctional Officer to take a reasonable amount of time to eat a lunch or meal during any shift,*
>
> *and*

> *(b) notwithstanding paragraph (a) above, a Correctional Officer may be required to eat the lunch or meal at his or her work location when the nature of the duties makes it necessary.*
>
> ***21.08*** *For the purpose of Clause 21.07, lunch or meal periods for each shift shall be sometime during the following hours:*
>
> *Day Shift – 11:00 to 13:00 hours (11 a.m. to 1 p.m.)*
> *Evening Shift – 17:00 to 19:00 hours (5 p.m. to 7 p.m.)*
> *Night Shift – 02:30 to 05:30 hours (2:30 a.m. to 5:30 a.m.)*

[23] As a consequence of the change, employees now have a ½ hour during which they are free to eat their lunch.

[24] There is nothing in the collective agreement to say the schedule is fixed forever. It is a management prerogative to schedule hours of work.

[25] Employees have suffered no loss. Their pay has not changed, and they are free to leave during the ½ hour unpaid break.

[26] The following case law was submitted by the employer's representative: *Public Service Alliance of Canada and Canada (Treasury Board)*, PSSRB File No.148-2-39 (1979) (QL); *Public Service Alliance of Canada (PSAC) v. Canada (Treasury Board)*, [1983] F.C.J. No. 700 (FCA) (QL); *Canadian Association of Professional Radio Operators and Treasury Board (Transport Canada),* PSSRB File No. 148-2-173 (1990) (QL); *Professional Institute of the Public Service of Canada and Treasury Board*, PSSRB File No. 148-2-185 (1991) (QL).

Reply

[27] The employer states that it has a right to change the schedule. That may be so, but not here when it was a practice for 18 years to have employees present during a paid lunch break.

Decision

[28] There is no dispute as to the facts in this case. At both the Atlantic and Nova institutions, the employer changed the employees' hours of work by adding ½ hour to their daily schedules in order to permit the taking of a ½ hour unpaid meal break.

This change was made in September 2002, which postdated the bargaining agent's March 26, 2002 notice to bargain.

[29] The question that must be answered is whether the change in the employees' working schedule was a change in a term or condition of employment as contemplated by section 52 of the *PSSRA*.

[30] In essence, what section 52 does is freeze whatever rights are embodied in the collective agreement on the date notice to bargain was filed, or, as stated by the Federal Court of Appeal, "Its purpose is to preserve and continue the effect of the agreement between the parties, not to qualify or restrict that effect." (*Public Service Alliance of Canada (PSAC) v. Canada (Treasury Board)*, [1983] F.C.J. No. 700 (FCA) Appeal No. A-429-82 (QL) at page 3).

[31] This same point was made in Board file 148-2-39 (*ibid*) where, after notice to bargain had been filed, the employer changed employees' shifts from eight hours to seven and one-half hours. The bargaining agent claimed this action violated section 51 (as it then was) of the *PSSRA*. At paragraph 14, the Deputy Chairperson wrote:

> *14. …To accede to* (the bargaining agent's) *argument would enable employees to benefit from rights during the section 51 time period not otherwise available to them during the operation of a collective agreement. Surely, the very condition of employment with which we are concerned here is that an employee may be required to work seven and one-half hours or eight hours depending upon operational needs. The potential for change in working conditions is a condition of employment which is applicable to employees at all material times before or after notice to bargain has been given.*

[32] If the employer had the right to change the shift schedules before notice to bargain was given, this right remained in force in September 2002 when the shift schedules were changed. On the other hand, if the employer did not have the right to alter the shift schedules when notice to bargain was given, the employer could not acquire that right.

[33] In the instant case, the onus to prove that the employer has violated section 52 of the *PSSRA* rests with the bargaining agent. I do not believe it has met that onus.

[34] The evidence of Mr. White showed that employees continued to be scheduled and continued to be paid for 8 hours of work both before and after the September 2002 memorandum. The change effected by the memorandum was to add an unpaid meal break of a ½ hour, for which Mr. White agreed employees were not working.

[35] Given the fact that both before and after the September 2002 memorandum employees continued to work 8 hours a day, I see no violation of subclause 21.02(a) of the collective agreement. As the employees were also given a ½ hour to take a meal break, I see no violation of clause 21.07 of the collective agreement.

[36] There was nothing in the collective agreement that the bargaining agent directed me to, or that I could find, that prohibited the employer from amending the shift schedule. If there was nothing preventing the employer from making such an amendment before notice to bargain was given, it must follow that nothing prevents such an action after notice to bargain was given. In other words, before notice to bargain was filed, the employer had the right to amend shift schedules and this right had to continue after notice was filed, pursuant to section 52 of the *PSSRA*.

[37] Mr. White testified that for the almost 18 years he had been at the Atlantic Institution, he had enjoyed a ½ hour lunch break included in his work schedule. This changed in September 2002. Although the bargaining agent did not mention estoppel in its written complaint to the Board, it alluded to it in reply and presented evidence that a change occurred after 18 years of a consistent practice.

[38] If the complainant had attempted to argue estoppel at the hearing, it may have been prevented from doing so due to the principles espoused by the Federal Court of Appeal in *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109, but I would have dismissed this argument anyway for the following reason.

[39] In *Canadian Labour Arbitration*, Third Edition, Brown and Beatty, at page 2-70, it states:

> *Thus, the essentials of estoppel are: a clear and unequivocal representation … and detriment resulting therefrom.*

[40] I was not made aware of any evidence to suggest that Mr. White relied to his detriment on the fact that the lunch break was included in the shift schedule.

Mr. White, and indeed all other correctional officers affected, continued to receive an 8-hour work schedule and continued to be paid for 8 hours of work.

[41] I also note that subclause 21.03(b) of the collective agreement (Exhibit U-2) states:

> *(b) The Employer agrees that, before a schedule of working hours is changed, the change will be discussed with the authorized representative of the Bargaining Agent if the change will affect a majority of the employees governed by the schedule.*

[42] The October 8, 2002 complaint to the Board does not state that the change to the schedule of working hours was not discussed with an authorized representative of the bargaining agent, nor was it argued in front of me that this action took place without such discussion.

[43] As the onus in this case rests with the bargaining agent, I can only presume that this condition, which existed before the notice to bargain was given and continued thereafter, was met.

[44] For all of the above reasons, this complaint is dismissed.

Joseph W. Potter,
Vice-Chairperson.

OTTAWA, May 17, 2004.