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File: 466-HC-00344

Citation: 2006 PSLRB 115

Parliamentary Employment and Staff Relations Act

Before an adjudicator

BETWEEN

DAVID SABOURIN

Grievor

and

HOUSE OF COMMONS

Employer

Indexed as
Sabourin v. House of Commons

In the matter of a grievance referred to adjudication

REASONS FOR DECISION

Before: Ian R. Mackenzie, adjudicator

For the Grievor: Paul Champ, counsel

For the Employer: Marie-Josée Lacroix

Ottawa, Ontario.
(Decided without an oral hearing)

Grievance referred to adjudication

[1] I issued a decision reinstating Mr. Sabourin on July 4, 2006. I retained jurisdiction to address any difficulties in the implementation of my award. The employer advised that the parties had two issues that needed to be resolved in the implementation. The first issue was the application of the "sunset" clause relating to previous discipline. The second issue related to a claim for compensation for lost overtime opportunities.

[2] I requested written submissions from the parties on these two issues, reproduced below.

Submission of the grievor

> ***Disciplinary Record***
>
> *The collective agreement between the PSAC and the House of Commons contains a provision that reads:*
>
> > **31.05** Any document or written statement related to disciplinary action, which may have been placed on the personnel file of an employee shall be destroyed after two (2) years have elapsed since the disciplinary action was taken, provided that no further disciplinary action has been recorded during this period.
>
> *The union submits that this is a mandatory provision that commands the employer to destroy all documents related to disciplinary action after two years have "elapsed", provided no further disciplinary action has been recorded "during this period". The employer argues that the two year period in Article 31.05 should be calculated on the basis of time when an employee is actively at work. In that regard, the employer notes that the grievor has been away from the workplace since June 2003, which was the time when he went off due to the workplace injury.*
>
> *With respect, the employer's interpretation is contrary to the plain and ordinary meaning of the words. The article says that documents shall be destroyed after two years have "elapsed". This clearly means that the time runs continually. As well, the article refers to the two years as "this period", which again indicates a single period of time that is not subject to extensions. If the parties had intended the clause to only apply to employees who are actively at work, they would have said so in the article. In the absence of exceptions, the two year period must be accepted as a continuous two year calendar period.*

It is also worth noting that the interpretation suggested by the employer would mean that employees who are away from work due to a disability would not receive the full benefit of the provision. Aside from the human rights issues that this would obviously raise, it would also call into question its application to employees who are disciplined for off-duty conduct. On the one hand, they can be disciplined while away from work, but on the other the time which elapses does not count in their favour. Clearly this would be an absurd result.

Finally, the French version of this article is very helpful and makes plain the intention of the parties. It reads:

> **31.05** Tout document ou toute déclaration écrite concernant une mesure disciplinaire qui peut avoir été versé au dossier personnel de l'employé(e) doit être détruit au terme de la période de deux (2) ans qui suit la date laquelle la mesure disciplinaire a été prise, pourvu qu'aucune autre mesure disciplinaire n'ait été portée au dossier dans l'intervalle.

By the words "au terme de la periode de deux (2) ans", the French version makes clear that documents must be destroyed at the end of a period of two years. As well, "qui suit la date" means "following the date", which again implies a two year period that is calculated following the date of the disciplinary action. The grievor's record should be clear as no discipline has been imposed since June 2002, or more than four years ago.

Overtime

The adjudicator ordered the employer to pay the grievor for lost remuneration from October 2003 until he returns to work. The grievor has asked that he be compensated for overtime that he would have earned during that period. The employer does not believe he should be so compensated.

In Gauthier and Treasury Board (Transport Canada) *[I983] C.P.S.S.R.B. No. 199 (J.M. Cantin), the adjudicator held that the reimbursement of lost wages for wrongfully discharged employees must include compensation for lost opportunity for overtime. The adjudicator reviewed other arbitration cases and secondary sources to determine the general principle that the aggrieved party is entitled to be placed in the position that he or she would have been in had there been no breach of the collective agreement. The quantum of damages was based on the employees' historical average of overtime hours worked.*

In the present case, the employer knows that the grievor worked an average of 30 hours of overtime per year for the

few years prior to this termination. These overtime hours are typically assigned during busy periods such as the Christmas rush, budget time, and other occasions when Members of Parliament tend to send and receive large volumes of mail. The grievor should be compensated based on the estimated overtime hours he would have worked during that period, which is probably best determined by his average overtime from 2000 to 2003.

Submission of the employer

Disciplinary record

The collective agreement article 31.05 provides that:

> Any document or written statement related to disciplinary action, which may have been placed on the personnel file of an employee shall be destroyed after two (2) years have elapsed since the disciplinary action was taken, provided that no further disciplinary action has been recorded during this period.

The union submits that the two-year period is a mandatory provision, that the time runs continually and that this period is not subject to extensions.

It is the Employer's submission that article 31.05 must be read as a whole. The article also stipulates:" …provided that no further disciplinary action has been recorded during this period. "

The Employer further submits that the two year period provided for in the collective agreements serves to give employers an assurance, for a certain period of time, in this case, two years, that an employee's behavior in the workplace has improved. Indeed, the principle of the disciplinary process is progressive and designed to correct employees' behaviors. The clause in question has as its purpose the balancing of the employer's capacity to impose progressive discipline and the employee's right to purge the record with improved behavior in the workplace and with a period of disciplinary free work.

The union submits that if the parties intended the clause to only apply to employees who are actively at work, they would have said so in the article.

In Re Maple Leaf Meats Inc. and U.F.C. W. Loc., 175 (Longboard), *93 L.A.C. (4m), page 339, the worker had suffered an injury on duty and had returned to work with restrictions and consequently only worked on a part-time basis. The collective agreement read:*

4.01 New employees shall be on probation for a period of seventeen (17) weeks ...

Arbitrator R.D. Howe made the following observation at page 403:

... ...parties are free to negotiate a probationary period which will include upon the elapse of seventeen calendar weeks, regardless of how many hours a new employee actually works during that period However, where a probationary period is defined simply in terms of days, weeks, or months, arbitrators have generally tended to construe the language as referring to days, weeks, or months actually worked by the employee, in view of the well-established rationale that probationary periods are intended to provide an employer with a reasonable period of time in which to assess a new employee's working ability.

The Arbitrator Howe concluded that: ... the probationary "period of seventeen (1 7) weeks" specified for new full-time employees in Article 4.01 does not refer to a period of seventeen calendar weeks, but rather to a period of seventeen work weeks ....

He further concluded, on page 406: . . .the probationary period contemplated by Section 4.01 is not based upon the mere passage of time but rather is based upon the elapse of time spent working in the plant, during which the satisfactoriness of the probationary employee's work performance can be evaluated by the Company in order to determine whether or not he or she should be retained in the employ of the Company.. . .

It is the Employer's position that the two-year period in regards to disciplinary action taken is analogous to and serves the same purpose as a probationary period. The probationary period serves to evaluate the employee's performance in relation to quality of work and the two-year period in relation to discipline, serves to evaluate the employees' behavior in the workplace.

We therefore submit that the period of absence should not be calculated in the two year period. The employer would be prejudiced if the period of absence would be included in the two-year period as it was not in a position to ensure the employee's behavior improved and was corrected while the employee was absent from the workplace.

The Union further submits:..."that employees who are away from work due to disability would not received the full benefit of the provision ... and that would raise human rights issues…."

The same issues were also raised in the Re Maple Leaf Meats Inc. and U. F. C. W. Loc., 175 (Longboard), (supra), *Arbitrator Howe concluded that:* ". . .denying the grievor probationary period service accrual during periods in which he was absent due to his compensable back injury is not violative of the Code because such accrual is a form of compensation in exchange of work, and requiring that work be performed in order to gain that accrual and duly complete the probationary period is a bona fide occupational requirement which cannot be accommodate without undue hardship. "

The Employer therefore submits that any prolonged absence from the work place should be excluded from the two-year period for the purpose of the disciplinary record of an employee.

Overtime

With regards to the overtime compensation requested, the employer did not object to the principle but requested clarification and advice from the Adjudicator on its application.

It is the Employer's submission that overtime compensation should be indeed considered and calculated based on the employee's history of overtime as also determined by Board Member T.O. Lowden, 166-2-1 8237, PSLRB.

However, in our particular situation, the griever's overtime records are as follows:

2000 - 20.5 hours of overtime worked

2001 - 12.5 hours of overtime worked

2002 - 6 hours of overtime worked

2003 - 0 hours of overtime worked

The number of hours worked by the grievor in the last years average 9.75 hours. Furthermore, as can be seen by the numbers above, not only are the overtime hours worked by the grievor insignificant, but they were decreasing year after year.

It is therefore the Employer's submission that the grievor should not be entitled to overtime compensation based on his overtime work record.

[*Sic* throughout]

Reply submission of the grievor

Disciplinary Record

The employer relies primarily on the case Re Maple Leaf Meats Inc. and U.F.C.W. Loc., 175 (Longboard), *(2000) 93 L.A.C. (4th) 399 (Howe). That case dealt with different parties, a different collective agreement and different issues. For the reasons below, it is the grievor's submission that the case offers no assistance to the present matter.*

First, the employer neglected to re-produce the entire provision at issue in Maple Leaf Meats*. That article, which dealt with probationary periods, states:*

> *New employees shall be on probation for a period of seventeen (17) weeks for full-time employees and six hundred and eighty (680) hours for regular part-time employees.*

The above provision clearly indicates that it refers to a period of time while an employee is actively at work. That is why it refers to specific hours worked by part-time employees. In the present case, Article 31.05 has nothing in it that would suggest it is meant to apply to time actively at work. As well, Article 31.05 uses the word "elapsed" and, in the French version, speaks to a period following a specific date. This difference in language clearly distinguishes Article 31.05 from the provision in Maple Leaf Meats*.*

In addition, the employer's logic flawed [*sic*] *in comparing a probationary period to a discipline-free period. As argued in our submissions, an employee can be disciplined for off-duty conduct. Indeed, that is exactly what the employer attempted to do with the grievor in this case. Accordingly, an employee's off-duty behaviour is relevant for evaluating a discipline-free period and that is what the article intended.*

Overtime

In its submissions, the employer concedes for the first time that the grievor is entitled to compensation for overtime he would have worked during the relevant period. While this is positive, the employer provides the hours of overtime worked by the grievor from 2000 to 2003 and suggests the grievor should be paid the average. The grievor submits that the year 2003 should not be used in the calculation because it only includes part of the year. The grievor was denied the opportunity to work in 2003 during the busiest times of the year for the mail room, such as the fall sitting of Parliament and Christmas, and therefore the overtime hours for 2003 are not an accurate reflection of overtime he would have worked over the entire year.

> *In light of the above, it is submitted that the grievor should be paid the average of 2000 to 2002, or 13 hours per year ((20.5 + 12.5 + 6)/3)). Given that he was out of work for three years as a result of the unjust dismissal, he should therefore be paid 39 hours at the overtime rate.*

Reasons

[3] The collective agreement's language is clear: any disciplinary document shall be destroyed after two years have elapsed since the disciplinary action was taken. From a plain reading of this language, the mere passage of time is sufficient to trigger the destruction of a disciplinary document. If the parties had intended for the elapsed time to exclude time away from the workplace, this would have been specified in the clause. Therefore, pursuant to article 31.05, all disciplinary records on the grievor's file must be removed by the employer.

[4] There appears to be no disagreement between the submissions on the principle of compensation for lost overtime opportunities. The employer's position is that the overtime worked by the grievor was declining and that, therefore, no compensation for overtime should be awarded. I agree that the recorded overtime amount for 2003 is misleading given that the grievor did not work a full year. However, the overtime record does show that there had been a steady decline in the amount of overtime hours worked. It is reasonable to assume that the number of overtime hours worked in subsequent years would have stayed at the same level as in 2002. There was no evidence presented about the usage of overtime generally in the workplace during the years in question. I can therefore make no conclusions on whether the amount of overtime that the grievor would have worked would have increased or decreased during the period in which he was off work. Based on the overtime usage in 2002 I am prepared to allow for the payment of six hours of overtime per calendar year. This results in a total of 18 hours of overtime. The calculation of the overtime payment is to be based on the rate of pay in the year in which the grievor would have earned the overtime. In other words, the calculation for each block of six hours is to be calculated on the basis of the rate of pay the grievor would have received during that calendar year.

[5] For all of the above reasons, I make the following order:

(The Order appears on the next page)

Order

[6] The disciplinary record of the grievor shall be destroyed as provided for in article 31.05.

[7] Overtime compensation shall be paid on the basis of six hours per year (2003, 2004 and 2005) for a total of 18 hours of overtime. The overtime compensation is to be calculated on the basis of the rate of pay for Mr. Sabourin for each calendar year.

October 25, 2006.

Ian R. Mackenzie,
adjudicator