Date: 20130626

File: 566-02-5067

Citation: 2013 PSLRB 73

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

DUNCAN KENNETH CHAPMAN

Grievor

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
Chapman v. Treasury Board (Department of National Defence)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Margaret T.A. Shannon, adjudicator

For the Grievor: Robin J. Gage, counsel

For the Employer: Lea Bou Karam, counsel

Heard at Victoria, British Columbia,
May 1 and 2, 2013.

I. Individual grievance referred to adjudication

[1] Duncan Kenneth Chapman ("the grievor") seeks compensation for travel time for trips home to Victoria, British Columbia, during a prolonged period of training at CFB Halifax in Nova Scotia. The grievor was entitled, pursuant to the National Joint Council *Travel Directive* ("the travel directive"), to a weekend trip home as the training that the Department of National Defence ("the employer") obliged him to take exceeded five weeks. He claimed, and was refused, payment at the overtime rate for the hours spent travelling from Halifax to Victoria and return. The grievor alleged that that refusal violated clause 18.03(a) of the collective agreement between the Treasury Board and the Federal Government Dockyards Trades and Labour Council (West) ("the bargaining agent") for the Ship Repair (West) Group (all employees located on the west coast of Canada), which expired on January 30, 2010 ("the collective agreement"). This collective agreement continued to be in effect until the parties executed a new collective agreement on February 25, 2011.

II. Summary of the evidence

[2] The grievor is employed as an electronics technician at CFB Esquimault. His primary area of work is maintaining and repairing electronic warfare systems. In early 2010, the employer asked him to attend a five-week course at the Fleet School, CFB Halifax, on maintaining 57 mm guns. The course was scheduled from March 31, 2010 to May 6, 2010, inclusive.

[3] He left Victoria for Halifax at 06:00 Pacific time on March 30, 2010 and arrived in Halifax at approximately 19:00 Atlantic time. He was paid pursuant to clause 18.03 of the collective agreement for the time spent travelling from Victoria to Halifax. His return following the completion of the course on May 7, 2010 was also compensated pursuant to that clause.

[4] On Friday, April 16, 2010, the grievor returned to Victoria from Halifax for a weekend visit home. He left at 16:30 Atlantic time and arrived in Victoria at 23:00 Pacific time. His return flight to Halifax left Victoria on Sunday, April 18, 2010 at 06:00 Pacific time on April 18, 2010 and arrived in Halifax at 14:00 Atlantic time. Unlike the two trips on either end of the training course, the grievor was not paid any wages for the travel time on that weekend.

[5] April 16, 2010 was a regular workday for the grievor. The day ended at 16:30. Any work performed after that would have been compensated at the overtime rate, pursuant to article 18 of the collective agreement. Sunday was one of his normal days of rest. Any work done on a day of rest would also be compensated at the overtime rate.

[6] The employer required the grievor to take the course and made all travel arrangements. The grievor was offered and accepted the opportunity to return home once during his course at CFB Halifax. He advised the employer when he wished to return home during the course, and the employer booked the travel arrangements and paid for the trip. On March 29, 2010, less than 24 hours before he was to leave for the course, the grievor's manager, Brian McGaw, advised him that he would not be paid overtime for the trip home.

[7] The grievor went on the course with the resolve that he would file a grievance concerning the denial of that overtime on his return. In 2006, the grievor attended a five-week course in Calgary, during which he took advantage of a weekend trip home. On his return, he requested, and believed that he had received, payment at the overtime rate for the travel time on that weekend, which was the basis for his belief that he was entitled to the same compensation for the Halifax course. In preparation for this hearing, the grievor discovered that the hours he had entered for travel time in 2006 had not been approved for payment. His manager had denied them on the same day they were entered into the payroll system.

[8] Stanley Dzbik, Local Vice-President for the bargaining agent, testified that the grievor spoke to him about the employer's refusal to compensate him for his weekend travel time in 2010. In his role as shop steward for the Instrument Shop, Mr. Dzbik approached Mr. McGaw in an attempt to determine why the employer refused to compensate the grievor pursuant to article 18 of the collective agreement for the weekend trip home. He was advised that the payment was refused as the employer did not require the trip home.

[9] According to Mr. Dzbik, that refusal was a change in the interpretation of employee entitlements under the travel directive and article 18 of the collective agreement. In the past, employees had been compensated for travel time on weekend trips home. Local management had changed its interpretation, which was

inappropriate as local management was not supposed to interpret a collective agreement between the bargaining agent and the Treasury Board.

[10] The employer did not provide notice that its interpretation had changed. In preparation for his testimony, Mr. Dzbik reviewed the history of clause 18.03 of the collective agreement over the last several collective agreements. The wording has not changed, although the numbering and amount payable has changed. He did not review older versions of the travel directive. During his time as shop steward, no one other than the grievor had complained to him that they had been denied compensation under clause 18.03 for travel time related to weekend visits home, which indicated to him that all other affected employees had been paid at the overtime rate for the hours spent travelling on weekend visits home.

[11] Gary Lokkan was employed with Fleet Maintenance Group Cape Breton at CFB Esquimault from 1976 to 2012. During his employment, he travelled numerous times for the employer. When he was entitled to weekend travel home, he took advantage of it. In 1982, he spent five or six weeks in Halifax for training. He was compensated in accordance with the collective agreement for travel on his weekend home. That travel was not treated any differently than was the travel required to and from the course. In 1999 or 2000, he attended a five-month course in Halifax and returned home every three weeks. He made five trips home and received wages for the travel time on all five trips. He testified that others also received overtime for weekend travel home but could not provide any specifics or names.

[12] Mr. McGaw is Work Centre Manager, Weapons and Fire Control Shops, CFB Esquimault. In 2010, he was the grievor's manager. He recommended that the grievor attend the course in Halifax. He recalled having a discussion with Mr. Dzbik in 2010 about paying overtime for the grievor's weekend travel home. He advised that some people might have been compensated for weekend travel home but that it depended on the circumstances. He has never approved such a payment in his time as manager.

III. Summary of the arguments

A. For the grievor

[13] Clause 18.03 of the collective agreement details how employees are compensated when travelling for government purposes. The grievor attended the course in CFB Halifax at the employer's request, which meant it qualified as

government travel. He was entitled to a weekend trip home under section 3.3.12 of the travel directive, which triggered clause 18.03. Except for the fact that the employer required the grievor to attend a course in Halifax, he would not have travelled on his mandated days of rest.

[14] No distinction can be made about time spent travelling based on weekend travel. All travel done while on travel status meets the definition of government travel. The employer was required by the travel directive to provide the grievor with a weekend trip home because his course was of at least five weeks' duration. The employer mandated the timing of the travel, booked it and paid for it.

[15] One narrow issue must be decided, which is determining the travel to which clause 18.03 of the collective agreement applies. The clause defines how employees are to be compensated when required by the employer to travel from their normal places of work. On its plain wording, it applies to any hours travelled, provided the employer requires the employee to travel to a place away from his or her normal place of work. Once that condition is met, all travel is to be compensated according to the provisions of clause 18.03.

[16] The requirement refers only to the employer requiring the employees to be away from their normal places of work. That interpretation is supported by the travel directive, which is deemed part of the collective agreement. The two documents must be read together. There is no dispute that weekend travel home meets the definition of government travel contained in the travel directive. No distinction exists between normal travel and weekend travel. The grievor was on travel status within the definition of that term contained in the Definitions section of the travel directive.

[17] The grievor was able to travel home for the weekend only if it did not interfere with the work he had to perform. The employer was in control of the trip's timing. The grievor could not travel during his normal work hours as he was required to attend the course in Halifax at that time. He could travel only after work hours on a Friday and had to return in time to attend the course on Monday morning, which required him to travel on his day of rest.

[18] There is no dispute that the grievor was entitled to a weekend trip home or that his normal place of work was at the dockyards in Esquimault, which meets the conditions triggering payment at the overtime rate for the hours he travelled on a

weekend. Anything that meets the definition of government travel for that period must be reimbursed pursuant to clause 18.03 of the collective agreement. Had the grievor been able to travel during his normal workday, he would have been paid for those hours at his normal rate of pay.

[19] The grievor's situation is almost identical to that dealt with in *Professional Institute of the Public Service of Canada v. Treasury Board*, 2011 PSLRB 80. The collective agreement provision in that case was identical to that of the collective agreement that applied in this grievor's case. The adjudicator in that case found as follows at paragraph 17:

> *[17] According to the employer's interpretation, the applicable maximums would therefore be greater on a normal working day than on a day of rest or on a designated paid holiday. In other words, for the same trips with the same travel times, employees would be paid more on a normal working day than on a day of rest or on a designated paid holiday. That interpretation is contrary to the logic behind the rates of pay set out in the collective agreement for normal working days, days of rest and designated paid holidays.*

[20] The grievor's interpretation does not create an absurdity. Clause 18.03 of the collective agreement equates travel time to work time, provided the employer requires the employee to be away from home. It does not distinguish between legs of a journey.

[21] The testimony has established that the employer's past practice was to pay employees overtime when travelling on weekend trips home. Mr. Lokkan testified that, on two separate trips over twenty years, he was paid overtime when he travelled home for a weekend. The bargaining agent never received any complaints from employees about being paid overtime for weekend travel home, which is further evidence of the existence of the past practice to pay employees under clause 18.03 of the collective agreement for time spent travelling home for a weekend. The preponderance of the evidence is that the common practice was to pay employees pursuant to clause 18.03 when they travelled home. It is noteworthy that, since 1982, there have been no grievances related to weekend travel entitlements under this collective agreement.

[22] Only clear and express language in the collective agreement can limit compensation for travel time (see *Thunder Bay Regional Health Sciences Centre v. Ontario Nurses' Association,* 2007 CanLII 21590 (ON LA)). There is no express language

in the collective agreement that limits the grievor's entitlement to compensation under clause 18.03.

[23] In *Landry and Raymond v. Library of Parliament,* PSSRB File Nos. 466-L-213 and 214 (19930518), the employees travelled on the weekend to attend a course scheduled for Monday to Friday. At page 10, the adjudicator stated that, to determine if an employee is performing work, "… one must ask who controls the use of the employee's personal time. If, in a given situation, the employer exercises this control, it can only do so in return for compensation."

[24] The grievor is entitled to compensation for the burden put on him by the requirement to travel. He was further burdened by the requirement to travel on his day of rest. Any interpretation that does not recognize those burdens on employees who return home rather than taking advantage of the other options for weekend travel has an extra impact on employees with family obligations. The Public Service Labour Relations Board (PSLRB) should interpret the collective agreement so as to avoid a disproportionate burden on employees with families. If the employer requires the grievor to travel, then he is entitled to compensation under clause 18.03.

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

[25] The only question to be answered is whether the grievor was entitled to overtime under clause 18.03 of the collective agreement. All the words used by the parties must be used in their ordinary context and meaning unless that would create an absurdity (see *Chafe et al. v. Treasury Board (Department of Fisheries and Oceans),* 2010 PSLRB 112, at para 51). The collective agreement provides the context of the agreement between the parties.

[26] Each word in clause 18.03 of the collective agreement has a use. Clause 18.03 prescribes two conditions to be met: the imposition of travel by the employer and the location of that travel. Once those conditions are met, the method of compensation is engaged. The requirement to travel is triggered by the employer, not the employee. Overtime is also within the employer's control. The employer determines when and in what circumstances overtime is payable. That is why the word "required" is in clause 18.03. The grievor was not required to travel home on a weekend. He chose to.

[27] Section 3.3.12 of the travel directive merely states that an employee "may" return home for a weekend when away on extended travel duty. It is an option available to the employee, not a requirement imposed by the employer. A requirement is not the same thing as an entitlement. It is a work-related obligation imposed and controlled by the employer. Weekend travel home is an entitlement under the employee's control. If the employee chooses to take advantage of that entitlement, it does not become a requirement imposed by the employer. If it were, the employee could be disciplined for failing to take advantage of the entitlement. There was no mention of the possibility of discipline being imposed if the grievor failed to return home.

[28] Had the grievor stayed in Halifax, he would not have received wages or overtime unless he worked on the weekend. The payment of overtime pursuant to clause 2.01(o) of the collective agreement requires that work be performed outside the employee's normal hours of work. Travelling home at the employee's option does not create work. Finding that exercising the employee's option creates work would be nonsense. The employer creates work and controls and directs employees during work. The grievor was not subject to the employer's control and direction when he elected to exercise his option under the travel directive.

[29] The grievor's interpretation of the link between clause 18.03 of the collective agreement and the travel directive leads to an absurdity. Clause 18.03 is applicable in the appropriate circumstances, irrespective of any entitlement under the travel directive. The travel directive is a stand-alone document that applies to any travel. Clause 18.03 applies only to travel required by the employer. The travel directive makes no mention of overtime entitlements.

[30] The grievor's position creates an obligation on the employer to pay overtime when travel is an exercise of the grievor's prerogative outside the employer's control. The PSLRB discounted that position in *Vallières v. Canadian Food Inspection Agency*, 2001 PSSRB 83, at para 33 and 34.

[31] The second condition to be met to trigger payment under clause 18.03 of the collective agreement is the requirement that the travel be away from the employee's normal place of work. When on training, the normal place of work does not change. CFB Halifax was the grievor's temporary place of work. It did not become his normal place of work for the duration of the training. Under section 3.3.12 of the travel

directive, the grievor was deemed at his temporary place of work for the duration of the course. He did not meet the second condition of clause 18.03, as he was deemed to have been in Halifax at the time.

[32] In *Attorney General of Canada v. Lamothe et al.*, 2008 FC 411, at para 40, the Federal Court set out as follows the test for establishing a past practice:

> *[40] . . . The evidence must show a practice over several years, and must meet the following requirements:*
>
> *(a) be repeated over several years;*
>
> *(b) be accepted by all of the parties involved; and*
>
> *(c) not be ambiguous or disputed.*

[33] Past practice is an aid to interpreting a collective agreement article or an element of the doctrine of estoppel. When using it as an aid to interpretation, there must be an ambiguity in the collective agreement language (see *Rook et al. v. Treasury Board (Correctional Service of Canada)*, 2004 PSSRB 146, at para 35). In her opening statements, counsel for the grievor said that the language of clause 18.03 of the collective agreement is clear and unambiguous.

[34] There is no evidence of repeated payments of overtime for travel time on weekends home over several years. The grievor was denied twice in the past, in 2006 and 2010. Mr. McGaw stated that he never granted it or received it. That others might have received such payments is speculation, hearsay or rumour in the face of direct evidence to the contrary. Mr. Dzbik's interpretation, which is if nobody grieved not receiving the same overtime payment as the grievor requested, then everybody else must have received it, is an unreasonable interpretation of the facts. Mr. Lokkan said that he was paid it twice in his entire career.

[35] The evidence submitted by the grievor is not sufficient to establish a repeated practice over several years. Clearly, the practice is in dispute, as it is the reason for the hearing. The bargaining agent had to prove that it was a practice accepted by the employer. There is no such evidence. The employer did not have to demonstrate that it did not accept the practice. The evidence clearly demonstrated that, if it did exist, the practice was inconsistent and therefore ambiguous.

[36] The doctrine of estoppel cannot be used to prevent the employer from invoking the true meaning of the collective agreement (see *Lamothe*, at para 52). There is no evidence that the bargaining agent did not know about the employer's interpretation of clause 18.03 of the collective agreement. Past practice has not been established.

[37] Even if there was a local practice, it cannot be used to create an estoppel (see *Pronovost v. Treasury Board (Department of Human Resources and Skills Development)*, 2007 PSLRB 93, at para 75). Any locally accepted practice can be stopped by senior management when it is discovered (see *Katchin and Piotrowski v. Canadian Food Inspection Agency,* 2011 PSLRB 70, at para 91).

[38] The evidence in this case does not indicate sufficient reliance to establish past practice. There was no detrimental reliance by the grievor. He knew before leaving for the weekend at issue that he would not be paid overtime to travel home. He relied heavily on the concept of government travel. However, clause 18.03 of the collective agreement refers to travel. The concept of government travel is for the application of the travel directives and not the collective agreement.

IV. Reasons

[39] The collective agreement sets out the terms and conditions of employment for members of the bargaining unit as agreed to by the parties. The travel directive sets out what an employee travelling on government business can expect by way of standards for that travel and the entitlements that travel brings. Clause 34.03 incorporates the travel directive into the collective agreement. Therefore, the terms and conditions of travel for government business are terms of the collective agreement.

[40] One of those benefits is an opportunity to travel home for a weekend when the employee desires and his work schedules permit it, unless the employer requires the employee to remain at the temporary work location over the weekend. Other options are also available. The employee may elect to visit another location rather than return home on the weekend. Alternatively, his or her spouse or a dependant could travel to the temporary work location to visit the employee. The employer imposes none of those choices. The determining factors are the work schedules, the employee's choice and the related costs. It is open to the employee to stay at his or her temporary work

location and to not travel. If that is the choice, then the employer is obligated to cover the cost of that stay but not to pay wages or overtime.

[41] To qualify for overtime, pursuant to clause 16.08 of the collective agreement, employees must work in excess of their normal hours of work. The grievor's normal hours of work are a Monday to Friday day shift. Saturday and Sunday are his appointed days of rest. What he does on those days is up to him, unless the employer requires him to work. For the grievor to be successful, he had to convince me that the time spent travelling on his weekend home constituted work.

[42] Work consists of activities related to an employee's employment directed by and under the control of the employer. By and large, the employer controls what is to be done, where it is to be done, when it is to be done, how it is to be done and who is to do it. The adjudicator in the *Chicorelli* decision (PSSRB File No. 166-2-23844 (19980114)) concluded that activities related to training programs constitute work under the collective agreement. The grievor in *Chicorelli* sought payment at the overtime rate for the time spent completing assignments for a training course he attended.

[43] To be successful, the grievor in this case had to convince me that the time spent travelling on the weekend at issue was spent on activities related to his training program in Halifax or was required of him by the employer. In order to qualify for payment under article 18.03 the employee must establish that "… (the) employee is required by the Employer to travel to a point away from the employee's normal place of work …" The situations in the cases referred to by counsel for the grievor dealt with work or travel related to a course, which was not so in this case. He was not required to travel to Victoria on the weekend in question. He chose to, as things at his home required his attention. He could easily have chosen one of the other options available to him. The employer exercised no control over his choice; nor did it direct that those attending the course in Halifax were required to travel home on the weekend in question.

[44] The other cases cited by counsel for the grievor are also distinguishable on their facts. In the *Landry* and the *Professional Institute of the Public Service of Canada* cases, the questions related to travel to and from a designated location, which was required by the employer. There is no question that the grievor in this case was entitled to and received appropriate payment for the time spent travelling to Halifax to attend the

course and to return to Victoria once the course was over. The employer required that travel; it constituted an activity related to the required training and fell within the provisions of clause 18.03 of the collective agreement.

[45] As for the weekend in question, the grievor would not have worked had he remained in Halifax. He would also have had a free weekend had he chosen to visit another location or to have his family join him in Halifax. His choice did not create a greater obligation on the employer beyond what is specified in the travel directive. The travel directive does not provide for the payment of overtime in the case of the option selected by the grievor. How he chose to spend his leisure time cannot create work. To receive wages and overtime, work must be performed or travel must be required by the employer.

[46] Given my conclusion that the weekend travel in the circumstances of this grievance did not constitute work within the meaning of article 16 of the collective agreement and that it was not required by the employer, as required under clause 18.03, to be successful, the grievor had to convince me that a long-standing past practice of paying employees pursuant to clause 18.03 for weekend home travel existed. The evidence in support of the existence of a past practice was that Mr. Lokkan was paid twice during his career with the employer. Two isolated incidents over a 36-year career do not create a past practice. Rumours that others might have received payment for weekend travel home go no further to meeting the requirements established by the Federal Court in the *Lamothe* decision. I have no evidence that the practice was repeated over several years, that it was accepted by all parties involved, and that it was not ambiguous or disputed. Clearly, it was disputed; otherwise, this grievance would have been allowed.

[47] There is no past practice that would alter my opinion that weekend travel home, elected by the grievor, does not constitute work; nor was such travel required by the employer. There is also no evidence before me that would establish a greater impact of the employer's refusal on the grievor, as argued by the grievor, based on his family obligations. The grievor's very brief argument on this issue referred to no jurisprudence in support of it. If the argument was intended to address the issue of human rights and discrimination based on family status, it fell far short of what is required. No argument was submitted to address whether or not the employer's actions constituted discrimination or even whether the grievor's family situation fell

within the scope of protection. Furthermore, pursuant to *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.), the grievor was not permitted to argue new grounds at adjudication that were not raised in the grievance process.

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

(The Order appears on the next page)

V. Order

[49] The grievance is dismissed.

June 26, 2013.

Margaret T.A. Shannon,
adjudicator