Date: 20230606

File: 561-02-43302

Citation: 2023 FPSLREB 59

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

UNION OF CANADIAN CORRECTIONAL OFFICERS - SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA - CSN

Complainant

and

TREASURY BOARD
(Correctional Service of Canada)

Respondent

Indexed as
Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board (Correctional Service of Canada)

In the matter of a complaint made under section 190 of the *Federal Public Sector Labour Relations Act*

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Corinne Blanchette, union advisor

For the Respondent: Emily Rahn, counsel

Decided on the basis of written submissions, filed January 24 and February 14 and 28, 2023.

REASONS FOR DECISION

I. Complaint before the Board

[1] On August 3, 2021, the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the complainant") made a complaint to the Federal Public Sector Labour Relations and Employment Board ("the Board"), alleging that the employer, the Correctional Service of Canada ("CSC" or "the respondent") failed to implement the provisions of the collective agreement at issue, contrary to s. 117 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*").

[2] The complainant is the bargaining agent certified to represent the correctional officers ("CXs") who work at the CSC. The Treasury Board is the legal employer (and the signatory to the collective agreement between it and the complainant), but for the purposes of this decision, the CSC is considered to be the employer, given that the Treasury Board has delegated its human resources authority to it.

[3] On September 17, 2021, in its response to the complaint, the respondent made a motion to have the matter dismissed without an oral hearing. It argued that the complaint was not about the implementation of the collective agreement but rather about how it had been interpreted and applied.

[4] The case was scheduled to proceed to an oral hearing from November 21 to 23, 2022. Before then, on November 17, 2022, the respondent reiterated its request that the matter be dismissed without an oral hearing. The oral hearing was adjourned on the first day, for medical reasons.

[5] Following the adjournment, I suggested to the parties that we deal first with the respondent's motion in writing, as it could clarify the issues before the Board.

[6] This decision concerns only the motion to dismiss the complaint without an oral hearing. Generally, in determining such a motion, the Board applies the arguable case framework. It takes the facts alleged by the party that initiated the matter, on their face. If those facts reveal an arguable case, it will go to a hearing on the merits. If, even taking the complainant's assertions as true, there is no arguable case, the complaint will be dismissed.

II. Context

[7] The complainant made this complaint under s. 190(1)(e) of the *Act*; the relevant part of that provision reads as follows:

190 (1) *The Board must examine and inquire into any complaint made to it that*	***190 (1)*** *La Commission instruit toute plainte dont elle est saisie et selon laquelle :*
…	[…]
(e) *the employer … has failed to comply with section 117 (duty to implement provisions of the collective agreement) ….*	***e)*** *l'employeur* […] *a contrevenu aux articles 117 (obligation de mettre en application une convention)* […]

[8] Section 117 reads as follows:

117 *Subject to the appropriation by or under the authority of Parliament of money that may be required by the employer, the parties must implement the provisions of a collective agreement*	***117*** *Sous réserve de l'affectation par le Parlement, ou sous son autorité, des crédits dont l'employeur peut avoir besoin à cette fin, les parties à une convention collective commencent à appliquer celle-ci :*
(a) *within the period specified in the collective agreement for that purpose; or*	***a)*** *au cours du délai éventuellement prévu à cette fin dans la convention;*
(b) *if no such period is specified in the collective agreement, within 90 days after the date it is signed or any longer period that the parties may agree to or that the Board, on application by either party, may set.*	***b)*** *en l'absence de délai de mise en application, dans les quatre-vingt-dix jours suivant la date de la signature de la convention ou dans le délai plus long dont peuvent convenir les parties ou que fixe la Commission sur demande de l'une ou l'autre des parties.*

[9] More specifically, the complainant worded the complaint as follows: "The employer failed to implement provisions of the collective agreement as the employer uses chronic and sustained ordering of involuntary overtime in its institutions to alleviate staff shortages."

[10] The context of this complaint is a policy grievance decision issued by the Board on March 4, 2021, *Union of Canadian Correctional Officers - Syndicat des agents*

correctionnels du Canada - CSN v. Treasury Board (Correctional Service of Canada), 2021 FPSLREB 22 ("*UCCO v. TB (CSC)* 2021").

[11] That decision dealt with CXs working involuntary overtime at the CSC's Kent Institution, a maximum-security penitentiary in Agassiz, British Columbia. As stated in the decision, overtime is mostly voluntary. When there is a staff shortage, management will call on volunteers to cover shifts. The Warden of Kent Institution issued a direction stating that if there were no volunteers, management could order a CX to work an overtime shift.

[12] The complainant filed a policy grievance, alleging that ordering overtime in the absence of an operational requirement, such as an emergency or security incident, was a violation of the collective agreement (the one that expired on May 31, 2018).

[13] The Board summarized its findings and order as follows:

> …
>
> *[11] This is a rather complicated analysis, but my finding is that the sustained and chronic reliance on involuntary overtime to address what is in effect a shortage of staff is not consistent with the collective agreement. I reached this finding after considering both the overtime provisions of the collective agreement and the language on hours of work and shift scheduling, as well as the case law submitted by the parties.*
>
> *[12] While the practice of ordering involuntary overtime has become continued and chronic at Kent, the exact scope and scale of the problem is not possible to determine, given the evidence tendered. For that reason, I am limiting my order to a declaration. I understand that this will leave the parties with having to work out solutions to reduce the level of involuntary overtime being ordered. However, I do not find it possible to go further, considering the content of the collective agreement and the limitations on the Board's power in this matter under the* [*Act*]*. I do offer some recommendations that may be of assistance to the parties.*
>
> …

[14] The decision was issued after the new collective agreement (that expired on May 31, 2022) was signed on January 5, 2021 ("the 2021-2022 CX collective agreement"), during the implementation period referred to in s. 117(a) of the *Act* (120 days, expiring on May 5, 2021). The complainant argues that by failing to comply with *UCCO v. TB*

(CSC) 2021, the respondent is not implementing the 2021-2022 CX collective agreement.

III. Summary of the arguments

A. For the respondent

[15] The respondent submits that the complainant is trying to obtain a determination that should be sought through the grievance process. For a complaint under s. 117 of the *Act* to be founded, there has to be a failure to implement provisions of a recently signed collective agreement. Such a complaint is not meant to determine whether the implementation is consistent with a specific interpretation or application of that agreement.

[16] The provisions concerning overtime assignment are not new; they were implemented previously in earlier versions of the collective agreement and continued to be implemented after the 2021-2022 CX collective agreement was signed.

[17] According to the complainant, the provisions were not implemented because of the chronic and sustained reliance on involuntary overtime to address staff shortages. These words are drawn from the findings in *UCCO v. TB (CSC)* 2021. They are not covered by the overtime provisions of the 2021-2022 CX collective agreement.

[18] The gist of the complaint is compliance with the direction in *UCCO v. TB (CSC)* 2021; it is not a matter of implementation.

[19] The complainant has filed numerous grievances (individual, group, and policy) concerning involuntary overtime.

[20] The respondent states the issue in this decision as follows: Does the complainant set out any basis upon which a complaint could be founded under s. 190(1)(e) (referring to s. 117) of the *Act*?

[21] For the complaint to be founded, the Board would have to find that the overtime provisions have not been implemented. As a matter of fact, the respondent has been applying the same overtime provisions for years, long before the 2021-2022 CX collective agreement was signed, and it has continued to do so after that signing. The numerous disputes concerning this application attest to the fact that they are indeed being implemented.

[22] The respondent relies on *Sousa-Dias v. Public Service Alliance of Canada*, 2018 FPSLREB 46, to distinguish "implementation" and "application".

[23] In that decision, the complainant argued that the bargaining agent had not implemented a collective agreement provision, as it had negotiated a variable-shift-schedule arrangement that according to the complainant contravened the collective agreement.

[24] The Board concluded that the issue was not one of implementation but rather of interpretation as to what the variable-shift-schedule arrangement should be. The provision had been implemented, but not to the complainant's liking.

[25] According to the respondent in this case, the situation is similar. The complainant disagrees with the respondent's interpretation of the overtime provisions and asserts that the respondent's alleged non-compliance with the *UCCO v. TB (CSC)* 2021 decision amounts to the non-implementation of the collective agreement. The impact of that decision, according to the respondent, does not relate to implementation but rather to the interpretation of the relevant collective agreement provisions.

B. For the complainant

[26] According to the complainant, the respondent has failed "… to implement multiple provisions of the collective agreement that circumscribed the circumstances when involuntary overtime is permissible under the collective agreement."

[27] Several clauses of the collective agreement come into play to set the parameters of the use of involuntary overtime. The complainant agrees that those provisions remain unchanged in the 2021-2022 CX collective agreement.

[28] The complainant quotes the Board's conclusion in *UCCO v. TB (CSC)* 2021, which reads as follows:

…

> *[170] Considering all this analysis, I conclude that the sustained and chronic use of involuntary overtime to address staff shortages is a violation of the collective agreement. Clearly, the agreement allows for involuntary overtime to be ordered in emergency situations or to ensure the completion of security duties, such as securing evidence. It may also legitimately be used to address*

> *short-term or unforeseen staff shortages when other alternatives for filling mandatory posts do not exist, which was in fact reflected in the employer's reply to this policy grievance. However, the way involuntary overtime is being used at Kent crosses the line into a mechanism for filling vacant shifts on a sustained and chronic basis. By doing so, considering the wording of both the overtime language at clauses 21.10 to 21.16 and the hours-of-work language at clause 21.02, article 34, and Appendix K, I have to conclude that its practice is a violation of the collective agreement.*
>
> …

[29] Since that decision was not subjected to judicial review, it became binding on the parties. That means that the respondent could no longer use involuntary overtime on a sustained and chronic basis to fill vacant shifts.

[30] According to the complainant, the respondent does not dispute the continued use of involuntary overtime to cover staff shortages or that it continued over the implementation period of the 2021-2022 CX collective agreement. The complainant has evidence to show that involuntary overtime has continued persistently during the implementation period.

[31] Despite that a number of grievances have been filed against involuntary overtime, the matter is still not resolved.

[32] The obligation found under s. 117 is one of result. What the collective agreement provides for must be implemented.

[33] The complainant submits that there is no contradiction between making a complaint under s. 190(1)(e) of the *Act* and filing group or other grievances on the same subject.

[34] Moreover, the number of grievances filed shows that the declaration issued in *UCCO v. TB (CSC)* 2021 has not been effective in resolving the matter.

[35] In brief, the complainant submits that the respondent "… has not implemented the relevant provisions of the collective agreement as involuntary overtime still occurs outside the acceptable parameters set by the myriad of relevant sections of the agreement."

[36] The complainant requests that the Board dismiss the respondent's motion.

IV. Analysis

[37] Essentially, the complainant's view seems to be that the respondent is continuing to violate the collective agreement, contrary to the Board's direction in *UCCO v. TB (CSC)* 2021. With respect, this is not an implementation matter.

[38] The complainant's cited jurisprudence does not support its arguments.

[39] In *Federal Government Dockyard Chargehands Association v. Treasury Board (Department of National Defence)*, 2013 PSLRB 139, the former Board upheld the bargaining agent's complaint concerning the employer's failure to implement the provisions of an arbitral award. (A complaint against a failure to implement can target either the collective agreement, as breach of s. 117 of the *Act*, or an arbitral award, as breach of s. 157.)

[40] In that case, the salary rates that the arbitration board awarded were not implemented within the implementation period. The employer conceded that it had been unable to implement them in time, and the decision dealt only with the appropriate remedy.

[41] In *United Transportation Union v. Canadian National Railway Company*, 2005 CIRB 315, the Canada Industrial Relations Board found that repeated violations of the same sections of the collective agreement constituted an unfair labour practice under the *Canada Labour Code* (R.S.C., 1985, c. L-2), because it interfered with the employees' representation rights. That case did not deal with a failure to implement the provisions of a collective agreement.

[42] The complainant cites two decisions in which the Board found deficient implementation, *Public Service Alliance of Canada v. Parliamentary Protective Service*, 2020 FPSLREB 1, and *Professional Association of Foreign Service Officers v. Treasury Board*, 2019 FPSLREB 69. In those cases, again, the employer acknowledged that it had not fulfilled its salary obligations stemming from the new collective agreements within the implementation period.

[43] In *Axis Family Resources Ltd. v. Community Social Services Employers' Association of British Columbia*, 2014 CanLII 37158 (BC LRB), the British Columbia Labour Relations Board found that the employer had failed to implement the provisions of a voluntary agreement. In that case, the dispute centred on whether the

voluntary agreement was part of the collective agreement. Since the employer had disputed the binding authority of the voluntary agreement, it had refused to comply with it and therefore had not implemented it.

[44] To summarize, in the cited jurisprudence, there is either a failure of implementation, with provisions of a collective agreement not being implemented within the implementation period, or as in the case of the *United Transportation Union*, an unfair labour practice. This case is not presented as an unfair labour practice but as a failure to implement, which are two very different allegations and statutory provisions.

[45] As in *Sousa-Dias*, the complainant seems to confuse the implementation and the interpretation of the collective agreement. There is no question that the collective agreement has been implemented and that the respondent is applying the agreement's overtime provisions, even if the complainant disagrees with the application.

[46] Even if I accept the complainant's assertion that the respondent continues to impose involuntary overtime outside the limits permitted by the collective agreement, that is not a failure to comply with the duty to implement the provisions of the collective agreement. Rather, it indicates that the provisions have been implemented, but that the complainant seeks a determination regarding their interpretation and application.

[47] Therefore, I conclude that there is no arguable case of a failure to implement the terms of the collective agreement, and accordingly, the complaint is dismissed.

[48] The complainant relied on the *UCCO v. TB (CSC)* 2021 decision to argue that there are repeated violations of the collective agreement. That decision did say that the chronic use of overtime to cover staff shortages was not consistent with the collective agreement. However, it did not specify exactly the instances of violation, for lack of complete evidence. Instead, it strongly encouraged the parties to resolve the matter through consultation.

[49] I can only echo that encouragement.

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

(The Order appears on the next page)

V. Order

[51] The complaint is dismissed.

June 6, 2023.

Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board