Distribution of Decision

File: 166-2-3178

THE PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

DICK G. JENNENS CATCA

Grievor,

AND:

TREASURY BOARD
(Ministry of Transport)

Employer.

DECISION

Before: R.D. Abbott, Board Member and Adjudicator.

For the Grievor: C.H. MacLean, counsel.

For the Employer: W.H. Corbett, counsel.

ART 15
CODE 402/76

Heard at Ottawa on January 16, 1978.

UNEQUAL DISTRIBUTION OF OVERTIME

DECISION

This grievance places in issue the employer's system for the distribution of overtime at the Vancouver Air Traffic Control Tower. The grievor is an air traffic controller (AI-4) employed at that tower. He is a member of the Air Traffic Control group, governed by a legislated collective agreement between the Treasury Board and the Canadian Air Traffic Control Association (Code 402/76). The pertinent provision of the collective agreement, Clause 15.03, reads as follows:

> 15.03 The Employer will endeavour to keep overtime work to a minimum and shall assign overtime equitably among employees who are qualified to perform the work that is required at the location concerned.

The facts out of which this grievance arose are not complicated and were the subject of an agreed statement of facts filed with me by the parties' representatives. In applying the provisions of Clause 15.03, the employer adopted a system of distributing overtime which had the following characteristics. Employees were informed that they had a "responsibility to make themselves available" for overtime work. If they declined overtime work, they would be "credited" as though they had worked the overtime hours offered. Overtime was to be offered first to employees who were on their first day of rest, ahead of employees who were on their second day of rest. In operation, the system was reflected in a record which indicated for each employee the overtime hours he actually worked together with the overtime hours

which were offered but declined by the employee. The record was maintained on an "expanded hours" basis, that is to say, if the overtime hours worked or declined were to be paid at time and one half, then the hours would be recorded as one and one-half times the actual hours. Thus, an eight-hour shift, worked or declined, which attracted a payrate of time and one-half, would be recorded as twelve hours. Likewise, if the applicable rate were double time then the record would indicate sixteen hours.

The grievor and Mr. A. Ballantyne were qualified air traffic controllers at the Vancouver Tower. On March 10, 1977, both were scheduled for a second day of rest. On that day, due to the sickness of another air traffic controller, an overtime shift had to be worked. Mr. Ballantyne was offered that shift and he accepted. In the period beginning January 1, 1977, Mr. Ballantyne was recorded as having worked one overtime shift at double time (recorded as sixteen hours), and the grievor was recorded as having declined two shifts at time and one-half (recorded as twenty-four hours). Thus, in the view of the employer, Mr. Ballantyne had priority for the offer of overtime work on March 10, 1977.

It is claimed for the grievor that he should have been offered the overtime shift on March 10, and the remedy sought is compensation at the applicable overtime rate of pay that he would have received had he worked that shift. In essence, his complaint

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is that in determining the order in which employees should be offered overtime work the employer should only take into account the overtime hours actually worked by each employee. Thus, as between the grievor and Mr. Ballantyne, it would be the grievor who would be entitled to the offer of overtime work on March 10 since he had actually performed no overtime work as of that date in the calendar year 1977.

Ms. MacLean, for the grievor, pointed out that Clause 15.03 obliges the employer to "assign overtime equitably". "Overtime" is defined in Clause 15.01 as "time worked by an employee in excess or outside of his scheduled hours of work". In other collective agreements, one finds at least three distinct approaches to the distribution of overtime: a requirement to offer overtime in strict accordance with seniority; a requirement to distribute overtime "equitably", sometimes subject to express conditions such as "operational requirements"; and, a provision for "equal opportunity" to work overtime which expressly requires the employer to take into account not only the accumulated overtime actually worked but also the overtime opportunities offered but declined. Ms. MacLean referred to examples of each of these approaches. The present situation is an example of the second approach to overtime distribution, involving an unmodified obligation of the employer to distribute overtime "equitably". It follows, she argued, that the parties could have made express provision

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that declined opportunities to work overtime had to be taken into account. But they have chosen not to do so.

Ms. MacLean cited two adjudication decisions which dealt with contract provisions similar to those in question here: Lemire (166-2-343) and Sumanik (166-2-395). In Lemire, the overtime distribution system adopted by the employer, in applying a clause very similar to the present Clause 15.03, took account only of the overtime hours actually worked by the employee. In Sumanik, the employer followed a policy, similar to that adopted in the present case, of offering overtime first to employees who were on their first day of rest, ahead of employees who were on their second day of rest. This policy resulted in grossly unequal hours actually worked among the four employees subjected to the system. Chief Adjudicator Jolliffe (as he then was) found this system to be unsupportable as dictated by "operational requirements", being merely a means adopted by the employer to reduce the financial impact of overtime work. Ms MacLean asked me to deduce from the Sumanik decision that to be "equitable", the distribution of overtime must result in approximate equality of overtime hours actually worked. In the present case approximate equality of overtime hours actually worked was unlikely to result as long as the employer took into account declined overtime as well as worked overtime.

For the employer, Mr. Corbett made the following

submissions. First, the employer's obligation under Clause 15.03 to "assign" overtime equitably is consistent with a policy of offering overtime equitably. Secondly, if only overtime hours actually worked were taken into account, the system could be inequitable as between an employee who accepted and worked overtime and another who declined overtime until he was offered overtime at the best possible premium rate. The former would be denied a random opportunity to be offered overtime at the best rate. Thirdly, this collective agreement Article (Article 4) reserving to management the right to assign and schedule work and this right is modified only to a limited extent by Clause 15.03.

Mr. Corbett would distinguish the Sumanik situation from the present one on the basis of the words used. There, the employer's obligation was to "allocate overtime work on an equitable basis". The references to "allocate" and "work" distinguish the obligation there from the obligation under Clause 15.03 to "assign overtime". Thus the system there in question, of taking account only of overtime work actually performed, and the assessment of whether that system was "equitable" in terms of its results by comparing the overtime work actually performed by each of the employees, is supportable.

Mr. Corbett referred to other adjudication decisions. In Melanson (166-2-583) the overtime distribution system was to offer overtime to each employee on a list on three occasions.

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After three acceptances or declines the employee went to the bottom of the list. This system was, according to Mr. Corbett's interpretation of the decision, found to be "equitable". It was a system which took account of both overtime worked and overtime declined. In Benjamin et al. (166-2-1770) the employer's obligation was "to distribute overtime fairly". The system adopted there took account of both overtime worked and overtime declined and that aspect was not challenged by the bargaining agent. In Doucett (166-2-1784) the employer's right to distribute overtime was expressly modified by the duty to follow "the principle of equal opportunity", i.e., express provision was made for taking into account declined overtime. The principle employed in that decision was that the employee had no "right to overtime" except as granted by the collective agreement. In the present case, likewise, there is no express "right to overtime".

Mr. Corbett also cited Re Phillips Cables Ltd. and International Union of Electrical, Radio & Machine Workers, Local 510 (1975) 9 L.A.C. (2d) 277; Re United Steelworkers, Local 6399, and W.S. Tyler Co. (1972) 24 L.A.C. 234; and Re United Steelworkers of America, Local 6519 and Foster Wheeler Ltd. (1968) 19 L.A.C. 309. In each of these arbitration awards overtime distribution schemes which took into account declined opportunities to work overtime were not treated as "inequitable". Thus, there is nothing on its face which requires that such a scheme be considered

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"inequitable". In fact, other collective agreements in the public service do provide expressly for that sort of distribution system.

In reply, Ms. MacLean first countered Mr. Corbett's argument that if declined overtime were not taken into account an employee could keep declining until overtime at the highest rate was offered. She pointed out that the high pay rate would reflect the fact that the overtime was at an undesirable time, thus balancing any unfairness done to other employees who would be denied the random chance to work that overtime. Ms. MacLean submitted that the Melanson, Benjamin et al. and Doucett cases are of no help in the present case since those cases dealt with other issues and did not come to grips with the question of whether it was equitable to take account of declined overtime. In fact, the collective agreement in Doucett expressly required the employer to take account of all opportunities to work overtime, whether accepted or declined. As to the private sector cases (Phillips Cable, Tyler, and Foster Wheeler), they all involved collective agreements expressly obliging the employer to take account of declined opportunities. It follows that parties to collective agreements have been aware of the distinction between taking account of all opportunities offered and taking account only of overtime actually worked and have expressly chosen the former.

During argument, I made the observation that Clause 15.03 by its terms (requiring the employer to minimize overtime and to "assign" overtime equitably) seemed to have in contemplation the employer's imposition of overtime work on an unwilling employee. I pointed out that I had previously dealt with other collective agreements which expressly provided for the imposition of involuntary overtime on employees in order of reverse seniority. The response of Ms. MacLean was that treating clauses such as Clause 15.03 as dealing with involuntary overtime was an approach never used before. The parties, she said, appear to have accepted in practice that this sort of clause deals only with the distribution of overtime to employees who may accept or decline overtime and who, in present economic circumstances, can be expected to welcome overtime opportunities.

The observation just referred to is an indication of my major difficulty in deciding this case. On its face, Clause 15.03 clearly deals with a situation totally different from that which gave rise to this grievance. It makes no sense to require the employer to "endeavour to keep overtime work to a minimum" and to "assign" overtime equitably unless the parties to this collective agreement assumed that Clause 15.03 was to apply only when overtime work was to be imposed on unwilling employees. If the parties assumed that employees are free to accept or decline overtime there would have been no need to oblige the

employer to minimize overtime work. Likewise, while "assign" may be synonymous with "allocate" or "apportion" (as suggested by Mr. Corbett in argument) nevertheless in its context, the word seems to connote authoritative imposition, i.e., involuntary overtime.

It is of considerable interest to note that in the Lemire, Sumanik, and Melanson cases, the obligation of the employer was to "allocate" overtime equitably, while in Benjamin et al. it was to "distribute" overtime fairly. The words "allocate" or "distribute" do not have the authoritative imposition connotation of the word "assign". Thus, it is easily understood why, in those cases, no question was raised as to whether those overtime distribution clauses contemplated only involuntary overtime.

In view of the different wording of the clause here in issue, it would not be a radical departure from the adjudication jurisprudence already cited for me to hold that Clause 15.03 on its face applies only to regulate the imposition of involuntary overtime work. No other clause limits the right of the employer to distribute voluntary overtime in any way it sees fit. Therefore distribution of overtime by the system here in question, taking account of both overtime worked and overtime declined, cannot be in breach of the collective agreement.

Ms. MacLean asserted that the parties appear to have accepted in practice that Clause 15.03 deals only with the

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distribution of voluntary overtime, i.e., overtime opportunities which employees are free to accept or reject. Mr. Corbett did not challenge this assertion. However, I must be mindful of the limitation imposed on me by Section 95(2) of the Public Service Staff Relations Act that my decision on this grievance must not have the effect of requiring the amendment of this collective agreement. I would take it that not even the agreement of the parties' representatives at a grievance hearing can displace that legislative limitation. I am furthermore satisfied that for me to accede to Ms. MacLean's assertion and Mr. Corbett's acquiescence would involve deleting from Clause 15.03 the word "assign" and replacing it by the words "allocate" or "distribute" or "apportion", as well as disregarding the Clause's requirement that the employer endeavour to minimize overtime work. Such would be an amendment of Clause 15.03, which I am precluded from doing. Therefore it must follow that I cannot accede to the submission that Clause 15.03 deals with voluntary overtime, in the face of my conclusion that it only contemplates situations in which overtime is imposed on unwilling employees.

If Clause 15.03 were ambiguous, then the parties' past practice, said by Ms. MacLean to involve acceptance that the Clause was intended to apply to voluntary overtime, could be looked to as a guide in interpreting the Clause. But the Clause is unambiguous on its face. Nor does it acquire ambiguity upon its application to the facts of this case, simply because on

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its face it has no application to a situation in which, as was accepted by both parties' representatives, the employee was free to accept or decline the opportunity to work overtime. Had either the grievor or Mr. Ballantyne been ordered to perform overtime work then the Clause might well have provided a basis for one or the other arguing that the assignment of overtime work to him was inequitable.

I have attached decisive significance to the use in Clause 15.03 of the word "assign", which sets this case apart from the situations dealt with in the Lemire, Melanson, Sumanik and Benjamin et al. decisions. Those cases are also distinguishable because in none of them was there placed in issue the distribution of overtime taking account of both overtime worked and overtime declined. In Lemire the issue was whether the grievor, a CR5, was entitled to be included in another group of employees, CR6's, when overtime was being distributed among those other employees. That the distribution was based on overtime hours actually worked by each employee was not considered.

In Sumanik one of the issues was whether the employer could allocate overtime giving priority to employees who were on their first day of rest over employees who were on their second day of rest. It does not appear from the decision whether, in allocating overtime to two employees who were both on their first day of rest, the employer would take account of both previous

overtime actually worked and overtime declined, or only overtime actually worked. In determining the case, Mr. Jolliffe paid special attention to the gross inequalities among the employees in the overtime each had actually worked. However, since it does not appear that the employer in that case did take account of overtime declined in allocating overtime, the Sumanik decision is of limited assistance in determining now whether such a practice would be "inequitable".

In Melanson the issue was whether the removal of the grievor from a group (bus drivers) amongst whom overtime was distributed was in breach of the collective agreement. The system involved the grouping of employees on the basis of the vehicle they usually operated. The amount of overtime allocated to each group varied widely. What was determined in my decision in that case was that the creation of these groups and the differential allocation of overtime as between groups was not inequitable. It was not in issue, nor was it decided, whether the selection of employees for overtime within each group on the combined basis of overtime worked and overtime declined was equitable.

Again, in Benjamin et al., the issue was not whether it was equitable to take account of both overtime worked and overtime declined. What was determined was that the distribution of overtime was not rendered inequitable by retaining the same employee to

work overtime on a particular welding task to attain the benefits of continuity, in the circumstances of the case.

Finally, the Doucett, Phillips Cable, Tyler and Foster Wheeler cases are all of no assistance since in each case the collective agreement made express provision that opportunities to work overtime were to be equitably allocated. It could not have been in issue whether the employer was justified in keeping track of the number of opportunities offered (whether accepted or declined) in determining which employee should receive the next offer. Of course, Ms. MacLean correctly pointed out that these cases demonstrate that parties to collective agreements can and do expressly provide for taking account of all overtime opportunities. But, equally, it can be said that parties to agreements can and do expressly provide for systems of voluntary overtime, as in the Lemire, Melanson, Sumanik and Benjamin et al. situations. They did not do so in the present case.

My review of the cited cases leads me to the conclusion that the issue of whether an overtime distribution system which takes into account declined overtime as well as worked overtime is "equitable", is still open. If I am wrong in my earlier determination that Clause 15.03 has no application to the facts of this case, then I would be prepared to hold that the system adopted in this case was "equitable". In the first place, it was a system which applied equally to all employees. Secondly, it left

employees free to determine for themselves individually, whether they wanted to achieve approximate equality of overtime actually worked, by accepting rather than rejecting offers of overtime. It would be unreasonable to uphold the complaint of an employee who consistently declined overtime offers that, over a period of time, he had not actually worked as much overtime as his fellow employees.

Finally, even if the system in question here resulted in gross inequalities between employees in terms of overtime hours worked, the Sumanik decision would not persuade me to find the system "inequitable". While it is not stated expressly in the Sumanik decision that the situation there was one of involuntary overtime, such an inference can be made. Mr. Sumanik was one of only four employees who had to maintain a twenty-four hour operation in which, apparently, three employees had to be on duty frequently. Their supervisor had pointed out to his superiors the scheduling difficulties he had due to his small staff. One of the remedies requested, and granted, was the sharing of overtime equitably in the sense that over the period of a 28-day scheduling cycle there should be approximate equality of overtime worked by each employee. Apparently neither the parties to that case nor Chief Adjudicator Jolliffe contemplated that an employee could distort the approximate equality of overtime worked by consistently declining to work overtime. If indeed the situation was one of involuntary overtime

then the relevant criterion for selecting the employee to be required to work overtime should be the relative amount of overtime work that that employee had actually performed up to that point in time. But the situation in the present case is not one of involuntary overtime, so that the principle adopted in Sumanik can have no application here.

To summarize, I have found that Clause 15.03, the only clause dealing with the distribution of overtime, has no application to the facts of this case. That Clause conditions the employer's imposition of overtime work on employees who are not free to decline that work. It says nothing about the distribution of overtime opportunities to employees who are free to accept or decline overtime. Therefore, the employer was free to adopt any system for the distribution of voluntary overtime and its adoption of the system here in question could not be a breach of the collective agreement. Furthermore, if indeed Clause 15.03 does apply to the facts of this case, then I would hold that the system adopted by the employer satisfied that Clause's requirement to "assign overtime equitably". For these reasons, this grievance must fail.

For the Board,

R.D. Abbott
Board Member and Adjudicator

OTTAWA, January 25, 1978.