Date: 20090914

Dockets: A-583-08
A-585-08

Citation: 2009 FCA 263

CORAM: **NOËL J.A.**
PELLETIER J.A.
TRUDEL J.A.

A-583-08

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

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

Respondents

A-585-08

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

Appellants

and

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

Respondent

Heard at Ottawa, Ontario, on September 9, 2009.

Judgment delivered at Ottawa, Ontario, on September 14, 2009.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: PELLETIER J.A.
TRUDEL J.A.

Federal Court of Appeal | Cour d'appel fédérale

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BETWEEN:

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

Respondent

REASONS FOR JUDGMENT

NOËL J.A.

[1] These are appeals from decisions of Justice Snider (the Federal Court Judge), dated October 24, 2008, disposing of two applications for judicial review in the course of a single set of reasons. The applications were directed at decisions rendered by an adjudicator of the Public Service Labour Relations Board (the adjudicator) rendered pursuant to the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 (the PSSRA).

[2] The appeals were heard together by order of the Chief Justice dated May 22, 2009 and the following reasons dispose of both appeals. The original will be filed in court file A-583-08 and a copy thereof in court file A-585-08.

BACKGROUND

[3] The dispute involves a group of heating plant operators (the employees) employed in a section of Public Works and Government Services Canada (the employer). Their work relationship is governed by a collective agreement negotiated between the Treasury Board of Canada and the Public Service Alliance of Canada (the collective agreement).

[4] The dispute results from a unilateral change brought by the employer to the employees work schedule. Until 2002, 10 of the employees worked 12-hour shifts on a rotating basis over a 12-week schedule for an average of 40 hours per week (averaged over the 12-week cycle). One of the employees worked a consistent schedule of 8 hours during the day, Monday to Friday.

[5] On October 28, 2002, the employer imposed a 5-week shift schedule that required all the employees to work a mix of 8-hour and 12-hour shifts. More specifically, the employees had to work 4 days of 8-hour shifts over a 5-week schedule with the remainder of the shifts being 12 hours in length. Employees continued to work an average of 40 hours per week, though the average was now calculated over a 5-week cycle rather than over a 12-week cycle.

[6] The employer now concedes that the change which it brought to the work schedule was in breach of the collective agreement. The issue turns on the extent of the damages, if any, payable as a result of this breach.

[7] In rejecting the applications for judicial review, the Federal Court Judge upheld the adjudicator's decision to award the overtime rate for the hours worked outside of those permitted under the collective agreement (the authorized schedule), and not to award any amounts for statutory holiday premiums and transportation expenses with respect to the hours worked outside of the authorized schedule.

STANDARD OF REVIEW

[8] The parties concede that the Federal Court Judge properly concluded that deference was owed to the adjudicator on both issues and that the appropriate standard of review is that of reasonableness as defined by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*). I agree that reasonableness is the standard applicable to the review of the adjudicator's decision by the Federal Court Judge given that both issues turn on the interpretation and application of the collective agreement, an exercise with which adjudicators have particular familiarity.

[9] When reviewing for reasonableness, a Court must examine the reasons given for the decision in order to ensure that it contains a rational justification. A decision is rationally justified if it falls within a range of possible, acceptable outcomes which are defensible having regard to the relevant facts and the law (*Dunsmuir*, above, para. 47).

ANALYSIS AND DECISION

[10] The first issue (A-583-08) is whether the employees should be compensated, by way of damages, for the hours worked outside the authorized work schedule. In his decision, the adjudicator held that damages were to be awarded based on the difference in overtime and other applicable premiums between the improperly imposed shift schedule and the authorized work schedule that the employees were working prior to the breach of the collective agreement. The main portions of his reasons 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 had 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. That was the method the bargaining agent used in its calculations (contained in its submissions). 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.

[11] The term “overtime” is defined in the collective agreement as “authorized work in excess of the employee’s scheduled hours of work”. As was noted by the Federal Court Judge, it is evident from the adjudicator’s reasons that he interpreted the term “overtime” to include hours worked outside of the authorized work schedule. The question, therefore, that the Federal Court Judge had to answer was whether the adjudicator’s interpretation of the term “overtime” fell within a range of possible, acceptable outcomes which are defensible when regard is had to the facts and the law.

[12] The submission of the employer is that the collective agreement provides for overtime only with respect to work done in excess of the employees' scheduled hours of work and that overtime is not available for work done outside of the employees' scheduled hours of work. Thus, the employer argues that, in construing the term "overtime" to include hours worked outside of the authorized work schedule, the adjudicator awarded a remedy that required, in effect, an amendment to the collective agreement contrary to subsection 96(2) of the PSSRA.

[13] A review of the relevant jurisprudence and doctrine in the field of labour arbitration indicates that the words "in excess of" can apply to work hours that fall outside of an authorized work schedule and that this does not mean that work must be in addition to normal work hours (Reference is made to *Re United Glass and Ceramic Workers, Local 248, and Canadian Pittsburgh Industries Ltd.* (1972), 24 L.A.C. 402 (Brown) (QL) at 2, 5; *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*)); Donald J. M. Brown and David M. Beatty, *Canadian Labour Arbitration, 4th ed.* (Aurora: The Cartwright Group, 2007) at para. 8:2110; Prof. E. E. Palmer, *Collective Agreement Arbitration in Canada, 3rd ed.* (Markham: Butterworths Canada Ltd., 1991) at 606). In my respectful view, it was open to the Federal Court Judge to accept the adjudicator's interpretation of the term "overtime" as reasonable.

[14] The employees for their part (A-585-08) submit that the denial of damages to compensate for expenses incurred in traveling to work for those days that they worked under the unauthorized schedule that would have been a day of rest under the authorized schedule is inconsistent with a

plain reading of the collective agreement and the adjudicator's own express findings respecting compensation on account of overtime.

[15] Under clause 29.10 of the collective agreement transportation expenses for overtime hours are payable to an employee where the work is not contiguous to the employee's scheduled hours and the employee is required to travel to work other than by normal public transportation. Having regard to the evidence before him, the adjudicator concluded that the employees did not incur additional transportation expenses as a result of the unauthorized schedule. He stated 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.

[16] In the absence of evidence of expenses beyond those that would have been incurred under the authorized schedule, it was reasonable for the Federal Court Judge to uphold the adjudicator's decision.

[17] The employees also take issue with the Federal Court Judge's dismissal of their claim for designated holiday pay. Under the 12-week schedule, designated holidays which fell on a day of rest were deemed to occur on the employee's next work day and, in respect of work done on that day, the employee received his regular rate of pay plus a holiday premium equal to one and one half times his regular rate of pay. Under the 5-week cycle, when a designated holiday fell on a day of rest within the maintenance portion of the cycle (4 eight hour shifts), the holiday was, once again,

deemed to occur on the employee's next work day, but the employee was simply given the day off with pay. Thus instead of working 12 hours at 2.5 times the regular rate of pay, employees were paid their regular pay for 8 hours which they did not work.

[18] The adjudicator held that there was no loss as the employee had not worked the designated holiday and had received a day of paid leave. The Federal Court judge accepted that this was a reasonable conclusion. With respect, this conclusion is unreasonable because it ignores the actual loss of pay suffered by the employees when the 12-week schedule is laid over the unauthorized 5-week schedule. These losses were recognized by the employer in its own calculations (see A-583-08, Appeal Book, vol. 3, pp. 434, 436 and 437).

[19] The adjudicator acted unreasonably in departing from the method which he himself had imposed for the calculation of losses arising from the implementation of the unauthorized schedule. As a result, I would allow the employees' appeal on this issue.

DISPOSITION

[20] I would dismiss the employer's appeal in file A-583-08 and allow the employees' appeal in file A-585-08 in part, set aside the decision of the adjudicator insofar as compensation for designated holiday pay is concerned, and remit the matter back to the adjudicator for reconsideration in a manner consistent with these reasons.

[21] Given the above disposition, the employer should bear the costs of the appeal in file A-583-08, and the costs of both the judicial review application and the appeal in file A-585-08. However given the limited success in file A-585-08, I would direct that costs be computed at the lower end of Column III of Tariff B.

"Marc Noël"

J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-583-08
(APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE SNIDER OF THE FEDERAL COURT DATED OCTOBER 24, 2008, T-1831-07 and T-1842-07.)	
STYLE OF CAUSE:	Attorney General of Canada and 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.
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	September 9, 2009
REASONS FOR JUDGMENT BY:	Noël J.A.
CONCURRED IN BY:	Pelletier J.A. Trudel J.A.
DATED:	September 14, 2009

APPEARANCES:

Richard E. Fader	FOR THE APPELLANT
Andrew Raven	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE APPELLANT
Raven, Cameron, Ballantyne & Yazbeck LLP/s.r.l. Ottawa, Ontario	FOR THE RESPONDENTS

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