Minimum Standards Monitor

It's All in the Timing – Minimum Standards and When Employees Are Considered to be "Working"

Date: March 22, 2018

In this edition of the Monitor, we summarize a few recent cases on the topic of when an employee is "working" and entitled to compensation. These cases demonstrate that not all travel time is compensable, that pre-employment training time can be compensable, and that an employer can determine that a meal break must be taken in the workplace as long as it is uninterrupted.

With thanks to Hicks Morley Articling Students Amanda Cohen and Ashlee Common for their assistance in preparing this Monitor.

On Travel Time

In *Ontario Power Generation v Society of Energy Professionals*, Arbitrator John Stout recently found the provisions of a Collective Agreement relating to "Time Worked Outside Normal Hours" (Article 58), and in particular a term which stated that "travel time in excess of one hour at the beginning and one hour at the end of the normally scheduled day will be compensated as straight time" (art. 58.2), were not in breach of the *Employment Standards Act, 2000* (ESA).

The Society of Energy Professionals (Society) argued that the failure to recognize travel time as hours worked violated the record keeping obligations found in section 15 of the ESA as well as the provisions of O. Reg. 285/01 pertaining to when work is deemed to be performed. The key issue raised was whether the parties to the Collective Agreement effectively "contracted out" of the ESA by providing that employees would not be compensated for the one hour travel at the beginning and the end of the normally scheduled day, as stated in art. 58.2

With respect to the issue of compensation for travel, the Arbitrator stated:

54 In my view, the language found in article 58.2 is consistent with the arbitral approach to compensation for travel. The parties have agreed that one hour of travel at the beginning and one hour of travel at the end of the normally scheduled work day is commuting and shall not be considered as work performed. The parties have also agreed that employees shall be compensated at straight time for excessive travel outside normal hours of work. Such excessive travel is deemed to be work and any such travel time beyond the one hour at the beginning and one hour at the end of the normally scheduled day shall be compensated at straight time.

Arbitrator Stout then considered whether this negotiated provision was in violation of the ESA. Because the ESA is silent on the issue of compensation for travel time, he turned to Ontario Labour Relations Board (OLRB) decisions which have found that the time it takes an employee to travel to and from work is commuting time, which is not compensable. Travelling on employer business, however, would be compensable.

The Arbitrator concluded that the one hour travelling time at the beginning and end of the normally scheduled day, as contemplated by art. 58.2, was not intended to be included by the parties as time worked. As a result, the employer did not violate the ESA by failing to record travel time that was not considered time worked. The grievance was dismissed.

On Travel Time and Split Shifts

In *Vancouver (City) v CUPE, Local 15*, Arbitrator Nichols considered a claim for travel time by auxiliary rink employees working at the City's ice rinks. The specific issue was whether travel time between rink locations during "multi-rink shifts" qualified as "work" for which employees should be paid.

Due to the nature of the City's programming, auxiliary employees are often scheduled for last minute bookings or short blocks not necessarily back to back. To accommodate this structure, the City introduced "multi-rink shifts" which allow employees to be scheduled at two ice rink locations within a twelve hour period.

Under the City's scheduling system auxiliary employees can chose their own shifts. The City does not regulate these choices and employees are free to set up "multi-rink shifts" at any available time and location. The exception to this practice is "employer-bundled shifts." These bundles set the block shifts to be worked and take away any freedom to determine the rink location or the break time between blocks.

The union argued that the requirement to travel between locations for multi-rink shifts was "travel for the purpose of carrying out assignments" and was therefore compensable work that had to be paid. In response, the City reasoned that the travel constituted a "commute" which is not considered "work" under the British Columbia *Employment Standards Act* and did not entitle the employees to pay for travel time.

In making her decision, Arbitrator Nichols considered the nature of the workplace and the posted positions, the extent to which travel was inherent in the shifts or duties and whether travel was a requirement given the scheduling model of the City. She noted that auxiliary employees reported to rinks across the City and had no need to travel as part of their responsibilities. These employees were not "on call" between blocks or expected to perform duties while travelling. Further, the City had structured its scheduling model to provide employees with a wide variety of shift options and to allow employees to choose the block combinations they were prepared to work.

Arbitrator Nichols relied on the flexibility of the scheduling program and the freedom of employees during their travel time in finding that the travel between locations did not constitute “work” for which the employees had to be paid. She concluded that the “travel is more properly characterized as a residual consequence of the scheduling model as opposed to an inherent or intrinsic element of the work or the shift.”

The Arbitrator did make one exception. She found that in circumstances where the City created an “employer-bundled shift” that resulted in a break of 60 minutes or less, the time spent travelling was compensable.

On Pre-Employment Training Time

In *2385259 Ontario Ltd. (c.o.b. Wilderness Environmental Services)* the OLRB considered whether a person was entitled to payment for training time which required by the employer prior to the commencement of employment.

The employer was a subcontractor for the Ministry of National Resources (MNR) and performed forest inventory work which was conducted by “timber cruisers.” Prior to commencing her employment with the employer as a “timber cruiser”, the respondent employee was required to complete and pass a course offered by the MNR, which she did. Among other things, she then claimed payment for this training time which the employer refused to pay. The employer argued that it did not provide the training and that the respondent was not an employee for the purposes of the ESA during this training.

Subsection 1(2) of the ESA states, “an individual receiving training from a person who is an employer is an employee of that person if the skill in which the individual is being trained is a skill used by the person’s employees, unless all of the following conditions are met… .”

The OLRB relied on the fact that upon successful completion of the course, the respondent had the right to commence work and there was no indication that remuneration would not be provided for the time spent training. The respondent had also signed her employment contract before attending the training and there was no suggestion in the contract that her employment was contingent upon passing the MNR Training Course.

The respondent drove a Company vehicle to training which the OLRB considered to be supplying “services to an employer for wages,” thereby meeting the definition of “employee” under the ESA. This was further supported by considering the focus on control or direction in the definition of “employer.” The fact the employer directed the respondent to drive the Company vehicle to training was indicative of control and direction and as well as illustrated the imbalance of bargaining strength.

The OLRB found that the mere fact the respondent’s training took place at the early stages of

employment was of no consequence and passing the course in order to work did not undermine her status as an employee. The respondent was an employee upon executing the employment contract and commenced providing services to the employer when she drove the Company vehicle to attend the MNR training.

On Meal Breaks

In *Anthony Hicks v PETM Canada Corporation o/a PetSmart*, the employee complained, among other things, that he was unable to leave his work area to take a meal break.

The employee worked night shifts taking care of animals at PetSmart's Pet Hotel. PetSmart has a policy that employees responsible for its Pet Hotel cannot leave the area where the animals are kept. The employee sometimes worked the night shift alone which effectively meant he could not leave the area for his eating period.

Under the ESA, employees are entitled to take a 30 minute meal break. The employer argued that the employee could still take his eating period in the Pet Hotel. The OLRB found that the fact that the employer determined where the employee could take the meal break was not dispositive of the issue: there needed to be evidence that the employee did not receive an uninterrupted meal break, which was not the case here. In dismissing the application, it stated:

19. The essential point about the mandatory eating period under s. 20 is that employees must receive 30 uninterrupted minutes for that break. Section 20 does not prohibit an employer from designating the place where the eating period must be taken. The Board did not have evidence before it that an employee on the overnight shift in the Pet Hotel would not have an uninterrupted 30 minutes for each 5-hour period during which they took their mandatory eating period.
