Date: 20240327

File: 566-02-47649

Citation: 2024 FPSLREB 45

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

LEANNE DUPUIS

Grievor

and

TREASURY BOARD
(Public Health Agency of Canada)

Employer

Indexed as
Dupuis v. Treasury Board (Public Health Agency of Canada)

In the matter of an individual grievance referred to adjudication

Before: Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Sean Kemball, representative

For the Employer: Erin Saso, representative

Decided on the basis of written submissions, filed June 30, July 12 and 28, and August 16, 2023.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Leanne Dupuis ("the grievor") was hired on January 11, 2021, by the Public Health Agency of Canada ("the employer") as a quarantine officer, classified CH-04, at the Emerson, Manitoba, port of entry. She was represented by the Professional Institute of the Public Service of Canada ("the bargaining agent").

[2] She was hired as a day worker but due to pressures at the border due to the COVID-19 pandemic, she was assigned to shiftwork on March 1, 2021. On November 10, 2021, she grieved the change to shiftwork, alleging that the employer had violated multiple articles of the Health Services (SH) collective agreement.

II. The employer's timeliness objection

[3] The employer submitted that the Board was without jurisdiction to adjudicate the grievance as it was untimely under clause 34.12 of the collective agreement:

> *34.12 A grievor may present a grievance to the first step of the procedure … not later than the twenty-fifth (25th) day after the date on which the grievor is notified or on which the grievor first becomes aware of the action or circumstances giving rise to the grievance.…*

[4] It said that although the grievor was hired as a day worker, as a result of a state of emergency at the border and frequent changes to traveller screening requirements due to the COVID-19 pandemic, her hours were changed to shiftwork.

[5] Before the change, she and other staff had participated in several meetings and discussions about the schedule changes. Management was clear that the staff members were to advise of any concerns about the shiftwork proposal and that adjustments could be made if required.

[6] The grievor began working a 12-hour shift schedule on March 1, 2021. She did not file her grievance until November 10, 2021 — 8 months later. The grievance was denied at all levels of the grievance process on the grounds that it was untimely.

[7] The employer asked that the reference to adjudication be dismissed without a hearing as the grievance was untimely and, therefore, outside the Board's jurisdiction.

III. The bargaining agent's response to the objection

[8] The bargaining agent submitted that the employer's objection should be dismissed and the matter scheduled for hearing because this was a continuing grievance. It argued that to decide whether a grievance is continuing, the Board must determine whether there has been a continuing breach of duty. To determine that, it must examine the merits of the case. The real substance of the matter in dispute must be heard and not determined by a strict technical interpretation.

[9] The bargaining agent said that elements of the grievance were related to pay, and that the employer's pay centre was unable to provide relevant pay records. As well, the employer's position seemed to be evolving — its grievance reply appeared to be that the grievor had always been a shift worker, or that her letter of offer empowered the employer to alter her scheduled hours as it saw fit.

[10] The bargaining agent submitted that the employer was wrong in its assertion that the shiftwork memorandum of agreement signed with Canada's largest airports, applied to the Emerson land port of entry.

[11] It further submitted that the employer was not entitled to act as it had simply because of the ongoing state of emergency due to the pandemic; at a minimum it was obligated to re-evaluate the scheduling on an ongoing basis. Thus, even if the Board agreed with the employer's objection, the grievor had a valid grievance going forward from the date of its filing.

IV. The employer's reply

[12] The employer replied that this was not a continuing grievance, that due to the frequent screening requirement changes it had made a distinct and unrepeated decision to implement a shift schedule. That the decision led to changes to the grievor's hours of work does not mean that it can be characterized as a recurring breach of the collective agreement. The decision to implement shiftwork was one action that happened to have ongoing consequences.

[13] The employer argued, in the alternative, that if the Board accepted the argument that the grievance was continuing and therefore timely, any remedy should be limited to the 25 days before the date on which it was filed. It also noted that none of the

bargaining agent's points explain why the grievor waited eight months to file her grievance.

V. The bargaining agent's sur-reply

[14] In response to the employer's reply submission, the bargaining agent stood by its earlier submission and further stated or reiterated that:

- the employer was confused about the grievor's official status, as shown by its first-level response and by the lack of official documentation of a change in status or a valid memorandum of agreement with the bargaining agent;
- the employer said that its decision was based on an emergency, but it had developed a memorandum of agreement for other bargaining unit members and ought to have done the same in this instance;
- the grievance contains elements connected to pay, and the employer did not provide pay records; and
- the employer had an ongoing obligation to turn its mind to whether its action was still warranted, which was not about one schedule change but an ongoing violation.

VI. Reasons for decision

[15] I agree with the employer that this is not a continuing grievance and that it cannot be held to be timely on that basis.

[16] Due to COVID-19-pandemic-related pressures at the border, the employer decided to implement a shift schedule. That that decision had a recurring negative impact on the grievor does not mean that it constituted a recurring breach of the collective agreement. See, for example, *Bowden v. Treasury Board (Canada Border Services Agency)*, 2021 FPSLREB 93 at paras. 35 and 36, in which the Board cited jurisprudence that examined whether a grievance is continuing in nature, as follows:

> *[35] The arbitrator in* British Columbia v. B.C.N.U. *(1982), 5 L.A.C. (3d) 404, relied on the definition of a continuing grievance in Professor Gorsky's* Evidence and Procedure in Canadian Labour Arbitration*, at page 35, as follows:*
>
> > … The recurrence of damage will not make a grievance a continuing grievance. It is necessary that the party in breach violate a recurring duty. When a duty arises at intervals and is breached each time, a "continuing" violation occurs, and the agreement's limitation period does not run until the final breach. When no regular duty exists and the harm

> merely continues or increases without any further breach, the grievance is isolated, and the period runs from the breach, irrespective of damage.
>
> *[36] In* Ontario Public Service Employees Union v. Ontario (Ministry of the Attorney General)*, 2003 CanLII 52888 (ON GSB), the arbitrator posed the question to be answered as follows: "Does it [the grievance] involve a continuing course of conduct rather than one action which happens to have continuing consequences?"*

[17] In this case, there were continuing consequences for the grievor but not a continuing course of action on the employer's part. The employer made a decision that the grievor would work shift work. That is the decision being grieved and it occurred at one point in time. She had 25 days to grieve it. A breach of the collective agreement did not occur every time she worked a shift other than the day shift.

[18] Much of the bargaining agent's submissions addressed the merits of the case but not the issue of timeliness. It made two points arguably related to timeliness.

[19] It said the grievance was related to pay, perhaps suggesting that that cloaked it with continuing grievance status, as pay grievances are typically understood to be continuing grievances. However, a grievance about a change to an employee's work schedule is not related to pay in any way that would render it a continuing grievance.

[20] It also said that the employer had an ongoing obligation to turn its mind to whether its action was still warranted and that this was not about one schedule change but an ongoing violation. If such an ongoing obligation existed, it would nevertheless not transform the grieved decision itself into a continuing violation.

[21] This is not a continuing grievance, and therefore, it was not filed in a timely manner. The grievor began working shifts on March 1, 2021, and did not file her grievance until November 10, 2021 — eight months later. No explanation was given to explain the lengthy delay; nor was any request made to extend the timelines. The employer raised its timeliness objection at each stage of the grievance procedure.

[22] I find that the grievance was untimely and that the Board is without jurisdiction to hear it.

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

(The Order appears on the next page)

VII. Order

[24] The grievance is denied.

March 27, 2024.

Nancy Rosenberg,
a panel of the Federal Public Sector
Labour Relations and Employment Board