Federal Court  Cour fédérale

Date: 20130607

Docket: T-761-12

Citation: 2013 FC 605

Ottawa, Ontario, June 7, 2013

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

JOSH HORNER

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] In 2009, Mr Josh Horner worked in Halifax at the Department of National Defence as a Master of the harbour tugboat the Listerville. He usually worked Monday to Friday from 07:30 to 15:30. He is a member of a union, the Canadian Merchant Service Guild.

[2] On August 11, 2009, Mr Horner worked his regular shift, plus two hours' overtime. That morning, he was asked to report for further duty on another vessel, the Glenbrook, at 20:00 that

evening. According to the collective agreement (*Agreement between the Treasury Board and the Canadian Merchant Service Guild*, Appendix K, article 30(*d*); see Annex for enactments cited), Mr Horner was entitled to receive 48 hours' notice of any shift change. Obviously, he did not receive that amount of notice on August 11, 2009.

[3] Mr Horner reported for duty before 20:00 on August 11, 2009 and stood watch from 04:00 to 08:00, and again from 18:00 to 24:00, on August 12, 2009. He stood watch again from 04:00 to 08:00 on August 13, 2009. In total, he performed 14 hours' work on the Glenbrook.

[4] Mr Horner presented a request for overtime pay relating to his extra duties on the Glenbrook. His request was turned down. He then filed a grievance seeking compensation and a declaration that his employer had violated the collective agreement.

[5] An adjudicator of the Public Service Labour Relations Board allowed Mr Horner's grievance and ordered the employer to pay him overtime for the 14 hours he worked outside his usual shift. The applicant argues that the adjudicator's decision was unreasonable because it amounted to the imposition of a penalty for failure to provide adequate notice of a shift change for which the collective agreement made no provision. The applicant asks me to quash the decision and order another adjudicator to reconsider the issue.

[6] I can find no basis for overturning the adjudicator's decision and must, therefore, dismiss this application for judicial review.

[7] The sole issue is whether the adjudicator's decision was unreasonable.

II. The Adjudicator's Decision

[8] Clearly, Mr Horner worked outside his regularly designated hours, and did not receive the amount of notice required by the collective agreement. The question before the adjudicator was what the appropriate remedy should be, if any.

[9] In an earlier case dealing with similar facts, the Federal Court concluded that an adjudicator had erred in granting an employee compensation because the collective agreement did not provide a specific remedy for breach of the notice requirement (*Canada (Attorney General) v McKindsey*, 2008 FC 73). However, the adjudicator in Mr Horner's case did not feel bound by *McKindsey* because that case arose under the *Public Service Staff Relations Act*, RSC 1985, c P-35 which contained a limited set of specified remedies, whereas Mr Horner's case had to be decided under the *Public Service Labour Relations Act*, SC 2003, c 22, s 2 which gives adjudicators the discretion to make any order they consider to be "appropriate in the circumstances" (s 228(2)).

[10] Given that the collective agreement required 48 hours' notice of a shift change, and provided no express penalty for violation of that requirement, the adjudicator concluded that Mr Horner had, in effect, worked overtime. Under the collective agreement, "overtime" is defined as the amount time a person worked "in excess of" his or her "designated hours of work" (Article 30.06 (*a*)). Mr Horner had worked outside his designated hours of work and was, therefore, entitled to overtime pay for the 14 hours he was on watch aboard the Glenbrook.

III. Was the adjudicator's decision unreasonable?

[11] The applicant argues that the adjudicator's decision is unreasonable because it granted Mr Horner overtime pay in circumstances where it was not warranted. In particular, Mr Horner was entitled to overtime only for time he worked in excess of his designated hours. Accordingly, Mr Horner should have been entitled to overtime for the two hours he worked in excess of his regular eight-hour shift on August 11, 2009. Similarly, he worked ten hours on August 12, 2009, so he was owed another two hours' overtime. However, on the next day, Mr Horner only worked four hours, so he did not work in excess of his designated 8-hour shift. Still, the adjudicator awarded Mr Horner a total of 14 hours of overtime, finding that all of his responsibilities on the Glenbrook fell outside his designated duties because he had not received proper notice of a shift change.

[12] If the requirement of 48 hours' notice of a shift change were strictly enforced, it is clear that Mr Horner had performed duties, amounting to a total of 14 hours, that did not fall within his regular assignment. The collective agreement left it to the adjudicator to decide what an appropriate remedy would be in the circumstances.

[13] Unlike in *McKindsey*, where only a limited range of remedies was available, the adjudicator here had authority to fashion an appropriate remedy. The award of overtime neither went beyond the collective agreement nor amounted to a punitive remedy. Further, the adjudicator provided a reasonable interpretation of the definition of "overtime" and a reasonable explanation for distinguishing *McKindsey*. Therefore, I see no basis for the applicant's submission that the

adjudicator's decision to award Mr Horner overtime pay was unreasonable. In my view, the adjudicator devised an appropriate remedy in the circumstances, and her decision falls within the range of defensible outcomes based on the facts and the law.

IV. Conclusion and Disposition

[14] The adjudicator's conclusion that Mr Horner had performed work outside his designated hours and, thus, should be compensated was not unreasonable in the circumstances. Therefore, I must dismiss this application for judicial review. As Mr Horner did not appear or participate in this proceeding, there is no order as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"James W. O'Reilly"

Judge

Annex "A"

Agreement between the Treasury Board and the Canadian Merchant Service Guild, (Ottawa, 2008)

Article 30: Hours of Work and Overtime

Overtime
30.06 In this Article:

(a) "overtime" means time worked by an officer in excess of his/her designated hours of work…

…

Appendix 'K': 40 Hour Work Week System

Article 30 – Hours of Work and Overtime
…
(d) For officers who regularly work five (5) consecutive days per week on "non-watchkeeping" vessels the hours of work shall be consecutive, except for meal periods,

and

The normal daily hours of work shall be between 0600 and 1800 hours.

and

Officers shall be given forty-eight (48) hours notice of any change in scheduled starting time.

***Public Service Staff Relations Act*, RSC, 1985, c P-35** [Repealed, 2003, c 22, s 285]	***Loi sur les relations de travail dans la fonction publique*, LRC (1985), ch P-35** [Abrogée, 2003, ch 22, art 285]
Decision requiring amendment	Décision entraînant une modification
96 (2) No adjudicator shall, in respect of any grievance, render any decision thereon the effect of which would be to require the amendment of a collective agreement or an arbitral award.	**96** (2) En jugeant un grief, l'arbitre ne peut rendre une décision qui aurait pour effet d'exiger la modification d'une convention collective ou d'une décision arbitrale.
Powers of adjudicator	Pouvoirs
96.1 An adjudicator has, in relation to the adjudication, all the powers, rights and privileges of the Board, other than the power to	**96.1** L'arbitre de grief a, dans le cadre de l'affaire dont il est saisi, tous les droits et pouvoirs de la Commission, sauf le pouvoir

make regulations under section 22.

***Public Service Labour Relations Act*, SC 2003, c 22, s 2**

Hearing of grievance

228 (1) If a grievance is referred to adjudication, the adjudicator must give both parties to the grievance an opportunity to be heard.

Decision on grievance

(2) After considering the grievance, the adjudicator must render a decision and make the order that he or she considers appropriate in the circumstances. The adjudicator must then

(*a*) send a copy of the order and, if there are written reasons for the decision, a copy of the reasons, to each party, to the representative of each party and to the bargaining agent, if any, for the bargaining unit to which the employee whose grievance it is belongs; and

(*b*) deposit a copy of the order and, if there are written reasons for the decision, a copy of the reasons, with the Executive Director of the Board.

…

réglementaire prévu à l'article 22.

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

Audition du grief

228. (1) L'arbitre de grief donne à chaque partie au grief l'occasion de se faire entendre.

Décision au sujet du grief

(2) Après étude du grief, il tranche celui-ci par l'ordonnance qu'il juge indiquée. Il transmet copie de l'ordonnance et, le cas échéant, des motifs de sa décision :

a) à chaque partie et à son représentant ainsi que, s'il y a lieu, à l'agent négociateur de l'unité de négociation à laquelle appartient le fonctionnaire qui a présenté le grief;

b) au directeur général de la Commission.

[…]

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-761-12
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA V JOSH HORNER
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 30, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	O'REILLY J.
DATED:	JUNE 7, 2013

APPEARANCES:

Adrian Bieniasiewicz	FOR THE APPLICANT
	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F Pentney Deputy Attorney General Ottawa, Ontario	FOR THE APPLICANT
	FOR THE RESPONDENT