Federal Court  Cour fédérale

Date: 20111103

Docket: T-1895-10

Citation: 2011 FC 1259

Ottawa, Ontario, November 3, 2011

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

**CHRIS BUCHOLTZ, DONALD BOUCHER,
DONI HUNT AND BRIAN HITCHCOCK**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Public Service Labour Relations Board (the Labour Board), dated October 25, 2010, allowing three grievances against Correctional Service of Canada (the employer), and ordering the employer to pay overtime to Messrs. Boucher, Hunt and Hitchcock for particular shifts for which they ought to have been engaged.

[2] This application raises a long-standing issue between the labour union and the employer about the employer's policy of allocating overtime to employees who would be entitled to one and

one-half their regular rate of pay (“time and one-half”), in priority over employees who would be entitled to double their regular rate of pay (“double time”) for particular shifts. The issue is whether this policy violates the collective agreement, which states that the employer shall allocate overtime to the employees on an “equitable basis”. This issue has been brought before the Labour Board at least 10 times, and has not been resolved to the satisfaction of the union or the employer. Now, this issue has been brought for the first time before the Federal Court in this case.

[3] In *Union of Canadian Correctional Officers – Syndicat des agents correctionels du Canada – CSN v Treasury Board*, 2010 PSLRB 85 (*UCCO*), the overtime allocation policy was itself subject to grievances referred to adjudication. The Labour Board discussed the employer’s overtime policy and the basis for it at paragraph 17:

> [17] The national policy on overtime is based on the following principles: controlling and reducing the need for overtime, giving employees adequate advance notice when they are required to work overtime, making every reasonable effort to allocate overtime at the same group and level, minimizing costs when overtime is required, and discussing overtime results with union local representatives on a quarterly basis. The policy states that managers should make every reasonable effort to offer hours of overtime on an equitable basis among readily available qualified employees. Managers are to keep a record of all hours of overtime offered and worked. Recording periods for overtime are quarterly from April 1 of each year to allow for regular adjustments, and equitability is calculated over a 12-month period.

[4] The Labour Board dismissed the grievances related to the overtime policy, and stated at paragraph 47:

> [47] No evidence was adduced at adjudication demonstrating that the national overtime policy violates the collective agreement. Such evidence would have been necessary for me to conclude a violation of the collective agreement. Specifically, the bargaining agent

> needed to prove on a balance of probabilities that, as a result of the policy, overtime had not been allocated on an equitable basis among readily available qualified employees. There might be some elements of the policy that could, when applied, create equitability issues, but no evidence was presented in support of that allegation.

FACTS

Background

[5] The respondents are correctional officers employed by Correctional Service of Canada. Each respondent presented a grievance (Mr. Hunt presented two grievances), pursuant to section 208(1) of the *Public Service Labour Relations Act*, SC 2003, C 23, s 2 (the Act), after he was not offered an overtime shift for which he had indicated his availability. Pursuant to section 209(1) of the Act, the respondents referred the grievances to adjudication before the Labour Board.

[6] The parties presented a joint statement of facts to the Labour Board for the purposes of the adjudication, which stated in part:

> …
> a. The subject grievances are all with respect to the interpretation of Article 21, Hours of Work and Overtime, and specifically clause 21.10, Assignment of Overtime Work.
>
> b. The grievances all relate to overtime situations for specific days on which the aggrieved employee had clearly indicated on the overtime roster that they were readily available and qualified to work, but were not offered the overtime shift on that day. During the timeframes in question, management had a practice and/or policy in place which stipulated that overtime shifts were to be offered to employees available at the rate of time and a half first prior to hiring employees at double time. The Union did not agree with this management position.
>
> c. All the grievors are considered to be qualified for the shifts grieved, and indicated their availability on the relevant signup sheets.
> …

[7] The relevant clauses of the collective agreement that covered Mr. Bucholtz and Mr. Boucher, signed in 2001, state:

> **21.10 Assignment of Overtime Work**
>
> Subject to the operational requirements of the service, the Employer shall make every reasonable effort:
>
> (a) to allocate overtime work on an equitable basis among readily available qualified employees,
> …
>
> **21.12 Overtime Compensation**
>
> Subject to Clause 21.13, an employee is entitled to time and one-half (1 1/2) compensation for each hour of overtime worked by the employee.
>
> **21.13** Subject to Clause 21.14, an employee is entitled to double (2) time for each hour of overtime worked by him or her,
>
> (a) on the employee's second or subsequent day of rest, (second or subsequent day of rest means the second or subsequent day in an unbroken series of consecutive and contiguous calendar days of rest),
> …

[8] The relevant clauses of the collective agreement that covered Mr. Hitchcock and Mr. Hunt, signed in 2006 (which for the purposes of this application are substantively identical), state:

> **21.10 Assignment of Overtime Work**
>
> The Employer shall make every reasonable effort:
>
> (a) to allocate overtime work on an equitable basis among readily available qualified employees,
> …

> **21.12 Overtime Compensation**
>
> Subject to Clause 21.13, an employee is entitled to time and one-half (1 1/2) compensation for each hour of overtime worked by the employee.
>
> **21.13** Subject to Clause 21.14, an employee is entitled to double (2) time for each hour of overtime worked by him or her,
>
> (a) on the employee's second or subsequent day of rest, (second or subsequent day of rest means the second or subsequent day in an unbroken series of consecutive and contiguous calendar days of rest),
> …

[9] The employer had an established policy of allocating overtime on a voluntary basis. The method by which the employer allocated overtime is summarized in the Labour Board's decision at paragraphs 8-9:

> [8] The first step in the procedures for the allocation of overtime was to record in writing the availability of correctional officers. The officers would indicate, on the list applicable to their classification level, for the upcoming seven days, the days and shifts for which they would be available for overtime. The form also included the officer's regular shift and hours, the dates of the officer's days of rest; the officer's phone number, and the total number of overtime hours that the officer had worked during the applicable quarter. Officers started a quarter with zero hours of overtime, and from there, every hour of overtime was compiled. The quarters were as follows: January 1 to March 31, April 1 to June 30, July 1 to September 30, and October 1 to December 31.
>
> [9] According to those procedures, the number of overtime hours worked by officers in a quarter was constantly recalculated. Overtime was offered to readily available officers, starting with the officer who had the fewest number of overtime points during a particular quarter. However, officers on their first day of rest (time and one-half) would be called first. The employer would then call officers on their second or subsequent day of rest (double time).

The Bucholtz, Boucher, and Hunt grievances with respect to the prioritization of the time and one-half rate in allocating overtime

[10] Messrs. Bucholtz, Boucher, and Hunt each grieved that the employer failed to allocate overtime equitably when it did not offer the grievor an overtime shift because the grievor would have been entitled to the double time rate of pay. The parties agreed that the respondents were qualified for the overtime shifts that gave rise to the grievances – the dispute lay in whether giving priority to those that would receive time and one-half constituted an inequitable allocation of overtime.

[11] The specific circumstances giving rise to these four grievances are summarized in the Labour Board's decision as follows:

> [16] On May 5, 2005, Mr. Bucholtz had 20 overtime points, but he was not called to work overtime on the day shift. Several officers were called to work that overtime shift, including one officer with 25 points and another with 26 points. Those two officers were paid at time and one-half, but Mr. Bucholtz would have been paid at double time. The quarter for the calculation of overtime points was from April 1 to June 30, 2005.
> …
>
> [19] …On May 5, 2005, Mr. Boucher had 11 overtime points, but he was not called to work overtime on the day shift. Other officers were called to work that overtime shift, including one officer with 29 points and another with 32 points. Those two officers were paid at time and one-half, but Mr. Boucher would have been paid at double time. The quarter for the calculation of overtime points was from April 1 to June 30, 2005.
> …
>
> [22] On May 27, 2007, Mr. Hunt had 12.5 overtime points, but he was not called to work 4 hours of overtime on the evening shift. Other officers were called to work those overtime hours, including an officer with 19.5 points, an officer with 23.25 points and an officer with 38.75 points. Those three officers were paid at time and one-half, but Mr. Hunt would have been paid at double time. The quarter

> for the calculation of overtime points was from April 1 to June 30, 2007.
> …
>
> [24] On July 19, 2007, Mr. Hunt had 16.5 overtime points, but he was not called to work overtime on the day shift. Officer Bouchard was called to work four hours of overtime at double time on that shift. He had 22.5 overtime points. An officer with 29 hours of overtime was called for 4 hours of overtime on that shift. That officer was paid at time and one-half, but Mr. Hunt would have been paid at double time. The employer allowed the grievance in part at the final level of the grievance process and compensated Mr. Hunt for four hours of overtime at double time. The only officers called to work a full overtime shift on the day shift on July 19, 2007 were officers with less overtime points than Mr. Hunt. The quarter for the calculation of overtime points was from July 1 to September 30, 2007.

Thus, in each of the four grievances, the overtime shift was offered to an employee with more overtime points than the grievor, because that employee was eligible for the time and one-half rate of pay, and the grievor would have been paid the double time rate of pay.

The Hitchcock grievance with respect to the misapplication of the overtime policy

[12] The facts giving rise to Mr. Hitchcock's grievance are distinct from the other grievances: he indicated he was available to work overtime for a shift starting at 15:00 on September 8, 2007. He worked the day shift that day, and at the end of his shift, he reminded the correctional manager that he was available for overtime that evening.

[13] Shortly after 15:00, the correctional manager learned that, because of an injury, he would need a replacement for the evening shift. Another officer covered the injured officer's post while the manager sought a replacement. The manager knew Mr. Hitchcock had left the institution, and he believed that another employee, Mr. Carew, was still in the institution. He therefore called Mr.

Carew, and although he learned that Mr. Carew had actually left and was in his car, he offered him the overtime shift, and Mr. Carew accepted. Prior to that shift, Mr. Carew had 111 overtime points, and Mr. Hitchcock had 98.5 points.

Decision Under Review

[14] In its decision dated October 25, 2010, the Labour Board summarized the arguments of both the parties: the grievors argued that, in the case of Mr. Hitchcock's grievance, the employer failed to respect the local overtime policy when it offered the shift to an employee with more overtime points than Mr. Hitchcock.

[15] Regarding the other grievances, the grievors argued that the practice of prioritizing employees who would receive time and one-half pay was a constant irritant in labour relations, was never agreed to by the bargaining agent, and violated the collective agreement. The grievors argued that the equitability of overtime must be assessed at every overtime opportunity, because availability varies greatly with each shift. They submitted that it was nearly impossible to measure equitability at the end of the quarter once an employee was bypassed for a shift, making inequity nearly impossible to prove.

[16] The employer argued that the grievors had not met the burden of proving inequity. Regarding Mr. Hitchcock's grievance, the employer submitted that the situation was exceptional, and the shift was offered to Mr. Carew because of a mistaken belief that he was still in the institution. The employer submitted that the grievors had not proven that this incident created an inequity by the end of the quarter.

[17] Regarding the other grievances, the employer argued that the grievors had presented no evidence that prioritizing employees paid at time and one-half created inequity. They submitted that the previous cases required that equitability be measured on a longer term basis – at the end of each quarter. The employer submitted that when the grievors' overtime allocation at the end of the quarter was compared to other employees, there was no inequity.

(a) The Bucholtz, Boucher, and Hunt grievances with respect to the prioritization of the time and one-half rate in allocating overtime

[18] The Labour Board referred to previous cases that had dealt with similar overtime allocation policies at paragraphs 45-46:

> [45] …In both *Evans* and *Hunt and Shaw*, the adjudicator concluded that, had he been convinced that prioritizing employees on their first day of rest created an inequitable allocation of overtime, he would have allowed the grievance. In *Sturt-Smith*, the adjudicator concluded that the grievor should have been offered overtime, even though he would have been paid at double time. In *Sumanik*, the adjudicator stated that cost should not be a factor in defining the equitable allocation of overtime.
>
> [46] I agree with the substance of those decisions. Even if it is legitimate for the employer to put in place practices to reduce costs, those should not result in the inequitable distribution of overtime. Otherwise, those practices violate the collective agreement. In the cases before me, using rates of pay when allocating overtime could violate the collective agreement if the result is the inequitable distribution of overtime among readily available qualified employees.

[19] The Labour Board stated that the dispute between the parties was whether the practice of prioritizing employees on their first day of rest created an inequitable allocation of overtime. The Labour Board further stated that it is difficult to prove inequity in these circumstances. The Labour

Board found that equitability should be examined for every overtime opportunity, but should be assessed at the end of the quarter.

[20] At paragraphs 50 and 51 of its decision, the Labour Board considered—and rejected—two possible methods of measuring equitability:

> [50] In establishing whether or not a particular overtime allocation made on the basis of cost (ie. time and one-half v. double time) caused an inequitability in the distribution of overtime over the course of a quarter, one cannot simply compare the total points or hours accumulated by each officer at the end of each quarter. Nor can one establish this by simply comparing the quarterly totals of the officer who claims to have been bypassed in comparison to the officer who was allocated the overtime. Since the number of overtime hours worked will largely be determined or influenced by the number of shifts for which an employee indicates his or her availability, such a simplistic comparison does not necessarily lead to a proper result. It may be that an officer's low totals at the end of a particular quarter are accounted for by the fact that he or she indicated availability on only a few occasions rather than by the fact that they were bypassed on one occasion because the employer would have had to have paid them double time.
>
> [51] It could also be argued that the proper way to measure equitability would be to compile a ratio of the number of hours of overtime worked in a quarter divided by the number of hours of availability. After being calculated, that ratio could be compared to the average ratio for all employees. However, this method also does not stand up to close analysis because it is largely biased by the fact that an employees' [*sic*] availability varies greatly over time and does not necessarily coincide with overtime opportunities. In other words, some employees could, for different reasons, be more available in periods when the amount of overtime offered is low. The opposite could also happen.

[21] Thus, the Labour Board rejected a comparison of the total overtime points of each officer at the end of the quarter, and the calculation of a ratio of the number of overtime hours worked divided by the number of hours of availability. The Labour Board found that both these results would be

inaccurate because of confounding factors such as differing availability or a variation in the amount of overtime available.

[22] The Labour Board then formulated its own test for equitability at paragraph 52:

> [52] In the context of these grievances, equitability should be examined for every overtime opportunity but should be assessed at the end of the quarter. The grievors adduced in evidence the volunteer overtime reports applicable to the grievances of Mr. Bucholtz, Mr. Boucher and Mr. Hunt. In examining those reports, it is possible to verify whether a grievor lost any overtime hours in a quarter because of the missed overtime situation that was grieved.

[23] Thus, based on each grievor's stated availability for the rest of the quarter, and the relative overtime points of the available employees, the Labour Board determined whether each grievor ended the quarter with fewer overtime points than he would have if he had been offered the overtime shift at issue.

[24] The Labour Board found that Mr. Bucholtz did not end the relevant quarter with fewer overtime hours than he would have if he had been offered the shift on May 5, 2005. If he had worked that shift, he would not have been offered a subsequent shift he worked, because there would have been other officers with fewer overtime points. The Labour Board therefore concluded he was treated equitably, and dismissed his grievance – this grievance is therefore not at issue in this application.

[25] The Labour Board found that Mr. Boucher ended the relevant quarter with eight fewer hours of overtime than he would have if he had been offered the shift on May 5, 2005. He still would have

been eligible for the other overtime shifts he was offered that quarter. The Labour Board therefore concluded he was not treated equitably.

[26] The Labour Board found that Mr. Hunt was not treated equitably when he was not offered the shift on May 27, 2007, because he ended that quarter with four fewer hours than he would have otherwise. However, the Labour Board found that Mr. Hunt was treated equitably regarding a four-hour shift on July 19, 2007, because the employer allowed his grievance in part and paid him four hours of overtime at double time. The only officers who worked a full overtime shift that day had fewer overtime points than Mr. Hunt, and therefore the Labour Board concluded that there was no inequity – thus, Mr. Hunt's second grievance was dismissed, and therefore is not at issue in this application.

[27] The Labour Board stated that recent cases had held that the proper remedy was to pay the grievor for the overtime that he or she would have worked if offered the shift. The Labour Board therefore ordered the employer to pay Mr. Hitchcock eight hours at double time; Mr. Boucher eight hours at double time; and Mr. Hunt four hours at double time. The other grievances were dismissed.

(b) The Hitchcock grievance with respect to the misapplication of the overtime policy

[28] The Labour Board found that, following the decision in *Mungham v Treasury Labour Board (Correctional Service of Canada)*, 2005 PSLRB 106, when an employer institutes an overtime allocation policy and applies it for a long period, it thereby limits its discretion to assign overtime hours according to that policy (unless the policy violates the collective agreement).

[29] As a result, the Labour Board found that the employer violated the collective agreement by offering the overtime shift to Mr. Carew instead of Mr. Hitchcock. The employer failed to adduce evidence that it could not have waited the additional 10 minutes it would have taken for Mr. Hitchcock to arrive for the shift, and the Labour Board therefore found that the employer did not make every reasonable effort to equitably allocate overtime.

[30] The Labour Board dismissed the argument that, had the employer respected the overtime policy, it would in fact not have offered the shift to Mr. Carew or Mr. Hitchcock, but to another employee with fewer overtime points. The Labour Board found that this other employee had not filed a grievance, and there was no evidence that he would have accepted the shift, and therefore it could only decide the issue directly before it – whether offering the shift to Mr. Carew instead of Mr. Hitchcock violated the collective agreement.

LEGISLATION AND COLLECTIVE AGREEMENTS

[31] Section 208(1) of the *Public Service Labour Relations Act*, SC 2003, c 23, s 2 (the Act), permits an employee to present an individual grievance in relation, among other things, to the application of a provision of a collective agreement:

208. (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved	208. (1) Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé :
(a) by the interpretation or application, in respect of the employee, of …	a) par l'interprétation ou l'application à son égard : …

(ii) a provision of a collective agreement or an arbitral award; …	(ii) soit de toute disposition d'une convention collective ou d'une décision arbitrale; …

[32] Section 209(1) of the Act states that the employee may refer a grievance to adjudication by the Labour Board if it relates to the application of a provision of a collective agreement:

209. (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to	209. (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire peut renvoyer à l'arbitrage tout grief individuel portant sur :
(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award; …	a) soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale; …

[33] The relevant clauses of the collective agreement that covered Mr. Bucholtz and Mr. Boucher, signed in 2001, state:

> **21.10 Assignment of Overtime Work**
>
> Subject to the operational requirements of the service, the Employer shall make every reasonable effort:
>
> (a) to allocate overtime work on an equitable basis among readily available qualified employees,
> …

> **21.12 Overtime Compensation**
>
> Subject to Clause 21.13, an employee is entitled to time and one-half (1 1/2) compensation for each hour of overtime worked by the employee.
>
> **21.13** Subject to Clause 21.14, an employee is entitled to double (2) time for each hour of overtime worked by him or her,
>
> (a) on the employee's second or subsequent day of rest, (second or subsequent day of rest means the second or subsequent day in an unbroken series of consecutive and contiguous calendar days of rest),
> …

(The Court notes that the parties agreed that this was the collective agreement in force at the time of Mr. Bucholtz's and Mr. Boucher's grievances. The copy of the agreement presented to the Court indicates that it expired in 2002. However, the Labour Board's decision was based upon this version of the collective agreement, and the Court accepts that a similar provision would have been found in the agreement in force at the relevant time, as neither party pointed this error out to the Court.)

[34] The relevant clauses of the collective agreement that covered Mr. Hitchcock and Mr. Hunt, signed in 2006, state:

> **21.10 Assignment of Overtime Work**
>
> The Employer shall make every reasonable effort:
>
> (a) to allocate overtime work on an equitable basis among readily available qualified employees,
> …
>
> **21.12 Overtime Compensation**
>
> Subject to Clause 21.13, an employee is entitled to time and one-half (1 1/2) compensation for each hour of overtime worked by the employee.
>
> **21.13** Subject to Clause 21.14, an employee is entitled to double (2) time for each hour of overtime worked by him or her,

> (a) on the employee's second or subsequent day of rest, (second or subsequent day of rest means the second or subsequent day in an unbroken series of consecutive and contiguous calendar days of rest),
> …

ISSUES

[35] This application raises the following issues:

1. Was the Labour Board's decision reasonable to allow the grievances of Mr. Boucher and Mr. Hunt (finding that they were entitled to be paid double time for the overtime shifts at issue)?
2. Was the Labour Board's decision reasonable to allow Mr. Hitchcock's grievance (regarding the misapplication of the overtime policy)?

STANDARD OF REVIEW

[36] The parties agreed that the standard of review in this case is reasonableness. The Court agrees: in *New Brunswick (Labour Board of Management) v Dunsmuir*, 2008 SCC 9, [2008] 1 SCR 190, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question": see also *Khosa v Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12, [2009] 1 SCR 339, per Justice Binnie at paragraph 53.

[37] As I previously held in *Attorney General of Canada v Bearss*, 2010 FC 299, the Labour Board's interpretation and application of provisions of a collective agreement is subject to a

standard of reasonableness. Labour adjudicators have a high level of expertise, and are thus deserving of considerable deference.

[38] In reviewing the Commission's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, above, at paragraph 47; *Khosa*, above, at paragraph 59.

ANALYSIS

Issue #1: Boucher and Hunt grievances—prioritization of the time and one-half rate

Parties' positions

[39] The applicant submits that the collective agreements should be interpreted in light of the definition of "equitable", which does not mean equal, but rather "fair, just, reasonable". The applicant further submits that consideration of cost in allocating overtime does not *per se* violate the collective agreement – the employer is permitted to minimize costs in allocating overtime as long as the resulting allocation is not inequitable.

[40] The applicant submits that three principles must be applied in measuring equitability:

i. Equitability must be assessed over a reasonable period of time: *Bérubé v Treasury Board (Transport Canada)*, [1993] CPSSRB No 34; *Lay v Treasury Board (Transport Canada)*, [1986] CPSSRB No 301; *Armand v Treasury Board (Solicitor General Canada - Correctional Service)*, [1990] CPSSRB No 124;

ii. The Labour Board must compare the grievor's overtime during that period to the overtime given to other employees in similar circumstances to the grievor: *Roireau v Treasury Board (Solicitor General Canada – Correctional Service)*, 2004 PSSRB 85, [2004] CPSSRB No 78.

iii. This comparison must take into account factors that may explain any discrepancies between the employees' number of overtime hours, such as availability, leave, etc: *Roireau*, above.

[41] The applicant submits that when this analysis is properly applied, the respondents did not meet their burden of proving inequitable allocation of overtime, and therefore the Labour Board's decision was unreasonable. The applicant submits the Labour Board did not make any comparison between the grievors and other officers, and that it did not take into account other factors that could create a discrepancy in the grievors' number of overtime hours.

[42] The applicant submits that the Labour Board's chosen method of assessing equitability takes for granted that prioritizing employees receiving time and one-half pay is *per se* inequitable. By asking whether the grievor's 'missed' overtime shift was later replaced, the applicant submits the Labour Board had already concluded the employer's policy was inequitable without any basis for reaching that conclusion.

[43] The applicant further submits that the Labour Board's test for equitability produces absurd results: by asking whether the grievor ended the quarter with fewer overtime hours than he would have if he were offered the shift in question, the Labour Board fails to consider whether other

factors affected the grievor's subsequent availability. As the applicant submits, an employee could request an overtime shift for which he would receive double time pay, and after he was denied that shift, he could make himself unavailable for overtime for the rest of the quarter. Applying the Labour Board's analysis, that employee must be compensated, because he ended the quarter with fewer overtime hours than if he had worked the shift in question. The applicant submits this result is absurd and not in keeping with the previous cases of the Labour Board.

[44] The respondents submit that the applicant has mischaracterized the Labour Board's decision by asserting that the Labour Board found the consideration of pay rates *per se* inequitable. They submit that the rejection of Mr. Bucholtz's grievance demonstrates that the prioritization of employees receiving time and one-half pay did not in itself violate the collective agreement.

[45] The respondents submit that it was reasonable for the Labour Board to reject the applicant's method of measuring inequity because of its inherent weaknesses, and that it was reasonable for the Labour Board to craft a new method in light of developments in the law related to this issue.

[46] The respondents submit that the Labour Board's decision was consistent with the decisions in *Sturt-Smith v Treasury Board (Solicitor General Canada)*, [1986] CPSSRB No 195, and *Sumanik v Treasury Board (Ministry of Transport)*, PSSRB File No 166-2-395 (19710927). The grievances were allowed in those cases after the grievors were bypassed for overtime shifts because they would have received a higher pay rate than the employees given the shifts.

Previous Labour Board cases regarding the employer's overtime policy

[47] As previously mentioned, the issue of whether the employer can prioritize those receiving time and one-half pay over those receiving double-time has been adjudicated many times. In *UCCO*, above, the bargaining agent filed policy grievances arguing that the policy violated the collective agreement. Thus, the Labour Board considered in that case whether the policy itself constituted an inequitable allocation of overtime among readily available qualified employees.

[48] The Labour Board found that the overtime policy did not violate the collective agreement:

> [47] No evidence was adduced at adjudication demonstrating that the national overtime policy violates the collective agreement. Such evidence would have been necessary for me to conclude a violation of the collective agreement. Specifically, the bargaining agent needed to prove on a balance of probabilities that, as a result of the policy, overtime had not been allocated on an equitable basis among readily available qualified employees. There might be some elements of the policy that could, when applied, create equitability issues, but no evidence was presented in support of that allegation.

[49] Thus, the Court wishes to emphasize that the Labour Board found that the policy itself does not constitute an inequitable allocation of overtime—in other words, the consideration of pay rates in allocating overtime is not unfair to employees *per se*. Only if that policy can be empirically shown to create an inequitable distribution does it violate the collective agreement.

[50] The Labour Board affirmed this principle in the decision under review at paragraphs 45-46:

> [45] …In both *Evans* and *Hunt and Shaw*, the adjudicator concluded that, had he been convinced that prioritizing employees on their first day of rest created an inequitable allocation of overtime, he would have allowed the grievance. In *Sturt-Smith*, the adjudicator concluded that the grievor should have been offered overtime, even though he would have been paid at double time. In *Sumanik*, the

> adjudicator stated that cost should not be a factor in defining the equitable allocation of overtime.
>
> [46] I agree with the substance of those decisions. Even if it is legitimate for the employer to put in place practices to reduce costs, those should not result in the inequitable distribution of overtime. Otherwise, those practices violate the collective agreement. In the cases before me, using rates of pay when allocating overtime could violate the collective agreement if the result is the inequitable distribution of overtime among readily available qualified employees.

[51] The Court finds no error in this part of the Labour Board's decision—the Labour Board states, consistent with its previous cases, that the employer's overtime policy *could* violate the collective agreement, but only if it is shown through evidence to result in an inequitable distribution of overtime.

Previous Labour Board cases on the method of measuring equitability

[52] The Court agrees with the applicant that certain principles are established by the previous Labour Board cases regarding how to assess whether an allocation of overtime is equitable:

i. Equitability must be measured over a reasonable period of time:

> It would be wrong to think that article 15 of the collective agreement requires the employer to assign overtime equitably on a daily basis. On the contrary, it is perfectly acceptable in this situation to examine the assigning of overtime by the employer during a reasonable period: *Bérubé*, above.
>
> Equitability cannot be determined on a day-by-day basis but only over an extended period of time: *Lay*, above.
>
> I would suggest that matters such as the equitable assignment of overtime cannot be properly assessed by taking a "snap-shot" of one relatively brief period of time. This becomes particularly apparent when examining the facts of this grievance. Undoubtedly, as of the week of December 4, 1986 there was a discrepancy in overtime

> assignments between the grievor and Mr. Boudreau. It is equally apparent that this discrepancy was considerably narrowed, if not virtually eliminated, by the end of the quarter: *Evans v Treasury Board (Solicitor General Canada – Correctional Service)*, PSSRB File No 166-2-17195 (19881007).

ii. Equitability is assessed by comparing the hours allocated to the grievor to the hours allocated to similarly situated employees over that period of time:

> …However, the issue here is not whether the employer called [the employee] on the days in question, but rather whether it allocated overtime work on an equitable basis. Past decisions have established that this is a factual question and adjudicators have answered this question by considering the amount of overtime worked by each employee over a reasonable period of time: *Charlebois v Treasury Board (Department of Veterans Affairs)*, [1992] CPSSRB No 43.
>
> (Emphasis added)

iii. Once the overtime hours of the grievor and other employees are compared, the adjudicator must determine if there are any factors to explain a discrepancy between their hours such as differing availability, leave, etc:

> Equitable assignment does not mean uniform assignment of overtime. There can be differences in the number of hours accumulated if these differences are the result of factors that are fair and accepted by the parties…There must be concrete evidence demonstrating that, after an analysis of all factors that may explain a discrepancy in the number of hours accumulated, the only factor remaining is inequity: *Roireau*, above at paragraphs 135-136.
>
> …the grievor admitted in his testimony that he did not recall whether he had been available for overtime between April 16 and 30, 2004 or if overtime had been assigned. Consequently, the grievor did not convince me that minimizing costs was the only reason that he had not been assigned overtime between April 16 and 30, 2004: *Brisebois v Treasury Board (Department of National Defence)*, 2011 PSLRB 18 at paragraph 41.

[53] As discussed below, the Labour Board's decision under review departed from these principles.

Analysis of the Labour Board's method of measuring equitability

(a) The Labour Board's method unreasonably departed from past cases

[54] The Court finds that the Labour Board departed from the established methodology in determining whether the employer had inequitably allocated overtime. The Labour Board expressed its reservations about the existing methods of measuring equitability, and therefore attempted to craft a simpler method. The Court agrees with the respondents that nothing necessarily prevents the Labour Board from developing new methods of analysis – however, those methods must not produce unreasonable decisions.

[55] The Labour Board's reason for rejecting the established methodology is that it is inaccurate—it does not take into account confounding factors like availability or variations in the number of overtime opportunities. The Court finds this conclusion unreasonable: a full application of the methodology summarized above involves both a comparison, and a consideration of the factors that might explain the discrepancy in overtime between the employees.

[56] The Labour Board's other, implicit, reason for rejecting the established methodology is the difficulty of applying it—the Labour Board noted at paragraph 48 of its decision:

> [48] …it is more complicated to prove inequitable distribution for the remaining grievors. In these grievances, the grievors have to adduce evidence that the employer's decision to prioritize employees on their first day of rest when it offered overtime created an inequitable allocation of overtime.

[57] The respondents reiterated this argument before the Court, and the applicant acknowledged that inequitability is difficult to prove in this context. The Court also acknowledges the grievor's task is complex: it must compile the statistics on overtime, and show that there is a discrepancy that cannot be explained by differing availability or some other confounding factor.

[58] The assertion that inequitability is difficult to prove does not, of course, reduce or reverse the grievor's burden to prove his or her case on a balance of probabilities. The Labour Board evidently sympathized with the grievors' difficulty. What the Labour Board failed to consider in its decision, however, is whether the reason the grievors could not prove inequity was because there was no inequity.

[59] The employer allocates overtime on a voluntary basis—the employees are thus permitted to choose how often to request overtime, and when. Presumably the employees are in favour of using this voluntary system, as different employees have different preferences regarding how much overtime they would like to work. The result of this system is that the single biggest factor affecting an employee's overtime points at the end of the quarter is availability—an employee who signs up for no overtime shifts will end the quarter with zero points, and an employee who signs up for every possible shift will have a large number of points. This does not constitute unfairness, because the first employee did not want any overtime.

[60] In the context of this voluntary overtime system, it is possible to understand why the Labour Board's past decisions were unable to find evidence that the overtime policy created any inequity—

it is because the differences in employees' overtime hours could always be attributed to those employees' differing availability.

[61] Consider a hypothetical scenario in which every correctional officer signed up for every available overtime shift: if the employer's policy were properly applied, the overtime would be allocated equitably. Each officer would receive around the same number of hours, because for some of the shifts he or she would be eligible for time and one-half pay, and for others he or she would be eligible for double time pay. Each officer would likely work more shifts at the time and one-half rate than the double time rate, but the number of overtime hours would be equitable as between the employees.

[62] In reality, the employees' overtime hours vary considerably, but this is because each employee has his or her preferences regarding how much overtime to work and when. The fact remains that overtime is allocated to employees who make themselves available for overtime, and an employee's decision not to sign up for as many overtime shifts as others does not render the allocation of overtime inequitable. The past cases of the Labour Board on this issue are thus reasonable to find that discrepancies in overtime were not proven to be based on inequity—and the Labour Board's decision in this case was unreasonable to depart from this view.

[63] The Court also notes that equity cuts both ways—the employer is entitled to implement a scheme for allocating overtime that is fair to the employees and fair to the employer in terms of its interests in maximizing efficiency and minimizing cost. The Labour Board has consistently found that the employer is permitted to consider these factors when allocating overtime. If the

consideration of cost is not itself prohibited, and there is no evidence that the resulting allocation is inequitable, then there is no violation of the collective agreement.

(b) The Labour Board failed to consider the implications of its method

[64] The Court further finds that the Labour Board failed to consider the implications of its chosen method for assessing equitability – given that it was a dramatic departure from the established method, the Labour Board needed to turn its mind to the possible drawbacks of assessing equitability in this new manner. As the applicant submits, the Labour Board's selected method had significant flaws.

[65] First, the Labour Board's method did not rely on a comparison between the grievor and other similarly situated employees. Instead, the Labour Board compared the grievor's total number of hours to the total he would have had if he had been offered the shift at issue. By focusing on whether the grievor made up for the 'missed' overtime shift, the Court agrees with the applicant that the Labour Board took for granted that the employer was wrong to deny the grievor the shift at issue—only if that wrong was later corrected was the grievor treated equitably. The failure to measure inequity through a comparison of the grievor and other employees is a clear departure from the past cases and was not reasonably justified by the Labour Board.

[66] Second, the Labour Board's method did not take into account confounding factors such as differing availability. The Labour Board found, for example, that Mr. Boucher would have ended the relevant quarter with eight more overtime hours if he had been granted the shift at issue.

However, the Labour Board did not consider that Mr. Boucher's total overtime hours at the end of the quarter were wholly dependent on how many shifts he signed up for, and when.

[67] Third, the Labour Board's method has the potential to produce absurd results. Again using the example of Mr. Boucher, as the applicant submits, if he had chosen not to sign up for any shifts after the shift he was denied, he would still have been entitled to compensation according to the Labour Board's method. The Labour Board did not address these implications of its chosen method, and its decision is therefore unreasonable.

[68] The Court finds that the Labour Board did not sufficiently justify its deviation from the established principles for determining equitable allocation of overtime. The Labour Board's chosen method for determining equitability was contrary to past Labour Board decisions, and the conclusions it reached were not reasonably open to it. The Court therefore finds that the Labour Board's decisions regarding Mr. Boucher's and Mr. Hunt's grievances must be set aside and referred back to the Labour Board for reconsideration by a different panel.

Issue #2: Hitchcock grievance—misapplication of overtime policy

Parties' positions

[69] The applicant submits that the employer's overtime allocation policy does not form part of the collective agreement, and therefore deviation from that policy cannot constitute a violation of the collective agreement. The applicant submits that it is the final result, and not the method of allocating overtime, that is relevant to determining whether overtime was allocated inequitably.

[70] The applicant further submits that the Labour Board's decision regarding this grievance took a 'snap-shot' approach, rather than assessing equitability over a reasonable period of time, which the applicant submits is contrary to the relevant case law: *Evans*, above; *Lay*, above.

[71] The applicant relies on the decisions in *Farcey v Treasury Board (National Defence)*, [1992] CPSSRB No 22, and *Côté v Treasury Board (Post Office Department)*, [1983] CPSSRB No 194, to submit that the inadvertent failure to apply an established overtime policy is insufficient to find that an employer has allocated overtime inequitably.

[72] The respondents submit that the Labour Board followed past jurisprudence in allowing this grievance, and the outcome was reasonably open to it. The respondents rely on *Mungham v Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 106, which states that an overtime policy accepted by both the employer and bargaining agent can be said to represent a common understanding of what constitutes equitable overtime allocation. In that case, the employer deviated from that accepted policy, and the grievance was therefore allowed. The respondents also rely on *Hunt and Shaw v Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 65, in which the Labour Board similarly allowed a grievance where the employer inadvertently failed to follow its established overtime policy.

Analysis of Labour Board's reasons

[73] The Court finds that there is conflicting jurisprudence on this issue at the Labour Board level: the applicant has directed the Court to decisions in which inadvertent deviation from an overtime policy was found not to constitute inequitable overtime allocation, and the respondents

have directed the Court to (more recent) decisions that reach the opposite conclusion. However, the Court's function is only to determine whether the Labour Board's decision was reasonable – the reasonableness standard of review acknowledges that there can be more than one reasonable conclusion on an issue.

[74] The Court finds that it is possible to distinguish the cases the applicant relies on: in *Farcey*, above, the decision was partly based on the adjudicator's conclusion that he could not consider the overtime policy because it did not form part of the collective agreement – that aspect of the decision has been overruled subsequently, for example in *Mungham*, above. In *Côté*, above, the outcome was partly motivated by the fact that the employer made up for its inadvertent error by offering the grievor overtime shifts on the two days following the shift at issue, and the grievor refused those shifts.

[75] The Court finds that the Labour Board followed the decisions in *Mungham*, above, and *Hunt and Shaw*, above, and the applicant has not persuaded the Court that those decisions were unreasonable – in fact the applicant relies on those decisions for its other arguments in this application. In those cases, the adjudicator found that the overtime policy was binding on the employer because it was accepted by both sides and regularly used over a long period of time. The Labour Board applied the reasoning in those cases, and found that the correctional manager was required by the policy to offer the shift to Mr. Hitchcock before offering it to Mr. Carew.

[76] The Labour Board's rejection of the argument that another employee would have been entitled to the shift is also reasonable. The Labour Board found that it must decide the issue directly

before it – whether offering the shift to Mr. Carew instead of Mr. Hitchcock violated the collective agreement. The Labour Board supported its conclusion with reference to the decision in *Federal White Cement Ltd. v United Cement Workers, Local 368* (1981), 29 LAC (2d) 342. The Court finds that this conclusion was consistent with the jurisprudence and reasonably open to the Labour Board.

[77] The Court therefore concludes that the Labour Board's decision regarding Mr. Hitchcock's grievance was intelligible and justified, and reasonably open to it on the facts and the law. The Court has no basis upon which to intervene in this decision.

CONCLUSION

[78] The Court finds that the Labour Board's decision to allow the grievances of Mr. Boucher and Mr. Hunt (regarding the prioritization of the time and one-half rate) was unreasonable, and must be set aside and referred back to the Labour Board for reconsideration by a different panel. However, the Court finds that the Labour Board's decision to allow the grievance of Mr. Hunt (regarding misapplication of the overtime policy) was reasonable, and the application regarding this decision is therefore dismissed.

[79] The parties informed the Court that they have reached an agreement regarding costs, and thus no order as to costs will be made.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted in part. The Labour Board's decisions regarding Mr. Boucher's and Mr. Hunt's grievances are set aside and referred back to the Labour Board for reconsideration by a different panel. The Labour Board's decision regarding Mr. Hitchcock's grievance is upheld and this part of the application for judicial review is dismissed.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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