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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

LUC-ANDRÉ VINCENT

Grievor

and

TREASURY BOARD
(Canadian Heritage)

Employer

Before: Jean Charles Cloutier, Board Member

For the Grievor: Jock Hazeldean, Professional Institute of the Public
Service of Canada

For the Employer: Renée Roy, Counsel



Heard at Ottawa, Ontario,
October 25 and 26, 2001.



DECISION

[1] On August 14, 2000, Luc-André Vincent, a CO-2 at Heritage Canada, filed a grievance in which he requested payment of overtime that had been denied. That grievance reads as follows:

[TRANSLATION]

Failure to sign or acknowledge overtime hours in accordance with the collective agreement, for the months of June and July, 2000.

[2] Mr. Vincent requested the following corrective action:

[TRANSLATION]

Acknowledgement and signature of the forms in accordance with the collective agreement.

[3] The first level reply dated October 16, 2000 from Bruce Stockfish, A/Director, General, Copyright Policy, reads as follows:

[TRANSLATION]

I am writing in response to your grievance dated August 14, 2000, requesting that 74 overtime hours at time-and-a-half and 50 overtime hours at double time be acknowledged in accordance with the collective agreement, for the period from June 24 through July 16, 2000.

On May 3, 2000, you were asked to prepare a document for the Canada Council, which was an integral part of your duties. You were given very specific instructions accompanied by deadlines: to submit a table of contents during the week of May 8, 2000 and a draft in June. As you know, you submitted a plan outline on May 26, 2000, and the draft was not completed by the deadline. At no time did you inform me that there were difficulties in delivering the document on time, that the required document was generating so many hours of work, or that your workload did not allow you to work on this document during normal working hours. I therefore consider the requested number of overtime hours unacceptable.

Although Branch practice allows for some flexibility concerning overtime, you should have discussed this matter with your supervisor previously, when you realized that the document required so many overtime hours. As well, during a discussion of this matter, you requested a few days' compensatory leave. I offered you two days' compensatory leave, which you refused.

For these reasons, I allow your grievance in part and grant you two days' compensatory leave.

[4] The second level reply dated November 21, 2000 from Michael Wernick, Assistant Deputy Minister, Cultural Development, reads as follows:

[TRANSLATION]

I am writing in response to your grievance at the second level dated October 20, 2000, requesting compensatory leave for the period from June 24 through July 16, 2000.

I have carefully reviewed the documents submitted by you, and considered the arguments made by you and your union representative at the November 3, 2000 consultation meeting.

A significant point is the fact that the document required for the Canada Council was an integral part of your duties. On May 3, 2000, you were given this project, with instructions including a June deadline for the draft. Nothing in the information indicates that the instructions were not specific enough. You submitted the draft to Mr. Don Stephenson on July 21, 2000.

I consider that your workload during that period allowed you ample time to work on this project; as well, you worked several days from your home.

In addition, you asked us to acknowledge that you worked 124 overtime hours, without having discussed this matter previously with your supervisor or the project manager, except for the weekend of July 8 and 9, 2000.

I therefore allow your grievance in part and grant you the overtime hours worked on July 8 and 9, 2000.

[5] The third and final level reply dated January 26, 2001 from Yazmine Laroche, Assistant Deputy Minister, Portfolio and Corporate Affairs, reads as follows:

[TRANSLATION]

I am writing in response to your grievance at the third level dated November 21, 2000, requesting compensatory leave for the period from June 24 through July 16, 2000.

I have carefully reviewed the documents submitted by you, and considered the arguments made by you at the January 5, 2001 consultation meeting. I have also requested additional information in order to clarify the situation.

Following a survey among federal public servants, Mr. Don Stephenson, Director General, Cultural Industries, established very specific directives on overtime, and I quote: "...all overtime hours claimed must be budgeted for and approved in advance by managers..." These directives were sent by e-mail to all Branch employees on March 13, 2000.

The facts submitted in this grievance do not show that you requested authorization to work overtime or discussed this matter previously with your immediate supervisor or the Director General. It is of the utmost importance that all extraordinary situations be pointed out to management. Employees are each responsible for protecting themselves by following the guidelines made available to them, in order to ensure that management is adequately informed of these situations.

My decision, then, is based on the directives on overtime established by Mr. Stephenson and on your July 7, 2000 e-mail message to him indicating that you would work the weekend of July 8 and 9. I therefore allow your grievance in part and uphold the decision given to you at the second level.

[6] The employer's counsel called two witnesses, Don Stephenson, the then Director General, Cultural Industries Branch, and Bruce Stockfish, the then Director General, Copyright Policy, and filed 10 exhibits.

[7] The grievor's representative called two witnesses, the grievor, Luc-André Vincent, and Marie-Claude Girard, then a colleague/co-worker of the grievor, and filed 35 exhibits.

[8] The grievor had a dental appointment at 3:00 p.m. on the first day of the hearing. He requested permission to leave but stated that the hearing could continue without his presence while the employer's witness (Mr. Stephenson) would testify. All present agreed and the grievor's representative remained present during the examination-in-chief, cross-examination and re-examination of this witness.

Summary of Background

[9] On March 14, 2000, Messrs. Stephenson and Stockfish discussed the active participation of their Branch in a conference of the Canada Council of the Arts to be held in early December 2000.

[10] The grievor was asked to prepare an outline to be used in writing a paper for the conference. A work plan was produced by the grievor to Mr. Stephenson in late May 2000. This document seemed satisfactory and the grievor was given instructions to prepare a first draft as soon as possible but emphasis was put on the fact that this was to be his priority.

[11] On June 22, 2000, nothing had been produced by the grievor; he was then asked to accelerate the pace and it was reinforced that this paper was to be kept simple because many persons to whom it would be given at the conference were lay persons in this matter.

[12] The grievor felt that management was putting pressure on him at this time. Nevertheless, he insisted on being the Acting Director during Mr. Stockfish's absence from June 27 to 30, 2000, knowing that this would leave him less time to work on the paper.

[13] The grievor testified that he did not request at any time authorization to work overtime nor was he specifically told that this work could be completed by working overtime hours. Both Mr. Stephenson and Mr. Stockfish also testified to the same effect. The two managers repeated on various occasions to the grievor that this paper was to be kept simple so that the readers (lay persons) could easily understand it.

[14] Mr. Stephenson testified that once the first draft was handed to him, it was obvious that this was not the kind of paper he had asked for nor would it be useful to the audience to whom it was intended.

[15] Mr. Vincent again felt pressured and, on July 7, 2000, he sent an e-mail to Mr. Stephenson stating that he would work that weekend, July 8 and 9, to allow him to produce the paper on the following Monday.

[16] The grievor did accept to go to Miami on departmental business during the month of June and further requested and was granted several days of leave during the months of June and July 2000, which gave him less time to work on the urgent project during regular working hours.

[17] The grievor acknowledged receiving an overtime policy dated March 13, 2000 sent by Mr. Stephenson (Exhibit G-10) which states:

Overtime

Staff have expressed concern that the policy on the payment of overtime is not clear and has been applied unevenly within the branch. Some believe that the "culture" of the branch discourages overtime claims, at least in some job categories, and that the real opportunity to take time in lieu of overtime pay is limited.

Collective agreements provide for authorized overtime to be paid or taken as time in lieu, and the Cultural Industries Branch respects this obligation. All staff, except those in the EX category, are encouraged to claim for overtime worked. At the same time, we are obliged to manage our resources. Therefore, all overtime claimed must be budgeted and approved in advance by managers, submitted at least monthly by staff (using the appropriate claim form) and accounted for as a separate expenditure category by each work unit. At the request of staff and at the discretion of the manager, time in lieu can be used, but should be taken within a reasonable period of time and not accumulated.

I would note that elsewhere in the department the comment was made that overtime should also be agreed to by the employee in advance and not imposed without notice. This is a valid point, and I would not dispute that managers should endeavour to plan ahead. I would, however, like to ask you to forgive us in advance for the moments when the "in-basket" overwhelms us.

[18] The grievor produced two "Extra Duty Pay/Shift Work Report and Authorization" sheets (Exhibit G-6), both dated July 24, 2000, which requested 74 hours at the rate of time and one-half (1 1/2) and 50 hours at double (2) time for the period between June 24 and July 16, 2000, inclusive. This overtime was denied and, as a result, became the subject of the present grievance.

[19] Mr. Stockfish testified that for "small" overtime work, such as one or two hours, it was the practice that the employees receive compensatory time off after discussing it with him. Never to his knowledge has there been such a large amount of overtime requested by an employee on one occasion.

[20] Mr. Stockfish testified that the grievor protested "vigorously and in an aggressive way" to have his turn acting while Mr. Stockfish was away, knowing that this was during the period in which the high priority project was to be completed.

[21] Messrs. Stephenson and Stockfish decided that the first draft presented by the grievor was too academic. They decided to give the task to Legal Services. This was done on a Friday and on the following Monday, a first draft was presented with the final paper approved before the end of that week.

Summary of the Grievor's Arguments

[22] There is no question that the grievor was under pressure and that his workload was such that he could not meet the deadline without working overtime hours.

[23] In the normal scheme of things, the collective agreement would apply but this is an exception to the rule.

[24] Management knew the grievor's workload at the time; it also recognized the grievor's expertise in the matter. Therefore, by not reducing his workload, it tacitly agreed to his overtime work.

[25] The grievor worked hard and many hours to complete the paper and just because the final product was not accepted by management does not mean that he should not be paid for the hours worked outside his regular hours.

[26] The grievor should get paid for all the hours he has submitted on the two claims for June and July 2000 (Exhibit G-6).

Summary of the Employer's Arguments

[27] Clause 9.01 of the collective agreement between the Treasury Board and the Professional Institute of the Public Service of Canada for the Audit, Commerce and Purchasing Group (Codes: 204/1999; 309/1999; 311/1999; Expiry date: June 21, 2000) stipulates:

**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 work day, 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 hours worked.

[28] Counsel for the employer referred me to the *Veilleux and Huneault* decision (Board files 166-2-28849 and 28850), specifically to the following paragraphs:

...

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.

...

[29] The grievor has the onus of proof and he has not discharged it.

[30] The grievor never addressed his excessive workload with his supervisor. The employer continues to concede the days of overtime as stated in the second and third level replies to the grievance.

[31] Mr. Stockfish clearly stated that the grievor was aggressive in seeking the acting appointment and that he also took days of leave in mid-June prior to working all this alleged overtime.

[32] I was also referred to the decision in Côté (Board file 166-2-18529) (page 1):

The grievor, J.-F. Côté, is a project officer, PM-02, employed by Employment and Immigration Canada in New Richmond. His grievance contests his employer's refusal to pay him for three and a half hours of overtime worked on December 3, 1987. In its reply at the final level of the grievance procedure, the employer states that it refused to pay the overtime claimed because Mr. Côté was not required by his supervisor to do the work in question and because there was no prior authorization.

...

[33] In March 2000, a new policy on overtime (Exhibit G-10) was distributed to all employees in the Branch stating the requirements to obtain authorization prior to working overtime.

[34] The grievor must overcome two barriers:

- (1) work requirement - collective agreement
- (2) pre-authorization - new policy

Reasons for Decision

[35] In this case, I must determine two questions:

- (1) Was the overtime worked at the employer's request?
- (2) Was the overtime pre-approved by the employer?

[36] The burden of proof rested with the grievor and it is my opinion that he failed to discharge that burden.

[37] I find it strange that management would approve the grievor acting in the Director's position, even for a short period of time, during a period when he was under time limits to submit his report. I also find it strange that management would grant the grievor annual leave during that period. However, the grievor acknowledged he understood the requirements of the collective agreement as well as the overtime policy (Exhibit G-10) dated March 13, 2000.

[38] The evidence from all witnesses does not show that the employer, either implicitly or impliedly, required the grievor to work the overtime in question or, with the exception of July 8 and 9, that any overtime was approved by the grievor's supervisor. Indeed, the evidence of the grievor was often evasive and vague and I am not convinced that he accepted the fact that a priority task could require explicit authorization to work overtime.

[39] Counsel for the employer stated in her arguments that the two days of overtime granted for July 8 and 9, 2000 in the second and third level replies will be paid.

[40] Accordingly, that part of the grievance is upheld and the grievance for the remaining overtime claimed is dismissed.

**Jean Charles Cloutier,
Board Member**

OTTAWA, November 16, 2001.

