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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

and

PARKS CANADA AGENCY

Employer

Indexed as
Public Service Alliance of Canada v. Parks Canada Agency

In the matter of a group grievance referred to adjudication

Before: Augustus Richardson, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Bargaining Agent: Douglas Hill, Public Service Alliance of Canada

For the Employer: Patrick Turcot, counsel

Heard at Halifax, Nova Scotia,
November 13 and 14, 2019.

REASONS FOR DECISION

[1] Can an employer recover an overpayment made to an employee even though the collective agreement does not give it the express right? Does it matter that the employer knows that the overpayment will be made, in fact repeatedly, for work done on particular days? These are two of the questions raised and answered in this decision.

I. Background

[2] The Parks Canada Agency ("the employer") and the Public Service Alliance of Canada ("the bargaining agent") were parties to a collective agreement that expired on August 4, 2014 ("the collective agreement"), which they agreed was applicable to the grievance at issue before me.

[3] Before me is a group grievance dated March 12, 2015, filed by the following employees (collectively, "the grievors") working at the Fortress of Louisbourg National Historic Site ("the Fortress") on Cape Breton Island in Nova Scotia:

1. Chad Magee
2. Michael Burke
3. Leo Carter
4. Ian Harte
5. Gary Kendall
6. Perry Lahey
7. John MacLean
8. Glenn Shepard
9. Kristy Martell

[4] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act* and the *Public Service Labour Relations Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board, the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act*.

[5] The parties agreed that all 10 grievors were classified GSPRC05 and that they had been red-circled at the GSPRC06 level. They were full-time seasonal employees who worked seven months of the year. Their normal weekly hours of work under the "Hours of Work Code" in the collective agreement were 40 hours composed of five 8-hour shifts. However, during the relevant period, by agreement, they had been working variable shifts at the Fortress, first 10-hour shifts, and then, starting in December 2014, 12-hour shifts. They all filed the same grievance with the same wording, as follows (Exhibit U1, tab 7):

> *I grieve the interpretation and application of Article 22 Hours of Work and Article 27 Designated Paid Holidays of the Parks Canada Agency's collective agreement with Public Service Alliance of Canada which was sent to me by emails on September 12th, 19th December 31st January 7th November 3rd by Karen Pink, Visitor Services Team leader on the subject of the compensation to which I am entitled as an employee working a variable work schedule who was scheduled to work and worked on Designated Paid Holidays in 2014 and 2015, including Dec. 25th, 26th, Jan 1st, Nov. 11th, Oct. 13th, Sept. 1st, August 4th, July 1st, May 19th and more. I do not agree with this interpretation of the Parks Canada Agency collective agreement because it does not provide me with my entitlement to full compensation based on the facts and merits of my case or respect the wording of my collective agreement. A copy of the agrieved [sic] email is attached. Consultation is requested on this grievance with my union representative:*

[6] I pause to note that in its first-level response, the employer made an initial objection to timeliness. It was later abandoned as unfounded.

[7] The parties also agreed that since all 10 grievors had filed the one grievance, the bargaining agent would call only one grievor — Chad Magee — to testify.

[8] The employer called to testify Karen Pink, the grievors' team lead, and Darlene Guilcher, a labour relations consultant.

[9] The facts were not in dispute. Instead, the issue turned on the interpretation and application of the terms and conditions of the collective agreement that governed the pay of variable-shift employees working on a designated paid holiday (DPH) and on the employer's power, if any, to recover any overpayments it might have made to the grievors.

[10] The relevant articles in the collective agreement are clauses 22.12, 22.14(d) and 27 ("Designated Paid Holidays"), and in particular clause 27.05(a), which is part of a

cluster of terms and conditions governing the administration of a variable-hours-of-work schedule. They provide as follows:

> ***27.05***
>
> *(a) When an employee works on a holiday, she/he shall be paid time and one-half (1 1/2) for all hours worked, up to the daily hours specified in article 22, and double (2) time thereafter, in addition to the pay that the employee would have been granted had she/he not worked on the holiday.*
>
> …
>
> ***22.12*** *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 Agency to schedule any hours of work permitted by the terms of this agreement.*
>
> …
>
> ***22.14*** *For greater certainty, the following provisions of this agreement shall be administered as provided herein:*
>
> ***(d) Designated Paid Holidays (clause 27.05)***
>
> *(i) A Designated Paid Holiday shall account for seven decimal five (7.5) or eight (8) hours (in accordance with the Hours of Work Code).*
>
> *(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 subparagraph (i), at time and one-half (1 1/2) up to his/her regular scheduled hours worked and at double (2) time for all hours worked in excess of her/his regular scheduled hours.*

II. The facts

[11] As noted, at one time, the grievors worked 8-hour shifts over a 40-hour workweek (or 80 hours biweekly). They provided 24-hour coverage over the 7 days of a week. A period of workforce reduction led to fewer employees. That led to consequential difficulties with scheduling, increased overtime, and decreased employee morale. Ms. Pink and Mr. Magee both testified that in consultation with employees, the employer moved to a variable-shift schedule initially composed of 10-hour shifts over 80 hours biweekly. It resulted in longer rest periods for the grievors of either 3 or 4 days. However, the schedule left 4 hours not covered each day. The grievors, worried about the Fortress being unsupervised during that 4-hour period, suggested that the employer move to 12-hour shifts. Ultimately, in December 2014, it

agreed. (I note that since then, at least as of the hearing date, the employer has returned to 8-hour shifts.)

[12] The change to 10- and then 12-hour shifts led to the grievance before me. Once the variable shifts came into effect, the employer took the position that when the grievors worked on a DPH, they were being overcompensated for working on that day in the case of the 10-hour shifts by 2 hours, and once they moved to 12-hour shifts, by 4 hours. Accordingly, the employer required the grievors to compensate for that overpayment by returning 2 or 4 hours (respectively) of annual leave or by being unpaid for working those hours. The grievors objected to being required to give up annual leave to make up for what the employer had called an overpayment. As Mr. Magee put it, when they worked a 10-hour shift on a DPH, they had to "pay ourselves the 2 hours of vacation or have to owe the employer the 2 hours and make it up … we'd owe 2 hours to the employer."

[13] In essence, the parties agreed that the problem arose because the employer's pay system did not recognize the requirements of clause 22.14(d) in the case of variable-shift employees working on a DPH.

[14] Clause 22.14(d) has been in collective agreements between the bargaining agent and the employer for some time. It was in those that expired on August 4, 2007 (Exhibit E5), and August 4, 2011 (Exhibit E6), as well as the most recent agreement, which expired on August 4, 2018 (Exhibit E7). Similar wording has appeared in other collective agreements to which the employer was a party. Not surprisingly, the issue of the entitlement of an employee working a variable-shift schedule, in terms of compensation for working on a DPH, has come up a number of times. For example, see the following decisions: *Bazinet v. Treasury Board (Department of Public Works and Government Services)*, 2011 PSLRB 111; *Mackie v. Treasury Board (National Defence)*, 2003 PSSRB 103; *Breau v. Treasury Board (Justice Canada)*, 2003 PSSRB 65; *Arsenault v. Parks Canada Agency*, 2008 PSLRB 17; *Campbell v. Treasury Board (Correctional Service of Canada)*, 2012 PSLRB 57; and *Public Service Alliance of Canada v. Treasury Board (Department of Fisheries and Oceans)*, 2015 PSLREB 62. All these decisions reached or supported the same conclusion: an employee who under a collective agreement would ordinarily work a regular 8-hour shift over a 40-hour week (paid biweekly for 80 hours) but who instead works 10-hour variable shifts and on a DPH is entitled to be compensated as follows under clause 22.14(d):

a. 8 hours of straight time as regular pay; and
b. 10 hours at time-and-a-half for the hours worked on the DPH.

[15] Unfortunately, what really happens is not that simple. The employer's pay system does not compensate employees hourly or daily. Rather, it pays them based on their basic entitlement under the collective agreement to 80 hours of regular pay for 80 hours worked biweekly. For premium time worked (such as overtime or working a DPH), the pay system issues a separate payment, distinct from the employees' regular pay. (I have omitted situations involving sick leave or vacation.) While the pay system recognizes that an employee has worked on a DPH, it does not recognize that the employee works a variable-hours shift and hence must be paid according to clause 22.14(d) as opposed to clause 27.05(a). Hence, it pays the employee in our example as follows:

a. 10 hours of straight time as regular pay; and
b. 10 hours at time-and-a-half for the hours worked on the DPH.

[16] In short, the employee in this example is being overpaid by two hours of straight pay.

III. Submissions

[17] In its submissions, the bargaining agent accepted that an employee working a 10-hour variable shift on a DPH is entitled to be paid only a combination of the following:

a. 8 hours of straight time, pursuant to clause 22.14(d)(i); and
b. time-and-a-half for the hours worked on the DPH, pursuant to clause 22.1(d)(ii).

[18] The bargaining agent also accepted that in this example, the employer's pay system would overpay the employee by two hours. However, it submitted that the employer was not entitled to then recover the overpayment. Nothing in the collective agreement authorized such a deduction or clawback. The bargaining agent also submitted that employees working a regular eight-hour shift were not required to repay vacation time to the employer. Requiring variable-shift workers to "pay" the employer two hours of vacation time constituted a violation of clause 22.12, since that meant that the employer required them to make an "… additional payment by reason only of such variation …". The bargaining agent requested that I make a declaration that the employer was not entitled to recover the two hours and that I remain seized to

permit it and the employer to work out how much time the grievors are entitled to recover.

[19] In response, the employer insisted that the employee in the example had been overpaid by two hours, which, accordingly, it was entitled to recover. The options it gave the grievors — to either work the two hours or give them up in vacation time — were reasonable. In addition, working the longer shifts of a variable-hour schedule had a benefit (longer rest periods). If a perceived injustice arose when an employee was required to give up vacation time or to work those hours, then it was a matter for the bargaining table.

[20] As for the employer's authority to recoup the overpayment, it relied on the provisions of article 5 ("Management Rights"), s. 3 of the *Parks Canada Agency Act* (S.C. 1998, c. 31), and s. 155 of the *Financial Administration Act* (R.S.C. 1985, c. F-11).

[21] The employer asked that I dismiss the grievance.

IV. Analysis and decision

[22] As noted, this issue has arisen a number of times. In those cases, it was determined as follows that using our example of a 10-hour variable shift, an employee who works on a DPH is entitled to pay equal to:

a. 8 hours at straight time; and
b. 10 hours at time-and-a-half.

[23] However, because the employer's pay system does not recognize that the employee is to be paid on the basis of clause 22.14(d) rather than clause 27.05(a), it pays the employee as follows:

a. 10 hours (not 8) at straight time; and
b. 10 hours at time-and-a-half for working on the DPH.

[24] The result is the overpayment of two hours. The question then is whether the employer can reclaim it.

[25] I am satisfied that now, as in the past, the employer is entitled to reclaim it.

[26] First, clause 5.01 of the collective agreement provides as follows: "Except to the extent provided herein, this agreement in no way restricts the authority of those

charged with managerial responsibilities in the Agency." The "Agency" means the Parks Canada Agency. Section 3 of the *Parks Canada Agency Act* provides as follows: "There is hereby established a body corporate to be called the Parks Canada Agency, that may exercise powers and perform duties and functions only as an agent of Her Majesty in right of Canada."

[27] The employer, as an agent of Her Majesty, is authorized — and in law required — to recover the overpayment by virtue of s. 155(3) of the *Financial Administration Act*, which reads as follows:

> ***155 (3)*** *The Receiver General may recover any over-payment made out of the Consolidated Revenue Fund on account of salary, wages, pay or pay and allowances out of any sum of money that may be due or payable by Her Majesty in right of Canada to the person to whom the over-payment was made.*

[28] It also accords with the collective agreement. The parties agreed that a variable-shift employee who worked a DPH was entitled to a credit of only eight hours of straight pay plus time-and-a-half (or double time as the case may be) for his or her work on the DPH. The parties agreed that such employees were not entitled to a credit equal to the number of hours in their regular shifts. Rather, they were entitled to the same credit as that extended to employees working regular days; that is, eight hours. If instead the pay system credits them for the number of hours in their regular shifts (as opposed to eight hours), then they receive an overcompensation, which they must return to the employer.

[29] It is unfortunate that the employer's pay system cannot recognize that a variable-shift worker who works on a DPH should be paid in the manner provided by clause 22.14(d) rather than clause 27.05(a). That inability means that the employer knowingly overpays variable-shift employees each time they work on a DPH. It is doubly unfortunate because no doubt, over the years, the employer's practice has confused employees and fostered the belief that they are being forced to work for free or, as Mr. Magee put it, "to pay ourselves." Having said that, it is equally clear that nothing in the collective agreement bars that practice or permits employees to retain the overpayments that arise from it. Certainly, the bargaining agent could point to no such provision. Hence, I was not persuaded that the employer had violated any term of the collective agreement. It is entitled to recover the value of the overpayments. The options it has provided to employees in such cases — and to the grievors before me —

are reasonable; see, for example, *Campbell*, at paras. 37 and 38; and *Public Service Alliance of Canada*, at para. 123.

[30] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[31] The grievance is dismissed.

February 11, 2020.

Augustus Richardson,
a panel of the Federal Public Sector
Labour Relations and Employment Board