Federal Court  Cour fédérale

Date: 20131024

Docket: T-1523-12

Citation: 2013 FC 1064

Ottawa, Ontario, October 24, 2013

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

TED McMANAMAN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 18.1(4) of the *Federal Courts Act*, RSC 1985, c F-7, of a decision that the applicant had violated article 21.10 of the Collective Agreement between the Treasury Board and the Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN (the Collective Agreement), by failing to allocate two overtime shifts to Mr. McManaman on January 4, and 7, 2011, and ordering the respondent to pay Mr. McManaman 16.25 hours at double time at the applicable salary rate, plus premiums, if applicable.

[2] With respect to January 4, 2011, overtime hours were found to have been inequitably allocated because they were offered to a correctional officer level 2 (CX-02) rather than the respondent, a correctional officer level 1 (CX-01), even though the post was a CX-01 post. The January 7, 2011, overtime hours were found to have been allocated inequitably as they were allocated on the basis of cost. The applicant seeks judicial review of the decision solely in relation to the determination regarding the allocation of overtime on January 7, 2011.

Background

[3] The applicant, Correctional Service of Canada (the employer or CSC), manages the allocation of overtime at a local level according to article 21.10 of the Collective Agreement, and the National Direction – Policy on the Management of Overtime for the Correctional Officers (the National Overtime Policy). Both state that managers shall make "every reasonable effort" to offer overtime work on an "equitable basis among readily qualified employees". The National Overtime Policy also directs managers to minimize costs when overtime is required. The respondent notes that while the CSC allocates overtime in accordance with these two documents, the National Overtime Policy was created unilaterally by the applicant and was never agreed to by the Union.

[4] The respondent, Mr. McManaman, is a CX-01 who, throughout the 2010-2011 fiscal year, made himself available for a total of 120 overtime hours. Specifically, Mr. McManaman was available for 16 overtime hours in November 2010, 56 overtime hours in January 2011, and 48 overtime hours in February 2011. Mr. McManaman only made himself available for overtime

on his second day of rest when he was eligible to be paid at a rate of double time. Overtime was not offered for 104 of the 120 overtime hours for which Mr. McManaman had indicated that he was available. Mr. McManaman was not offered any overtime hours throughout the 2010-2011 fiscal year.

[5] On January 7, 2011, the employer offered an eight hour-long overtime shift to an employee, DD, who was available for overtime at the rate of time and a half, rather than to Mr. McManaman, who was available for overtime at a rate of double time. Prior to January 7, 2011, DD had been offered 236.75 hours of overtime over the 2010-2011 fiscal year. Mr. McManaman had not been offered any overtime hours during that same period of time. Cost was the only factor guiding the employer's decision to extend the offer to DD rather than to Mr. McManaman.

[6] On April 5, 2011, Mr. McManaman presented a grievance alleging that the applicant had denied him an equitable distribution of overtime over the 2010-2011 fiscal year. The grievance was referred to adjudication on September 15, 2011, pursuant to section 209 of the *Public Service Labour Relations Act*, SC 2003, c 22 [the *Public Service Labour Relations Act*].

Decision under review

[7] Relying on *Canada (Attorney General) v Bucholtz*, 2011 FC 1259 at para 52, [2011] FCJ no 1548 [*Bucholtz*], where Justice Kelen set out the established principles regarding how to assess whether an allocation of overtime is equitable (the *Bucholtz* test), the Adjudicator held that the overtime allocation of January 7, 2011, was inequitable:

[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 (CanLII), 2011 PSLRB 18 at paragraph 41. [Emphasis in original]

[8] The Adjudicator found that the employer's sole reason for not offering overtime to Mr. McManaman on January 7, 2011, was cost. The officer to whom the overtime was allocated had already worked 236.75 hours of overtime that year, but received the offer because he was paid at a rate of time and a half. Mr. McManaman, who had not worked any hours of overtime that year, was not offered overtime because he would have been paid at a rate of double time. Consequently, cost had driven the allocation of overtime rather than equitability. The Adjudicator noted that no other overtime opportunities arose for Mr. McManaman for the remainder of the fiscal year because he was only available on days where there wasn't any overtime offered.

[9] The Adjudicator also held that the employer had deliberately denied Mr. McManaman the January 7, 2011, overtime shift on grounds other than those authorized by paragraph 21.10(a) of the Collective Agreement; that is equitability, qualifications, availability and readiness to work. The Adjudicator noted that should the employer want the flexibility to allocate overtime on the basis of cost, regardless of equitability, it must obtain the bargaining agent's consent and

amend the Collective Agreement. The Adjudicator concluded that until this was done, the employer was not free to allocate overtime on the basis of cost if it resulted in a violation of the terms of the Collective Agreement.

[10] The Adjudicator rejected the employer's arguments that overtime was allocated on the basis of cost just once, that it was not able to correct the situation afterwards, and that he should not find inequity on the basis of one missed overtime shift. The Adjudicator held that the employer should have known that allocating overtime on the basis of cost would result in inequity for officers such as Mr. McManaman, who were only available for overtime at a rate of double time.

[11] The Adjudicator also rejected the employer's argument that there was no evidence that Mr. McManaman would have accepted the overtime had it been offered to him. The Adjudicator held that he could assume Mr. McManaman would have accepted the offer on the basis of his notice of availability to work overtime on January 7, 2011.

[12] The Adjudicator ordered that Mr. McManaman be paid the eight hours of missed overtime on January 7, 2011, at double time at the applicable salary rate, plus premiums, if applicable.

Issue

[13] Was it reasonable for the Adjudicator to conclude that the grievor had not been treated equitably over the 2010-2011 fiscal year on the basis of the employer's allocation of overtime on January 7, 2011?

Standard of review

[14] The parties agree that the applicable standard of review is that of reasonableness.

[15] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] at para 62, and in *Canada (MCI) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 53, the Supreme Court of Canada held that the first step in establishing the standard of review is to consult the prior jurisprudence.

[16] I see no reason to depart from the finding in *Bucholtz*, above, at paras 37-38, that reasonableness is the applicable standard of review with respect to the Public Service Labour Relations Board's interpretation and application of the provisions of a collective agreement:

> [37] As I previously held in *Attorney General of Canada v Bearss*, 2010 FC 299 (CanLII), 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.

Applicable legislation

[17] Article 21.23 of the Collective Agreement and section 209 of the *Public Service Labour Relations Act* set out the procedures for filing grievances and referring grievances to

adjudication. Article 21.10 of the Collective Agreement sets out the parameters for the allocation of overtime hours.

***Public Service Labour Relations Act*, SC 2003, c 22.**	***Loi sur les relations de travail dans la fonction publique*, LC 2003, c 22.**
INDIVIDUAL GRIEVANCES	**GRIEFS INDIVIDUELS**
Reference to Adjudication	***Renvoi à l'arbitrage***
Reference to adjudication	**Renvoi d'un grief à l'arbitrage**
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;
[…]	[…]
Collective agreement between Treasury Board and the Union of Canadian Correctional Officers – Syndicat des agents correctional du Canada – CSN	**Convention entre le Conseil du Trésor et Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN**
Article 20 – Grievance Procedure Article 20.23	**Article 20 – Procédure de règlement des griefs Article 20.23**

Where an employee has presented a grievance up to and including the Final Level in the grievance procedure with respect to:

(a) the interpretation or application in respect of him or her of a provision of this Agreement or a related arbitral award,

[…]

And the employee's grievance has not been dealt with to his or her satisfaction, he or she may refer the grievance to adjudication in accordance with the provisions of the *Public Service Labour Relations Act* and *Regulations*.

[…]

Article 21 – Hours of Work and Overtime

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,

**

(b) to allocate overtime work to employees at the same group and level as the position to be filled, i.e.:

Lorsque l'employée a présenté un grief jusque et y compris le dernier palier de la procédure de règlement des griefs au sujet de :

(a l'interprétation ou de l'application, à son égard, d'une disposition de la présente convention ou d'une décision arbitrale s'y rattachant,

[…]

Et que son grief n'a pas été réglé à sa satisfaction, il peut se présenter à l'arbitrage selon les dispositions de la *Loi sur les relations de travail dans la fonction publique* et de son règlement d'exécution.

[…]

Article 21 – Durée du travail et heures supplémentaires

21.10 Répartition des heures supplémentaires

L'Employeur fait tout effort raisonnable pour :

(a répartir les heures supplémentaires de travail sur une base équitable parmi les employé-e-s qualifiés facilement disponibles

**

b) attribuer du travail en temps supplémentaire aux employé-e-s faisant partie du même groupe et niveau

Correctional Officer 1 (CX-1) to Correctional Officer 1 (CX-1), Correctional Officer 2 (CX-2) to Correctional Officer 2 (CX-2) etc.;	par rapport au poste à combler, par ex. Agent Correctionnel 1 (CX-1) à agent correctionnel 1 (CX-1), agent correctionnel 2 (CX-2) à agent correction 2 (CX-2), etc.
However, it is possible for a Local Union to agree in writing with the Institutional Warden on an another method to allocate overtime.	Cependant, il est possible pour une section locale de convenir par entente écrite avec le directeur de l'établissement d'une méthode différente en ce qui a trait à l'attribution du temps supplémentaire.
and	et
(c) to give employees who are required to work overtime adequate advance notice of this requirement.	c) donner aux employées, qui sont obligés de travailler des heures supplémentaires, un préavis suffisant de cette obligation.

Analysis

[18] I am in agreement with the applicant that even though the Adjudicator expressly recognized that the *Bucholtz* test, above, should be applied in assessing the equitability of the allocation of overtime hours to the respondent over the 2010-2011 fiscal year, the Adjudicator failed to apply the *Bucholtz* test in making his determination. Rather than consider the allocation of overtime hours over the 2010-2011 fiscal year, the Adjudicator narrowed his assessment to the allocation of a single overtime shift on January 7, 2011.

[19] Furthermore, the Adjudicator failed to compare the number of overtime hours allocated to the respondent to those allocated to other similarly situated employees. Instead, the

Adjudicator compared the number of overtime hours allocated to the respondent to those allocated to DD. DD, who was allocated the overtime shift on January 7, 2011, was not a similarly situated employee. The respondent was available for a total of 120 overtime hours during the 2010-2011 fiscal year, whereas DD was available for 1900 overtime hours. Finally, the Adjudicator erred by failing to consider whether any discrepancies in the allocation of overtime hours between the respondent and similarly situated employees over the 2010-2011 fiscal year as a whole could be explained by factors such as availability. Instead, the Adjudicator considered the factors explaining the allocation of the single shift before finding that the allocation of overtime hours was not equitable. For these reasons, this decision is, in my view, unreasonable.

[20] As this was essentially a dispute between the employer and the union which is unlikely to arise again due to amendments to the collective agreement, the parties shall bear their own costs.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that:

1. the application is granted and the Adjudicator's order for the applicant to pay the respondent eight hours at double time at the applicable salary rate, plus premiums, if applicable, for the January 7, 2011, overtime shift is set aside;
2. there is no order as to costs.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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