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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

**ROBERT VEILLEUX
and
GILBERT HUNEAULT**

Grievors

and

**TREASURY BOARD
(Revenue Canada - Customs, Excise and Taxation)**

Employer

Before: Jean Charles Cloutier, Board Member

For the Grievors: Michel Paquette, Professional Institute of the Public Service of
Canada

For the Employer: Karl G. Chemsy, Student-at-Law and David R. Merner, Counsel



Heard at Ottawa, Ontario,
August 24 and 25, 1999.



DECISION

Robert Veilleux and Gilbert Huneault are employed by Revenue Canada, Customs, Excise and Taxation and are part of the Commerce Group at the CO-2 level.

On July 2, 1998, the grievors each filed a grievance containing the following statement:

[Translation]

...

I object to the employer's refusal to compensate me for overtime in accordance with Article 9 of the collective agreement between the Treasury Board and the Professional Institute of the Public Service of Canada.

...

The corrective action requested reads as follows:

[Translation]

...

That I be paid for the hours mentioned in [above] in accordance with Article 9 of the agreement.

...

Both grievances received the same replies at the three levels of the grievance procedure, namely the second, third and final level. (The grievances were submitted directly to the second level.)

On September 23, 1998, the grievances received the following response at the second level of the grievance procedure:

[Translation]

...

This letter is further to the submission of [your grievances] regarding management's refusal to compensate you for overtime that you claim to have worked during your trip to Taiwan from April 6 to May 9, 1998.

At the hearing [of the grievances] on August 24, 1998, in the presence of your union representative, I asked you to provide me with more information regarding your claim. In particular, I asked you to indicate which periods of time were

claimed as compensation for travel time and which for overtime. On September 1, 1998, you informed me in writing that it would be very difficult for you to provide me with an estimate of your travel time.

After reviewing the grievance [files] and taking into account the related circumstances, I do not believe that I have sufficient information to consider compensation for travel time as set out in your collective agreement. As for the overtime, you did not ask for or obtain prior authorization, either before or during your business trip, from any member of management. As reaffirmed by your supervisor, Mr. Mackay, before your departure, it is imperative that authorization be obtained before working overtime. This allows management to consider various options, such as reducing the work to be done, extending the trip or paying overtime after reviewing our ability to pay in a context of tight budget constraints.

Under the circumstances, I am unable to allow [your grievances] and to grant the corrective action requested.

...

On November 13, 1998, the grievances were replied as follows at the third level of the grievance procedure:

[Translation]

...

Following the presentation by your union representative, your comments during the meeting on October 19, 1998 and my investigation, here is my decision regarding [your grievances].

Prior to your departure, you were involved in discussions to prepare the investigation plan for the trip to Taiwan. This plan included the overall costs for the trip, the number of weeks, costs of the trip and the travel time. This was your second business trip to Taiwan and involved updating the work of an earlier investigation. After several discussions dealing, among other things, with the time required to perform the work, you agreed to the plan and understood management's position on the issue of pre-approved overtime. Furthermore, this requirement and practice has been in place for some time and you were aware of it. Despite existing practices, you decided not to follow instructions regarding authorization of overtime.

Among other things, you were not [required] by the employer to work overtime as set out in Article 9.01 of the collective agreement between Treasury Board and the Professional Institute of the Public Service of Canada. Therefore, management's refusal to compensate you for overtime claimed during your trip to Taiwan from April 16 to May 9, 1998 is justified.

Under the circumstances, I am unable to allow [your grievances] and to grant the corrective action requested.

...

Lastly, the grievances were dealt with as follows at the final level of the grievance procedure:

[Translation]

...

I have reviewed the circumstances surrounding [your grievances] and the corrective action requested.

Based on a review of [your files], I have determined, first, that were you aware of the practice of pre-approved overtime. Second, you were unable to provide any specific details on the use of these hours. Lastly, there is nothing [in the files] to indicate that you were [required] by the employer to work overtime. The response at the third level of the grievance procedure describes the reasons why you were not paid for the overtime. I have received no information to show that management acted unreasonably in this matter.

In light of the above, I cannot grant the corrective action requested. [Your grievances are denied.]

...

Article 9 (Overtime) of the collective agreement between Treasury Board and the Professional Institute of the Public Service of Canada for the Commerce Group, expiring September 30, 1999 (Code: 311/98), is referred to in the grievances and I believe it necessary to reproduce the article in its entirety below:

****ARTICLE 9**

OVERTIME

9.01 When an employee is required by the Employer to work overtime he shall be compensated as follows:

- (a) on his normal day of work, at the rate of time and one-half (1 1/2) for each hour of overtime worked;
- (b) on his first day of rest, at time and one-half (1 1/2) for each hour of overtime worked;
- (c) on his second or subsequent day of rest, at double (2) time for each hour of overtime worked. Second or subsequent day of rest means the second or subsequent day in an unbroken series of consecutive and contiguous calendar days of rest;
- (d) notwithstanding clause (c) above, if, in an unbroken series of consecutive and contiguous calendar days of rest, the Employer permits the employee to work the required overtime on a day of rest requested by the employee, then the compensation shall be at time and one-half (1 1/2) for the first day worked.

- (e)
 - (i) on a designated holiday, compensation shall be granted on the basis of time and one-half (1 1/2) for each hour worked, in addition to the compensation that he would have been granted had he not worked on the designated holiday;
 - or
 - (ii) when an employee works on a holiday, contiguous to a second day of rest on which he also worked and received overtime in accordance with clause 9.01(c), he shall be paid in addition to the pay that he would have been granted had he not worked on the holiday, two (2) times his hourly rate of pay for all time worked.

9.02 All calculations for overtime shall be based on each completed period of fifteen (15) minutes.

9.03 Except in cases of emergency, call-back, stand-by or mutual agreement the Employer shall whenever possible give at least twelve (12) hours' notice of any requirement for the performance of overtime.

9.04 Upon application by the employee and at the discretion of the Employer, compensation earned under this Article may be taken in the form of compensatory leave, which will be calculated at the applicable premium rate laid down in this Article. Compensatory leave earned in a fiscal year and outstanding on September 30 of the next following fiscal year shall be paid at the employee's daily rate of pay on September 30.

9.05 When a payment is being made as a result of the application of this Article, the Employer will endeavour to make such payment

within six (6) weeks following the end of the pay period for which the employee requests payment, or, if payment is required to liquidate compensatory leave outstanding at the expiry of the fiscal year, the Employer shall endeavour to make such payment within six (6) weeks of the commencement of the first pay period after September 30 of the next following fiscal year.

9.06

- (a) An employee who works three (3) or more hours of overtime immediately before or immediately following his scheduled hours of work shall be reimbursed for one meal in the amount of \$7.00, except where free meals are provided. Reasonable time with pay, to be determined by the Employer, shall be allowed the employee in order to take a meal either at or adjacent to his place of work.*
- (b) When an employee works overtime continuously extending four (4) hours or more beyond the period provided in (a) above, he shall be reimbursed for one additional meal in the amount of \$7.00, except where free meals are provided. Reasonable time with pay, to be determined, by the Employer, shall be allowed the employee in order that he may take a meal break either at or adjacent to his place of work.*
- (c) Clause 9.06(a) and (b) shall not apply to an employee who is in travel status which entitles the employee to claim expenses for lodging and/or meals.*

At the outset of the hearing, I agreed to the exclusion of the witnesses, at the request of the grievors' representative. The grievors' representative called two witnesses, namely, the two grievors, and filed 13 exhibits.

The employer's representative called two witnesses, Karl D. Mackay, the immediate supervisor of the two grievors, and Barry Desormeaux, Acting Director, Antidumping and Countervailing Directorate. Four exhibits were filed.

The employer's two witnesses testified in English with the consent of the grievors' representative.

Evidence

The evidence can be summarized as follows:

At the outset, it was agreed that Gilbert Huneault would provide a detailed testimony which would give me the background information on the case for both grievors. The other grievor, Robert Veilleux, also testified but simply to confirm his colleague's testimony.

Both grievors have more than five years of experience in Revenue Canada's Antidumping and Countervailing Directorate as senior program officers (Exhibits E-2 and E-12). Their work involves implementing the *Special Import Measures Act* (Exhibit E-4) and ensuring compliance with administrative practices (Exhibit E-5).

Exhibit E-6 shows the various documents and statements of reasons that senior program officers (Mr. Huneault and Mr. Veilleux) are required to prepare and implement.

In this instance, Mr. Huneault had already investigated the trade practices of certain Taiwanese companies in 1992 and had participated in an on-site audit in Taiwan. The Act requires periodic investigations and that an on-site re-investigation be conducted. The documents (Exhibit E-8) show that the schedule of events as prepared and accepted by the grievors covered the period from February 27 to June 26, 1998. The schedule included a trip to Taiwan from April 16 to May 9, 1998.

The grievors' representative introduced Exhibit E-7 which sets out the instructions governing overtime. The document is dated April 23, 1993 and reads as follows:

[Translation]

Directors and Managers

RE: Overtime

Recent events lead me to the conclusion that we have not yet addressed the issue of controlling overtime in an adequate or coherent manner throughout the Division, and that we have not taken the necessary steps to control this important element of our budget. Consequently, I would like to share my ideas with you in this regard, and ask you to follow the guidelines set out below.

I would like to point out that this is an area in which we are highly vulnerable both in terms of spending unnecessary funds and possibly exceeding budget if we do not take the

matter in hand. I expect every manager to closely monitor his overtime spending, and, if in fact such costs must be incurred, that he be able to justify those costs and that he also know, in advance, the overtime that will be claimed and the exact amount that will have to be expended. I do not expect any more "surprises" in this regard.

1. Every manager is required to ensure that we make conscientious and effective use of our resources and that we promote a sense of professionalism in our work. To this end, we must make every effort to avoid any overtime spending and to ensure that such expenditures are the exception not the norm. All managers are required to identify any resource-related problems so that we can make the necessary decisions regarding the shifting of resources within the Division to better handle our workload.
2. I do not want any overtime charges related to implementing the B3 or processing the B2s. If a manager cannot identify any other option, I would like it brought to my attention BEFORE costs are incurred. We will do everything necessary to manage the workload through a more flexible use of all of our resources throughout the Branch's hierarchical services.
3. As for trips related to the investigation of a complaint or to preliminary investigations, we will not pay any overtime unless absolutely necessary, such as in the case of travel time.
4. As for investigations related to final decisions, new investigations and investigations under section 55, overtime will be covered in exceptional cases only and will normally apply only to travel time, if necessary. In these instances, if the manager believes that an exception must be made, I ask that, prior to the departure of the investigators, a budget be prepared in which the maximum amount of overtime to be claimed by the travelling officers is clearly established. These estimates must be approved by me prior to any trip.
5. To be absolutely clear, these comments apply equally to the payment of overtime in cash or in compensatory leave.

...

Both grievors admitted that they were aware of and familiar with the above document (Exhibit E-7) prior to their departure for Taiwan.

During the trip to Taiwan, Gilbert Huneault teamed up with a colleague and Robert Veilleux teamed up with another colleague. Both teams were to carry out similar work in Taiwan but at different companies. The grievors stated that the time allowed for investigations during trips was being reduced each year, which put a great deal of pressure on them.

Prior to their departure, the employees met with Mr. Mackay, their supervisor, to discuss the possibility of working overtime during the trip. According to them, the answer was: [Translation] "Keep track of your time and when you get back, I will see what I can do".

Each of the grievors handed in a claim for overtime (Exhibits E-9 and E-13) showing the overtime that they worked during the Taiwan trip. These hours were worked in three ways:

- (a) hours contiguous to their normal work hours, that is, after 4:00 p.m.;
- (b) travel time between the company visited and the hotel at the end of the day; and
- (c) hours worked in their hotel room in the evening and on weekends.

After receiving the employees' overtime claims, Mr. Mackay sent them to the Director, Mr. Desormeaux, who is the only one authorized to approve overtime.

At a meeting between the grievors and Mr. Desormeaux, the latter refused payment of the overtime; he confirmed his decision in writing on June 15, 1998 (Exhibit E-11).

Both grievors admitted that they were familiar with the collective agreement and the Department's overtime policy. They also admitted that they did not think to ask for an extension of the trip given the volume of work or to ask for an authorization to work overtime by telephone or fax.

Prior to their departure, the grievors had accepted the schedule of events knowing full well that there was no allocation for overtime included in the defined costs.

Mr. Desormeaux testified that, schedules of events have been drawn up since 1993 so that there is no overtime because the Department has been reducing overtime budgets to the point where, for 1998-1999, no funds were available at all (Exhibit C-3).

Mr. Mackay testified that he never said [Translation] "keep track of their time and when they return, we will see". Moreover, Mr. Mackay stated that he did not have the authority to approve overtime and that the grievors knew it. Further, he indicated that the grievors could have contacted the Ottawa office at any time to obtain the necessary authorization. The other two employees working with the grievors did not claim for overtime.

Argument on Behalf of the Grievors

The argument of the grievors' representative can be summarized as follows:

- (a) The grievances challenge the refusal to compensate for overtime worked by the grievors when they travelled to Taiwan between April 13 and May 9, 1998 (Mr. Huneault - 36 hours; Mr. Veilleux - 50 hours);
- (b) Exhibit E-7 (overtime policy) does not mention the obligation to obtain prior authorization;
- (c) Clause 9.01 of the collective agreement stipulates that overtime will be paid "when an employee is required by the Employer" to work overtime and, in this instance, the grievors were required to work overtime to complete their investigation within the time allotted;
- (d) Over time, the Department has reduced the time allowed for investigations, which forces employees to work overtime;
- (e) Many unforeseen circumstances arise during an investigation which require adjusting to the original schedule and, because of their extensive experience in this field, the grievors were able to adapt to the circumstances;
- (f) The comments of the grievors' supervisor, Mr. Mackay ([Translation] "keep track of your hours and we will discuss it when you get back"), should be considered as an explicit authorization to work overtime;

- (g) Mr. Mackay never told the grievors prior to their departure not to work overtime;
- (h) The hours worked by the grievors during their trip to Taiwan are not in dispute;
- (i) The amount of overtime claimed by the grievors is not contested;

The grievors' representative referred me to the following cases: *David* (Board files 166-2-17250 to 17257) and *Suchma* (Board file 166-2-19518).

Argument on Behalf of the Employer

The argument of the employer's representative can be summarized as follows:

- (a) Two questions are at issue:
 - (1) were the grievors authorized to work overtime?
 - (2) were the grievors "required by the Employer to work overtime" as stipulated in clause 9.01 of the collective agreement?
- (b) The grievors were evasive in their testimony and their credibility suffered;
- (c) Mr. Mackay testified that he never told the grievors [Translation] "to keep track of their time and when they returned, we will see";
- (d) Both of the grievors were very familiar with the collective agreement, the overtime budgets and the related policy;
- (e) They never considered it necessary to provide explanations in support of their overtime claims, even though management asked for such explanations on several occasions;
- (f) Management reaffirmed its overtime policy annually and the grievors were well aware of that policy;
- (g) The control of expenses related to overtime is the employer's exclusive prerogative;
- (h) "Is required by" means being obliged to do something;

-
- (i) The grievors did not make any request to the employer to extend the trip or to obtain approval for overtime;
 - (j) The burden of proof rested on the grievors and they failed to discharge it.

The employer's representative referred to the following cases: *Weber v. Canada* (Department of Supply and Services), [1991] F.C.J. No. 1274 (Q.L.); *Ducharme* (Board file 166-2-17419); *Boulianne* (Board file 166-2-15021); *Lancashire* (Board file 166-2-14848); and *Côté* (Board file 166-2-18529).

Reasons for Decision

In the cases at hand, the burden of proof rested on the grievors and it is my opinion that they failed to discharge that burden. Indeed, the testimony of the two grievors was often evasive and vague:

In the instant cases, I must determine two questions:

- (a) was the overtime worked at the employer's request?
- (b) was the overtime pre-approved by the employer?

The testimony of both witnesses was quite clear and supported a negative response to both these questions. Further, the two grievors, who are very experienced, admitted that they were well aware of the requirements of the collective agreement and of the overtime policy. The grievors not only worked these hours without their employer requiring them to do so, but they failed to obtain prior approval from the employer, either by telephone or by fax.

Therefore, I find that the grievors did in fact work the overtime that they claim to have worked and that the employer does not challenge that claim. However, the evidence does not show that the employer required the grievors to work the overtime and then refused to pay them for it. Further, I was not convinced that the comments made by Mr. Mackay prior to the grievors' departure amounted to explicit authorization to work overtime.

Accordingly, the grievances are dismissed.

**Jean Charles Cloutier
Board Member**

OTTAWA, September 24, 1999

Certified true translation

Serge Lareau