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Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

MICHEL R. DARGIS AND PAUL A. LEBLANC

Grievors

and

TREASURY BOARD (Department of Foreign Affairs and International Trade)

Employer

Before: Joseph W. Potter, Board Member

For the Grievors: Edith Bramwell, Public Service Alliance of Canada

For the Employer: Jock Climie, Student-at-Law

Heard at Ottawa, Ontario,
February 6 and June 2, 1998.

Both grievors are diplomatic couriers (GS-MES-10) with the Department of Foreign Affairs and International Trade. They are grieving the employer's interpretation and application in relation to them of clause 19.20 of the Group Specific Agreement between the Treasury Board and the Public Service Alliance of Canada for the general services group, Codes 604/89 and 654/89. This clause reads as follows:

> *19.20 Couriers, Towermen and Harbour Managers are entitled to receive compensation at:*
>
> *(a) straight-time rates for all hours compensated within a cycle up to a total to be determined by the following formula:*
>
> $$\frac{\text{Number of calendar days in cycle} \times 40}{7}$$
>
> *(b) time and one-half (1 1/2) for all other hours worked.*

The other relevant clauses in both the Group Specific Agreement and the Master Agreement between the Treasury Board and the Public Service Alliance of Canada are the following:

> (Group Specific Agreement)
>
> *19.22 Couriers shall have four (4) three (3)-month cycles equivalent to five hundred and twenty-two (522) hours per cycle commencing April 1st each year.*
>
> *****
>
> (Master Agreement)
>
> *M-GS20.11 - Couriers (Diplomatic),*
>
> *(a) ...*
>
> ****
>
> *(b) In accordance with clause 19.20 Couriers (Diplomatic) shall receive ten (10) hours' compensation for any designated holiday specified in clause M-20.01 whether or not the designated holiday falls on a workday.*
>
> *(c) Work performed by Couriers (Diplomatic) on a designated holiday will be compensated as per clause 19.20 of the Group Specific Agreement.*

ARTICLE M-40

VARIABLE HOURS OF WORK

The Employer and the Public Service Alliance of Canada agree that the following conditions shall apply to employees for whom variable hours of work schedules are approved pursuant to the relevant provisions of the applicable Group Specific Agreement. The Master Agreement and Group Specific Agreements are modified by these provisions to the extent specified herein.

It is agreed that the implementation of any such variation in hours shall not result in any additional expenditure or cost by reason only of such variation.

...

5. Specific Application

...

Designated Paid Holidays

(a) A designated paid holiday shall account for the normal daily hours specified by the relevant Group Specific Agreement.

(b) When an employee works on a Designated Paid Holiday, the employee shall be compensated, in addition to the normal daily hours' pay specified by the relevant Group Specific Agreement, time and one-half (1 1/2) up to his or her regular scheduled hours worked and double (2) time for all hours worked in excess of his or her regular scheduled hours.

More specifically, and put simply, the grievors seek the following:

1. On those occasions when a designated paid holiday coincides with a scheduled day of rest and they do not work, they wish to be credited with eight hours "work".

2. On those occasions when a designated paid holiday coincides with a scheduled workday and they work that day, they wish to be credited with an extra eight hours "work". This is in addition to receiving credit for the actual hours they worked that day.

They claim the employer's incorrect interpretation results in a financial penalty in overtime compensation as well as the exclusion of statutory holidays in the calculation of pensionable income. The grievors' representative acknowledged I have no jurisdiction with respect to the impact on the couriers' pension; consequently this decision will relate to the contract interpretation issue only.

Both grievors seek overtime compensation with accrued interest. In addition, they seek a retroactive application of this interpretation and a deduction from their required work cycle for all statutory holidays.

At the outset of the hearing, the employer's representative raised the issue of timeliness. The grievors' representative suggested it was a continuing grievance and sought an effective date of December 1995. Mr. Climie did not agree and stated the earliest effective date could only be 25 days prior to the filing of the grievances, if sustained.

The parties agreed to proceed with the evidence and I indicated that, if necessary, I would rule on the timeliness issue in the decision itself.

Evidence

I heard from two witnesses, namely Mr. Paul LeBlanc, who is one of the grievors, and Mr. Michael McGrath, the Acting Head of the Diplomatic Mail Services.

Mr. LeBlanc stated couriers have a three-month work cycle totaling 522 hours. Each week the number of hours worked is added to the previous week's cumulative hours of work total. Once the threshold of hours, as calculated under clause 19.20, is reached, any additional work in the cycle is compensated at time and one-half. Therefore, as Mr. LeBlanc stated in cross-examination, the sooner a courier reaches the threshold, the sooner the courier begins to receive overtime. Couriers receive a regular bi-weekly pay cheque, which equates to a 40-hour week. For each of the 11 statutory holidays, couriers receive 10 hours compensation, pursuant to subclause M-GS20.11(b), and a separate cheque is issued for this payment.

If a courier is ill, or on annual leave for a week, the courier will receive credit for 40 hours of work. More specifically, 40 hours would be added to the courier's cumulative hours of work total. The problem, however, is with designated paid

holidays. Mr. LeBlanc testified that on those occasions when couriers are not scheduled to work, and a designated holiday occurs, there is no addition made to their cumulative hours of work total. If they are scheduled to work the statutory holiday, couriers only receive credit for the actual hours worked (that is, only those hours actually worked are added to their cumulative hours of work total).

Mr. LeBlanc testified that, at one time, couriers did get credit for statutory holidays but this stopped in 1982. The grievor also testified that if a courier requests a week of annual leave during which a statutory holiday occurs, the employee must ask for 40 hours to be taken out of his/her leave bank (based on an 8-hour day).

The grievor testified he inquired about this issue in January 1996 and received a reply on January 23, 1996 (Exhibit G-3). As this did not satisfy his concerns with respect to pensionable service, he wrote to the Superannuation Directorate on July 27, 1996 (Exhibit G-4). He was directed back to his employer on August 19, 1996 (Exhibit G-5) and received another reply from his employer on October 18, 1996 (Exhibit G-6). The grievances were filed October 21, 1996.

In cross-examination, Mr. LeBlanc was shown a three-month work shift cycle (Exhibit E-1) commencing October 1, 1997. For the first 10 days of the cycle, Mr. LeBlanc was scheduled to work (except for October 4 and 5, which were days off). Mr. LeBlanc was then scheduled off from October 11 to 19 inclusive, during which time a designated paid holiday fell (October 13). Mr. LeBlanc agreed that, in this case, he received 10 hours pay for the October 13 designed paid holiday, but no time was added to his cumulative hours of work total. Using the same exhibit, Mr. LeBlanc identified the designated paid holiday of November 11 as a scheduled day of work for him. He agreed that if he had worked 12 hours on November 11, then 12 hours would be added to his cumulative hours of work total.

Mr. LeBlanc identified Exhibit E-2 as being his overtime authorization report. It shows he claimed 10 hours pay for each designated paid holiday which occurred in the three-month cycle.

Mr. McGrath testified employees could opt for leave instead of the 10-hours' pay and it would be given consideration.

Argument for the Grievors

Ms. Bramwell argued that the employer has failed to give effect to subclause M-GS20.11(c), as well as the section on "Designated Paid Holidays" under Article M-40, "Variable Hours of Work", at page 96 of the Master Agreement. It was argued that subclause M-GS20.11(c) indicates there is to be a difference for a designated paid holiday if it is worked, as compared to a situation where it is not worked. Since the employees receive a cheque for 10 hours pay for every designated paid holiday, whether it is worked or not, Ms. Bramwell argued the employer has given no effect to this difference specified in the collective agreement.

Due to the fact subclause M-GS20.11(c) uses the word "compensated", Ms. Bramwell argued this refers to a time aspect, as opposed to a dollar aspect, because the employee receives 10-hours pay under subclause M-GS20.11(b).

From here, Ms. Bramwell referred me to clause 19.20 of the GS Group Specific Agreement, which, she states, sets out the formula for compensation.

This, in conjunction with page 96 of the Master Agreement ("Designated Paid Holidays"), enables eight hours to be credited to the cumulative totals for each designated paid holiday.

The provisions were difficult to understand, Ms. Bramwell stated, and were complicated by the fact we were dealing with both the Master Agreement and the Group Specific Agreement. Unfortunately, the drafter of the language has passed away so no evidence in clarifying the intent could be led.

However, Ms. Bramwell said every provision in the collective agreement has to be given meaning, and she referred me to "Collective Agreement Arbitration in Canada", Third Edition, by Earl Edward Palmer, Q.C.. At page 123, Professor Palmer wrote:

> *It is elementary that all the terms of the agreement must be read together and that any board of arbitration should be highly skeptical of an interpretation of one article which would nullify or render absurd the effect of another article.*

Given this accepted principle, Ms. Bramwell argued that Article M-40 of the Master Agreement says: "A designated paid holiday shall account for the normal daily hours…". It has not been accounted for under the employer's interpretation. Under subclause M-GS20.11(c) of the Master Agreement, couriers are entitled to get credit for the time; therefore, whether they work the designated paid holiday or not, they should have an extra eight hours added to their cumulative hours of work total.

Argument for the Employer

Mr. Climie stated, in this case, the bargaining agent bore the burden of proof and it has not been met. A review of the collective agreement shows the provisions are clear when examined in the general context of the agreement as a whole.

There are two collective agreements at play for the couriers, namely the Master Agreement and the Group Specific. In clause 19.22 of the Group Specific Agreement, the hours of work for the couriers are spelt out, namely 522 hours per each three-month cycle. Subclause 19.20(a) of the same agreement is a formula to determine the number of straight-time hours in the particular three-month cycle. It is based on a 40-hour work week. The formula shows some three-month cycles require as little as 514 hours to be worked at straight time rates before overtime commences. Other cycles require more, for example 525 hours in another three-month cycle before overtime commences.

The dispute centers around the fact the couriers want to be credited for an additional eight hours for each designated paid holiday, whether they work it or not. This allows them to reach the "overtime threshold" more quickly.

In the Master Agreement, Article M-20, "Designated Paid Holidays", does not apply to the couriers except for clause M-GS20.11 which, in (b), allows the couriers to receive an additional 10 hours' pay for each designated paid holiday. As this is the only clause in this Article that applies to the couriers, a designated paid holiday that falls on a scheduled working day is treated no differently than any other working day. That is, the hours worked are accumulated and added to the cumulative hours of work total, and paid at straight-time rates until the overtime threshold is reached.

To agree with the grievors means that for every designated paid holiday, an additional eight hours is credited to them under the formula in subclause 19.20(a) and this would be clearly outside the provisions of the agreement, according to Mr. Climie.

It was also argued that the employees are attempting to pyramid benefits. Again, I was referred to Palmer (supra), at page 124, where he wrote:

> *If a contract is open to two interpretations and one interpretation involves the pyramiding of overtime and the other interpretation does not involve the pyramiding of overtime, the board of arbitration, in the absence of specific wording in the contract should accept the interpretation which doe not provide for the additional penalty payments by reason of pyramiding overtime.*

In this case, couriers receive 10 hours pay for each holiday. If they work the holiday, the hours worked are credited towards the threshold. There should not be an additional eight hours credited to them. Clauses M-29.03 and M-30.06 preclude the pyramiding of benefits and designated paid holidays and overtime are mentioned in both.

With respect to the provisions found under Article M-40 at page 96 of the Master Agreement titled "Designated Paid Holidays", Mr. Climie stated the general provision is overridden by the Group Specific Agreement and would not, therefore, apply.

At this juncture, I adjourned the proceedings on the joint request of the parties.

The hearing ultimately resumed on June 2, 1998, but not before numerous communications flowed between the parties and the Board indicating Mr. Climie wished to call further evidence to show that Article M-40 did not apply to the couriers. Ms. Bramwell objected to this calling of evidence and ultimately I issued both parties with a letter, dated May 28, 1998, stating the hearing would resume where we left off, namely with the employer arguing its case, to be followed by the rebuttal from the bargaining agent. This ruling was issued in consideration of the fact the evidentiary portion of the hearing had, in fact, been completed and to permit further evidence could lead to procedural unfairness and extensive delays.

Upon resumption of the hearing, Mr. Climie examined what the bargaining agent was seeking with respect to those occasions when the couriers worked a holiday. Mr. Climie gave, by way of example, a courier working 12 hours on a holiday Currently, the employee has 12 hours added to his/her cumulative hours of work total (as per clause 19.20 of the Group Specific Agreement). The employee gets his/her regular pay cheque based on a 40-hour week and receives an additional cheque for 10-hours pay for the holiday. In this example, the grievors want to receive, in addition to the above, a further eight hours added to the cumulative hours of work total due to the fact they worked on a holiday. Mr. Climie suggested this claim is based on the bargaining agent's reading of Article M-40 of the Master Agreement. Therefore, if Article M-40 does not apply to the grievors, the grievances must fail. Mr. Climie added that, in this case, even if Article M-40 did apply, it would not be sufficient to support the bargaining agent's position.

In any event, Mr. Climie suggested Article M-40, titled "Variable Hours of Work", only applied to variable hour employees (see preamble, page 92) and couriers did not fall into this category. To discover who did fall into this category, one had to refer to clause 19.35 of the Group Specific Agreement, as it was the only provision related to variable hours. This clause allows employees who work a five-day workweek to vary their hours and thereby shorten their workweek, and this situation was not applicable to the couriers. Other indications that Article M-40 did not apply to couriers were also made by Mr. Climie but I do not feel it necessary to elaborate on them, at this time. Also, Mr. Climie pointed out that Article M-40 was not mentioned in the grievances.

In closing, Mr. Climie suggested that to do anything other than deny the grievances would result in an amendment to the collective agreement.

Grievors' Rebuttal

The couriers receive pay as if they had worked an eight-hour day, and this is simply a reflection of the way the employer schedules their work. Annual leave and sick leave are credited on the basis of eight hours a day, so designated paid holidays should account for the same.

Subclause M-GS20.11(b) says: "...Couriers (Diplomatic) shall receive ten (10) hours' compensation...". Ms. Bramwell argued the word compensation means both time and money. Employees currently get 10 hours pay, but no credit for the holiday itself is made.

Additionally, Ms. Bramwell suggested these employees are variable hour employees and Article M-40 does apply. The fact that there are a number of clauses within Article M-40 that are not currently being applied to couriers does not mean the Article itself does not apply. Ms. Bramwell suggested the employer was not applying many of the provisions of Article M-40 correctly to the couriers.

Insofar as the fact the grievances themselves did not specifically refer to these other provisions, Ms. Bramwell referred to the Federal Court of Appeal decision in *Blais* (A-846-85). In the decision, at page 3, it states:

> *The adjudicator could not find clause 29.03 of the agreement inapplicable simply because the applicant had failed to mention this clause in filing his grievance at the various levels of the grievance procedure. The applicant was clearly arguing that he was entitled to the pay associated with the reclassified position for the work done by him since January 1, 1984. This was the nature of the grievance. The adjudicator therefore had to consider whether such a claim was valid in terms of all the applicable provisions of clause 29.*

Therefore, Ms. Bramwell argued, I had to consider the collective agreement as a whole and, in this case, Article M-40 applies. Furthermore, because the issue was clarified in the July 27, 1996 letter from Mr. LeBlanc to the Superannuation Directorate (Exhibit G-4), the employer knew the real issue.

Finally, Ms. Bramwell stated the real issue is the eight hours not credited to the couriers for each statutory holiday. Whether the couriers work the holiday or not, the time must be credited.

Decision

Put in its simplest form, I am being asked to interpret the collective agreement, which applies to the diplomatic couriers, with respect to two issues.

Firstly, when a designated paid holiday coincides with a scheduled day of rest, should the courier be credited with "having worked" eight hours?

Secondly, when a designated paid holiday coincides with a scheduled workday, should the courier be credited with "working" eight more hours than actually worked that day?

In each situation, the employer has stated there is no such entitlement under the collective agreement. The grievors claim there is an entitlement and to not do so violates clause 19.20 of the Group Specific Agreement.

Again, in its simplest form, the practice has been to accumulate all hours actually worked in a three-month cycle and pay straight-time rates for those hours that do not pass the threshold formula found in subclause 19.20(a). The only exception is that, if the courier is on annual leave with pay or sick leave with pay, a credit for having "worked" eight hours is made.

I can find no provision in the collective agreement which would allow a credit of eight hours to be made for a designated paid holiday which happens to fall on a day of rest. Similarly, I can find no provision to add an additional eight hours of work to the cumulative hours of work totals in those situations where a designated paid holiday falls on a scheduled working day.

The bargaining agent drew on the provisions found in the Master Agreement at Article M-40 to buttress its position that the couriers should have an additional eight hours added to their cumulative hours of work total, for each holiday. More specifically, the bargaining agent relied upon the wording found at page 96 under the heading "Designated Paid Holidays". The employer replied that Article M-40, "Variable Hours of Work", did not apply to couriers, and only applied to employees whose normal five-day week was altered, by mutual agreement, so that the employee would work longer days in return for additional time off.

I find the employer's interpretation of Article M-40 to be most consistent with the evidence and the language of the collective agreement. The preamble states that the Article applies to employees "...for whom variable hours of work schedules are approved pursuant to the relevant provisions of the applicable Group Specific Agreement...". I find the language here is unambiguous, and it means that Article M-40 would apply to an employee who has received approval, in accordance with that employee's Group Specific Agreement, to work variable hours. For couriers, the employer stated the reference point in the Group Specific Agreement is subclause 19.35(a). I agree. This states, in part, "...employees, with the approval of the Employer, may complete their weekly hours of employment in a period other than five (5) full days...". This provision pre-supposes an employee works five days in a week initially, then varies this, with approval from the employer. No evidence was presented to me to suggest that couriers initially had a five-day week, then sought approval to vary it. In fact, the evidence was clear that couriers are scheduled for long periods of work, followed by long periods of days of rest (Exhibit E-1).

Therefore, while Ms. Bramwell is correct in that all provisions of the collective agreement have to be afforded their proper meaning, I find, in this case, Article M-40 does not lead to the conclusion that couriers are entitled to an extra eight hours' credit for each designated paid holiday.

The bargaining agent states that the word "compensated" in subclause M-GS20.11(b) means the courier gets paid and receives credit in time. Similarities were drawn to the fact that, when the courier takes annual leave, the courier receives pay and gets credited with having "worked" eight hours. A like situation occurs for the occasion when a courier takes sick leave. The bargaining agent states the same should apply for designated paid holidays.

In those situations where the designated paid holiday falls on a scheduled work day, and the courier is given the day off to observe the holiday, I agree with Ms. Bramwell. The courier, in this situation, should be credited with eight hours "work". This would be identical to a situation of annual leave or sick leave replacing a scheduled day of work and having the employee being credited with "working" eight hours on that day.

However, I find nothing in the collective agreement to support the proposition advanced by the bargaining agent that an additional eight hours be credited to the employees for each designated paid holiday that coincides with a scheduled work day. Nor can I find support for the proposition that employees receive credit for eight hours of work for those occasions when a holiday falls on a day of rest and the employee does not work that day.

For all of these reasons, the grievances must be dismissed.

Joseph W. Potter,
Board Member

OTTAWA, June 25, 1998.