Federal Court  Cour fédérale

**Date: 20110825**

**Docket: T-884-10**

**Citation: 2011 FC 1020**

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

**Ottawa, Ontario, August 25, 2011**

**PRESENT: The Honourable Mr. Justice Scott**

**BETWEEN:**

**SERVICES MARITIMES DESGAGNÉS INC.**

**Applicant**

**and**

**DANY DUFOUR**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

## I. INTRODUCTION

[1] This is an application for judicial review under section 251.11 of Division XVI of Part III of the *Canada Labour Code*, RSC (1985), c L-2 (the Code) of a decision, dated May 4, 2010, by Mr. Jean-Paul Boily (the Referee). The decision under review (the decision) allowed, in part, the

applicant's appeal of a decision by the inspector from Human Resources and Social Development Canada [HRSDC].

## II. FACTS

[2] The applicant operates a maritime transport company. Its ships delivered goods and supplies to various communities in Canada's Far North.

[3] From 2003 to 2006, the respondent worked for the applicant as a seasonal worker. Each year, his employment would begin around the end of June and would end in November.

[4] On June 12, 2006, the respondent signed a contract of employment stating that he would be paid $183.00 per diem. In addition, the agreement also stated that that respondent may be required to work additional hours, without mentioning what the remuneration of those additional hours would be.

[5] The respondent was paid the per diem salary regardless of hours worked. In fact, he was not subject to any precise work schedule with a fixed number of minimum hours per day or per week.

[6] The applicant argues that the per diem salary includes an amount for his regular hours and for additional hours worked.

[7] During the 2006 season, the respondent worked on the ship “Anna Desgagnés”. He was paid $13,908.00 for 76 days of work.

[8] On January 24, 2007, the applicant advised the respondent that his contract would not be renewed. On July 15, 2007, the respondent filed a complaint with HRSDC, claiming he was owed payment for overtime hours worked during the 2006 season.

## III. INSPECTOR’S DECISION

[9] On March 19, 2008, the inspector sent the applicant his preliminary determination. In it he stated that under section 174 of the Code, the respondent was entitled to be paid for 496 overtime hours, namely, $3,784.48. The applicant remitted this sum to the Receiver General for Canada, while asserting its disagreement.

[10] On April 4, 2008, the applicant declared that the $183.00 per diem salary was consistent with the minimum standards set out in the Code and that the respondent was not entitled to any additional amounts.

[11] On April 30, 2008, the inspector ordered the applicant to pay $4,126.30 to the respondent. The applicant appealed that order on May 15, 2008.

## IV. REFEREE'S DECISION

[12] The referee allowed the applicant's appeal in part because the inspector's order was contrary to the applicable law. The arbitral award stated that the respondent was entitled to payment for 27.5 overtime hours at time-and-a-half. To determine the time-and-a-half rate, the referee divided the per diem salary of $183.00 by 8 hours per day – i.e. $22.86 –and added 50% to arrive at a time-and-a-half rate of $34.29 an hour, for remuneration of the overtime hours. The referee added an additional 4% for vacation pay. The respondent was to be paid the sum of $1,020.13. Thus, the referee ordered the respondent to reimburse the applicant the remaining $3,106.17.

## V. APPLICABLE LAW

*Canada Labour Code*, RSC 1985, c L-2:

| Standard hours of work | Règle générale |
|---|---|
| 169. (1) Except as otherwise provided by or under this Division | 169. (1) Sauf disposition contraire prévue sous le régime de la présente section : |
| (*a*) the standard hours of work of an employee shall not exceed eight hours in a day and forty hours in a week; and | *a*) la durée normale du travail est de huit heures par jour et de quarante heures par semaine; |
| (*b*) no employer shall cause or permit an employee to work longer hours than eight hours in any day or forty hours in any week. | *b*) il est interdit à l'employeur de faire ou laisser travailler un employé au-delà de cette durée. |
| … | […] |

Overtime pay

174. When an employee is required or permitted to work in excess of the standard hours of work, the employee shall, subject to any regulations made pursuant to section 175, be paid for the overtime at a rate of wages not less than one and one-half times his regular rate of wages.

…

Minimum wage

178. (1) Except as otherwise provided by or under this Division, an employer shall pay to each employee a wage at a rate

(*a*) not less than the minimum hourly rate fixed, from time to time, by or under an Act of the legislature of the province where the employee is usually employed and that is generally applicable regardless of occupation, status or work experience; or

(*b*) where the wages of the employee are paid on any basis of time other than hourly, not less than the equivalent of the rate under paragraph (a) for the time worked by the employee.

…

Majoration pour heures supplémentaires

174. Sous réserve des règlements d'application de l'article 175, les heures supplémentaires effectuées par l'employé, sur demande ou autorisation, donnent lieu à une majoration de salaire d'au moins cinquante pour cent.

[…]

Salaire minimum

178. (1) Sauf disposition contraire de la présente section, l'employeur doit payer à chaque employé au moins :

*a*) soit le salaire horaire minimum au taux fixé et éventuellement modifié en vertu de la loi de la province où l'employé exerce habituellement ses fonctions, et applicable de façon générale, indépendamment de la profession, du statut ou de l'expérience de travail;

*b*) soit l'équivalent de ce taux en fonction du temps travaillé, quand la base de calcul du salaire n'est pas l'heure.

[…]

| | |
|---|---|
| Order final | Caractère définitif des décisions |
| 251.12 (6) The referee's order is final and shall not be questioned or reviewed by any court. | 251.12 (6) Les ordonnances de l'arbitre sont définitives et non susceptibles de recours judiciaires. |
| No review by certiorari, etc. | Interdiction de recours extraordinaires |
| (7) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, certiorari, prohibition, quo warranto or otherwise to question, review, prohibit or restrain a referee in any proceedings of the referee under this section. | (7) Il n'est admis aucun recours ou décision judiciaire — notamment par voie d'injonction, de certiorari, de prohibition ou de quo warranto — visant à contester, réviser, empêcher ou limiter l'action d'un arbitre exercée dans le cadre du présent article. |

*East Coast and Great Lakes Shipping Employees Hours of Work Regulations, 1985*, CRC, c 987

| | |
|---|---|
| Hours of Work | Durée du travail |
| 4. (1) Except as otherwise provided in these Regulations, the standard hours of work of an employee shall not exceed eight hours in a day and 40 hours in a week. | 4. (1) Sauf disposition contraire du présent règlement, la durée normale du travail d'un employé est de huit heures par jour et de 40 heures par semaine. |
| (2) The hours worked in a week need not be scheduled and actually worked in order that each employee has at least one full day of rest in the week and Sunday need not be the normal day of rest in a week. | (2) Les heures de travail de la semaine ne sont pas nécessairement réparties et accomplies de façon que chaque employé ait au moins une journée complète de repos chaque semaine et le dimanche n'est pas nécessairement la journée normale de repos. |
| Maximum Hours | Durée maximum du travail |

| | |
|---|---|
| 5. An employee is exempt from the application of section 171 of the Act. | 5. Les employés sont soustraits à l'application de l'article 171 de la Loi. |
| … | […] |
| Averaging | Calcul de la moyenne |
| 7. (1) Where the nature of the work necessitates irregular distribution of hours of work of any class of employees, with the result that the employees within that class have no regularly scheduled daily or weekly hours of work, the hours of work in a day and the hours of work in a week of an employee may be calculated as an average for a period not exceeding 13 consecutive weeks. | 7. (1) Lorsque la nature du travail nécessite une répartition irrégulière des heures de travail des employés d'une catégorie et que, en conséquence, les employés de cette catégorie n'ont pas d'horaire de travail quotidien ou hebdomadaire régulier, la durée du travail quotidien et hebdomadaire d'un employé peuvent être considérées comme une moyenne établie sur une période d'au plus 13 semaines consécutives. |
| (2) The standard hours of work (being the hours for which the regular rate of pay may be paid) of an employee within a class shall be 520 hours where the averaging period is 13 weeks or where the averaging period selected by the employer is less than 13 weeks, the number of hours that equals the product obtained by multiplying the number of weeks so selected by 40. | 2) La durée normale du travail (soit les heures payables au taux normal) d'un employé de la catégorie est de 520 heures si la période de calcul de la moyenne est de 13 semaines ou, si l'employeur prend une période inférieure à 13 semaines, le nombre d'heures qui correspond au produit de la multiplication du nombre de semaines par 40. |

## VI. ISSUES AND STANDARD OF REVIEW

[13] The following issues arise in this matter:

1. ***Was the arbitral award to the effect that the respondent was entitled to an additional amount for overtime hours worked reasonable?***
2. ***Did the referee err when he used the per diem salary as a basis for calculating the additional amount owed for overtime hours?***

[14] The standard of review applicable to these issues is reasonableness. According to the case law, decisions made by an adjudicator or referee command a high degree of deference (see *Deschênes v. Canadian Imperial Bank of Commerce*, 2009 CF 799, [2009] F.C.J. No. 934 (QL) at paras. 12 and 13).

[15] Thus, the Court must examine the justification, transparency and intelligibility of the decision, and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47).

## VII. ANALYSIS

1. ***Was the arbitral award to the effect that the respondent was entitled to an additional amount for overtime hours worked reasonable?***

The applicant's position

[16] The applicant claims that the referee erred by failing to take into account that the respondent's per diem salary included his pay for regular hours and overtime hours. The applicant argues that the referee must apply subsection 178 (1) of the Code. This subsection states that the respondent is entitled to be paid at a rate not less than the equivalent minimum hourly rate in effect in the province where he is employed for the time worked.

[17] The applicant relies on the adjudicator's decision in *Wanham Valley Feeds Ltd v. Ritthaler*, [2002] CLAD No 342, 2002 CarswellNat 5335 [*Ritthaler*], which states, at paragraph 43: "[n]othing in ss. 169 or 174 requires the inspector or me to find that, despite the apparent intention of the parties, the $4,000 monthly rate was intended to compensate only the regular hours, leaving the overtime hours totally uncompensated except by the operation of ss. 169 and 174". In that case, the adjudicator determined that the employee's monthly salary was sufficient to include overtime hours.

[18] Thus, the applicant claims that the respondent's per diem salary included his overtime hours because the minimum hourly rate in effect in Québec in 2006 was only $7.75. By applying that rate to the 27.5 overtime hours, the applicant argues it only owed the respondent $4,039.69. Since it had already paid him $13,908.00, the applicant contends that it was unreasonable to conclude that the respondent was entitled to an additional amount.

[19] Moreover, the applicant contends that if we accept the respondent's claim that he worked an average of 12 hours per day, his per diem salary of $183.00 would also include his overtime hours if

we apply the minimum hourly wage that was in effect in Quebec in 2006. The applicant therefore submits that the referee erred and that his decision was unreasonable.

[20] The respondent, who was present at the hearing but was not represented by counsel, relied on the referee's decision.

Analysis

[21] Subsections 251.12 (6) and (7) of the Code contain very strong privative clauses that consequently call for a very high degree of deference from this Court and its intervention would only be warranted if the applicant were able to clearly establish that the referee's decision was unreasonable and that it did not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[22] The applicant is challenging the referee's findings, but it also acknowledges that the respondent is entitled to be paid for the 27.5 overtime hours worked, although it claims the $183.00 he was paid per diem was largely sufficient to cover those hours. The applicant does not dispute the fact that the respondent worked 27.5 hours in excess of the standard hours of work set out in subsection 7(2) of the *East Coast and Great Lakes Shipping Employees Hours of Work Regulations, 1985, CRC* c 987. In addition, the referee, at paragraphs 66 and 67 of his decision, arrived at the conclusion that to maintain the legality of the contract, the applicant had to pay the respondent for those hours and use a reasonable method of calculating those hours. The applicant argues that the agreement remunerated all overtime hours, regardless of the number of hours. This last claim is not

acceptable as it would potentially contravene the *Regulation respecting labour standards*, RRQ, c N-1.1, r 3 (the Regulation).

[23] Furthermore, the facts in the decision cited by the applicant in support of its claims are different that those in the present case, because in *Ritthaler*, above, the parties had discussed an hourly rate of $12.00 or $15.00 without stating this in the agreement and the dispute revolved around, among other things, the applicable hourly rate in the industry. The adjudicator's decision in that case was based on applying an hourly rate of $12.00. As he wrote at paragraph 43:

> The contract between Wantham and Ritthaler has enough money in the monthly rate to provide the proper overtime rate, if we assume that the regular rate of pay is below, say, $12.00 an hour, a rate well above the minimum wage. Nothing in ss 169 or 174 requires the inspector or me to find that, despite the apparent intention of the parties, the $4000 monthly rate was intended to compensate only the regular hours leaving the overtime hours totally uncompensated except by the operation of ss 169 and 174.

[24] In the present case, the parties never discussed an hourly rate. The applicant first argued that the referee should have applied the minimum hourly rate of $7.75 (the minimum hourly rate in Quebec in 2006), then the applicant argued that the $183.00 paid per diem could cover the hours worked as well as 4 hours of overtime work even if an hourly rate of $13.07 was applied.

[25] The Court must apply the reasonableness standard and therefore cannot accept the applicant's contention that the referee's decision did not fall within a range of possible, acceptable outcomes because the applicant acknowledges that the overtime must be paid. The applicant agrees that the respondent is entitled to be paid for the overtime hours but argues that the per diem amount paid was sufficient, regardless of the number of overtime hours worked. This logic could lead to

remuneration less that that which is set out in the Regulation. In the absence of concrete evidence that would establish the existence of an hourly rate, it became open to the referee to establish one. Therefore, given such circumstances, the Court's intervention is not warranted.

***2. Did the referee err when he used the per diem salary as a basis for calculating the additional amount owed for overtime hours?***

The applicant's submissions

[26] The applicant claims that the referee calculated the amount for the overtime hours in an arbitrary manner because he based it on an hourly rate of $22.87. He simply divided the per diem salary of $183.00 by the eight hours worked in a normal day, as set out in the Code. The applicant argues that this method of calculation contravenes subsection 178 (1) because it obliges the applicant to pay the respondent more than twice the minimum hourly rate that was in effect in Quebec in 2006.

[27] The applicant further claims that the referee cannot add 4% of vacation pay because it is already included in the per diem salary of $183.00.

Analysis

[28] The Court dismissed the applicant's claims. Subsection 178 (1) guarantees a minimum hourly rate; it does not prohibit payment of a higher hourly rate. Furthermore, it is difficult for the Court to subscribe to the applicant's position when it argues that the overtime hours are not included in the per diem salary but that the 4% vacation pay applicable to applicable to the very same hours is included. There is a significant contradiction here. In the absence of concrete evidence in this regard, the Court cannot find that the referee's decision was unreasonable.

## VIII. CONCLUSION

[29] The applicant has not established that the referee's decision was unreasonable. Given the high degree of deference the Court must give to the referee's decision and in the absence of any evidence of unreasonableness, the Court dismisses this application for judicial review.

**JUDGMENT**

**THE COURT ORDERS that** the application for judicial review be dismissed, with costs against the applicant.

"André F.J. Scott"
Judge

Certified true translation

Sebastian Desbarats, Translator

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-884-10 |
| **STYLE OF CAUSE:** | SERVICES MARITIMES DESGAGNÉS INC.<br>v.<br>DANY DUFOUR |
| **PLACE OF HEARING:** | Québec, Quebec |
| **DATE OF HEARING:** | August 11, 2011 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | SCOTT J. |
| **DATED:** | August 25, 2011 |

**APPEARANCES:**

| | |
|---|---|
| Pierre Caouette | FOR THE APPLICANT |
| Dany Dufour | FOR THE RESPONDENT<br>(ON HIS OWN BEHALF) |

**SOLICITORS OF RECORD:**

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