



MANITOBA LABOUR BOARD

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CASE NO. 189/10/ESC

File No. 103542

IN THE MATTER OF: *THE EMPLOYMENT STANDARDS CODE*

BETWEEN: D.B.,

Employee,

- and -

**THE GREAT-WEST LIFE ASSURANCE COMPANY,
Employer.**

CASE NO. 190/10/ESC

File No. 103546

IN THE MATTER OF: *THE EMPLOYMENT STANDARDS CODE*

BETWEEN: D.T.,

Employee,

- and -

**THE GREAT-WEST LIFE ASSURANCE COMPANY,
Employer.**

CASE NO. 191/10/ESC

File No. 103545

IN THE MATTER OF: *THE EMPLOYMENT STANDARDS CODE*

BETWEEN: M.A.,

Employee,

- and -

**THE GREAT-WEST LIFE ASSURANCE COMPANY,
Employer.**

**BEFORE: C.S. Robinson, Vice-Chairperson
S. Oakley, Board Member
Y. Milner, Board Member**

APPEARANCES: D. Negus, Counsel for The Great-West Life Assurance Company

T.V.W., on behalf of The Great-West Life Assurance Company

P. Hesse, Counsel for D. B.

D.B., Employee

D.T., Employee

M.A., Employee

<p>This Decision/Order has been edited to protect the personal information of individuals by removing personal identifiers.</p>

REASONS FOR DECISION

I. Background

The above-noted cases concern the interpretation of the statutory provisions contained in Part II, Division 8 of *The Employment Standards Code* (the “Code”). Enacted in 2006, subsections 51(1), 51(2) and 51(3) of Division 8 set forth provisions relating to wages payable to employees for reporting to work. This is the first occasion that the Manitoba Labour Board (the “Board”) has been called upon to interpret these provisions.

The Employees filed complaints with the Employment Standards Division claiming that their Employer, the Great-West Life Assurance Company (“Great-West Life”), failed to properly compensate them for certain work they performed while on-call. Great-West Life disagreed and maintained that the Employees were paid in accordance with the provisions of the *Code*. The Employment Standards Division investigated the complaints. The Director of Employment

Standards Division (the “Director”), by Order, dismissed each of the complaints. The Employees disputed those decisions and, accordingly, the Director, pursuant to section 110 of the *Code*, referred the matter to the Board.

The Board conducted a hearing at which time the parties appeared and presented evidence and argument. All parties agreed that Case Nos. 189/10/ESC, 190/10/ESC and 191/10/ESC would be heard together and common evidence relevant to the cases would be applied *mutatis mutandis*. The Board, following consideration of the material filed and the evidence and argument presented, determined that the Employees were reporting to work for a scheduled period of less than three hours and had been paid in accordance with the provisions of section 51(2) of the *Code*. Accordingly, the Board, in its Substantive Orders, held that the Employer had paid all wages owing and dismissed the Employees’ appeals. The Board has been requested to provide written reasons for its decision.

II. Facts

1. The Employees are all Information Technology professionals employed in the Information Services division of Great-West Life.
2. The Information Services division operates continuously and it therefore requires employees to provide technical support and service for its various hardware, software and systems at all times. In order to provide the required 24 hours per day/7 days per week coverage, the Employer has directed that the employees therein be “on-call” and therefore available to report to work during certain periods outside of their normal working hours. An employee is said to be “on-call” when they have been notified that they are required to provide technical support to resolve technical problems outside of the employee’s regular working hours.

3. Thus, in addition to a regular work schedule during which they work 7 ½ hours per day, five days per week for a total of 37 ½ hours per week, employees are also periodically required to be “on-call”. By way of example, D.B. testified that approximately every three weeks he is designated to be on-call for a period of 7 consecutive days.

4. When an employee is on-call outside of their normal working hours, they may be paged, or contacted in some other manner, to provide technical support or service. They must respond to such service calls within a short time frame. They are expected to take such action as may be necessary to deal with problems and restore operating services. Practically, most of the work performed by an employee during these on-call shifts may be, and is, performed at their own home by logging into the Employer’s computer system. The employee is considered to have reported to work at the point that they log into the computer system.

5. Employees are compensated for being on-call. Specifically, when they are designated to be on-call, employees receive \$20.00 per weekday and \$60.00 per weekend day or a day which falls on a statutory holiday. The on-call period is normally 4 p.m. to 8 a.m. on weekdays and 8 a.m. to 8 a.m. on weekends and statutory holidays.

6. Service calls received by an employee during the on-call periods are of indeterminate length and may occur at any time. Some calls may take a few minutes to complete, others require several hours of labour. The Board accepts the evidence that the majority of service calls received by the Employees during their on-call shifts require one hour or less for them to resolve. Indeed, the Board heard that in 2009, the Employer completed an extensive on-call policy review during which it examined employee time sheets and concluded that the average service call time was, on average, 20 to 30 minutes in length.

7. Receiving service calls outside of one’s regular hours of work, whether on-call or not, causes significant inconvenience for employees. The necessity to be on-call and to attend to service

calls promptly at any time during the on-call shift is obviously difficult for the Employees and their families. The payment of the on-call per diem amounts are meant to reflect and compensate employees for the acknowledged inconvenience.

8. Pursuant to the Employer's "Information Services On-Call Policy", when an employee receives a call during the on-call period they are compensated for a minimum of one hour. If the actual time worked on the call exceeds one hour, then they are paid for the actual time worked. If taking the call during the on-call period places an employee in a position in which they have exceeded the standard hours of work per day or per week, then the Employer pays the requisite overtime rate for the employees' work.

9. The Employer maintains that by providing for this minimum payment, it is effectively scheduling employees to a shift of at least one hour. Thus, if the call takes 15 minutes to deal with, an employee is still paid for one hour. Employees know that when they receive a call during the on-call period, they will be paid at least one hour when they respond. There is one exception to that practice. When an employee takes a call and it is resolved in less than an hour and then another call comes in within that hour, the employee are not compensated once again with the minimum one hour payment. In this way, the Employer is not paying an employee twice for the same period of time.

10. Three categories of work were referred to at the hearing: 1) scheduled work during the on-call period in which employees know in advance that they will be required to perform a specific task or tasks; 2) the intermittent and random calls that employees attend to during their on-call periods and the Employer compensates with the minimum one hour payment; and 3) calls received by employees after their normal working hours even though they are not themselves on-call.

11. The Employees, relying upon section 51(1) of the *Code*, believe that they should be compensated for a minimum of three hours (or such longer period as the call takes to complete) for the second and third categories referred to above. They are not seeking any further wages over and above what they have already received from the Employer for the first category which they refer to as “scheduled” work during the on-call period. Each of the Employees provided extensive documentation in support of their claims which details the specifics of their request for additional wages.

III. Analysis

The Employees assert that the Employer has failed to properly compensate them for certain work they performed. They maintain that Division 8 of the *Code* entitles them to payment for wages for a minimum of three hours when they attend to calls after their normal working hours. Most of these calls occur when the Employees are designated to be on-call in order to deal with such technical issues as may from time to time arise. Specifically, the Employees each rely upon section 51(1) of the *Code* which provides the following:

Wage for reporting for work

- 51(1) An employee who
- (a) reports for work
 - (i) at the employer's request, or
 - (ii) when scheduled to work for a period of three hours or more; and
 - (b) is not required to work or is required to work for less than three hours;
- is entitled to be paid
- (c) the wage payable for the hours worked, if any; or
 - (d) the regular wage rate for three hours of work;
- whichever is more.

It is the position of the Employees that the Employer's policy and practice of paying a minimum of one hour pay when they attend to a call outside of their normal working hours does not constitute "a scheduled period of less than three hours". As such, the Employees contend that when they attend to a call after their normal working hours they are reporting to work at the request of the Employer and are entitled to be paid for such hours that they work or three hours of pay, whichever is greater.

The Employer disagrees. It argued that Division 8 of the *Code* permits employers to schedule an employee to a period of less than three hours, in which case the employee who attends to that shift is entitled to the wages payable for any hours worked or the wages for the period scheduled, whichever is more. In support of its position, the Employer referred the Board to section 51(2) of the *Code* which states:

Reporting for less than 3 hours

51(2) An employee who reports for a scheduled period of less than three hours is entitled to be paid

(a) the wage payable for the hours worked, if any; or

(b) the regular wage rate for the scheduled hours of work;

whichever is more.

The Employer asserted that its practice of arranging for employees to know that they will be paid a minimum of one hour when they accept a call after hours constitutes a "scheduled period of less than three hours" as that term is used in the *Code*.

Call-in pay is the minimum payment to which employees are entitled if they are called into or report to work but are not given the opportunity to work the shift at all or in its entirety. Call-in pay protects workers from being called into work and then being sent home without remuneration for the period scheduled by their employer. That is the essential purpose of this

Division of the *Code*. In attempting to meet that challenge, however, the Legislature has also preserved a measure of flexibility by allowing for scheduled periods of less than three hours.

The Board is satisfied that the Employer's policy of paying employees who receive calls during the on-call period for a minimum of one hour or the actual time worked if the call exceeds one hour, constitutes a "scheduled period of less than three hours". The Employer's policy and practice in this regard is consistent with section 51(2) of the *Code*. The Employees knew that they would be paid a minimum of one hour of wages when they accepted calls after hours and were reporting to work for a scheduled period of less than three hours. The Board concurs with the position of the Employer that each of the Employees was paid in accordance with the *Code* and that no further wages are owing to them.

Having regard to the foregoing, the Board upheld the decisions of the Employment Standards Division to dismiss the Employees' complaints.

DATED at WINNIPEG, Manitoba, this 14th day of November, 2011, and signed on behalf of the Manitoba Labour Board by

"Original signed by"

C.S. Robinson, Vice-Chairperson

"Original signed by"

S. Oakley, Board Member

"Original signed by"

Y. Milner, Board Member