Date: 20031023

File: 166-2-31947

Citation: 2003 PSSRB 96

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

DANIEL HELM

Grievor

and

TREASURY BOARD
(Health Canada)

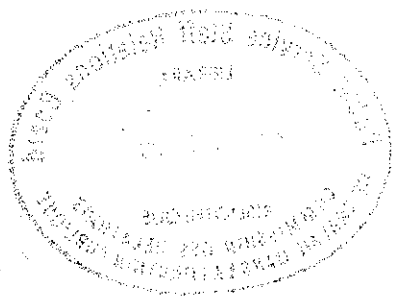
Employer

Before: Joseph W. Potter, Vice-Chairperson

For the Grievor: James Bart, The Professional Institute of the Public Service of Canada

For the Employer: Neil McGraw, Counsel

Heard at Edmonton, Alberta,
October 9, 2003.



[1] On November 13, 2002, Daniel Helm, a community health nurse level 3, filed a grievance requesting call-back pay for four days in June 2002, pursuant to clause 10.01 of the Health Services Group collective agreement (Exhibit G-1, expiry date: September 30, 2003).

[2] The employer replied to the grievance stating Mr. Helm was not entitled to call-back, but rather he was entitled to overtime for the dates in question.

[3] I heard from one witness. The grievor filed three exhibits and the employer filed five exhibits. The facts were not in dispute and can be summarized below.

Background

[4] Saturday, June 8, 2002, was a scheduled day of rest for Mr. Helm. However, he was required to go in to work to administer tuberculosis treatment to a client of his. This same requirement existed on Sunday, June 9, 2002, as well as Saturday and Sunday of the following week. Mr. Helm went in to work each of these four days.

[5] The treatment for someone with tuberculosis is daily for the first two months, and Mr. Helm was responsible for administering the treatment during the patient's last two weekends of the two-month period.

[6] The requirement to go in to work was known to Mr. Helm some six weeks in advance, and he was not on stand-by during these weekend periods.

[7] No one called Mr. Helm to go in to work on the days in question, and Mr. Helm could have had someone else fill in for him if he so desired.

Argument for the Grievor

[8] The grievor's representative submitted a written argument which he had prepared in advance of the hearing. The full version is on file with the Board, and it is summarized below.

[9] The grievor's normal work week is Monday to Friday, and he returned to work on Saturday, June 8, Sunday, June 9, Saturday, June 15, and Sunday, June 16, 2002.

[10] The grievor knew well in advance that he would be required to do this work outside his normal working hours.

[11] The work took about 15 minutes to complete on each occasion and travelling time consumed about 15 minutes in each direction.

[12] For each of his claims, the grievor is claiming three hours' pay at the applicable overtime rate. The grievor maintains that each of the four occasions in question constituted a call-back to which the payment specified in clause 10.01 is applicable.

[13] Clause 10.01 of the applicable collective agreement reads as follows:

> ***10.01*** *When an employee is called back to work or when an employee who is on stand-by duty is called back to work by the Employer any time outside his normal working hours the employee shall be entitled to the greater of:*
>
> *(a)* *a minimum of three (3) hours' pay at the applicable overtime,* [sic]
>
> *or*
>
> *(b)* *compensation at the applicable overtime rate for each hour worked.*

[14] The employer's position that overtime applies would be supportable only if additional language were to be incorporated into the collective agreement. The adjudicator is bound by subsection 96(2) of the *Public Service Staff Relations Act* and cannot amend the collective agreement.

[15] In order for an employee to be entitled to the guaranteed minimum, two fundamental conditions must be met:

> A) employees must be called to return to work;
>
> and
>
> B) They must be called to return to work at "an irregular time" or "outside their regular hours".

[16] The language of clause 10.01 is clear and unambiguous. The grievor was called back to work and he returned to work outside his normal hours. Therefore, the provisions of clause 10.01 apply to him.

[17] The grievor's representative submitted the following jurisprudence:

Canadian Labour Arbitration (Third Edition) Brown and Beatty, 4:2100;

United Electrical, Radio & Machine Workers of America, Local 510 in Re Phillips Electrical Works Limited (Brockville) (1952), 4 L.A.C. 1281;

Re Service Employees International Union, Loc. 268 and United Steel Workers of America, Local 5481 (1994), 43 L.A.C. (4th) 76;

Re Burns Foods Ltd. and Canadian Food and Allied Workers, Local P-234 (1973), 4 L.A.C. (2d) 4;

International Molders & Allied Workers Union, Local 49, and Webster Manufacturing (London) Ltd. (1971), 23 L.A.C. 37;

Attorney General of Canada v. R.S. Tucket [1979] 1 F.C. 543;

Dicaire and Treasury Board (Revenue Canada, Customs and Excise) (Board file 166-2-13682);

Jashewski and Treasury Board (Transport Canada) (Board file 166-2-13868);

Brouillette and Treasury Board (Veterans Affairs) (Board files 166-2-21051 to 21067).

Argument of the Employer

[18] The facts of this case are not in dispute and, although there is no definition of call-back in the collective agreement, it is clear from the collective agreement that this provision does not apply.

[19] There was never a call made to Mr. Helm telling him to go in to work. In fact, the requirement was known long in advance.

[20] In *Brouillette* (*supra*), the evidence indicated that the employees were called in to work. That is what the case law says a call-back or a call in is.

[21] The following jurisprudence was submitted by counsel for the employer: *Bourbonnais v. Canada (Public Service Staff Relations Board) (F.C.A.)* [1984] F.C.J. No. 1118; *Carruthers and Treasury Board (Transport Canada)* (Board files 166-2-14332

to 14334 and 14314); *Pellicore v. Treasury Board (Citizenship and Immigration Canada)* (Board file 166-2-30787).

Reply

[22] There doesn't have to be an actual call to invoke the call-back provisions. In *Canada (Attorney General) v. Redden* [1990] F.C.J. No. 950, Mr. Redden, while on standby, received a number of calls requiring him to work. On two of those occasions he actually had to go in to the office to work, while on all other occasions, he performed work at his home.

[23] Mr. Redden's collective agreement read:

> *M-30.04 An employee on standby, who is required to report for work shall be paid, in addition to the standby pay, the greater of:*
>
> *(a) the applicable overtime rate for the time worked, or*
>
> *(b) the minimum of four (4) hours' pay at the hourly rate of pay, except that the minimum shall apply only the first time that an employee is required to report for work during a period of standby of eight (8) hours.*

[24] The Federal Court of Appeal said Mr. Redden did not have to physically go in to work to receive the benefits of the above-cited clause. Rather, even though he worked from home, he was still entitled to the provisions of clause M-30.04.

[25] Similarly, for Mr. Helm, there does not need to be an actual call made to him telling him to go in to work. He had to go in and he did so. The provisions of clause 10.01 should apply.

Decision

[26] The facts are not in dispute here. Mr. Helm knew about six weeks ahead of time that he would have to work on Saturday, June 8, Sunday, June 9, Saturday, June 15 and Sunday, June 16. All of these days were, for Mr. Helm, days of rest. The grievor has admitted that he was not called by anyone to go in to work.

[27] Mr. Helm claimed a minimum of three hours' pay for each occasion, that being the provision of clause 10.01(a). The employer altered the claim to that of overtime for the actual time worked.

[28] The question to be answered here is, does the provision of clause 10.01 apply in these specific circumstances?

[29] It is trite law to state that adjudicators are bound by the specific provisions of the collective agreement. In the instant case, the grievor would be entitled to the minimum three hours' pay if he was called back to work. The grievor himself stated he was not called and told to go in. In fact, the work requirements were known to Mr. Helm some six weeks in advance.

[30] The grievor's representative states that an actual call is not necessary in order to entitle the grievor to the benefits of clause 10.01. He cites *Redden* (*supra*) in support of this proposition. As I understand the Federal Court of Appeal's decision in *Redden* (*supra*), it stated Mr. Redden was entitled to the collective agreement provisions because a) he was called and b) he had to work. Whether he went in to work or not was not determinative of the issue; however, two elements were present which entitled Mr. Redden to be eligible for the benefits of clause M-30.04 (which is akin to the call-back provisions). Firstly, he was called by the employer, and secondly he had to work (albeit he was able to do the work from home).

[31] For Mr. Helm, the first criterion has not been met. He was not called. There is no dispute on this issue. In my view, in order for the call-back provision to apply, a call has to be made. The collective agreement is quite clear on this issue. It states "when an employee is called back to work ..." There was no call made to Mr. Helm telling him to go to work. This is not to state that a "call" has to be a "phone call". There could be circumstances where an employee is sent an e-mail, for example, and "called" back to work. However, in this case, the grievor testified there was no "call". Also, the fact that the requirement to work was known well in advance (in this case in excess of six weeks), in my view buttresses the fact this is not a call back. Clause 9.03 of the collective agreement reads:

> *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.*

[32] The scheme of the collective agreement is such that, generally speaking, notice cannot be given in a call-back situation but it can for overtime. Since there was some six weeks' notice, it removes it from the application of the call-back situation.

[33] For these reasons, the grievance is denied.

Joseph W. Potter,
Vice-Chairperson

OTTAWA, October 23, 2003.