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Parliamentary Employment and Staff Relations Act

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

and

HOUSE OF COMMONS

Employer

Indexed as
Public Service Alliance of Canada v. House of Commons

In the matter of a reference made under section 70 of the *Parliamentary Employment and Staff Relations Act*

REASONS FOR DECISION

Before: Michael F. McNamara, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Bargaining Agent: Kim Patenaude, counsel

For the Employer: Carole Piette, counsel

Heard at Ottawa, Ontario,
September 14 and 15, 2015.

I. Reference under section 70 of the *Parliamentary Employment and Staff Relations Act*

[1] On February 13, 2013, the Public Service Alliance of Canada ("the bargaining agent") filed this reference under s. 70 of the *Parliamentary Employment and Staff Relations Act* (R.S.C., 1985, c. 33 (2nd Supp.); "the *Act*") with the former Public Service Labour Relations Board (PSLRB). Section 70 provides a process by which a party to a collective agreement seeking to enforce an obligation alleged to arise under the agreement may refer the matter to the Federal Public Sector Labour Relations Board.

[2] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the names of the Public Service Labour Relations and Employment Board and the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board") and the *Federal Public Sector Labour Relations Act* (*FPSLRA*).

[3] The bargaining agent seeks to enforce what it views as an obligation arising under Appendix F of its collective agreement with the House of Commons for the Reporting and Text Processing Sub-Groups (which expired on June 30, 2011; "the collective agreement"). The following particulars were set out in the Form 17 that the bargaining agent submitted to the Board: "The PSAC became aware of the situation of Anne Morrison who worked 702.5 hours in 2012; however, on January 1st 2013, she was not made an employee pursuant to Appendix F of the parties' Agreement."

[4] The corrective action requested is set out as follows:

- a declaration that the employer has violated the collective agreement;
- an order conferring the status of "Seasonal Certified Indeterminate Employee" (SCI employee) on any person who has surpassed the threshold of 700 hours worked in one year, as outlined in Appendix F of the collective agreement; and
- any other remedy deemed necessary to make the affected person whole.

[5] The issue raised by this reference is whether overtime hours worked by part-time or seasonal employees in the bargaining unit at issue ought to be included in the calculation of the 700-hour threshold that confers upon them SCI employee status pursuant to Appendix F of the collective agreement.

[6] The employer states that overtime hours are not included in that calculation and that they never have been. The bargaining agent asserts that they should be included and that by failing to, the employer is violating the collective agreement.

[7] I find that the employer is correct. The view that the parties intended to include overtime in the 700-hour threshold for SCI employee status is not supported by the language of the *Act* or by the text of the collective agreement.

II. The language of the *Act* and the collective agreement

[8] The *Act* defines *"employee"* as follows:

> ***3*** *In this Part*
>
> …
>
> ***employee*** *means a person employed by an employer, other than*
>
> …
>
> ***(b)*** *a person not* ***ordinarily required*** [emphasis added] *to work more than seven hundred hours in a calendar year or one-third of the normal period for persons doing similar work, whichever is greater ….*
>
> [Emphasis added]

[9] Article 2 of the collective agreement reads in part as follows:

> ***2.01*** *For the purpose of this agreement:*
>
> …
>
> *(r) Seasonal Certified Indeterminate Employees (SCI) (Full-time or Part-time) means employees* ***ordinarily working*** *more than seven hundred (700) hours but less than eighteen hundred and twenty (1820) hours in a calendar year. SCI employees may be required to work on shifts and weeks of more or less than thirty-five (35) hours pursuant to Appendix "F" of this Agreement. Scheduling of hours of work is subject to operational requirements and the collective agreement. The terms and conditions of employment are determined by Article 40 of the collective agreement and Memorandum of*

> *Agreement, Appendix "F". Seasonal certified indeterminate employees are subject to be temporarily struck-off strength when there is a shortage of work.*
>
> ***2.02*** *Except as otherwise provided in this Agreement, expressions used in his Agreement*
>
> *(a) if defined in the Parliamentary Employment and Staff Relations Act, have the same meaning as given to them in the Parliamentary Employment and Staff Relations Act ….*
>
> [Emphasis added]

[10] The relevant portions of Appendix F of the collective agreement read as follows:

> *APPENDIX F*
>
> *MEMORANDUM OF AGREEMENT*
>
> *RE: Seasonal Certified Indeterminate (SCI) Employees*
>
> *The conditions listed below are to be applied/followed to obtain or lose the status of Seasonal Certified Indeterminate Employee.*
>
> 1. *A person who works seven hundred (700) hours in one (1) calendar year will obtain the status of seasonal certified indeterminate employee effective January 1st of the year following the year in which the seven hundred (700) hour threshold was surpassed. The collective agreement and the terms and conditions of employment for SCI employees will begin on the first (1st) day that employment resumes in that year.*
>
> 2. *A SCI employee who works less than seven hundred (700) hours in two (2) consecutive years will no longer be recognized as a SCI employee effective December 31st of the second (2nd) year in which the SCI employee did not reach the threshold of seven hundred (700) hours for those two (2) consecutive years.*
>
> 3. *Due to the irregularity of work available during election and prorogation years, years with less than one hundred and ten (110) sitting days will be excluded for the purpose of losing status. Consequently, if a SCI employee works less than seven hundred (700) hours during a year with less than one hundred and ten (110) sitting days, this discrepancy will not be used to lose the status of a SCI employee.*
>
> 4. *Leave granted under Article 12.10 and 12.11 shall be considered hours worked for the purposes of determining if an employee has worked seven hundred*

> *(700) hours in the calendar year in which the leave is granted.*
>
> …
>
> *10. **Overtime compensation***
>
> *Seasonal Certified Indeterminate (SCI) employees shall be paid for overtime hours worked except where, at the request of an employee and with the approval of the Employer, overtime may be compensated in equivalent time off in the following manner:*
>
> …
>
> *(d) Overtime compensated in equivalent time off shall not be considered in the calculation of:*
>
> *(i) Continuous employment;*
>
> *(ii) Accumulation of sick leave credits;*
>
> *(iii) The hours worked to obtain and to maintain the status of SCI;*
>
> *(iv) Any other benefits under this agreement.*
>
> *Subject to this Agreement, an employee's request for compensatory leave shall not be unreasonably denied.*
>
> *11. **Hours of work***
>
> …
>
> *(b) General*
>
> *When there is work available, the Employer shall make every reasonable effort to maximize scheduled hours for SCI employees.*

III. Summary of the arguments

A. For the bargaining agent

[11] The bargaining agent submitted that the language in Appendix F simply refers to "… a person who works seven hundred (700) hours in one (1) calendar year …". It makes no distinction between regular and overtime hours for the purpose of reaching the 700-hour threshold to attain SCI employee status.

[12] The bargaining agent submits that if there is a conflict between Appendix F and the definitions of "employee" in the collective agreement and in the *Act*, then the substantive provisions in Appendix F should prevail.

[13] While recognizing that overtime work is subject to wide fluctuations and is not always predictable, the bargaining agent argues that it nevertheless represents a significant portion of the hours worked by the employees in question. Although employees are normally not required to work overtime, the vast majority do. Therefore, overtime hours should form part of the total hours they work in a year.

[14] Paragraph 10(d) of Appendix F deals with overtime being compensated as time off and specifically excludes those hours from being used in the calculation of the 700-hour threshold. This indicates to the bargaining agent that overtime hours worked and compensated with wages, rather than with compensatory time off, should be included in the 700 hours.

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

[15] The employer submits that the definition of SCI employees in s. 2.01(r) of the collective agreement does not contradict Appendix F, as suggested by the bargaining agent. Rather, it is more specific than Appendix F.

[16] The word "ordinarily" in s. 2.01, and in the statutory definition of employee, means "most of the time, generally, usually." In the employer's view, overtime is not ordinarily worked within the meaning of those definitions. Similar words in the *FPSLRA* have been interpreted as referring to normal scheduled hours of work.

[17] Overtime is not mandatory and is not established in advance. The considerable fluctuation in the number of overtime hours worked in successive years, as reflected in Exhibits 6 to 13, is attributable to the very nature of the work. It is based on House of Commons sitting days and on whether a given year is an election year. Overtime hours caused by these fluctuations in the work is beyond the employees' normal schedule and is not ordinarily required.

[18] Paragraph 10(d) of Appendix F states that overtime compensated in equivalent time off is not included in the calculation of hours worked, which does not create an ambiguity. This wording simply further clarifies and supports the employer's contention that no overtime hours should be counted in the calculation of the 700

hours worked, whether they were paid or were compensated with time off.

IV. Reasons

[19] Despite each party's view that the language is clear, they each called witnesses who were part of the negotiating process for a memorandum of agreement (MOA) that became Appendix F of the collective agreement. The witnesses presented their understanding of the parties' intention when they negotiated the MOA. I find that the language of the collective agreement is not ambiguous. Therefore, I do not rely on the extrinsic evidence; nor will I outline it.

[20] There was no real dispute between the parties with respect to the nature of the overtime work, which is that it occurred often but was not scheduled, was not mandatory, and fluctuated significantly.

[21] In my view, the definition of SCI employees in s. 2.01(r) of the collective agreement does not contradict Appendix F but rather must be read with it. It specifies with the phrase "ordinarily working" that the reference to a "… person who works seven hundred (700) hours …" found in Appendix F means a person who works 700 regularly scheduled hours.

[22] The statutory definition of "employee", set out in s. 3 of the *Act*, contains an exception for "… a person not ordinarily required to work more than seven hundred hours in a calendar year …". The voluntary overtime worked by the employees in this bargaining unit is not ordinarily required.

[23] The PSLRB dealt with a similar issue in *Bigdeli-Azari v. Deputy Head (Department of Veterans Affairs)*, 2011 PSLRB 126, in which it considered the following exception to the definition of employee in the *FPSLRA* (at that time, the *PSLRA*): "… a person not ordinarily required to work more than one third of the normal period for persons doing similar work …". At paragraph 20 of that decision, the PSLRB stated as follows:

> *[20] It seems to me that, based on the facts before me, the number of hours that a person is "ordinarily required" to work is the number of hours planned on that person's normal work schedule. Thus, a full-time general attendant is required to work 37.5 hours per week. If the evidence showed that Mr. Bigdeli-Azari was normally required to work more than one third of those hours, I would conclude that he was an*

> *employee within the meaning of the* Act*, but that is not the case….*

[24] The PSLRB accepted the grievor's evidence that he regularly agreed to last-minute replacement work, two or three times a week, which made his average work hours exceed one-third of normal hours. However, it found that the hours of his regular schedule, which he was required to work, did not exceed the one-third threshold.

[25] I come to the same conclusion. To attain SCI employee status, an employee must work 700 regularly scheduled hours. Overtime hours are not included in the calculation.

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

(The Order appears on the next page)

V. Order

[27] I find that the employer has not violated the collective agreement.

July 26, 2017.

Michael F. McNamara,
a panel of the Federal Public Sector
Labour Relations and Employment Board