Date: 20090216

Docket: T-903-08

Citation: 2009 FC 162

Ottawa, Ontario, February 16, 2009

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

GRERGORY ROBERT SMITH

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision rendered April 7, 2008, by Superintendent J.R.A.G. Héroux, acting as a Level II Adjudicator under the grievance provisions of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10. The decision denied, in part, the applicant's claim to payment for overtime hours accumulated between May of 2003 and March of 2005.

Background

[2] The applicant, Gregory Robert Smith, has been an Occupational Safety Officer with the "K" Division of the Royal Canadian Mounted Police since 1995. He works out of Edmonton, where the Division is headquartered. Mr. Smith's primary responsibility is to ensure that RCMP personnel within his geographical area of responsibility comply with the *Canada Occupational Health and Safety Regulations*, SOR/86-304 under the *Canada Labour Code*, R.S., 1985, c. L-2.

[3] In his affidavit filed in this proceeding, Mr. Smith states that prior to May of 2003, he was never asked to obtain specific authorization from his supervisors before incurring overtime hours. He says that it was his understanding that he had a standing authorization to work the overtime necessary to perform his job. All of the overtime hours he had previously claimed were paid.

[4] In May of 2003, the applicant's reporting relationship changed and he began reporting to Paul Braun, Director Employer Services, who was stationed in Winnipeg. Less than two years later, in February of 2005, Phil Wall, Chief of Occupational Safety, became his acting supervisor. Mr. Wall was stationed in Regina. The chronology of relevant events is as follows.

- March 14, 2004: Mr. Smith submitted overtime claims ("form 1112 claims") to Mr. Braun for the period from May 2003 to March 2004.
- March 24, 2004: Mr. Braun emails Mr. Smith asking whether the claims had been preauthorized by the Commanding Officer. He writes that Finance has not set aside money to pay for the claims and that "K" Division is already in deficit.

- March 25, 2004: Mr. Smith responds that it has never been his practice to go to the Commanding Officer for approval, and that there are overtime monies in his budget which is a Regional budget. He also writes that he is working long hours. "As you know, I work as many hours as I can to try to deal with the excessive workload. So far this month I've only been able to take 3 days off."
- March 26, 2004: Mr. Braun writes that "I recognize that you have the biggest workload in the Region," and that Finance is "raising a stink" about the fact that the claims were not pre-authorized, because his overtime budget is already in deficit. He says that he is being denied access to the Regional budget and that he has asked the Commanding Officer whether he would be prepared to process these claims, in order that Finance would not have to be dealt with on the matter.
- March 26, 2004: Mr. Smith responds "do what you can" and informs his supervisor that while he is planning to take time off at the end of May and beginning of June, that "doesn't make a dent in it." There is no further communication between these men until August 2004.
- August 8, 2004: Mr. Smith emails Mr. Braun asking for a status update and writes "we are in a new budget year and there should be OT monies in my budget."
- October 13, 2004: Mr. Smith again emails Mr. Braun asking if there is anything new and writes "I have not been submitting any OT claims since, but need to."
- October 18, 2004: Mr. Braun responds saying "Yes, go ahead and process any claims you have, now that funds have been finalized." Subsequently Mr. Smith resubmits overtime claims for the period May 1, 2003 to January 21, 2004.

- February 21, 2005: Mr. Smith submits overtime claims for the remainder of 2004 to Mr. Wall, who was in an acting supervisory position.
- March 17, 2005: Mr. Smith emails Mr. Wall asking if there are any problems with the overtime claims and expresses his hope that he will not have to take any action to get them processed.
- March 24, 2005: Mr. Wall and Mr. Smith meet in Edmonton. Mr. Wall informs Mr. Smith that the overtime claims are going to be denied, that it was Mr. Smith's decision to work the overtime, and that he was foolish to have worked the hours. Mr. Smith requests that he put his response in writing.
- April 4, 2005: Mr. Braun writes to Mr. Smith's representative, who has gotten involved: "O/T was not been approved, by the A/Reg. Manager Occup. Safety for the following reasons: 1. all requests fir O/T must receive prior approval (as per Fin. Act) This did not occur in any of the situations fro which Greg submitted claims. 2. the claims were not submitted in the budget year in which the unauthorized O/T was incurred. We do not have the ability to pay claims for previous F/Y, even if prior authorization would have been received (*sic*)."
- April 8, 2005: Mr. Wall emails Mr. Smith informing him that the decision was his and that "the primary guiding factor was item 1 that Paul stated and this is reflected in RCMP policy."

[5] Mr. Smith grieved the refusal to pay his overtime. Ultimately, the grievance was transmitted to the Level 1 Adjudicator's office in January of 2007. The latter requested from Mr.

Smith an explanation as to why he had not sought preauthorization for the claims at issue. Mr. Smith's explanation was that previously "there was no question of having to ask for preauthorization before any specific O/T claims, as there was a general recognition that overtime had to be incurred on a regular basis in order to deliver the service to the employees in the Divisions I served", and that on account of his having to travel outside of normal work hours in order to be on site during normal work hours, seeking permission on each occasion from a supervisor who worked normal hours would have been impractical.

[6] In a decision rendered on May 22, 2007, the Level I Adjudicator allowed Mr. Smith's grievance in part. He ruled that Mr. Smith had incurred overtime without authorization, contrary to policy, and that the blanket authorization under which he had previously been operating was itself against policy. He found however that the overtime claims which corresponded with travel expense claims which had been accepted by the RCMP should be paid, on the basis that the approval of travel expenses associated with overtime work indicated acquiescence or constructive knowledge that he was working overtime. This amounted to 261.5 of the 491.75 hours of overtime claimed. The Level I Adjudicator wrote that "the Respondent knew, or ought to have known, that the Grievor was working the overtime claimed (…)." He also remarked that "[o]rganizationally there seems to have been a problem in managing the Grievor's position and that problem was compounded by the Grievor failing to address the overtime issues in a timely manner."

[7] Unsatisfied with this outcome, on June 20, 2007, Mr. Smith appealed the Level I decision to a second level Adjudicator, in accordance with the grievance provisions of the *RCMP Act*. In his

Level II submissions, Mr. Smith included a statement asserting that the blanket preauthorization under which he had been operating was in conformity with applicable policy, as it was interpreted. He also affirmed that he had been informally informed by Mr. Braun sometime after October 18, 2004, that the claims would be paid. The RCMP took the position that the overtime in question had not been pre-approved, that there were no exceptional circumstances justifying Mr. Smith's failure to seek pre-approval, and that from the time the he began reporting to Mr. Braun, it was clear overtime funds were unavailable.

[8] In his 21-page decision, the Level II Adjudicator quoted extensively from the *Administration Manual* section entitled "Pay and Allowances" (Policy AM II.4) dealing with overtime pay, and briefly from the section of the *Pay Procedures Manual* (PPM) dealing with the submission and processing form 1112 claims. He also noted that form 1112 itself directs that one is to submit separate claims for each Pay Period for (a) acting pay, (b) compensation at different rates of pay, and (c) claims against a unit other than one's own; and that the travel form requires the unit commander to certify that "services were performed, prices are reasonable, and that travel was authorized."

[9] The Level II Adjudicator expressed his view that the central issue was not whether the grievor's overtime hours were justifiable, but rather whether they were properly authorized pursuant to policies, "thus making them valid."

[10] In this respect, the Adjudicator made a number of conclusions. He did not accept the grievor's affirmation that he had previously held a "standing authorization" to accumulate and claim any necessary overtime, based on an analysis of his form 1112 claims from a three-month period in early 2003. Neither did he find that the grievor respected policies when he submitted all of his claims for the previous 10 months in March of 2004, or after when he continued to accumulate overtime despite being aware of the small budget available. On both occasions, the Level II Adjudicator characterized the grievor's actions as "a failure to exercise due diligence." With respect to the October 18, 2004 direction to "go ahead and process any claims," the Adjudicator took the view that Mr. Smith's alleged assumption that this statement indicated that his claims would be paid, was misplaced. Rather, it was found that he should have realized that Mr. Braun was subject to the spending restrictions outlined in the *Administrative Manual* and interpreted the statement accordingly. Finally, the Adjudicator dismissed the claim that requesting his supervisor's authorization before working overtime hours would have been impractical, given the means of communication at his disposal and the fact that he did obtain preauthorization for other aspects of his duties, such as travel.

[11] For these reasons, the Level II Adjudicator declined to modify the decision of the First Level Adjudicator. Overtime claims associated with properly approved travel were granted, whereas those unrelated to travel duties and thus not supported by travel expense claim forms were denied.

Issues

[12] The applicant raised two issues:

a. Whether the Adjudicator erred on a finding of fact and whether, as a result this decision should be set aside; and

b. Whether the decision of the Adjudicator in his interpretation and application of the Policy of the RCMP was unreasonable.

Analysis

Standard of Review

[13] The applicant submits that, following *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, the applicable standard of review is reasonableness. The respondent urges the Court to follow the judgment of the Federal Court of Appeal in *Colistro v. BMO Bank of Montreal*, 2008 FCA 154, in which the Court held that the standard of review applicable to findings of fact is that set out in section 18.1(4)(d) of the *Federal Courts Act*, R.S.C. 1970, c. F-7, namely that the decision was based on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before the decision-maker. Further, relying on *Ewart v. Canada (Attorney General)*, 2008 FCA 285, the respondent submits that the reasonableness standard described by the Supreme Court in *Dunsmuir* incorporates many different degrees of deference. It is submitted that the decision under review, the decision of an Adjudicator, is deserving of the greatest degree of deference.

[14] I concur with the submissions of the respondent as to the proper standard of review. To the extent that the applicant is alleging that errors of fact were made, it must be established that the Adjudicator made an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before him. I further agree that the Adjudicator is to be shown a great deal of deference in assessing the reasonableness of his decision. He is familiar with the working of the RCMP and its employee relations and policies, and like a labour arbitrator is knowledgeable in the area and deserving of respect and deference. See: *Dunsmuir*, at para. 68; *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, at para. 22.

Erroneous Finding of Fact

[15] The applicant submits that the Adjudicator erred in the following finding of fact at page 6 of the decision: "The Grievor also mentioned that on 2004-03-24, the latter informed him that he would not likely approve any overtime claims and added that working overtime was his (Grievor's) decision and foolish on his part." In fact, that conversation occurred one year later on March 24, 2005, and none of the issues in dispute either before the Adjudicator or here concern that later period. Thus, there is no doubt that the Adjudicator erred in this finding of fact. Further, in my view, that finding was made without regard to the material before the Adjudicator.

[16] That said, there are three conditions precedent in order to set aside the decision of the Adjudicator on the basis of Section 18.1(4)(d) of the *Federal Courts Act*: the finding of fact must be erroneous, it must have been made without regard to the evidence, and the decision must have been based on that erroneous finding. While I find that the first two conditions have been met, there is

nothing in the reasons of the Adjudicator to indicate that he based his decision, in whole or in part, on the erroneous finding of fact. Therefore, the decision cannot be set aside on the basis of this error.

Unreasonable Interpretation and Application of the Policy of the RCMP

[17] The applicant submits that the Adjudicator's interpretation of Article I.1.d of the *Administrative Manual* was unreasonable. That is the article providing that "when possible, a member should obtain his/her supervisor's authorization before he/she works overtime." The applicant submits that this provision contains "qualified, permissive, non-mandatory language" that suggests a course of recommended conduct when circumstances permit. The Adjudicator, it is claimed, interpreted the provision in such a way so as to establish an "unqualified, mandatory precondition to compensation entitlement."

[18] The respondent submits that the interpretation given the article by the Adjudicator was not unqualified. It led to a possible, reasonable outcome, and therefore merits deference, as explained by the Supreme Court in *Dunsmuir*.

[19] I do not accept the applicant's contention that the Adjudicator gave the article an unqualified interpretation. He recognized that the article required approval only when possible. He rejected the applicant's assertion that the duties of his job made it impossible to seek pre-approval. The Adjudicator wrote:

> I retain (*sic*) that the latter's only argument is to the effect that it was impractical. Taking into consideration the various communication

> means available to the Grievor to communicate with his successive supervisors, I find this argument is not valid. … I determine that it was possible for the Grievor to obtain his supervisor's authorization before he worked overtime, as he did for all the other aspects relating to his duties …

In short, the Adjudicator recognized that if it were not possible to obtain pre-approval, this would not in itself prevent the payment of the overtime claim. He simply found to be without merit, on the evidence presented, the applicant's blanket assertion that his work always prevented him from getting that pre-approval. Based on the record, that cannot be said to have been an unreasonable determination.

[20] As the following passages show, the Adjudicator's interpretation of the applicable policies was that if it were possible to obtain pre-approval for the overtime, and pre-approval was not sought or granted, then the hours worked were not overtime hours but were to be considered as voluntary duty:

> I determine that the central issue of the grievance is not whether the overtime hours that the Grievor claimed he worked were justifiable, but whether these hours were authorized pursuant to policies, thus making them valid.
>
> I find that without having obtained pre-approval to incur overtime, the Grievor placed himself on voluntary duty and was not then entitled to overtime compensation, pursuant to policy.
>
> I consider that the policies on overtime, which aim at ensuring accountability for RCMP allocated resources and made available to achieve the organizational objectives, were to be followed by the Grievor to render him entitled to the payment of overtime.
>
> I find that it was not up to the Grievor to incur overtime and hope that his manager would find the funding to cover its costs. I am of the

> view that the Grievor ought to have known of the existing policies on approval of overtime, which I consider very clear.

[21] In short, the Adjudicator held that if an employee breaches Article I.1.d., the consequence is that overtime is not paid, regardless of whether or not the hours worked were "justifiable". In my view, this is not a reasonable interpretation of Article I.1.d. in the broader context of the policies of the RCMP applicable to Mr. Smith. In fact, in my view, the interpretation given by the Adjudicator is one made without regard to the evidence before him with respect to the other relevant policies of the RCMP.

[22] Article E.1.a. of "K" Division AM II.4. Pay and Allowances (Revised 2001-07-06 and still in effect) is quoted by the Adjudicator in his decision but not later referred to or considered by him. Article E.1.a of that policy under the heading of "Overtime" provides "Members shall be compensated for all justifiable overtime. It is essential that good management be demonstrated in the monitoring and control of this program." (emphasis added). This is undoubtedly mandatory language. The interpretation given Article I.1.d. by the Adjudicator ignores and renders meaningless Article E.1.a, which is specifically applicable to the Division in which Mr. Smith worked. As such, in my view, the Adjudicator's interpretation is unreasonable and cannot stand.

[23] Further, given that employees are paid for their work, and that is the essence of the contract between them and their employer, it is my view that the Policy would require express language in order to justify a conclusion that an employee who is performing his regular duties, albeit outside regular hours, is "volunteering" his services. This is particularly the case here where it was known

by his superiors that Mr. Smith had a heavy workload, that he was working more than just the regular hours required, and where Mr. Smith made it clear throughout that he was expecting to be paid for his services. Thus, even in the absence of the overtime policy that is specific to "K" Division, the Adjudicator's determination that Mr. Smith was volunteering his services is, in my view, an unreasonable one.

[24] I wish to make it clear that I neither condone nor endorse the actions of either Mr. Smith or his supervisors. I consider them equally at fault for this situation having reached this point. Mr. Smith bears responsibility for failing to submit overtime reports in a timely manner and in failing to seek pre-approval when he was able, and in my view, there were many instances when it would have been possible for him to seek pre-approval. At the same time, not once before March 2005 did any supervisor tell Mr. Smith that he would not be paid for the additional hours which they accepted were justified unless he obtained pre-approval before each overtime period.

[25] My view of the faults of the men involved is irrelevant to this decision, however, I do not wish this judgment to be taken by any party as justification for their conduct. It is because the interpretation given Article I.1.d. is unreasonable in the face of Article E.1.a. of "K" Division AM II.4, which appears not to have been considered, that the Adjudicator's decision cannot stand.

[26] In the course of the hearing counsel for the respondent acknowledged that, contrary to the suggestions of the Adjudicator, there is no requirement that the form 1112 claims be submitted each pay period or at any particular time, although he suggested that a reasonable person would do so. It

was conceded that had the claims of the applicant been otherwise compliant with the Policy, they should have been honoured regardless of his delay in transmitting them for approval. In light of my decision in this matter, I would direct the next decision-maker to note this observation.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application is allowed and the decision rendered April 7, 2008, by Superintendent J.R.A.G. Héroux, acting as a Level II Adjudicator under the grievance provisions of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 is set aside.

2. The applicant's grievance shall be remitted to another person acting as a Level II Adjudicator, in accordance with these Reasons.

3. The applicant shall have his costs.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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