

Federal Court



Cour fédérale

**Date: 20140108**

**Docket: T-2263-12**

**Citation: 2014 FC 15**

**Ottawa, Ontario, January 8, 2014**

**PRESENT: The Honourable Mr. Justice O'Reilly**

**BETWEEN:**

**JOHN WAYNE LUTY**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

I. Overview

[1] Mr John Wayne Luty works as a Border Services Officer with the Canada Border Services Agency (CBSA). He also acts as co-chair of the Workplace Health and Safety Committee at Pearson International Airport.

[2] In 2012, Mr Luty raised concerns about the lack of overtime pay for Committee members who attended meetings outside their regular shifts. He felt members were entitled to premium pay under the collective agreement and the *Canada Labour Code*, RSC 1985, c L-2.

[3] An Occupational Health and Safety Officer investigated Mr Luty's complaint and rejected it. Mr Luty argues that the officer's decision was unreasonable; he asks me to quash it and order another officer to reconsider his complaint. I agree with Mr Luty that the officer's decision was unreasonable. However, I cannot order another officer to deal with the complaint because it should be the subject of a grievance under the collective agreement instead. There are two issues:

1. Was the Officer's decision unreasonable?
2. What is the proper remedy?

## II. The Legal Framework

[4] The *Canada Labour Code* provides that committee members may take time during work hours to attend committee meetings (s 135.1(10) – see Annex for all provisions cited). The member must be compensated either at the regular rate of pay or a premium rate of pay as provided in the collective agreement (s 135.1(11)).

[5] Concerns about health or safety can be brought to the attention of a health and safety officer. The officer's directions can be appealed to an appeals officer (s 146(1)).

[6] Under the collective agreement, an employee can present grievances relating to wages and compensation. The agreement provides mechanisms for resolving disputes, including the referral of a grievance to an adjudicator. The agreement specifically provides that grievances relating to the Occupational Health and Safety Directive, which deals with the committees and the compensation of their members, should be presented under agreement and the *Public Service Labour Relations Act*, SC 2003, c 22, ss 208, 209).

III. Issue One – Was the officer’s decision unreasonable?

[7] Mr Luty was concerned about overtime pay for committee members. In response, the officer stated that travel to meetings must be authorized, and that members are entitled to take time for meetings during regular working hours. Mr Luty had not raised the issue of travel. The officer did not deal at all with the issue that Mr Luty had presented – compensation for attendance at meetings outside regular working hours.

[8] In my view, the officer’s decision was clearly deficient. It was incoherent and did not respond to Mr Luty’s complaint whatsoever.

[9] In the officer’s defence, however, this is a matter that should never have come to him for a decision. A health and safety officer has a very specific role under Part II of the *Canada Labour Code*, which is entitled “Occupational Health and Safety”:

- Investigating complaints relating to workplace safety (ss 127.1(9), 129(1));
- Issuing directions in respect of contraventions of Part II (ss 145(1), 129(6), 145(2.1));

- Deciding whether a danger exists in a workplace (ss 129(4), 145(2));
- Exempting employers from establishing health and safety committees (s 135(6)(a));
- Investigating deaths in the workplace (s 242(4)); and
- Conducting inspections of work sites (s 141.1(1)).

[10] Here, Mr Luty's complaint fell well outside the officer's mandate.

#### IV. Issue Two – What is the proper remedy?

[11] While the officer's decision was clearly unreasonable, there is no point sending the matter back for redetermination; a health and safety officer has no jurisdiction over the subject matter of Mr Luty's complaint. The proper recourse is for Mr Luty to invoke the grievance procedure available under the *Public Service Labour Relations Act*, the *Canada Labour Code*, and the collective agreement.

#### V. Conclusion and Disposition

[12] I would allow this application for judicial review, in part. The decision under review was unreasonable and must be quashed. However, there is no point referring the matter back for redetermination by another officer. Mr Luty's concern should be presented by way of a grievance, not a complaint to a health and safety officer. Given the divided success on this application for judicial review, there is no order as to costs.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that:**

1. The application for judicial review is allowed in part;
2. The decision under review is quashed; and
3. There is no order as to costs.

“James W. O’Reilly”  
\_\_\_\_\_  
Judge

## Annex

**Canada Labour Code, RSC 1985, c L-2****Code canadien du travail, LRC (1985), ch L-2**

## Time required for duties

## Temps nécessaire à l'exercice des fonctions

**135.1(10)** The members of a committee are entitled to take the time required, during their regular working hours,

**135.1(10)** Les membres du comité peuvent consacrer, sur leurs heures de travail, le temps nécessaire :

(a) to attend meetings or to perform any of their other functions; and

a) à l'exercice de leurs fonctions au comité, notamment pour assister aux réunions;

(b) for the purposes of preparation and travel, as authorized by both chairpersons of the committee.

b) aux fins de préparation et de déplacement, dans la mesure autorisée par les deux présidents.

## Payment of wages

## Droit au salaire

**135.1(11)** A committee member shall be compensated by the employer for the functions described in paragraphs (10)(a) and (b), whether performed during or outside the member's regular working hours, at the member's regular rate of pay or premium rate of pay, as specified in the collective agreement or, if there is no collective agreement, in accordance with the employer's policy.

**135.1(11)** Pour le total des heures qu'il consacre à ces activités, l'employé a le droit d'être rémunéré par l'employeur au taux régulier ou majoré selon ce que prévoit la convention collective ou, à défaut, la politique de l'employeur.

## Inquiry

## Enquête

**146.1 (1)** If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may

**146.1 (1)** Saisi d'un appel formé en vertu du paragraphe 129(7) ou de l'article 146, l'agent d'appel mène sans délai une enquête sommaire sur les circonstances ayant donné lieu à la décision ou aux instructions, selon le cas, et sur la justification de celles-ci. Il peut :

(a) vary, rescind or confirm the decision or direction; and

a) soit modifier, annuler ou confirmer la décision ou les instructions;

(b) issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).

b) soit donner, dans le cadre des paragraphes 145(2) ou (2.1), les instructions qu'il juge indiquées.

**Public Service Labour Relations Act, SC 2003, c 22, ss 208, 209)**

**Loi sur les relations de travail dans la fonction publique (LC 2003, ch 22, art 2)**

Right of employee

**208.** (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved

Droit du fonctionnaire

**208.** (1) Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé :

(a) by the interpretation or application, in respect of the employee, of

a) par l'interprétation ou l'application à son égard :

(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or

(i) soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document de l'employeur concernant les conditions d'emploi,

(ii) a provision of a collective agreement or an arbitral award; or

(ii) soit de toute disposition d'une convention collective ou d'une décision arbitrale;

(b) as a result of any occurrence or matter affecting his or her terms and conditions of employment.

b) par suite de tout fait portant atteinte à ses conditions d'emploi.

Limitation

(2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the Canadian Human Rights Act.

Réserve

(2) Le fonctionnaire ne peut présenter de grief individuel si un recours administratif de réparation lui est ouvert sous le régime d'une autre loi fédérale, à l'exception de la Loi canadienne sur les droits de la personne.

Limitation

(3) Despite subsection (2), an employee may not present an individual grievance in respect of the right to equal pay for work of equal value.

Réserve

(3) Par dérogation au paragraphe (2), le fonctionnaire ne peut présenter de grief individuel relativement au droit à la parité salariale pour l'exécution de fonctions équivalentes.

Limitation

(4) An employee may not present an individual grievance relating to the interpretation or application, in respect of the employee, of a provision of a collective agreement or an arbitral award unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective

Réserve

(4) Le fonctionnaire ne peut présenter de grief individuel portant sur l'interprétation ou l'application à son égard de toute disposition d'une convention collective ou d'une décision arbitrale qu'à condition d'avoir obtenu l'approbation de l'agent négociateur de l'unité de négociation à laquelle s'applique la

agreement or arbitral award applies.

#### Limitation

(5) An employee who, in respect of any matter, avails himself or herself of a complaint procedure established by a policy of the employer may not present an individual grievance in respect of that matter if the policy expressly provides that an employee who avails himself or herself of the complaint procedure is precluded from presenting an individual grievance under this Act.

#### Limitation

(6) An employee may not present an individual grievance relating to any action taken under any instruction, direction or regulation given or made by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

#### Order to be conclusive proof

(7) For the purposes of subsection (6), an order made by the Governor in Council is conclusive proof of the matters stated in the order in relation to the giving or making of an instruction, a direction or a regulation by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

#### Reference to adjudication

**209.** (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;

(b) a disciplinary action resulting in

convention collective ou la décision arbitrale et d'être représenté par cet agent.

#### Réserve

(5) Le fonctionnaire qui choisit, pour une question donnée, de se prévaloir de la procédure de plainte instituée par une ligne directrice de l'employeur ne peut présenter de grief individuel à l'égard de cette question sous le régime de la présente loi si la ligne directrice prévoit expressément cette impossibilité.

#### Réserve

(6) Le fonctionnaire ne peut présenter de grief individuel portant sur une mesure prise en vertu d'une instruction, d'une directive ou d'un règlement établis par le gouvernement du Canada, ou au nom de celui-ci, dans l'intérêt de la sécurité du pays ou de tout État allié ou associé au Canada.

#### Force probante absolue du décret

(7) Pour l'application du paragraphe (6), tout décret du gouverneur en conseil constitue une preuve concluante de ce qui y est énoncé au sujet des instructions, directives ou règlements établis par le gouvernement du Canada, ou au nom de celui-ci, dans l'intérêt de la sécurité du pays ou de tout État allié ou associé au Canada.

#### Renvoi d'un grief à l'arbitrage

**209.** (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire peut renvoyer à l'arbitrage tout grief individuel portant sur :

a) soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale;



termination, demotion, suspension or financial penalty;

*b)* soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;

*(c)* in the case of an employee in the core public administration,

*c)* soit, s'il est un fonctionnaire de l'administration publique centrale :

(i) demotion or termination under paragraph 12(1)(*d*) of the Financial Administration Act for unsatisfactory performance or under paragraph 12(1)(*e*) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or

(i) la rétrogradation ou le licenciement imposé sous le régime soit de l'alinéa 12(1)*d*) de la Loi sur la gestion des finances publiques pour rendement insuffisant, soit de l'alinéa 12(1)*e*) de cette loi pour toute raison autre que l'insuffisance du rendement, un manquement à la discipline ou une inconduite,

(ii) deployment under the Public Service Employment Act without the employee's consent where consent is required; or

(ii) la mutation sous le régime de la Loi sur l'emploi dans la fonction publique sans son consentement alors que celui-ci était nécessaire;

*(d)* in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.

*d)* soit la rétrogradation ou le licenciement imposé pour toute raison autre qu'un manquement à la discipline ou une inconduite, s'il est un fonctionnaire d'un organisme distinct désigné au titre du paragraphe (3).

#### Application of paragraph (1)(*a*)

(2) Before referring an individual grievance related to matters referred to in paragraph (1)(*a*), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.

#### Application de l'alinéa (1)*a*)

(2) Pour que le fonctionnaire puisse renvoyer à l'arbitrage un grief individuel du type visé à l'alinéa (1)*a*), il faut que son agent négociateur accepte de le représenter dans la procédure d'arbitrage.

#### Designation

(3) The Governor in Council may, by order, designate any separate agency for the purposes of paragraph (1)(*d*).

#### Désignation

(3) Le gouverneur en conseil peut par décret désigner, pour l'application de l'alinéa (1)*d*), tout organisme distinct.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-2263-12

**STYLE OF CAUSE:** JOHN WAYNE LUTY v THE ATTORNEY GENERAL  
OF CANADA

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** SEPTEMBER 25, 2013

**REASONS FOR JUDGMENT  
AND JUDGMENT:** O'REILLY J.

**DATED:** JANUARY 8, 2014

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