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Public Service Labour Relations and Employment Board Act and *Public Service Labour Relations Act*

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

TRAVIS LAHNALAMPI ET AL.

Grievors

and

TREASURY BOARD
(Department of Human Resources and Social Development)

Employer

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

In the matter of individual grievances referred to adjudication

Before: Margaret T.A. Shannon, a panel of the Public Service Labour Relations and Employment Board

For the Grievors: Jacek Janczur, Public Service Alliance of Canada

For the Employer: Lea Bou Karam, counsel

Heard at Toronto, Ontario,
August 5 and 6, 2015.

I. Individual grievance referred to adjudication

[1] Travis Lahnalampi, Gilda Marinucci, Bev J. McCarthy, Amber L. Morden, Jocelyn T. Myint-Swe, Jay Raikundalia, Elizabeth Ray, Cleopatra Reid, Craig Russel, Harminder Sahota, Antonella Sciacca, Brian Shin, Scott Stanley, Beata Syropiatko, Mary Visco, Suzanne Walters, Tracey Watters, Sharon Ali, Enid Awuku, Latricia Beeston, Barbara Budgell, Gennaro Canale-Parola, Kathy Cooper, Amabel Court, Roger Descotes, Omar Fairclough, Bruce Flannigan, Megan Gagnon-Fitzgerald, Robert Graham, Simone Hercules, Julian Jeganathan, Diane Johnson, David Jones and Clint James ("the grievors") alleged that the employer, the Department of Human Resources and Social Development (now the Department of Employment and Social Development), violated clause 28.05(a) of the agreement between the Treasury Board and the Public Service Alliance of Canada ("the bargaining agent") for the Program and Administrative Services Group (all employees), with an expiry date of June 20, 2007 ("the collective agreement"), between January and March 2007, by implementing a project to open employment insurance (EI) call centres on Saturdays at locations in Montreal, Quebec, and Sudbury, Ontario ("the project"), resulting in an inequitable distribution of overtime.

[2] 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 new Board") to replace the former Public Service Labour Relations Board ("the former Board") 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 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[3] At the outset of the hearing on a preliminary motion by the grievors' representative, it was determined that the scope of this hearing would deal with whether, by assigning overtime opportunities to call centres other than the one in Toronto, Ontario, the employer had breached clause 28.05(a) of the collective

agreement. If the answer to that question was in the affirmative, the matter was to be referred back to the parties to determine the compensation owed as a result of the breach. The motion went on to propose that I maintain jurisdiction over the matter in the event that the parties are unable to resolve it.

II. Summary of the evidence

[4] Beginning in 2007, the employer determined that EI call centres should be opened on Saturdays to provide better service to Canadians experiencing difficulties filing EI claims either over the phone or electronically. The intention was to reduce the workload on Mondays of addressing problems that had arisen at the close of the previous week's reporting period. This was initially intended to be a pilot project with the Montreal and Sudbury sites chosen to be open on Saturdays to ensure that bilingual service was available. The project was extended to include the St. John's, Newfoundland; Edmonton, Alberta; and Vancouver, British Columbia, call centres to ensure that all the time zones in the country were covered. The Toronto call centre was brought into the project on the last Saturday of March 2011 and was excluded from overtime for an 11-week period. The overtime in the various centres was shared on an equitable basis pursuant to clause 28.05 of the collective agreement as they were brought into the project. The grievors argued that by virtue of clause 28.05, they were entitled to be included in the distribution of overtime from the outset of the project.

[5] This matter was heard by Michael Bendel in 2013 (see 2014 PSLRB 22). The Federal Court later overturned his decision (see *Lahnalampi v. Canada (Attorney General)*, 2014 FC 1136) and remitted the matter for reconsideration by a different adjudicator of the former Board.

[6] Mr. Lahnalampi was employed at the Toronto call centre during the period in question and was at the time the vice-president of local 638 of the Canada Employment and Immigration Union ("the union"), a component of the bargaining agent. In early 2007, he found out that calls were being assigned to the Sudbury centre on Saturdays, which was not a regular occurrence in EI call centres. Through discussions with colleagues and at local labour-management meetings, he determined that a pilot project had started in Sudbury and Montreal and had spread to other locations. When he posed the question of why the Toronto call centre was not part of the Saturday overtime project, he was advised that it had been excluded for cost reasons, such as rent, overhead and additional salaries. Eventually, with the project's

success, the Toronto call centre was opened as of the last Saturday in March 2007, at which time the overtime was distributed among the grievors according to the collective agreement.

[7] Mr. Lahnalampi's opinion is that the explanation the employer provided was without merit. Phone traffic into the call centres can be networked nationally, which means that calls go to the first available agent, regardless of province or region. The grievors were available to work overtime from January to March 2007, and the technology was such that the employer was able to distribute overtime on an equitable basis across provinces and regions.

[8] Mr. Lahnalampi prepared a chart comparing the distribution of overtime at the EI call centres across the regions for the period in question (Exhibits 4 and 5). His chart showed that the Montreal, Sudbury and Edmonton call centres received more overtime hours than the Toronto call centre. He also testified that by filing their grievances, the grievors proved that they had been readily available to work the overtime had the employer offered it to them as required by the collective agreement. Their availability was also confirmed by the demands to work overtime in Toronto once the union became aware of the project and raised the issue with local management.

[9] Bruce Flannigan has spent his entire 17-year public service career as a payment officer with the employer. His job is to answer EI phone inquiries. At the time he filed his grievance, he was the union's local president for the Toronto region. In late January 2007, Mr. Lahnalampi advised him that the Sudbury centre was opened on Saturdays and that as a result, union members there were working overtime. They both wondered why the overtime was limited to the Montreal and Sudbury centres when call centres reported nationally, so the overtime should have been available to them all. By reporting nationally, all call centres offer the same services.

[10] Following informal discussions with Stephen Pellicori, the Toronto EI call centre manager, Mr. Flannigan raised the matter at the local labour-management consultation committee (LMCC) meeting. Mr. Pellicori told the committee that the Toronto call centre would not be opened because of the costs of opening it, which were estimated at approximately $700 to $800 per hour.

[11] At an LMCC meeting on February 2, 2007, at which the matter was discussed, the union advised the employer that the collective agreement did not mention that

overtime would be distributed only to call centres at which no cost would be incurred to open their buildings. The employer's National Headquarters could not pick and choose to whom overtime would be distributed (see the minutes of the LMCC meeting, Exhibit 6). The employer provided no other reason for not opening the Toronto call centre until this grievance was heard before Mr. Bendel in 2013.

[12] A question-and-answer document prepared by the employer in January 2007 (Exhibit 7) identifies which call centres would be open on Saturdays, commencing on January 20, 2007. According to that document, the reason the Sudbury and Montreal call centres were chosen was that they generated the highest volume of calls and consequently had the highest impact on the entire network's performance. Nowhere in the document is language mentioned.

[13] Even though there are a handful of bilingual officers in the Toronto call centre, it is classified as unilingual, and the agents there deal only with English calls. A caller has the choice of service in English or French and selects the language of service by choosing the appropriate phone number. The call will initially go to the region where the caller is situated, but if that region is unable to respond to the call, it is transferred to the region with the most availability. For the Toronto call centre to receive English calls during the Saturday opening project, all that was needed was to configure the phone system to direct calls there. Access to the building where the Toronto call centre was located was possible through the mailroom. Employees would have been required to sign in with the commissionaire on duty as they entered. A team lead would have been required to meet the employees, give them access to the elevators and take them to the call centre.

[14] Mr. Pellicori was the manager of the Toronto call centre at the time the grievances were filed. As manager, he was responsible for the call centre's budget and its performance and for managing its resources. Approximately 112 call agents worked there. His budget responsibilities included both salary and non-salary dollars. A workforce management specialist who reported to Mr. Pellicori was responsible for scheduling staff and for ensuring that the phones were covered during peak demand times. The workforce management specialist gathers and maintains overtime data; managers approve overtime. When overtime is available, it is offered to all staff in the office where the overtime is required on a volunteer basis based on the data maintained by the workforce management specialist.

[15] The EI call centres use generic call routing software called "intelligent call management" (ICM). Calls enter the queue. The ICM then determines the point of origin of the call and routes it to a call centre based on the shortest wait time. If more than one call centre is online, the ICM examines each call centre's wait time and moves the call to the one with the shortest wait time. If a caller requested French service, he or she enters the queue in the same way, and the ICM distributes the call to either a unilingual French or a bilingual call centre.

[16] The Toronto call centre is unilingual English. No skill set has been established for French calls in Toronto. The employer determines which call centre will provide service and in which language. The Toronto call centre offered general information and the payment reporting system when the grievances were filed. The payment reporting system deals with calls in which a claimant who has tried to file a bi-weekly EI report is required to speak to a payment services officer or a client services officer.

[17] Each EI call centre is distinct and is managed under its own distinct budget. Client services officers' positions are classified the same, regardless of location. The Toronto, Montreal and Sudbury call centres each answer English calls under the general inquiry and payment reporting lines. However, Sudbury and Montreal also respond to French calls.

[18] Call centres may have different hours of operation. The Toronto and Montreal centres are normally open from 08:30 to 16:30, Monday to Friday, while the Sudbury centre is normally open from 08:00 to 16:00, Monday to Friday.

[19] In addition to taking calls in both official languages on the general inquiries and payment reporting lines, the Montreal call centre also deals with Canada Pension Plan inquiries. The Montreal employees are not cross-trained in the pension area; there are two separate teams co-located there, each of which has its own budget, team leads, work management specialists and separate management teams.

[20] The pilot project came about following a weekly call centre managers' conference call, during which the ability to provide service to clients on Mondays was discussed. Data that could not be processed on Friday or that required more information produced a "trip down," which the ICM rerouted to an agent. A trip down required the caller to speak to an agent in order to file their report. The problem was that if the trip down occurred after normal working hours, the caller was required to

call back on Monday. That caused a high demand for service, which the call centres struggled to meet as Monday was traditionally the busiest day of the week for inquiries.

[21] The decision was made to open on Saturdays to alleviate this demand as a trial project. As the majority of trip-down calls were in Ontario and Quebec from citizens seeking service in French, a business decision was made to open the Sudbury and Montreal call centres, due to their bilingual capacity. The project was initially to last four weeks and was to examine the impact of the Saturday service on reducing the demand on Mondays.

[22] After two weeks, it was evident that it was the correct decision; however, the impact on the Monday service demand was not sufficient. The decision was then made to evaluate the traffic flow from coast to coast, which confirmed that both the east and west coasts would benefit from weekend service, so the project was extended to include the St. John's; Shawinigan, Quebec; Edmonton; and Vancouver call centres. Vancouver was selected as it had a small complement of bilingual customer service officers. St. John's was unilingual English, while Shawinigan was unilingual French. Mr. Pellicori was uncertain as to the linguistic profile of the Edmonton centre. The Sudbury centre's operating hours were also changed to start at 07:00 on Saturdays. For the centres that offered both pension plan and EI services, only those in the EI service section worked overtime. Eventually, the decision was made to queue the Montreal and Sudbury centres only for French calls and to add the Toronto centre to deal with English calls. The Winnipeg, Manitoba, centre was excluded from the project as it had space issues.

[23] The grievors were not solicited to determine if they were interested in working overtime at the beginning of the project because no overtime was to be worked at that location. The Toronto call centre staff were not solicited for their interest in working overtime until week 11 of the project.

[24] The $800 cost mentioned in the LMCC meeting's minutes (Exhibit 6) was discussed as noted in the minutes. However, the reference was incorrect and was corrected at the next meeting. The cost was actually $800 per hour or $8000 per overtime shift. Although the minutes do not reflect that the bilingual service requirement on overtime shifts was discussed at the LMCC meeting, Mr. Pellicori was

adamant that it was, and it was also corrected in the next minutes. The union representatives were also advised when the project was discussed that if it was successful in Sudbury and Montreal, other call centres would be added, although the minutes of the next LMCC do not reflect any reference to language being a consideration in selecting the Sudbury and Montreal call centres.

[25] At the end of the project, a business decision was made to continue offering bilingual service on Saturdays for EI calls. A Saturday shift was added, and employees were recruited to work Saturdays as shift workers under the collective agreement. The overtime requirement was then eliminated.

III. Summary of the arguments

A. For the grievors

[26] Clause 28.05(a) of the collective agreement requires an equitable distribution of overtime among readily available qualified employees. The employer must make every reasonable effort to offer employees overtime on an equitable basis, subject to operational requirements. No operational requirements would have justified excluding the Toronto call centre from participating in the Saturday overtime from the beginning of the pilot project. Equitable distribution requires distributing overtime to all offices within the same operation.

[27] The grievors should have been given the opportunity to work overtime and should be compensated for their loss. In *Boujikian v. Treasury Board (Citizenship and Immigration Canada)*, PSSRB File No. 166-02-27738 (19980615), the former Board considered the same language as is at issue in the current case. In *Boujikian*, the grievor was denied the opportunity to work overtime when he returned from a disciplinary suspension. In determining that the grievor was entitled to some remedy for lost overtime, the adjudicator awarded him payment at the overtime rate based on an average of the overtime available during the period in question.

[28] Equitable distribution requires distributing overtime across offices within the same operation. The operational rights prerogative invoked by the employer should not be exercised arbitrarily or in bad faith (*Zelisko and Audia v. Treasury Board (Citizenship and Immigration Canada)*, 2003 PSSRB 67, at para 161). Contrary to that philosophy, the employer in this case arbitrarily decided to deny the Toronto call

centre the overtime opportunities; there was no reason to, since other unilingual centres had been brought into the project much earlier.

[29] The employer's actions were not discriminatory or carried out in bad faith; however, they were arbitrary. Overtime clauses are a voluntary fetter on management rights. The employer cannot be permitted to contract away its rights to manage at the bargaining table only to object at adjudication that it has the sole and exclusive right to manage its workplace (see *Bunyan et al. v. Treasury Board (Department of Human Resources and Skills Development)*, 2007 PSLRB 85, at para 61, *Foote v. Treasury Board (Department of Public Works and Government Services)*, 2009 PSLRB 142, at para 29 and 37, and *Weeks v. Treasury Board (Correctional Service of Canada),* 2010 PSLRB 132).

[30] The questions to be answered in this case are as set out as follows in *Bunyan et al.*, at para 81:

. . .

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?*

[31] There is no dispute in this case that the overtime was not equitably assigned. No efforts were made, let alone any reasonable efforts, to equitably distribute overtime; nor were any operational requirements identified that would have prevented an equitable distribution. All the witnesses testified that the Toronto call centre could have received calls on Saturdays.

[32] There was some evidence of the increased cost to open the Toronto call centre but no evidence of any additional costs incurred to open the other ones. The Toronto call centre's opening costs cannot be considered in isolation of the costs for opening other centres. Regardless, cost issues do not outweigh the language of the collective agreement, which requires the equitable distribution of overtime. Office location is also not a consideration in allocating overtime when all offices perform the same function (see *Bunyan et al.*). Considering such things as location or productivity goals

contravenes the equitable distribution principle by importing restrictions that are not included in the collective agreement. When cost-saving measures lead to an inequitable distribution, managers' requirement to be fiscally responsible will not outweigh the specific provisions of the collective agreement (see *Weeks*, at para 52).

[33] It is up to the employer to provide reasonable and credible reasons for inequitably distributing overtime (*McCallum v. Canada Revenue Agency*, 2011 PSLRB 73, at para 157). At paragraph 30 of the original decision in this matter, the adjudicator determined that no operational requirements made it necessary for the employer to have the work performed in Sudbury and Montreal but not in Toronto. While it might have made good business sense, the adjudicator stated that the employer's preference did not amount to an operational requirement. This finding withstood the Federal Court's review of the initial decision and was not the basis for referring the matter back to the former Board.

[34] There is no evidence of operational requirements that prevented distributing overtime to the Toronto call centre. The grievors' interest in working overtime on Saturdays was not canvassed. They were available and willing to work the overtime as is evidenced by the grievances they filed about it before the former Board (Exhibit 2). Even if there was an operational requirement related to opening the Montreal and Sudbury call centres, the fact that those in St. John's and Edmonton were brought into the project, both of which were unilingual English centres, contradicts this argument. Why were other bilingual centres, such as Bathurst, New Brunswick, not included if the need was to provide bilingual service across time zones?

[35] The bilingualism argument should be treated with skepticism. The employer's witness was unable to provide a breakdown of the number of English versus French calls received during the overtime even though he had attended conference calls at which it was discussed. Mr. Flannigan's evidence was that there was no indication that bilingualism was a factor in deciding which call centre would be opened on Saturdays, until the last hearing. This evidence is preferable and consistent with the communique sent out to employees (Exhibit 7).

[36] Based on *Mungham v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 106, the grievors are entitled to a monetary award representing the amount of overtime they missed based on an average of the overtime hours worked at

all locations during the pilot project before the Toronto call centre was included. When determining the equitable distribution of overtime, the distribution of overtime hours must be considered over a period and not on one occasion. The chart submitted as Exhibits 4 and 5 demonstrates a significant disparity in the number of overtime hours allocated to the Toronto call centre.

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

[37] The employer did not violate clause 28.05(a) of the collective agreement as there were no operations at the Toronto call centre on Saturdays before the end of March 2007. It was under no obligation to open the Toronto centre simply to offer the grievors overtime. Nothing in the collective agreement requires the employer to open all the call centres in the country to offer workers overtime.

[38] The burden of proof was on the grievors to prove that, on the balance of probabilities, the employer violated the collective agreement. There are 35 individual grievors, each with his or her individual fact situation. To conclude that each was entitled to overtime, the individual fact situations must be examined and compared.

[39] The test for the equitability of overtime distribution is established in *Attorney General of Canada v. Bucholtz et al.*, 2011 FC 1259, at para 52. The equitability of overtime distribution must be measured over a reasonable period. It is assessed by comparing the hours allocated to a grievor to the hours allocated to employees in similar situations over that period. Once the grievor's overtime hours and those of other employees are compared, the adjudicator must determine if any factors explain any discrepancy, such as differing availability.

[40] It is the employer's prerogative to assign work and to control its workplace (see *Professional Institute of the Public Service of Canada v. Treasury Board (Department of Human Resources and Skills Development)*, 2014 PSLRB 18, at para 48). The decision to open the Montreal and Sudbury call centres was based on a business decision for a pilot project. Nothing anywhere in the collective agreement prevents the employer from opening some of its call centres. There is never a time when all are open for business as it is not required. The employer's core business is service to Canadians, and it distributes work to its employees as required (see *Chapman v. Treasury Board (Department of National Defence)*, 2013 PSLRB 73, at para 42). According to *Bunyan et al.*, at para 98, the employer has the authority to determine when and if overtime is

required and authorized. Achieving consistent service while reducing overtime is within its scope of authority as is moving work from office to office to maximize resources.

[41] The grievors alleged that clause 28.05 of the collective agreement is a limitation on the employer's management rights, the extent of such a limitation is subject to an interpretation of the collective agreement as a whole. Of particular importance are the principles of interpretation set out in *Wamboldt v. Canada Revenue Agency*, 2013 PSLRB 55, at para 25 to 28, which state that a benefit that has a monetary cost to the employer must be clearly and expressly granted under the collective agreement and that the parties to a collective agreement are generally considered to have attempted to arrive at an agreement that is easy to apply in daily practice.

[42] Overtime, being a monetary benefit, is defined in article 2 of the collective agreement as authorized work in excess of an employee's scheduled hours. Nowhere is there an obligation to create overtime (see *Doherty and Hawkes v. Treasury Board (Department of National Defence)*, 2014 PSLRB 77). Likewise, nowhere in clause 28.05 is there an obligation to offer overtime to all call centres as the grievors argued. Clause 28.05 is not about creating work; for it to apply, the work must exist. No authorized work was available on Saturdays during the period in question at the Toronto call centre; therefore, no overtime was available for distribution.

[43] The limitation in clause 28.05 of the collective agreement that makes the distribution of overtime subject to operational requirements is intended to apply to a workplace or work unit. This collective agreement applies to many classifications and departments within the federal public service, not just the employer. To apply this clause as the grievors submitted would result in a requirement that overtime be distributed across the bargaining unit members wherever they are located in the public service, which would cause chaos.

[44] Mr. Pellicori testified that the workload is locally distributed, that each call centre has its own budget, workplace and workforce, and that the hours of work may vary between locations. Overtime is distributed within these parameters. It is implicit in the language of the collective agreement and the organization of the workplace that operational requirements are determined workplace by workplace.

[45] The chart submitted as Exhibits 4 and 5 has a separate line for each call centre. The Toronto call centre's operational requirements differ from those of the Sudbury and Montreal centres. The clientele is different, the hours of work are different, the budgets are distinct and the workforce is different. The operational requirements of each location are determined at each location; therefore, clause 28.05 of the collective agreement applies in only one location. Nothing in it, explicit or implicit, requires the employer to distribute overtime across work units.

[46] Alternatively, if the grievors' argument is successful and overtime is to be distributed across work units, the employer argued that it did distribute overtime on an equitable basis. To determine if overtime has been distributed equitably, convincing evidence is required to prove that the grievors were inequitably treated over a period, after an analysis that indicates that the only factor remaining is inequity. The burden of proof was on the grievors to prove that, on the balance of probabilities, the employer violated the principles for measuring equitability as set out at paragraph 52 of *Bucholtz et al.* There has been no evidence of how much overtime each grievor worked. The chart in Exhibits 4 and 5 does not indicate a distribution at an individual level. No individual-to-individual comparison was provided. Overtime grievances do not compare overtime worked by offices but rather by individuals. The grievors submitted that their grievances are proof of their availability. However, a grievance is not evidence (see *Edmunds et al. v. Treasury Board (Correctional Service of Canada)*, 2015 PSLREB 28, at para 38). A simple comparison of the number of hours worked is not sufficient. Evidence of leave and grievor availability and qualifications, among other things, is required (see *Canada (Attorney General) v. McManaman*, 2013 FC 1064, at para 19).

[47] The employer made a business decision, as was its right, to open two bilingual call centres as a pilot project. Other call centres were brought on line as the demand required. Mr. Pellicori's evidence was uncontradicted and should be given full weight. The employer did not arbitrarily pick and choose the centres to open; other factors were considered, costs and bilingualism among them. For these reasons, the grievances should be dismissed.

C. Grievors' reply

[48] The fact situation in *Bucholtz et al.* is distinct and should be distinguished on that basis. Furthermore, the former Board's decision was overturned on judicial review because of how the calculations were performed. The question in those grievances was the employer's failure to offer overtime. Following the employer's argument, this type of grievance could never be successful because the Toronto call centre was never open. The grievors did not contest that there is no obligation to create overtime; what they contested is how it is distributed once created. There is no evidence before the new Board that the employer made any attempt to distribute overtime equitably.

[49] The grievors contested the employer's decision not to open the Toronto call centre. The decision not to was arbitrary and resulted in an inequitable distribution of overtime. The time zone issue that the employer raised could have been addressed through adjusting the Toronto call centre's hours of operation as had been done in Sudbury.

[50] The question before the new Board does not turn on the definition of overtime. Overtime was authorized in this case but was not distributed according to the collective agreement. Its article 28 is not about creating work but rather deals with how to distribute it if it is created. The chaos argument proposed by the employer is preposterous. By limiting the distribution of overtime to qualified employees, the collective agreement places clear limitations on who may work the available overtime.

[51] The overtime project was budgeted at the national level. Limiting operational requirements to a local level flies in the face of the new Board's jurisprudence. Mr. Pellicori admitted that the grievors were qualified to do the work and that they were entitled to participate in the overtime created by the pilot project on an equitable basis.

D. New issues

[52] Following the Federal Court of Appeal's ruling overturning *McManaman* (2015 FCA 136), the parties were asked to provide written submissions on the impact of this ruling on their arguments in this case. Counsel for the employer argued that the Federal Court of Appeal did not reverse the test in *Bucholtz et al.* but rather endorsed it. Consequently, an adjudicator must define who the similarly situated employees are

to properly apply the test in *Bucholtz et al*. Since the grievors did not provide any information about who the similarly situated employees were, they did not discharge their burden of proof.

[53] The grievors' representative argued that the union's failure to present evidence on the question of which employees were similarly situated and available was covered by the preliminary determination of the question and that no adverse inference was to be drawn from it. The issue that gave rise to the grievances was the exclusion of the Toronto call centre from Saturday overtime opportunities despite the fact that it was technologically possible for it to participate in the overtime. Clause 28.05 of the collective agreement requires the employer to make every reasonable effort to offer overtime equitably. The evidence established that the employer made no such effort, and consequently, the Toronto call centre was excluded from the equitable distribution of overtime.

IV. Reasons

[54] When interpreting a collective agreement, an adjudicator must consider the collective agreement as a whole. Each word must be given its normal meaning, and the interpretation must facilitate the easy application of the collective agreement. Any cost-related benefit must be set out specifically in the collective agreement (see *Wamboldt*). The grievors relied on clause 28.05 of the collective agreement, which reads as follows, to confer on them the right to an equitable distribution of overtime nationally rather than call centre by call centre:

> *28.05 Assignment of Overtime Work*
>
> *(a) 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.*
>
> *(b) Except in cases of emergency, call-back or mutual agreement with the employee, the Employer shall, wherever possible, give at least four (4) hours' notice of any requirement for overtime work.*

[55] The grievors argued that equitable distribution requires distributing overtime across offices within the same operation. There was no reason to deny the overtime opportunities to the Toronto call centre when other unilingual centres were brought into the project much earlier and the technology would have allowed the calls to be

directed as easily to the Toronto call centre as to any other. Furthermore, the grievors submitted that the new and former Boards, in interpreting the same language, have ruled that overtime is to be distributed across an operation and not merely to one part of it (see *Bunyan et al.*). However, *Bunyan et al.* is clearly distinct from the one before me as it dealt primarily with the unilateral implementation of a condition on eligibility for overtime, which was a productivity requirement to qualify for overtime distribution at the office in question, which clearly violated the collective agreement. In my opinion, it does not stand for the principle that overtime is to be distributed equitably across an operation.

[56] In my opinion, for the grievors to be successful in this interpretation, the collective agreement must require either directly or by interpretation that overtime is to be distributed other than on a local basis. It does make distribution subject to operational requirements, but nowhere could I find a provision that would lend itself to the interpretation that overtime should have been distributed nationally rather than at targeted offices where the operational requirement was determined to exist.

[57] Mr. Pellicori's uncontradicted evidence is that funding for positions at the employer's call centres, including for paying overtime, is allocated on a regional basis and that centres in various regions were brought online as the employer determined the ongoing operational requirements for weekend service. The nature of the funding, described by Mr. Pellicori, supports the finding that each centre functions autonomously within the call centre network and not, as the grievors argued, as one large national call centre. The approach as described by Mr. Pellicori demonstrated a rational and non-arbitrary approach to determining how the needs of the Canadian public would best be met and to what location the overtime would be assigned.

[58] Even if I am wrong in this determination, as an adjudicator, I am bound to interpret the collective agreement in a manner consistent with the ease of its application. The parties to a collective agreement are generally considered to have attempted to arrive at an agreement that is easy to apply in daily practice (see *Wamboldt*). The employer has argued that the limitation in clause 28.05 making the distribution of overtime subject to operational requirements is intended to apply to a workplace or work unit, and I agree. This collective agreement applies to many classifications and departments within the federal public service, not just the present employer, and to apply this clause as the grievors submitted would result in a

requirement that overtime be distributed across the bargaining unit members wherever they are located in the public service, provided they are available and qualified, creating chaos.

[59] Even if it were possible to distribute overtime in the fashion advocated by the grievors, such an interpretation of the collective agreement would require amending the collective agreement as currently written to reflect that overtime is to be distributed across the bargaining group regardless of the departmental employer. Section 229 of the *PSLRA* prohibits me from making any decision that would require such an amendment, as follows:

> *Decision requiring amendment*
>
> ***229.*** *An adjudicator's or the Board's decision may not have the effect of requiring the amendment of a collective agreement or an arbitral award.*

[60] Having found that there is no obligation on the employer to distribute overtime to offices other than those at which it has identified an operational requirement, there is no need to proceed further with an evaluation of whether the grievors received an equitable distribution of overtime before late March 2009, when the employer decided that the Toronto call centre would be open on Saturdays, thus creating overtime at that location.

[61] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[62] The grievances are dismissed.

December 22, 2015.

Margaret T.A. Shannon,
a panel of the Public Service Labour Relations and Employment Board

APPENDIX A

List of grievors

PSLREB File No.	Grievor
566-02-2013	Travis Lahnalampi
566-02-2014	Gilda Marinucci
566-02-2015	Bev J. McCarthy
566-02-2016	Amber L. Morden
566-02-2017	Jocelyn T. Myint-Swe
566-02-2019	Jay Raikundalia
566-02-2020	Elizabeth Ray
566-02-2021	Cleopatra Reid
566-02-2022	Craig Russel
566-02-2023	Harminder Sahota
566-02-2024	Antonella Sciacca
566-02-2025	Brian Shin
566-02-2026	Scott Stanley
566-02-2027	Beata Syropiatko
566-02-2028	Mary Visco
566-02-2029	Suzanne Walters
566-02-2030	Tracey Watters
566-02-2031	Sharon Ali
566-02-2032	Enid Awuku
566-02-2033	Latricia Beeston
566-02-2034	Barbara Budgell
566-02-2035	Gennaro Canale-Parola
566-02-2036	Kathy Cooper
566-02-2037	Amabel Court
566-02-2038	Roger Descotes
566-02-2039	Omar Fairclough
566-02-2040	Bruce Flannigan
566-02-2041	Megan Gagnon-Fitzgerald
566-02-2042	Robert Graham
566-02-2043	Simone Hercules
566-02-2044	Julian Jeganathan
566-02-2045	Diane Johnson
566-02-2046	David Jones
566-02-2047	Clint James