

Federal Court



Cour fédérale

Date: 20190808

Docket: T-1638-18

Citation: 2019 FC 1061

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, August 8, 2019

PRESENT: Associate Chief Justice Gagné

BETWEEN:

DERRICK VOLPI, JEAN MICHEL PAUL ET AL.

Applicants

and

PARLIAMENTARY PROTECTIVE SERVICE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Derrick Volpi is seeking judicial review of an arbitration award rendered August 14, 2018, by Marie-Claire Perrault, grievance adjudicator appointed by the Federal Public Sector Labour Relations and Employment Board, whereby the adjudicator dismissed the individual grievance Mr. Volpi had filed against his employer, the Parliamentary Protective Service [PPS].

Mr. Volpi asked to be paid for his meal break, specifically to take into account the restrictions imposed on him by the wearing of the new PPS uniform.

[2] For the reasons that follow, the application for judicial review will be dismissed.

II. Facts

[3] Mr. Volpi is an employee of the PPS, an organization created in 2015 by certain amendments to the *Parliament of Canada Act*, RSC 1985, c P-1, in response to the armed attack at the National War Memorial and Parliament in October 2014. The PPS is responsible for security on Parliament Hill and within the Parliamentary Precinct. It covers all the buildings where the House of Commons, the Senate and their various committees operate.

[4] Mr. Volpi is a member of the House of Commons Security Services Employees Association (SSEA). The PPS succeeds the House of Commons as employer and is bound by the collective agreement signed by the House of Commons and the SSEA on October 30, 2012, which was in effect at the time of the grievance.

[5] Since the creation of the PPS, a number of changes have been made to the practices of parliamentary security officers and several pieces of restricted equipment have been added to their uniform. The employer also issued a verbal directive prohibiting security officers from leaving the perimeter known as the Armed Operational Precinct (bounded by the Ottawa River to the north, Kent Street to the west, Queen Street from north to south, and the Rideau Canal to the east) in uniform. As a result, security officers who wish to leave the Armed Operational Precinct

during their lunch break to go to the ByWard Market or the Rideau Center, for example, must now first go to the lockers in the Wellington Building to get changed and store their restricted equipment. They tried to demonstrate before the adjudicator that it took on average 25 minutes 45 seconds to get there and take off the equipment and as much time to put the equipment back on and return to their post. Almost the entire one-hour meal break would therefore be taken up by tasks performed for the benefit of the employer.

III. Impugned decision

[6] The adjudicator reviewed the case law applicable to the compensation of meal breaks and retained certain parameters. Generally speaking, employees required to remain available to meet the needs of the employer or to perform certain duties outside of work hours are entitled to compensation (*Association of Justice Counsel v Treasury Board (Department of Justice)*, 2015 PSLREB 31, aff'd. *Association of Justice Counsel v Canada (Attorney General)*, 2017 SCC 55; *Steinberg Inc v United Food and Commercial Workers International Union, Local 486*, [1985] OLA No 5 (QL)). The same applies for employees who are on standby and are required to be able to respond immediately (*Olynyk and Treasury Board (Solicitor General)*, [1985] CPSSRB No 122 (QL)). In any event, the wording of the collective agreement is crucial to the analysis (*Canada (Attorney General) v Paton*, 1990 1 FC 351 (FCA); *Hutchison v Treasury Board (Department of National Defence)*, 2015 PSLREB 32; *Martin v Canada (Treasury Board)*, 1990 FCJ No 939 (FCA)). However, additional compensation is paid only when additional work is required by the employer (*Annapolis Valley District Health Authority and Nova Scotia Government and General Employees Union*, 177 LAC (4th) 218 (NSLRB)). Employees who

must remain available during their meal break are sometimes, but not systematically, entitled to some compensation.

[7] The adjudicator also upheld three principles of the arbitration decision in *Nova Scotia (Attorney General) v PANS*, [1993] NSLAA No 8: (1) if an employer directs an employee to perform an activity, the employee is at work and is to be paid; (2) if an employer gives an employee the opportunity to perform an activity, compensation may be paid in some circumstances; and (3) if an employee voluntarily performs an activity which in other circumstances would be “work”, the employee will not be paid because the activity was performed voluntarily.

[8] The collective agreement governing the PPS’s labour relations at the time of the grievance provides for unpaid meal breaks unless employees are required to remain at their post.

[9] As for the time needed to put on and remove the full uniform (the latter includes storing restricted equipment), the evidence before the adjudicator was largely contradictory. Mr. Volpi tried to demonstrate that it took about 25 minutes per change while the employer tried to show that two minutes was enough. After assessing the evidence provided, the adjudicator estimated that at least 10 minutes are necessary, taking up at least 20 minutes of the meal break.

[10] Since the collective agreement stipulates that the meal break is generally unpaid, the adjudicator found that the applicants had the burden of showing that the employer’s directive imposing the storage of the uniform when leaving the Armed Operational Precinct violated the

collective agreement. In the absence of such a violation, the adjudicator found that she could not order the payment of compensation that is not provided for in the collective agreement or in any other agreement between the parties (*Maple Leaf Fresh Foods Brandon v UFCW, Local 832*, [2010] MGAD No 30).

[11] The adjudicator was of the opinion that the PPS officers' "workplace" was limited to their respective post and did not extend to the entire Armed Operational Precinct. Officers do not carry out their duties throughout the Parliamentary Precinct but only in the spaces of Parliament Hill, where the members of the House of Commons are present.

[12] The adjudicator concluded that the wearing of the uniform indicated that they were in the service of the House of Commons, but not necessarily working or on duty—a subtle distinction, if there is one. PPS officers could use their meal break as they pleased, even if they were required to wear their uniform. All employees had to comply with the dress code for their workplace, and this dress code continued to apply during the meal break.

[13] The adjudicator therefore concluded that since the applicants were in control of their time during the meal break, they were not entitled to additional compensation.

IV. Issues and standard of review

[14] This application for judicial review raises a single issue:

Did the adjudicator err in concluding that Mr. Volpi and the PPS officers were not entitled to be paid for their meal break?

[15] Mr. Volpi argues that if the adjudicator failed to consider decisive evidence, a rule of procedural fairness was violated and the decision should be reviewed against the standard of correctness (*Rakheja v Canada (Citizenship and Immigration)*, 2009 FC 633 at para 19; *Syndicat des salariés des produits de céramique et autres (CSN) c Commission des relations du travail*, 2013 QCCS 5694 at para 51). He concedes, however, that all of his other arguments are reviewable against a standard of reasonableness.

[16] The PPS is of the opinion that since Mr. Volpi disputes the adjudicator's factual findings, the only applicable standard of review is one of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 54–55; *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at paras 7, 54). The review of an administrative tribunal's findings of fact requires extreme deference on the part of the Court (*Stewart v Elk Valley Coal Corp*, 2017 SCC 30 at para 27; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16; *Canadian Union of Public Employees, Local 301 v Montreal (City)*, [1997] 1 SCR 793 at para 85; *Jean Pierre v Canada (Immigration and Refugee Board)*, 2018 FCA 97 at paras 52–58, 62, 66).

[17] I agree with the PPS. The standard of reasonableness applies to the adjudicator's decision since all of Mr. Volpi's arguments raise issues of fact, or questions of mixed fact and law.

[18] The Federal Court of Appeal has indeed confirmed that the standard of review applicable to the decision of an adjudicator appointed by the Federal Public Sector Labour Relations and Employment Board is that of reasonableness (*Canada (Attorney General) v Public Service*

Alliance of Canada, 2019 FCA 41 at para 34). The privative clause in section 72 of the *Parliamentary Employment and Staff Relations Act* and the interpretation of subsection 18.1(4) of the *Federal Courts Act*, RSC 1985, c F-7, must also be considered, since both advocate a high degree of deference to the adjudicator's findings (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 72; *Stelco Inc v British Steel Canada Inc*, [2000] 3 FC 282 (FCA) at paras 14, 21–26).

V. Analysis

A. *Did the adjudicator fail to consider Mr. Volpi's alternative argument?*

[19] Mr. Volpi submits that the adjudicator failed to consider an entire aspect of his grievance. His main claim is that the whole meal break be paid since the officers are “captive”: they have to stay in full uniform, keep their radios on and connected to their earpiece, and respond to people who address them as a result of their being in uniform. In the event of an emergency on Parliament Hill, they would have to intervene.

[20] However, in the alternative, he requests that if the adjudicator were to conclude that they should not be paid for the entire meal break, they should at least receive compensation for the time required to regain their freedom, that is, the 20 minutes required to remove their uniform and to put it back on. It is this last aspect that, according to Mr. Volpi, is missing from the analysis. By failing to address this serious argument, the adjudicator rendered an incomplete decision that lacks intelligibility and transparency (*Société Radio-Canada c Lauzon*, 2017 QCCS 993 at para 43).

[21] Contrary to the PPS's argument, Mr. Volpi did not split his grievance before the adjudicator; it is clear from paragraph 108 of his factum that he asked to be paid for the time spent changing, in the event that compensation was not granted for the full hour:

[TRANSLATION]

108. . . . And even if that were the case, the complainants would still be captive for 30 to 40 minutes and should be paid for that period.

[22] However, I am of the view that the adjudicator did understand Mr. Volpi's position and the fact that he was submitting an alternative argument. She notes as follows in paragraph 69 of her reasons:

The issue to decide is whether that means that members are entitled to be paid during the meal breaks or to receive a bonus for the time needed to don and remove their equipment.

[23] The adjudicator ultimately holds that the employees are in control of their time throughout the meal break. In other words, they are free to do what they want, including leaving the Armed Operational Precinct, provided they remove their uniform. However, the employer does not require them to remove and return their uniform during the meal break. Since the time required to do so arises from the employee's personal choice to leave the Armed Operational Precinct, the employee should not be paid (*Nova Scotia (Attorney General) v PANS*, [1993] NSLAA No 8).

[24] It is my view that this conclusion adequately addresses both aspects of Mr. Volpi's grievance.

B. *Travel time*

[25] As noted above, the adjudicator retained from the evidence that the time required to remove and return the complete uniform was 20 minutes. However, Mr. Volpi submits that the adjudicator failed to take into account the travel time between officers' posts and the lockers at the Wellington Building, which was included in his own 50-minute assessment.

[26] I am rather of the opinion that a reading of the adjudicator's reasons as a whole suggests that she took into account the time it takes to get to the lockers. In paragraph 23, she notes that the evidence indicates that the secure lockers are "in the second basement of a building on Wellington Street". In paragraph 30, she adds that "secure lockers are available in all buildings where PPS members work" and at paragraph 66, she ultimately holds that "secure lockers are in designated rooms, access to which takes a certain amount of time". While she recognized that some time is required to access one of these rooms, she does not accept that the only place where officers can store their restricted equipment is the Wellington Building.

[27] In addition, her factual conclusion is consistent with the analysis of the contradictory evidence presented by both parties, which in both cases included the time required to get to the lockers. Her conclusion must logically include travel time.

C. *Evidence considered*

[28] Mr. Volpi submits that the adjudicator failed to consider an entire aspect of his grievance. First, she ignored a decision made by the PPS's predecessor on January 23, 2012, in which the officers' grievance was allowed and their entitlement to additional compensation was confirmed for the time required to remove and store their equipment, before and after their shifts.

[29] In his testimony, the director of the House of Commons Security Services further acknowledged that the time required to put on and take off the uniform should be considered to be working time for the exclusive benefit of the employer, and that it should be paid.

[30] The adjudicator ultimately failed to take into account the *PPS Dress & Department Policy*, which states in section 2.2 that employees are on duty when wearing their uniform.

[31] If the adjudicator had taken these elements into account, Mr. Volpi submits, she would at least have concluded that the time spent by employees to equip themselves is work time that should be paid.

[32] With respect, I am of the opinion that the January 23, 2012, decision has little relevance in this case. It concerns the time officers need to get changed before and after their shift. Since officers cannot leave the Armed Operational Precinct in uniform, they must remove it at the end of their shift before leaving. This is an employer requirement that must be fulfilled outside normal working hours. For this reason, officers are paid additional compensation. Again, no such requirement is imposed on officers during the meal break.

[33] The same comment applies to the testimony of the Director of the House of Commons Security Services regarding the time officers require to prepare before and after their shift.

[34] Finally, paragraph 2 of section 2.2 of the *PPS Dress & Department Policy* does not provide, as Mr. Volpi argues, that officers are on duty when wearing their uniform. Instead, it

stipulates that officers must wear their uniform while on duty. This is an important distinction, and I am of the opinion that a correct interpretation of this provision makes the adjudicator's distinction between being "in the service of the House of Commons" and being "on duty" or "not working" completely irrelevant. In my opinion, the officers are neither in the service of the House of Commons nor on duty during their meal break.

[35] The adjudicator therefore did not fail to consider relevant and decisive evidence.

D. *Adjudicator's analysis*

[36] Mr. Volpi submits that the adjudicator misunderstood the issue; rather than determining whether he should be compensated for the time it took him to change during his meal break, she questioned whether the requirement to wear a uniform and securely store restricted equipment violated the collective agreement.

[37] Mr. Volpi argues that since officers are captive during their meal break, they should be considered to be on duty and be paid. The evidence shows that the majority of officers stay in uniform during their meal break and therefore do not leave the Armed Operational Precinct. In the event of an emergency on Parliament Hill, they would be asked to assist. Their uniform may also be inspected by their superiors. Finally, they are regularly spoken to by tourists and other passersby and could be targeted because of their uniform.

[38] However, the evidence also shows that there have been only two or three incidents in the past requiring an intervention during a meal break and that the officers who assisted while they were on break were paid for their work.

[39] In my opinion, the adjudicator asked the right question and properly analyzed the evidence presented to her, in light of the relevant case law.

[40] She reasonably concluded that PPS officers can claim compensation only if they have been called to work during their break time (*Annapolis Valley District Health Authority and Nova Scotia Government and General Employees Union*, 177 LAC (4th) 218 (NSLRB)).

[41] She considered the relevant provisions of the collective agreement, which provide that the meal break is unpaid, unless officers are required to remain at their place of work, which does not extend to the entire Armed Operational Precinct.

[42] Mr. Volpi therefore had the burden of demonstrating how by the mere fact that he was required to stay in uniform within the perimeter of the Armed Operational Precinct during the meal break, he should be considered to be on duty at his place of work. The adjudicator rightly concluded that he failed to do so. She recognizes a certain loss of freedom but concludes that it is not sufficient to justify compensation. Contrary to Mr. Volpi's contention, there is no contradiction between not being able to use one's meal break completely as one wishes and the fact that officers nevertheless control their time. The requirement to comply with certain employer requirements does not automatically entitle employees to compensation when the

collective agreement provides otherwise (*Re Maple Leaf Fresh Foods Brandon and United Food & Commercial Workers, Local 832*, [2010] MGAD No 30).

[43] The irony in Mr. Volpi's position is that if it were concluded that the mere fact that officers have to wear a uniform during their meal break means that they should be considered to be on duty and at their workplace, officers would have to be paid overtime. Officers spending their meal break in a break room or restaurant would then be paid overtime. This is not what Mr. Volpi is claiming expressly, but since this is what the collective agreement provides, it would have been the result of a favorable decision by the adjudicator.

[44] It is true that officers' working conditions have changed somewhat during the period covered by the collective agreement, but that is precisely the reason why collective agreements exist for a fixed term and are renegotiated at the end of that term.

E. *The PPS officers' workplace*

[45] Mr. Volpi submits that PPS officers perform their duties throughout the Armed Operational Precinct, whereas the PPS is of the opinion that they are limited to Parliament Hill and the spaces used by members of the House of Commons.

[46] The SSEA representative conceded on cross-examination that the PPS officers' duty "to ensure the security of people and property applies only to Parliament Hill (the buildings of Parliament), not to the entire Parliamentary Precinct. On Wellington, Sparks, and Queen streets, for example, it is the Ottawa Police Service's responsibility" (Decision, at para 28). The

adjudicator concluded from this that the workplace is the precise place where officers are on duty and that unless they are in the service of the House of Commons, they leave their workplace when they go to Sparks or Queen streets.

[47] I am of the opinion that the adjudicator reached a reasonable conclusion in this regard, given the evidence administered.

VI. Conclusions

[48] I believe that the adjudicator properly considered the evidence presented by the parties and correctly concluded that Mr. Volpi was not entitled to additional compensation for his meal break because of the PPS directive imposing the wearing and safe storage of the uniform. Since the evidence shows that break time belongs to the officers and that the PPS does not expect them to remain on duty or be available, the adjudicator reasonably concluded that PPS officers are not entitled to additional compensation.

JUDGMENT

THE COURT ORDERS AND ADJUDGES THAT:

1. The application for judicial review is dismissed;
2. Costs are awarded to the PPS.

“Jocelyne Gagné”

Associate Chief Justice

Certified true translation
This 28th day of August 2019.

Johanna Kratz, Reviser

FEDERAL COURT
SOLICITORS OF RECORD

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