Date: 20140407

File: 566-02-7764

Citation: 2014 PSLRB 43

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

KEVEN FARROW

Grievor

and

TREASURY BOARD
(Department of National Defence)

Employer

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

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Stephan J. Bertrand, adjudicator

For the Grievor: Ronald A. Pink, counsel

For the Employer: Talitha A. Nabbali, counsel

Heard at Halifax, Nova Scotia,
February 7, 2014.

I. Individual grievance referred to adjudication

[1] Keven Farrow ("the grievor") is an electrical technician employed at Fleet Maintenance Facility Cape Scott ("FMF Cape Scott"), a unit of the Department of National Defence (DND), which is located in Halifax, Nova Scotia. At the relevant time, he was acting as a technical services supervisor.

[2] On February 8, 2012, he grieved his employer's refusal to compensate him at the applicable overtime rate for work he had performed on December 2, 2011, from 20:15 to 20:45, and on December 3, 2011, from 04:00 to 15:00, contrary to the agreement between the Treasury Board ("the employer") and the Federal Government Dockyard Chargehands Association for the Ship Repair (All Chargehand and Production Supervisor Employees Located on the East Coast) Group, which expired on March 31, 2011 ("the collective agreement").

[3] The employer took the position that the grievor was travelling and not working during those periods and that it compensated him at the applicable travel rate. After receiving the employer's final-level response denying his grievance, the grievor referred this matter to the Public Service Labour Relations Board ("the Board") for adjudication on November 2, 2012.

II. Summary of the evidence

[4] I heard from only one witness during this hearing, the grievor. No one testified on behalf of the employer.

[5] The grievor testified that he was approached by his manager at approximately 16:00 on December 2, 2011, to travel to Charleston, South Carolina, in connection with certain repairs that needed to be performed on the helicopter haul-down device of HMCS Charlottetown, which was docked in Charleston at that time. Shipboard helicopter landings can be assisted though the use of a haul-down device that essentially consists of attaching a cable to a probe on the bottom of the helicopter before landing. Tension is maintained on the cable as the helicopter descends, helping the pilot to accurately position the aircraft on the deck. HMCS Charlottetown is equipped with such a device, and the cable in question required repair.

[6] The grievor indicated that while the DND had initially contemplated sending a mobile repair party, which would have been a crew consisting of engineers and

technicians, it opted to send that mobile repair party on another more pressing assignment and tasked him with the following assignment: he was to travel to Charleston and transport and deliver a tensiometer, an expensive apparatus designed to measure the tension on the cable of the haul-down device, and once on the ship, to act as a liaison between the ship's repair crew and the engineering department at FMF Cape Scott. The tensiometer, with a value estimated at $35 000, was carefully packed and secured inside a large suitcase-type container for its transportation to Charleston.

[7] The grievor accepted his assignment and proceeded to organize his travel arrangements, which he finalized at approximately 20:00. He had commenced his regular day shift at 07:45 that morning.

[8] Rather than picking up the equipment the next morning before leaving for the airport, which would have amounted to an extra hour of time, he opted to bring it home with him when he left work at 20:15 on December 2, 2011. He got home at 20:45 that evening, which is why he claimed overtime for that period (20:15 to 20:45).

[9] The next morning, he packed the tensiometer, left his home at 04:00 and headed for the Halifax airport. He brought the equipment inside the terminal and was held up at customs for 1.5 hours. After all, it was not in a regular suitcase, and a number of forms had to be filled out to put this type of equipment on an international flight.

[10] When he arrived at Charleston at approximately 14:00, he retrieved the tensiometer from the special baggage area and took a taxi to his hotel, where he waited for personnel from the ship to get him. He was eventually picked up at his hotel and delivered the tensiometer to HMCS Charlottetown personnel at 15:00. Some discussions followed about the work that would be performed the next day, and the grievor got back to his hotel at 20:30 that evening (December 3, 2011). According to the grievor, while he agreed that he was travelling on December 3, 2011, he is of the view that transporting and delivering the tensiometer consisted of work for which he ought to have been compensated through overtime rather than through travel time.

[11] On December 4, 2011, the grievor went to HMCS Charlottetown and acted as a liaison, as instructed. The repairs to the ship's haul-down device were successful, and he returned to Halifax the following day, December 5, 2011, without the tensiometer, which remained on the ship. There is no dispute over the compensation the grievor

received for December 4 and 5, 2011. In fact, the grievor acknowledged that it was appropriate that he be paid travel pay on December 5, 2011, since he was not tasked with travelling back with the tensiometer and was no longer responsible for its safekeeping.

III. Summary of the arguments

A. For the grievor

[12] The grievor argued that taking possession of the tensiometer, transporting it, assuming responsibility for it during its transportation and ensuring its successful delivery to the ship amounted to "work" and not "travel time."

[13] The grievor suggested that the employer could have shipped the equipment by some other commercial means. Instead, it chose to entrust him with the care and control of this expensive piece of equipment, and it expected him to successfully deliver it to the ship's crew, which had an immediate need for that equipment. Such an assignment can be considered only as work and as nothing less, according to the grievor.

[14] The grievor contended that since he had commenced work at 07:45 on December 2, 2011, not only was he entitled to overtime pay for those hours worked after 16:15, which is not in dispute, but also, he ought to have been paid overtime for between 20:15 and 20:45, when he transported the equipment to his home, as this also constituted work performed on that day. For the same reasons, the grievor argued that he was entitled to overtime pay on December 3, 2011, for all the hours submitted, since he had not benefited from the nine-hour rest period provided under clause 6.10 of the collective agreement between the end of his shift on December 2, 2011, and the beginning of his shift on December 3, 2011.

[15] The grievor argued that if an employee has a continuing responsibility to care for government property during a period of travel, then the time spent caring for this property ought to be characterized as "work" and not merely as "travel." According to the grievor, the determining test should be whether the employee is essentially free of responsibility. The grievor suggested that the employer had entrusted him with the custody of an expensive piece of equipment and held him responsible for it until he delivered it to the intended recipients. He submitted a number of non-binding authorities in support of this argument.

[16] The grievor also referred me to a decision of this Board's predecessor, *MacDonald v. Treasury Board (National Defence)*, PSSRB File No. 166-02-24114 (19940713), a case that similarly involved a DND employee transporting and delivering government property while on travel status. In *MacDonald*, it was held that taking possession of the equipment, supervising its transportation, clearing it through customs, ensuring its safety and proper handling, and delivering it to a party that had a need for it was clearly outside the normal scope of travel and consisted of work.

[17] Finally, the grievor contended that the work he performed during the relevant periods triggered overtime pay, for which he ought to be compensated.

B. For the employer

[18] The employer argued that the grievor had been appropriately compensated for the period in question and that he had failed to discharge his burden of demonstrating an entitlement to overtime pay.

[19] The employer argued that delivering the tensiometer was merely convenient or incidental to the grievor's journey. In support of this argument, the employer referred me to *Hunt v. Treasury Board (Fisheries and Oceans)*, PSSRB File No. 166-02-15797 (19860904).

[20] The employer further contended that the fact that delivering materials or equipment was not captured by the grievor's work description was yet another indication that these tasks were merely incidental to his principal duties.

[21] The employer conceded that the grievor would be entitled to the overtime pay he claimed had he performed work during the relevant period but suggested that nothing more than travelling-related activities had occurred during that time, for which the grievor had correctly been compensated under article 9 of the collective agreement.

IV. Reasons

[22] The issue in this case is simple: was the grievor working on December 2, 2011, between 20:15 and 20:45, and on December 3, 2011, between 04:00 and 15:00? If so, he ought to have been compensated pursuant to article 6 of the collective agreement. If not, he was correctly compensated in accordance with article 9.

[23] Article 6 of the collective agreement deals with hours of work and overtime. It is a lengthy article that I have not reproduced since the parties do not disagree on the interpretation to be given to it. The dispute lies with the interpretation to be given to clause 9.03, which reads as follows:

> ***9.03*** *Where an employee is required by the Employer to travel to a point away from the employee's normal place of work, the employee shall be compensated as follows:*
>
> *(a)* *on any day on which the employee travels but does not work, at the applicable straight-time or overtime rate for the hours travelled, but the total amount shall not exceed twelve (12) hours' straight time.*
>
> *(b)* *on a normal workday in which the employee travels and works:*
>
> *(i)* *during the employee's regular scheduled hours of work at the straight-time rate not exceeding eight (8) hours' pay,*
>
> *(ii)* *at the applicable overtime rate for all time worked outside the employee's regular scheduled hours of work,*
>
> *(iii)* *at the applicable overtime rate for all travel outside the employee's regular scheduled hours of work to a maximum of twelve (12) hours' pay at straight time in any twenty-four (24)-hour period;*
>
> *(c)* *on a rest day on which the employee travels and works, at the applicable overtime rate:*
>
> *(i)* *for travel time, in an amount not exceeding twelve (12) hours straight-time pay,*
>
> *and*
>
> *(ii)* *for all time worked;*
>
> *(d)* *notwithstanding the limitations stated in Article 9.03(a), (b) and (c), where an employee travels on duty, but does not work, for more than four (4) hours between 22:00 and 06:00, and no sleeping accommodation is provided, the employee shall be compensated at the applicable overtime rate for a maximum of twelve (12) hours' straight-time pay.*

[24] I disagree with the employer's contention that delivering the tensiometer was merely convenient or incidental to the grievor's journey. In fact, as suggested in *Hunt*,

such a delivery cannot be considered merely convenient or incidental when the equipment being delivered is in immediate need at the other end, as was so in this case. The grievor was not transporting and delivering the equipment to Charleston for his own convenience; the tensiometer was essential to the work that had to be performed there. His task of getting the equipment to Charleston was directly related to the work he had to oversee once he arrived on the ship. It was clearly not an incidental task (see *MacDonald*).

[25] I agree with the grievor's suggestion that if an employee has a continuing responsibility to care for government property during a period of travel, then the time spent by that employee to care for this property ought to be characterized as "work" and not merely as "travel." In this case, the grievor was not free of responsibility, regardless of the travel arrangements that had been made on his behalf or the fact that the task or responsibility in question was not captured or specified in his work description. The bottom line is that he was carrying out actual job responsibilities that had been assigned to him while travelling. He transported the equipment, ensured its care and control, was accountable for it, had to clear the equipment through customs, had to ensure its safekeeping, and ultimately delivered the equipment to the ship's crew, which had an immediate need for it at the other end. His responsibility for the tensiometer, which the employer had entrusted to his custody, continued until he safely delivered it to the intended recipients, including the time he sat in the plane, as he continued to be accountable for the luggage and equipment he had checked during that time. It would be unreasonable to conclude that the grievor was not working during a period over which the employer was holding him responsible for its property.

[26] I have no doubt that had the grievor left the equipment unsupervised at the airport while he did some personal shopping in one of the airport stores and the equipment were stolen, he would in all likelihood have been found accountable for such a loss in some fashion and would have likely been subject to some form of disciplinary measure, incidental or not.

[27] If an employer asks an employee to deliver an expensive piece of equipment it owns outside of the place of employment but does not wish to have the delivery constitute "work", it should at the very least give the employee the choice of refusing to make the delivery and its assurances that the employee will be in no way responsible for its safekeeping or liable for any damages or losses. Only under such

circumstances could it be said that the employee was free of responsibility and not working or that the delivery was truly incidental.

[28] When an employer sends an expensive piece of equipment by a commercial courier company, it undoubtedly contracts for its safekeeping, and the courier company may be found liable for any resulting damages or losses while the equipment is in its care and control. If the employer does not expect its employee to ensure the safekeeping of its equipment while in his or her care and control, it ought not to leave a $35 000 piece of equipment with that employee. There is no doubt in my mind that such an assignment comes with an expectation on the part of the employer that the equipment in question will be cared for and that the employee will be responsible for its safekeeping, and so it should. Otherwise, the employer would be acting carelessly and irresponsibly with respect to Crown property.

[29] I am not suggesting that every time an employee cares for and controls equipment belonging to the Crown while travelling, he or she is *de facto* in "working" status. That determination must be made on a case-by-case basis, depending on the particular circumstances of each case. But when an employee is tasked to deliver expensive equipment that is required to repair a military ship stationed in a foreign country, whether or not that task is specifically included or captured by his or her work description, to oversee its use and installation once it has been delivered to the vessel, and to liaise with other subject matter specialists to ensure its proper use and installation, for which there was an immediate need, then delivering that equipment ought to be considered work and not merely travel.

[30] Having carefully considered all the evidence presented by the parties, I conclude that the grievor was working during the periods in question and that the employer violated the collective agreement by compensating him in accordance with article 9, rather than in accordance with article 6, which applied in this case. The grievor ought to have been compensated with the overtime pay he sought in his grievance.

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

(The Order appears on the next page)

V. Order

[32] The grievance is allowed.

[33] I will remain seized for 60 days of any issues relating to the calculation of overtime owed to the grievor for the applicable periods.

April 7, 2014.

Stephan J. Bertrand,
adjudicator