Date: 20140422

File: 566-02-7261

Citation: 2014 PSLRB 47

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

GEOFFREY LEGGE

Grievor

and

TREASURY BOARD
(Department of Fisheries and Oceans)

Employer

Indexed as
Legge v. Treasury Board (Department of Fisheries and Oceans)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Margaret T.A. Shannon, adjudicator

For the Grievor: Dana Lenehan, QC, counsel

For the Employer: Christine Diguer, counsel

Heard at St. John's, Newfoundland,
March 5, 2014.

I. Individual grievance referred to adjudication

[1] The grievor, Geoffrey Legge, alleged that his employer, the Canadian Coast Guard (CCG), a branch of the Department of Fisheries and Oceans ("the employer"), has violated article 30 of Appendix "H" and "Letter of Understanding (08-5)" of the collective agreement between the Treasury Board and the Canadian Merchant Service Guild for the Ships' Officers (All employees) Group (expiry date: March 31, 2011; "the collective agreement"; Exhibit 1), by denying his request for compensation at the overtime rate for work performed in addition to his regular hours of work. The grievor requested and was denied pay at the overtime rate for one hour spent in training on April 11, 2011, despite the fact that the commanding officer of the ship he was serving on had approved the training session.

II. Summary of the evidence

[2] The grievor has been employed with the CCG for in excess of 28 years. He is currently a deck officer, sailing as the chief officer on the CCG Vessel *Cygnus*. On April 11, 2011, he was assigned to the CCG Vessel *Leonard J. Cowley* ("the *Cowley*") as the first officer. His schedule required him to stand watch as the watchkeeper on a "6-on/6-off" basis; that is, he was on watch from 00:00 to 06:00 and again from 12:00 to 18:00, for a total of 12 hours in a 24-hour period during the on-duty part of his work cycle. His schedule required him to be on-board ship for 14 days ("on-cycle") and then onshore ("off-cycle") for 14 days. While on his off-cycle, the grievor does not perform duties for his employer. He uses "lay-days" to continue his salary over these periods.

[3] In addition to his duties as first officer/watchkeeper, he was a rescue specialist and a member of the armed boarding team, for which he received special additional allowances under the collective agreement provided he maintained the required certification. At the time of filing of this grievance, the grievor was a rescue specialist and a member of the armed boarding team aboard the *Cowley.*

[4] Each vessel is required to have at least two rescue specialists on board. Each rescue specialist is required to complete the "Medical First Responder II Course" and must recertify every three years. In addition, each requires a "Medic A" course, which also requires recertification every three years. As part of the armed boarding team, the grievor was required to complete training with the Royal Canadian Mounted

Police, along with firearms and arrest techniques training, which require annual recertification.

[5] The grievor completed all this training and the required recertifications on both his on-cycles and his off-cycles. That is, some of it was completed while he was scheduled to be aboard ship, while some was completed in his downtime, when he was onshore. When completed on his on-cycle, he was paid for the hours spent in certification and recertification training at his regular hourly rate, provided the training did not exceed his regular number of work hours for that day. When completed on his off-cycle, he was paid at the overtime rate specified in article 30 of Appendix "H" of the collective agreement.

[6] As a rescue specialist, the grievor is required to administer oxygen therapy. After discussions with his fellow rescue specialists aboard the *Cowley* in April 2011, the grievor approached the ship's commanding officer, Thomas O'Brien, to secure authorization for the rescue specialists to conduct an in-house refresher in administering oxygen therapy on April 11, 2011. The commanding officer agreed it would be a good idea and told the grievor to go ahead and organize it for that evening. The one-hour session occurred at 19:00 that evening, at which point the grievor had completed two 6-hour watches that day and was scheduled to return to the watch at 00:00 on April 12, 2011. According to the grievor, it meant that he worked 13 hours on April 11, 2011: his 2 scheduled 6-hour watches and 1 hour of training.

[7] The grievor put in a claim for overtime for the hour spent on training by noting it on the supplementary page used to note overtime on his time sheets (Exhibit 3). The time sheet and supplementary page were submitted through the normal process. Denise McKinley crossed out the entry when it was submitted to the CCG Maritime Branch for payment. The grievor was not paid for the hour in question.

[8] Captain Bruce Thorne testified on behalf of the employer. He is now the captain of the CCG Vessel *Cygnus*. In April 2011, he was assigned to a pool of relief captains who worked a number of shifts on a number of vessels. He was not on board the *Cowley* on April 11, 2011, although he was at the time of the first-level response in the grievance process (Exhibit 5). He consulted with Marine Superintendent Wayne Stieg and with Mary-Ann Murphy from the employer's Human Resources Branch. He read the collective agreement, the employer's short-term training policy, and "Fleet Circular FC 03-2007," on training compensation ("the fleet circular"; Exhibit 6).

[9] From his review of the documents, he concluded that any training conducted outside work hours was to be paid at the regular hourly rate. Overtime premiums did not apply. The oxygen therapy training conducted by the rescue specialists occurred at 19:00, which was outside the grievor's hours of work. Consequently, his grievance was denied. The grievor could have resubmitted the time sheet and been compensated at the regular rate of pay for the hour spent in training, pursuant to the fleet circular (Exhibit 6).

III. Summary of the arguments

A. For the grievor

[10] Within any 28-day period, the grievor is on-board ship for 14 days and off ship for the next 14 days. All 28 days are considered days of work. The grievor is not required to work on his off-ship days, although he is paid for them as if he did by function of the pay administration under the collective agreement. The off-ship days are called "lay-days." The combination of lay-days plus the on-board days equals one work cycle of 28 days.

[11] According to Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, when interpreting a collective agreement, the words used must be given their most normal and ordinary meaning (at 4:2100). The "Short Term Training" portion of the Letter of Understanding (08-5) of the collective agreement states that officers who undertake training while on the ". . . off-duty portion of the work cycle . . ." shall be compensated at their regular hourly rate for the training hours. The off-duty portion of the work cycle is the time during which the officers are at home and are not required to work.

[12] "Work cycle" is not defined in the collective agreement; however, the term "cycle" appears in some of its provisions, as do the terms "on-duty" and "off-duty," dealing with lay-days. The grievor submitted that the clear implication of the use of "on-duty-cycle" and "on-duty-cycle day" in paragraph (c) of the lay-day article in Appendix "H" is that a workday consists of 12 hours per day during the on-duty portion of the work cycle, which is the 14 days aboard ship. The corollary is that the off-duty cycle is the 14-day period during which the grievor is ashore and is not required to work.

[13] Article 2 of Appendix "H" of the collective agreement defines "day" as a 24-hour period during which an officer is normally required to perform duties. An entire

on-duty cycle day is 24 hours, during which the officer is required to work 12 hours, so a working day for the grievor is 12 hours during a 24-hour period. This is consistent with the "Sick Leave with Pay" provisions of Appendix "H". Sick leave with pay or injury-on-duty leave can be granted only during the on-duty cycle. If it is accepted that an officer is on the off-duty cycle once the workday ends, then he or she would not be entitled to leave for more than 12 of the 24 hours in the on-duty cycle day.

[14] The provision dealing with non-watchkeeping vessels in Appendix "H" of the collective agreement supports the proposition that the off-duty cycle does not mean off-duty hours. This provision does not refer to the off-duty portion of the work cycle. It refers to off-duty hours as follows: "Where the Employer requires an officer working on 'non-watchkeeping' vessels to be on standby during off duty hours, an officer shall be entitled to a standby payment . . . ."

[15] As a fundamental rule of interpretation, different words are presumed to have different meanings. There is no mention in that provision of the off-duty portion of the work cycle; it specifically refers to off-duty hours. Clearly, the parties intended to distinguish off-duty hours from the off-duty part of the work cycle.

[16] If the drafters of the Letter of Understanding (08-5) intended to have it applied to off-duty hours and not to the off-duty portion of the work cycle, they would have used those words as they specifically did when discussing standby pay for non-watchkeeping vessels.

[17] The grievor's interpretation is consistent with case law. In *Canadian Merchant Service Guild v. Treasury Board (Department of Fisheries and Oceans)*, 2008 PSLRB 52, the adjudicator determined that employees who attended training on their lay-days were entitled to payment at the regular hourly rate when it occurred on their lay-days. The case of *Murphy v. Treasury Board (Department of Fisheries and Oceans)*, 2006 PSLRB 80, demonstrates that the parties have agreed that "cycle" refers to a set number of days.

[18] In *Giasson v. Treasury Board (Department of Fisheries and Oceans)*, 2000 PSSRB 94, the uncontradicted evidence was that the chief engineer aboard the CCG Vessel *George R. Pearkes* worked 28 days on and 28 days off and that his work schedule was from noon to noon. His on-duty cycle was 28 days, followed by a 28-day off-duty cycle. The adjudicator concluded that one could not be on duty and on a

lay-day at the same time. The off-duty cycle consists of lay-days earned while on the on-duty cycle aboard ship.

[19] In this case, the grievor was on a 28-day work cycle, which consisted of 14 days on and 14 days off. The training in question occurred while the grievor was on one of his 14 "on-duty" days; that is, during the on-duty portion of his work cycle. The provision the employer relied on in the Letter of Understanding (08-5) applies only to the off-duty portion of the work cycle. The short-term training provision of the Letter of Understanding (08-5) permits training during the off-duty portion of the work cycle without premium costs to the employer. If an employee attends training during the off-cycle, he or she is entitled to compensation at the normal hourly rate for which the lay-day is cancelled. If the training occurs during the on-duty portion of the work cycle, overtime rates may apply. The Letter of Understanding (08-5), as interpreted by the employer, was incorrectly applied to the grievor's case as he was on his on-duty cycle at the time and had completed his regular work schedule before the training started.

[20] For the grievor to be entitled to overtime for the refresher session at issue, it must fit the definition of a course. The Letter of Understanding (08-5) enumerates a list of training to which the letter applies, including courses and training. Therefore, a course may be training, in certain circumstances. However, it does not necessarily follow that all forms of training are courses for the purpose of clause 30.12 of the collective agreement. The very fact that in Letter of Understanding (08-5) items (a) and (b) are enumerated separately, apart from item (c) ("a seminar, convention or study session . . .") and item (d) ("[t]ime required to maintain or re-qualify [*sic*] or re-certify [*sic*] training . . ."), suggests that the concept of training captures more than a course.

[21] The cases of *Ferre v. The Queen*, 2010 TCC 593, *Siddell v. The Queen*, 2011 TCC 250, and *Tarkowski v. R.,* 2007 TCC 632, all deal with what constitutes a course. Whether the narrow or the broad interpretation of what constitutes a course is used, the common theme is that it refers to a series of lectures or study opportunities. The activities undertaken by the grievor and his colleagues on April 11, 2011, were not in the nature of a course. The session lasted just one hour and cannot be equated to a series of lectures or studies. Therefore, the grievor is entitled to payment at the overtime rate for the hour spent reviewing oxygen therapy and not at straight time, as set out in the Letter of Understanding (08-5).

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

[22] Counsel for the employer acknowledged the grievor's interpretation of the Letter of Understanding (08-5) and agreed with his interpretation of the off-duty portion of the work cycle. However, unlike in the *Murphy* decision, the grievor was on the on-duty part of the work cycle. Appendix "H" of the collective agreement makes no mention of compensation to be paid when attending training while on the on-duty part of the work cycle. That silence does not automatically entitle the grievor to overtime.

[23] In the collective agreement, clause 30(1)(b) of Appendix "H" states the following:

> ***Article 30 – Hours of Work and Overtime***
>
> *(1) Overtime compensation will be subject to:*
>
> . . .
>
> *b. an officer shall be entitled to compensation at time and one-half (1 ½) for overtime worked in excess of his/her regularly scheduled hours of work, except when an officer works more than eighteen (18) consecutive hours without six (6) consecutive hours of rest, he shall be paid at the double time rate (2T) for all hours in excess of eighteen (18) hours.*

[24] There is no definition of "worked" for the purposes of the collective agreement. The parties never intended to include training as work. The collective agreement must be read in its entirety.

[25] The training session held on April 11, 2011, was not imposed on the grievor. He was not ordered to participate in it. He approached the commanding officer, who agreed that it would be a good idea. Its timing was not imposed or directed by the employer; it was scheduled at the participants' convenience. Captain Thorne testified that employees are not paid overtime when they participate in training on their off-duty hours. There is no provision for overtime for training conducted off-shift.

[26] Clause 30.12 of the collective agreement does not limit the definition of a course. A study session is training and is therefore a training course. It is a course of study or it comes out of formal studies. It is training to maintain courses previously taken. Clause 30.12 can be read in a fashion broad enough to include a study session. This type of study is compensated by the special allowances listed in Appendix "F", which are paid to rescue specialists.

[27] Where the employer intended to pay overtime, it is clearly stated. The provision in the fleet circular for travel is independent of payment for hours worked. There is no indication that training done on one's own time, at one's own initiative, warrants paying overtime. Clearer language is required. Where the collective agreement is silent, management has the right to determine compensation unilaterally as an exercise of its rights.

[28] The language used in the collective agreement and the fleet circular does not contemplate the type of training the grievor undertook on April 11, 2011. Article 30 of Appendix "H" is silent concerning such training. Therefore, the employer is entitled to compensate for the time as it sees fit. In this case, the employer was and continues to be willing to compensate the grievor at straight time for the hour spent in training on April 11, 2011. The training was not imposed upon the grievor by the commanding officer; it was scheduled in consultation with him. The commanding officer did approve the grievor's initiative, which is why he is entitled to payment at straight time rather than no payment at all.

IV. Reasons

[29] Before determining whether the grievor is entitled to payment at the overtime rate for his training activities on the evening of April 11, 2011, I must first determine whether these activities meet the definition of training for the purposes of the collective agreement. That is defined, for those employees to whom Appendix "H" applies, in the Letter of Understanding (08-5), which defines training as follows:

> ***Definition***
>
> *Training refers to an activity where the Employer has determined that such training is necessary or will assist the officer in carrying out his/her assigned duties.*
>
> *The following activities shall be deemed to be training:*
>
> *(a) a course given by the Employer,*
>
> *(b) a course offered by a recognized academic institution,*
>
> *(c) a seminar, convention or study session in a specialized field directly related to the officer's work,*
>
> . . .

> *(d) Time required to maintain or re-qualify [sic] or re-certify [sic] training previously taken under (a), (b) or (c).*
>
> . . .

[30] According to the grievor, he is a designated rescue specialist who has been trained and certified in the field. He is paid the rescue specialist allowance under Appendix "F" of the collective agreement. He was one of three rescue specialists aboard the *Cowley* on April 11, 2011, when he approached the ship's commanding officer with a request from the group that they be authorized to hold an impromptu refresher session on administering oxygen therapy. The commanding officer agreed, and the session took place that evening when the grievor came off his watchkeeping shift, which was from 12:00 to 18:00.

[31] The grievor described a group session in which the rescue specialists led each other through various scenarios in which oxygen therapy may be required, including a review of operating the equipment. In my opinion, these activities clearly meet the plain wording of either paragraph (c) or (d) of the definition section in Letter of Understanding (08-5). By agreeing to the grievor's request to schedule the oxygen therapy refresher, the commanding officer tacitly recognized that even if it was not necessary in the sense that it was required to maintain certification, the training would enable the grievor to better carry out his duties, which include those of a rescue specialist. Those duties are directly related to training previously taken in the area of oxygen therapy, which is a skill required to be a rescue specialist. It constituted a study session directly related to the grievor's work as a rescue specialist.

[32] Having concluded that the activity for which the grievor seeks overtime compensation meets the definition of training for the purposes of the collective agreement, I must now determine whether the training should have incurred payment at the overtime rate. Article 30 of Appendix "H" sets out when overtime occurs. The grievor referred me to clause 30(1)(b) of that appendix as authority for his claim for compensation at the overtime rate for the hour spent in training on April 11, 2011.

[33] At the time of the training, the grievor had completed 12 hours of watchkeeping duties. When on-board ship, his normal work schedule was 12 hours of watch in a 24-hour period, broken down into periods of 6 hours on watch and 6 hours off. His work cycle consists of 14 days on-duty and 14 days off-duty (lay-days). There is no

definition in the collective agreement of the term "work cycle"; however, the term "cycle" does appeal in other provisions, as does the term "on-duty" in the lay-day article of Appendix "H", as follows:

> ***Lay-Days***
>
> ***General***
>
> *(a) Subject to operational requirements, the Employer will operate the selected vessels on a lay-day system. Under this system, all days will be considered as working days and there will be no days of rest.*
>
> *(b) "Lay-day" means a day off work with pay to which an officer becomes entitled by working on the Lay-Day Crewing System for a number of days. A lay-day shall be considered a part of the work cycle and as such is not considered as a day of authorized leave with pay.*
>
> . . .
>
> *(c) The work day will consist [sic] on-duty-cycle of twelve (12) hours of work per day. For each day worked or for each on-duty-cycle day on which an officer is on authorized leave with pay other than compensatory leave and vacation leave with pay, an officer shall earn one (1) lay-day in addition to the officer's Lay-Day rate of pay.*
>
> . . .

[34] The grievor clearly described his work cycle and his hours of work when on-board ship. While on board, in essence, he works a split 12-hour shift, which consists of two 6-hour periods when he is on duty, performing his watchkeeper function. He is expected to work 12 hours in a 24-hour period commencing at 00:00 and ending at 23:59. On the day in question, he had completed 12 hours of duty by 18:00. Paragraph (c) of the lay-day article in Appendix "H" clearly distinguishes between hours of work and "on-duty-cycle" days. Therefore, he had concluded his workday but not his on-duty cycle.

[35] Counsel for the employer argued that since the collective agreement is silent on the rate of pay for training, management has the discretion to compensate employees as it deems fit. As evidence of this it submitted the fleet circular (Exhibit 6), which states that the employer's policy is that employees on training will be compensated for the scheduled training period at their straight rates of pay. The employer argues that the parties never intended during collective bargaining that employees on training

would be entitled to payment at the overtime rate. I find that, to consider the parties' intention in the bargaining process, there must be an ambiguity in the collective agreement language, and evidence of the parties' intention must have been led. In this case, I see no ambiguity; nor did the employer lead any collective bargaining evidence in support of this argument regarding its intention. The only evidence it submitted was that of Captain Thorne, who was not involved at the time the request for training was made to the commanding officer of the *Cowley.* He relied on the fleet circular, which had been provided to him by a member of Fleet Command management and on his consultation with the employer's labour relations representative.

[36] As counsel for the grievor pointed out, a fleet circular is only management's interpretation and does not form part of the collective agreement. The grievor's bargaining agent had no input into drafting the fleet circular, and to the extent that it conflicts with the collective agreement, it is invalid.

[37] If there is ambiguity in this matter, it is not with the collective agreement. The fleet circular draws no distinction between ships' officers who work on a lay-day basis and those who work on a conventional basis. Everyone who participates in a course, seminar, convention or study session at the direction of management is to be paid at the regular hourly rate while in attendance, even if the course goes beyond the regular hours of work. It does not address training completed after a full day's work while on the on-duty part of the work cycle.

[38] Letter of Understanding (08-5) provides for both short- and long-term training. Short-term training is any training of less than 28 days, during which the employee is to remain on the current work cycle. Training that occurs on the off-duty portion of the work cycle is compensated at the regular hourly rate. Clearly, there must be a distinction between work cycle and work schedule, as is envisioned in the overtime article of the collective agreement. If not, why is the language so distinct? The Supreme Court of Canada, in *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, at para 21, cited Sullivan, *Driedger on the Construction of Statutes,* 3rd edition, as follows, to confirm the appropriate method of interpreting statutes in Canada:

> *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.*

[39] This approach is equally applicable to interpreting collective agreements. All words must be given their normal or ordinary meaning, and all words are intended to have a purpose (see Brown & Beatty, at 4:2000 to 4:2120). The collective agreement refers to work cycles and work schedules. If they have the same meaning, the rules concerning tautology have been offended, as the grievor's counsel has argued. As commonly understood by the parties and as confirmed by the employer's counsel, work cycles are divided into two phases, those on-board ship and those on shore. While on-board ship, the grievor has a specific work schedule, during which he must complete duties assigned to him by the employer. While onshore, the grievor has no specific work schedule or expectation that he will complete duties assigned by the employer except in special circumstances for which there are special provisions in the collective agreement.

[40] Work performed in excess of the scheduled hours of work while on-board ship incurs overtime. The training session in which the grievor participated on April 11, 2011, met the definition of training, was sanctioned by the employer, occurred after he had completed his 12 hours of scheduled duties and constituted overtime for the purposes of the collective agreement. The employer argued that the grievor initiated the session of his own accord and could have scheduled it anytime. The employer did not see fit to call evidence from the commanding officer of the *Cowley* who authorized the training session to support this argument. The fact that the ship's commanding officer had approved the session directly contradicts such an argument and clearly indicates an understanding on the part of the grievor and the ship's commanding officer that the activity was purely personal or voluntary in nature.

[41] The employer's argument that since the grievor was receiving the rescue specialist allowance at that time, any training intended to maintain his qualifications disentitled him to any payment of overtime, is not supported by the collective agreement. Appendix "F" states that the payment of these allowances is in recognition of additional duties performed by the grievor because of his additional qualifications. He receives this allowance only when assigned to the rescue specialist role, for which he must maintain his certifications. Maintaining certifications is covered under the Letter of Understanding (08-5). These are clearly two independent entitlements.

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

(The Order appears on the next page)

V. Order

[43] The grievance is allowed.

April 22, 2014.

Margaret T.A. Shannon,
adjudicator