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File: 566-02-6536

XR: 566-02-6527 to 6535

Citation: 2013 PSLRB 44



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

JEANNIE SURIC

Grievor

and

TREASURY BOARD

(Department of Human Resources and Skills Development)

Employer

Indexed as

Suric v. Treasury Board (Department of Human Resources and Skills Development)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Margaret T.A. Shannon, adjudicator

For the Grievor: Abudi Awaysheh, Public Service Alliance of Canada

For the Employer: Richard Fader, counsel

Heard at Vancouver, British Columbia,
February 19 to 21, 2013.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Jeannie Suric (“the grievor”) is one of a group of nine subrogation officers (classified AS-02) employed by the Department of Human Resources and Skills Development (HRSDC or “the employer”) who alleged that the job description for their positions does not accurately reflect the level of authority that they exercise. They further alleged that it does not reflect that they supervise other employees or that they are required to travel as part of their job. The grievor argued that the job description as written does not reflect the complexity, authority, responsibilities or tasks of a subrogation officer.

[2] It was agreed by the parties that this decision would apply to all the subrogation officers who had filed a grievance.

II. Summary of the evidence

[3] The grievor is a subrogation officer in the Labour Program, Federal Workers’ Compensation branch of the HRSDC, located in the employer’s Northwest Pacific Region. She negotiates settlements of personal injury claims resulting from workplace-related injuries to federal government employees in the course of their employment caused by a third party. Under the *Government Employees Compensation Act*, R.S.C. 1985, c. G-5 (*GECA*), an employee can elect to receive workers’ compensation benefits or sue the third party in civil court for a personal injury. If the employee chooses to receive workers’ compensation benefits, the personal injury claim is subrogated to the Crown. The Crown then becomes the owner of the claim.

[4] A subrogation officer negotiates the settlement of a claim against a third party or its representative, including the payment of special and general damages. Subrogation officers are trained in conducting investigations and prosecuting civil claims. They require the successful completion of two law courses and training in statistics. A law degree is an asset.

[5] The work description found in Exhibit 3, Tab 4, for position 75290 is applicable to the grievor’s position. At the final level of the grievance process, minor changes were made to the work description. The employer agreed to add the following (Exhibit 3, Tab 7): “Attends judicial and non-judicial proceedings including settlement conferences, discoveries, and mediations, ADR, pre-trials, case management and trials as the representative of the Labour Program.”

[6] The employer did not agree to the addition of “sole authority to settle the claim,” as was requested (Exhibit 3, Tab 7). A classification review was promised as a result of the additions. On cross-examination, the grievor confirmed that the promised classification review was completed and that she had worked with an external consultant in 2006 on drafting the work description at Exhibit 3, Tab 6. The grievor did not feel that the changes satisfied the requirements of her grievance, as they did not address the duties, responsibilities and authority of a subrogation officer.

[7] A subrogation officer’s responsibility is defined in Exhibit 3, Tabs 9 and 10. The *Subrogational Operational Policy Directives*, OPD/DPO 610-1 (Exhibit 3, Tab 9), outlines the roles, responsibilities and procedures to be used by the injury compensation staff within the HRSDC’s Labour Program, including subrogation officers. OPD/DPO 610-5 (Exhibit 3, Tab 10) sets out the lines of communication between the HRSDC, Justice Canada and the claimant in the conduct of subrogation actions. According to the grievor, the operational policy directives are the source of all the authority the subrogation officers have over subrogated claims.

[8] The grievor submitted a *GECA* flow chart as Exhibit 3, Tab 12. In 12 of the process boxes, the grievor claims that a subrogation officer has the sole authority and discretion to make the required decision or perform the required action to move the process forward.

[9] A subrogation officer receives a claim from the claims administrators and conducts a cursory review of the claim to determine if it involves a third party, based on documents submitted by the employer of record. Claims administrators have limited training in third-party claims, so when they are unsure, they send them to subrogation officers for review. Subrogation officers have extensive training in third-party liability and negligence, according to the grievor.

[10] If the subrogation officer determines that the claim involves a third party, he or she directs the claims administrator to set up the claim in the National Injury Compensation System. An electronic and a paper file are then created. The employer’s report is sent to the claimant’s province of residence and is stamped to note that an election is required. No benefits are paid to the injured employee until the election is received.

[11] The claims administrator sends out an election package to the injured employee. If that employee has any questions about the election process, they are to contact the subrogation officer. In 40% of the claims, injured employees request an explanation of the process and of the consequences of an election. Conversations between an injured employee and a subrogation officer are not subject to supervision.

[12] If the claim has national implications, the subrogation officer refers the matter to the regional manager, who forwards it to national headquarters. If it is not of national importance, the subrogation officer alone determines whether the claim should be brought to the attention of national headquarters. When a file goes to national headquarters, it may be dealt with from there, or it may be returned to the regional subrogation officer, depending on the issue.

[13] If an injured employee is not expected to recover within the two-year limitation period, the subrogation officer requests that Justice Canada file a statement of claim to protect the limitation period for filing claims against the third party. According to the grievor, she instructs Justice Canada counsel and provides direction throughout the legal process. She obtains any evidence on the incident and researches the quantum of damages. She is the sole person instructing legal counsel, and her decisions are not subject to review.

[14] The HRSDC owes a fiduciary duty to injured employees. The only avenue open to an injured employee to pursue the HRSDC for negligence in the execution of this duty is to file a claim against the Crown. The fiduciary duty requires the grievor to determine liability, causation, negligence and multiple-party liability. She obtains medical reports to substantiate injuries and reviews the jurisprudence to determine the amount of damages due. If she believes that general damages are due, she drafts a settlement proposal and submits it to the third party or its representative.

[15] Settlement proposals are not reviewed. They typically range between \$15 000 and \$16 000. They are accepted 10% of the time. The other 90% require further negotiations. During the negotiation process, the grievor does not consult with anyone. She may continue settlement negotiations even after a statement of claim is filed. She decides whether Justice Canada will continue with the claim. Her decision of whether a claim should be litigated or the action suspended is hers alone and is not subject to review. If the claim continues and a settlement offer is received by Justice Canada counsel, it is sent to the subrogation officer for instructions on acceptance. If the

grievor rejects the proposal, she instructs Justice Canada counsel to make a counter proposal. She appears on behalf of the HRSDC throughout the litigation process at Justice Canada's request, as she has the sole authority to settle a claim.

[16] The regional director of Labour Programs for the Northwest Pacific Region will sign the full and final release of the third party in exchange for the payment of the negotiated settlement. The regional director does not review the content of the settlement, which is the sole authority of the subrogation officer. Once the release is signed, the grievor will calculate the amount of wage loss included in the special damages and reimburse the employer of record. If there is any excess, it is sent to the injured employee as general damages. The grievor is responsible for the accuracy of the disbursement calculations.

[17] Exhibit 3, Tab 15 contains what the grievor claims is an accurate version of her work description. It speaks to the level of authority and the complexity of the job she performs. It also reflects the supervisory duties that she performs. Unlike the other grievors, Ms. Suric is directly responsible for the supervision of the claims administrators (classified CR-04) in her office. As to what extent other subrogation officers in other regions may be required to supervise claims administrators, she had no knowledge. In her region, she is the only subrogation officer directly responsible for supervising employees. Other subrogation officers in the office may perform those duties if she is away.

[18] On cross-examination, the grievor admitted that she reports directly to a regional manager, who reports directly to the regional director. They work on the same floor and see each other daily if both are in the office. The grievor has no delegated authority under the *Financial Administration Act*, R.S.C. 1985, c F-11 (*FAA*). She can commission medical reports based on the guidelines for costs established by the relevant professional body but cannot authorize the payment of the account.

[19] When asked about the difference between "appears" and "attends," as related to judicial proceedings, the grievor insisted that she "appears" at judicial proceedings, as she is there with the authority to settle the case. To "attend" means that she is there and that she has no authority to settle.

[20] The grievor's draft job description at Exhibit 3, Tab 15 reflects the requirement that the grievor travel within the region. As to the amount of travel and the distance

she is required to travel, the grievor stated that, since 2009, she might have travelled outside her area twice. However, she travels within the lower mainland area of British Columbia on a regular basis.

[21] Deborah Silvester has been Manager, Federal Workers Compensation, Northwest Pacific Region, HRSDC, for approximately 14 years and is the grievor's direct supervisor. When presented with the *GECA* flow chart (Exhibit 3, Tab 12), she agreed that 8 of the 12 boxes identified by the grievor accurately reflect the grievor's sole discretion and authority. Any references to sole authority, sole responsibility or sole discretion contained in the job description (Exhibit 3, Tab 15) are subject to the proviso that, if there is a problem, it is referred to Ms. Silvester.

[22] When recruiting someone to be a subrogation officer, Ms. Silvester looks for excellent interpersonal skills, negotiation skills, knowledge of legislation and regulations, and the ability to do legal research. She does not see the work of a subrogation officer as similar to that of a paralegal as, in her opinion, paralegals are secretaries who do not negotiate settlements or make decisions. However, she admitted that she has never worked with a paralegal and that she had no basis for that comparison.

[23] Subrogation officers have no authority under section 34 of the *FAA*. The grievor, in communication with Justice Canada or the third party, determines if a medical report is required. The grievor may order one, but Ms. Silvester must authorize the payment of the bill before it is processed. As the manager, Ms. Silvester reviews all requests for payment and certifies that they are approved and that they are appropriate for payment.

[24] As to the question of the grievor's sole authority to settle claims, Ms. Silvester stated that, if the grievor is in settlement discussions with a third party and Justice Canada counsel, the grievor is not required to obtain her permission to accept the offer. It is the grievor's decision. However, cases are regularly discussed at meetings of the subrogation officers and Ms. Silvester. Subrogation officers have a large volume of cases. They meet at least weekly to discuss their cases with each other and to examine options and consequences. If Ms. Silvester disagrees with a subrogation officer's proposal, she has the last word on how to proceed, not the subrogation officer.

[25] The grievor is expected to produce workload statistics and informational reports, neither of which requires knowledge of statistics. The grievor may also be exposed to graphic pictures of injuries and accident scenes as a regular part of her job. Ms. Silvester confirmed that the grievor supervises the claims administrators in the Vancouver office, although the grievor is the only subrogation officer in that office with that responsibility.

[26] Marguerite McGregor, Regional Director, Northwest Pacific Region, Labour Program, HRSDC, testified on behalf of the employer. Her role is to lead, direct, and control regional business activities in four business lines, one of which is federal workers' compensation. She testified that every employee is subject to direct supervision, including the grievor. The extent of that supervision depends on the quality of the employee's work. Employees are responsible within a management framework. Subrogation officers meet on a regular basis with their managers, who are the primary points of contact with the management framework.

[27] No one without authority under section 34 of the *FAA* may authorize payment on behalf of the Crown. Ms. McGregor has responsibility under section 34 to approve payment for anything within her region. She has the delegated responsibility for the *GECA* and for any settlement made pursuant to it. Subrogation officers have no delegated authority under the delegation instrument or under the *FAA* to approve a third-party settlement. For any settlement to be final, she must sign the release and approve the settlement.

[28] Exhibit 9, the employer's Subrogational Operational Policy Directives, is Ms. McGregor's rebuttal to the grievor's proposed work description (Exhibit 3, Tab 15). She stated that the grievor's submission is focused on how an activity is done and not on what is to be accomplished. Everything that the grievor requested is already in the current generic work description (Exhibit 3, Tab 4). As to the matter of the analyses and legal research performed by the grievor, Ms. McGregor stated that the extent of the legal research is looking at the amount of damage awards in similar circumstances. No research need be done on special damages, as they are out-of-pocket expenses. Furthermore, subrogation officers are not responsible for statistical reporting. They retrieve and report information. Retrieving and organizing information is not statistical analysis.

[29] When asked what her primary objection was to the description written by the grievor, Ms. McGregor stated that it was the claims of sole discretion and sole authority. Subrogation officers do not have any such authority delegated to them. Just because an action by an employee is not reviewed when it is carried out does not mean that it is not subject to review. A trained and qualified subrogation officer requires less oversight than a less qualified officer. All officers are expected to discuss situations outside the norm with their managers. If Justice Canada counsel disagrees with a subrogation officer, counsel raises it through their chain of command, which then raises it with the *GECA* office at national headquarters. Counsel does not blindly follow the subrogation officer's direction. It is a completely incorrect statement that subrogation officers have the sole authority to settle claims. They have neither the delegated authority nor the financial authority to do so.

[30] Much time was spent in cross-examination on the issue of the sole authority of subrogation officers vis-à-vis the delegated authorities of those in the chain of command above them. The authority to settle claims rests with the regional director and is not delegated to the subrogation officers. Exhibit 8 is the organizational chart within which Ms. McGregor, Ms. Silvester and the grievor function. Exhibit 6 is an excerpt of the HRSDC "Delegation of Authorities" document related to the *GECA* that clearly identifies the level for approval of a third party claim as being the regional director or someone higher in the hierarchy. Nowhere on the delegation document does it identify subrogation officers as an appropriate level of authority. When asked if she had delegated her authority, Ms. McGregor responded that she is not entitled to do so. A subrogation officer enters into a promise of an agreement with a third party, subject to the regional director's approval.

[31] The *GECA* flow chart (Exhibit 3, Tab 12), is accurate as a process chart but does not include the management framework. Subrogation officers have access to their managers and receive technical assistance from headquarters. They attend case meetings and have discussions with their managers and peers, and they have Justice Canada expertise available to them. In every box of the *GECA* flow chart, the manager has responsibility. If a problem arises, the manager is available to assist and provide advice. If an employee is doing his or her job correctly, the employee is trusted to recognize things that are out of the norm and to bring them to his or her manager.

[32] According to Ms. McGregor, the employer's job description encompasses all the subrogation officer's duties. The work description submitted by the grievor describes tasks and not activities.

III. Summary of the arguments

A. For the grievor

[33] This grievance is about the employer's failure to provide a complete and current job description. The employer admitted by providing an updated job description in its response at the final level of the grievance process that the job description was not accurate. Exhibit 3, Tab 15, accurately reflects the grievor's duties. Exhibit 3, Tab 4, does not.

[34] To be accurate, a job description must not omit a reference to a particular duty or responsibility that the employee is required to perform. It need not contain a detailed list of all activities performed under a specific duty (see *Public Service Alliance of Canada v. Treasury Board (Department of Human Resources and Skills Development)*, 2012 PSLRB 86, at para 65).

[35] The grievor is required to be continually up to date with current jurisprudence and legislation, which both Ms. Silvester and Ms. McGregor agreed change quickly. That is missing from the current job description. Also missing is the requirement to instruct Justice Canada counsel during the litigation phase. Again, Ms. Silvester and Ms. McGregor agreed that subrogation officers direct Justice Canada counsel. In direct testimony, Ms. Silvester agreed with the *GECA* flow chart (Exhibit 3, Tab 12), stating that no one monitors the decision making of a subrogation officer. There is a great degree of responsibility in upholding the Crown's fiduciary responsibility to injured workers and in directing legal counsel.

[36] There is no dispute that the grievor supervises the claims administrators in her office. When she is absent, another subrogation officer is required to supervise them.

[37] The additions made by the grievor to her job description (Exhibit 3, Tabs 14 and 15) are appropriate and accurate. They demonstrate her scope of authorities. Exhibit 6, the delegation of authorities document, is wrong. The employer failed to prove that Ms. McGregor has the authority to settle subrogated claims. Ms. McGregor has no role or oversight on decisions made by subrogation officers. If she has some, it is limited to

assuring that the numbers are accurate. She has control over negligence in the performance of the subrogation officer duties, only if the officer successfully achieves an agreement. In the alternative, if the grievor does not have sole authority, she has independent authority, because she is not subject to any oversight.

[38] Ms. McGregor's role is clerical in nature and is not based on her sole authority. She performs a rubber-stamp function at the end of the process. Ms. McGregor's testimony speaks for itself. She demonstrated that she is neither a reliable nor a credible witness, and her evidence should be questioned. She was not aware of how subrogation matters work. She only has authority over non-subrogated claims. The grievor's representative completely disagreed that Ms. McGregor has any authority over the settlement of subrogated claims.

[39] Ms. McGregor did not provide any examples of when a subrogation officer's independence is modified or changed. Her understanding that she is required to sign the release is wrong in law. The Crown is bound by an agreement negotiated by a subrogation officer. A breach of a promise to settle does not alter the deal that was struck. The employer relies on the grievor without observing the nature of the claim. There is no demonstrated right of appeal of a subrogation officer's decision. There is no process to appeal negative decisions.

[40] Everyone corroborated the requirement to travel.

[41] The grievance should be allowed, and the job description at Exhibit 3, Tab 15, should be substituted in for the current job description.

B. For the employer

[42] The grievor must prove that, on the balance of probabilities, the current job description is incomplete. In this case, the generic job description in use is consistent with the relevant collective agreement, and as long as the activities are described even in general, it is sufficient. There is no specific format to be used, and nothing to specify how the functions are to be described (see *Cairns et al. v. Treasury Board (Department of Citizenship and Immigration)*, 2006 PSLRB 130). The focus must be on the duties and not on the attributes of the person performing them. There is no requirement to describe the impact, working conditions and required education in a job description.

[43] A distinction must be drawn between an employee's duty and his or her responsibility. It is not unusual for job descriptions (particularly those that are intended to be applicable to a number of positions across the country) to be written in fairly broad language. A job description may be incomplete in that it may omit a reference to a particular duty or responsibility. That does not mean that the statement must ". . . spell out in infinite detail every possible variation, combination or permutation of how a function is performed" (see *Fedun et al. v. Treasury Board (Revenue Canada - Taxation)*, Board File Nos. 166-02-28278 to 28288 (19980611) at paragraph 31). "A job description need not contain a detailed listing of all activities performed under a specific duty. Nor should it necessarily list at length the manner in which those activities are accomplished" (see also *Jaremy et al. v. Treasury Board (Revenue Canada - Customs, Excise & Taxation)*, 2000 PSSRB 59, at para 24).

[44] Everything the grievor is required to do is in the current job description. If something is not included, it is not her responsibility. The grievor is not solely responsible for the tasks she performs. She has a supervisor who is also responsible and who deals with them through daily or weekly meetings. Ultimately, everything is the supervisor's call. When the supervisor certifies and approves the release of funds under her authority under section 34 of the *FAA*, she indicates her agreement and that the request is correct. If she disagrees, she can overrule the grievor. The regional director is responsible for all employees and their work within her management framework. Subrogation officers do not have any authority under section 34 of the *FAA*.

[45] The grievor has not met her burden, and the grievance should be dismissed in its entirety.

IV. Reasons

[46] To successfully prove that there has been a violation of her collective agreement, the grievor must prove on the balance of probabilities that her job description lacks the elements she has identified, that in fact they are an integral part of her job function (see *Jennings and Myers v. Treasury Board (Department of Fisheries and Oceans)*, 2011 PSLRB 20, at para 52).

[47] In the case before me, the grievor alleged that the employer violated her collective agreement by not including the sole discretion and authority she exercises in

her role as a subrogation officer. She also included references to her supervisory role and to the need to travel in the generic job description, which applies to her and to the group of grievors that she represents.

[48] Many of the changes to the job description that the grievor seeks are editorial in nature, or “wordsmithing,” so to speak. My role is not to correct the wording or the expressions that are used as long as they broadly describe the responsibilities and the duties being performed (see *Jarvis et al. v. Treasury Board (Industry Canada)*, 2001 PSSRB 84, at para 95). For example, it is not my role to decide whether the modifier “complex” should be added to describe research, as suggested by the grievor. It is sufficient that the generic job description refers to the requirement to conduct research.

[49] The witness for the employer described the grievor’s proposed job description as a list of tasks. I agree with that assessment. The proposed job description (Exhibit 3, Tab 15) reduces the flow chart of the subrogation process (Exhibit 3, Tab 12) to words. It is in fact a lengthy and wordy written description of the process and the grievor’s role in it. It is not a job description with the purpose of identifying the key purpose and functions of a position and how that position contributes to the overall accomplishment of the employer’s goals.

[50] Much of the testimony and argument revolved around the “sole authority” of the grievor to settle subrogation claims and the independence with which she works. The grievor’s representative would have me believe that the grievor works without any supervision, even though she reports to the manager, Federal Workers’ Compensation. The grievor and her colleagues attend weekly, if not daily, case conferences with their manager, at which they discuss their files. The fact that she is a more experienced subrogation officer than some of her colleagues does not mean that the grievor works without supervision or that her decisions are not reviewable by those above her in the chain of command. Furthermore, her argument that her direction to legal counsel is final and without review is inaccurate, as Justice Canada counsel who disagree with her directions raise the issue through the chain of command at Justice Canada, which then contacts the national headquarters office responsible for subrogation claims.

[51] The grievor’s argument that she has “sole authority” to settle claims in the absence of any delegated authority under section 34 of the *FAA* is without legal basis, despite her representative’s argument that the regional director merely rubber-stamps

the settlement. The regional director has the delegated authority for the *GECA* in her region, and she ultimately has the authority to finalize a settlement. Any payments related to subrogation claims are authorized by either Ms. Silvester or Ms. McGregor, both of whom have signing authority under sections 32 and 34 of the *FAA*. The grievor has no such authority.

[52] The generic job description (Exhibit 3, Tab 4) includes references to supervising staff and to travel which are sufficient to describe the supervisory activities and travel of the position. It is sufficient to say as does the job description that a subrogation officer “. . . may be required to supervise staff to meet regional operational needs.” It is also sufficient to say “. . . travel may be required several times per year to attend meetings, training, testimonies and tribunals or to conduct investigations,” to describe the limited amount of travel described by the grievor.

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

(The Order appears on the next page)

V. Order

[54] The grievance is dismissed.

April 22, 2013.

**Margaret T.A. Shannon,
adjudicator**