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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

GORDON HOLMES

Grievor

and

TREASURY BOARD
(Department of the Environment)

Employer

Indexed as
Holmes v. Treasury Board (Department of the Environment)

In the matter of an individual grievance referred to adjudication

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Mariah Griffin-Angus, Public Service Alliance of Canada

For the Employer: Adam C. Feldman, counsel

Decided on the basis of written submissions,
filed July 22, August 12, and September 2 and 16, 2020.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Gordon Holmes ("the grievor") was a supervisor with the National Hydrological Service/Water Survey of Canada, a branch of Environment Canada (EC). He was part of a bargaining unit represented by the Public Service Alliance of Canada, which had signed a collective agreement with the Treasury Board covering the Technical Services group. It expired on June 21, 2014 ("the collective agreement").

[2] On March 25, 2015, the grievor filed a grievance in which he claimed that he was entitled to call-back pay for February 19, 2015. On that day and after his regular shift, he was on standby as EC contact for the safety monitoring system of employees in the field. While on standby, he logged in to the system to verify that all employees were safely back from their fieldwork. The login confirmed it; thus, his standby ended. He claims that the login was call-back work; the employer disputes his interpretation of "call-back".

[3] On February 2, 2017, the grievance was referred to the Public Service Labour Relations and Employment Board, since renamed the Federal Public Sector Labour Relations and Employment Board ("the Board", see *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Act and to provide for certain other measures*, S.C. 2017, c. 9). The parties agreed to proceed by way of written submissions.

II. Summary of the evidence

[4] The parties filed with the Board the following joint statement of facts:

> *1. Gordon Holmes was a hydrometric supervisor at the National Hydrological Service/Water Survey of Canada branch of Environment Canada in Prince George, British Columbia.*
>
> *2. As a supervisor, he was the "EC Contact" person within the framework management instituted to assure safety of crews out in the field.*
>
> *3. SafetyLine was a computer application introduced as a way of monitoring crews in the field. With SafetyLine, crews would periodically check in and at the end of their shift to an automated system via telephone, satellite device, or computer to confirm they had safely completed their work. Check-ins from the crews*

occurred every four hours and start-times from the crews varied which meant the final check-in time from the last crew also varied.

4. Mr. Holmes, as the EC Contact, was the on-call contact. Should an employee not check- in within the prescribed timeframe, or require immediate assistance, the SafetyLine system would notify the EC Contact by phone and email. Upon acknowledgement of the notification from SafetyLine, the EC Contact would follow a series of emergency response procedures. There were no emergencies on the day in question.

5. EC contacts were put on stand-by and were instructed by management to have their cellphones on them and be near cellular/internet connection until the last crew checked in at the end of the day, which could take place outside regular hours. The EC contact was to check itineraries at the beginning of the day. Any change to the itinerary was supposed to be inputted into SafetyLine by the crew.

6. The Occupational Health and Safety Check-in Directive, issued in 2014, identifies an EC Contact as "[…] a departmental contact person(s) to be notified in the event of an emergency/failure to contact employee." It states that "EC Contacts ***must remain available for contact from employees, and be able and ready to assist,*** *until advised that an employee or field party has checked-in, or an itinerary has been closed. The EC Contact will be contacted early in the process when an overdue employee could not be reached in the prescribed timely manner as per the itinerary" (emphasis in original)*

7. The WSC Safety Check in Safe Work Procedure, issued June 5, 2014 and re-approved on October 28, 2014, were the protocols that were being used for SafetyLine at the WSC Water Survey of Canada (WSC). Employees were provided with Introduction to Safety Check In Directives Safe Work Procedures in use at Water Survey of Canada and Provider requirements and User Guidelines training. "Monitors can check the provider website anytime, as required. The Monitor is on call until the last employee checks in. The Monitors will receive and accept any provider notification – Unconfirmed Emergency or Panic Emergency". There was confusion in early phase of SafetyLine implementation regarding the definitions of 'monitor' and 'EC contact'. David Hutchinson, the grievor's former supervisor, sent an email to Gordon Holmes on December 22, 2014, entitled "RE: Safety Check-in Directive", where Mr. Hutchinson wrote: "For WSC field operations, the 'EC Contact' is defined as the on-call monitor…for WSC field operations, the 'Itinerary Monitor' is defined as SafetyLine".

8. The Itinerary Monitor (SafetyLine) was responsible for notifying EC Contacts: when a mission was safely completed; if a check-in time was missed; or a confirmed emergency. Once the Itinerary

> *Monitor accepts the provider's Unconfirmed Emergency notifications, the Itinerary Monitor must contact the EC Contact.*
>
> *9. Russ White, the Pacific & Yukon Region manager, wrote an email to the grievor on June 24, 2014, that "the act of verifying that no staff are actively monitored, which amounts to logging on to or refreshing the SL home page, will not be considered 'call back' and will not trigger 3 hours of OT". Staff are paid for stand-by when they act as designated monitor.*
>
> *10. On the day in question, February 19, 2015, Mr. Holmes worked his regular shift of between 7:30 – 16:30. He was on stand-by until 20:30. The final check in that evening occurred 1.5 hours after Mr. Holmes' finished his regular hours.*
>
> [Emphasis in the original]
>
> [*Sic* throughout]

[5] Both the grievance and the second-level response to it refer to the day in question as March 12, 2015; the third-level response refers to it as February 19, 2015. That difference is immaterial for the purposes of this decision. The subject matter of the grievance itself is clear.

[6] In addition to the joint statement of facts, the parties included a number of documents that show that with the implementation of a system called the "SafetyLine", the EC monitors' role was not entirely clear. In January 2014, the employer allowed a similar grievance from the grievor in the following terms:

> …
>
> *Although the Safe Work Procedure does not explicitly specify the need to do so, the actions you took by logging in to make sure that all employees were back supported the spirit of the procedure. The fact that you have done so does constitute a call-back and should be remunerated as such according to the collective agreement.*
>
> …

[7] However, the employer reviewed and clarified standby duties in an email from Russell White, Pacific Yukon Regional Manager, dated June 27, 2014, as follows:

> …
>
> · *When staff are the designated monitor they would receive stand by pay according to 30.01 of the CBA (0.5 hours pay for 4.0hrs stand-by).*
>
> · *When the monitor answers an unconfirmed emergency they will receive Call back pay according to 29.01 (3 hours OT)*

> · *The Safety Check-in SWP requires that a monitor is on stand-by as long as staff are in the field. While monitors can check the latest check in time from the itineraries during regular work hours they will need to verify that itineraries are closed before ending their monitoring shift. The act of verifying that no staff are actively monitored, which amounts to logging on to or refreshing the SL home page, will not be considered "call-back" and will not trigger 3 hours of OT.*
>
> …

[8] As stated in the joint statement of facts, the EC contact's responsibility during standby, according to EC's "Safety Check-in Directive", was to remain available and ready to assist.

[9] In explaining his grievance in an email dated April 15, 2015, to Josée St-Arnaud, a labour relations advisor with the employer, the grievor wrote the following to detail his actions while on standby (the numbering in the quote starts at 8 because actions 1 to 7 are during regular working hours):

> …
>
> *8) In the evening numerous checks of the Safety Line web site to verify when all crews have ended their monitoring for that day. I have to log into the SafetyLine Web site on computer or Blackberry to determine when the web site shows "0 actively monitored".*
>
> *9) Log the final check in time, once all staff have completed their day. Verify if any check-ins were missed and if they were resolved, check for any changes to the following days itinerary in accordance with the EC Safety Check In directive (Dec 19, 2014).*
>
> *10) Keep a record for the week to report on the duties/event for the week as per regional protocol as a performance indicator.*
>
> *11) After determining that no check ins were missed and that all staff had completed their work days and had ended monitoring and that no additional follow up with the employees or the managers was required turned off the cell phone for the evening.*
>
> *The duties as the monitor of employees is more than waiting for the phone to ring, the reason for verification of "0 monitored" is to insure that all staff are accounted for and no one remains in*

> *active field status. These duties require the monitor to log into the web site and perform the listed duties at days end and to report on any deviations to the protocol laid out in the EC directive.…*
>
> …
>
> [*Sic* throughout]

III. Summary of the arguments

A. For the grievor

[10] The grievor argues that "standby" means being ready to work if called upon. Call-back pay is meant to cover the work done. In this case, the act of logging in was work done to ensure the safety of the employees in the field.

[11] I quote directly from the grievor's submissions. He wrote the following at paragraphs 25 and 26:

> *25. In order for Mr. Holmes to finish his shift, he had to verify that all employees had checked in and that there had been no modifications to the itineraries. If an itinerary had been modified to end later, Mr. Holmes would not have known unless he logged in to double check. He was required to log in, as stated by the Pacific Yukon regional manager, Russ White, in an email. [Exhibit 8]*
>
> *26. This is call-back because he is [sic] literally had to* report *back to work to verify that a) the crews had checked in safely and b) that he no longer needed to be on standby.*

[12] The grievor's main argument is that to ensure that all the employees had safely returned, it was necessary to log in. This constituted work. It had been recognized in his first grievance but was denied in this one. Mr. White's June 27, 2014, email, which indicated that the final call-in to ensure that all employees had returned from the field was not call-back work, showed that actual work had to be done to verify the employees' statuses at the end of their work day.

[13] The grievor summarized his grievance as follows at paragraph 55 of his submissions: "It is also disingenuous to argue that logging on does not constitute call back. Logging on requires a different action from the employee who was previously on standby. Standby is passive, that a person just has to wait. Logging on is active, a form of work."

[14] The grievor also argued that returning to the workplace was not a factor in determining whether a call-back occurred.

B. For the employer

[15] The employer distinguished between two collective agreement clauses, clause 28.11, which allows an employee on standby to work from home when called back to work, and clause 29.01, the call-back provision. Each provided for a different rate of pay if the employee was called upon to perform duties while on standby. Clearly, clause 29.01 did not apply, as the grievor did not return to work.

[16] The grievor had to check the website to end his monitoring or standby status. That was not the employer requesting him to perform duties.

[17] The employer admitted that the roles and responsibilities might have been somewhat confused on the implementation of the SafetyLine, which explained why the first grievance had been allowed. However, by February 2015, the EC contact's role had been clarified, and it was clear that ending one's standby by checking that all employees had returned would not constitute a call-back.

[18] The employer's view is that the grievor was on standby from 4:30 to 8:30 p.m. His standby duty would end either at the end of that four-hour period or when it could be verified that all employees had safely returned. By calling in at 5:48 p.m., as he did, he ended his standby duty, while still receiving the full standby pay. Call-back pay is meant to compensate for a disruption to the employee's time off; there was no disruption in this case, only the early ending of the grievor's standby shift.

C. The grievor's reply

[19] The grievor insisted that he was entitled to call-back pay under clause 30.04 of the collective agreement, which provides that an employee required to report to work while on standby is entitled to call-back bay, according to clause 29.01.

IV. Analysis

[20] The parties submitted jurisprudence to support their respective positions.

[21] In *Borgedahl v. Treasury Board (Correctional Service of Canada)*, 2020 FPSLREB 34, the issue was whether taking two brief calls at home constituted a "return to work" as provided in the call-back provision in that case. The adjudicator found that it would

be necessary for the employee to return to the workplace for the call-back provision to apply.

[22] In the collective agreement that applies in this case, clause 28.11 specifically provides for the situation of an employee on standby who receives a call to work but can carry out his or her duties from home. Therefore, the reasoning in *Borgedahl* is of limited use.

[23] In *Canada (Attorney General) v. Redden*, [1990] F.C.J. No. 950 (C.A.)(QL), the Federal Court of Appeal allowed the judicial review of a decision in which an adjudicator found that being on standby was in reality overtime. The Federal Court of Appeal ruled that that was an error. Overtime would occur only if the employee answered a call; otherwise, he was not working overtime but was on standby, and he was properly compensated at the standby rate.

[24] In *Canada (Treasury Board - Transport Canada) v. Heath*, PSSRB File No. 166-02-25457 (19941124), [1994] C.P.S.S.R.B. No. 142 (QL), the employee had received an emergency call at home on a day of rest. He made several calls following the initial call. The adjudicator found that he had returned to work, and although physically, he had remained at home, he was entitled to call-back pay. The reasoning in *Séguin v. Canada (Treasury Board)*, PSSRB File No. 166-02-23982 (19940408), [1994] C.P.S.S.R.B. No. 53 (QL), was similar in that the employee was entitled to call-back pay when she was called back to her duties, whether she was at home or in the workplace.

[25] The facts in this case are simple. The grievor was on standby as the EC contact for four hours, but the standby could end earlier if all the itineraries were closed and all the workers had safely returned from their fieldwork. The EC contact had to log on to the system to ensure that that was the case. The grievor argues that the very fact of logging on is work and that it constitutes a call-back. According to him, the meaning of "standby" is waiting to be called. If one calls or logs in, even only to verify that standby can end because all the workers have safely returned, it becomes a call-back, with the attendant call-back pay.

[26] The following provisions of the collective agreement apply when an employee on standby is called back to work:

> ***28.11*** *An employee who* ***receives a call to duty or responds to a telephone or data line call while on standby*** *or at any other time outside of his or her scheduled hours of work, may at the discretion of the Employer work at the employee's residence or at another place to which the Employer agrees. In such instances, the employee shall be paid the greater of:*
>
> (a) compensation at the applicable overtime rate for any time worked,
>
> *or*
>
> (b) compensation equivalent to one (1) hour's pay at the straight-time rate, which shall apply only the first time an employee performs work during an eight (8) hour period, starting when the employee first commences the work.
>
> …
>
> ***29.01*** *If an employee is called back to work:*
>
> …
>
> *(c) after the employee has completed his or her work for the day and has left his or her place of work, and returns to work, the employee should be paid the greater of:*
>
> (i) compensation equivalent to three (3) hours' pay at the applicable overtime rate of pay for each call-back to a maximum of eight (8) hours' compensation in an eight (8)-hour period. Such maximum shall include any reporting pay pursuant to clause 32.06 and the relevant reporting pay provisions,
> or
> (ii) compensation at the applicable rate of overtime compensation for time worked, provided that the period worked by the employee is not contiguous to the employee's normal hours of work.…
>
> …
>
> ***30.04*** *An employee on standby who is required to report for work shall be compensated in accordance with clause 29.01.*
>
> …
>
> [Emphasis added]

[27] The employer states that clause 28.11 would apply if indeed the grievor had been requested to perform additional tasks; he insists that he is entitled to call-back pay per clause 30.04. It is clear that he was on standby and that he was not called back to his place of work. In any event, neither clause 28.11 nor clause 29 applies to this case.

[28] One of the grievor's stronger arguments, in my mind, is the fact that in an earlier grievance, management sided with his interpretation and agreed to pay call-back pay when he logged in to check the status of the itineraries while on standby.

[29] There is no doubt that there was some confusion as to roles and responsibilities. Nevertheless, the facts remain simply that the grievor believes that logging in to check the status of the itineraries went beyond his standby status and counted as work. The employer agreed, in his first grievance. However, I believe that management could revisit that interpretation, and it did. In an email dated June 27, 2014, the employer clearly stated that the final check-in would not be considered a call-back. The grievor did not establish that this check-in went beyond being on standby. Clause 30.02 states that an employee on standby "…shall be available during his or her period of standby at a known telephone number and be available to return to work as quickly as possible if called." The collective agreement does not otherwise define "standby".

[30] As indicated in clauses 28.11 and 30.04, standby status changes when there is a request from the employer to report to duty or answer a call. However, I find that the grievor did not establish that either of those clauses was applicable in the circumstances of this case. "Call-back" means being "…called back to work" (clause 29.01 of the collective agreement). The grievor's login put an end to his standby duties; it certainly did not call him back to work. Again, the grievor was not required to report to work in accordance with clause 30.04. Otherwise, clause 28.11 applies when an employee on standby receives a call to duty or responds to a telephone or data line call. The grievor did not respond to a telephone or data line call. I cannot see a simple login, to end a standby shift, as being a call to duty. If one of the workers had not come back, if further intervention had been necessary, or if the grievor had had to make other calls to ensure the workers' safety, then likely, he would be entitled to additional remuneration (whether under clause 28.11 or 29.01, I do not need to decide). But again, I was not convinced that the requirement to login to end standby was a call to duty or a request to report to work from the employer.

[31] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[32] The grievance is dismissed.

December 4, 2020.

Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board