201801.ARB

PART 4

SODEXO CANADA LIMITED v. HRW LOCAL 779

FINAL AWARD

Subsequent to the release of the November 9, 2018 Ruling on Friday Overtime in PART 3, the arbitrator received correspondence from the parties as requested and responded accordingly, as follows. Since this correspondence establishes each party's final position on the Friday Overtime Ruling and the overall compensation owing amounts that were calculated by the Accounting Firm Harris Ryan both prior to and subsequent to the Ruling on Friday Overtime, it is considered evidence of same in this Final Award.

With respect to the arbitrator's request in the Friday Overtime Award that the Employer advise the Union and the arbitrator about the individual circumstances of employees where the Employer claimed overtime should not be paid for work performed on Fridays, counsel for the Employer responded by e-mail on November 27, 2018:

> Mr. Alcock,
>
> The Employer cannot inform the Union and yourself of the particular circumstances involved in each case where the Employer has claimed overtime should not be paid for work on Friday, other than the employee had not worked more than 40 hours in the applicable week prior to working their shift on a Friday.
>
> The Sodexo employees working at the Tata Steel Timmins Camp are not construction workers, rather they are accounting attendants, housekeepers, janitors, cooks and sandwich makers and the nature of the Employer's operation at the Tata Steel Timmins Site does not lend itself to a Monday to Friday or Monday to Thursday operation as contemplated by Article 7.01 of the Collective Agreement. During the relevant time period, Sodexo was required to maintain accommodations and food services to the Site seven days per week providing services to both construction and non-construction personnel staying at the camp. Therefore, Sodexo's work schedule had to include scheduling workers seven day a week. Most employees worked a two week on/two week

off rotation, but the Company also had employees who only worked a few days and then left and some of them worked a Friday.

On page 38 of your ruling identified as "Part 3 – Ruling on Friday Overtime" dated 9 November 2018 (the "Part Three Ruling"), you write as follows:

> "The essential bottom line is that overtime on Friday would be payable if it was the Employer's fault that employees were unable to fulfill the conditions for earning it. If the reason for employees not working the required number of regular hours was not the Employer's fault, overtime payment for work on Fridays would not be earned until sufficient hours were worked at regular rates on that day."

On page 39 of the Part 3 Ruling you write:

> "Overtime for work on Friday will be payable if the Employer was at fault for not scheduling employees on Monday in accordance with the condensed work schedule in article 7:01. Also, in such cases, collateral payment for regular days not assigned to work on Monday through Thursday will be payable at employees' regular rates of pay.
>
> The Employer has some work to do to inform the Union and the Arbitrator of the circumstances involved in each case where the Employer has claimed overtime should not be paid for work performed on Friday. The schedule for providing this information and receiving the Union's response is contained above."

To suggest that overtime would be payable if it was the Employer's "fault" that employees were unable to fulfill the conditions for earning overtime on Friday or that the Employer was somehow "at fault" for not scheduling employees to work on Mondays in accordance with the condensed work schedule, is rather confusing and suggests a misunderstanding of the nature of the Employer's operation and scheduling of employees. It is respectfully submitted that this is not a matter of assigning "fault", but rather applying the terms of the Collective Agreement to a particular set of circumstances (ie. a business that is required to operate and provide services seven days per week). The Employer's business operates seven days a week, and as such, not all employees can commence work on Monday, while at the same time ensuring coverage of operations from Monday to Sunday. In calculating compensation to employees, Sodexo applied a Monday to Thursday compressed schedule under the Collective Agreement and compensated employees at straight time for the first 10 hours worked and double time for all hours worked over ten hours a day. In addition, as noted in the Part 3 Ruling, employees scheduled to work Saturday and Sunday are automatically entitled to compensation at the rate of double the regular rate of pay in accordance with Article 7.02. Therefore, the only question left unanswered was how to compensate employees who were scheduled to work on Friday. If employees had not worked 40 hours at straight time by the time they started their shift on Friday then it is difficult to understand, from the language of the Collective Agreement, where overtime is to compensate for extra working time or how all Friday hours could be paid at overtime rates.

It is respectfully submitted that there is no "fault" to be assigned with respect to employees being scheduled to work on Friday. It is a work day, like any other work day in the Employer's seven day operation. The question is how should employees who are scheduled to work on that day be compensated, as it is not specifically addressed in the Collective Agreement as is the case with Monday to Thursday and Saturday and Sunday. The Employer's position is that the Collective Agreement contemplates a 40 hour week, it calculated overtime on Friday based on whether an employee had accumulated 40 hours of work. The Union's position is that any employee who works on Friday is entitled to overtime at the rate of double their straight time rate of pay, regardless of the number of hours worked in the week. The Employer's position was that the language of the Collective Agreement does not lend itself to such an interpretation.

The Employer is not in a position to provide the reasons and circumstances associated with each case of an employee working on Friday, as employees were scheduled to work every Friday. For some, it would be part of their normal schedule, for others it may be their first day of work with the Company, and for still others it may be that they were called in to cover for someone who was unable to attend work. As such, the Employer is unable to explain or provide evidence with respect to whether it was Sodexo's "fault" or the employee's fault for the employee being unable to fulfil the conditions for earning overtime.

I trust above adequately answers your inquiry.

Regards,

Gregory Anthony

On November 27, 2018, the arbitrator e-mailed Mr. Anthony (copy to Mr. Lenehan) as follows:

Dear Mr. Anthony:

Thank you for the Employer's response to the arbitration ruling concerning Friday Overtime. Since all other compensation matters have been calculated, subject to necessary adjustments for matters such as interest to date, I accept the Employer's response as its final position on compensation owing.

I now invite counsel for the Union to provide me with the Union's final response on the Friday Overtime issue.

The arbitrator's final award on the calculation of total overall compensation owing will then follow.

Aside from the parties' acknowledged differences regarding the matter of Friday Overtime (the final calculation of which is now the arbitrator's responsibility), previous discussion with

both counsel has indicated mutual understanding on the final calculation totals including adjustment to interest and other housekeeping matters such as:

a) the Employer will issue the final cheques to appropriately identified individual employees, with the Union assisting in locating current addresses;
b) the Employer will send remittances owing for dues not collected to the Union Local;
c) the Employer will send remittances owing for Industry Funds not collected to the applicable Industry Funds themselves.

The arbitrator has requested that all such matters, as well as a proposed date certain for the award, be jointly provided by the parties in a format that will permit the issuing of a brief, timely final arbitration award on total compensation owing.

I respectfully request counsel to provide the foregoing to me by Monday December 3rd.

I am fully aware that each party has the right to seek judicial review of the arbitrator's award on total compensation owing.

Kindest regards,
David L. Alcock
Sole Arbitrator

On December 6, 2018, counsel for the Union wrote the arbitrator and Employer counsel the following via e-mail:

I concluded, from reading Greg Anthony's last email to you, Sodexo had no submissions with respect to any specific employees which would lead to a modification of the calculation for time worked on Fridays.

Relying on the previously agreed upon amount for damages and interest payable to June 30, 2018, I instructed Doug Harris to calculate the additional interest to the end of November 30, 2018 and to prepare a spreadsheet showing the allocation of the compensation and interest to the affected employees (the list of employees, with their actual hours worked, and actual benefits received, was provided by Sodexo and formed a part of, at least, one of the exhibits entered through Mr. Harris at phase two).

Mr. Harris has determined, based on your ruling, and consistent with the approach agreed upon by the parties, that the additional interest is $81,983.07 to arrive at a total distributable amount, to the end of November 2018, of $7,440,548.59.

I had expected Mr. Harris would be able to provide the spreadsheet with specific allocations by this past Monday or Tuesday. However, he advised me today he has been quite busy and some of the accounting was a little more complicated than first thought. In any case, he should have the work done by tomorrow, or Monday at the latest. I will forward the results to Greg Anthony for his review. I fully expect they should lead to a finalization of this matter shortly afterwards.

Thank you for your patience. I look forward to proceeding further with this as soon as possible.

Dana Lenehan

The arbitrator responded (Employer counsel copied) on December 7, 2018:

Dear Mr. Lenehan:

All things considered, I agree that we are back to the parties' calculations of overtime.

I look forward to receiving Mr. Harris' spreadsheet.

David Alcock

On December 29, 2018, the arbitrator emailed counsel:

Gentlemen:
I presume the Christmas season interfered with your proceedings to wrap up the Sodexo Award.

After receiving responses from each of you concerning my interpretation ruling regarding Friday Overtime, I just want to be clear on my understanding of things.

I will not be responding at length to the Employer's submission except to comment that the collective agreement established the work schedule to be followed, but the Employer ignored the agreement. If it had not done so, any issue over difficulties adhering to the stated schedules should have been discussed with the Union from the very onset, with a view to negotiating a viable alternative. Making a claim at this late date that the Employer simply could not have scheduled its employees according to the collective agreement is not acceptable.

As I understand the Union's submission, its position is that the upper amount for overtime as determined by the parties will be affirmed in the final award. Therefore, it is not pursuing payment for the 4 regular days employees were not scheduled to work Monday, Tuesday and Thursday, which would have entitled them to overtime for work on Friday. Rather it is solely claiming overtime for any work by employees on Friday, as indicated in the Friday Overtime ruling.

If my understanding of the Union's position is not correct, please advise me of same.

Respectfully yours,
David Alcock

Nothing further was received from the Employer or from the parties jointly until February 8, 2019, when counsel for the Employer emailed the arbitrator advising that correspondence was attached regarding the above matter, and that "We look forward to receipt of your final award."

The attached correspondence, dated February 7, 2017 is as follows:

> Dear Mr. Alcock,
>
> On November 9, 2018 you provided the parties with Part Three of your award in the above matter entitled "Ruling on Friday Overtime (the Part Three Award"). In the Part Three Award you stated: "The Employer has some work to do to inform the Union and the arbitrator of the circumstances involved in each case where the Employer has claimed that overtime should not be paid for work on Friday." After consulting with our client, Sodexo Canada Inc., we wrote to yourself and Mr. Lenehan on November 27, 2018 to advise that the Employer was unable to inform the Union and yourself of the particular circumstances involved in each case where the Employer has claimed overtime should not be paid for work on Friday, other than the employee had not worked more than 40 hours in the applicable week prior to working their shift on a Friday.
>
> In addition, the Part Three Award required the parties to make revised calculations and to provide them to you so that you could confirm the amounts as part of the Final Award. Following receipt of the Part Three Award, we understand that the Union provided instructions to the accounting firm Harris, Ryan, on or about November 21, 2018, to calculate amounts owing by Sodexo Canada Inc. to Hotel and Restaurant Workers Union, Local 779 in accordance with the Collective Agreement and Parts One, Two and Three of your award. By correspondence dated December 10, 2018 (including the attached Schedules, a copy of which is attached hereto), Douglas G. Harris, CPA, CA, of Harris, Ryan provided the revised calculations to Mr. Lenehan (the "Revised Calculations").
>
> We write to advise that Sodexo Canada Inc. has reviewed the Revised Calculations and agree that the Revised Calculations, including the total distributable amount of $7,440,548.59 has been calculated in accordance with Parts One, Two and Three of your Award. Please note that Sodexo Canada Inc.'s agreement with the Revised Calculations including the total distributable amount of $7,440,548.59, calculated as owing by the Employer in accordance with the considerations and findings obtained within Parts One, Two and Three of your Award and the Union's interpretation of overtime due for work on a Friday, shall not be considered as acceptance of the considerations and findings of the Arbitrator and the Employer reserves all rights to seek judicial review of Parts One, Two and Three of your award and/or your Final Award.
>
> I trust the above is satisfactory at this time and we look forward to your Final Award.
>
> Thank you very much,
>
> Yours truly,
> Gregory M. Anthony

On February 8, 2019, the arbitrator emailed the following correspondence to both counsel:

> Dear Mr. Anthony:

Thank you for your correspondence dated February 7, 2019.

From your correspondence, I understand that (subject to the Employer's right to seek judicial review of Parts One, Two and 3 of the arbitrator's Award and the Final Award to follow), the parties are in agreement to the final calculations of compensation owing for distribution.

If my understanding is correct, it would appear that the parties are in possession of everything they need to provide me with a directed Final Award for my signature.

This will ensure completeness of all details concerning associated matters such as the method of cheque distribution to Employees, the Union and Industry Funds, a date certain for the Final Award, and any other relevant matter on which the parties may agree.

This is as close to agreement that we have managed at any point in the parties' dispute. I would prefer to avoid omission of some relevant detail that might jeopardize the Final Award.

So in this case, I am requesting that counsel provide me with a directed Final Award for my signature.

Respectfully yours,
David Alcock

On February 18, 2019, the arbitrator received a couriered package of materials from counsel for the Union including a cover letter, a proposed "Draft" Directed Award, and three Addenda from the office of Harris, Ryan. The cover letter, dated February 18, 2019 states:

Re: HRW 779 v. Sodexo Canada Ltd.

Enclosed with this letter is a proposed Directed Award to finalize this matter. I have included the documentation from Doug Harris which has been agreed to by Sodexo. By incorporating the documents in the Directed Award, it will give clear direction as to where the money should be allocated; that is, among employees, the union, and other remittance recipients.

I had discussed an earlier draft of a Directed Award with Greg in July but we have not discussed the wording of this Directed Award. However, I do not think it should pose much of a concern. I have copied this letter to Greg, via email. I am going to be in Goose Bay for the balance of the week at the Muskrat Falls Inquiry. However, I can find time to speak by telephone any day if there are concerns from either you, or Greg.
I trust the enclosed is satisfactory.

Yours truly,
Dana Lenehan, Q.C.

The arbitrator responded to the above by email, copy to Mr. Anthony:

Dana:

Please be advised that I just received by courier your hard copy (with exhibits) of the proposed Directed Award between HRW 779 and Sodexo Canada Ltd.

I will await final confirmation from Greg Anthony that the wording of this Proposed Directed Award is acceptable to Sodexo Canada.

Other than the parties' most gracious reference to me as "QC", I have no concerns about its content.

Once the Proposed Award is confirmed by counsel for the Employer, I shall include its wording in the final award and advise counsel of the date of issue.

David Alcock

On February 20, 2019, the arbitrator emailed the following to counsel for the Employer:

Greg:
Would you kindly advise whether you can confirm Dana's Draft of the proposed Directed Award?

Sincerely,
David Alcock

By return email on February 20, 2019 counsel for the Employer responded as follows:

Dear Mr. Alcock,

I have consulted with my client and taken instructions with respect to Mr. Lenehan's Proposed Directed Award. Although Sodexo Canada Inc. has agreed that the Revised Calculations, including the total distributable amount of $7,440,548.59, has been calculated in accordance with Parts one, Two and Three of your Award, in light of the fact that Sodexo does not agree with all of the consideration and findings in Parts One, Two and Three of your Award and/or your Final Award, we cannot agree with a Directed Award and request that you proceed to provide a written Final Award to the parties.

I trust the above is satisfactory at this time and we look forward to receipt of your Final Award.

Thank you,
Greg

On February 21, 2019, the arbitrator responded to the above, copy to Mr. Lenehan.

Greg:

All you have said re judicial review is already in the final award as I have included all correspondence between counsel and myself since the Friday Overtime ruling. You have already made the Employer's position perfectly clear.

As you know, arbitrators have no jurisdiction to grant or deny judicial review. That issue is solely for the courts to deal with. In my view, a directed award in this instance simply enables completeness and would not jeopardize either party's right to judicial review.

However, since you have received your instructions, I have no choice but to write the remainder of the Final Award as time permits.

Respectfully yours,
David Alcock

CONSIDERATIONS

Concluding the issue of quantum of compensation arising from the Friday Overtime Ruling

The Employer's response to the arbitrator's finding in the Friday Overtime Ruling, dated November 9, 2018, was that the Employer was unable to provide the particular circumstances regarding individual employees whom the Employer claimed were not entitled to overtime pay for work performed on Fridays. It was the Employer's essential position that the nature of its business required it to operate on a seven (7) day/week basis, wherein all employees worked Fridays, but not all employees could begin work on Mondays, as the work schedules in the collective agreement required.

As indicated in the arbitrator's correspondence to counsel on December 29, 2018:

> I will not be responding at length to the Employer's submission except to comment that the collective agreement established the work schedule to be followed, but the Employer ignored the agreement. If it had not done so, any issue over difficulties adhering to the stated schedules should have been discussed with the Union from the very onset, with a view to negotiating a viable alternative. Making a claim at this late date that the Employer simply could not have scheduled its employees according to the collective agreement is not acceptable.

Given that the Employer has ignored the collective agreement in every respect since the date the collective agreement first applied to this bargaining relationship in December 2013, thereby requiring these compensation hearings to determine the amounts of overall compensation owing, the arbitrator rejects the notion that the Employer should be permitted to rely on its own violation of the work schedules in Article 7:01 to claim exemption from them in determining the payment of overtime for employees who worked on Fridays.

Since the Employer is unable to provide information about all the employees who worked Fridays but whose personal circumstances caused them to miss work on Mondays, Tuesdays, Wednesdays and Thursdays, the logical conclusion is that it was the Employer's choice of scheduling employees contrary to the work schedules prescribed by the collective agreement, which resulted in those employees being unable to work the qualifying preceding days required to establish entitlement to overtime for work on Fridays. In the result, the arbitrator finds that those Employees were improperly denied overtime pay for Friday work.

It is clear that the Union's sole interest in the Friday Overtime matter is overtime payment for employees who worked on Friday, not payment of any kind for the preceding days in the week that employees did not work. In these particular circumstances where compensation owing is due to the Employer's failure to adhere to the terms and conditions of the work schedule provisions of the collective agreement, the arbitrator confirms overtime payment for employees who worked on Fridays.

Prior to the Employer's request that the issue of Friday Overtime be determined by interpretation of the overtime provisions of the collective agreement, which Ruling is contained in Part 3 of the arbitrator's deliberations to date, the parties had agreed to the overall compensation calculations required by the arbitrator's considerations and decisions in Parts

One, Two and Three, with the exception of a disagreement on whether overtime compensation should be assigned for work on Fridays.

In terms of total compensation owing to June 30, 2018 based on the "Penultimate Award", the Employer calculated $7,209,281.58 and the Union calculated $7,358,565.52. The difference between the parties was $149,283.94. The Union's offer to split this difference so as to conclude the final calculations of total compensation owing was declined by the Employer.

Determining final overall compensation owing amounts for the Final Award

Now that the final result of the Friday Overtime Ruling has been determined, the Union's amount of $7,358, 565.52 as of June 30, 2018 is considered the starting point for determining the current amount of total compensation owing. After the Friday Overtime Ruling was issued on November 9, 2018, the Union's accounting firm, Harris Ryan, was asked to re-calculate the amount for interest owing up to November 30, 2018. The letter from Douglas G. Harris, CPA, CA, dated December 10, 2018 (Addendum #1), which the arbitrator accepts, established that "the interest in the period from July 1, 2018 to November 30, 2018 is $81,983.07, and the cumulative balance of interest owing at November 30, 2018 is $753,926.50". Adding the additional interest of $81,983.07 to the total compensation owing amount as of June 30, 2018, Mr. Harris' calculations established the current total distributable amount of overall compensation owing as $7,440,548.59.

On balance, the arbitrator accepts Mr. Harris' "overall scheme of distribution" referred to on p.2 of Addendum #1 as follows:

Wages to individuals			$5,165,744.97
Benefits			
	Hours	**Rate**	

Health	222,463.10	$3.00	667,389.31
Pension	222,463.10	$5.00	1,112,315.52
Promotion	154,236.38	$1.61	248,320.58
Recovery	154,236.38	$1.00	154,236.38
NLBCTC	154,236.38	$0.30	46,270.91
CLRA	154,236.38	$0.30	46,270.91
			$7,440,548.59

The arbitrator also accepts Addendum #2 from Harris Ryan, "Memo Concerning the Calculation of Amounts in the Final Award".

The arbitrator further accepts Addendum #3, including *Schedule A - Allocation of Award Among Affected Union Members as Wages*"; *Schedule B – Benefits by Employee;* and *Schedule C – Union Dues by Employee.*

DECISION

On the basis of the forgoing considerations, the parties' acceptance that the final calculation of total compensation owing is accurate based upon the arbitrator's considerations and findings in Parts One, Two and Three of his Award to date, and the arbitrator's acceptance of the calculations provided by Harris Ryan in Addenda #1, #2 and #3 on December 10, 2018, the arbitrator's findings and orders are as follows:

1. Addenda #1, #2 and #3 provided by Harris Ryan Accountants on December 10, 2018, shall be incorporated as part of this Final Award.

2. Total damages and interest due for compensation owing is $7,440.548.59, which is to be paid in total by March 11, 2019.

3. If the total amount of compensation owing in paragraph 2 is not paid by March 11, 2019, the amount of interest from December 1, 2018 to the date of actual payment shall be calculated by Harris Ryan, and those additional amounts shall be payable and allocated

accordingly.

4. Wages and other direct benefits to the employees shall be paid in the form of payroll cheques with all the required statutory deductions.

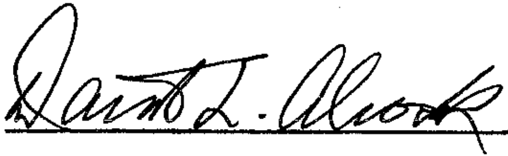
5. The Union shall assist Sodexo Canada, where necessary, with finding mailing addresses or contact information of Employees who are due total compensation payroll cheques.

6. Wages due to individuals shall be paid in accordance with Schedule "A" of Addendum #3. Benefits shall be paid in accordance with Schedule "B" of Addendum #3. Union dues shall be remitted in accordance with Schedule "C" of Addendum #3.

7. The Union will inform Sodexo Canada as to where the various industry benefits and Union dues shall be remitted.

Respectfully submitted at the decision of the arbitrator.

Dated at Mount Pearl, Newfoundland and Labrador, this 25th day of February, 2019.



David L. Alcock
Sole Arbitrator