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to 35650

Citation: 2007 PSLRB 85

Public Service
Staff Relations Act

Before an adjudicator

BETWEEN

ELIZABETH BUNYAN ET AL.

Grievors

and

TREASURY BOARD
(Department of Human Resources and Skills Development)

Employer

Indexed as
Bunyan et al. v. Treasury Board (Department of Human Resources and Skills Development)

In the matter of grievances referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Barry D. Done, adjudicator

For the Grievors: Douglas Hill, Public Service Alliance of Canada

For the Employer: Amita R. Chandra, counsel

Heard at Toronto, Ontario,
May 23 to 25, 2007.

I. Grievances referred to adjudication

[1] On February 5, 2002, Elizabeth Bunyan and eight of her colleagues from the Scarborough, Ontario, office of Human Resources Development Canada (HRDC) (as it then was) grieved a denial of overtime:

. . .

> *I, the undersigned, hereby grieve management's contravention of clause 28.05(a) of the Collective Agreement by unilaterally and deliberately denying overtime work to local office insurance staff, and assigning said work to other offices.*

. . .

[2] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, these references to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 ("the former *Act*").

[3] Ms. Bunyan and her colleagues were employed in the Employment Insurance Division of the office as Agent II Insurance Officers and Agent I Service Delivery Representatives, classified as PM-02 and CR-05 respectively.

[4] Their collective agreement (Exhibit E-1) is one between the Treasury Board and the Public Service Alliance of Canada for the Program and Administrative Services group, which expired on June 21, 2003. Clause 28.05(a) of that agreement provides:

. . .

> *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.*

. . .

II. Preliminary matters

A. Certain references withdrawn

[5] The grievors' representative advised me that three of the nine grievors had withdrawn their references to adjudication: Elizabeth Bunyan (PSSRB File

No. 166-02-35642), Kim Christoffersen (PSSRB File No. 166-02-35643) and Darlene Palenik (PSSRB File No. 166-02-35648).

B. Objections to jurisdiction of the Board

[6] Counsel for the employer submitted that these grievances challenge the employer's prerogative to organize the public service, a right found in section 7 of both the *Financial Administration Act (FAA)* and the former *Act*. The employer has the sole and exclusive prerogative concerning how work is done in the workplace, subject to the collective agreement.

[7] Additionally, since the grievances were filed on February 5, 2002, the grievors' cause of action did not crystallize until March 31, 2002, when they allege the overtime freeze period began. The grievances do not allege any wrongdoing in the 25 days that preceded the filing of the grievances. Therefore, the grievors prematurely filed their grievances.

C. Reply to the employer's objections to jurisdiction

[8] The grievors received no notice that the employer considered their grievances untimely until late in the evening on the day before this hearing. The grievors believe that the employer has waived its right to object, based on timeliness.

[9] I determined that I would reserve my decision on jurisdiction and further consider the matter once final submissions were concluded.

III. Summary of the evidence

A. For the grievors

[10] Judy Phillips' substantive position is PM-02, Agent II Adjudicator, at Service Canada (formerly HRDC) in Scarborough, Ontario. Ms. Phillips is currently the Vice-Chairperson of Local 3574 of the Canada Employment and Immigration Union. She has acted as a supervisor, PM-03, on several occasions, including one period of five years from 1997 to 2002 that included the time when these grievances were filed.

[11] Her acting supervisor duties included planning and distributing work, participating in weekly teleconference calls and attending both staff and management meetings. On more than one occasion during the weekly teleconference calls, Ms. Phillips was told that no overtime would be offered to the Scarborough office until

its productivity improved. The weekly calls customarily involved the supervisors of the eight offices in the Greater Toronto Area (GTA), the managers from those offices, the central coordinator of overtime, a rotating chairperson and, potentially, the Director. One of the rotating chairpersons made several references to low productivity during normal working hours in the Scarborough office. Ms. Phillips believed those comments to be unfair, as they failed to recognize the cultural diversity of Scarborough and how much more difficult it was to gather the required information in Scarborough compared to most other offices.

[12] Sometime late in January 2002 Ms. Phillips attended an information-sharing meeting in her role as supervisor. At that meeting, Peter Pantaleo, a service delivery manager, announced that, because of a lack of productivity during normal working hours in the Scarborough office, overtime would cease in that office.

[13] Ms. Phillips identified two exhibits: Exhibit G-2, a package of documents showing overtime worked by Joanne Santino, from the Toronto Centre office, from February 8 to November 28, 2002, and Exhibit G-3, a similar package of documents showing overtime worked by Seymour Martin, one of the grievors from the Scarborough office, from June 20, 2001, to August 22, 2003. The latter indicates that between March 30 and October 14, 2002, Mr. Martin worked no overtime. The grievors refer to that period as the "overtime freeze period." Exhibit G-3 also shows periods of six-and-a-half months before the freeze period, and six-and-a-half months following the freeze period. Mr. Martin worked an average of 143 hours of overtime during each of those periods.

[14] In cross-examination Ms. Phillips agreed that an organization chart (Exhibit E-1) of the Scarborough office was accurate. At the weekly teleconference calls workload, attendance and productivity were discussed, as well as the attendance, availability for overtime and how many files that had been processed the previous week. Charles Salonia, formerly the manager of the York office, had commented during the weekly teleconference calls on the low productivity in the Scarborough office during normal working hours and had asked Ms. Phillips: "What are you guys doing?"

[15] Ms. Phillips explained some of the codes in Exhibit G-2, Ms. Santinos' record of overtime. Project Code 03597 referred to files that related to the SARS epidemic and Project Code 03594 indicated files that related to "customs-match." The lack of a

project code indicated regular insurance files from another office. The initials "RC" stood for *Responsibility* Centre, and RC 3516 referred to the Scarborough office.

[16] Ms. Phillips acknowledged that overtime was not an entitlement and that an employer was within its rights to choose not to have work performed on an overtime basis.

[17] Service standards exist for the insurance department, and when they are not met, a backlog of claims can result.

[18] Prior to his retirement, Seymour Martin, one of the remaining six grievors, was a PM-02 agent II, in the Scarborough office. He attended a meeting in late January 2002 where Mr. Pantaleo clearly stated that a decision had been made to cease overtime in the Scarborough office. Overtime would be redirected to other GTA offices due to the ongoing low productivity problem at Scarborough. Once office productivity improved, overtime would be reinstated.

[19] When Mr. Martin complained that he considered that decision to be punitive and arbitrary, he was told that the decision was not up for debate or discussion. Mr. Martin expressed the opinion that it would be difficult to improve productivity when one-third of the work done in the office is on difficult files, and that in his opinion, the easy files were sent to other offices.

[20] During the six-and-a-half month freeze period he was not offered, and so did not work, any overtime. This is a radical departure from his experience of over 36 years for the employer where there had never been another example of him being offered no overtime for six-and-a-half months. In fact, on average, he normally worked approximately 143 hours of overtime in a six-month period, as shown in Exhibit G-3.

[21] In cross-examination, Mr. Martin acknowledged that overtime is not an entitlement but, once a decision was made to offer overtime, how it was to be allocated was prescribed in the collective agreement.

[22] The Scarborough office serves a predominantly working-class area where employment is not stable, making for a high-volume workload in the office.

[23] Mr. Martin said that he rarely took vacation leave, as evidenced by his having been paid out, on his retirement, 12 weeks of vacation pay.

B. For the employer

[24] Peter Pantaleo is a service delivery manager, currently classified PM-05, in Oshawa. At the time the grievances were filed, he occupied a similar position in the Scarborough office, classified PM-04. Mr. Pantaleo identified a compilation of statistics kept for each GTA office (Exhibit E-4) indicating the number of files received for the fiscal years 2001-2002 and 2002-2003. He acknowledged that the Scarborough office's workload is the second highest in the GTA.

[25] There was a need to organize workloads within the GTA in order to maximize resources and to provide consistent service. An analysis was done to determine office capacity, and a committee was created, the Employment Insurance Operations Committee, to manage overtime and draft a policy to examine a one-workload concept for the GTA. The one-workload concept would manage both workload and overtime centrally.

[26] Mr. Pantaleo acknowledged that "it had been a concern that performance in the Scarborough office was not as it should be." A meeting was held at the Scarborough office in late January 2002, where production concerns were discussed and expectations were communicated. The one-workload approach was also discussed, including the central monitoring of offices. To facilitate discussion, a document dated November 29, 2001, was distributed, explaining the new one-workload approach (Exhibit E-6). Attached to Exhibit E-6 was a question and answer sheet dated December 4, 2001.

[27] When individual performance was examined, it was noted that "there were some outstanding performers," which the Director General was apprised of.

[28] Mr. Pantaleo said that only three employees in the Scarborough office were qualified to do customs-match overtime/appeal writing and that those employees were given overtime. He also said that he had "no performance concerns with Mr. Martins' productivity, as he was either at or slightly above my performance expectations." Nevertheless, he conceded that Mr. Martin had not been offered an opportunity to work overtime for six-and-a-half months, from March 30 to October 14, 2002 (Exhibit E-3).

[29] It was normal in the April to June period each year for intake volumes to be low, and that factor, as well as the budget, contributed to no overtime being offered. Another contributing factor might have been that employees were not available for overtime during the summer vacation period. However, June to August was a spike, traditionally, in claim intake and overtime was normally used to address that spike. Looking at the total overtime spreadsheet (Exhibit E-8) from September 2001 to December 31, 2002, Mr. Pantaleo was unable to explain why no overtime was offered in the June to August 2002 period, as "normally I would have thought that the Service Delivery group would have worked overtime in that period."

[30] In cross-examination, Mr. Pantaleo agreed that in September 2002 the Scarborough office's intake had decreased by more than 1000 files compared to the Toronto Centre office, which had had a marginal increase. Nevertheless, Exhibit G-2, Ms. Santinos' extra duty statistics, shows that she worked 36 hours of overtime in September 2002 processing Scarborough files, compared to Mr. Martin, a Scarborough office employee, who worked no overtime that month.

[31] Mr. Pantaleo said that "productivity was probably a factor" accounting for the overtime freeze period in the Scarborough office. This is in keeping with information communicated to Scarborough office staff (Exhibit E-6, at pages 3 and 5):

> . . .
>
> *Overtime will be authorized to offices only when productivity requirements have been met.*
>
> . . .
>
> *Overtime will be allowed when productivity targets at straight time have been met.*
>
> . . .

[32] Mr. Pantaleo agreed that "the overtime freeze was due, in part, to the one-workload approach." At this point, for clarification, I asked Mr. Pantaleo whether a star performer who was unlucky enough to work in an office with lacklustre performers would be denied overtime if the overall office productivity was below expectations, and Mr. Pantaleo replied that he or she would.

[33] In redirect Mr. Pantaleo said that the Scarborough office had been underperforming for a long time, both in its quality and quantity of work.

[34] Tony Taccogna is currently the manager of the Scarborough Call Centre, classified PM-06. From September 2002 to February 2005 he supervised the Scarborough office Insurance Unit, when the one-workload policy was applied and when overtime was distributed centrally within the GTA. Prior to that, both the overtime budget and office work were controlled locally and certain monies were set aside for overtime.

[35] By 2002 there was a backlog in the Scarborough office, and there was tremendous pressure to reduce it. A committee was created to develop a sector-wide approach to assigning work and overtime, and a capacity report was done for every office to detect deficiencies and rectify areas that were not up to speed. Monthly meetings were held, as well as weekly teleconference calls, to determine which offices had the capacity to take on more work.

[36] Mr. Taccogna believes that Scarborough was a very misunderstood office that "always got a bum rap" and that was frequently criticized. It was, and is, his opinion that the Scarborough office staff was excellent and did "wonderful things." The cultural diversity of the Scarborough clients, in his opinion, impacts on productivity, as it takes longer to deal with clients who do not speak English.

[37] Charles Salonia, now retired, was the workload coordinator; his job was to erase backlogs by moving the workload to offices that had the capacity to take on extra work. Capacities were determined by offices sharing information during the weekly teleconference calls on work plans, intakes and staff availability. Mr. Salonia kept minutes of these calls (Exhibit E-7) and distributed them to various managers.

[38] When overtime was authorized, it was given to an office. Although Mr. Salonia was aware that productivity in the Scarborough office was lower than the other GTA offices, it had no bearing on his allocation of overtime. The Scarborough office was given no overtime because it had no capacity to do extra work, "based on what files they had been completing on a weekly basis."

[39] Mr. Salonia recognized Exhibit E-6, the one-workload management plan, but maintained that "capacity, not productivity, was the determining factor." Capacity, he explained, was "what was produced that particular week compared to the average in the GTA." Mr. Salonia said that he did not offer overtime to individuals but to offices,

as "there was no way I could go through 400 employees and determine you get this, you get that. That's not possible."

[40] Referring to some overtime that was given to the Scarborough office during the overtime freeze period, Mr. Salonia said that overtime was assigned to an office by type of overtime; for example, employment insurance money or claims preparation money. During the overtime freeze period, he allocated only customs-match money to the Scarborough office.

IV. Summary of the arguments

A. For the grievors

[41] Productivity clearly was the determining factor in allocating overtime, as shown by Ms. Phillips' evidence about Scarborough's low productivity being a concern often raised during the weekly teleconference calls; by the announcement at the January 2002 meeting that overtime was to be removed from Scarborough due to low productivity; by Mr. Martin's evidence that never in 36 years, with this one exception, had he gone six-and-a-half months without overtime; by Mr. Pantaleo's comment that overtime would be removed until Scarborough's productivity improved; and by Exhibit E-6, the one-workload management plan that links the offering of overtime to productivity requirements being met.

[42] Meeting productivity expectations is not a criterion in clause 28.05(a) (Exhibit E-1) of the collective agreement. It is a small wonder then that in Exhibit E-6 management expects, at page two, "some criticism from staff and union representatives."

[43] In September 2002, according to Exhibit G-2, Ms. Santino, in the Toronto Centre office, performed overtime from Scarborough no fewer than 11 times in the 16 days between September 9 and 24, 2002.

[44] Both Exhibits G-3 (Mr. Martin's extra duty statistics) and E-3 (prepared by the employer) confirm that there was a six-and-a-half month gap in overtime for Mr. Martin. This, according to Douglas Hill, the grievors' representative, made no sense, since Scarborough's intake had decreased and Toronto Centre's intake had increased.

[45] Mr. Salonia's evidence concerning the relevance of productivity in the allocation of overtime to offices lacks credibility. He recognized Exhibit E-6, the one–workload management plan, yet maintained that productivity was not a factor in his not allocating overtime to Scarborough. This flies in the face of the weight of all the other evidence.

[46] I was referred to three excerpts from Brown and Beatty, *Canadian Labour Arbitration,* Third Edition, at 5:3200; 5:3220; and 5:2100, on past practice and on persons normally performing the work. As well, I was referred to *Zelisko and Audia v. Treasury Board (Citizenship and Immigration Canada)*, 2003 PSSRB 67, *Buskop v. Treasury Board (Solicitor General of Canada – Correctional Service)*, PSSRB File No. 166-02-23520 (19931001), and *Jutras v. Treasury Board (Correctional Service of Canada, Ministry of the Solicitor General)*, PSSRB File No. 166-02-20534 (19970912).

B. <u>For the employer</u>

1. <u>Preliminary objections to jurisdiction</u>

[47] The wording of these grievances is notable. The grievances are against "assigning said work," which is a disguised challenge to the employer's right to organize the workplace. The mere fact that these grievances raise an allegation of a contravention of the collective agreement is not sufficient for jurisdiction, as this would negate the employer's prerogative to organize the workplace. Beyond that, this matter should have been brought as a policy grievance since it concerns an employer initiative in managing the workload. Sections 7 and 11 of the *FAA* and the former *Act,* as well as the collective agreement article on managerial responsibilities, recognize the employer's right to manage.

[48] I was referred to the following cases: *Cargill Foods v. United Food and Commercial Workers International Union*, Local 633, [2006] C.L.A.S.J. 7 (QL), *Paynter et al. v. Treasury Board (Agriculture and Agri-Food Canada*), PSSRB File Nos. 166-02-27186, 27378 and 27379 (19970912).

[49] The employer is not alleging that these grievances are untimely, only that at the time they were filed, none of the grievors had been denied overtime. The collective agreement, at clause 18.02, provides the right to grieve to an employee who "has been treated unjustly or considers himself or herself aggrieved by any action or lack of action . . . ."

[50] If these grievances are an attack on the employer's initiative, then the reasoning in *Burchill v. Canada (Attorney General),* [1980] F.C.J. No. 97 (QL), applies. Three grievors in the Scarborough office did get overtime in the overtime freeze period.

[51] The collective agreement (Exhibit E-1, article 2) defines overtime as "in the case of a full-time employee, authorized work in excess of the employee's scheduled hours of work."

[52] In considering what is the appropriate length of time over which I should consider whether overtime distribution was equitable, I should use a one-year window, as in *Sumanik v. Treasury Board (Ministry of Transport)*, PSSRB File No. 166-02-395 (19710927), and *Anstruther et al. v. Treasury Board (Department of Human Resources and Skills Development),* 2004 PSSRB 132.

[53] Past practice is irrelevant in this matter. The information in Exhibit E-6 as to how overtime would be assigned in the future was reasonable notice and does not violate the collective agreement.

C. Rebuttal for the grievors

[54] In *Zelisko and Audia* at page 21, the adjudicator states that management cannot exercise its authority in a manner that is arbitrary, discriminatory or in bad faith.

[55] As management did not mention their concerns regarding jurisdiction or timeliness throughout the grievance process, they have waived their right to object at adjudication.

[56] Clause 18.10 of the collective agreement allows an employee to present a grievance "not later than the twenty-fifth (25th) day after the date on which he or she is notified orally or in writing or on which he or she first becomes aware of the action or circumstances giving rise to the grievance." The action and the circumstances in this case were evidenced by Mr. Pantaleo's announcement that he was removing overtime from Scarborough office employees. There is no need to continue to submit grievances every 25 days, as the breach of the collective agreement is a continuing one.

V. Reasons

A. Jurisdiction

[57] Paragraph 92(1)(*a*) of the former *Act*, states that an employee who has presented a grievance up to and including the final level in the grievance process with respect to the interpretation or application in respect of the employee of a provision of a collective agreement that has not been dealt with to his or her satisfaction may refer his or her grievance to adjudication.

[58] The grievors and their grievances meet these conditions.

[59] As counsel for the employer pointed out, the employer's sole and exclusive prerogative concerning how work is done in the workplace is subject to the collective agreement.

[60] Clause 6.01 of the collective agreement (Exhibit E-1), under the heading "managerial responsibilities," begins with these words: "Except to the extent provided herein. . . ." This contractual limitation on management's authority to manage is echoed in the case law provided by the employer, for example in *Cargill* at paras 8 and 10:

. . .

> *. . . the company has the right to direct and supervise the workforce and the Company retains those rights unless specifically covered in this agreement.*
>
> [Emphasis added]

. . .

> *A board of arbitration should hesitate before requiring a company to manage its business in a different manner, unless the collective agreement clearly indicates to the contrary.*
>
> [Emphasis added]

. . .

[61] Obviously, the employer cannot be permitted to contract away or abridge its right to manage at the bargaining table only to object at adjudication that it has the

sole and exclusive right to manage, notwithstanding that it has voluntarily fettered that right during the negotiation of a collective agreement.

[62] I reject this first submission on jurisdiction.

[63] The second submission on jurisdiction deals with the prematurity of the grievances in that the grievors were not yet aggrieved on the date that they filed them.

[64] As the grievors' representative pointed out, clause 18.10 of the collective agreement deals with the timing of a grievance. A grievance must be brought "not later than the twenty-fifth (25th) day after the date on which he or she is notified orally or in writing or on which he or she first becomes aware of the action or circumstances giving rise to the grievance."

[65] What action or circumstance gave rise to these grievances? Clearly, it was the decision to not offer overtime to Scarborough office employees until their straight-time productivity improved. That decision was announced by the grievors' manager, Mr. Pantaleo, at the staff meeting in late January 2002.

[66] As Mr. Martin testified, when he challenged that decision at the meeting, Mr. Pantaleo replied that the decision was not up for debate. In other words, the die was cast. Mr. Martin's reply was that the decision was arbitrary and punitive. It was at that meeting that the grievors' cause of action was crystallized and the 25-day window began to operate, as they then were orally notified, and notified in writing as well (Exhibit E-6), that "overtime will be offered to offices only when productivity requirements have been met."

[67] At that meeting, as well as at previous weekly teleconference calls and monthly meetings, employees in the Scarborough office were told that their office productivity was below the acceptable level.

[68] Should the employees have waited until the overtime freeze period began to present their grievances?

[69] Perhaps an analogy to grievances contesting discipline is useful here to illustrate the folly of such a course of action.

[70] If an employee is called to a meeting at which it is announced that a decision has been made to suspend that employee, must that employee, so advised, wait until the start of the suspension to grieve?

[71] Hardly!

[72] It is the decision itself, which appears etched in stone that is being challenged. That is precisely the situation faced by these grievors. They were called to a meeting where it was announced that a firm decision had been made affecting their conditions of employment, one that the grievors believed contravened their collective agreement.

[73] To delay their grievances, or not to act on their right to grieve within the negotiated window of 25 days, would have been foolhardy and perhaps fatal to exercising that right.

[74] For these reasons I also reject the employer's second submission on jurisdiction and find that I have jurisdiction to hear and decide these grievances.

[75] The article in the collective agreement that is grieved concerns management's obligation to offer overtime on an equitable basis to readily available and qualified employees.

[76] Despite Mr. Salonia's testimony to the contrary, the evidence is clear, even from the employer, that starting early in 2002, as the one-workload concept evolved, that office productivity was not just a factor among many others but that it was the only factor used in allocating overtime to an office.

[77] How else can one read the unambiguous words in Exhibit E-6, the one-workload management plan? "Overtime will be authorized to offices only when straight time capacity has been depleted and productivity requirements have been met [emphasis added]."

[78] It was hardly a well-guarded secret that for a long time, management was not happy with straight-time productivity in the Scarborough office. Indeed, Mr. Pantaleo, Mr. Taccogna and Mr. Salonia spoke of that fact, a fact that Ms. Phillips testified was commented on during a weekly teleconference call by Mr. Salonia, the central coordinator of workload and of allocating overtime, in a derisive manner: "What are you guys doing?"

[79] Despite the clear words I have already spoken of in Exhibit E-6, the one-workload management plan, Mr. Salonia said that it was capacity and not productivity that determined whether an office received overtime money. Yet, when asked how capacity was determined, he replied that it was based on the availability of staff to do the work and on the number of files that they had completed on a weekly basis. Surely, it is not a quantum leap for me to conclude that capacity was based on productivity, as "the number of files that they had completed on a weekly basis" is semantics, a distinction without a difference. If there was any doubt about the link between files completed, capacity and productivity, which there is not, that doubt is put to rest by Mr. Salonia's next statement: "Capacity is what was produced that particular week compared to the average in the GTA [emphasis added]."

[80] I agree with Mr. Hill's point that the weight of the evidence, using the standard of proof of a balance of probabilities, favours the grievors and strains Mr. Salonia's credibility on the issue of the role productivity played in awarding overtime.

[81] The issues I must decide given these facts are:

1. Was overtime offered on an equitable basis to readily available and qualified employees?

2. If the answer to that question is in the negative, had the employer made every reasonable effort to do so?

3. If the employer did not make every reasonable effort, was it prevented by some operational requirement?

B. Issue 1: equitable overtime

[82] The *Canadian Oxford Dictionary*, Second Edition, 2004, defines "equitable" as "just or characterized by fairness" or as "pertaining to equity."

[83] The word "just" is defined as "morally right or fair." "Equity" is defined as "fairness" or "impartiality." "Impartially" is defined as "fair" or "unprejudiced."

[84] Without exhausting all other terms, the recurring theme is fairness. Can allocating overtime to an office based upon that office's overall productivity withstand that test?

[85] Not by a very wide margin.

[86] In the first place, overtime could not be offered directly to an employee, even an outstanding performer who met or exceeded the productivity expectations such as Mr. Martin, if the numbers for his or her office were below the expected norm. Mr. Pantaleo could not offer overtime to Mr. Martin for the simple reason that Mr. Pantaleo had not been given overtime money, other than customs-match money, of which I will speak later, by Mr. Salonia, the central coordinator. The converse of that, of course, is that a poor performer whose individual performance fell below the acceptable level but who worked with a group of superior performers could get overtime.

[87] That approach is not only unfair, but untenable.

[88] To support the proposition that it would be fair to add restrictive provisions to collective agreement provisions such as office production is a slippery slope. For if one can add an arbitrary modifier such as minimum acceptable office productivity to create an entitlement to individual overtime, one could also add such notions as being discipline free, having one or more fully satisfactory appraisals, being at or below the average use of sick leave, etc. As the employer well knows, any such change to existing collective agreement terms can only be achieved at the bargaining table.

[89] Mr. Martin believes that the decision to not offer overtime to Scarborough office employees based on overall office productivity during straight-time hours was punitive. I find that the decision was not equitable.

C. Issue 2: reasonable effort

[90] It is common ground that, during what the grievors refer to as the overtime freeze period, from March 30 to October 14, 2002, some six-and-a-half months, the only overtime given to Scarborough office employees was given to Ms. Bunyan, Ms. Christoffersen and Ms. Palenik (Exhibit E-8). These grievors were offered overtime as they were considered the only employees qualified to do customs-match work involving writing appeals. Mr. Salonia said that the only overtime allocated to the Scarborough office was “customs match money.” I was offered no evidence on the degree of difficulty this work involves over and above the skills and experience other employees possessed. Nor do I know what specific skills the others needed to perform customs-match work, nor how long it would take to learn or acquire.

[91] The only evidence I have in this regard is that these three employees were qualified and so were offered the overtime. This seems insufficient to meet the "every reasonable effort" test. There is no suggestion that the immediacy of the work would not allow training, that other employees were canvassed to determine if they were interested in being trained, that the training would take too long or that the training budget would not permit any additional training.

[92] All of these steps would seem to fit within "every reasonable effort." Yet, there is no evidence to support the exclusion of any or all of these steps as being unreasonable. The burden on the employer in clause 28.05(a) of the collective agreement is an onerous one: "The employer shall make every reasonable effort."

[93] These words do not impose an obligation to make just any effort, or some effort, but every reasonable effort.

[94] Having recognized that "there were some outstanding performers that the Director General was apprised of," including grievor Seymour Martin, how much effort would it have taken for the employer to reward those employees with an opportunity to work overtime, even using their own criterion of productivity? Mr. Salonia's testimony speaks to that: "There was no way I could go through 400 employees and determine you get this, you get that. That's not possible."

[95] According to Mr. Pantaleo it was not only possible, it had already been done. Mr. Pantaleo said that individual performance was analyzed so that he could provide feedback to each employee. This process was apparently how Mr. Pantaleo became aware of outstanding performers. Mr. Pantaleo further said that: "I had no performance concerns with Mr. Martin's productivity, as he was either at or slightly above my performance expectations."

[96] This having been said, Mr. Martin was offered no overtime, which leads me to conclude that no effort was made to offer overtime on an equitable basis.

D. Issue 3: operational requirements

[97] There has been no evidence led nor any submission made that the employer was prevented from complying with the clear provisions of the collective agreement by some overriding operational requirement. On the contrary, the evidence is clear that the only stumbling block in the employer's way was self-imposed and of its own making and that is that portion of the one-workload concept that based overtime allocation on overall office productivity.

[98] I agree that the employer is free to manage as long as the collective agreement is not violated. That freedom includes if and when overtime is required and authorized. To achieve consistent service while reducing overtime is within its scope of authority as is moving work from office to office to maximize resources.

[99] What the employer cannot do, however, is create a system that offends the collective agreement. The employer authorized overtime (Exhibit G-2, Ms. Santinos' extra duty worksheet). The overtime worked was on Scarborough office files, Responsibility Centre 3516 (Exhibit G-2). That overtime was not offered equitably.

[100] For all of the above reasons, I make the following order:

(The Order appears on the next page)

VI. Order

[101] The grievances are allowed.

[102] The parties jointly requested that I determine this matter in a declaratory manner leaving remedy to themselves to determine, considering such variables as availability of staff to perform extra duty, etc. I agreed to remain seized should the parties be unable to agree on whatever remedy follows from my finding, noting that I also order that compensation for any lost overtime be awarded in cash as opposed to a remedy in kind.

August 14, 2007

Barry D. Done,
adjudicator

List of grievors

PSSRB File No.	Grievors
166-02-35644	Carol Desmond
166-02-35645	Sandra Fleming
166-02-35646	Martin Seymour
166-02-35647	Novia Morris
166-02-35649	Manjul Sultan
166-02-35650	Lorraine Doyle