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Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

AARON BALDASARO AND VICKIE THIESSEN

Grievors

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Baldasaro and Thiessen v. Treasury Board (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievors: Corinne Blanchette, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

For the Employer: Christine Diguer, counsel

Heard at Abbotsford, British Columbia,
April 11 to 13, 2012.

I. Individual grievances referred to adjudication

[1] At the time they filed their grievances in August and September 2010, Aaron Baldasaro and Vickie Thiessen ("the grievors") were correctional officers employed by the Correctional Service of Canada ("the employer" or CSC) in the Pacific Region. Ms. Thiessen worked at the Kwìkwèxwelhp Healing Village Institution and Mr. Baldasaro at the Matsqui Institution. The grievors alleged that the employer, by offering overtime inequitably, violated clause 21.10(a) of the collective agreement signed on June 26, 2006 by the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the union") ("the collective agreement"). Clause 21.10(a) reads as follows:

> ***21.10 Assignment of Overtime Work***
>
> *The Employer shall make every reasonable effort:*
>
> *(a) to allocate overtime work on an equitable basis among readily available qualified employees . . . .*

[2] The equitable distribution of overtime has been a long-standing issue between the employer and the union. As I will explain later, until November 1, 2009, overtime was distributed among readily available and qualified employees according to local procedures in each institution. The employer rescinded those local procedures on November 1, 2009 and replaced them with a standardized procedure contained in a national overtime policy ("the national policy").

[3] These two grievances deal with overtime distribution under the national policy. They are the first two to be heard of approximately 500 grievances referred to adjudication under the national policy. The parties selected them as test cases that will hopefully provide answers to several questions about the equitable distribution of overtime among correctional officers.

II. Summary of the evidence

[4] The parties adduced 52 documents in evidence. The grievors testified. They also called Gaelen Joe as a witness. Mr. Joe is a correctional officer at Matsqui Institution and is the local union president. The employer called John Kearney, Philippe Ariss, Randy Warren, Andrew Burke, Danielle Laberge and Andrew Marshall as witnesses. Mr. Kearney is Director of Labour Relations Policy for the CSC. Mr. Ariss is the manager of the CSC Scheduling and Deployment System (SDS). At the time of the grievances,

Mr. Warren, Mr. Burke, Ms. Laberge and Mr. Marshall were in correctional manager (CM) or manager of operations positions at Kwìkwèxwelhp Healing Village or at Matsqui Institution. They were involved at the time of the grievances in scheduling employees for work, calling them for overtime, applying the national policy, or operating and using the SDS.

A. The national policy

[5] Before November 2009, the CSC's institutions developed their own procedures for the equitable distribution of overtime. Most institutions offered overtime to the qualified available employee with the lowest number of overtime hours worked in the quarter or in the year. In that sense, equitability was recalculated every day. To reduce costs, some institutions offered overtime to employees at time and one-half before offering it to other employees at double time. There were other variances between local procedures across the country, but it is not useful to expand on them. On November 1, 2009, all local procedures were rescinded and replaced by the national policy.

[6] According to the national policy, the CMs have to control and reduce the need for overtime; give employees, whenever possible, advance notice of overtime to be worked; make every reasonable effort to offer overtime at the same group and level; minimize costs when overtime is required; and discuss overtime results with the union local representatives on a quarterly basis. The policy states that the CMs should make every reasonable effort to offer hours of overtime on an equitable basis among readily available and qualified employees. The CMs should also keep a record of all hours of voluntary overtime offered. Overtime is to be reviewed quarterly to allow for regular adjustments, as equitability is calculated over a 12-month period.

[7] Mr. Kearney testified that the employer differentiates voluntary overtime from mandatory overtime. Employees are called for mandatory overtime to satisfy very specific operational requirements and at the employer's discretion. For example, employees who are members of Institutional Emergency Response Teams (IERT) are required to work overtime with no opportunity for refusal when called as part of an IERT. Those overtime hours are recorded separately, and not used to compute and assess the equitable allocation of overtime.

[8] According to the national policy, the CMs consider the number of voluntary overtime hours already offered during the year when offering overtime. All hours of voluntary overtime offered and refused, offered with no answer, offered and worked, and spent on training, including IERT training, are compiled. From now on, when I refer to voluntary overtime hours offered, I mean all of those hours. However, that does not include mandatory overtime, which is compiled separately.

[9] The national policy defines the equitable offering of overtime as follows:

> ***Equitable offering of overtime****: means that over the fiscal year, management has made every reasonable effort to offer approximately the same amount of overtime hours to one employee as it has to other readily available qualified employees in the same work area. However, some employees may end the recording period with fewer overtime hours worked.*
>
> [Emphasis in the original]

[10] Mr. Kearney testified that the quarterly review period allows readjusting discrepancies that could have been generated by the national policy. When discrepancies are identified, measures can be taken to correct the situation and to offer overtime shifts to employees who have not had their fair share of overtime offers. For example, an employee who was not offered enough overtime because of his or her availability only at double time would be offered more overtime shifts after the quarterly review, to re-establish equitability.

[11] According to Mr. Kearney, local union presidents are supposed to receive regular monthly and quarterly reports (cumulative and non-cumulative) on the distribution of overtime among employees. Local union presidents and employees can receive other overtime reports if they require clarification. In addition, employees can ask questions of the CM in charge of scheduling or of the SDS if they believe that there has been an issue with the distribution of overtime. The grievors' witnesses testified that it was sometimes difficult to obtain from the employer the information they needed to assess equitability in offering overtime. There were some inconsistencies in reporting formats, and there were difficulties receiving cumulative reports. For the employer's witnesses, this was not a real problem since union officers can, at any time, ask for the report that they want.

B. The local implementation of the national policy

[12] When the CMs need to hire officers for overtime, they input the work requirements and details of the overtime shift to be offered into the SDS. The SDS automatically produces a list of qualified officers who meet the work requirements and who have indicated their availability to work the overtime shift. The SDS list ranks the officers in the order that they should normally be called. The list starts with officers who would be paid at time and one-half. Officers who would be paid at double time are listed next. Within those two groups, officers are listed in reverse order of the number of hours of voluntary overtime offered during the year. In other words, the officer to be paid at time and one-half and with the lowest number of voluntary overtime hours offered appears at the top of the list.

[13] According to the CMs who testified, they automatically call the first officer on the list and continue until they fill the overtime needs for a shift. Mr. Kearney testified that the CMs use the SDS list as a tool to make discretionary decisions about whom to call for overtime. For Mr. Kearney, the CMs might not necessarily respect the list. The CMs who testified about it said that they respect the list order at all times.

[14] The national policy states that local CMs are to produce quarterly reports to identify discrepancies in offering overtime. According to the national policy, the CMs are to address possible imbalances in offering overtime and may decide to prioritize employees who were not offered their share of overtime, even if additional costs may be incurred, like calling an employee on double time rather than on time and one-half. However, according to the oral evidence from the CMs at the hearing, it is not done that way at the local level. Audits or adjustments are normally not done. In fact, CMs seem to audit only on a request from an employee who feels that he or she did not receive his or her fair share of overtime or who does not understand why he or she was bypassed for overtime.

C. Evidence specific to Ms. Thiessen's grievance

[15] Ms. Thiessen input into the SDS an indication that she available to work overtime on June 22, 2010. Because of a glitch in the SDS, when the CM asked for a list of all employees available for an overtime shift, Ms. Thiessen's name did not come up. For that reason, she was not called for that shift, even though, normally, she should

have been called. She was qualified and available and had the lowest number of overtime hours worked in the year.

[16] At the end of the quarter on June 30, 2010, Ms. Thiessen had been available for 15 hours of overtime. However, she was offered none. At the end of the fiscal year, she had been available for 143 hours of overtime, and she was offered none. The CM analyzed that situation and concluded that, except for June 22, 2010, each time that Ms. Thiessen was available, no overtime was offered.

[17] The employer tried to correct its error of June 22, 2010. It offered Ms. Thiessen an overtime shift shortly after that day. She refused because she did not want to bump the next person who would have been offered that overtime shift. Later on during the same fiscal year, the employer offered Ms. Thiessen an overtime shift as an extra person on the roster at a time convenient to her and to the employer, so that her overtime shift would not impact the overtime offered to other employees. She refused that offer. She also testified that she had a very busy life with many responsibilities outside her workplace and that she could not accept the employer's offer.

[18] In her grievance, Ms. Thiessen asked that the employer show more transparency in the equitable offering of overtime. As a result, the employer agreed to post some information that was not posted before. However, Ms. Thiessen still believed that that was not sufficient and that more information sharing was necessary.

D. Evidence specific to Mr. Baldasaro's grievance

[19] Mr. Baldasaro indicated that he was available to work overtime on the day shift of August 26, 2010. That shift started at 07:00 and ended at 18:45. Mr. Baldasaro would have been paid at double time had he worked that overtime shift. The shift was offered to "S.H.," who was also to be paid at double time. Mr. Baldasaro believes that he should have been offered that shift because he had worked less overtime hours during the year than S.H.

[20] According to the information provided by the SDS to Ms. Laberge, who offered the overtime shift on August 26, 2010, S.H. had 19.75 overtime hours offered during the year, and Mr. Baldasaro had 34 hours offered. Ms. Laberge called S.H. since the SDS indicated that S.H. had less hours offered than Mr. Baldasaro. She did not verify

anything else since her directive was to call officers according to their rank on the SDS screen.

[21] Mr. Baldasaro adduced in evidence a document produced by the SDS that indicated that those totals, for S.H. and him, were not the number of hours of overtime worked during the year. It indicated that Mr. Baldasaro had worked 28.75 hours of overtime before August 26, 2010 and that S.H. had worked 42 hours of overtime for the same period.

[22] A third document produced by the SDS and introduced by the employer showed that, before August 26, 2010, Mr. Baldasaro had worked 19.25 hours of voluntary overtime, that he was offered and was not available for or refused an additional 14.75 hours of overtime, and that he was ordered to work 9.5 hours of overtime. That helps reconcile the two other SDS documents. The overtime hours that appeared on the SDS screen when the CM called employees for overtime on August 26, 2010 did not include the 9.5 hours of mandatory overtime worked by Mr. Baldasaro and the hours of mandatory overtime worked by S.H. However, it included the 14.75 hours for which Mr. Baldasaro was called but not available. No evidence was introduced on the number of hours for which S.H. was not available, as part of the 19.75 hours shown on the SDS screen used by Ms. Laberge.

[23] Another SDS report adduced at the hearing by the employer showed that, between April 1, 2010 and March 31, 2011, Mr. Baldasaro was offered 104.75 hours of voluntary overtime, worked 9.5 hours of mandatory overtime and was available to work 1663 hours of overtime. In comparison, S.H. was offered 87.75 hours of voluntary overtime, worked 72.75 hours of overtime, worked 38.5 hours of mandatory overtime and was available for 592.75 hours of overtime. Mr. Marshall testified that there were not necessarily any discrepancies in those figures. The differences would most likely be explained by checking the offers of overtime for every day that overtime was worked and offered to the two officers. He admitted that that analysis was not done since nobody asked him to do it.

[24] Mr. Joe testified that he does not have access to enough information and data from the employer at the Matsqui Institution to monitor and check if the employer offers overtime equitably and to make the overtime offering system work fairly and smoothly. The employer's witnesses testified that the union or any employee can

obtain all the information they want to monitor whether overtime is offered equitably. The employer has never refused to provide the information requested by the union.

III. <u>Summary of the arguments</u>

A. <u>For the grievors</u>

[25] Ms. Thiessen was not offered overtime on June 22, 2010 because of an error in the SDS. The error was never corrected, and at the end of year, Ms. Thiessen had not worked any overtime even though she had been available for 143 hours of overtime. The principle of equitability was broken. Further, the employer could not provide any explanation as to why Ms. Thiessen did not work any overtime that year. The employer violated the collective agreement, and it should be ordered to pay Ms. Thiessen eight hours of overtime at the applicable rate.

[26] Mr. Baldasaro was not offered overtime on August 26, 2010, because the SDS computation was wrong. IERT training and IERT work hours were not reflected in the overtime hours computed by the SDS. As a result, the SDS showed that S.H. had less overtime hours worked than Mr. Baldasaro, even though she had worked more hours. The CM trusted the SDS computation and called S.H. rather than Mr. Baldasaro. There should be no distinction between voluntary and involuntary overtime for the purposes of computing overtime hours and for offering overtime. Such a distinction is not part of the collective agreement. Had the parties wanted to make such a distinction for the allocation of overtime, they would have written it into the collective agreement.

[27] At the end of the year, Mr. Baldasaro was clearly disadvantaged when compared to S.H. This becomes apparent when the ratio of hours worked and hours available are compared. The jurisprudence on remedies is clear. If the adjudicator allows the grievance, he should order the employer to pay Mr. Baldasaro the missed overtime opportunity.

[28] The evidence showed that the employer did not perform any quarterly or annual audits or reviews of the discrepancies in overtime allocation, either at Kwìkwèxwelhp or at Matsqui. The national policy was not respected. Nor was it respected with respect to the obligation to share the overtime SDS information with the union. That was not done regularly. The information was not transparent. The way in which it was

transmitted or posted did not allow the union or its members to fully monitor the equitable distribution of overtime.

[29] The grievors referred me to the following decisions: *Boujikian v. Treasury Board (Citizenship and Immigration Canada)*, PSSRB File No. 166-02-27738 (19980615); *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *Casper v. Treasury Board (Department of Citizenship and Immigration)*, 2011 PSLRB 27; *Allard et al. v. Treasury Board (Department of Citizenship and Immigration)*, 2011 PSLRB 26; *Hunt and Shaw v. Treasury Board (Correctional Service of Canada),* 2009 PSLRB 65; *Sturt-Smith v. Treasury Board*, PSSRB File No. 166-02-15137 (19860731); *Weeks v. Treasury Board (Correctional Service of Canada),* 2010 PSLRB 132; *Lauzon v. Treasury Board (Correctional Service of Canada),* 2009 PSLRB 126; and *Mungham v. Treasury Board (Correctional Service of Canada),* 2005 PSLRB 106.

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

[30] The employer argued that it did not violate the collective agreement and that it allocated overtime on an equitable basis. The employer's witnesses explained that the application of the national policy is transparent through reports that can be consulted at any time by the union or by employees. Rather, the problem is that the union is resistant to the national policy. The CMs monitor the allocation of overtime on a regular basis and enquire further if they receive a request from employees or the union.

[31] Past decisions of the Federal Court and of adjudicators have established that equitability must be measured over a reasonable period, that equitability should be assessed by comparing the hours allocated to a grievor to the hours allocated to similarly situated employees over that period, and that, when overtime hours are compared, the adjudicator must determine if any factors can explain any discrepancies, such as differing availability, leave or other factors. The employer respected those principles and did not violate the collective agreement.

[32] The employer is entitled to set the parameters of equitability. It did so with the national policy. Under that policy, an employee cannot assert his or her right to a particular overtime shift. Equitability cannot be established on a day-to-day basis. Rather, the employer decided to establish it annually. No evidence was presented to establish that it cannot be done that way.

[33] Since equitability is established annually, the grievances are premature because it is not possible in June or in August of a particular year to establish if the distribution of overtime has been equitable. The answer to that question will come after the year is completed. The offer of overtime for a particular shift needs to be placed in the context of all offers of overtime over the year.

[34] The employer argued that, if one of the grievances is allowed, the adjudicator should simply declare that the collective agreement has been violated and should not order anything else. Ordering the employer to pay for a missed overtime shift is punitive since the shift was not worked by the relevant grievor. Remedies of a punitive nature should not be ordered when the employer acted in good faith.

[35] For Ms. Thiessen, the employer offered to correct its mistake by offering an alternate overtime shift. She refused that offer twice. She further testified that she was not available often to work overtime because of her responsibilities outside the workplace.

[36] For Mr. Baldasaro, the employer admitted that it treats voluntary and mandatory overtime differently under the national policy. Nothing in the collective agreement prevents the employer from implementing such a policy. The SDS reports do not show that Mr. Baldasaro was treated inequitably.

[37] The employer referred me to the following decisions: *Attorney General of Canada v. Bucholtz et al.*, 2011 FC 1259; *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board*, 2010 PSLRB 85; and *Canada (Attorney General) v. Lussier*, [1993] F.C.J. No. 64 (F.C.A.).

IV. <u>Reasons</u>

[38] These two grievances raise important questions about the equitable allocation of overtime among readily available qualified employees. The qualifications required to perform the overtime or the availability of the grievors were not at issue in these grievances. Instead, this decision will focus on the following questions:

- The reference period to assess the equitable distribution of overtime.
- The moment at which employees can file grievances.
- The obligation to offer overtime to the employee with the lowest number of hours worked during the reference period.

- The distinction between voluntary and mandatory overtime.
- The appropriate remedies for violations of the equitability principle.

A. <u>The reference period to assess the equitable distribution of overtime</u>

[39] A penitentiary operates 24 hours a day, 7 days a week with a complement of staff that cannot be reduced below a certain level. Most of the time, when a correctional officer scheduled for work is absent, he or she should be replaced. Occasionally, emergencies in the penitentiary require the employer to find non-scheduled officers to work. Because of those operational realities, overtime is frequent for correctional officers. This context needs to be considered when establishing whether the collective agreement allows the employer to assess equitability in overtime allocation on an annual basis.

[40] First, the collective agreement does not mention any restrictions and does not provide any guidance about the period for which to assess equitability. Second, nothing in the collective agreement prevents assessing equitability on an annual basis. Third, the case law of both this Board and its predecessor clearly establishes that "equitable" does not mean "equal" and that equitability should be assessed for a term longer than daily. Fourth, most adjudicator's decisions involving these parties since 2005 assessed equitability on a daily basis, but that was based on the premise that there were established policies or procedures in place at CSC institutions, which implied a daily assessment of the equitable distribution of overtime.

[41] Since the local procedures for allocating overtime were rescinded in November 2009, nothing prevents the employer from assessing equitability on an annual basis. Considering that there are no restrictions in the collective agreement, the employer has the right to establish a reference period to assess the equitability of overtime offered to correctional officers. It decided to use the fiscal year, starting April 1 and ending March 31, as the period in which to assess equitability. Nothing was adduced in evidence to prove that that period is not reasonable and that it does not permit a fair or reasonable assessment of the equitable allocation of overtime. Furthermore, there is abundant jurisprudence involving these parties or their predecessors confirming that the employer does not violate the collective agreement when it assesses the equitable distribution of overtime annually.

B. The period in which to exercise the right to grieve

[42] The employer argued that these two grievances are premature because it was not possible in June or in August 2010 to establish whether equitability in the distribution of overtime was respected. For the employer, the answer to that question would be known only when all offers of overtime over the year were analyzed. The employer also took that position in its reply to the grievances. I do not agree with the employer's argument. These grievances were not premature. In accordance with the clear wording of section 208 of the *Public Service Labour Relations Act*, S.C., 2003, c.22 ("the *Act*") an employee's right to grieve is established when he or she "feels aggrieved" and not when he or she is in a position to prove the grievance.

[43] The evidence shows that both grievors felt aggrieved by the employer when it did not offer them an overtime shift in June or in August 2010. It did not happen at the end of the fiscal year but rather on those dates. Subsection 208(1) of the *Act* gives employees the right to grieve if they feel aggrieved. It reads as follows:

> ***208.*** *(1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved*
>
> *(*a*) by the interpretation or application, in respect of the employee, of*
>
> *(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or*
>
> *(ii) a provision of a collective agreement or an arbitral award; or*
>
> *(*b*) as a result of any occurrence or matter affecting his or her terms and conditions of employment.*

[44] Statutorily therefore, Ms. Thiessen and Mr. Baldasaro had a right to grieve the employer's decision not to call them for overtime in June or in August 2010 respectively within the timeline stated in the collective agreement. Further support for this interpretation is found in clause 21.10 of the collective agreement which states that an employee may present a grievance within specific deadlines after he or she is "notified" or "first become aware of the action <u>or the circumstances</u> giving rise to the grievance" (emphasis added).

[45] The employer replied to these grievances at the final level in November and December 2011 respectively. By then, fiscal year 2010-2011 was over, and the parties would have had access to all the information needed to assess equitability over that fiscal year. The same logic applies to the adjudication hearing. Based on past practices, hearings rarely take place within the fiscal year of the grieved overtime.

[46] I also find that correctional officers could instead accept the employer's logic and choose to wait to the end of the fiscal year to file their grievance. They could then grieve the inequitable allocation of overtime for the full year. They could also then grieve an inequitable allocation of overtime for a specific date that was not corrected later on during the fiscal year.

[47] I should add that it seems to me that the grievors acted in the manner that best fosters positive labour relations. The grievors, in filing their grievances at the outset, alerted the employer that they felt that there was a problem and gave it time to fix the issue. Had they waited until the end of the fiscal year, the employer would not have been able to correct the alleged inequitable distribution of overtime.

C. <u>Offering overtime to employees with the lowest number of hours worked</u>

[48] It is important to again cite the following extract from the text of the national policy, which defines the employer's understanding of the equitable offering of overtime:

> ***<u>Equitable offering of overtime</u>****: means that over the fiscal year, management has made every reasonable effort to offer approximately the same amount of overtime hours to one employee as it has to other readily available qualified employees in the same work area. However, some employees may end the recording period with fewer overtime hours worked.*
>
> [Emphasis in the original]

[49] No national policy on the allocation of overtime can, given the wording of the collective agreement, ignore the issue of how to distribute overtime amongst readily available and qualified employees. In other words, such a policy must deal with who has priority on offers of overtime since the collective agreement requires that the employer make every reasonable effort to distribute overtime on an equitable basis. I have already established that the time period for the evaluation of this obligation can

be the fiscal year. I also agree with the employer's argument that under the terms of the collective agreement, officers are not automatically entitled to an overtime shift even if they have the lowest number of hours of overtime offered in a year. However, that number cannot be ignored by the employer either.

[50] According to the national policy, the CMs should consider the number of overtime hours already offered during the year. To do so, they use the SDS, which ranks the officers starting with the one to be paid at time and one-half with the lowest hours of overtime offered. The oral evidence is unequivocal; the CMs respect the order on that list. On that basis, the employer's well-established practice, since November 2009, is that it offers overtime to officers on the basis of rates of pay and the lowest number of hours of overtime offered. I should also add that the employer needs to have a system in place to build equitability on a yearly basis. It cannot wait a few months before the end of the fiscal year to analyze equitability. In a way, it does that every time it offers overtime.

[51] That does not mean that an adjudicator would necessarily be required to allow a grievance if the employee proved that he or she was not called for a specific overtime shift, despite having the lowest number of overtime hours offered. The adjudicator would have to first assess whether that omission resulted in an inequitable allocation of overtime at the end of the fiscal year. That means that the employer could correct the omission later during the year and still allocate overtime equitably. As well, it could be that the employer would have a valid reason to offer the overtime to another employee on the list, but I shall not speculate on what those valid reasons could be.

[52] I must underline the importance of the quarterly reviews and audits which are integrated into the national policy, as explained in Mr. Kearney's testimony. Those are essential to ensure equitability. Even though the witnesses testified that they perform reviews on request, that is not sufficient to ensure equitability. Discrepancies in overtime allocation will arise only when reviews and audits are done. Obviously, discrepancies cannot be corrected if they are not known.

[53] In *Mungham,* and in many other decisions that applied the same logic, the adjudicator concluded that the employer violated the collective agreement because it did not respect its own local policies or procedures on the allocation of overtime. According to those procedures, equitability was assessed daily. According to the national policy, it is assessed annually, but it is allocated for individual shifts on the

basis of the number of hours of overtime offered to officers during the year. The main difference between both systems is that, under the national policy, the employer can make corrections during the year and can readjust offering overtime if its national policy and its application results in an inequitable allocation of overtime.

D. <u>The distinction between voluntary and mandatory overtime</u>

[54] According to the national policy and to the SDS, the employer does not compute mandatory overtime hours for which correctional officers were ordered to work. Evidence was adduced at the hearing about overtime hours on the IERT, which are considered mandatory by the employer because officers are expected to work when called. Mandatory overtime can also be worked in emergencies by officers who are not members of the IERT. The grievors disagreed with this distinction between mandatory and voluntary overtime, which distinction, they argued, is nowhere to be found in the collective agreement.

[55] On that point, I agree with the grievors. Had the parties wanted to make a distinction between the mandatory and voluntary allocation of overtime, they would have written it into the collective agreement and would have excluded mandatory overtime from the equitable distribution of overtime. However, they did not.

[56] When the employer calls officers who are qualified to work on the IERT, it is normal that it does not consider other officers with less overtime hours but who are not qualified to work on the IERT. However, it should compute those hours as overtime offered to those qualified employees. By not doing so, the employer puts a systemic bias into the equitable distribution of overtime. It should instead include mandatory hours. This would increase the overtime of those employees and give more overtime opportunities to employees who do not work mandatory hours. At the end of the year, the final figures between employees from both groups would be equitable. Otherwise, there is a strong possibility that the opposite would occur.

[57] The employer did not submit any jurisprudence to support that mandatory overtime hours should not be counted for the purpose of assessing overtime equitability. Based on the wording of clause 21.10 of the collective agreement and the absence of any distinction between mandatory or voluntary overtime, I conclude that the employer must include the mandatory hours of overtime when assessing

equitability in offering overtime. If the employer wants to exclude mandatory overtime from clause 21.10(a), it must obtain the union's agreement to amend that clause.

E. <u>The appropriate remedies for violations of the equitability principle</u>

[58] The employer argued that the proper remedies at adjudication in a case of a violation of the collective agreement should be limited to a declaration that the collective agreement was violated. The employer referred me to *Lussier* in support of its argument. That decision is of little interest in this case. In *Lussier*, the adjudicator concluded that the employer violated the collective agreement by refusing vacation leave to an employee. He ordered the employer to pay $100 to the grievor for damages. The Federal Court of Appeal quashed that decision on the basis that the adjudicator exceeded his jurisdiction by awarding such damages. I find that the issue and principles at play in that decision are completely different from those before me in these cases.

[59] The employer's position in this case is simply contrary to the prevailing jurisprudence. I raised this point with the employer at the hearing, but it maintained its position. Furthermore, the remedy that it proposes does not fix the prejudice done to employees who would feel aggrieved. I am not sure whether the employer realizes it or simply ignores it, but the reality is that, for example, Mr. Baldasaro would have been paid 11.75 hours at double time had he been called for overtime on August 26, 2010. That represents a loss of more than $700 for him. A declaration does very little to compensate for that loss.

[60] Considering that grievances are very rarely heard at adjudication in the same fiscal year in which they are filed, and considering the jurisprudence, the proper remedy for an adjudicator is to order the employer to pay a grievor who proves an inequitable distribution of overtime. This is coherent with most of the recent adjudication decisions in this jurisdiction, including *Mungham*, *Weeks*, *Sturt-Smith*, *Hunt and Shaw*, *Casper*, *Boujikian*, and *Lauzon*.

[61] However, in cases in which adjustments can still be made to the overtime allocation of a fiscal year, the employer, within the internal grievance procedure, could offer alternate overtime shifts to compensate for an inequitable distribution of overtime. When the grievance reaches adjudication, it is too late for that solution, and a cash payment becomes the proper remedy.

F. Ms. Thiessen's grievance

[62] The employer admitted that it did not respect its own policy by not offering Ms. Thiessen overtime on June 22, 2010, due to a glitch in the SDS. On that day, Ms. Thiessen should have been called for overtime since she had the lowest number of overtime hours during the year, but she was not because the SDS screen did not show her name as available for that shift, even though she was.

[63] When the employer realized that it made a mistake, it tried to correct it by offering Ms. Thiessen another overtime shift. She refused on the basis that she did not want to take an overtime shift away from her co-workers. Later during the year, the employer made another offer to Ms. Thiessen. She would work an overtime shift as an extra person on the roster at a time convenient to her. She refused again because she had a very busy life and was not available.

[64] At the end of the year, Ms. Thiessen had been available for 143 hours of overtime but she was not offered any except for the two offers made to her for the missed overtime shift of June 22, 2010. The CM testified that he analyzed Ms. Thiessen's overtime situation for fiscal year 2010-2011. For each shift that Ms. Thiessen was available, no overtime was offered. That explained why she did not work any overtime during the year. That evidence was not contradicted.

[65] Based on the evidence adduced at the hearing, on all the facts of this case and on the principles established earlier in this decision, I conclude that I must dismiss the grievance. Initially, the employer made a mistake but it tried on two occasions to correct it. It gave choices for the overtime shift that Ms. Thiessen could work. In my opinion, the employer made every reasonable effort to allocate overtime equitably to Ms. Thiessen. I believe her testimony that she has a very busy life. However, she needed at least to make herself available for an eight-hour overtime shift at a time convenient to her and to the employer. She refused to do it and prevented the employer from correcting its mistake.

G. Mr. Baldasaro's grievance

[66] Mr. Baldasaro grieved that he should have been called for overtime for an 11.75-hour shift at double time on August 26, 2010, because he was available and had less hours of overtime than S.H., who was also available at double time. The SDS screen

consulted by Ms. Laberge indicated that S.H. had 19.75 hours of overtime offered during the year and that Mr. Baldasaro had 34 hours. On that basis, Ms. Laberge called S.H. to work that shift. However, as the evidence showed, the SDS information used by Ms. Laberge did not include the mandatory overtime hours worked during the year. To respect the collective agreement, the employer should have added those hours so that the full picture of the overtime offered was correct before the August 26, 2010 overtime shift was allocated.

[67] Mr. Baldasaro adduced in evidence an SDS report that showed that he had worked 28.75 hours of overtime before August 26, 2010 and that S.H. had worked 42 hours of overtime for the same period. That included the mandatory overtime worked but did not include the hours offered and refused by both officers, which were part of the report used by Ms. Laberge to make her calls for the August 26, 2010 shift. Finally, the employer adduced in evidence a report showing that Mr. Baldasaro worked 9.5 hours of mandatory overtime between April 1 and August 25, 2010.

[68] If I add all the hours that should have been computed by the employer by August 25, 2010, I arrive at 43.5 hours of overtime offered to Mr. Baldasaro and at least 42 hours of overtime for S.H. The total for S.H. could be higher, if she refused overtime between April 1 and August 25, 2010. However, I do not have evidence as to the number of hours that she might have refused during that period. Consequently, I have no evidence to prove that Ms. Laberge made the wrong decision, even if she made it with the wrong information. In addition, and as stated earlier in this decision, equitable does not mean equal and the employer is not obliged to offer overtime to the employee with the lowest number of overtime hours. In this case, a difference of one hour does not ground an argument that the allocation of overtime was inequitable. It was not inequitable for Ms. Laberge to offer overtime for the August 26, 2010 shift to S.H. rather than to Mr. Baldasaro.

[69] Another SDS report adduced at the hearing by the employer showed that, between April 1, 2010 and March 31, 2011, Mr. Baldasaro was offered 104.75 hours of overtime and was ordered to work 9.5 hours of mandatory overtime, for a total of 114.25 hours. He was available to work 1663 hours of overtime. In comparison, S.H. was offered 87.75 hours and was ordered to work 38.5 hours, for a total of 126.25 hours of overtime. She was available for 592.75 hours of overtime. Basically, S.H. was offered or worked 12 more hours of overtime than Mr. Baldasaro during that year.

That difference of 12 hours in itself might not be inequitable. However, that must be put in the context that Mr. Baldasaro had 1070 more hours of availability than S.H. did, which is almost 200 percent more.

[70] The annual comparison between Mr. Baldasaro and S.H. shows major discrepancies. According to the national policy, those types of discrepancies need to be analyzed, as they were in the case of Ms. Thiessen. In Mr. Baldasaro's case, that was not done. Mr. Marshall testified that those differences could most likely be explained by checking the offers of overtime for every day of the year. I am not sure that Mr. Marshall is right on that point. However, that is not what Mr. Baldasaro grieved. Instead, he grieved the August 26, 2010 shift, and the evidence adduced at the hearing did not prove that he was treated inequitably that day.

H. <u>Other considerations</u>

[71] A fair amount of time was spent at the hearing on evidence related to information sharing. Almost every witness testified about it. I reported only a small part of that evidence, since it seemed irrelevant to deciding these grievances and the questions in front of me about the interpretation of clause 21.10(a) of the collective agreement.

[72] However, the problem of information sharing seems serious, and I believe that it could explain in part why there are more than 500 grievances at adjudication concerning clause 21.10(a) of the collective agreement. No other single clause of any collective agreement for which the Public Service Labour Relations Board has jurisdiction is the object of that many grievances. It would be naive to believe that better communication between the parties would eliminate all those grievances, but I am firmly convinced that it would reduce their number.

[73] The complete application of the national policy and of what it implies, as per Mr. Kearney's testimony, would be an excellent start to improve communication between the parties. More transparent, understandable and regular automatic reporting and discussions should take place with the union. At the moment, it seems to be done only on a reactive basis. In my opinion, the employer should be more proactive in that respect. It takes time, but it would be worth the effort.

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

V. Order

[75] Ms. Thiessen's grievance is dismissed.

[76] Mr. Baldasaro's grievance is dismissed.

May 04, 2012.

Renaud Paquet,
adjudicator