Federal Court Cour fédérale

Date: 20141126

Docket: T-760-14

Citation: 2014 FC 1136

Ottawa, Ontario, November 26, 2014

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

TRAVIS LAHNALAMPI, GILDA MARINUCCI, BEV MCCARTHY, AMBER MORDEN, JOYCELYN MYINT-SWE, JAY RAIKUNDALIA, ELIZABETH RAY, CLEOPATRA REID, CRAIG RUSSELL, HARMINDER SAHOTA, ANTONELLA SCIACCA, BRIAN SHIN, SCOTT STANLEY, BEATA SYROPIATKO, MARY VISCO, SUZANNE WALTERS, TRACEY WATTERS, SHARON ALI, ENID AWUKU, LATRICIA BEESTON, BARBARA BUDGELL, GENNARO CANALE-PAROLA, KATHY COOPER, AMABEL COURT, ROGER DESCOTES, OMAR FAIRCLOUGH, BRUCE FLANNIGAN MEGAN GAGNON-FITZGERALD, ROBERT GRAHAM, SIMONE HERCULES, JULIAN JEGANATHAN, DIANE JOHNSON, DAVID JONES, and CLINT JAMES

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Thirty-four employees (the grievors) who filed grievances against the Treasury Board (the employer) have brought an application for judicial review pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. The grievors challenge a decision of a Public Service Labour Relations Board adjudicator which dismissed their grievances. They allege that the adjudicator breached the principles of procedural fairness in rendering this decision.

[2] For the reasons that follow, I grant the application for judicial review. The matter will be returned to the Board to be decided by a different adjudicator.

I. **Background**

[3] During the relevant time period, the grievors were employed at the Employment Insurance (EI) Call Centre of the Department of Human Resources and Skills Development located in Toronto. This department has since been renamed the Department of Employment and Social Development.

[4] The grievors allege that the employer violated the collective agreement between itself and the Public Service Alliance of Canada in respect of the Program and Administrative Services Group bargaining unit. This collective agreement expired on June 20, 2007.

[5] The grievors' allegations relate to clause 28.05(a) of the collective agreement, which reads as follows:

> Subject to the operational requirements, the Employer shall make every reasonable effort to avoid excessive overtime and to offer

> overtime work on an equitable basis among readily available qualified employees.

[6] The French version of clause 28.05(a) states:

> Sous réserve des nécessités du service, l'Employeur s'efforce autant que possible de ne pas prescrire un nombre excessif d'heures supplémentaires et d'offrir le travail supplémentaire de façon équitable entre les employé-e-s qualifiés qui sont facilement disponibles.

[7] In 2007, fifteen call centres across Canada handled the public's requests for assistance with the EI program, the Canada Pension Plan and the Canada Student Loans program. Not every call centre dealt with all three programs. For EI enquiries, members of the public could call one of two 1-800 numbers to speak with an agent in the official language of their choice. The call centres were open for business from Monday to Friday.

[8] Management decided to run a pilot project from January to June 2007, in which it would open a few call centres on Saturdays in an attempt to even out the workload and improve service to the public. Management decided that the call centres in Sudbury and Montreal would participate in this project. For employees working there, Saturday work would count as overtime compensated at premium rates. January 20, 2007 was the first Saturday involved in this plan.

[9] The grievors sought the opportunity to work overtime on Saturdays. However, management refused to include the Toronto call centre in the pilot project. On March 9, 2007, the employer provided first level responses rejecting the grievances. On January 21, 2008, the employer provided final level responses rejecting these same grievances.

[10] Management was satisfied with the results from opening the Sudbury and Montreal call centres on Saturdays. It therefore decided to also open other call centres at later dates during the pilot project. On March 31, 2007, the Toronto call centre was included.

[11] When the pilot project ended, the employer decided to open all EI call centres on Saturdays on a permanent basis. The employer made Saturday part of its employees' shift schedules, with the result that Saturday work no longer attracted premium compensation.

[12] The grievors had appealed the dismissal of their grievances to the Public Service Labour Relations Board. An adjudicator heard the parties in Toronto on December 5, 2013. By decision dated February 21, 2014, the adjudicator dismissed the grievances. This is their application for judicial review of that decision.

II. **Issues**

[13] This application for judicial review raises two issues:

1. Did the adjudicator breach the principles of procedural fairness?
2. Should the adjudicator's decision be upheld even if he did breach the principles of procedural fairness?

III. **Relevant Legislation**

[14] Sections 6 and 7 of the *Public Service Labour Relations Act*, SC 2003, c 22, s 2 [*PSLRA*] preserve and entrench the management rights of the Treasury Board.

6. Nothing in this Act is to be construed as affecting the right or authority of the Treasury Board under paragraph 7(1)(b) of the *Financial Administration Act*.	6. La présente loi n'a pas pour effet de porter atteinte au droit ou à l'autorité du Conseil du Trésor conféré par l'alinéa 7(1)b) de la *Loi sur la gestion des finances publiques*.
7. Nothing in this Act is to be construed as affecting the right or authority of the Treasury Board or a separate agency to determine the organization of those portions of the federal public administration for which it represents Her Majesty in right of Canada as employer or to assign duties to and to classify positions and persons employed in those portions of the federal public administration.	7. La présente loi n'a pas pour effet de porter atteinte au droit ou à l'autorité du Conseil du Trésor ou d'un organisme distinct quant à l'organisation de tout secteur de l'administration publique fédérale à l'égard duquel il représente Sa Majesté du chef du Canada à titre d'employeur, à l'attribution des fonctions aux postes et aux personnes employées dans un tel secteur et à la classification de ces postes et personnes.

[15] Paragraphs 7(1)(b) and (e) of the *Financial Administration Act*, RSC 1985, c F-11 [*FAA*] establish the Treasury Board's powers with respect to the organization of work within the federal public administration.

7. (1) The Treasury Board may act for the Queen's Privy Council for Canada on all matters relating to [...]	7. (1) Le Conseil du Trésor peut agir au nom du Conseil privé de la Reine pour le Canada à l'égard des questions suivantes : [...]
(b) the organization of the federal public administration or any portion thereof, and the determination and control of establishments therein;	b) l'organisation de l'administration publique fédérale ou de tel de ses secteurs ainsi que la détermination et le contrôle des établissements qui en font partie;
(e) human resources management in the	e) la gestion des ressources humaines de

federal public administration, including the determination of the terms and conditions of employment of persons employed in it;	l'administration publique fédérale, notamment la détermination des conditions d'emploi;

[16] Paragraph 11.1(a) provides the Treasury Board with additional powers with respect to the management of human resources in the public service.

11.1 (1) In the exercise of its human resources management responsibilities under paragraph 7(1)(e), the Treasury Board may	11.1 (1) Le Conseil du Trésor peut, dans l'exercice des attributions en matière de gestion des ressources humaines que lui confère l'alinéa 7(1)e) :
(a) determine the human resources requirements of the public service and provide for the allocation and effective utilization of human resources in the public service;	a) déterminer les effectifs nécessaires à la fonction publique et assurer leur répartition et leur bonne utilisation;

IV. **Decision under Review**

[17] On February 21, 2014, adjudicator Michael Bendel issued *Lahnalampi et al v Treasury Board (Department of Employment and Social Development)*, 2014 PSLRB 22.

[18] The adjudicator began by explaining that, at the outset of the hearing, he had ruled (over the employer's objection) that evidence and argument would be limited to the following issue: "Whether Toronto EI Call Centre employees were entitled to be offered overtime work on the pilot project." He would proceed on the assumption that all the grievors were available and

qualified to perform the overtime work. The adjudicator posited that this assumption would reduce delay in deciding the matter, since it permitted him to avoid calling upon every one of the grievors to testify about his or her availability and qualification for the work in question.

[19] The grievors who provided evidence, Messrs Travis Lahnalampi and Bruce Flannigan, testified that upon first asking management why the Toronto employees had not been given the opportunity to work on Saturdays, they had been told that it would cost $800 to open the Toronto building on Saturdays.

[20] Ms Line Lacombe Laurin, testifying for the employer, provided four reasons why the Toronto call centre was not initially included in the pilot project. (1) The Sudbury and Montreal centres offered bilingual service, whereas the Toronto centre offered service only in English. (2) It would be more difficult for employees to gain access to the call centre in Toronto on Saturdays, as they would have to obtain authorization by telephoning a manager. In the two other centres, a security guard could grant them access immediately. (3) The cost of opening the Toronto office would have been $800 per hour. This is because the Toronto call centre was located in a large building and it was not possible to provide ventilation, heating and lighting only to the area occupied by the employer. Ms Lacombe Laurin did not state the cost of opening the Sudbury or Montreal offices but testified that it was lower. (4) The employer followed a practice of having at least 10 call centre agents on duty at any call centre at the same time, since a supervisor and quality assurance advisor were required to be present when calls were received. Due to this arrangement, it was impractical to have small numbers of employees working out of several call centres on Saturdays.

[21] According to the grievors, the adjudicator bore the task of determining whether any "operational requirements" invoked by the employer were reasonable. In their view, cost considerations could not reasonably affect overtime opportunities. Further, comparison had to be made both within work units and between them.

[22] The grievors further submitted that the evidence did not establish the existence of any operational requirements which would have relieved the employer of the duty imposed by clause 28.05(a). The employer brought no evidence about the relative cost of opening the Montreal and Sudbury call centres on Saturdays. There was no valid reason that English language calls could not have been rerouted to the Toronto call centre, as occurred after March 31. The employer's evidence demonstrated a mere preference, as opposed to an operational requirement, for using only the Sudbury and Montreal employees at the outset of the pilot project.

[23] Counsel for the employer submitted that an employer has the exclusive right to organize the workplace pursuant to the *PSLRA* and *FAA*. The determination of hours of operation falls within the ambit of that prerogative. These grievances flow from a change to the hours of operation of the Sudbury and Montreal call centres. The decision to offer overtime only to the employees in Sudbury and Montreal "was no more subject to an adjudicator's review than the decision to open only those two call centres": paragraph 24.

[24] Counsel for the employer further submitted that comparisons should be drawn between employees within each workplace. The employer does not shoulder the cumbersome obligation of offering identical overtime opportunities to employees at different workplaces across the

country. The employer was justified in limiting Saturday hours to the Sudbury and Montreal call centres in view of the factors explained by Ms Lacombe Laurin.

[25] The adjudicator stated that he was not satisfied that operational requirements required the employer to offer work in Sudbury and Montreal but not Toronto. He agreed with the grievors that this was a mere preference. He accepted that the employer had made a sensible business decision in good faith, yet this did not raise its decision to the level of an operational requirement.

[26] However, the adjudicator then stated that sections 6 and 7 of the *PSLRA* precluded the grievors' claim to work in the pilot project, "although not in precisely the way articulated by employer counsel [*sic*]": paragraph 31.

[27] Clause 28.05(a) of the collective agreement confers a right to employees who are "readily available" to perform overtime work. The adjudicator assumed that the grievors were "available" on the Saturdays in question, in the sense that they would have accepted an offer to work overtime at the Toronto call centre. However, he wished to attribute some meaning to the word "readily".

[28] According to the adjudicator, the employer had the exclusive and entrenched prerogative to open or close the Toronto call centre on the Saturdays in question. As such, the adjudicator had "no authority to declare that the employer should have opened it for the grievors or to question its failure to do so": paragraph 34.

[29] On the strength of this conclusion, the adjudicator read the words "ready available" (facilement disponibles in French) to mean that little would prevent the employees from performing the work if it were actually assigned to them. He buttressed this interpretation with the Ontario arbitration decision *Kirkland and District Hospital v Service Employees International Union, Local 204 (Lafontaine Grievance)*, [2004] OLAA No 71 [*Kirkland*], where a collective agreement was read to allow managers to drive an ambulance if employees were not "ready available", interpreted to mean physically present at the base.

[30] The adjudicator held that the Toronto employees were not "ready available" for the work in question on Saturdays because no Toronto workplace existed on those days. Even if clause 28.05(a) gave them a claim to work out of the Montreal or Sudbury call centres, the fact that they would have had to travel would have impeded their ready availability for that work.

[31] For the above reasons, the adjudicator dismissed the grievances.

V. **Analysis**

A. *Did the adjudicator breach the principles of procedural fairness?*

[32] There is no need to engage in a detailed standard of review discussion to decide this issue. Counsel for both parties agreed that the Court should not show deference to the adjudicator when determining whether he breached the duty of fairness on the facts of this case. After undertaking my own analysis of this question, I have concluded that the adjudicator did indeed breach the duty which fell upon him.

[33] The applicants contend that the adjudicator denied them the right to be heard, also known as the *audi alteram partem* principle. They refer to Justice Sopinka's definition of this principle in his dissenting reasons in *IWA v Consolidated-Bathurst Packaging Ltd*, [1990] 1 SCR 282 at page 298 [*Consolidated-Bathurst*]: "a party to an administrative proceeding entitled to a hearing is entitled to a meaningful hearing in the sense that the party must be given an opportunity to deal with the material that will influence the tribunal in coming to its decision".

[34] In *Consolidated-Bathurst*, the Supreme Court considered whether the Ontario Labour Relations Board's practice of conducting *ex parte* meetings where its members discussed the cases before them contravened procedural fairness. At page 338, the majority of the Court held that this practice was consistent with the *audi alteram partem* principle, as long as certain safeguards were met:

> It is now necessary to consider the conditions under which full board meetings must be held in order to abide by the *audi alteram partem* rule. In this respect, the only possible breach of this rule arises where a new policy or a new argument is proposed at a full board meeting and a decision is rendered on the basis of this policy or argument without giving the parties an opportunity to respond.
>
> I agree with Cory J.A. (as he then was) that the parties must be informed of any new ground on which they have not made any representations. In such a case, the parties must be given a reasonable opportunity to respond and the calling of a supplementary hearing may be appropriate.
>
> [Emphasis added]

[35] Thus, the Court held that a breach of procedural fairness arises when a decision is rendered on the basis of new arguments to which the parties have had no opportunity to respond.

The case law does not limit the reach of this principle to *ex parte* meetings. Indeed, it has harnessed the same approach in a variety of circumstances.

[36] *Audi alteram partem* applies in the context of civil trials to prevent judges from rendering decisions on grounds different from those which the parties pleaded and argued. In *Rodaro v Royal Bank*, [2002] OJ No 1365 at paras 58-61, the Ontario Court of Appeal explained that it is inappropriate for the trial judge to determine the defendants' liability on the basis of a theory which had not been raised during the hearing. Further, at para 62, the Court held that such a practice was not only unfair but also created the risk of an unreasonable decision, since the argument endorsed by the judge had not been tested through the adversarial process.

[37] The Federal Court of Appeal offered a recent summary of the state of the law on the principle in *Tervita Corporation v Commissioner of Competition*, 2013 FCA 28 at paras 71-74:

> In the normal course of judicial proceedings, parties are entitled to have their disputes adjudicated on the basis of the issues joined in the pleadings. This is because when a trial court steps outside the pleadings to decide a case, it risks denying a party a fair opportunity to address the related evidentiary issues: *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.) at paras. 60 to 63; *Nunn v. Canada*, 2006 FCA 403, 367 N.R. 108 at paras. 23 to 26; *Labatt Brewing Company Ltd. v. NHL Enterprises Canada*, L.P., 2011 ONCA 511, 106 O.R. (3d) 677 at paras. 4 to 9 and 21.
>
> [72] However, this does not mean that a trial judge can never decide a case on a basis other than that set out in the pleadings. In essence, a judicial decision may be reached on a basis which does not perfectly accord with the pleadings if no party to the proceedings was surprised or prejudiced: *Lubrizol Corp. v. Imperial Oil Ltd.*, [1996] 3 F.C. 40 (C.A.) at paras. 14 to 16; *Barker v. Montfort Hospital*, 2007 ONCA 282, 278 D.L.R. (4th) 215 at paras. 18 to 22; *Colautti Construction Ltd. v. Ashcroft Development Inc.*, 2011 ONCA 359, 1 C.L.R. (4th) 138 at paras. 42 to 47.

> [73] A trial judge must decide a case according to the facts and the law as he or she finds them to be. Accordingly, there is no procedural unfairness where a trial judge, on his or her own initiative or at the initiative of one of the parties, raises and decides an issue in a proceeding that does not squarely fit within the pleadings, as long as, of course, all the parties have been informed of that issue and have been given a fair opportunity to respond to it: *Pfizer Canada Inc. v. Mylan Pharmaceuticals ULC*, 2012 FCA 103, 430 N.R. 326 at para. 27; *Murphy v. Wyatt*, [2011] EWCA Civ. 408, [2011] 1 W.L.R. 2129 at paras. 13 to 19; *R. v. Keough*, 2012 ABCA 14, [2012] 5 W.W.R. 45.
>
> [74] These principles also apply to contested proceedings before the Tribunal. It acts as a judicial body: section 8 and subsection 9(1) of the *Competition Tribunal Act*. Though the proceedings before the Tribunal are to be dealt with informally and expeditiously, they are nevertheless subject to the principles of procedural fairness: subsection 9(2) of the *Competition Tribunal Act*. Accordingly, the *Competition Tribunal Rules*, SOR/2008-141("Rules") provide that an application to the Tribunal must be made by way of a notice of application setting out, *inter alia*, a concise statement of the grounds for the application and of the material facts on which the applicant relies, as well as a concise statement of the economic theory of the case: Rules at paras. 36(2)(c) and (d). Similar provisions apply to a response and to a reply: Rules at paras. 38(2)(a)(b) and (c) and subsection 39(2). The Rules also set out a detailed and complete system of pre-hearing disclosures: Rules at sections 68 to 74 and 77-78.
>
> [Emphasis added]

[38] There are three takeaway points from this discussion. First, a decision-maker may raise and decide a new issue if the parties have been given a fair opportunity to respond to it. Second, non-compliance with the previous rule will amount to a breach of procedural fairness only if it inflicts surprise or prejudice upon a party. Third, these principles apply to administrative decision-makers in addition to courts.

[39] Courts have applied this principle when reviewing the decisions of arbitrators and labour boards. The applicants have brought two such cases to my attention. In *NAPE v Conception Bay South Integrated School Board* (1995), 132 Nfld & PEIR 353, the Newfoundland Supreme Court Trial Division quashed a labour board decision which had relied on an argument that had not been raised by the parties. In *Canada Linen and Uniform Service Co v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, 2005 SKQB 264, the Saskatchewan Court of Queen's Bench quashed a decision because the board had relied on numerous decisions from other jurisdictions which neither party had addressed. In my view, this last case is germane to the extent that it stands for the proposition that a tribunal should not rely on authority which neither party addressed in order to decide an issue which neither party raised.

[40] The crux of the applicants' argument is that the adjudicator based his decision on grounds that were never advanced by the employer: namely, that the applicants were not "readily available" for overtime within the meaning of clause 28.05(a). When deciding this issue which neither party had raised, the adjudicator referred to *Kirkland*, an Ontario arbitration decision which neither party had addressed.

[41] The respondent argues that the applicants were not denied procedural fairness because the only issue between the parties at all relevant times – from the filing of the initial grievances to the adjudicator's decision – was the interpretation and application of clause 28.05(a). The adjudicator did not prohibit the parties from making submissions on any aspect of this clause, including the definition of the word "readily". As such, the applicants voluntarily refrained from addressing this matter and must accept the consequences of their choice.

[42] I agree with the applicants that the adjudicator contravened *audi alteram partem* by deciding the matter on the basis that the applicants were not "readily available" for overtime work. Contrary to the respondent's suggestion, the applicants did not undertake the risk of not making submissions on the meaning of "readily available" with full knowledge that it might lead to a negative decision. To the contrary, the applicants did not make such submissions because the adjudicator had caused them to believe that he would not be deciding that question.

[43] At paragraph 3 of his decision, the adjudicator explicitly narrowed the issue to the question of "whether, on the assumption that they were available and qualified, [the grievors] were entitled to be offered overtime opportunities". He segmented the question of whether they were, in fact, available and qualified from the interpretive exercise he proposed to conduct at that stage of the proceedings.

[44] The adjudicator agreed with the argument made by the respondent to the effect that sections 6 and 7 of the *PSLRA* gave it the prerogative to decide whether or not to open the Toronto office on Saturdays. However, the adjudicator then explicitly rejected the respondent's argument that the above legislation shielded its decision to offer overtime only to Montreal and Sudbury employees from review. At paragraph 31, he declared:

> I should state that while an adjudicator cannot question or compel the employer's exercise of its entrenched prerogative, I am satisfied that overtime resulting from the exercise of that prerogative is fully subject to the terms of the collective agreement.

[45] It is therefore clear that, in itself, the adjudicator's conclusion on the interpretation of sections 6 and 7 of the *PSLRA* did not resolve the underlying question. The adjudicator had to

take one additional step – interpreting the words "readily available" – before dismissing the grievances.

[46] The adjudicator plainly breached procedural fairness by deciding that the grievors were not readily available for work despite telling the parties that he would assume that they would have been available. It might be said that he never stated that he would assume that they would be "readily available", yet it would be unduly formalistic to focus on the absence of the word "readily" from paragraph 3 of his decision. The applicants subjectively believed that they did not need to address the interpretation of this word due to the adjudicator's declared assumption. In my view, this belief was objectively justified from the standpoint of the reasonable person.

[47] The applicants were clearly surprised and prejudiced by the adjudicator's failure to provide them with an opportunity to make submissions on this point. Had they been offered such an opportunity and presented arguments, their grievances might not have been dismissed.

[48] To conclude this point, I wish to reject two arguments made by counsel for the respondent. First, I do not agree that the applicants are raising a question on judicial review which they ought to have raised before the adjudicator. The applicants had no notice that the adjudicator would ground his decision on the interpretation of the term "readily available" until they received his decision. As such, they had no earlier opportunity to raise the allegation of procedural unfairness which they have raised in this application.

[49] Second, I reject the respondent's suggestion that *audi alteram partem* is relaxed to the point of permitting a decision-maker to decide issues that neither party addressed when these issues pertain to law or policy, as opposed to factual disputes. Read properly, *Consolidated-Bathurst* insists that a decision-maker cannot raise novel issues of any sort without bringing them to the attention of the parties. In that case, the majority found that *audi alteram partem* had not been breached because the parties had made submissions on the policy issues which the Board members discussed *ex parte*.

B. *Should the adjudicator's decision be upheld even if he did breach the principles of procedural fairness?*

[50] Two Supreme Court cases are helpful for deciding whether a decision tainted by procedural unfairness should be allowed to stand. In *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at page 661, Justice Le Dain held that

> …the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

[51] This statement received some qualification in *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202. In that case, the Canada-Newfoundland Offshore Petroleum Board had rejected the applicants' request in writing, pursuant to its interpretation of the relevant legislation. The Supreme Court endorsed the Board's statutory interpretation on the cross-appeal, yet it found that the Board had breached the

principles of natural justice by denying the applicants an oral hearing. The Court stated the following at page 228:

> In light of these comments, and in the ordinary case, Mobil Oil would be entitled to a remedy responsive to the breach of fairness or natural justice which I have described. However, in light of my disposition on the cross-appeal, the remedies sought by Mobil Oil in the appeal *per se* are impractical. While it may seem appropriate to quash the Chairman's decision on the basis that it was the product of an improper subdelegation, it would be nonsensical to do so and to compel the Board to consider now Mobil Oil's 1990 application, since the result of the cross-appeal is that the Board would be bound in law to reject that application by the decision of this Court.
>
> The bottom line in this case is thus exceptional, since ordinarily the apparent futility of a remedy will not bar its recognition: *Cardinal*, *supra*. On occasion, however, this Court has discussed circumstances in which no relief will be offered in the face of breached administrative law principles: *e.g.*, *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561. As I described in the context of the issue in the cross-appeal, the circumstances of this case involve a particular kind of legal question, *viz*., one which has an inevitable answer.
>
> In *Administrative Law* (6th ed. 1988), at p. 535, Professor Wade discusses the notion that fair procedure should come first, and that the demerits of bad cases should not ordinarily lead courts to ignore breaches of natural justice or fairness. But then he also states:
>
> > A distinction might perhaps be made according to the nature of the decision. In the case of a tribunal which must decide according to law, it may be justifiable to disregard a breach of natural justice where the demerits of the claim are such that it would in any case be hopeless.
>
> In this appeal, the distinction suggested by Professor Wade is apt.
>
> [Emphasis added]

[52] Thus, I would be justified in upholding the adjudicator's decision if there existed an "inevitable answer" to the contested legal issue that would justify dismissing the applicants' grievances. In other words, their claim would have to be "hopeless". In my view, the applicants' case does not meet this threshold. I must quash the adjudicator's decision even though I express no opinion on the applicants' ultimate chance of success.

[53] The applicants submit that they could have realistically led evidence and made arguments rebutting the adjudicator's conclusion on the meaning of "readily available" within the collective agreement. For instance, they allege that they would have been able to prove that their case is distinguishable from *Kirkland* for two reasons. First, the clause interpreted in *Kirkland* went to the definition of bargaining unit work, not the distribution of overtime. Second, the decision-maker's interpretation in *Kirkland* was influenced by the emergency context, whereas the grievors do not respond to emergencies.

[54] The applicants further submit that they would have been able to present evidence about the employer's general practices for distributing overtime which would have rendered the adjudicator's interpretation of "readily available" unreasonable. As an illustration, the applicants refer to a subsequent decision rendered by the Public Service Labour Relations Board, *Public Service Alliance of Canada v Treasury Board (Department of Employment and Social Development)*, 2014 PSLRB 11, where an adjudicator considered such evidence when interpreting the term "readily available".

[55] At first impression, the applicants advance plausible arguments. It would not be "hopeless" for them to attempt to persuade an adjudicator to endorse a different interpretation of "readily available" than the one adopted in the decision under review.

[56] The applicants have requested costs. As no request was made for enhanced costs or costs in a fixed amount, they shall be determined according to the ordinary scale.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. the application for judicial review is granted;
2. the matter is remitted for reconsideration by a different adjudicator at the Public Service Labour Relations Board; and
3. costs are awarded to the applicants, in an amount to be determined in accordance with the ordinary scale.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-760-14
STYLE OF CAUSE:	TRAVIS LAHNALAMPI, GILDA MARINUCCI, BEV MCCARTHY, AMBER MORDEN, JOCELYN MYINT-SWE, JAY RAIKUNDALIA, ELIZABETH RAY, CLEOPATRA REID, CRAIG RUSSELL, HARMINDER SAHOTA, ANTONELLA SCIACCA, BRIAN SHIN, SCOTT STANLEY, BEATA SYROPIATKO, MARY VISCO, SUZANNE WALTERS, TRACEY WATTERS, SHARON ALI, ENID AWUKU, LATRICIA BEESTON, BARBARA BUDGELL, GENNARO CANALE-PAROLA, KATHY COOPER, AMABEL COURT, ROGER DESCOTES, OMAR FAIRCLOUGH, BRUCE FLANNIGAN, MEGAN GAGNON-FITZGERALD, ROBERT GRAHAM, SIMONE HERCULES, JULIAN JEGANATHAN, DIANE JOHNSON, DAVID JONES, and CLINT JAMES
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 25, 2014
JUDGMENT AND REASONS:	MOSLEY J.
DATED:	NOVEMBER 26, 2014

APPEARANCES:

Amanda Montague-Reinholdt	FOR THE APPLICANT
Léa Bou Karam	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Raven, Cameron, Ballantyne & Yazbeck LLP Ottawa, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT