

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20150527**

**Docket: A-391-13**

**Citation: 2015 FCA 136**

**CORAM: PELLETIER J.A  
GAUTHIER J.A.  
SCOTT J.A.**

**BETWEEN:**

**TED MCMANAMAN**

**Appellant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Montréal, Quebec, on May 25, 2015.

Judgment delivered at Montréal, Quebec, on May 27, 2015.

**REASONS FOR JUDGMENT BY:**

**GAUTHIER J.A.**

**CONCURRED IN BY:**

**PELLETIER J.A.  
SCOTT J.A.**

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**REASONS FOR JUDGMENT**

**GAUTHIER J.A.**

[1] Ted McManaman is appealing from the decision (2013 FC 1064) rendered by Justice Mosley of the Federal Court that allowed the respondent's application for judicial review of a decision rendered by an adjudicator from the Public Service Labour Relations Board (PSLRB). The judge also rejected the appellant's grievance regarding the allocation of overtime on January 7, 2011.

[2] The judge applied the reasonableness standard and concluded that the adjudicator's decision was unreasonable because, after referring to the test set out in *Canada (Attorney General) v. Bucholtz*, 2011 FC 1259 [*Bucholtz*], for determining whether the employer had allocated available overtime work on an equitable basis, the adjudicator allegedly did not apply that test in its entirety. According to the judge, the adjudicator, on the one hand, did not consider the fiscal year as a whole and, on the other, compared the appellant's situation solely with that of an employee who actually worked the overtime hours on January 7, 2011, but was clearly not in a similar situation. According to the judge, in the light of the test that the adjudicator had identified (paragraphs 29 to 33 of his reasons, 2012 PSLRB 75), he should have compared the appellant's situation with those of other similarly situated employees over the course of the year.

[3] In the context of an appeal from a decision disposing of an application for judicial review, this Court must determine whether the judge chose the correct standard of review and applied it properly (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paragraph 46).

[4] In this case, it is common ground that the judge applied the correct standard. What therefore remains to be examined is whether he applied it properly.

[5] At the hearing, the appellant submitted that the judge had simply substituted his opinion for that of the adjudicator. He states that the adjudicator was entitled to conclude that overtime hours had been assigned inequitably on January 7, 2011, even if this inequity involved just one shift. According to the appellant, even though the adjudicator does not directly address the appellant's situation in relation to those of other similarly situated employees in his analysis at paragraphs 35 to 37 of the reasons, the adjudicator had sufficient evidence before him (see the evidence described at paragraphs 5 and 6 of the reasons) for the Court to infer that he implicitly concluded that this comparison confirmed the inequity in the allocation of overtime to the appellant's detriment.

[6] The parties agree that the adjudicator described the proper test and that this test necessarily involves the comparative analysis described in *Bucholtz*. Therefore, the only real issue before us is whether, using the approach set out in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, particularly at paragraphs 14 and 15, the Court can in this case infer from the outcome that the adjudicator implicitly concluded as the appellant suggests, and this assumes that the evidence in the record was sufficient for him to do so.

[7] The parties have made some rather detailed arguments regarding the evidence in the record. However, they do not agree on which employees had to be taken into account in this case, or on the details that the adjudicator needed to make the comparison described in *Bucholtz*.

[8] In the absence of any guidance on this subject, be it in the adjudicator's decision or in arbitral case law, I cannot conclude whether the decision is reasonable without defining the phrase "similarly situated employees" and determining the relevant factors for comparison. The deference owed to the adjudicator suggests that the Court should not substitute its own judgment for that of the adjudicator to define these concepts, which are at the core of the PSLRB's expertise. .

[9] I also agree with the appellant that the judge erred in substituting his own interpretation of "similarly situated employees" and rendering the decision that the adjudicator should have rendered. It appears that he took the liberty of doing this because, in his view, there was little chance that the facts in this case would reoccur, given the amendments made to the collective agreement.

[10] However, the parties before the Court agree that the issue at stake—namely, which employees are similarly situated and must be taken into account, and what evidence does an adjudicator need to conduct the analysis set out in *Bucholtz*—is important because it is relevant in this respect to a number of grievances that are still pending.

[11] I therefore conclude that it would be more appropriate to refer the matter back to the adjudicator to decide this issue with regard to the grievance concerning January 7, 2011. I

therefore propose that the appeal be allowed and that, rendering the decision that the judge should have made, the application for judicial review be allowed and the matter referred back to the adjudicator to decide the grievance concerning the allocation of overtime on January 7, 2011, in accordance with these reasons, without costs.

“Johanne Gauthier”

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J.A.

“I agree.

J.D. Denis Pelletier J.A.”

“I agree.

A.F. Scott J.A.”

Certified true translation  
François Brunet, Revisor

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-391-13

**STYLE OF CAUSE:** TED MCMANAMAN v. THE  
ATTORNEY GENERAL OF  
CANADA

**PLACE OF HEARING:** MONTRÉAL, QUEBEC

**DATE OF HEARING:** MAY 25, 2015

**REASONS FOR JUDGMENT BY:** GAUTHIER J.A.

**CONCURRED IN BY:** PELLETIER J.A.  
SCOTT J.A.

**DATED:** MAY 27, 2015

**APPEARANCES:**

Mathilde Baril-Jannard FOR THE APPELLANT

Pierre-Marc Champagne FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

LAROCHE MARTIN FOR THE APPELLANT  
Montréal, Quebec

William F. Pentney FOR THE RESPONDENT  
Deputy Attorney General of Canada  
Montréal, Quebec