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Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

BRIAN KRANSON AND JOHN W. SAWCHUK

Grievors

and

CANADIAN FOOD INSPECTION AGENCY

Employer

Indexed as
Kranson and Sawchuk v. Canadian Food Inspection Agency

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Dan Butler, adjudicator

For the Grievors: Ray Domeij, Public Service Alliance of Canada

For the Employer: Barry Benkendorf, counsel

Heard at Vancouver, British Columbia,
May 6, 2009.

I. Individual grievances referred to adjudication

[1] When Brian Kranson and John W. Sawchuk ("the grievors") worked three hours of overtime on February 24, 2005, they expected to receive a $10.00 overtime meal allowance and one-half hour paid time for a meal break under clause 27.08 of their collective agreement. When the employer paid the meal allowance but denied their claim for the paid meal break, the grievors objected and grieved. This decision will determine whether they were right.

[2] The relevant collective agreement is between the Canadian Food Inspection Agency ("the employer") and the Public Service Alliance of Canada regarding the Public Service Alliance of Canada Bargaining Unit. The collective agreement expired December 31, 2006.

II. Summary of the evidence

[3] The parties submitted an Agreed Statement of Facts as follows:

> *1. The applicable collective agreement is the* Collective Agreement between the Canadian Food Inspection Agency (CFIA) and the Public Service Alliance of Canada (PSAC) regarding the Public Service Alliance of Canada Bargaining Unit*, signed on March 9, 2005.*
>
> *2. Mr. Brian Kranson was employed at all material times by the CFIA as an EG-03 Modernized Poultry Inspection Program Inspector working at Establishment 7F located at 2619-91 Avenue Edmonton, Alberta.*
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> *3. Mr. John Sawchuk was employed at all material times by the CFIA as an EG-03 Modernized Poultry Inspection Program Inspector working at Establishment 7F located at 2619-91 Avenue in Edmonton, Alberta.*
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> *4. On February 24, 2005 the Grievors worked their regular shift from 04:40 to 12:40.*
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> *5. The Grievors then worked 3.0 additional hours of overtime from 12:40 to 15:40. They have been paid for this period at overtime rates.*
>
> *6. They were paid $10.00 in accordance with Article 27.08 (a) of the Collective Agreement for the meal allowance.*

7. On March 1, 2005 the Grievors submitted Attendance and Overtime Statement and Premium Report forms. The Grievors claimed 0.50 hours at the rate of time and one half for a meal allowance. The time of this claim is from 15:40 to 16:10. Attached as Exhibits "A" and "B" are the respective Attendance and Overtime Statement and Premium Reports for each of the Grievors. The grieviors [*sic*] *washed up from 15:40 to 15:50.*

8. The Grievors left the worksite at 15:50 without asking for or receiving a meal break during or at the end of the overtime period referred to in point #5. The first requests of this sort were the claims on March 1, 2005.

9. The usual practice at Establishment 7F was to provide a meal and time to eat it during the overtime shift or at the end of the overtime shift.

10. On March 10, 2005 the claims of overtime were denied by Bob Holowaychuk, Inspection Manager.

11. On April 1, 2005 the Grievors each filed one grievance.

12. The relevant article in the collective agreement is article 27.08 which states:

> (a) An employee who works three (3) or more hours of overtime immediately before or immediately following the employee's scheduled hours of work shall be reimbursed for one (1) meal in the amount of ten dollars ($10.00) except where free meals are provided.
>
> (b) When an employee works overtime continuously extending three (3) hours or more beyond the period provided for in (a) above, the employee shall be reimbursed for one (1) additional meal in the amount of ten dollars ($10.00) for each additional three (3) hour period thereafter, except where free meals are provided.
>
> (c) Reasonable time with pay, to be determined by the Employer, shall be allowed the employee in order that the employee may take a meal break either at or adjacent to the employee's place of work.

13. The parties agree that no further evidence will be introduced.

[4] The parties also submitted, on consent, Attendance and Overtime Statement and Premium Report forms for each grievor covering February 24, 2005 (Exhibits A and B).

[5] No witnesses testified for either party.

III. Summary of the arguments

A. For the grievors

[6] According to the grievors, the employer was obliged by the collective agreement to provide them "reasonable time with pay" for a meal break once they completed the required three hours of overtime on February 24, 2005. The meal break entitlement was not subject to discretion. Clause 27.08(c) states that employees "shall be allowed" that reasonable time with pay. Use by the parties of the word "shall" in the provision confirms that the requirement is mandatory: *Black's Law Dictionary*, 1990.

[7] The grievors were not obligated to request the meal break; the employer was obligated to provide it. The employer's only discretion was to determine the "reasonable time" required for the meal. The evidence is clear that the employer did not follow the usual practice and did not provide the required "reasonable time with pay." By failing to do so, the employer violated clause 27.08(c) of the collective agreement.

[8] Concerning the appropriate corrective action, the grievors argued that the employer cannot now make them whole by providing them with the lost meal break, particularly in the case of one of the grievors, who has since retired. Nonetheless, the employer can provide a monetary remedy to compensate the grievors. Payment of damages equal to one-half hour of pay represents a fair remedy at the low end of the appropriate range that is consistent with the objective to compensate the grievors rather than punish the employer.

[9] In support of their position on corrective action, the grievors referred me to Brown and Beatty, *Canadian Labour Arbitration*, ¶2:1410, 2:1423, 5:3240, 8:2130 and 8:3700; Mitchnick and Etherington, *Leading Cases on Labour Arbitration*, 7.4.1; and *United Steelworkers of America v. International Nickel Co. of Canada Ltd.* (1970), 21 L.A.C. 428.

B. For the employer

[10] The employer noted that the Agreed Statement of Facts reveals that both grievors worked overtime until 15:40 on February 24, 2005 and then left the workplace

to go home. Neither grievor availed himself of the opportunity to take a meal break. There is no evidence that they discussed taking a meal break with their employer or that the employer denied a meal break at the time. The first time that the grievors raised the issue of a meal break came when they submitted their attendance and overtime reports on March 1, 2005 (Exhibits A and B).

[11] The employer referred me to *Comeau v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-14716 (19850723), characterizing the decision as "exactly on point." According to the employer, *Comeau* analyzed essentially the same collective agreement provision applied to the same facts and found as follows:

. . .

> *[11] I have concluded that this question must be answered in the negative, with the result that the grievance must be dismissed.*
>
> *[12] Clause 23.23(a) provides for reasonable time with pay for an employee "in order that he may take a meal break". As I read this clause, it is drafted so as to ensure that the entitlement to time off with pay only arises if the employee takes a break from his work or intends to do so. The purpose of the clause is to allow an employee who has performed his normal day's work and is required to work a significant period of overtime immediately thereafter an opportunity to eat and relax. I express no opinion on whether it is necessary that a meal actually be contemplated or consumed. If an employee does not want to avail himself of the opportunity of leaving the job for a reasonable period in order to eat and rest, he is free to continue working until the job is completed. But, in such a case, I have difficulty in understanding upon what basis the employee could claim compensation for having foregone the opportunity.*
>
> *[13] This is not to deny that, from an economic point of view, Mr. Comeau's claim may have some merit. Had he chosen to do so, he could have taken his paid meal break from, say, 6:00 p.m. to 6:30 p.m. and then returned to work until 7:15 p.m. (Without deciding the point, I am assuming that under clause 23.23(a) a meal break can be taken before three hours of overtime have elapsed provided that three hours or more of overtime are scheduled.) The result would have been that he would have been entitled to overtime compensation for three and a half hours at the applicable rate. In fact, he worked without a break from 3:45 p.m. to 6:45 p.m. and, by so doing, he provided superior service to the employer. Why then should he be entitled to only three*

> *hours overtime compensation rather than three and a half hours compensation?*
>
> *[14] Whatever the attractiveness of such an argument might be from an economic point of view, it ignores the fundamental principle of labour law that it is up to the parties to collective bargaining to decide what the various benefits and conditions of work are to be and to draft a collective agreement accordingly. The agreement so drafted is binding on the parties and the employees. In the absence of agreement between the parties, it is not open to employees to assert that, having foregone certain rights under the collective agreement in the interests of the employer, they should be compensated accordingly. In the absence of express language to the contrary in the agreement, time off or leave is not convertible into cash, and employees who have abstained from the exercise of certain rights do not generally have the option of being compensated in cash for having done so. . . .*
>
> *[15] Put quite simply, clause 23.23(a) of the collective agreement does not provide, contrary to the view implicit in Mr. Landry's submissions, that an employee who works three hours of overtime immediately before or after his normal hours of work is entitled to be compensated as if he had worked for three and a half or four hours (depending on what would be considered a reasonable amount of time off). The clause provides that employees are entitled to a paid meal break. This meal break entitlement is not convertible into cash at the option of the employee. It can only be taken in kind.*
>
> . . .

The employer submitted that the same result should apply to the grievors.

[12] The employer maintained that the grievors' real argument is that clause 27.08(c) of the collective agreement requires that the employer "shall pay" for a meal break. The actual language of the provision states that an employee "shall be allowed" time for a meal break. Consistent with the ruling in *Comeau*, that means that an employee shall be provided reasonable time with pay if the employee wants to take a meal break. In the circumstances of this case, the grievors did not request a meal break and decided instead to go home. Once they went home, they were on their own time and could do whatever they wished.

[13] The employer submitted that a question of damages does not arise. The situation experienced by the grievors did not involve any deception by the employer

nor did the grievors suffer hardship or injury because of the employer's actions. The issue is simply whether they were entitled to reasonable time with pay to take a meal break.

C. Grievors' rebuttal

[14] The grievors argued that *Comeau* can be distinguished because the employer in that case offered the employee a meal break, but the employee willingly chose to forego the time and pay to take it. Once an employee makes that choice, he or she cannot later seek that time and pay.

[15] In this case, the employer never fulfilled its obligation to the grievors to provide them with reasonable time with pay for a meal break, as was its usual practice. Because of that failure, the employer cannot claim that the actions of the grievors disentitled them to their rights under the collective agreement.

IV. Reasons

[16] Did the collective agreement obligate the employer to provide the grievors with a paid meal break when they worked three hours of overtime on February 24, 2005 and then left the workplace for home?

[17] This is not a dispute about the facts but, rather, about the proper interpretation of the following provision of the collective agreement:

> **27.08(c)** Reasonable time with pay, to be determined by the Employer, shall be allowed the employee in order that the employee may take a meal break either at or adjacent to the employee's place of work.

[18] The grievor's entitlement to a meal break came into question once they satisfied the requirement to work ". . . three (3) or more hours of overtime immediately . . . following the employee's scheduled hours of work . . . ." The grievors claim that the paid meal break was mandatory once they passed that threshold. The fact that they did not actually take a meal break and decided instead to leave the workplace for home after completing the overtime did not alter the employer's obligation. The employer rejects that interpretation and contends that the actual wording of the collective agreement "allowed" the grievors a meal break as a matter of right on February 24, 2005 but only if they actually took the meal break. When the grievors decided to leave the workplace rather than take a break, the employer's obligation

ended. According to the employer, clause 27.08(c) of the collective agreement does not operate to establish an automatic entitlement to pay at the premium rate – or, presumably, at any rate – independent of taking a break.

[19] The employer cites the decision in *Comeau* as a powerful precedent in support of its position. The ruling in *Comeau* is based on a purposive analysis. The (then) Deputy Chairperson found that the parties intended that employees should have an opportunity to take a meal break when they find themselves in a protracted work and overtime situation. That meal break is paid by the employer but must be of reasonable duration, as determined by the employer. If employees choose not to take the meal break — the fundamental objective of the collective agreement provision — they release the employer from the obligation and cannot subsequently seek to convert the foregone entitlement into a cash payment.

[20] Many of the observations in *Comeau* are compelling. As it finds, I have little doubt that the origins of collective agreement provisions such as clause 27.08 lay in the conviction that employees should be able to pause for a paid meal break when their work hours extend significantly beyond the normal daily schedule. That the principal objective is the break itself as a safeguard for the employee's well-being, rather than the entitlement to be paid for "reasonable time," is reinforced by the precise language that the parties have used. They allow "[r]easonable time . . . <u>in order that the employee may take a meal break</u>. . . . [emphasis added]" Moreover, the break is to be taken ". . . <u>at or adjacent to the employee's place of work</u> [emphasis added]," strongly suggesting an expectation that employees organize the break so as to be able to return to duty quickly at its end. If it were the case that employees could claim the entitlement once they have departed the workplace for the day, the presence of the words ". . . at or adjacent to the employee's place of work" would seem difficult to explain. It is also questionable whether the principal objective of providing for the employees' well-being in a lengthy overtime situation really applies if, at the time that the work becomes protracted and the entitlement is triggered, employees can leave the workplace for the day without facing the prospect of returning to duty. From that perspective, the plain meaning of the word "break" does seem to imply a period interposed in a continuing work requirement. For example, see *The New Shorter Oxford English Dictionary*, where break is defined as follows: "A short spell of recreation or refreshment in a period of work."

[21] On the other side of the coin, the Agreed Statement of Facts clearly suggests that the "reasonable time" for a meal break that the employer in practice allows, and for which it pays under clause 27.08(c) of the collective agreement, need not be a "break" followed by a return to work. Paragraph 9 confirms the following:

> *The usual practice at Establishment 7F was to provide a meal and time to eat it during the overtime shift or at the end of the overtime shift.*
>
> [Emphasis added]

If the break period eligible for payment can come at the end of the overtime requirement, why is it critical that the employees actually take the break and/or eat a meal (whether provided by the employer or not) as a precondition for payment for the "reasonable time?" Moreover, is the employer's emphasis on that point entirely consistent with its decision in this case to pay the $10.00 overtime meal allowance to the grievors (paragraph 6 of the Agreed Statement of Facts) even though they did not take a meal break?

[22] A closer reading of *Comeau* suggests why its findings may not reasonably apply to the case before me, as the employer urges. In paragraph 13 of the decision (excerpted above), the Deputy Chairperson states his assumption ". . . that under [the clause] a meal break can be taken before three hours of overtime have elapsed provided that three hours or more of overtime are scheduled [emphasis added]." In my view, the resulting analysis and findings in *Comeau* must be understood with that assumption firmly in mind. The reasoning in *Comeau* proceeds from the belief that the grievor in that case chose to work through a meal break that could or should have occurred during his first three hours of overtime rather than after. When he exercised that choice, he could not then claim payment for additional time at the end of the three hours of overtime in lieu of the foregone meal break. The *Comeau* analysis adopts that view because it reads the precondition of three hours of overtime as being satisfied if the employee is scheduled to work three hours of overtime. With great respect to the former Deputy Chairperson, I do not believe that the collective agreement provision, then and now, is best read that way. Clause 27.08(a) begins with the following words: "An employee who works three (3) or more hours . . . ." It does not read as follows: "An employee who is scheduled to work three (3) or more hours . . . . [emphasis added]" I take the plain meaning of the words that do appear in clause 27.08 to indicate that the entitlement to a meal break requires that an employee

complete the qualifying three hours of overtime — "works" means, in effect, "has worked."

[23] Interpreting the provision in that manner, I must give substance to the entitlement stated in clause 27.08(c) of the collective agreement in any situation where an employee works at least three hours of overtime, even if the overtime period comes to an end at that time. In my view, requiring an employee who only works three hours of overtime to actually take a meal break as a precondition to payment of either the meal allowance or for "reasonable time" has the effect of qualifying the three hour overtime work requirement out of existence in that specific situation. I do not believe that that is what the parties intended, despite some of the other phrases that appear in clause 27.08(c).

[24] Given that the employer's practice accepts that a meal period can occur at the end of an overtime shift, it seems clear that the employer would have paid the grievors not only the meal allowance but also for the "reasonable time" had they in fact taken a meal break at 15:40 on February 24, 2005 and then left the workplace for home after the break. The employer emphasized that the grievors did not request a meal break but, in the context of an overtime work requirement already completed, why did they need to request a break? The purpose of submitting a request would have been to allow the employer to confirm that the grievors could stop work at that moment and proceed on their break and/or to permit the employer to determine what would have comprised "reasonable time" for the break. In the circumstances of this case, the former was not an issue. With respect to the determination of "reasonable time," the employer fully retained the right to decide on an appropriate period for pay purposes when it subsequently evaluated the grievors' overtime claim. It certainly would have been able to make that determination guided by what would have been its usual practice in allowing "reasonable time" had the grievors taken a break and then continued to work. All in all, I find it difficult as a practical matter to understand why the grievors' decision to go home at 15:50 p.m. figures so prominently in the employer's assessment of the situation. Nothing in what the grievors did caused any operational problem for the employer or changed the fact that they provided the three hours of overtime that the employer required and that constitutes the key qualifying period in clause 27.08(a) of the collective agreement. If the employer's argument were to succeed, it would escape a liability (that it would have otherwise accepted) only because the employees did not stay close by for a meal break after completing their

overtime, even though the employer had no operational reason to insist that they should have.

[25] On balance, I prefer the grievors' interpretation of clause 27.08(c) of the collective agreement. Although the decision in *Comeau* is helpful to understanding the objective of the provision, a key assumption that it makes is not consonant, in my view, with the practical requirement to give substance to the entitlements expressed in clause 27.08 where an employee works three hours of overtime — and only three hours of overtime — and then is finished for the day. Read in context with the three-hour qualifying period that is essential to the operation of the provision, I accept the grievors' contention that clause 27.08(c) states a mandatory requirement. The grievors expected to receive the $10.00 meal allowance after they worked three hours of overtime, and they did. They also expected to receive pay for a reasonable meal break period, to be determined by the employer. They did not. By refusing their claim, the employer violated the collective agreement.

[26] If I am wrong in the foregoing assessment, I believe that there is an alternate analysis that also results in the same finding.

[27] It seems probable that the parties did not contemplate the particular circumstances of this case when they negotiated clause 27.08 of the collective agreement — fitting all of the component elements of the clause to those circumstances is very difficult. The general architecture of the clause appears to presume a situation where an employee works at least three hours of overtime, takes a meal break ". . . either at or adjacent the employee's place of work . . ." and then continues to work overtime. However, the precise language used by the parties does not express a requirement that overtime work actually continue following the meal break. The plain wording of clause 27.08 instead obligates the employer to provide both the $10.00 meal allowance and reasonable time with pay for a meal break whenever an employee has worked his or her first three hours of overtime even if there is no further overtime worked. The expression "three (3) hours or more [emphasis added]" in clause 27.08(a) permits no other interpretation. Both "three (3) hours" of overtime and "more" trigger the entitlements.

[28] In the circumstances of this case, the employer's payment of the $10.00 meal allowance to the grievors must be taken as proof that it accepted that clause 27.08 did apply. Once the clause applied, the employer was also obligated to provide the grievors

with reasonable time with pay for a meal break. Its failure to act on that obligation is *prima facie* proof of a violation of the collective agreement.

[29] With the breach of the collective agreement established on a *prima facie* basis, the evidentiary burden shifted to the employer to explain why it did not fulfill its obligation. For example, did the employer offer reasonable time with pay for a meal break to the grievors but they refused? Was there a practice in the workplace that the employer assumed that the grievors would follow, but they did not? Were there specific instructions about what employees were expected to do when a meal break period occurs at the end of a shift that were not respected?

[30] The only evidence before me about what actually occurred on February 24, 2005 after the grievors completed three hours of overtime (and washed up) is that they left the worksite without asking for a meal break (paragraph 8 of the Agreed Statement of Facts). However, as discussed earlier, clause 27.08 of the collective agreement did not require the grievors to request a meal break. Their failure to ask did not discharge the employer from its obligation to provide reasonable time with pay for a meal break. As there is no other information in the Agreed Statement of Facts to explain why the employer could not meet that obligation, the employer has failed to meet its evidentiary burden in the face of *prima facie* proof of a breach of clause 27.08. Accordingly, the finding of a violation of the collective agreement is confirmed.

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

(The Order appears on the next page)

V. Order

[32] The grievances are allowed.

[33] I will remain seized of the matter for a period of 30 days from the date of this decision in the event that the parties are unable to agree on corrective action to redress the violation of the collective agreement.

June 12, 2009.

Dan Butler,
adjudicator