Date: 20081024

Docket: T-1831-07
T-1842-07

Citation: 2008 FC 1194

Ottawa, Ontario, October 24, 2008

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

FRANK NITSCHMANN, ERIC ARMSTRONG, AU HAI NGUYEN, QUIRINO DEL CASTILLO, DOUG CHAPPELL, PIERRE GOULET, TERRANCE MCKINNON, GERARD PINEAULT, MUZAFFOR AHMED, GERRY SANDER, DAVID OLIVE, THE ESTATE OF THE LATE DAVID SWAIN

Applicants

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by TREASURY BOARD

Respondent

AND BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

FRANK NITSCHMANN, DOUG CHAPPELL, DAVID OLIVE, TERRANCE MCKINNON, MUZAFFOR AHMED, GERRY SANDER, DAVID SWAIN, ERIC ARMSTRONG, QUIRINO CASTILLO, PIERRE GOULET, AU HAI NGUYEN AND GERALD PINEAULT

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Background

[1] These Reasons for Judgment and Judgment respond to two applications for judicial review (Court File No. T-1842-07 and T-1831-07) involving a group of Heating Plant Operators (the Employees) employed in a section of Public Works and Government Services Canada (the Employer). Until 2002, the Employees had been working 12-hour shifts on a rotating 12-week schedule (10 of the Employees) or a consistent schedule of 8-hour daytime shifts (1 of the Employees), which arrangements had been put in place through mutual agreement of the Employees and Employer.

[2] On October 28, 2002, the Employer unilaterally implemented a new 5-week schedule that required all of the Employees to work a mix of 8-hour and 12-hour shifts. This schedule change led to a grievance and three decisions by an adjudicator of the Public Service Labour Relations Board (PLSRB) (the Adjudicator).

[3] In his first decision, dated July 4, 2005, the Adjudicator concluded that, by unilaterally imposing the new schedule, the Employer had breached the collective agreement between the Employees' bargaining unit and the Employer. The Employer did not seek judicial review of this decision and now accepts that there was a breach.

[4] In a second decision, dated February 28, 2007, the Adjudicator addressed the question of damages. Still unable to agree on the appropriate damages for the breach of the collective

agreement, the parties asked the Adjudicator to provide an explicit methodology for calculating the damages, which the Adjudicator did in his third decision, dated September 20, 2007.

[5] In his third decision, the Adjudicator reached a decision on a number of outstanding issues, three of which are the subject of these judicial reviews.

1. the Adjudicator awarded an overtime premium for all hours worked outside of those the Employer had authority to schedule (that is, for hours that would not have fallen within the previous schedule). The Employer seeks to overturn this aspect of the award.

2. the Adjudicator refused to award any amounts for (a) statutory holiday premiums and (b) transportation expenses related to the hours worked outside the authorized hours. The Employees seek to overturn these two conclusions.

II. Issues

[6] The issues raised by these applications are as follows:

1. Did the Adjudicator err by concluding that the Employees should receive, as damages, compensation for hours worked outside those in the previous schedule? As sub-issues:

(a) Did the Adjudicator render a decision the effect of which would be to require the amendment of the collective agreement, contrary to s. 96(2) of the *Public Service Staff Relations Act*, R.S., 1985, c. P-35 (PSSRA) (repealed March 31, 2005, but still applicable to this dispute); and

(b) Was the award, in effect, an award of punitive damages and thus outside the mandate of the Adjudicator?

2. Assuming that the Adjudicator did not err in awarding "overtime" hours to the Employees, did he err when he declined to also order payment of amounts for: (a) travel; and (b) designated holiday pay?

III. Analysis

A. *Standard of Review*

[7] As required, the first step in the analysis is to determine the proper standard of review of the Adjudicator's decision.

[8] The issues before the Court all relate to the interpretation and application of the collective agreement and the Adjudicator's regard for the material before him. Past jurisprudence shows that deference is owed to adjudicators on these issues (*Public Service Alliance of Canada v. Canada (Food Inspection Agency)*, 2005 FCA 366, 343 N.R. 334 at para. 18, *Currie v. Canada (Customs*

and Revenue Agency), 2005 FC 733, 36 Admin L.R. (4th) 138 at paras. 11-15 (this case was reversed by the FCA in *Currie v. Canada (Customs and Revenue Agency)*, 2006 FCA 194, [2007] 1 F.C.R. 471, although the FCA accepted the lower court's standard of review analysis at para. 20).

[9] Although the Employees suggest that the present case may deal with a question of mandate requiring review on a correctness standard, I do not see the issue as a true question of jurisdiction. The Supreme Court, in *Dunsmuir v. New Brunswick*, 2008 SCC 9, defined such questions at paragraph 59, as those "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter." In the present case, the Adjudicator interpreted, applied and determined a remedy flowing from the breach of a collective agreement. This is not a true jurisdictional question. The standard of review is reasonableness.

[10] Thus, the task of the Court is to determine "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para. 47).

B. *Did the Adjudicator err by concluding that the Employees should be compensated, as damages, for hours worked outside those in the previous schedule?*

[11] In submissions to the Adjudicator, the Employer argued that the calculation of damages should be done by comparing the total hours worked between the authorized or previous schedule and the unauthorized schedule. Using this method of calculation, the Employees suffered little loss.

The Adjudicator rejected this argument. The critical portions of his reasons for doing so are as follows:

> [9] In my decision of February 28, 2007, I concluded that damages were to be awarded based on the difference in overtime and other applicable premiums between the improperly imposed shift schedule and the schedule that the grievors were working prior to the breach of the collective agreement. Damages were to be calculated for the period from October 28, 2002 to July 5, 2005 (para. 47 of that decision).
>
> [10] In that decision, I came to the following conclusion on the methodology to be used for calculating the damages.
>
> > *[42] …To calculate the damages, the parties will have to lay the 12-hour/12-week shift schedule that the grievors would have worked on top of the 12-hour/5-week shift schedule the grievors did work…*
>
> [11] Calculating damages is necessarily speculative since it is impossible to come to any definitive conclusions on what might have happened if the collective agreement has been respected. I addressed the speculative nature of determining the damages in my February 28, 2007 decision. I was clear in that decision that it would be necessary to compare the two schedules by laying one over the other...The employer's position that the grievors should only be compensated for the difference in total hours worked is not in accord with this methodology. If that were the only consequence of an improper change in variable hours of work, there would be little cost to the employer in breaching the collective agreement. The result of the improperly imposed schedule was that the grievors worked on days they would not have worked under the previous schedule. That represents a loss suffered by the grievors for which they should be compensated.

[12] The term "overtime" is defined in the applicable collective agreement as "authorized work in excess of the employee's scheduled hours of work".

[13] The thrust of the Employer's argument is that the definition of overtime in the collective agreement only allows for the payment of overtime when the hours worked are additional to normal hours. In this case, the total number of hours worked by the Employees under the imposed schedule was not any different from the total number of hours worked in the previous schedule. The assertion is that the collective agreement provides for overtime only with respect to work done *in excess* of the employee's normal scheduled hours of work; overtime is not available for work done *outside of* an employee's scheduled hours of work. Thus, the Employer submits, the Adjudicator awarded a remedy that required, in effect, an amendment to the collective agreement contrary to s. 96(2) of the PSSRA. In doing so, it is argued, the Adjudicator exceeded his jurisdiction (*Canada (A.G.) v. Hester*, [1997] 2 F.C. 706 (T.D.), *Canada (A.G.) v. Lussier*, [1993] F.C.J. No. 64 (F.C.A.) (QL)).

[14] I first note that this complex question of whether work done outside of the normal scheduled hours could meet the definition of overtime provided for in the collective agreement was not made to the Adjudicator. Had such an argument been made, I am confident that the Adjudicator would have directly dealt with it. On this basis alone, this argument could be rejected. However, the argument can also be dismissed on its merits.

[15] It is evident from the Adjudicator's reasons that he interpreted the term "overtime" to include hours worked outside of usual hours. The question before me is whether that interpretation of "in excess of" falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir*, above, at para. 47). Given that labour adjudicators have substantial expertise with respect to interpretation of collective agreements, I find that this particular Adjudicator's interpretation was reasonable. As was pointed out by the Employees, arbitrators have

found in past cases that the words “in excess of” could apply to hours that fell outside the hours an employee normally worked (See *Int’l Mine Workers, Local 902, and Loblaw Groceterias Co. Ltd.* (1963), 14 L.A.C. 53 (Little), *Re Printing Specialties & Paper Products Union, Local 466, and Interchem Canada Ltd.* (1969), 21 L.A.C. 46 (Weatherill)). It was open to the Adjudicator to adopt this interpretation over the Employer’s methodology of examining only differences in total number of hours worked.

[16] The Employer also submits that the Adjudicator erred by ordering a remedy that was punitive in nature without any evidence to support that such a remedy was warranted (*Hester*, above, *Lussier*, above). The Employer points to the Adjudicator’s reasons, wherein he rejects the Applicant’s damages calculation on the basis that “if that were the only consequence of an improper change in variable hours of work, there would be little cost to the employer in breaching the collective agreement.”

[17] I do not agree with the Employer’s characterization of the award. The words isolated by the Employer must be read in the entire context. In the decision in question, the Adjudicator plainly stated that the Employees suffered a loss by having to work on days they would not have worked but for the improperly imposed schedule. It was within the Adjudicator’s discretion to come to this conclusion. The consequential remedial relief granted to the Employees was also within the Adjudicator’s broad discretionary powers and within a range of reasonable outcomes.

[18] I would also note that we are dealing here with a breach of contract, the damages for which seek to put the plaintiff in the position they would have been in if the breach had not occurred. Just

as the Adjudicator stated in his decision, this is necessarily speculative. Furthermore, damages for breach of contract must be contrasted with damages for tort, which attempts to compensate the plaintiff for actual loss suffered. Arguably, it would be unreasonable in a case such as this to confine the Adjudicator to award damages springing solely from the proof of real loss suffered by the Employees.

C. *Did the Adjudicator err by failing to award transportation expenses?*

[19] In their submissions to the Adjudicator, the Employees submitted that they would be entitled to a mileage allowance for those days that they worked under the new schedule that would have been a day of rest under the previous schedule. The Adjudicator declined to make such an award, stating that:

> The intent of this provision [clause 29.10 of the collective agreement] is to compensate employees for transportation expenses on a day of rest. In this case, the grievors were receiving days of rest – just not necessarily the day of rest they would have received under the previous schedule. There was no evidence of additional transportation expenses incurred as a result of the improper schedule. Accordingly, I find that the grievors are not entitled to claim transportation expenses.

[20] Clause 29.10 of the collective agreement provides that:

> Where an employee is required to report to work overtime on a day of rest or to work overtime which is not contiguous to the employee's scheduled hours of work, and reports, and is required to use transportation other than normal public transportation services, the employee shall be reimbursed for reasonable expenses.

[21] The Employees submit that the Adjudicator's decision on compensation for travel allowances is unreasonable. The Adjudicator had accepted that all hours worked under the

wrongfully-imposed 5 week schedule constituted overtime within the meaning of the collective agreement. He had also accepted that the Applicants were required to travel on days of rest in order to work the shifts that were wrongfully imposed upon them. It follows, the Employees argue, that they should be compensated for the travel expenses they incurred while working these overtime hours.

[22] I accept that the Employees' position with respect to travel has some logic. However, this does not necessarily mean that the Adjudicator's position on this issue is unreasonable. It must be remembered that the Adjudicator was using the concept of overtime as a methodology for calculating damages. As noted by the Adjudicator, "calculating damages is necessarily speculative since it is impossible to come to any definitive conclusions on what might have happened if the collective agreement has been respected." In coming to a fair assessment of damages, the Adjudicator acted reasonably by referencing the collective agreement without necessarily adhering to each and every clause.

[23] Further, under clause 29.10, transportation expenses for overtime hours were payable to an employee only where: (a) the work is not contiguous to the employee's scheduled hours; and, (b) the employee is required to travel to work other than by normal public transportation. Contiguous, according to the Webster's dictionary means "next or near in time or sequence." The Employees did not establish that they were required to work overtime that was not "next or near in time" to their normal scheduled hours of work. Nor was there evidence that they were required to use transportation other than normal public transportation.

[24] In the context of an award of damages and in the absence of evidence of expenses beyond those that would have been incurred under the previous schedule, it was not unreasonable for the Adjudicator to decline to award transportation expenses.

D. *Did the Adjudicator err by failing to award statutory premiums?*

[25] Under the collective agreement, a holiday that coincides with an employee's day of rest is moved to the next working day. The result is that the employee will work the deemed holiday and attract premium pay. In their submissions to the Adjudicator, the Employees also argued that a statutory holiday premium may be payable as part of the damages. The Adjudicator rejected this submission, stating the following:

> The grievors have not demonstrated that there are any statutory holiday premiums owing. Any difference in statutory holiday premiums between the two schedules would be the result of the grievors not working on a statutory holiday. Accordingly, I see no reason to compensate grievors at the premium rate for those hours.

[26] Once again, I can see no reviewable error in this reasoning or conclusion. In this case, while the Employees may have been denied an opportunity for premium pay, it was not unreasonable for the Adjudicator to exclude the possibility of statutory premiums in this exercise of establishing a fair assessment.

IV. Conclusion

[27] In sum, I conclude that the Court's intervention is not warranted in either of these judicial reviews. They will both be dismissed.

[28] I turn to the question of costs. The Employer was successful in Court File No. T-1831-07 and the Employees were successful in Court File No. T-1842-07. At first blush, the application of the Employer (Court File No. T-1842-07) appears to be much more complex and substantial than that of the Employees, thereby warranting a greater award of costs to the Employees. However, I observe that the underlying decision of the Adjudicator and the background to each application is identical. Thus, if only Court File No. T-1831-07 had proceeded, substantially the same amount of preparation would have been required. Accordingly, I will exercise my discretion and decline to award costs to either party.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review in Court File No. T-1831-07 is dismissed;

2. The application for judicial review in Court File No. T-1842-07 is dismissed; and

3. No costs are awarded in either application.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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