**Date:** 20090610

**File:** 566-32-746

**Citation: 2009 PSLRB 71**

*Public Service*
*Labour Relations Act*

Before an adjudicator

BETWEEN

**ED VERRETH**

Grievor

and

**CANADIAN FOOD INSPECTION AGENCY**

Employer

Indexed as
*Verreth v. Canadian Food Inspection Agency*

In the matter of an individual grievance referred to adjudication

**REASONS FOR DECISION**

***Before:*** Dan Butler, adjudicator

***For the Grievor:*** Ray Domeij, Public Service Alliance of Canada

***For the Employer:*** Barry Benkendorf, counsel

Heard at Vancouver, British Columbia,
May 5, 2009.

## I. Individual grievance referred to adjudication

[1] Ed Verreth ("the grievor") claimed call-back pay when a co-worker asked him to come to the workplace early on the morning of May 9, 2005 and provide assistance. His employer, the Canadian Food Inspection Agency, refused the grievor's claim because the call-back request did not originate from an authorized employer representative and because the grievor did not perform work.

[2] The issue in this decision is whether the employer's refusal violated the call-back pay provision of the applicable collective agreement.

[3] As corrective action, the grievor seeks ". . . full payment for the work done . . ." on the morning of May 9, 2005 ". . . at the applicable rate . . ." and compensation ". . . for all benefits applicable to overtime hours as per the collective agreement."

## II. Summary of the evidence

[4] The parties submitted the following Agreed Statement of Facts:

> *1. The applicable collective agreement is the* Collective Agreement between the Canadian Food Inspection Agency and the Public Service Alliance of Canada regarding the Public Service Alliance of Canada Bargaining Unit*, signed on March 9, 2005.*
>
> *2. Mr. Ed Verreth is an indeterminate Food Processing Specialist Inspector, EG-04 working in the Parksville District Office at 457 Standford East in Parksville, British Columbia. Mr. Verreth has been an employee of the CFIA and its predecessors since November 09, 1981.*
>
> *3. Mr. Verreth reports to Raymond Schaff, Food Processing Supervisor.*
>
> *4. Mr. Schaff reports to Mr. Sam Elder, Inspection Manager, Victoria District Office.*
>
> *5. On May 9, 2005, Mr. Paul Richardson an Animal Programs Inspector, EG-03, left the Parksville District office without his keys, realized he was locked out of the office, tried to re-enter the office, and accidentally tripped the alarm. He was prevented from turning off the alarm as he was locked out.*
>
> *6. The proper protocol was for Mr. Richardson to call his two supervisors, Mr. Elder and Mr. Schaff on their mobile phones. Mr. Richardson then attempted to call Mr. Elder, one of his*

*supervisors, but called the wrong number. He did not call Ray Schaff.*

*7. Mr. Richardson then called the RCMP to alert them to the fact he had set off the alarm.*

*8. Mr. Richardson then called the Grievor at home at 05:06 am and asked him to attend the office to let him into the office. This was outside the Grievor's normal working hours.*

*9. Mr. Richardson had called the Grievor because he had his phone number written on slip of paper in his pocket. The number had been given to Mr. Richardson by the Grievor as they intended to get together for purposes outside the scope of their employment.*

*10. The Grievor does not have a reporting relationship with Mr. Richardson. Mr. Richardson does not have the authority to contact the Grievor to report to work.*

*11. The Grievor's work duties did not include being an emergency contact, opening doors on an emergency basis, or fixing or shutting off alarms on an on call basis. (Exhibit E1 - Work Description)*

*12. The alarm was not monitored by an alarm company or by the police.*

*13. The Grievor came into the office for approximately ten (10) minutes to open the door and to turn off the alarm.*

*14. The relevant article in the collective agreement is article 28 which states:*

> If an employee is called back to work:
>
> . . .
>
> (c) after the employee has completed his or her work for the day and has left his or her place of work, and returns to work, the employee shall be paid the greater of:
>
> (i) compensation equivalent to three (3) hours' pay at the applicable overtime rate of pay for each call-back to a maximum of eight (8) hours' compensation in an eight (8) hour period. Such maximum shall include any reporting pay pursuant to clause 31.06 and the relevant reporting pay provisions;
>
> or

> (ii) compensation at the applicable rate of overtime compensation for time worked, provided that the period worked by the employee is not contiguous to the employee's normal hours of work.
>
> *15. Section 7.3 of the* CFIA Human Resources Delegation of Authority*, effective June 18, 2003, gives Supervisors or an equivalent with budgetary control, reporting to a Manager, the authority to approve shift schedules, overtime, work on a designated holiday, call-back and stand-by.*
>
> *16. Authorization for call-back or overtime in relation to the May 9, 2005 incident was never given by the Grievor's delegated manager or supervisor.*
>
> *17. The grievance was filed within the time limits as specified in the collective agreement.*
>
> *18. The issue before is whether the Grievor is entitled to Call Back Pay as per Article 28 of the collective agreement.*
>
> *19. The parties agree that no further evidence will be introduced.*
>
> [*Sic* throughout]

[5] The parties also submitted, on consent, a National Generic Work Description for the position of Food Processing Specialist Inspector (Exhibit E-1).

[6] No witnesses testified for either party.

## III. Summary of the arguments

### A. For the grievor

[7] The grievor argued that the purpose of call-back pay is to compensate an employee for the inconvenience and disruption caused him or her by having to come into work outside the normal schedule. Its purpose is also to insure that the employee does report to work as required: Brown and Beatty, *Canadian Labour Arbitration*, ¶8:3410.

[8] The grievor also referred me to E.E. Palmer, *Collective Agreement Arbitration in Canada*, 3d. ed., for further discussion of the purpose of call-back pay and for the definition of "work."

[9] According to the grievor, the employer will maintain that the grievor did not perform work on the morning of May 9, 2005. The grievor contended that, to the

contrary, the definition of "work" offered in *Black's Law Dictionary*, 1990, clearly encompasses what occurred. The grievor's action in response to the call from Paul Richardson was only for the employer's benefit. The grievor received no recreational value or personal satisfaction from the experience.

[10] The grievor noted that the collective agreement does not specify a minimum period of work to trigger the entitlement to call-back compensation. The amount of work performed on May 9, 2005 is not an issue.

[11] The grievor urged me to give a purposeful reading to the disputed clause of the collective agreement. He attended the workplace to perform a function for the employer — unlocking the door for a fellow employee. The grievor did what was required of him, for the benefit of the employer.

[12] The grievor concluded that he has met his burden to establish his entitlement to call-back under clause 28.01(c) of the collective agreement. He asked me to declare that the employer breached the collective agreement and to remain seized of the matter should the parties not agree on the appropriate corrective action to make the grievor whole.

**B. <u>For the employer</u>**

[13] The employer argued that the proper protocol for Mr. Richardson in the circumstances of this case was to call his supervisors for instructions. The evidence established that he phoned the wrong number for his first supervisor and that he did not call his second supervisor. After alerting the Royal Canadian Mounted Police about the alarm that he had set off, Mr. Richardson called the grievor to come to his aid because he had the grievor's telephone number ready at hand for personal reasons.

[14] Based on those facts, the employer maintained that the call-back provision of the collective agreement did not apply. There was no reporting relationship between the grievor and Mr. Richardson. The latter had no authority to call the grievor into work. In the circumstances of this case, no authorized representative of the employer called back the employee. It was simply a situation where one employee asked a colleague for assistance.

[15] When Mr. Richardson contacted him, according to the employer, the grievor could have refused to provide assistance and would not have suffered any

consequences for that refusal. Responding to such a call was not part of the grievor's job as outlined in his job description (Exhibit E-1). He was not on standby duty. He was not designated as a person who performs emergency services.

[16] To qualify under clause 28.01(c) of the collective agreement, the employer argued that a call-back (1) requires a contact from a properly authorized representative of the employer and (2) must fulfill an employment duty. Neither condition applied to the grievor's action on May 9, 2005.

[17] The employer referred me to *Hydro-Electric Commission of Town of Mississauga v. International Brotherhood of Electrical Workers, Local 636 (1975)*, 8 L.A.C. (2d) 158, *Perley Hospital v. Ontario Nurses' Association* (1981), 29 L.A.C. (2d) 178, and, as cited by the grievor, the definition of "work" in *Black's Law Dictionary*.

[18] Based on the case law, the employer argued that an employer must have the opportunity in a potential call-back situation to make the decision whether to require an employee to report for duty. It is the employer's responsibility to manage resources, including making decisions about the use of labour. If an authorized employer representative does not have the opportunity to decide what to do, it leads to a situation where the employer loses control over the management of money and people and where employees may call each other to perform work.

[19] The employer stated that the grievor had not been in a situation in which it would have been difficult to say "no." Either he or Mr. Richardson should have contacted a supervisor and acted on management's instructions. Instead, the grievor acted entirely on a voluntary basis without being compelled to do so by the employer.

[20] The employer stated that it had been unable to find any case where an employee who was not on standby duty and who was not required to respond to calls outside normal work hours as part of his or her duties was awarded call-back pay in comparable circumstances.

[21] The employer urged me to dismiss the grievance.

**C. <u>Grievor's rebuttal</u>**

[22] The grievor maintained that the collective agreement does not require pre-authorization for a call-back. The employer's argument improperly suggests that

the adjudicator should read that requirement into the call-back article. Call-backs can, and do, arise in various unforeseen circumstances, such as fires or other situations where safety is involved. On the morning of May 9, 2005, there was some urgency to what the grievor was asked to do. Pre-authorization was not necessary.

[23] Had the grievor not responded to Mr. Richardson's call, he might have been disciplined, according to the grievor. The employer's argument that a refusal to respond would not have placed the grievor at risk of discipline calls for speculation about what would have happened and is not based on any evidence.

[24] The grievor dismissed the relevance of *Hydro-Electric Commission of Town of Mississauga.* In that case, the employee who claimed call-back pay was already at work. The grievor submitted that there is no case law where the employer has been found to have properly denied call-back pay in the type of situation that the grievor faced.

## IV. Reasons

### A. Procedural ruling

[25] During the hearing, I asked the grievor to produce a copy of the collective agreement, a requirement stated in the official Notice of Hearing. Both parties initially opposed that request, citing their understanding that an adjudicator should confine his or her consideration of the case to the facts outlined in their Agreed Statement of Facts, including the excerpt it contains from the collective agreement. After hearing the views of the parties on that point, I ordered the grievor to produce the collective agreement.

[26] The canons of arbitral interpretation expressed in the case law amply recognize that a decision maker in a dispute over the interpretation or application of a provision of a collective agreement should determine the intent of the parties by giving the terms that they used in the collective agreement their plain and ordinary meaning ". . . unless to do so would lead to some absurdity or inconsistency with the rest of the collective agreement, or unless the context reveals that the words are used in some other sense": *Brown and Beatty*, ¶4:2110. My order at the hearing was consistent with that normal approach. It reflected the possibility that I might need to refer to other provisions of the collective agreement within or outside article 28 (Call-back) to render a decision. In my respectful view, the order fell well within the authority of an adjudicator under the *Public Service Labour Relations Act*, enacted by section 2 of the

*Public Service Modernization Act*, S.C. 2003, c.22, and under the *Public Service Labour Relations Board Regulations*, SOR/2005-79 ("the *Regulations*"). I wish to draw the parties' attention, in particular, to subsection 97(1) of the *Regulations*, which reads as follows:

> ***97.*** *(1) If a grievance relates to the interpretation or application of a provision of a collective agreement or an arbitral award, the party referring the grievance to adjudication shall, before or at the hearing, provide a copy of the collective agreement or the arbitral award to the adjudicator, the other party or its representative, if any, and intervenors and, if notice to the Canadian Human Rights Commission was given under subsection 210(1), 217(1) or 222(1) of the Act, to the Canadian Human Rights Commission.*

[27] In the end, as discussed below, I found it unnecessary to refer to other provisions of the collective agreement to make my ruling.

**B. <u>Did the employer violate the collective agreement?</u>**

[28] The grievor must prove that the employer violated the call-back pay provision of the collective agreement when it refused to compensate him for the alleged call-back requirement that occurred on the morning of May 9, 2005.

[29] Clause 28.01 of the collective agreement reads, in part, as follows:

> **28.01** If an employee is called back to work:
>
> . . .
>
> *(c) after the employee has completed his or her work for the day and has left his or her place of work, and returns to work, the employee shall be paid the greater of:*
>
> *(i) compensation equivalent to three (3) hours' pay at the applicable overtime rate of pay for each call-back to a maximum of eight (8) hours' compensation in an eight (8) hour period. Such maximum shall include any reporting pay pursuant to clause 31.06 and the relevant reporting pay provisions;*
>
> *or*
>
> *(ii) compensation at the applicable rate of overtime compensation for time worked, provided that the*

> *period worked by the employee is not contiguous to the employee's normal hours of work.*
>
> . . .

[30] The essential dispute between the parties is whether a call from a co-worker, as opposed to a contact from an authorized representative of the employer, can trigger a call-back within the meaning of clause 28.01 of the collective agreement.

[31] The crux of the grievor's argument is that clause 28.01 of the collective agreement does not require pre-authorization from the employer. If an employee acts on a request to return to work to perform a function that comprises work, then the conditions for call-back compensation have been met.

[32] The employer clearly disagrees. It submits that the employer's ability to determine work requirements and the deployment of labour must be respected. The employer should have the opportunity to decide whether a situation requires it to call an employee back to work. It should not be found liable for call-back compensation when no employer representative with the requisite authority has been involved in approving the work to be performed on a call-back basis.

[33] I note that the language that appears in clause 28.01 of the collective agreement does not include a reference to pre-authorization by the employer. The introductory phrase does not read, for example, "If an employee is called back to work by the employer . . . [emphasis added]." Does the lack of specific language to such an effect signify that the parties intended that call-back compensation apply as long as the employee ". . . is called back to work . . ." — by whomever?

[34] The agreed evidence of the parties is that ". . . Supervisors or an equivalent with budgetary control . . ." are the persons authorized to approve a call-back. Paragraph 15 of the Agreed Statement of Facts reads as follows:

> *15. Section 7.3 of the* CFIA Human Resources Delegation of Authority*, effective June 18, 2003, gives Supervisors or an equivalent with budgetary control, reporting to a Manager, the authority to approve shift schedules, overtime, work on a designated holiday, call-back and stand-by.*

There is no evidence before me to establish that other persons also have the authority to approve call-backs or that they might have the authority to approve a call-back in certain circumstances. Similarly, there is no evidence that the practice in the workplace

regarding call-back authorization can, or has, differed from what the delegation of authority requires. Moreover, the grievor has effectively accepted that the existing protocol properly required an employee to contact his or her supervisor or manager first for approval when a call-back situation arises. Paragraph 6 of the Agreed Statement of Facts explicitly states that requirement in the case of Mr. Richardson. It is entirely reasonable to conclude that the same requirement applied to the grievor.

[35] The parties did not address in their submissions the legal status of the *CFIA Human Resources Delegation of Authority* for the purpose of interpreting the collective agreement. Without suggesting any formal ruling about its legal status, I believe that I am entitled nevertheless to rely on what it states, as a fact agreed by the parties, to assist my understanding of how clause 28.01 of the collective agreement operates in practice. I believe that I may also rely on the agreed existence of an established contact protocol in call-back situations for the same purpose. Those facts strongly suggest to me that it is reasonable to interpret clause 28.01 in light of a prevailing expectation, understood by both parties, that pre-authorization of a call-back is normally required by a duly authorized agent of the employer.

[36] By not specifically including the words "by the employer" in the preamble to clause 28.01 of the collective agreement, I believe that the parties have allowed for some flexibility in applying the provision. In my view, it remains possible that there may be circumstances where an employee has not secured employer pre-authorization but faces a situation where he or she reasonably concludes that it is necessary to return to work to perform a function for the employer. Various types of emergency situations come to mind. In such situations, it may be unrealistic to require an employee to obtain the employer's pre-authorization. The employee's response to the circumstances might still reasonably trigger the entitlement to call-back compensation.

[37] The uncontested evidence in this case is that the grievor did not try to contact either his supervisor, Raymond Schaff, or Sam Elder, the manager, to verify that he should return to work to assist Mr. Richardson. Mr. Richardson, for his part, had not tried to contact Mr. Schaff and had the wrong number for Mr. Elder. At least regarding Mr. Schaff, the grievor could not presume based on Mr. Richardson's experience that the responsible supervisor was unavailable. He acted on Mr. Richardson's telephone call without the benefit of Mr. Schaff's instructions that may have been available.

(Whether Mr. Richardson himself sufficiently complied with the expected contact protocol is largely irrelevant.)

[38] Clearly, Mr. Richardson had no authority to approve the call-back — confirmed as well by paragraph 10 of the Agreed Statement of Facts. While I accept that the grievor acted in good faith in going to Mr. Richardson's assistance, I find, based on the evidence, that he remained subject to a reasonable expectation to try to contact his employer before undertaking work. To be sure, the obligation to afford the employer the opportunity to determine the work requirement was more than just a matter of complying with the employer's policy and protocol. It is an obligation that is basic to the nature of the employment relationship itself, with few exceptions. That obligation should inform the interpretation of the collective agreement, unless the text of the collective agreement indicates otherwise or there are exceptional circumstances. I judge that neither situation applies in this case.

[39] Based on the agreed evidence, I rule that the grievor has not met the burden of proving that the employer breached clause 28.01 of the collective agreement. That said, I respectfully suggest that the employer may wish to find a way to recognize that the grievor responded to an unusual situation on May 9, 2005 in good faith and that he assisted a co-worker who was genuinely in a difficult situation.

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

*(The Order appears on the next page)*

**V. Order**

[41] The grievance is dismissed.

June 10, 2009.

**Dan Butler,**
**adjudicator**