Date: 20080402

Docket: T-1244-07

Citation: 2008 FC 411

Ottawa, Ontario, the 2nd day of April 2008

Present: The Honourable Orville Frenette

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

YVES LAMOTHE, CLAUDE FAVREAU, KATIE BERNARD, SONJA LAURENDEAU, NORMAND BÉLAIR, PÂQUETTE DUFOUR, CARL GAGNON, KARINE NADEAU, JOCELYNE GAUTHIER, HÉLÈNE GAGNON

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 for judicial review of a decision of a grievance adjudicator, a member of the Public Service Labour Relations Board, dated June 7, 2007, in which she determined that the respondents were entitled to compensation for travel time when they attended training courses.

[2] The Attorney General submits that the adjudicator exceeded her jurisdiction by awarding a benefit that was not bargained in the collective agreement, and that was in fact clearly excluded by the parties when the collective agreement was negotiated.

I. Facts

[3] The respondents are all employees in the Veterinary Medicine Group bargaining unit and veterinarians at the VM-01 or VM-02 level whose positions are located within the Meat Hygiene Section or the Animal Health Section in the Quebec region.

[4] Each respondent was required to attend training sessions offered by their employer in the spring of 2004. Those sessions were held outside their normal employment area.

[5] The respondents applied for overtime for the time devoted to training in excess of their normal hours of work and for travel time between their residences and/or their accommodations and the training site.

[6] The respondents were compensated for time devoted to training in excess of their normal hours of work. Their travel expenses were also covered under the Treasury Board Secretariat of Canada's Travel Directive. However, the employer refused to cover travel time between their residences and/or their accommodations and the training site.

[7] On April 1, 2005, the respondents each filed a grievance with the Public Service Labour Relations Board.

II. Adjudicator's Decision

[8] The grievances were heard on January 30, 2007, and the adjudicator's decision was released on June 7, 2007.

[9] After reviewing the facts and arguments submitted by the parties, the adjudicator examined article B7.08 of the collective agreement. In her opinion, that provision was unequivocal; under that clause, an employee who travels to attend courses or training sessions is not entitled to compensation for travel time. However, she believed that the employer had created an exception to that rule when it required its employees to attend training.

[10] In support of that conclusion, the adjudicator noted that each grievance related to mandatory training. She said that even though the employer had made known its refusal to compensate employees for travel time, it had not offered them the choice of not attending training. The adjudicator further noted that the grievors had all been authorized to travel, their expenses were covered as a work situation, and the purpose of the training was to increase their professional skills in their field as veterinarians.

[11] The adjudicator stated that there were two consequences to the fact that the training was mandatory. First, the employer recognized that the training was tantamount to work for compensation purpose. Second, the employer accepted that employees should be compensated under the rules that apply to any other type of work-related travel.

[12] The adjudicator concluded that by agreeing to compensate employees for hours of training exceeding their regular work schedule, the employer recognized that training was akin to work. Accordingly, travel to attend training is one consequence of the employer's decision to have employees attend training. The adjudicator was therefore of the opinion that the employees were entitled to compensation for their travel under the same conditions as those that apply to their work.

[13] The adjudicator also considered other instances when the employer sent its employees on training, to show that compensating employees for travel time was not a practice completely divorced from normal procedures. For example, the adjudicator reviewed clause C19 of the collective agreement, which provided for overtime to be paid for time spent travelling to or from a conference where the employee has attended the conference to represent the interests of the employer.

[14] The adjudicator then found that the employees were also entitled to be compensated for time travelling between their accommodations and the training centre. On that point, she noted that the time employees spend travelling from their residences to their workplaces differs from the time they spend travelling to a training activity, because in the latter case they must comply with the time of

departure and travel time as set by the employer and are not free to decide how they will use their time. That was the adjudicator's conclusion in *Landry v. Library of Parliament*, [1993] P.S.S.R.B. No. 90, in which he held that travel time required to attend a course at the employer's request should be compensated, given that the employee is putting his or her personal time under the employer's control.

[15] The adjudicator concluded by rejecting the employees' argument that the doctrine of estoppel applied to the facts of the case. In her opinion, there was no evidence that the employees had agreed to attend training on the strength of claims made by the employer of its intent to compensate them for their travel time. Ambiguity respecting compensation for travel expenses incurred to attend mandatory training had been resolved by the new provisions of the collective agreement, and accordingly there was no longer any ambiguity.

[16] For those reasons, the grievances were allowed.

III. Issues

[17] The Attorney General stated the two following questions:

A. Did the grievance adjudicator err in fact and law when she found that the employer had created an exception to the clause in the collective agreement in the case of employees who are required to attend training?

B. Did the grievance adjudicator err in fact and law when she found that that employees' travel between their accommodations and the training centre must be compensated where the employer determines the mode of transport?

IV. Standard of Review

[18] The parties agreed that the applicable standard of review is patent unreasonableness. However, the recent decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, has abolished the patent unreasonableness standard and revised the manner in which the standard of review is determined.

[19] According to *Dunsmuir*, the standard of review is determined contextually and calls for consideration of the following factors: whether there is a privative clause; the reason for the existence of the administrative tribunal based on interpretation of its enabling statute, the nature of the question in issue and the expertise of the administrative tribunal.

[20] The grievances were all filed before April 1, 2005. Under section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, the new *Public Service Labour Relations Act*, 2003, c. 22, section 2 (the new Act) was proclaimed in force and replaced the former *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 (the former Act). Under section 61 of the *Public Service Modernization Act*, the grievances filed by the respondents were decided under the former Act.

[21] The former Act contained a privative clause, in subsection 96(3), but expressly excluded grievances such as these, which may be referred to adjudication under section 92 of the Act. Accordingly, in the circumstances of this case, no privative clause applies.

[22] It is settled law that the interpretation and application of a collective agreement, including referrals under the former Act in which infringement of the former Act is alleged, are within the Board's area of expertise: *Public Service Alliance of Canada v. Canada (Canada Food Inspection Agency)*, 2005 FCA 366; *Canada (Attorney General) v. Grover*, 2007 FC 28.

[23] The nature of the question in issue is strictly one of law. This Court must determine whether the adjudicator's decision created an exemption from the collective agreement or whether the adjudicator exceeded her jurisdiction by making a finding the effect of which was to amend the collective agreement.

[24] While I recognize the adjudicator's expertise, the fact that there is no privative clause and that the question is strictly a question of law suggest the need for less deference. Accordingly, it is my opinion that the applicable standard of review in this case is the correctness standard.

V. Analysis

[25] The Attorney General submits that the existence of a clear and unequivocal clause in the collective agreement prohibits compensation for travel time, whether training is akin to work or not. There is an important distinction between work and travel; because the respondents were not working when they were travelling, they were not entitled to compensation. The approach taken by the adjudicator disregards a clear clause in the collective agreement, and she therefore exceeded her jurisdiction by making a finding the effect of which was to amend the collective agreement, contrary to section 96 of the former Act.

[26] The Attorney General also notes that while the adjudicator had regard to the fact that the training was mandatory and their participation was in its interests, the collective agreement creates no exception that would have the effect of allowing compensation in those circumstances. On the contrary, the effect of the finding is to add conditions that amend the clause. It is generally accepted that the wording of agreements cannot be amended by interpretation; the collective agreement must be read as a single coherent unit.

[27] He adds that the adjudicator's analogy between article B7.08 and article C19.02 is wrong. That clause deals with travel time in the context of career development and specifically provides for compensation. There is no specific provision for compensation when the travel time is connected with training and the fact that there is no such provision indicates that the parties intended to rule it out.

[28] In reply, the respondents accept the clear wording of the clause in the collective agreement providing that no compensation shall be paid for the time an employee spends travelling to training courses. However, they suggest that the adjudicator acknowledged an ambiguity in the wording of that clause and this justified the use of various methods of interpretation in order to interpret that article.

[29] One of those methods of interpretation is to refer to past practice. That requires that the adjudicator be satisfied that there was a practice on the employer's part, that the practice interprets the clause in question and that the parties acquiesced in the practice and accordingly accepted that interpretation.

[30] The respondents submit that the adjudicator was satisfied that the three requirements were met in this case. The existence of a past practice was established by the evidence given by Michel Gingras, a negotiator for the Professional Institute of the Public Service. That evidence, which the employer did not attempt to contradict, showed that the employer would pay compensation for travel time when employees attended a training course at its request. In addition, that practice and

the interpretation of the collective agreement were accepted by the respondents' union. The analogy between clause B.7.08 and clause C19.02 was merely an example.

[31] For the two reasons that follow, I cannot accept the respondents' arguments. First, in my opinion, the adjudicator's decision is not based on the evidence of past practice. Even if I were wrong on that point, the evidence submitted by the respondents would hardly be satisfactory for establishing past practice.

[32] Clause B7.08 provides as follows:

> Compensation under this Article shall not be paid for travel time to courses, training sessions, conferences and seminars unless so provided for in the Article 18, Career Development.

[33] That clause is clear; an employee who travels for training will not be compensated for travel time "to … training sessions". I do not think the respondents are contesting that conclusion.

[34] However, the adjudicator found that the employer had created an exception where it required its employees to attend training. The respondents suggest that the adjudicator was making up for ambiguity in the collective agreement by looking to evidence of past practice.

[35] I do not share that opinion, since it is apparent on reading the adjudicator's complete decision that it is not based on an analysis of that nature. We should consider the two dispositive paragraphs of the adjudicator's decision:

> [36] In my opinion, there were two consequences to the employer's decision to have the employees attend training. The first was to recognize that such training was tantamount to work for compensation purposes; the second was to accept that employees should be compensated under the rules that apply to any other type of work-related travel. In this particular case, by accepting to compensate employees for hours of training exceeding their regular work schedule, the employer specifically recognized that training was akin to work. The employer is now being inconsistent in dissociating travel time from this observation by referring to other provisions of the collective agreement that prohibit the compensation of travel time required for attendance at training. Since training constitutes work, travel to and from the training site is one consequence of the employer's decision to have employees attend training. The grievors are therefore entitled to compensation for their travel under the same conditions as those that apply to government business.
>
> [Emphasis added.]

[36] This passage clearly shows that the adjudicator's decision is essentially based on the fact that the training was mandatory and that the employees were compensated for training time outside their normal work hours. Nowhere in the adjudicator's analysis does she base her decision on the evidence that travel time was compensated in the past.

[37] The adjudicator does note that in certain circumstances travel time for "an employee who attends a conference or convention at the request of the Employer to represent the interests of the Employer" may be compensated by the employer under article C19 of the collective agreement. However, where there is a clear clause prohibiting compensation for travel time, as in this case, I agree with the Attorney General that this analogy is not particularly useful.

[38] The adjudicator clearly made the decision she considered to be fairest to the parties. In so doing, however, she ignored the plain wording of the collective agreement and did not do an adequate analysis to establish the existence of a past practice.

[39] In any event, I am not satisfied that the evidence in the record would have been sufficient to establish such a practice.

VI. Past Practice and Estoppel

[40] The doctrine dealing with the issue of past practice that can contradict specific clauses of a collective agreement holds that certain stringent requirements must be met. The evidence must show a practice over several years, and must meet the following requirements:

(a) be repeated over several years;

(b) be accepted by all of the parties involved; and

(c) not be ambiguous or disputed.

[41] The legal literature tells us that the testimony of one witness is insufficient to meet those requirements (Brown and Beatty, article 3:4430, *Canadian Labour Arbitration*, vol. 1, Aurora, The Cartwright Group, 2007).

VII. Estoppel

[42] The doctrine of estoppel (*préclusion* or *fin de non recevoir*) comes to us from English common law; it is described as follows:

> The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance has been made by him…
>
> *Combe v. Combe*, [1951] 2 K.B. 215 (Denning L.J.)

[43] Evidence of past practice may be admitted to establish estoppel in the context of collective agreements governing labour relations (Brown and Beatty p.72).

[44] The doctrine has been applied in labour law to employees' compensation (see *Excel Forest Products Ltd. and I.W.A.-Canada, Loc. 2995 (Re)*, 100 L.A.C. (4th) 16, Ontario, J. Sarra, September 4, 2001).

[45] Accordingly, in order to establish past practice, the party alleging it must show its existence persuasively, that is, "one or two occurrences will not normally constitute a sufficient practice to be reliable". On the contrary; "when arbitrators have relied on a past practice, it typically will have been a uniform practice over a number of years": Brown and Beatty, article 3:4400.

[46] The only evidence submitted by the respondents on this point was the testimony of Mr. Gingras. We saw in the literature cited *supra* that the testimony of one witness on this point is insufficient.

[47] Mr. Gingras said that he received an email on December 23, 2003, in which the Human Resources Branch confirmed that "employees shall not be paid overtime nor be compensated for time spent travelling to courses or training sessions".

[48] On January 26, 2004, Mr. Gingras wrote to the staff relations manager and suggested that the employer's refusal showed that it was contradicting itself. As evidence of the contradiction, he included an email in which, he contended, the employer had agreed to pay overtime and travel time in relation to a mandatory course taken by another employee in February 2003.

[49] Before the adjudicator, Mr. Gingras explained that overtime and travel time had been paid to employees in the past. It is impossible to verify that assertion, because there is no record of Mr. Gingras' testimony before this Court. However, he repeated the statement in his affidavit, filed on September 14, 2007.

[50] Even if I were to accept Mr. Gingras' contentions, he offered only one example of a situation in which the employer apparently compensated an employee for travel time. In addition, the email does not state the position held by the employee in question; it is therefore impossible to

confirm whether the employee was covered by the same collective agreement as the respondents in this case.

[51] In the affidavit, Mr. Gingras seems to suggest that this was common practice on the employer's part. He gave no other examples of it, however.

[52] I acknowledge that the employer submitted no evidence on this point. However, the employer has no onus of replying to the respondents when they are unable to establish the existence of a common interpretation of the collective agreement. On that point, I would adopt the wise words written in *City of Trail and International Association of Fire Fighters, Local 941* (1983), 10 L.A.C. (3d) 251:

> [T]he past practices of the parties, no matter how clear and prolonged, can never provide a jurisdictional basis for arbitral amendment of the agreement. Beyond that, evidence of past practice, and other kinds of extrinsic evidence, should not be seized upon as an analytical "escape hatch". Whether or not there is a body of extrinsic evidence, the question is always the same: what was the common intention of the parties when they expressed their bargain in the way in which they did?

[53] Accordingly, I find the adjudicator's decision regarding the existence of an exception to article B7.08 to be incorrect. That finding is sufficient for the purposes of this application for judicial review. However, I will make the following comments regarding another question raised by the Attorney General.

[54] The Attorney General submits that the adjudicator's finding that compensation must also be paid for travel time between the hotel and the training centre is incorrect because she failed to have regard to article B7.02 of the collective agreement. That clause provides for compensation when an employee travels between his or her residence and workplace. The Attorney General argues that the term "residence" cannot include a hotel where the employees are staying. That interpretation is consistent with the interpretations of the English term "residence" discussed in *Mayoh et al. v. Treasury Board (Regional Economic Expansion)*, P.S.S.R.B. file Nos. 166-2-8896-8914, March 6, 1981, and the French definitions of the terms "*domicile*" and "*résidence*".

[55] In addition, article B7.01 deals with compensation only where the employee travels outside his or her headquarters area for the purpose of performing duties. Accordingly, the Attorney General submits, the article concerning travel time is not relevant where the employee has reached the place where he or she is performing local duties or receiving training, because the headquarters area is no longer the destination or point of departure.

[56] The Attorney General also notes that article B7.07 includes time necessarily spent at each stop-over, to a maximum of three hours, as travel time. This indicates the specific circumstances in which an employee can be compensated for travel time. Instead of having regard to the relevant clauses of the collective agreement, the adjudicator considered inappropriate factors, and in particular the decision in *Landry v. Library of Parliament*, [1993] P.S.S.R.B. No. 90, in which the collective agreement did not contain a clause regarding travel time, unlike the collective agreement in this case.

[57] As a final point, regarding the respondents' argument that compensation paid in the past operated to bring the doctrine of estoppel into play, the Attorney General notes that there was no evidence on this point other than one example, where an employee was compensated when he attended a course in February 2003. Moreover, the respondents were unable to show that they suffered any prejudice after relying on the employer's representations stating that they would be compensated for travel time, and in addition, well before they travelled, the employer confirmed that the employees would not be able to claim travel time.

[58] The respondents reply that the adjudicator is not bound by the decision in *Mayoh* because in that case the employer was being more generous than the collective agreement provided, and, consequently, [the employee] was not entitled to compensation for travel time. In the respondents' submission, *Landry* is the most appropriate decision because travel time was compensated where the employer determined the mode of transport and the times of departure and return. On the other hand, in *Mayoh*, the employer's policy made up for an oversight in the collective agreement; in this case, the employer has no such policy.

[59] On the question of definitions, the respondents note that *Mayoh* interprets "home" and not "residence". In addition, as the adjudicator noted, the interpretation could lead to absurd results, and so the expression "residence" must be given a broad interpretation. Taking that approach, it was not unreasonable for the adjudicator to conclude that the employer was required to pay the employees

compensation for travel between the hotel and the training site. Accepting the employer's interpretation produces an unreasonable result that is not consistent with the purpose of the article.

[60] The respondents add that the interpretation of the terms "normal employment area" and "headquarters area" is also unreasonable and they cannot be considered to be the place where the employee attends to take a training course. Based on the definitions in the collective agreement, the respondents submit, the only reasonable conclusion is that the headquarters area is the place where the employees ordinarily work, and not the place where the training courses take place.

[61] The respondents' final submission is that both the Attorney General and the adjudicator have framed the question of estoppel incorrectly. They assert that the question is whether the employer, having paid compensation for travel in the past, and the union having relied on that interpretation, may unilaterally change the interpretation of that article. The respondents submit that all of the requirements for estoppel have been met. First, the adjudicator agreed that there was a past practice that interpreted the collective agreement as described by the respondents. That shows that the employer tried, by its conduct, to affect its legal relations with its employees. Second, relying on that conduct, the union did not try to renegotiate the clause when the collective agreement was renewed in 2000. And third, the employer is now trying to advance the interpretation that it claims to have advanced before the training took place.

[62] For convenience, I reproduce the dispositive paragraph:

> [42] With respect to the grievors' travel between their accommodations and the training centre, in cases where the employer

> determines the mode of transport as well as the times of departure and return, I also believe that such time should be compensated. The time that employees spend traveling from their residences to their workplaces differs from the time they spend traveling to a training activity according to a schedule set by the employer. In the first instance, employees are free to decide how they will use their time and to travel as they deem best according to their own constraints. In the second instance, employees must comply with the time of departure and travel time as determined by the employer and cannot choose to act otherwise. They are at the complete disposal of the employer during that time.

[63] It may be correct to conclude that where an employee is required to travel for training according to a schedule set by the employer, the employee must comply and is at the disposal of the employer. However, while that may seem unfair, it does not justify compensation when the collective agreement expressly prohibits it.

[64] The adjudicator's analysis begins and ends with an analysis of the constraints imposed by the training the employer required the employees to take, but she makes no reference to the relevant clauses of the collective agreement. It seems to me, however, that this should be the starting point for any analysis.

[65] The collective agreement contains specific clauses that apply where an employee is required by the employer to travel outside his or her normal employment area for the purpose of performing duties. As noted by the parties, the relevant clauses govern compensation for travel time. In particular, they include specific limitations and provide for compensation only for time travelling between the employee's "residence" and "workplace" or the time between the time of departure and time of arrival at the "destination".

[66] The Attorney General suggests that the term “residence” must be interpreted narrowly, and must exclude the hotel where an employee is “residing”. The respondents suggest a broader interpretation under which the term would include a temporary residence.

[67] Those arguments to not answer the question, however. Article B7.08 seems to me to settle the argument. For convenience, that article is reproduced below:

> Compensation under this Article shall not be paid for travel time to courses, training sessions, conferences and seminars unless so provided for in the Article 18, Career Development.
>
> [Emphasis added.]

[68] As we saw earlier, article B7.08 is clear and unequivocal. It provides for no compensation for travel time where the travel is to attend a training course. In addition, the wording of the article itself makes it clear that it is not limited to travel time between the employee’s residence and accommodations, and rather includes all travel time.

[69] The fact that there is no such clause in the collective agreement on which the grievance in *Landry* was based makes that decision of little relevance in these circumstances. As the Attorney General observed, that collective agreement did not even contain a travel time clause. In *Landry*, the adjudicator concluded that, under a provision granting compensation for overtime, the employees were entitled to compensation for travel time outside their regular work schedule. Article B7.08 prohibits such compensation in these circumstances.

[70] With respect to the estoppel argument, the respondents must show, *inter alia*, that there was a promise or conduct that induced them to affect their relations with the employer. I am not satisfied that this first requirement of the doctrine of estoppel has been met.

[71] The respondents suggest that the evidence of a [TRANSLATION] "well established" practice, according to Mr. Gingras' affidavit, illustrates the existence of the conduct on which they relied.

[72] The conduct or promise on which the party alleging estoppel relies must be "unequivocal". For example, R.B. Blasina, the adjudicator in *Abitibi Consolidated Inc. and I.W.A. Canada, Local 1-424* (2000), 91 L.A.C. (4th) 21, stated:

> In other words, an estoppel will arise when a person or party, unequivocally by his words or conduct, makes a representation or affirmation in circumstances which make it unfair or unjust to later resile from that representation or affirmation. The unfairness or injustice must be more than slight. It does not matter whether the representation or affirmation was made knowingly or unknowingly, or actively or passively. The representation is taken to have that meaning which reasonably was taken by the party who raises the estoppel.
>
> [Emphasis added.]

[73] In addition, the existence of the conduct or promise on which a party relied is a question of fact: *Abitibi Consolidated*.

[74] As I noted earlier, the evidence by no means establishes that there was such a past practice, let alone a "well established" past practice. A mere assertion that this was the case, in Mr. Gingras' affidavit attesting to the fact, and a single example, are by no means convincing and sufficient.

[75] Accordingly, the fact that there is no evidence of a promise or conduct precludes application of the doctrine of estoppel in these circumstances.

VIII. Conclusion

[76] The adjudicator's decision is an incorrect interpretation of the collective agreement. Moreover, I am not satisfied that the decision is based on a well established past practice, and in any event the evidence would be insufficient to support such an analysis. For the same reason, I cannot accept the respondents' arguments regarding the application of the doctrine of estoppel.

JUDGMENT

THE COURT ORDERS that this application for judicial review be allowed and the decision of the tribunal be set aside, with costs. The matter is referred back to the Public Service Labour Relations Board with the direction that the grievances be dismissed in accordance with these reasons.

"Orville Frenette"
Deputy Judge

Certified true translation

Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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