Date: 20210416

File: 566-02-12786

Citation: 2021 FPSLREB 42

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

JUSTIN COOKE

Grievor

and

TREASURY BOARD
(Department of the Environment)

Employer

Indexed as
Cooke v. Treasury Board (Department of the Environment)

In the matter of an individual grievance referred to adjudication

Before: David Orfald, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Guido Miguel Delgadillo, Public Service Alliance of Canada

For the Employer: Alexandre Toso, counsel

Decided on the basis of written submissions, filed January 25, February 9, and March 2, 2021.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] This case is about the employer's ability to change a day worker into a shift worker, and back again, over the course of a seven-day period. It also concerns the compensation to be paid for weekend hours worked during that time frame.

[2] Justin Cooke ("the grievor") was hired in May 2009 as a wildlife enforcement officer by the Department of the Environment now commonly known as Environment and Climate Change Canada ("the employer"). For more than three years, his regular hours of work were Monday to Friday, from 8:00 a.m. to 4:00 p.m.

[3] In August 2012, the employer informed the grievor it would require him to start working shifts effective September 13, 2012. He worked two weekend shifts, one on each of Saturday and Sunday, September 15 and 16, 2012. On Thursday, September 20, 2012, the employer decided to revert Mr. Cooke back to the normal day work schedule.

[4] Mr. Cooke filed his grievance on September 14, 2012, under the provisions of the Technical Services (TC) collective agreement between the Treasury Board and the Public Service Alliance of Canada ("PSAC" or "the union"); expiry date, June 21, 2011 ("the collective agreement"). PSAC is the certified bargaining agent for employees classified in the TC bargaining unit.

[5] The grievor submitted that the employer violated the collective agreement by attempting to transform him from a day worker to a shift worker. He should be considered a day worker and therefore should be paid overtime for the hours he worked on the weekend of September 15 and 16, 2012.

[6] The employer's position was that when he was hired, the grievor was informed that he might have to work shifts. While he initially worked a day work schedule, the employer retained the right to place him on a shift-work schedule. It did so in accordance with the provisions of the collective agreement. On the weekend of September 15 and 16, 2012, the grievor worked the hours scheduled by the employer. As such, he was not entitled to pay at overtime rates, it said.

[7] Mr. Cooke referred his grievance to adjudication on July 25, 2016.

[8] For the reasons that follow, I find that the employer's decision to change the grievor from a day worker to a shift worker, and back again, within the course of a week was inconsistent with the collective agreement. As such, the hours he worked on the weekend of September 15 and 16, 2012, should be paid at overtime rates.

[9] The grievor's referral to adjudication was made to the Public Service Labour Relations and Employment Board. 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 and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing that Board's name to the Federal Public Sector Labour Relations and Employment Board ("the Board").

[10] In this decision, the Board and its predecessors will be referred to collectively as "the Board".

II. Summary of the evidence

[11] Following discussion with the parties, the Board agreed to hear this matter via written submissions. The parties submitted an agreed statement of facts supported by a joint book of documents comprising seven tabs.

[12] Mr. Cooke was deployed to his wildlife enforcement officer position effective May 19, 2009. The employer's letter of offer was dated May 8, 2009. The initial letter of appointment did not address his hours of work. In one of two addendums to the letter of offer, dated May 25, 2009, the employer added several conditions of employment. One such condition is relevant to this matter and reads as follows: "The requirement to work shift-work and/or weekends, and/or statutory holidays and provincial/territorial holidays, irregular hours and overtime."

[13] As noted, starting in May of 2009, the grievor's regular hours of work were Monday to Friday, from 8:00 a.m. to 4:00 p.m. (including a 30-minute unpaid lunch break).

[14] Also starting in 2009, the employer consulted with PSAC regarding the implementation of shift work for wildlife enforcement officers. These discussions took place on both national and regional levels for the next several years.

[15] On August 22, 2012, the grievor was informed by email that the employer would implement a shift schedule for wildlife enforcement officers starting with the September 13, 2012, pay period (a Thursday). The schedule ran for 56 days (through to the end of the November 7, 2012, pay period).

[16] Over the course of the week beginning September 13, 2012, this took place:

1) The grievor was scheduled to work a day shift on Thursday, September 13, but was on annual leave that day.
2) On Friday, September 14, despite being scheduled to work from 1:00 p.m. to 9:00 p.m., the grievor worked his regular hours from 8:00 a.m. to 4:00 p.m., including a 30-minute unpaid break.
3) In accordance with the shift schedule, on both Saturday, September 15, and Sunday, September 16, the grievor worked from 1:00 p.m. to 9:00 p.m., including a 30-minute unpaid break.
4) In keeping with the schedule, the grievor did not work on Monday, September 17, or Tuesday, September 18.
5) On Wednesday, September 19, and Thursday, September 20, he worked his scheduled hours from 8:00 a.m. to 4:00 p.m., including a 30-minute unpaid break.

[17] On Thursday, September 20, 2012, the employer decided to revert Mr. Cooke to a normal day work schedule, effective Friday, September 21, 2012.

III. Summary of the arguments

A. For the grievor and his union

[18] The grievor submitted that when he filed his grievance, he was a day worker. The employer could not transform a day worker into a shift worker in the manner it proposed. Because he remained a day worker, he should be entitled to overtime compensation for the hours he worked on the weekend of September 15 and 16, 2012.

[19] While acknowledging that the union and employer had been in discussions for several years about transforming day workers into shift workers, PSAC said that no agreement had yet been reached.

[20] The union argued that the employer's decision to transform the grievor from a day worker to a shift worker and back again was a violation of the collective agreement. In its response to the grievance, the employer was wrong to focus on the lack of a clause prohibiting it from changing a day worker to a shift worker, PSAC said. Citing Brown and Beatty, *Canadian Labour Arbitration*, 5th edition (at 4:2100), it argued

that the collective agreement must be read as a whole, which in this case distinguishes between day workers and shift workers as different types of employees.

[21] If the employer could simply change an employee to shift work whenever it pleased, it could engage in subterfuge, the union argued. This would mean that the employer could change an employee to a shift worker and back again to assign weekend work simply to avoid paying overtime. This would be an absurd result that is not in keeping with the intention of the parties, considering the collective agreement as a whole.

[22] The grievor denied that the amended letter of offer established him as a shift worker. He was only a day worker from the time he was hired in May 2009 through the dates in question. As such, he should be paid overtime for the hours he worked on September 15 and 16, 2012.

B. For the employer

[23] The employer argued that the grievor has not established that it violated the collective agreement. There is no prohibition in the agreement that could stop management from changing an employee from a day worker to a shift worker. Moreover, the terms and conditions of this grievor's employment stated that management could require him to work shifts. As such, the employer did not change his terms and conditions of employment, which means that it did not trigger the requirement to engage in consultation in accordance with either clause 21.03 (the joint-consultation clause) or clause 25.02 (consultation about changes to work schedules).

[24] Nevertheless, the employer had consulted with PSAC about implementing a shift schedule for wildlife enforcement officers. After more than three years of consultation, the employer provided the officers, including the grievor, with a shift schedule in accordance with clause 25.09 of the collective agreement.

[25] The employer argued that it is well established that the employer has the right to transform day workers into shift workers without the bargaining agent's agreement (see *Hodgson v. Treasury Board (Transport Canada)*, 2005 PSSRB 30). That case concerned employees originally hired as day workers. As a result, the Board ruled in

Hodgson that the employer had an obligation to **consult** with the bargaining agent but no obligation to obtain its **agreement.**

[26] As of September 13, 2012, the grievor was a shift worker, the employer argued, and his work hours on September 15 and 16, 2012, were scheduled in accordance with clause 25.09. The collective agreement clearly defines "overtime" as authorized work in excess of an employee's scheduled hours of work. As such, those hours should not be paid at overtime rates (see *Maessen and McKindsey v Treasury Board (Department of National Defence)*, 2006 PSLRB 95 at para 58).

[27] The employer acknowledged that it was bound to adhere to clause 25.09 when scheduling shift workers. It had to schedule employees to work an average of 5 days per week, 7.5 hours per day. Clause 25.09(d) sets out a number of other protections for shift workers that the parties have agreed upon. The union has not argued that the employer failed to comply with those provisions.

[28] However, there is no language in the collective agreement that limits management's discretion to schedule an employee to work hours in accordance with clause 25.09, the employer argued. Management may do anything not prohibited by inference, statute, or the collective agreement, it said (*Brescia v. Canada (Treasury Board),* 2004 FC 277 at par 30, aff'd *Brescia v. Canada (Treasury Board)*, 2005 FCA 236 at paras. 50 and 55).

[29] Both the employer and union are sophisticated parties, and if they intended to limit the employer's right to change day workers to shift workers, they could have done so explicitly. In fact, the parties did exactly that in a subsequent version of the collective agreement (the one that expired on June 21, 2018). In that agreement, the parties included a new clause, 25.11, which reads as follows:

> ***25.11*** *Before the Employer changes day workers into shift workers, or changes shift workers into day workers, the Employer, in advance, will consult with the Alliance on such hours of work, and in such consultation, will show that such hours are required to meet the needs of the public and/or efficient operations.*

[30] However, the employer argued, the version of the collective agreement that the Board must interpret in this matter is the one that expired on June 21, 2011. That agreement did not place any such restriction on management's right to change a day worker to a shift worker or a shift worker to a day worker.

IV. Reasons

[31] What I find unique about this case is the grievor's quick transition from a day worker to a shift worker, and then back again, all within the space of a week.

[32] Clearly, there was an underlying issue at play, evidenced by the long period of consultation between the employer and the union about the employer's proposal to place wildlife officers on a shift schedule. In its final-level reply to the grievance, the employer stated that it "… had a large number of activities that required significant after hours field work and your employer wanted to correctly apply the collective agreement across the country when managing after-hours presence." It initiated consultation in October of 2009 with the union at a national level and consulted at a local level with officers across all regions. It then proceeded, in August 2012, to place the wildlife officers on a shift schedule.

[33] The parties provided no evidence or explanation of why the employer decided to reverse its decision with respect to the grievor. I do not presume that the employer engaged in subterfuge to avoid paying overtime for one weekend of work. The grievor was clearly unhappy about being placed on a shift schedule and filed his grievance at the very first opportunity. I suspect that the employer simply decided that it preferred to have a happy day worker than an aggrieved shift worker. However, nothing really turns on that assumption; the fact is that after only seven days as a shift worker, the employer turned Mr. Cooke back into a day worker.

[34] I also was provided no evidence or explanation of what happened to the work schedules of the larger wildlife enforcement community as a whole, and those issues are not before me.

[35] The only question I have to determine is whether the employer violated the collective agreement by placing Mr. Cooke on a shift schedule starting on September 13, 2012, only to return him to a day work schedule on September 21, 2012, and whether it paid him correctly for time worked during that period.

[36] The parties do not dispute the basic contract interpretation principles at issue here. The Board must presume that the parties intended to use the words they did and give meaning to the words of the collective agreement in their entire context, given their grammatical and ordinary sense. The whole of the agreement forms the context

within which individual provisions are interpreted. The fact that a particular provision may seem unfair is not a reason for the adjudicator to ignore it, if the provision is otherwise clear. (See for example: Brown and Beatty, *Canadian Labour Arbitration, 5th edition,* at 4:2100; *Arsenault et al v Parks Canada Agency*, 2008 PSLRB 17 at para. 29. *Chafe et al v Treasury Board (Department of Fisheries and Oceans),* 2010 PSLRB 112 at para. 51.)

[37] The collective agreement makes a clear distinction between day workers and shift workers. The hours of work for day workers are set out at clause 25.04(a), which reads as follows:

> *(a) Except as provided for in clause 25.09, the normal work week shall be thirty-seven decimal five (37.5) hours exclusive of lunch periods, comprising five (5) days of seven decimal five (7.5) hours each, Monday to Friday. The workday shall be scheduled to fall within a nine (9) hour period between the hours of 06:00 and 18:00, unless otherwise agreed in consultation between the Alliance and the Employer at the appropriate level.*

[38] The language at clause 25.04(a) establishes clause 25.09 as an exception to the normal workweek. Employees who are scheduled under clause 25.09 are commonly referred to as shift workers. Clause 25.09 starts as follows:

> ***25.09*** *For employees who work on a rotating or irregular basis:*
>
> *(a) Normal hours of work shall be scheduled so that employees work:*
>
> *(i) an average of thirty-seven decimal five (37.5) hours per week and an average of five (5) days per week;*
>
> *and*
>
> *(ii) seven decimal five (7.5) hours per day.*
>
> *…*

[39] Clause 25.09 contains a number of other provisions governing shift workers. Clause (d) is of relevance to this matter and reads as follows:

> *(d) Every reasonable effort shall be made by the Employer:*
>
> *(i) not to schedule the commencement of a shift within eight (8) hours of the completion of the employee's previous shift;*
>
> *(ii) to avoid excessive fluctuations in hours of work;*

> *(iii) to consider the wishes of the majority of employees concerned in the arrangement of shifts within a shift schedule;*
>
> *(iv) to arrange shifts over a period of time not exceeding fifty-six (56) days and to post schedules at least fourteen (14) days in advance of the starting date of the new schedule;*
>
> *(v) to grant an employee a minimum of two (2) consecutive days of rest.*

[40] At clause 25.09(g), the parties also make provisions for alternative shift schedules with different hours of work than those outlined in clause 25.09(a). These are governed by several other clauses that set out the terms and conditions governing the administration of variable hours of work (clauses 25.10 to 25.13, inclusive). However, the union did not assert that the grievor's shift schedule was a special arrangement covered by clause 25.09(g).

[41] Of note, clause 25.02 sets out this process by which the work schedule of a group of employees can change:

> ***25.02*** *The Employer agrees that, before a schedule of working hours is changed, the changes will be discussed with the appropriate steward of the Alliance if the change will affect a majority of the employees governed by the schedule.*

[42] The clear distinction between day workers and shift workers is also reflected in the language of article 27, titled "Shift and Weekend Premiums". It provides a shift premium of $2.00 per hour to employees working shifts outside the hours of 8:00 a.m. to 4:00 p.m. It also provides an additional premium of $2.00 per hour for all weekend hours worked on shift. Article 27 is prefaced by a clear exclusion that states that it "… does not apply to employees on day work, covered by clauses 25.04 to 25.06 …".

[43] Despite the wording in his amended letter of offer, it is not disputed that from May 19, 2009, to September 12, 2012, the grievor worked a normal workweek, Monday to Friday, with hours of work from 8:00 a.m. to 4:00 p.m., exclusive of an unpaid meal break of 30 minutes.

[44] During that period, he did not work "on a rotating or irregular basis", as contemplated by clause 25.09. Nor did the employer arrange his hours of work through a schedule of up to 56 days. The grievor was a day worker.

[45] The issue is whether the employer had the right, under the collective agreement, to change the grievor to a shift worker.

[46] I find that the employer is correct that no language in the collective agreement explicitly bars it from changing a day worker to a shift worker. This is what led the Board to conclude in *Hodgson* that management therefore retained the right to make that decision. Its conclusion was at paragraph 128, as follows:

> *[128] It is clear that the general management rights conferred on the Treasury Board may be substantially circumscribed by negotiated terms and conditions of employment contained in a collective agreement … In this case, I have determined that the collective agreement does not restrict the right of the employer to determine the hours of work such that an employee who was formerly a day worker becomes a shift worker. There is still an obligation on management's part to consult with the bargaining agent on such fundamental changes in conditions of employment (see the joint consultation article - Article 21).*

[47] *Hodgson* concerned a decision of Transport Canada to change regional airport security inspectors from day workers to shift workers in the months after the September 11, 2001, attacks in the United States (commonly termed "9/11"). This was in a context in which the department had to deliver enhanced airport security provisions that had been put into place by the federal government. The department consulted the union and tried to meet most of its shift-work requirements through new hires. However, in the end, some employees who had been hired as day workers were changed to shift workers. This took place under the terms of an earlier version of the TC collective agreement, which had the same essential hours-of-work provisions in force in this matter. The Board upheld the department's decision.

[48] However, I find it is easy to distinguish the matter before me from *Hodgson*. That was heard as a test case for more than a dozen individual grievances. In *Hodgson* Transport Canada argued that there was a demonstrated operational need to have employees become shift workers. Following the 9/11 events, it invoked the "State Security" provisions of the collective agreement as supportive rationale for its decision. Once the employees were changed to shift workers, they continued working shifts.

[49] In this case, the employer did not provide evidence of an operational need for how it exercised its management rights. It relied on the facts that Mr. Cooke's amended

letter of appointment indicated that he might have to work shifts and that it had consulted the union about changing the wildlife enforcement officers to shift workers.

[50] But what most distinguishes this case from *Hodgson* is the employer's decision to transform Mr. Cooke from a day worker to a shift worker, and back again, within the space of one week. I do not believe that *Hodgson* stands for that proposition. I agree with the Board's conclusion in *Hodgson* that changing an employee's work status is a **fundamental** change of employment conditions. Management needs a good reason to exercise its rights to do that.

[51] Furthermore, the language of the collective agreement at clause 25.09 does not say, "shift workers will be scheduled as follows …". It commences with the phrase, "[f]or employees who work on a rotating or irregular basis". All its provisions flow from that basis.

[52] Despite the wording of his amended letter of appointment, Mr. Cooke was **not** an employee who worked on a rotating or irregular basis. He was a day worker from the date of his appointment in 2009 until September 12, 2012. The employer assigned him to irregular and rotating shifts for a 56-day period starting on September 13, 2012. However, he worked only two such shifts, on the weekend of September 15 and 16, 2012. After that, he only worked days.

[53] As the grievor was not an employee who worked on a rotating or irregular basis, the employer's assertion that he was covered by clause 25.09 must fail. By default, the collective agreement provides that employees not covered by clause 25.09 are day workers whose hours of work must be scheduled in accordance with clause 25.04.

[54] Given that the hours he worked on the weekend of September 15 and 16, 2012, were outside the hours of work allowed for under clause 25.04, they cannot be considered regular hours of work scheduled in accordance with the collective agreement.

[55] I recognize that overtime is defined at clause 2.01 of the collective agreement as "… in the case of a full-time employee, authorized work in excess of the employee's scheduled hours or work …". The employer scheduled the grievor to work on September 15 and 16, 2012, and did not schedule him to work on Monday, September 17, or Tuesday, September 18, 2012. He did not work those days. Following

the logic of the Board's decision in *Maessen,* I need to consider this in constructing an appropriate remedy.

[56] As such, I find that the grievor is entitled to receive the difference between what his overtime pay would have been for the hours he worked on the weekend of September 15 and 16, 2012, and his straight-time pay for the days he did not work on September 17 and 18, 2012. In other words, he is entitled to a further 0.5 time for the hours worked on the Saturday and a further 1.0 time for the hours worked on the Sunday.

[57] Furthermore, having determined that Mr. Cooke should have been considered a day worker, he is no longer entitled to any shift and weekend premiums paid to him for the hours worked on September 15 and 16, 2012. Therefore, the overtime pay owed to him as a result of this decision must be discounted by any shift and weekend premiums paid to him for that weekend.

[58] As the employer noted in its arguments, in subsequent collective agreements, the parties agreed to new language that limits the employer's ability to change employees from day workers to shift workers or from shift workers to day workers. That was not the language before me in this matter. However, I do take note that the new language could alter the framework of analysis to be applied by the Board should a situation such as Mr. Cooke's arise in the future.

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

(The Order appears on the next page)

V. Order

[60] The grievance is allowed in part.

[61] The grievor is entitled to be paid the overtime rate for work performed on Saturday and Sunday, September 15 and 16, 2012.

[62] The parties are to determine the actual amount of compensation owed the grievor, in accordance with the reasons stated in this decision. In the event that the parties are unable to, I shall remain seized of this matter for a period of 90 days.

April 16, 2021.

David Orfald,
a panel of the Federal Public Sector
Labour Relations and Employment Board