Date: 20111101

File: 166-32-37690

Citation: 2011 PSLRB 123

Public Service
Staff Relations Act

Before an adjudicator

BETWEEN

SANDY STAFFORD

Grievor

and

CANADIAN FOOD INSPECTION AGENCY

Employer

Indexed as
Stafford v. Canadian Food Inspection Agency

In the matter of a grievance referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Beth Bilson, adjudicator

For the Grievor: John T. Haunholter, Public Service Alliance of Canada

For the Employer: Caroline Engmann, counsel

Heard at Calgary, Alberta,
April 19 to 21, 2011.

I. Individual grievance referred to adjudication

[1] When this grievance was filed on February 13, 2004, Sandy Stafford ("the grievor") was employed by the Canadian Food Inspection Agency (CFIA or "the employer") as a meat hygiene inspector at the Cargill Beef Plant ("the plant") in High River, Alberta. The grievor alleged in his grievance that the employer violated the relevant collective agreement between the CFIA and the Public Service Alliance of Canada ("the bargaining agent") for the Engineering and Scientific Support Group, expired on December 31, 2002 ("the collective agreement") by failing to pay him overtime for the time spent preparing for his daily shift on the plant's kill floor. This collective agreement was still in force at the time of the grievance, as a new agreement was not concluded until March, 2005. The grievor resigned from his employment with the CFIA in July 2007.

[2] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35.

II. Summary of the evidence

[3] The grievor was the sole witness called by the bargaining agent. Before joining the CFIA, he was a pasture rider in the community pasture program of the Prairie Farm Rehabilitation Administration and was a self-employed cowboy and farrier. He first went to work for the employer as a meat inspector in 1992. At that time, he worked in Edmonton, Alberta. After working in several other locations, he moved to the plant.

[4] At the plant, Cargill employs approximately 800 people who slaughter and butcher cattle and prepare the resulting cuts of beef for shipment to customers in different parts of the world. The CFIA maintains a staff of meat inspectors and veterinarians whose jobs are to ensure that the processing of cattle taking place in the plant is carried out in accordance with the laws and regulations governing food safety and security. Although some of the inspectors are stationed at the packing and shipping areas of the plant, the majority spend their shifts on the kill floor, examining parts of animal carcasses to ensure that there are no concerns of cleanliness, contamination or disease. This examination may include making a visual inspection, palpating organs or cutting open the part of the animal being inspected.

[5] The grievor commented as to how inspectors are scheduled to carry out their work and used a sample shift schedule (Exhibit E-10). Although the number and names of the positions on the schedule have changed somewhat, the grievor stated that the basic principles of scheduling seemed the same as when he was at the plant. The schedule indicates each inspector's position at the beginning of his or her shift. Inspectors rotate through a number of positions over the course of a shift at intervals of 25 minutes. The positions include inspecting hearts and lungs, heads and tongues, and livers and kidneys. One position is referred to as the "inside/outside" position, in which inspectors ensure that the hide and viscera of a given carcass have been thoroughly removed. In most of the positions, inspectors stand next to a table in the centre of the kill floor; its surface moves, bringing specimens before the inspectors for their examination. Given the speed of the production line, an inspector has a very small number of seconds to assess each specimen or carcass and to judge whether any concerns need to be addressed.

[6] For most of his employment at the plant, the grievor worked the day shift. On that shift, some inspectors are scheduled to begin at 07:25, and others begin at 08:10. Cargill employees begin slaughtering animals at around 07:00, and carcasses and animal parts reach the first inspection stations at about 07:25, which is therefore when inspectors are expected to be at their positions and ready to begin their inspection tasks.

[7] Like other CFIA and Cargill employees, inspectors must pass through a security checkpoint to enter the plant. The inspectors then go to the office and lounge area assigned to the CFIA to get ready for their shifts. This area includes locker rooms for male and female inspectors, a laundry room, a couple of small offices, a large area with a table at which inspectors can gather for meetings or for breaks, several computer stations, an area with a refrigerator for maintaining samples, shelving for manuals and information, and several large notice boards. CFIA policies require inspectors to wear white pants and shirts for their work. Each inspector obtains a fresh set of "whites" from racks in the laundry room in the CFIA office area; they are arranged by size. Inspectors are also expected to wear hairnets, earplugs and gloves, which are available in the CFIA office area. Each inspector is also issued personal protective equipment including steel-toed rubber boots, a latex apron, a hard hat and a cut-resistant glove. Each inspector has a personal area with a locker and hook where those items are kept. Each inspector also has a set of knives, a meat hook, a belt, a scabbard and a steel for

sharpening knives, which are kept there as well. Eye protection is optional but is available to inspectors.

[8] The grievor testified that it is important for inspectors to set a high standard of cleanliness and professional appearance in the plant to emphasize the importance of sanitation and to display a concern for safety. In that context, it is important for inspectors to prepare carefully for each shift by ensuring that their clothing is clean, that their safety equipment is in good order, and that their knives are clean and sharp.

[9] The grievor also testified that, when he worked at the plant, inspectors had to carry out other aspects of shift preparation. He stated that they had to check the schedule to confirm their positions at the start of their shifts, they sometimes had to check for emails, and there were sometimes briefings from the supervisors or the veterinarians about specific issues.

[10] The grievor stated that the time taken by those preparations varied but that changing into the proper clothing and checking equipment might have taken several minutes; he estimated five or six minutes. If a knife had to be sharpened, there were two options: using one of the two sharpening stations staffed by Cargill employees or using the sharpening wheel in the CFIA office area. In either case, the time needed to sharpen the knife was influenced by the dullness of the knife and the experience of the person sharpening it, but it usually took between two and five minutes. Receiving a briefing from a supervisor, checking emails and confirming the schedule also took a variable amount of time. The trip from the CFIA office to the kill floor was sometimes lengthened by congestion in the hallway, as Cargill employees also used that route. At the entrance to the kill floor, inspectors were expected to dip their equipment in a sanitary solution, wash it off and wash their boots. The grievor testified that each inspector checked to make sure everything was in place at the first station, including soap, sanitizer and towels. At that point, the inspector was ready to start the shift.

[11] At the end of the day, the process was reversed. Inspectors cleaned their equipment, partly at their stations and partly at the equipment area and washed their boots at the entrance to the kill floor. Inspectors return to the CFIA office area, place their equipment on their hooks and remove their whites, placing them in a laundry bin. The grievor stated that he thought that some compensation for cleanup time was in the collective agreement.

[12] When the grievor worked at the plant, CFIA employees were required to keep time sheets on which they recorded the hours they worked, including overtime, and indicated when they took leave. On a series of time sheets in 2003 (Exhibit E-7), the grievor entered times for the periods of preparation before his shifts, under the code for overtime. He testified that, when the timesheets were returned to him for his records, all those overtime preparation periods had been crossed out. He was not sure by whom.

[13] The grievor stated that he had once been the president and chief shop steward of the local bargaining agent and that the preparation time issue had come up in discussions with management. He stated that, in those discussions he emphasized the importance of inspectors being properly prepared to do their jobs and alluded to employer documentation and training that confirmed that the employer also considered that preparation important. He acknowledged that filing the claim for overtime for the preparation period was an effort to gather evidence that such a claim would not be allowed. When his time sheets were returned with the preparation time crossed out, he consulted with a regional staff representative of the bargaining agent and filed this grievance.

[14] The employer called two witnesses, Dr. Connie Taylor, the managing veterinarian at the plant, and Richard Boucher, a meat hygiene inspector. Dr. Taylor has worked at the plant since 1989. Her current position of Managing Veterinarian is the senior management position for the CFIA at the plant, and she oversees the work of approximately 37 meat inspectors, including three supervisors and six veterinarians. Only two managing veterinarian positions have been created in Canada; one was created at the Cargill plant because of its size and the number of CFIA employees.

[15] Dr. Taylor described the work of inspectors as inspecting animal carcasses and monitoring the workers and processes in the plant to ensure compliance with the regulatory system governing food safety. In addition to the work area assigned to the CFIA near the plant entrance, the CFIA maintains a number of stations on the kill floor. At the time of the hearing, there were three stations on the head line, where inspectors examined heads and tongues suspended on hooks on a moving line. There was an evisceration table six to eight feet wide, with a moving surface. Two inspectors on one side examined hearts and lungs, and two inspectors on the other side examined kidneys, livers and other organs. The remainder of the animal carcasses passed

through hanging on a moving line, and as the carcasses passed the end of the table, the "inside/outside" inspector would check each one. Farther along the line, one inspector verified that the spinal cord had been completely removed. Dr. Taylor indicated that that position was fairly new, that it arose from Japanese food safety requirements and that it would not have been in place during the grievor's time at the plant.

[16] Dr. Taylor described several other positions listed on the shift schedule that are not on the line. The "monitor" position is for an inspector who is part of the "high-speed line inspection program," a CFIA program where the operation of the line is observed to ensure that its speed does not compromise safety. The "box export" position refers to an inspector who observes the shipping and distribution side of the plant.

[17] There is also a listing on the schedule for an "administration" position. The inspectors on the schedule rotate through that position, also referred to as "offline time," which is intended to give them a chance to carry out administrative responsibilities in the office, such as checking email, filling out forms or using the computer. The time can also be used for approved special projects. That particular kind of administrative rotation would not have been in place when the grievor worked at the plant, although some time was allotted for similar administrative tasks. The shift schedule also includes two 15-minute coffee breaks and a 30-minute lunch break for each inspector.

[18] Dr. Taylor stated that, when inspectors begin employment, part of their training is on how to prepare for starting their shifts on the kill floor. She stated that she has the authority to discipline employees but that she generally resolves issues by direction and discussion. She could remember issuing only one reprimand for lateness and could not recall the details of that incident. She testified that she normally begins work at 08:00 and that she does not regularly observe the preparations of the majority of inspectors before 07:25 but that, in her experience, the preparation period is not protracted. There is little formal process, such as briefings or meetings, although the odd time a supervisor might have some instructions or information for inspectors. Inspectors sometimes have coffee before they start their shifts, and as she described it, there is then "general chatter and then off to the kill floor." She stated that she had

worked in other plants and that she never encountered any starting time other than when inspectors reach their assigned stations on the kill floor.

[19] Dr. Taylor acknowledged that it is important for inspectors to maintain their equipment in good order and to keep it clean. Her impression was that inspectors sharpened their knives or got them sharpened at different times during their shift, often when on offline or on break. She did not think this sharpening process was necessarily linked to the period before the start of a shift.

[20] Mr. Boucher had been in a supervisory role at the plant for 12 years at the time of the hearing. He described the job of the meat inspectors as ensuring regulatory compliance and determining whether the beef produced in the plant is fit for human consumption. He confirmed the descriptions of the different inspector positions given by Dr. Taylor and also outlined how the positions are scheduled. The rotation of inspectors through the different positions at 25-minute intervals is designed to prevent employees from losing concentration or "zoning out." Inspectors' shifts end at staggered times to reflect the relationship between the function being performed by individual inspectors and the status of the line, and for some positions, notably the monitor, it involves a period paid at the overtime rate. The regular rotation of positions in the schedule ensures that overtime is evenly distributed among the inspectors. The extra time required of employees at the end of the day shift depends on the number of animals being put through the line on a given day. Any overtime not indicated on the schedule or communicated during a shift must be authorized by a supervisor.

[21] Mr. Boucher stated that the personal protective equipment that inspectors are required to wear is described in the "Scales of Entitlement" provided by the employer (Exhibit E-8). A copy is posted on the notice board in the CFIA office area and is also available online. As a supervisor, Mr. Boucher spends some of his own shift on the kill floor, alternating with the veterinarians, and he wears a similar kit to that of the inspectors, although he does not carry knives.

[22] Mr. Boucher described the time inspectors spend preparing for their shifts, and stated that he follows a routine similar to theirs for changing into whites and donning personal protective equipment. He stated that it might take him two to three minutes to change, which he thought would be similar to the time taken by inspectors. He stated that he speaks with inspectors before they go to the kill floor. Their

conversations were mostly of an informal nature and did not involve much work-related discussion. However, it is sometimes necessary to convey information. In cross-examination, he stated there are no "daily briefings," although a formal scripted meeting is held once a month at lunchtime.

[23] Mr. Boucher testified that he and the two other supervisors are responsible for producing the shift schedule, which is approved by Dr. Taylor. The schedule is released seven days in advance; a hard copy is posted on the notice board, and individual employees are sent a copy electronically, a practice that would not have been in place in the grievor's time. It is often necessary to make changes to the schedule, which are entered on the posted schedule, emailed to employees, and communicated verbally to affected employees. Although sending the schedule by email is new, the system would have been fundamentally the same when the grievance was filed.

[24] As a supervisor, Mr. Boucher begins his shift at 06:30, although he is usually at work by 06:00. He uses the extra time to make coffee and complete paperwork. There is no punch or swipe-card system, and employees arrive at different times to get ready for their shifts. One of his functions is to confirm that all positions are filled when the shift starts, so that the line will not be unnecessarily disrupted. If necessary, he reallocates employees from positions off the line, like the monitor. If an inspector finds it necessary to leave the line for some reason, such as a washroom break or to sharpen a knife, Mr. Boucher may cover for the monitor and move him or her. Most of the time, inspectors time washroom breaks or equipment maintenance to coincide with breaks or offline time. Mr. Boucher confirmed that cleanliness is very important to the inspectors and that they will often use time off the line to soak their aprons or rinse their knives and other equipment.

[25] Mr. Boucher commented that most of the Cargill employees are already on the kill floor by the time the inspectors begin their shifts in the morning, so there is relatively little congestion in the hallway. The end of the shift for most inspectors is likely to coincide with the end of the shift for the Cargill employees, so there are more people in the hallway at that time.

[26] Mr. Boucher stated that an employee's time is now recorded on electronic forms and that they contain the same information as the grievor's sheets (Exhibit E-7). He confirmed that his signature appeared on the time sheet submitted in evidence. He was not sure who had crossed out and initialled the portions of the time sheet indicating

the grievor's claim for preparation time, but those entries were crossed out when he signed it. Mr. Boucher did not recall ever authorizing any such overtime.

[27] Although Mr. Boucher stated that he did not have access to Cargill policies or training materials, his impression was that the expectations for its employees were much the same, emphasizing the cleanliness of the operation and the safety of employees. The personal protective equipment used by Cargill employees seems very similar to that issued to CFIA inspectors. Mr. Boucher stated that he was not familiar with the financial details of the arrangements between Cargill and the CFIA for inspectors' work.

[28] The parties toured the CFIA operations at the plant. The visit was timed to coincide with the period before the start of the 07:25 shift, so that I could observe the site as well as the activities of the inspectors. The visit included some time in the CFIA office area, as well as an opportunity to observe inspectors at work on the kill floor.

III. Summary of the arguments

A. For the grievor

[29] Counsel for the grievor stated that the grievance alleged that the employer violated the collective agreement by not compensating the grievor at an overtime rate for time spent preparing before beginning his shifts. Clause 27.01 of the collective agreement in place at the relevant time (which is identical to the provision in the current agreement), reads in part as follows:

> ***27.****01 Each fifteen (15) minute period of overtime shall be compensated for at the following rates:*
>
> *a) time and one-half (1½) except as provided in clause 27.01(b) or (c)*

[30] Overtime is defined in clause 2.01 (now clause 2.01(r)) of the collective agreement as "… in the case of a full-time employee, authorized work in excess of the employee's scheduled hours of work." The grievor's representative also referred me to article 60, which concerns wash-up time and reads in part as follows:

> ***60.*** *(1) Where the Employer determines that due to the nature of the work there is a clear cut need, wash-up time up to a maximum of ten (10) minutes will be permitted before the end of the working day, or immediately following and contiguous to the working day.*

> ***60.*** *(2) Wash-up time permitted pursuant to clause 60.01 and immediately following and contiguous to the working day shall be deemed to qualify for overtime compensation for the purpose of Clause 27.01.*

[31] He also noted that article 21 of the collective agreement requires the employer to make "reasonable provisions" for the health and safety of employees and that clause 23.07 suggests that, when training is required for concerning new technology or other developments, efforts should be made to provide it during working hours without cost to the employee.

[32] The grievor's representative argued that the evidence clearly showed that the grievor regularly took 15 minutes or more to prepare himself to begin his shift and that this evidence was uncontested. He also suggested that this evidence was confirmed by the activities of the inspectors when the parties and I visited the plant. It is true that overtime is defined as "authorized work" in excess of normal working time, but he argued that that criterion was met by the fact that the employer expected and in fact insisted that employees be properly prepared to start their tasks when they started their shifts. The employer's expectations could be characterized as stronger than mere permission and exceeded what was required to satisfy the definition of compensable overtime in the collective agreement.

[33] The grievor's representative anticipated that the employer would rely on *Grégoire et al. v. Canadian Food Inspection Agency*, 2009 PSLRB 146, which appears to deal with a similar issue concerning the preparation time of food inspectors. He stated that the bargaining agent disagreed with the analysis of the adjudicator in that case. In particular, he argued that the adjudicator missed the point that the continuing expectation of the employer that employees prepare themselves to meet specified standards before they start their shifts constitutes the authorization of overtime work.

[34] The grievor's representative referred me to several cases dealing with the question of whether an employee is at work or performing work, suggesting that the findings in those cases support his argument that an employee is entitled to be compensated when doing work required or expected by the employer, see *Slaney and Williams v. Treasury Board (Fisheries and Oceans)*, PSSRB File Nos. 166-02-17761 and 17762 (19890216); *Suchma v. Treasury Board (Tax Court of Canada)*, PSSRB File No. 166-02-19518 (19900710); and *Chicorelli v. Treasury Board (National Defence),* PSSRB File No. 166-02-23844 (19940114).

[35] In that context, counsel for the grievor referred me to a number of cases dealing with the equitable concepts of unjust enrichment and restitution and suggested that they have application to this grievance. One much-quoted formulation of the equitable principle underlying those concepts is from *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32, at paragraph 61, which reads in part as follows:

…

> *It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.*

…

[36] Examples of the application of those concepts in Canada can be found in *James More & Sons Ltd. v. University of Ottawa* (1975), 5 O.R. (2d) 162; *Deglman v. Guaranty Trust Co. of Canada and Constantineau*, [1954] S.C.R. 725; *Carleton (County of) v. Ottawa (City)*, [1965] S.C.R. 663; *Air Canada v. British Columbia,* [1989] 1 S.C.R. 1161; and *Canada (Attorney General) v. Confederation Life Insurance Co.* (1995), 24 O.R. (3d) 717. In the last case, the Court stated as follows:

…

> *The principles which give rise to the imposition of a constructive trust, based upon unjust enrichment, require the finding of a benefit to or enrichment of one party, a corresponding detriment to or deprivation suffered by the other party, and an absence of any juristic reason for the benefit or enrichment….*

…

[37] The grievor's representative further argued that an adjudicator has jurisdiction to apply those equitable concepts in the context of a grievance adjudication and cited *Vancouver School District No. 39 v. International Union of Operating Engineers, Local 963* (2000), 92 L.A.C. (4th) 182; *Lapierre v. Treasury Board (Veterans Affairs Canada)*, PSSRB File No. 166-02-22301 (19930415); and *Ménard v. Canada*, [1992] 3 F.C. 521 (C.A.).

[38] In this case, he argued, the employer required employees to carry out work and declined to pay them appropriate compensation, in violation of the collective agreement. The equitable concepts of unjust enrichment and restitution apply in this case, meaning that an equitable response to that violation is required.

B. For the employer

[39] Counsel for the employer reminded me that this is an individual grievance rather than a policy grievance, and therefore close attention must be paid to the question of whether the facts established in evidence support the proposition that the employer violated the collective agreement by declining to pay the grievor at the overtime rate for preparation time. She further stressed that the grievance refers only to the failure to make an overtime payment and that no other violations of the collective agreement have been seriously suggested.

[40] Counsel for the employer argued that there was no evidence that the grievor performed work as understood within the context of the relationship between the parties or the collective agreement. Furthermore, the collective agreement makes it clear that the employer has to authorize any work for which payment at the overtime rate will be made. The collective agreement does not contemplate any concept of implied authorization, and no actual authorization was ever given.

[41] Although the grievor's representative described as "uncontested" the time sheet evidence that the grievor had performed the work he claimed payment for, counsel for the employer argued that it was in fact contested, since Mr. Boucher testified that he could not confirm the preparation time claimed by the grievor. She noted further that the grievor stated that he had filled out the time sheets after the fact and that his testimony concerning the actual amount of time spent performing different tasks was not precise.

[42] Counsel for the employer argued that the decision of the adjudicator in *Grégoire* should guide this decision, as it addressed the same issue raised by the grievor in this case. Although she conceded that an adjudicator is not bound by previous decisions, she argued that a previous decision arising from the same collective agreement and addressing the same issue should carry great weight. She cited *Timson et al. v. Treasury Board (Correctional Service of Canada)*, 2011 PSLRB 8; and *Breau et al. v. Treasury Board (Justice Canada)*, 2003 PSSRB 65. She referred to the

letter (Exhibit E-13) in which the bargaining agent sought a delay in the hearing of this grievance to await the outcome of *Grégoire. S*he stated that it suggested that the bargaining agent expected that the issue would be resolved in that case. The fact that the decision was not to the bargaining agent's liking is not grounds for departing from its conclusions.

[43] The employer's position with respect to this grievance is essentially the same as that put forward in *Grégoire* – that the tasks carried out in preparation to begin shifts did not constitute work, and that, otherwise, the employer had not authorized them to be performed as overtime. Although "work" is not defined in the collective agreement, it is a well-understood term, and dictionary definitions of work do not indicate that it includes kitting-up to begin work. Being properly attired and equipped is in everyone's interests, including of each employee, and the policies that the employer set out for personal protective equipment and sanitary procedures are meant to fulfill its obligation to ensure a safe workplace. Employees also have an obligation to protect themselves by inspecting their equipment and keeping it in good order, but that does not mean those tasks constitute "work." The position description (Exhibit E-9) gives no hint that preparation is considered a duty expected of inspectors.

[44] With respect to the argument made on behalf of the grievor that the authorization can be implied from its policies, which indicate the expectation that employees will be properly kitted out before their shifts begin, counsel for the employer distinguished the cases relied on by the grievor's representative. In *Suchma* and *Chicorelli*, the tasks for which the employees claimed payment clearly constituted part of their jobs, unlike the preparation process at issue in this case. *Slaney and Williams* dealt with the somewhat different issue of whether employees confined to their normal workplace by natural forces beyond their working time should be paid for being "at work." That situation was quite different from the circumstances raised by the grievor in this case.

[45] Counsel for the employer referred me instead to *Burns Meats v. United Food and Commercial Workers (International Union), Local 111, (1989), 14 C.L.A.S. 13*, which was more pertinent to the circumstances in this grievance. In that case, which also involved a claim by employees for time spent cleaning up and changing, the adjudicator wrote as follows at page 11:

…

> *The function of a board of arbitration such as this is to interpret and apply the provisions of the Collective Agreement. There is no provision in this Agreement which allows for a set amount of paid time for the purpose of clean-up and charge which is not required by either the Company or an inspector. Such a provision, if it is desired, will have to be negotiated between the parties….*
>
> …

Counsel for the employer referred me to *Turcotte & Turmel (Co-opérative Fédérée de Québec) v. Syndicat des Travailleurs (eueses) de l'Abattoir de Princeville* (1988), 10 C.L.A.S. 97, which also rejected a claim for payment for time spent preparing for work, in that case to return from a break.

[46] With respect to the grievor's argument about unjust enrichment and restitution, counsel for the employer argued that, in the *Ménard*, *Lapierre* and *Vancouver School Board* cases, a key element was that promises or representations were made, and relied on, which did not occur in this case. The analysis found in *Confederation Life Insurance Co.* is relevant, counsel for the employer indicated, as there is no evidence of loss to the grievor, one of the essential elements in the doctrine of unjust enrichment. In addition, the employer could put forward as a "juristic reason" (*see Confederation Life Insurance Co.*) for requiring the procedures used by employees to prepare for their shifts that third parties, including legislators and the bargaining agent, imposed that obligation on them so that they would be protected. Counsel for the employer urged me to exercise caution when applying equitable doctrines to the facts in this case. The principles associated with those doctrines, as set out in cases like *Confederation Life* suggest that they would not apply.

[47] The employer and the grievor differed on how clause 27.01 of the collective agreement should be interpreted. Counsel for the employer argued that the provision established a 15-minute threshold to qualify for any overtime payments and pointed out that that was how the provision was interpreted in *Grégoire*. The grievor argued that clause 27.01 should not be interpreted as requiring an employee to work for 15 minutes before they become entitled to any overtime payment but as indicating that an employee will be paid for at least 15 minutes even if they work for less time. He argued that the provision allows for bundling shorter periods into 15 minutes segments for the purposes of compensation.

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

[48] In his rebuttal to counsel for the employer's argument, the grievor's representative argued that the tasks carried out by the grievor in preparation for his shift were expected by the employer and were essential to the duties of his job. He argued that the evidence supported the factual conclusion that the grievor deserved to be compensated for the tasks he performed before beginning his shift. Although the doctrine of unjust enrichment is a helpful way of framing and reinforcing the case advanced by the grievor, its technical aspects are not necessary to establish his claim.

IV. <u>Reasons</u>

[49] As many of the cases cited by the parties indicate, there is often a difference of opinion between employees and their employers over what constitutes work and when an employee may be considered at work. The boundary between the personal time of an employee and the time that an employee is at work and should therefore be compensated by the employer may not be easy to define, and the question of what preparations for work are reasonable to expect of an employee on his or her own time may be controversial. To take an extreme example, the educational qualifications acquired by an employee may be relevant to the performance of his or her duties, but it is not usually expected that an employer will compensate an employee for the time spent in school. Tasks specifically tied to preparing for work, such as driving to and from work, donning safety gear or a uniform, ascertaining scheduled times or task assignments, or performing maintenance on equipment, may be more difficult to assign to one side of the boundary or the other. In a number of cases referred to in the parties' arguments, the decision makers acknowledged the need to ensure that the boundary between personal time and work time is respected and that an employer is not permitted to trespass on personal time by requiring employees to perform their duties other than at appropriately scheduled times. For example, in *Suchma*, the adjudicator held that an employer cannot arbitrarily define an employee as being off work while at the same time expecting her to carry out a particular work assignment.

[50] However, in cases like *Burns Foods Limited*, *Turcotte & Turmel,* and *Grégoire,* adjudicators have considered certain preparatory tasks as belonging within employees' personal time and not as duties for which they should be compensated. As the adjudicator in *Burns Foods Limited* suggested, it is always open to the parties to reach an agreement that employees should be compensated for some or all such tasks; the

CFIA and the bargaining agent did so with respect to the wash-up time at the end of shifts. In article 60 of the collective agreement, the parties agreed that employees should be allowed up to 10 minutes at the overtime rate for washing up.

[51] In *Grégoire,* the adjudicator firmly assigned ordinary preparatory tasks to the "non-work" category, accepting the employer's argument summarized as follows at paragraph 59:

> *The time that an employee spends getting ready to report on time does not constitute work. Specifically, the time that employees take to get out of their cars in the parking lot, go to the plant, put on their uniforms and protective equipment, gather up their tools, wash their hands, head to their posts and adjust their platforms on the production line does not constitute work. Employees are required to be present at their posts on the plant's production line (or their off-line posts) when their shifts start.*

[52] The adjudicator in that case also found that clause 27.01 of the collective agreement did not apply because the evidence presented at the hearing before him persuaded him that the tasks, which he did not, in any case, view as work, occupied less than 15 minutes. In reaching his conclusion, he adopted the interpretation put before me by counsel for the employer that 15 minutes is the threshold for any overtime payment. He cited a similar interpretation of a comparable provision in *Lirette and Nadon v. Treasury Board (Transport Canada)*, PSSRB File Nos. 166-02-15325 and 15328 (19870406). The adjudicator further found that the employer did not authorize any overtime as required by clause 27.01, in contrast to the cases cited by the bargaining agent.

[53] The grievor's representative urged me to disregard *Grégoire*, arguing that the adjudicator in that case misinterpreted clause 27.01 of the collective agreement and was mistaken in finding that the preparatory tasks did not constitute work for which the grievors should be compensated. He reminded me that an adjudicator is not bound by prior decisions.

[54] It is true that no doctrine of *stare decisis* (a requirement to respect precedents) exists formally requiring an adjudicator to adhere to prior decisions. On the other hand, as counsel for the employer pointed out, adjudicators are often reluctant to disregard prior decisions, particularly those involving the same parties or the same collective agreement, without strong reason. The adjudicator in *Breau et al.* remarked on that tension at paragraph 13 as follows:

> *… It is generally accepted that to deny the persuasive force of previous decisions made in similar fact circumstances and calling for the interpretation of the same or closely related collective agreement terms between the same parties would wholly undermine those values universally accepted as essential to any rational system of third-party dispute resolution: certainty, uniformity, stability and predictability. On the other hand, neither justice nor equity are to be sacrificed to these values as in our collective bargaining regime, absent a jurisdictional challenge, an arbitrator or adjudicator is statutorily bound to adjudicate a dispute upon its merits. Indeed, to do otherwise by blindly adopting the reasons for decision given in a previous dispute could arguably be viewed as an improper declining of jurisdiction.*

[55] A similar caution was expressed as follows by the adjudicator in *Timson et al.* at paragraph 22:

> *While arbitral authorities are not unanimous about the application of issue estoppel and* res judicata *to the arbitral process, those principles are not rigidly entrenched in the adjudication regime under the* Public Service Labour Relations Act (PSLRA)*. Nonetheless, the finality of the adjudication process under subsection 233(1) of the* PSLRA*, in my view, suggests an inclination for maintaining the effect of earlier awards but not without considering the legitimate interests of each party.*

[56] In my view, there would have to be strong reasons to disregard *Grégoire*, since it involves the same provisions of the same collective agreement, the same parties, the same job classification and the same question concerning preparation time before beginning shifts. In that respect, I cannot find that *Grégoire* becomes illogical or that it reaches a level of injustice that would justify ignoring it. With respect to the conclusion that preparation tasks do not constitute work as contemplated by the parties, the adjudicator in that case drew on *Burns Foods Limited* and *Turcotte & Turmel* to support his view that it was reasonable to consider that those tasks are part of employees' personal time.

[57] The decision also depended on an interpretation of clause 27.01 of the collective agreement that characterized the 15 minutes period as a threshold for eligibility for payment at the overtime rate. Counsel for the grievor put forward an alternative interpretation that the 15 minutes includes any time less than that during which work is done. Although such an interpretation would not on its face be impossible, the interpretation by the adjudicator in *Grégoire,* an interpretation also reached by the adjudicator in *Lirette and Nadon,* is in my view more reasonable. If preparation time is properly considered work, and if any time spent working of less than 15 minutes should be compensated by 15 minutes of overtime, then it would

hardly have been necessary for the parties to include article 60 (now clause 59.01) in the agreement, which explicitly provides 10 minutes of wash-up time.

[58] Even were I inclined to ignore *Grégoire*, I would be compelled to find that the grievor has not met the onus of proof required to establish his claim. His representative described as uncontested the evidence presented in the time sheets (Exhibit E-7), which showed that the grievor had been punctilious in recording the time he spent taking the preparatory steps to start his shifts on the kill floor. Yet it is difficult to know what to make of that evidence, and it does not seem accurate to describe it as uncontested. The grievor uniformly entered periods of 15 minutes as overtime on the time sheets, and at one point, his representative stated in argument that it would take employees "at least" 15 minutes to carry out preparations. However, that is at odds with the grievor's own testimony, as he attached variable lengths of time to the tasks and indicated that not all of them were performed at the beginning of every shift. The other witnesses also gave ranges of times for changing clothes and other tasks. My own observation from the visit to the plant before the 07:25 shift was that the employees did a variety of things that did not seem to consume 15 minutes. The grievor's representative suggested to me that some inspectors were gone from the CFIA office area by 07:11, but no evidence was adduced about what they might have been doing from then until 07:25, and I cannot draw any conclusions from that fact. If it did sometimes take the grievor longer than 15 minutes to carry out his preparatory tasks, as his representative intimated, it is odd that no claims were made for more than one 15 minute unit of overtime.

[59] I agree that an employer should not be permitted to encroach on the personal time of employees by expecting them to carry out work without compensation. However, in the murky territory where personal time ends and work begins, the judgment in *Grégoire* that the kind of preparations at issue in this case does not constitute work seems reasonable, as does the interpretation that, in any case, an employee must work for at least 15 minutes to be eligible for overtime.

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

(The Order appears on the next page)

V. Order

[61] The grievance is dismissed.

November 1, 2011.

Beth Bilson,
adjudicator