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Public Service Labour Relations Act



Before an adjudicator

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining agent

and

**TREASURY BOARD
(Department of National Defence)**

Employer

Indexed as

Public Service Alliance of Canada v. Treasury Board (Department of National Defence)

In the matter of a group grievance referred to adjudication

Before: Catherine Ebbs, adjudicator

For the Bargaining Agent: Kim Patenaude, counsel

For the Employer: Pierre-Marc Champagne, counsel

Heard at Montreal, Quebec,
November 16, 2014.
(PSLREB Translation)

On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (“the PSLREB”) to replace the former Public Service Labour Relations Board (“the PSLRB”) as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 396 of the *Economic Action Plan 2013 Act, No. 2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) as that Act read immediately before that day.

I. Group grievance referred to adjudication

[1] In 2008, Jean Gauvin and Réjean Pelletier (“the grievors”) were civilian employees with the Department of National Defence (“the employer”). They worked with five other civilian employees in the Transportation suborganization within the 5th Support Group, Material Support Service, at the Saint-Jean Garrison in Quebec (“Mat Sp Svc Transport”). All seven civilian employees held GL-MDO-5 bus driver positions.

[2] In 2008, the 34 Canadian Brigade Group (“34 CBG”) was looking for civilian employees who had the qualifications required to drive a tractor semi-trailer. The grievors did not have the required qualifications to drive such a vehicle.

[3] Four of the grievors’ colleagues, who held those qualifications, were selected to work in the 34 CBG for the Noble Guerrier exercise, in Mississippi in the United States (“the special task”). They participated in the special task from December 26, 2008, to January 16, 2009. During that time, each of the four civilian employees worked approximately 340 hours of overtime.

[4] Under clause 29.04 of the applicable collective agreement (for the Operational Services Group; expiry date, August 4, 2011), the employer was required to offer overtime hours on an equitable basis “among readily available qualified employees.”

[5] The “DA 450-4 Directive,” entitled “[translation] Overtime Procedures for the Mat Sp Svc” (“the DA 450-4”), published in February 2007, sets out a procedure for allocating overtime hours. Mat Sp Svc Transport kept a registry in which the overtime hours that the seven civilian employees worked were recorded. Mat Sp Svc Transport consulted the registry before allocating overtime hours, and generally, it offered the

overtime hours to the qualified civilian employee with the least amount of overtime hours worked during the period in question.

[6] Mat Sp Svc Transport did not add the overtime hours that the four civilian employees worked while participating in the special task to the total hours recorded in the registry for each of them.

[7] On May 1, 2009, the Public Service Alliance of Canada (“the bargaining agent”) filed a grievance against that decision that reads in part as follows:

[Translation]

We dispute that overtime hours were not accumulated in the overtime hours registry established under DA 450-4 and clause 29.00 and all other relevant sections of the collective agreement that the four civilian staff members of 5ASG Mat Sp Transport, Saint-Jean, worked in Mississippi from December 26, 2008, to January 16, 2009.

[8] The employer concluded that the group grievance was unfounded for the following reasons:

- since the overtime hours were worked as part of a posting external to the service and under another authority, it was appropriate to not record those hours in the Material Support Service registry (at the final level); and
- distributing overtime hours does not involve personnel deemed unqualified (at the first level).

[9] On November 26, 2010, the bargaining agent referred the group grievance to adjudication under section 216 of the *Public Service Labour Relations Act*.

[10] At the hearing, the bargaining agent called two witnesses, Pierre Rivard and Mr. Gauvin; the employer called one witness, Captain Geneviève Dagenais.

[11] For the following reasons, the group grievance is dismissed because the bargaining agent did not prove that the employer violated clause 29.04 of the collective agreement.

II. Issue

[12] Did the employer violate clause 29.04 of the collective agreement?

III. Summary of the evidence

[13] In 2008, Mr. Gauvin was in a GL-MDO-05 bus driver position with Mat Sp Svc Transport. All seven Mat Sp Svc Transport civilian employees held GL-MDO-05 positions.

[14] Mr. Gauvin had the required qualifications for his position. He had a provincial driver's licence that allowed him to drive, among other things, buses, ambulances and tractor semi-trailers. He had also received an employer accreditation that allowed him to drive other types of buses. However, he did not have an employer accreditation that allowed him to drive tractor semi-trailers. Mr. Gauvin mentioned that he had requested permission from his employer on several occasions to take the training required to obtain that accreditation but that his requests were always refused.

[15] Mr. Rivard was the bargaining agent representative who signed the group grievance in May 2009. At the hearing, he had difficulty recalling the exact date on which he became a union representative.

[16] The employer issued a preliminary objection that Mr. Rivard's testimony was inadmissible because he did not have any direct knowledge of the relevant facts. According to the employer, Mr. Rivard did not hold a position with Mat Sp Svc Transport during the period in question and could not specify the date on which he became a union representative. The grievors mentioned that Mr. Rivard had the required knowledge to explain the procedures in place in 2008-2009 at Mat Sp Svc Transport with respect to allocating overtime hours.

[17] I accepted Mr. Rivard's testimony based on its probative value.

[18] Mr. Rivard explained that according to the DA 450-4, Mat Sp Svc Transport kept a registry in which overtime hours that the seven civilian employees worked were recorded. Mr. Gauvin also mentioned that the data on the civilian employees' time sheets was verified and sent to the administrative secretary and that that data was then accounted for and recorded in the registry. Mr. Rivard and Mr. Gauvin both confirmed that the registry was posted such that all staff could become familiar with it. Normally, when overtime hours are allocated, Mat Sp Svc Transport allocates them to the civilian employee who has worked the least overtime hours during the period in question, according to the registry.

[19] At the end of the fiscal year, the administrative secretary cancels the overtime hours accumulated over the preceding period. However, the respective positions remain unchanged, which means that the civilian employee with the least overtime hours at the end of the month of March is the first to be offered overtime hours in the new fiscal year.

[20] Mr. Rivard explained that he had represented the grievors at all three levels of the grievance process with the employer. According to him, the employer offered different explanations for its decision to not include overtime hours worked in Mississippi in the four civilian employees' total overtime hours. One explanation was that it was appropriate for Mat Sp Svc Transport to not add overtime hours worked as part of an external posting and under another authority in the total hours recorded in the registry. However, according to Mr. Rivard, the four civilian employees were not on an assignment when they participated in the special task.

[21] Mr. Rivard confirmed that 34 CBG was looking for employees who held all the required qualifications to drive a tractor semi-trailer. The grievors did not have those qualifications. Mr. Rivard stated that despite that fact, the grievors should have been considered for the special task because the actual work consisted of performing their regular duties and not driving tractor semi-trailers.

[22] During his testimony, Mr. Rivard examined four documents, entitled "Task Authority-Autorisation de la Tâche," which confirmed that the four Mat Sp Svc Transport civilian employees were selected for the special task. Mr. Rivard's opinion was that the presented documents could not be used for civilian employee assignments. However, in cross-examination, he admitted that he was not a staffing or human resources expert for the employer.

[23] Mr. Gauvin explained that he knew about the special task one week before the four Mat Sp Svc Transport civilian employees left for Mississippi. On their return, Mr. Gauvin knew that they had worked overtime hours while participating in the special task and that those overtime hours were not added to the total overtime hours that the four civilian employees had accumulated, as recorded in the registry.

[24] Mr. Gauvin questioned that approach. The employer responded to him that since the overtime hours were worked while the four civilian employees performed duties for the 34 CBG, they were not added to the total hours recorded. Mr. Gauvin

believed that the employer was incorrect in that decision and that because of that mistake, it violated its obligation to allocate overtime hours in an equitable manner. He also stated that the employer did not have a consistent approach for handling the overtime hours that civilian employees worked for other units due to service requests.

[25] In cross-examination, Mr. Gauvin recognized that the 34 CBG had specified that civilian employees selected for the special task were required to have an employer accreditation to drive tractor semi-trailers.

[26] The bargaining agent submitted as evidence a copy of the Mat Sp Svc Transport registry dated April 6, 2009, with the overtime hours that each civilian employee worked from April 2008 to January 2009. Overtime hours worked during the special task were recorded at the bottom of the registry and were not added to the total hours that each of the four civilian employees accumulated.

[27] Mr. Gauvin confirmed that he ignored the overtime hours worked by the Mat Sp Svc Transport civilian employees in February and March 2009. In addition, he did not know why the bargaining agent had been unable to adduce in evidence a copy of the registry showing the data for the entire 2008-2009 fiscal year. He added that the employer did not give him a copy of the registry for the entire 2008-2009 fiscal year during the required disclosure for this case.

[28] In 2008 and 2009, Captain Dagenais commanded Mat Sp Svc Transport. In that capacity, she decided to not add the overtime hours that the four civilian employees worked in Mississippi to the total hours recorded in the registry.

[29] Captain Dagenais stated that the 34 CBG had specified in its service request for the special task that the civilian employees chosen required an employer accreditation that would have allowed them to drive tractor semi-trailers. The four Mat Sp Svc Transport civilian employees chosen held that accreditation.

[30] A document, entitled "Task Authority-Autorisation de la Tâche," was prepared for each of the four civilian employees chosen for the special task. Those documents confirmed that the service request for the special task was sent under the authority of the Canadian Forces Tasks, Plans and Operations (CFTPO).

[31] According to Captain Dagenais, the 34 CBG supervised and paid the salaries of the Mat Sp Svc Transport's four civilian employees during the assignment and had the

authority to allocate the necessary overtime. Consequently, the overtime hours the civilian employees worked during that period were not added to the totals recorded in the registry.

[32] Captain Dagenais confirmed that two types of service requests existed, those under the CFTPO's authority, and internal service requests ("DND 645"). Mat Sp Svc Transport had more control over DND 645s. It continued to supervise and pay civilian employees and to allocate overtime hours. Consequently, overtime hours that civilian employees worked providing services following a DND 645 request were accounted for and added to the totals recorded in the registry.

[33] Captain Dagenais stated that in her opinion, her decision complied with clause 29.04 of the collective agreement, which required that the employer make every reasonable effort ". . . to allocate overtime work on an equitable basis among readily available qualified employees" She concluded that since the grievors did not have the required qualifications for the special task, overtime hours that the four civilian employees worked in Mississippi could not be added to the totals recorded in the registry.

[34] However, Captain Dagenais stated that during the time of the special task, the four Mat Sp Svc Transport civilian employees could have performed a bus driver's duties, i.e., duties for which the grievors were qualified. However, she reiterated that the 34 CBG required that the employees chosen for the special task had an employer accreditation allowing them to drive tractor semi-trailers.

[35] Captain Dagenais stated that the four employees were not replaced during the special task period and that no other documents existed other than the one entitled "Task Authority-Autorisation de la Tâche." She also explained that the totals recorded in the registry from April 2008 to February 2009 would have included overtime hours that employees worked for other units following DND-465 requests. She was unable to answer as to whether the units that made the DND-465 requests had ever required qualifications other than those required for the bus driver position.

IV. Summary of the arguments

A. For the grievors

[36] The bargaining agent maintained that clause 29.04 of the collective agreement requires that the employer allocate available overtime hours on an equitable basis and that the employer established the procedure outlined in DA 450-4 to satisfy that obligation.

[37] According to the bargaining agent, four civilian employees of Mat Sp Svc Transport worked overtime hours when they participated in the special task. Those overtime hours were not added to the totals recorded in the registry. Consequently, they were not considered in the decisions made later with respect to distributing overtime hours among Mat Sp Svc Transport's seven civilian employees.

[38] The bargaining agent maintained that the employer had two explanations for not recording the overtime hours in the registry. First, the employer stated that overtime hours that employees on assignment work must not be included in the totals recorded in the registry. Second, it confirmed that the grievors did not have the required qualifications for the special task.

[39] The bargaining agent maintained that deploying the four employees to the special task did not constitute an assignment.

[40] In addition, the bargaining agent maintained that the evidence showed that Mat Sp Svc Transport did not have a consistent approach to distributing overtime hours. Overtime hours were not distributed on an equitable basis during the period in question, and consequently, the bargaining agent requested that the PSLREB order an appropriate distribution in the form of monetary compensation.

[41] The grievors referred me to several decisions to support their position, including the following: *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 39, *Baldasaro and Thiessen v. Treasury Board (Correctional Service of Canada)*, 2012 PSLRB 54, *Casper v. Treasury Board (Department of Citizenship and Immigration)*, 2011 PSLRB 27, *Hunt and Shaw v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 65, and *Mungham v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 106.

B. For the employer

[42] The employer maintained that clause 29.04 of the collective agreement does not require perfection from it and that the collective agreement does not give employees the right to overtime hours. On the contrary, the employer was obliged to make every reasonable effort to ensure that overtime hours were allocated on an equitable basis. The employer's opinion was that by using the expression "make every reasonable effort," the collective agreement gives it a great deal of latitude.

[43] The employer maintained that the grievors did not meet their burden of proving that overtime hours were allocated inequitably at Mat Sp Svc Transport. They adduced no evidence about the entire period in question, i.e., the 2008-2009 fiscal year. The copy of the registry adduced in evidence covered only the first 10 months of that period. In addition, the grievors did not adduce any evidence of other circumstances that could have explained certain variances in the data, e.g., availability.

[44] Furthermore, the employer maintained that the evidence showed that the overtime hours worked for a service request under the CFTPO's authority could not be included in the totals recorded in the registry.

C. Grievors' rebuttal

[45] The bargaining agent stated that since the employer did not include the overtime hours that the four civilian employees worked in Mississippi in the totals recorded in the registry, the result was that the employer was unable to act in accordance with clause 29.04 of the collective agreement; no additional evidence is required for that issue.

V. Analysis

[46] At the hearing, the grievors wished to adduce evidence to the effect that the employer had refused their training requests for accreditation that would have allowed them to drive tractor semi-trailers. They also alleged that they could have been chosen for the special task, since the four civilian employees chosen were required to carry out duties for which the grievors held all the qualifications.

[47] The employer pointed out that the PSLREB's jurisdiction is limited to deciding whether the employer acted in accordance with clause 29.04 of the collective

agreement. It submitted that the PSLREB does not have the jurisdiction to deal with the questions that the grievors submitted to the effect that the employer should have allowed them to take the training to obtain the accreditation that would have allowed them to drive tractor semi-trailers and that it should have then chosen them for the special task.

[48] I do not have the jurisdiction to deal with those two allegations because they are not stated in the description of the group grievance that is the subject of this referral to adjudication. Therefore, I will limit my observations and conclusions to the issue of this group grievance.

A. Clause 29.04 of the collective agreement and the DA 450-4

[49] Clause 29.04(a) of the collective agreement reads as follows:

29.04

Subject to operational requirements of the service, the Employer shall make every reasonable effort:

a) to allocated overtime work on an equitable basis among readily available qualified employees

[50] The relevant provisions of the DA 450-4 are as follows:

[Translation]

. . .

Application

This administrative directive applies to DND civilian employees in Mat Sp Svc.

. . .

Purpose

This directive sets out the procedure to follow for overtime hours that civilian employees work.

. . .

Overtime hours

The expression overtime hours designates approved hours during which an employee works beyond daily or weekly

working hours and for which he or she could be entitled to remuneration in accordance with the provisions of a collective agreement or a Treasury Board statutory instrument (Ref. A).

...

Registry

It is agreed that each suborganization of Mat Sp shall establish and maintain its registry of civilian employees' overtime hours.

Tracking hours

Overtime hours will be managed at the respective SO level and allocated equitably among qualified civilian personnel recorded in the registry that the SOs maintain (as is the case for MDO 4 - MDO 5 - MDO 6)

Consulting the registries

The overtime hours registry contents shall be posted in plain sight so that all staff members can become familiar with it.

Updating the registries

The new overtime hours registry will be in effect as of April 1 and will be published quarterly. It will annul all overtime hours accumulated over the preceding period. However, the respective positions on the list will remain unchanged. To calculate the difference (in hours) between the different positions in the new registry, as a base amount, the "total hours accumulated" credited to the person in the last position on the list will be deducted from the "total hours accumulated" by the persons in each subsequent position in the registry. The corresponding results will be credited, if any, to each position in the new registry that comes into effect

...

[Emphasis in the original]

[51] The collective agreement provides that the employer shall make every reasonable effort to allocate overtime work on an equitable basis among readily available qualified employees (clause 29.04 of the collective agreement).

[52] In that context, the employer adopted and applied a directive (DA 450-4) about allocating overtime hours to Mat Sp Svc Transport's civilian employees.

[53] Neither the employer nor the bargaining agent contested the DA 450-4's validity. Although that document is not part of the collective agreement, it is relevant to its interpretation and application. Therefore, I conclude that the DA 450-4 represents the generally recognized method used to allocate overtime hours on an equitable basis since at least 2007; consequently, the employer is bound by the DA 450-4 (see *Mungham* and *Public Service Alliance of Canada*).

[54] The employer explained that the decision to not add the total overtime hours that the four civilian employees accumulated, which were the overtime hours they worked while participating in the special task, was based on the fact that the 34 CBG's service request was sent under the CFTPO's authority; consequently, overtime hours worked during that service period could not be added to the total accumulated hours in the registry.

[55] The employer adduced evidence in an attempt to establish that the conditions for a CFTPO authorization differ from those for an internal service request. Although the evidence showed that there were at least two different ways to make a service request, it did not help me determine the rules established for processing overtime hours worked during such service periods.

[56] In addition, I note that according to the DA 450-4, the term "overtime hours" means "[translation] . . . designates approved hours during which an employee works beyond daily or weekly working hours and for which he or she could be entitled to remuneration in accordance with the provisions of a collective agreement or a Treasury Board statutory instrument"

[57] The employer did not adduce any evidence supporting its position that overtime hours worked during a service period under the CFTPO's authority are not overtime hours for the purposes of the DA 450-4. Consequently, I will not approve that proposal by the employer.

[58] The employer also indicated that the overtime hours that the four civilian employees worked in Mississippi could not be added to the totals recorded in the registry because the employees did not have the qualifications required for the special task.

[59] The DA 450-4 stipulates that "[translation] [o]vertime hours will be managed at

the respective SO level and allocated equitably among qualified civilian personnel recorded in the registry that the SOs maintain” Therefore, the DA 450-4 states how overtime hours are allocated to qualified civilian personnel recorded in the registry.

[60] The parties did not mention that the work carried out in Mississippi was not the bargaining unit’s work. In addition, the fact that the four civilian employees in question worked overtime hours in Mississippi was not contested. Thus, my opinion is that those overtime hours meet the definition in the DA 450-4. Consequently, the overtime hours worked in Mississippi should have been added to the registry.

[61] It remains to be seen whether the employer’s error in how it applied the DA 450-4 was made such that it violated the collective agreement. Clause 29.04 provides that the employer offer overtime work on an equitable basis “among . . . qualified employees.”

[62] In *Canada (Attorney General) v. Bucholtz*, 2011 FC 1259, the Federal Court of Canada (“the FC”) examined several of the former Public Service Labour Relations Board’s decisions that dealt with allocating overtime hours in a regime similar to that of this case. The FC also stated that the following three principles must be applied when analyzing a question of overtime hours being allocated equitably:

1. equitability must be assessed over a reasonable period;
2. equitability must be assessed by comparing overtime hours allocated to the employees to those allocated to employees in similar circumstances during the period in question; and
3. the adjudicator must determine whether any factors might explain any discrepancies in their hours.

[63] In this case, the bargaining agent did not contest that the four civilian employees worked overtime hours during the special task in Mississippi. It contested that those overtime hours were not added to the registry, which affected the equitable distribution of overtime after that. Thus, it must be examined whether overtime work during the rest of the 2008-2009 fiscal year was offered in an equitable manner to qualified employees.

B. Equitability must be measured over a reasonable period

[64] The DA 450-4 strives to allow the employer to ensure that overtime hours are allocated in an equitable manner each fiscal year. However, the documents that the bargaining agent adduced as evidence do not cover the entire 2008-2009 or 2009-2010 fiscal years. Therefore, I am not able to evaluate the situation as it existed on March 31, 2010.

[65] The bargaining agent suggested that the employer failed to send it a copy of the overtime hours registry for the 2008-2009 fiscal year. Yet, under the circumstances, the bargaining agent is responsible for asking the employer to provide that document. Given the lack of evidence showing that such a request was made and then refused, I find that the bargaining agent still has the responsibility to obtain and adduce that document as evidence.

C. Equitability must be assessed by comparing the hours allocated to employees to those allocated to employees in similar circumstances during the period in question

[66] Again, the situation that existed at the end of the period in question would have to be examined to make a conclusion. Since the overtime hours registry was not provided for the entire 2008-2009 fiscal year and the next, it is not possible to make such an evaluation.

D. The adjudicator must determine whether any factors might explain any discrepancies in their hours

[67] The bargaining agent did not adduce any evidence to the effect that the grievors were disadvantaged in February and March 2009 or in the subsequent fiscal year because the overtime hours worked in 2008-2009 were not added to the registry. In addition, since none of the complete registries for 2008-2009 and 2009-2010 was adduced as evidence, I cannot assess whether any discrepancies occurred with civilian personnel's hours. It is impossible to conclude whether the absence of overtime hours resulted in overtime work not being allocated in an equitable manner among qualified employees in February and March 2009 and in the subsequent year.

[68] The grievors also alleged that the employer did not have a consistent method for allocating overtime hours that civilian employees worked in other units. However, the grievors did not adduce any documentary evidence to support that allegation.

[69] Therefore, I conclude that the bargaining agent did not meet the burden of proving that the employer violated clause 29.04 of the collective agreement.

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

(The Order appears on the next page)

VI. Order

[71] The group grievance is dismissed.

May 7, 2015.

PSLREB Translation

**Catherine Ebbs,
adjudicator**