File: 166-2-23844

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

GINO CHICORELLI

Grievor

and

TREASURY BOARD
(National Defence)

Employer

Before: P. Chodos, Vice-Chairperson

For the Grievor: Gail Owen, Public Service Alliance of Canada

For the Employer: Harvey Newman, Counsel

Heard at Victoria, British Columbia,
June 19, 1998.

The grievor is a firefighter employed at Canadian Forces Base (CFB) Esquimalt. He had submitted a grievance respecting overtime compensation, which was the subject of an adjudication decision issued by the undersigned on January 14, 1994. In that decision the concluding paragraph stated the following:

> (at page 13)
>
> *In all the circumstances, it is my determination that the grievor is entitled to overtime compensation in respect of the course assignments performed by him in excess of his normal scheduled hours of work. I leave it to the parties to determine the amount of compensation owed to Mr. Chicorelli in light of my decision. I shall remain seized in the event that the parties are unable to come to a resolution on the question of compensation.*

As it happens, the parties were unable to resolve the question of what, if any compensation, was due to Mr. Chicorelli as a consequence of his grievance being upheld. Accordingly, by letter dated April 19, 1994, the Public Service Alliance of Canada advised the Board that it required its assistance in resolving this issue. Accordingly, this hearing was convened for that purpose (it should be noted that a hearing in respect of this matter was scheduled on several previous occasions; however, on each occasion the scheduled hearing had to be postponed for reasons unrelated to this grievance). The dispute as to compensation centres largely on what were the daily hours of the course which the grievor had attended at CFB Borden.

At the outset of the hearing, the employer's counsel advised that it intended to call witnesses in respect of the outstanding compensation issue. On behalf of the grievor, Ms. Owen objected to the admission of this evidence on the grounds that the employer is attempting to re-argue a matter which was already addressed in the earlier decision. Specifically, she maintained that the employer did not contest the grievor's evidence with respect to the question of paid lunch breaks, or the hours that he put in with respect to the assignments he was required to perform as part of his course work. The objection was taken under advisement; that is, the employer was permitted to adduce further evidence, subject to a determination of the objection.

Mr. Joseph Paul Beaulieu, the Fire Chief at CFB Esquimalt testified in this proceeding. Mr. Beaulieu testified that Firefighters at CFB Esquimalt are on duty during their lunch break, and must remain in radio contact during that period. They

must be ready to respond if necessary during the lunch period, and accordingly are in continual communication with the fire hall. As a consequence, the firefighters are considered to be on duty during their lunch break and are therefore paid for it.

Mr. Beaulieu noted that he is familiar with the practices and procedures at the Canadian Forces Fire Academy (CFFA) at CFB Borden where Mr. Chicorelli had taken the course work in question. He stated that there is usually a lunch break of one hour, during which time the students are not under the direction and control of the instructor, and in effect, can go where they wish. Mr. Beaulieu referred to Exhibit 1, a memorandum addressed to him from Major B. Colledge, the Commandant of the CFFA. Mr. Colledge noted that the courses *"have always been based on a 37.5 hour week"*, and operate from *"0800 to 1200 and from 1300 to 1630 hours, Mon to Fri."*.

In cross-examination, Mr. Beaulieu acknowledged that the firefighters at CFB Esquimalt are permitted to leave the Base during their lunch break, and can engage in personal matters during that time; however, they must remain in radio contact. He also acknowledged that in a memorandum addressed to Mr. Chicorelli dated March 11, 1992 (Exhibit G-5) the then Commandant of the CFFA, Major Moreland, noted that "*As detailed in the CFFA Joining Instructions, the CFFA hours of work are normally 0800-1630 hrs Monday to Friday."* Mr. Beaulieu observed that the memorandum said nothing about a lunch break.

Mr. Chicorelli testified on his own behalf. He maintained that prior to departing for CFB Borden he was advised that the course would be running from 0800 to 1630 hours, as set out in Exhibit G-5. Mr. Chicorelli maintained that at CFB Borden, while they were free to leave the Base, the period for the lunch break varied, some days running for a half hour, on others for a full hour. Mr. Chicorelli noted that his request to be given course work during lunch period was refused; they were not given advance notice as to when the lunch break would occur, which was at the discretion of the instructor. Accordingly, they could make no plans for activities during the lunch break; he acknowledged that he took no notes as to when he had taken lunch during the course.

In argument, the grievor's representative reiterated her objection as to the admissibility of the employer's evidence with respect to the hours of work. Ms. Owen

noted that paragraph M-2.01(o) of the Master Agreement between the Public Service Alliance of Canada and the Treasury Board defines "overtime" as work "*in excess of the employee's scheduled hours of work;*". Ms. Owen submitted that the grievor's evidence with respect to receiving a paid lunch at his work site was not challenged in the earlier proceedings. The grievor's representative submitted that as he already receives a paid lunch break at his normal work site, he should also receive a paid lunch break while on a course. He noted that during the lunch break at the fire hall, the employees are free to leave the Base and do personal business on a regular basis. If it was the Department's policy that lunch hours should not have been paid while on the course, this should have been raised at the original hearing by the employer's representative. Ms. Owen contended that this question was already answered in respect of the first hearing; and therefore it is not now open to the employer to re-argue this issue.

According to Ms. Owen the question in dispute is exclusively the amount of overtime which was put in by the grievor; Mr. Chicorelli claimed 34.75 hours at time and one-half, equaling 52.125 paid hours, and 8 hours at double time, equaling 16 paid hours, for a total of 68.125 hours. Ms. Owen also argued that, in accordance with paragraph 2.01(o), overtime is not restricted to hours in excess of the normal scheduled hours *worked as a firefighter*. Furthermore, the evidence from the grievor was that the scheduled hours of work during the course ran from 0800 to 1630 hours, and this was not challenged in the first instance. Accordingly, Mr. Chicorelli is entitled to the equivalent of 68 hours of pay.

Counsel for the employer submitted that the collective agreement contemplates that "operational" firefighters do not have a meal break, that is, they are still on duty when they take their lunch. Paragraph 22.13(b) of the agreement provides for reasonable time for a meal break; the provision does not say whether this is paid or unpaid; however, operational firefighters are paid when they are working, and the period during their meal break is considered work; accordingly, unlike the Fire Chief, who receives an unpaid break for lunch, the grievor is considered on duty when he gets a break and consequently is paid during that time period.

Mr. Newman stated that he is entirely in agreement with the conclusion in the earlier decision that in this instance the course did not constitute "career development leave" as described in clause M-23.05. However, this leaves open the question of

whether Mr. Chicorelli had actually put in overtime, that is, whether he did authorize work in excess of his scheduled hours of work. It is the employer's position that Mr. Chicorelli factored in his lunch break as part of his scheduled hours of work; however, he had in fact received an unpaid lunch break which was not part of his hours of work. The employer could have, but made no deduction, from his 42 hour work week notwithstanding the change of hours during his course; it was only as a consequence of the overtime grievance that this became an issue.

Counsel for the employer submitted that the undersigned made no finding as to whether there had actually been overtime worked; rather, the earlier decision only determined that there could be overtime compensation while the grievor was on course. The question of whether there actually was overtime worked remained to be determined. Counsel also noted that the onus is on the grievor to establish what were his hours of overtime; he in fact testified that he did not keep track of his lunch time, which in accordance with Exhibit 1 and Mr. Beaulieu's testimony, is normally one hour per day. There is no dispute that Mr. Chicorelli had lunch during the course, was free to go where he wished, and was not required to perform any other duties or carry a radio.

Mr. Newman cited the Federal Court of Appeal judgment in *J.F. Kerr et al.* v. *Her Majesty The Queen in Right of Canada as represented by the Treasury Board*, Court File A-843-84, in support of the principle that where an employee is under the direction and control of management during their lunch break, they are considered to be at work and therefore entitled to be paid. Accordingly, the grievor is paid for his lunch break while at the fire hall at CFB Esquimalt, but is not at work and therefore receives no compensation while on course at the Canadian Forces Fire Academy at CFB Borden. In conclusion, Mr. Newman maintained that the grievor has not established that he performed course assignments in excess of his scheduled hours of work of 42 hours per week.

In rebuttal, Ms. Owen reiterated that the grievor's lunch breaks at CFB Borden were uncertain and variable; he maintained that in reality the grievor was restricted as to where he could go.

Reasons for Decision

As noted above, the undersigned retained jurisdiction to address the question of compensation following the issuance of the earlier decision. The retention of jurisdiction was necessary because the issue of what compensation, if any, may be owing to the grievor had not been fully addressed by the parties in the previous proceeding. In fact, that proceeding was essentially confined to the question of whether the course taken by the grievor constituted career development leave in accordance with clause M-23.05 of the relevant Master Agreement. Thus, at page 10 of the earlier decision the following observation was made:

> *There is no dispute that the TQ 6A course was sponsored by the employer, at its own facility, as part of a skills upgrade program directly related to the performance of the grievor's duties as a firefighter. Accordingly the grievor was considered as being on "temporary duty" and received full pay during the period in which he was participating in the course. It is the grievor's contention in effect that by requiring him to prepare assignments outside his normal hours of work, he was performing authorized overtime work, that is, work in excess of his scheduled hours of work in accordance with the definition of overtime in paragraph M-2.01(o). On the other hand, it is the employer's contention that the employee's attendance at the course in question constitutes career development leave as set out in clause M-23.05, which specifically precludes the payment of overtime compensation.*

It is clear from the arbitral jurisprudence that an arbitrator is not *functus officio* unless and until the arbitrator has disposed of all of the issues in dispute, including, of course, any questions concerning quantum. For example, in *Re McDonnell Douglas Canada Ltd. and Canadian Automobile Workers, Local 673* (1993), 29 L.A.C. (4th) 284 (Burkett) the learned arbitrator observed that " *I accept that once having issued an award I am not entitled to amend, vary or revoke it. However, this is not to say that under a statute that requires a final and binding determination I cannot complete an award in respect of identifying who is entitled to compensation and the quantum: see Re Canada Post Corp. And C.U.P.W. re National Policy Grievance, No. N-00-88-00022, Medical Remuneration Supplement (August 14, 1992), unreported (Burkett).*"

There can be no doubt that the previous decision did not bring finality to the dispute between the parties; indeed, it was the bargaining agent that requested that

this matter be brought back to the adjudicator in order to resolve the question of the quantum of overtime compensation that may be due the grievor. Accordingly, the question as to the actual hours worked by the grievor during the period in question, as compared to his standard scheduled hours of work of 42 hours a week, as set out in clause 22.01 of the Firefighters Group Specific Agreement, is critical to a final determination of the matters in dispute between the parties. Accordingly, I find that the evidence presented by the employer in respect of that question is both admissible and relevant in the context of these proceedings.

The grievor's representative noted that the employer never contested the contents of Exhibit G-1 wherein the grievor enumerated the amount of time he spent on preparing assignments outside the classroom hours. It is true that the employer did not contest those hours either in the earlier proceedings or in these proceedings. However, there is no basis for concluding that the employer had, in effect, conceded that the hours of instruction at the Fire Academy constituted 42 hours per week. Indeed, the reply at the final level of the grievance procedure on behalf of the Deputy Minister notes that:

. . .

> *Firstly, I note that the hours of work for the Canadian Forces Fire Academy are 08:00 to 16:30 with a 60 minute break for lunch which amounts to a 37.5 hour work week. At the same time, while you were on course you continued to be compensated your normal pay of 42 hours per week.*
>
> (Letter to Mr. Chicorelli from D.K. Candline for Deputy Minister dated 9 February 1993)

It would appear therefore that in the employer's mind, the question as to the grievor's actual hours of work at the Fire Academy was very much at issue. Accordingly, that question must be addressed here in order to determine what compensation, if any, may be owing to the grievor.

In my view, the evidence supports the conclusion that the grievor was given an unpaid lunch break of approximately one hour per day, and accordingly the course hours ran from 8:00 a.m. to 12:00 noon, and from 1:00 p.m. to 4:30 p.m. daily, for a weekly total of 37.5 hours. It is not in dispute, however, that the grievor's scheduled hours of work as a firefighter is 42 hours per week per clause 22.01 of the Group

Specific Agreement. Taking into account this provision as well as the other relevant provisions, which are set out in the January 14, 1994 decision, and applying them to the evidence provided by the grievor respecting the amount of time he spent on doing assignments outside of classroom hours (i.e. Exhibit G-1), I have concluded that the grievor is entitled to compensation equivalent to 15 hours of work multiplied by his then hourly rate of pay.

Accordingly, the employer is directed to compensate the grievor in this amount. To this extent, the grievance is upheld.

P. Chodos,
Vice-Chairperson.

OTTAWA, July 6, 1998.