Federal Court  Cour fédérale

Date: 20101126

Docket: T-2046-09

Citation: 2010 FC 1192

Ottawa, Ontario, November 26, 2010

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

DALE GARRAH

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant challenges the legality of the decision (2009 PSLRB 148) made by Mr. Renaud Paquette (the adjudicator), on November 6, 2009, an adjudicator designated pursuant to section 209 of the *Public Service Labour Relations Act*, R.S.C. 2003 c. 22, allowing the grievance made by the respondent against Correctional Services of Canada (the employer).

[2] The respondent is a correctional officer. At the time of the incident, he worked on a shift schedule (8.5 hours for six days in a seven-consecutive-day schedule), and also on a modified

schedule due to his extended hours of work (9 hours on Tuesdays). He was scheduled to work an 8.5 hour shift on Christmas Day, December 25, 2006, a designated paid holiday. He requested leave, which was approved; however, the employer considered the time value of the designated paid holiday to be 8 hours of leave rather than 8.5 hours. As a result, the employer asked the respondent to pay back one half-hour of time for leave taken on Christmas Day. The respondent grieved.

[3] The respondent's grievance raised a fairly simple question about the time value of a designated paid holiday taken by an employee working on a modified schedule under the collective agreement signed on June 26, 2009 between the Treasury Board and the Union of Canada Correctional Officers – Syndicat des agents correctionnels du Canada – CSN for the Correctional Services Group (the collective agreement).

[4] Conflicting positions were taken before the adjudicator with respect to the interpretation and effect of various clauses of the collective agreement. Simply stated, the employer's position is that the pay allowed to an employee working on a modified schedule and who takes leave for a designated paid holiday is 8 hours remunerated at straight time (clause 26.05(b)), while the respondent holds that such an employee is entitled to a time value equal to the daily hours specified in clause 21.02 of the collective agreement for shift workers, namely, 8.5 hours a day (article 34).

[5] The adjudicator found that the employer violated the collective agreement.

[6] The applicant now submits that the adjudicator's refusal to apply clause 26.05(b) of the collective agreement to the facts of the case is not supported by the provisions of the collective

agreement and the applicable case law. Clause 26.05(b) now makes it clear that employees, whether they work on a regular basis or on a rotating or irregular basis, are only entitled to receive 8 hours of leave if they are not working on a designated paid holiday. Contrary to what the adjudicator has suggested in the impugned decision, article 34 does not establish a parallel regime in the treatment of employees working a regular schedule and employees working a modified schedule. Furthermore, the applicant argues that nothing in article 34 suggests that a provision of general application such as clause 26.05(b) should not apply to employees working a modified schedule.

[7] The respondent, on the other hand, holds that the adjudicator's decision is reasonable and that there are no grounds for judicial review. The respondent argues that if the parties did not change the designated paid holiday clause at article 34, knowing the interpretation it had been given in past case law, they did not intend to change its meaning. The evidence that was before the adjudicator confirms the parties' common intention. Furthermore, if the parties had intended to have clause 26.05(b) apply to employees working a modified schedule, they would have simply removed the designated paid holiday clause at article 34. Had the parties intended for one sole regime for employees on modified hours of work and employees who do not work modified hours, they would not have set up two parallel articles dealing with the value of a statutory holiday.

[8] With respect to the standard of review, both parties recognize that the Public Service Labour Relations Board and its adjudicators enjoy a high level of expertise in the area of labour and employment law which is the central focus of their governing statute. In the past, the courts have accorded a high degree of deference to the decision of an adjudicator when interpreting provisions of a collective agreement, as in the present case. All of this calls for a standard of reasonableness.

See *Currie v. Canada (Attorney General)*, 2009 FC 1314 at paragraph 24; *Canada (Attorney General) v. Pepper*, 2010 FC 226 at paragraph 20; *Attorney General of Canada v. Bearss*, 2010 FC 299 at paragraph 23; *Chan v. Canada (Attorney General)*, 2010 FC 708 at paragraph 17.

[9] The Court finds no reason to interfere with the adjudicator's decision.

[10] As explained hereunder, the adjudicator's general conclusion is supported by the provisions of the collective agreement. The adjudicator's reasoning for ruling that clause 26.05(b) of the collective agreement does not apply to employees working on a modified schedule is defensible and is not arbitrary or capricious, considering the particular wording of article 34 and clause 21.02(a) of the collective agreement and the interpretation and effect given to these provisions in the case law. Indeed, the adjudicator's 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 paragraph 47.

[11] Since the respondent worked a modified work schedule, the provisions of article 34 of the collective agreement applied:

ARTICLE 34 MODIFIED HOURS OF WORK	ARTICLE 34 HORAIRE DE TRAVAIL MODIFIÉ
The Employer and the Union agree that the following conditions shall apply to employees for whom modified hours of work schedules are agreed upon pursuant to the relevant provisions of this collective agreement. The	L'Employer et le Syndicat conviennent que les conditions suivantes s'appliquent aux employé-e-s à l'intention desquels des horaires de travail modifiés ont été convenus conformément aux dispositions pertinentes de la présente

agreement is modified by these provisions to the extent specified herein.	convention collective. La convention est modifiée par les présentes dispositions dans la mesure indiquée.
…	…
3. Specific Application For greater certainty, the following provisions shall be administered as provided herein :	3. Champ d'application particulier Pour plus de précision, les dispositions suivantes sont appliquées comme suit :
…	…
Designated Paid Holidays (a) A designated paid holiday shall account for the normal daily hours specified by this agreement.	Jours fériés désignés payés (a) Un jour férié désigné payé correspond au nombre d'heures journalières normales prévues dans la présente convention.
(b) When an employee works on a Designated Paid Holiday, the employee shall be compensated, in addition to the normal daily hours of pay specified by this agreement, time and one-half (1 1/2) up to his or her regular scheduled hours worked and double (2) time for all hours worked in excess of his or her regular scheduled hours.	(b) Lorsque l'employé-e travaille un jour férié désigné payé, il est rémunéré, en plus de sa rémunération horaire journalière normale prévue dans la convention particulière du groupe concerné, à tarif et demi (1 1/2) jusqu'à concurrence des heures normales prévues à son horaire effectuées et à tarif double (2) pour toutes les heures effectuées en sus des heures normales prévues à son horaire.

(My underlining)

[12] According to paragraph (a) of the designated paid holiday clause of article 34 of the collective agreement, a designated paid holiday shall account for the "normal daily hours" specified in the collective agreement. The interpretation and effect of this expression was examined in a number of cases: *White v. Treasury Board (Solicitor-General-Correctional Service),* 2003 PSSRB 40, affirmed in 2004 FC 1017 (*White*); *Diotte v. Treasury Board (Solicitor General-Correctional Service),* 2003 PSSRB 74 (*Diotte*); *Wallis v. Treasury Board (Correctional Service of Canada),*

2004 PSSRB 180 (*Wallis*). The "normal daily hours" are those specified in clause 21.02 of the collective agreement for shift workers.

[13] Clause 21.02 of the collective agreement reads as follows:

Shift Work	Travail par quart
21.02 When hours of work are scheduled for employees on a rotating or irregular basis:	21.02 Lorsque les heures de travail des employé-e-s sont établies suivant un horaire irrégulier ou par roulement :
(a) they shall be scheduled so that employees on a weekly basis, work an average of forty (40) hours, and on a daily basis, work eight decimal five (8.5) hours per day.	(a) elles doivent être établies de façon à ce que les employé-e-s : travaillent une moyenne de quarante (40) heures par semaine, travaillent huit virgule cinq (8,5) heures par jour.

(My underlining)

[14] In *White*, above, the grievor, who worked shifts and on a modified schedule just like the respondent, argued that the designated holiday accounted for 12 hours, the number of hours he was requested to work by the employer. The adjudicator dismissed the grievance and determined that the "normal daily hours" as referred to in article 34 were the number of hours specified at clause 21.02(a), which was at the time 8 hours (now 8.5 hours pursuant to clause 21.02(b)). The Federal Court refused to set aside the adjudicator's decision, holding that the adjudicator "[had] considered the appropriate provisions of the collective agreement and interpreted those in accord with normal principles of interpretation". In this respect, it was held that the "interpretation [of the adjudicator could not] be said to be without reason…" (2004 FC 1017 at paragraph 13). The decisions rendered in *Diotte* and *Wallis*, above, are to the same effect.

[15] But it is submitted by the applicant that the reference to clause 21.02(b) is no longer necessary in view of the incorporation of clause 26.05(b) which did not exist at the time that the decisions in *White, Diotte and Wallis*, above, were made:

ARTICLE 26 DESIGNATED PAID HOLIDAY	ARTICLE 26 JOURS FÉRIÉS DÉSIGNÉS PAYÉS
…	…
26.05 (a) When an employee works on a holiday, he or she shall be paid time and one-half (1 1/2) for all hours worked up to the regular daily scheduled hours of work as specified in Article 21 of this collective agreement and double (2) time thereafter, in addition to the pay that the employee would have been granted had he or she not worked on the holiday.	26.05 (a) Lorsqu'un-e employé-e travaille pendant un jour férié, il est rémunéré à tarif et demi (1 1/2) pour toutes les heures effectuées jusqu'à concurrence du nombre d'heures journalières normales prévues à son horaire tel qu'indiqué à l'article 21 de la présente convention collective, et à tarif double (2) par la suite, en plus de la rémunération qu'il aurait reçue s'il n'avait pas travaillé ce jour-là.
(b) <u>The pay that the employee would have been granted had he or she not worked on a designated paid holiday is eight (8) hours remunerated at straight-time.</u>	(b) <u>La rémunération que l'employé-e aurait reçue s'il n'avait pas travaillé ce jour-là est huit (8) heures à tarif normal.</u>

(My underlining)

[16] The adjudicator specifically considered the impact of clause 26.05 in his decision and found that this does not affect the time value of a designated paid holiday in the case of employees who work on modified schedules. For the reasons given in his decision, the adjudicator rules that clause 26.05(b), under the general designated paid holidays provision, cannot apply to employees who

work on modified schedules. If the intent of the parties to the collective agreement was to have clause 26.05(b) apply to employees working on modified work schedules, they would have deleted paragraph (a) of the designated paid holiday clause of article 34, but they did not. In this respect, as already decided by other adjudicators, the "normal daily hours" for employees working on a modified work schedule are equal to the daily hours specified in clause 21.02 of the collective agreement (formerly clause 21.01 of the old collective agreement) for shift workers. Thus, the adjudicator concludes that the respondent was entitled to 8.5 hours of paid leave on Christmas Day and the claw-back of one half-hour by the employer violated the collective agreement.

[17] His reasoning is expressed in the following manner:

> Even though clause 26.05(a) and paragraph (b) of the designated paid holiday clause of article 34 of the collective agreement are worded differently, they apply the same logic in determining an employee's pay when he or she works on a designated paid holiday. Clause 26.05(b) clarifies the last line of clause 26.05(a) in establishing eight hours as the time value of a designated paid holiday. In the designated paid holiday clause of article 34, the order is reversed, and the time value of a designated paid holiday is covered in paragraph (1) rather than in paragraph (b).
>
> If the intent of the parties to the collective agreement was to have clause 25.06(b) applied to employees on modified work schedules, they would have deleted paragraph (a) of the designated paid holiday clause of article 34, but they did not. Considering that the provisions of article 34 modify specific parts of the collective agreement and that article 34 covers the time value of a designated paid holiday, I conclude that clause 26.05(b) cannot apply to employees who work modified schedules.
>
> …
>
> I agree with [the *White, Diotte and Wallis*, above] decisions, which have established that a designated paid holiday has a time value equal to the daily hours specified in clause 21.01 of the collective agreement for shift workers, namely, 8.5 hours a day.

> The employer is right in reminding me that the cited decisions interpreted the old collective agreement. However, the collective agreement in question here does not differ from the old collective agreement concerning the clauses relevant to establishing the time value of a designated paid holiday for employees working a modified shift schedule. The employer argued that clause 26.05(b) was added and that it changed the rules. I have already ruled that that clause does not apply to employees working modified hours. Therefore, the rules remained unchanged when the parties signed the collective agreement in 2006.

[18] As can be seen, the adjudicator clearly adopted a contextual approach in the interpretation of the collective agreement looking at relevant provisions, including clause 26.05(b), to support the conclusion reached, which is one of the possible and acceptable outcomes on the facts and the law in this case. The applicant is simply reasserting arguments already considered and dismissed by the adjudicator. Indeed, the adjudicator specifically addressed the applicant's argument that if the grievance were allowed, it would create an inequity between employees and concluded that the collective agreement creates several differences in work rules between employees working regular hours and those working modified hours, and that unequal treatment is not inequity. Furthermore, the parties had made this decision and the adjudicator is bound to respect the will of the parties.

[19] While the adjudicator's interpretation of the jurisprudence and the structure of the collective agreement may not correspond with that of the applicant, this does not render the adjudicator's decision unreasonable. The Court should refrain itself from reinterpreting the collective agreement and substituting its own views for those of the adjudicator. While another result was perhaps possible – another adjudicator may have accepted the employer's arguments – this is not the applicable test in this judicial review proceeding.

[20] In conclusion, the adjudicator clearly undertook a thorough analysis of the jurisprudence and the structure of the collective agreement, including the changes made to the old collective agreement, and made a decision that is justifiable in light of the facts and the law. Accordingly, the Court dismisses the present judicial review application. In view of the result, costs are in favour of the respondent.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the judicial review application made by the applicant is dismissed with costs in favour of the respondent.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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