File: 149-2-168

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

THOMAS G. BENTLEY

Applicant

and

TREASURY BOARD
(Public Works and Government Services Canada)

Employer

RE: Application for Extension of Time to Present a Grievance

Before: Joseph W. Potter, Board Member

For the Applicant: Dan Rafferty, The Professional Institute of the Public Service of Canada

For the Employer: Robert H. Jaworski, Counsel

Heard at Toronto, Ontario,
May 8, 1998.

This decision relates to an application for an extension of time for the filing of a grievance by Mr. Thomas Bentley, who was an architect (level 5) with Public Works and Government Services Canada (PWGSC) in Toronto. Mr. Bentley's grievance was filed on May 22, 1996 and, in it, he requested reimbursement for overtime, which he stated he had worked between April 1991 and October 1995.

Mr. Bentley was informed, in the grievance replies, that his grievance was untimely (Exhibits E-5 and E-6). On April 11, 1997, Mr. Rafferty wrote to the Public Service Staff Relations Board (PSSRB), seeking an extension of time for the presentation of a grievance. At the outset of the hearing, both Mr. Jaworski and Mr. Rafferty requested that I issue a decision with respect to the application for an extension of time prior to hearing the merits of the grievance. I agreed with their request.

Mr. Rafferty requests that I exercise the discretion I have under section 63 of the *P.S.S.R.B. Regulations and Rules of Procedure* to extend the time allowed for the filing of Mr. Bentley's grievance.

Section 63 of the *P.S.S.R.B. Regulations and Rules of Procedure* reads as follows:

> *63. Notwithstanding anything in this Part, the times prescribed by this Part or provided for in a grievance procedure contained in a collective agreement or in an arbitral award for the doing of any act, the presentation of a grievance at any level or the providing or filing of any notice, reply or document may be extended, either before or after the expiration of those times*
>
> *(a) by agreement between the parties; or*
>
> *(b) by the Board, on the application of an employer, an employee or a bargaining agent, on such terms and conditions as the Board considers advisable.*

I heard from two witnesses and a total of 26 exhibits were filed.

The basic facts of the matter are summarized below.

Although Mr. Bentley retired in September 1996, at the material times for his grievance he was a member of the Architecture and Town Planning Group and was subject to its collective agreement. Clause 35.09 of this agreement, entered into by

the Treasury Board and the Professional Institute of the Public Service of Canada, reads as follows (Exhibit G-1):

> *35.09 An employee may present a grievance to the first step of the procedure in the manner prescribed in clause 35.03, not later than the twenty-fifth (25th) day after the date on which he is notified orally or in writing or on which he first becomes aware of the action or circumstances giving rise to the grievance.*

Mr. Bentley testified that, in 1989-1990, he was a project manager for PWGSC, doing design and construction work for the Health Protection Branch (HPB) of Health Canada. In this capacity, he developed a computerized forecasting model for the HPB project and Health Canada felt this model could be applied to other ongoing projects. Accordingly, Health Canada asked PWGSC if Mr. Bentley could be assigned to Health Canada to continue with his project-management work and this request was granted, effective April 1991. Exhibit G-2 is a "Specific Service Agreement" between PWGSC and HPB showing Mr. Bentley to be on assignment with HPB, from April 1, 1991 to March 31, 1995, and his function was to provide program support. The agreement was signed by Mr. M. McElrone, Director Central Services with HPB. Mr. Bentley reported to Mr. McElrone, although Mr. McElrone's office was located in Ottawa and Mr. Bentley was located in the Metropolitan Toronto area.

The first order of business was to establish an office location and, due to the anticipated heavy travel requirements in the new assignment, Mr. Bentley was told by Health Canada that the best location for an office would be his own home. Accordingly, Mr. Bentley refurbished his basement to accommodate a small office.

In order to accurately reflect the hours he worked, Mr. Bentley devised a spreadsheet for each fiscal year of his assignment (Exhibits G-3, G-4, G-8 and G-9 respectively). The spreadsheets list each day separately, they indicate the start and stop times for hours worked, the actual number of hours worked, a running total of hours worked and a running total of the regular hours per week, as per the collective agreement (7.5 hours per day, 37.5 hours per week).

Exhibit G-3 is the spreadsheet covering the 1991-92 fiscal year and the witness testified he sent this in to Mr. McElrone in April 1992. Mr. Bentley testified it was submitted to show Mr. McElrone the number of hours the witness worked. The exhibit

indicates Mr. Bentley worked a total of 2582 hours that fiscal year, and his regular hours (based on 37.5 hours per week) totaled 1890 (Exhibit G-3, last page). This means he worked about 692 hours of overtime during the first fiscal year of his assignment.

Mr. Bentley testified he did not make a request for payment of overtime at that juncture because he felt there would be opportunities for taking time off at a later date. Furthermore, he stated he felt the excessive hours were more attributable to typical start-up requirements of the new job and would diminish as time progressed. Such was not the case however.

In cross-examination, Mr. Bentley identified Exhibit E-2 as a memorandum he wrote to Mr. McElrone on July 2, 1991, some three months after commencing his assignment. In it he wrote, at section 11.0), "Overtime":

> ***11.0) Overtime***
>
> ***11.1)*** *Significant overtime is looming as a likelihood due to 2 diverging clients and the spreadout of consultants across the country, so I shall advise verbally if it becomes unreasonable and the normal overtime approval can be sought. Regardless of hours paid for, it is evident that I cannot stop the substantial telecom, courier and fax machine output which demands timely decisions and answers from me so I shall expect to suffer valiantly if HC decides to not cover some overtime.*

Mr. Bentley testified he expected to do some minimal overtime without being reimbursed and was anticipating taking some time off in lieu. Mr. Jaworski suggested that, even at the outset, the overtime was significant, yet Mr. Bentley chose not to claim it. Mr. Bentley felt the employer could have mitigated the overtime without necessarily paying for it.

The 1992-93 fiscal year hours-of-work totals are seen in Exhibit G-4. Mr. Bentley claims in that fiscal year he worked 3044.5 hours compared to 1882.5 regular hours. This means he worked about 1162 hours of overtime in this fiscal year. The witness testified he had numerous discussions with Mr. McElrone about the excessive hours he was working. Mr. Bentley testified that Mr. McElrone agreed to pay for 380 overtime hours for 1992-93 and, accordingly, Mr. Bentley submitted a claim for this on February 15, 1993 (Exhibit G-5). Mr. Bentley agreed, in cross-examination,

that he had signed and submitted the February 15 claim for 380 overtime hours. Mr. Jaworski suggested Mr. Bentley made a conscious decision to lower his overtime claim but Mr. Bentley disagreed, saying that the figures were submitted merely to coincide with the amount Mr. McElrone was willing to pay.

The 1993-94 fiscal year hours-of-work totals (Exhibit G-8) show Mr. Bentley working 2673.5 hours compared to 1845 regular hours. This means the witness worked 828.5 overtime hours. The witness testified Mr. McElrone agreed to pay for 307 overtime hours, so Mr. Bentley submitted a claim for 307 overtime hours on March 4, 1994 (Exhibit G-6). Mr. Bentley agreed, in cross-examination, he had signed and submitted this claim.

The 1994-95 fiscal year hours-of-work totals (Exhibit G-9) show Mr. Bentley working 2857 hours compared to 1860 regular hours. This means the witness worked 997 hours of overtime. The witness testified that Mr. McElrone authorized payment for 310 overtime hours, so Mr. Bentley submitted a claim in January 1995 for 310 overtime hours (Exhibit G-7). The witness agreed, in cross-examination, he signed and submitted this claim. The witness was shown Exhibit E-4, a memorandum Mr. Bentley wrote to Mr. McElrone on January 6, 1995, claiming the above-mentioned 310 overtime hours. The letter states: "There will be no further claim this fiscal year." Mr. Bentley stated this simply corresponded with the overtime limit Mr. McElrone was prepared to approve.

Mr. Bentley testified he was aware of the overtime provision in the collective agreement and, in fact, at some point in the assignment, he spoke to Mr. Randy Dhar, a union official, about the excess in hours worked during the assignment and the potential for a grievance. Mr. Bentley testified that he was told by Mr. Dhar that, if he grieved, he would likely be returned to PWGSC and there was no work available for him there; so, he would likely be terminated. As a result, Mr. Bentley said he did nothing beyond submitting the above-referenced claims. In cross-examination, the witness stated the reason he did not file a grievance was because he wanted to keep his job.

In early 1995, Mr. Bentley was subjected to a travel audit and he testified he was told by the auditor he should make a claim for the overtime which had not been paid.

Accordingly, on May 27, 1995, Mr. Bentley submitted a claim for the unpaid overtime for each fiscal year of his assignment (Exhibits G-20, G-10, G-11 and G-12). Mr. Bentley testified he was told by Mr. McElrone, in June 1995, that he could not get paid for his overtime claims and no further action, at that time, was taken by Mr. Bentley. He testified the reason for his inaction was because he heard Mr. McElrone was about to retire and, in fact, this event occurred in July 1995. Replacing Mr. McElrone was Ms. Marie Williams and, again, Mr. Bentley said he did not take any formal action to pursue his overtime claim at that time. He testified he continued to feel any pursuit of overtime would result in the cessation of his assignment to Health Canada.

In September 1995, Mr. Bentley received a telephone call from Ms. Williams and was told Health Canada was looking for a replacement for him, and he agreed to continue the assignment until a replacement was found. In November 1995, he was returned to his PWGSC office, whereupon he was informed that there was no work for him and that he should look elsewhere for employment.

On November 20, 1995, Mr. Bentley wrote to Ms. Susanne Borup, Regional Director General, Ontario Region, PWGSC, and itemized areas that were, in his view, unresolved. At item 3.7 of his letter, "Unpaid Required Overtime 1991/95" (Exhibit G-13), he stated he was owed $79,962, which represented the difference between what he had been paid and what he claimed was owed for his hours worked. In cross-examination, Mr. Bentley agreed this was the first time he followed up in writing the denial to pay overtime.

Ms. Borup replied on February 8, 1996, rejecting this request for overtime payment (Exhibit G-14). Mr. Bentley wrote back to Ms. Borup on March 4, 1996 (Exhibit G-15), further explaining the unpaid overtime claim and asked Ms. Borup if she would review her opinion. There is no evidence before me that Ms. Borup replied to this request. Further correspondence flowed between these two individuals, between April 12 and May 3, 1996, on a claim for reimbursement for $6,000, as a

result of refurbishing the grievor's basement into an office (Exhibits G-16, G-17, G-18 and G-19). Mr. Rafferty informed me the claim for this matter was no longer in issue. Finally, on May 22, 1996, Mr. Bentley filed his grievance requesting overtime payment.

Ms. Borup testified there would be harm to the employer in allowing an extension of time in that there is no access to 1991-1995 funds at this time if PWGSC had to pay the claim. However, she agreed, in cross-examination, that, if the Department was ordered to reimburse an employee for moneys from a previous year, the Department would have to pay.

Argument for the Applicant

Mr. Rafferty argued that the case, on its face, should have been grieved earlier by Mr. Bentley, namely in 1992, 1993, 1994 and 1995, rather than the actual filing date of May 1996. However, subsection 63(b) of the *P.S.S.R.B. Regulations and Rules of Procedure* allows for an extension of time "on such terms and conditions as the Board considers advisable."

The case of *Stubbe* (Board file 149-2-114) was reviewed by Mr. Rafferty and he suggested four principles flowed from that decision, that could be applied to the instant case. Those four principles are:

1. The extent of the delay in submitting Mr. Bentley's grievance was not, in the circumstances, unreasonable;

2. There were good and legitimate reasons for the delay;

3. It would not cause substantial prejudice to the employer should the extension be granted; and

4. Mr. Bentley exercised due diligence in the circumstances.

With respect to the first and second items, the extent of the delay and reasons for it, Mr. Rafferty argued that Mr. Bentley was in a highly vulnerable situation while on assignment to Health Canada. He had to stay within budget, yet get all the necessary tasks accomplished. In spite of discussions with Mr. McElrone to attempt to find a way to get the extensive hours of work under control, nothing was done to

either reduce these hours or pay for the overtime. Mr. Bentley knew that asserting his rights would almost certainly result in the termination of his assignment and in his return to PWGSC, so he tried to strike a balance between asserting his rights and preserving his employment. It was only when the assignment with Health Canada ended that he felt he should pursue his claim for moneys owed. Even then, this did not result in a grievance.

The grievor chose to write to Ms. Susanne Borup, and, Mr. Rafferty argued, it was only when Ms. Borup finally and definitely refused to grant Mr. Bentley any part of the money owing to him that he chose to submit a grievance. In fact, it was the May 3, 1996 letter (Exhibit G-19) from Ms. Borup which should be regarded as the trigger for the May 22, 1996 grievance.

Mr. Rafferty also argued that the travel audit, which Mr. Bentley was subjected to, provided him with motivation to pursue a claim for overtime. The auditor, it was argued, recommended Mr. Bentley pursue a request for overtime payment and Mr. Bentley used this as a launching pad, so to speak, to raise the issue again.

These, Mr. Rafferty suggests, indicate the length of delay is not, in these circumstances, unreasonable. In addition, these were good and legitimate reasons for the delay.

The third area addressed by Mr. Rafferty was the prejudice to the employer, should the extension be granted. Given the existence of written records indicating how much time was worked by Mr. Bentley, Mr. Rafferty argued any prejudice to the employer would be minimal. Also, while the sum claimed by Mr. Bentley is large to him, Mr. Rafferty suggested it should cause little concern to the employer.

Finally, the issue of due diligence was canvassed. Mr. Rafferty argued that Mr. Bentley did not simply "sit on his rights". The grievor spoke to Mr. McElrone about the lengthy hours of work on numerous occasions. Furthermore, Mr. Bentley submitted written accounts for the extensive hours he worked, while at the same time he tried not to "rock the boat", so to speak. Mr. Rafferty alleged that it was immediately upon Mr. Bentley's return to PWGSC that he pursued his claim for compensation.

For these reasons, Mr. Rafferty suggested I exercise my discretion and grant an extension of time.

In the alternative, Mr. Rafferty suggested that the grievance was timely in that its filing on May 22, 1996 was within 25 days of Ms. Borup's definitive denial of reimbursement.

Argument for the Employer

Mr. Jaworski began by reviewing clause 35.09 of the collective agreement and he stated that, to the extent possible, the collective agreement should be honoured. Clause 35.09 is a negotiated deadline and should not be lightly set aside. Given the fact Mr. Bentley knew at a very early stage in his assignment that he was working extensive hours, any claim should have been pursued then. He did not, and instead chose to accept the number of hours Mr. McElrone proffered as being acceptable for payment.

In this regard, I was referred to *Wilson* (Board files 166-2-27330 and 149-2-165), a decision of then Deputy Chairperson P. Chodos. At page 8, he wrote:

> *... it is incumbent on the applicant to provide cogent reasons explaining the delay, and to justify why he or she should be relieved of the consequences of their failure to abide by the contractual time limits set out in the relevant collective agreement. It should be understood that the Board will not lightly set aside the duly negotiated time limits, and will in fact only do so where the application of the time limits would "cause an injustice"....*

Mr. Jaworski argued that the circumstances of Mr. Bentley's application for an extension of time do not meet the above-noted criteria and, therefore, should not be granted.

Mr. Bentley chose to sit on his rights and, given the large sum of money being asked for, Mr. Jaworski suggested it would behove Mr. Bentley to act early. He did not, instead opting to accept the settlement offered by Mr. McElrone. This is not a demonstration of diligence: he made a conscious decision to accept the compensation as put forward by Mr. McElrone. He even raised the issue of excessive hours with a union official early on in the assignment and, still, he chose not to grieve. It was only

supposition to suggest he could suffer a job loss if he pursued his claim, and the facts show he chose not to file a grievance at the relevant times.

Insofar as prejudice is concerned, Mr. Jaworski argued that the applicant bore the burden to show an extension of time could not cause prejudice to the employer, and this the applicant has failed to do. In fact, there would be prejudice here, given the fact the budgets for the years in question have all been finalized and funds cannot be accessed.

Mr. Jaworski also referred me to the *Coallier* decision (Board file 166-8-13465; and FC File No. A-405-83).

Decision

I will deal firstly with the alternative argument advanced by Mr. Rafferty, namely that the letter authored by Ms. Borup on May 3, 1996 (Exhibit G-19) be considered as the trigger point for the filing of the grievance on May 22, thereby rendering the grievance timely. Based on the evidence, I cannot accept this argument.

The May 3, 1996 letter deals exclusively with a claim Mr. Bentley submitted in respect of some $6,000, for costs related to setting up an office in his basement. I cannot concur that the May 22, 1996 filing of a grievance on overtime be considered timely in light of Ms. Borup's letter, since I find the letter did not deal at all with the issue of overtime. The two issues are separate and distinct.

I must also reject the request for an extension of time pursuant to section 63 of the *P.S.S.R.B. Regulations and Rules of Procedure,* based on the facts presented by both parties.

In *Wilson* (supra), at page 8, then Deputy Chairperson Chodos wrote the following, which I consider applicable to this case:

> ... *A significant factor in this consideration* [in determining whether to grant an extension of time] *is the extent of the delay, and whether the grievor showed due diligence in all the circumstances.*

I concur with Mr. Jaworski that, in this case, Mr. Bentley has not shown due diligence. The facts clearly indicate that, very early on in the assignment, Mr. Bentley was aware he was working lengthy days (see Exhibit G-3). On July 2, 1991, Mr. Bentley wrote to Mr. McElrone and stated: "Significant overtime is looming...." (Exhibit E-2, page 3). Further on, he stated: "Regardless of hours paid for, it is evident that I cannot stop the substantial telecom, courier and fax machine output which demands timely decisions and answers from me so I shall expect to suffer valiantly if HC decides to not cover some overtime." At the end of the first fiscal year, Mr. Bentley's records indicated he worked almost 700 overtime hours (see last page of Exhibit G-3).

For at least the first fiscal year, the evidence suggests Mr. Bentley chose not to claim the real amount of overtime he had worked. He could not "sit on his rights" as it were, and submit a grievance for non-payment of overtime some five years later.

Although the evidence indicates Mr. Bentley was prepared to forgo some of his entitlement to overtime payments in the first year, this does not mean he was not going to, or entitled to, claim overtime in the ensuing years. The fact that Mr. Bentley chose not to claim overtime at the outset does not, in my view, mean he was willing to forgo all overtime in the future. I believe it is necessary to review the circumstances of each year to respond to the request for an extension of time. The finding of waiver applying only to the first year of the assignment is strengthened by the fact Mr. Bentley did claim overtime in subsequent years.

In the second fiscal year of the assignment, Mr. Bentley submitted a claim for 380 overtime hours (Exhibit G-5). The evidence indicates that Mr. Bentley claimed 380 overtime hours, although he states he worked more overtime hours than that (see Exhibit G-4). There is simply no evidence to suggest he did not agree with this at that time. The same can be said for 1993-94, where he claimed for some 307 overtime hours (see Exhibit G-6). On January 28, 1995, Mr. Bentley's written claim for 310 overtime hours for 1994-95 was submitted for payment (Exhibit G-7).

So, up to January 28, 1995, all written requests for overtime Mr. Bentley submitted were actioned as submitted. Although he had spoken to a union official, Mr. Randy Dhar, as well as his supervisor, Mr. McElrone, about his long hours, all written requests for payment had been actioned as submitted. In fact, in a

memorandum from Mr. Bentley to Mr. McElrone dated January 6, 1995, Mr. Bentley states, with respect to his overtime claim for 310 hours: "There will be no further claim this fiscal year" (see Exhibit E-4). The evidence indicates that Mr. Bentley knew he was working more overtime hours than he was seeking compensation for.

In my view, the evidence indicates that, up to at least January 1995, Mr. Bentley accepted the overtime compensation that he had been paid. However, at a later point, Mr. Bentley changed his mind and submitted a claim for the unpaid hours. The evidence indicates this took place on May 27, 1995 (see Exhibits G-10, G-11, G-12 and G-20). Mr. Bentley testified that he sent these overtime claims directly to Mr. McElrone. At that point, Mr. Bentley was still working on his assignment with Health Canada; so, in my view, it is reasonable to assume Health Canada was placed on notice, effective May 27, 1995, that Mr. Bentley was claiming overtime for the extra hours he had worked.

Mr. Bentley was told by Mr. McElrone that he would not be getting paid for them. So Mr. Bentley was certainly aware, according to his testimony, that Mr. McElrone was not going to pay the overtime and he testified this verbal exchange took place about June 1995.

I note that Mr. Bentley's records indicate the last day of overtime worked was March 31, 1995 (Exhibit G-9), although Mr. Bentley testified he remained on assignment with Health Canada until his return to PWGSC, in November 1995. Consequently, when he submitted his claim for unpaid overtime on May 27, 1995, and was told in June 1995 by Mr. McElrone he was not going to receive payment, he could have filed a grievance at that point for, at least, a portion of the overtime, if he so desired. He testified he did nothing until he returned to PWGSC, in November 1995. On November 20, 1995, he requested payment of the said overtime from Ms. Borup. In February 1996, he received a written reply from Ms. Borup, saying he was not going to be paid for the overtime (see page 2 of Exhibit G-14). Again, he did not grieve this action at that point, and chose to wait until May 1996 to do so.

In the end, I find that there is no compelling reason for me to invoke the provisions of section 63 of the *P.S.S.R.B. Regulations and Rules of Procedure*. The time limits specified in clause 35.09 of the collective agreement have been negotiated between the parties themselves and should not lightly be set aside.

The application for an extension of time is therefore denied.

Joseph W. Potter,
Board Member

OTTAWA, June 9, 1998.