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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

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

BETWEEN

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2228

Bargaining Agent

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board (Department of National Defence)

In the matter of a policy grievance referred to adjudication

Before: Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Bargaining Agent: James Shields and Sogol Naserian, counsel

For the Employer: Amita Chandra, counsel

Heard at Ottawa, Ontario
July 30, 2019
Written submissions filed August 2 and 6, 2019 and November 5 and 12, 2020

REASONS FOR DECISION

I. Policy grievance referred to adjudication

[1] The International Brotherhood of Electrical Workers, Local 2228 ("the bargaining agent") represents civilian electronic technologists working at the Department of National Defence ("the employer"), in the Fleet Maintenance Facilities Engineering Department. The affected employees in this matter work regular day shifts weekdays at Cape Scott in Nova Scotia. At times, they conduct sea trials aboard Canadian Armed Forces submarines or other naval vessels to collect data and test and calibrate electronic equipment. Employees are "captive" on-board ship during this time and are required to work irregular hours.

[2] The bargaining agent filed a policy grievance on May 23, 2017, challenging the employer's interpretation of the collective agreement language setting out the calculation of overtime pay during sea trials. The grievance raised other issues as well, but the bargaining agent has not pursued them at adjudication.

[3] There are two issues before the Board:

- Issue 1: whether regularly scheduled hours are included in the 12 hours of work that entitle an employee to overtime compensation at double and triple time; and
- Issue 2: whether, after a mandatory 10-hour rest period, triple-time compensation reverts to time-and-a-half or to double time.

[4] With respect to the first issue, I find that regularly scheduled hours worked are included in the 12 hours of work needed to reach overtime compensation at double and triple time.

[5] With respect to the second issue, I find that the collective agreement is silent as to the compensation rate after a period of overtime at triple time followed by a 10-hour rest period. Therefore, the employer is within its rights to determine the compensation rate that applies after such rest period.

II. Collective agreement language

[6] When this grievance was filed, the Electronics Group bargaining unit was covered by the collective agreement between Treasury Board and the bargaining agent

which expired on August 31, 2014 ("the collective agreement"). The relevant provisions are set out in article 32 (Sea Trials Allowance).

[7] Clause 32.04 outlines how employees are to be compensated while conducting sea trials. The English version states this:

> *32.04*
>
> *(a) He or she shall be paid at the employee's straight-time rate for all hours during his or her regularly scheduled hours of work and for all unworked hours aboard the vessel or at the shore-based work site.*
>
> *(b) He or she shall be paid overtime at time and one-half (1 1/2) the employee's straight-time hourly rate* ***for all hours worked in excess of the regularly scheduled hours of work up to twelve (12) hours.***
>
> *(c) After this period of work, the employee shall be paid twice (2X) his or her straight-time hourly rate for all hours worked in excess of twelve (12) hours.*
>
> *(d) After this period of work, the employee shall be paid three (3) times his or her straight-time hourly rate for all hours worked in excess of sixteen (16) hours.*
>
> *(e)* ***Where an employee is entitled to triple (3) time in accordance with paragraph (d) above, the employee shall continue to be compensated for all hours worked at triple (3) time until he or she is given a period of rest of at least ten (10) consecutive hours.***
>
> *(f) Upon return from the sea trial, an employee who qualified under paragraph 32.03(d) shall not be required to report for work on his or her regularly scheduled shift until a period of ten (10) hours has elapsed from the end of the period of work that exceeded fifteen (15) hours.*
>
> [Emphasis added]

[8] The French version is as follows:

> *32.04*
>
> *(a) L'employé-e est rémunéré-e au taux des heures normales pour toutes les heures prévues à son horaire de travail et pour toutes les heures non travaillées à bord du navire ou au lieu de travail sur terre.*
>
> *(b) L'employé-e touche une fois et demie (1 1/2) son taux horaire normal pour toutes les heures travaillées* ***en sus de son horaire normal de travail jusqu'à ce qu'il ou elle ait travaillé douze (12) heures.***

> *(c) Après cette période de travail, l'employé-e touche le double (2) de son taux horaire normal pour toutes les heures effectuées en sus de douze (12) heures.*
>
> *(d) Après cette période de travail, l'employé-e touche trois (3) fois son taux horaire normal pour toutes les heures effectuées en sus de seize (16) heures.*
>
> *(e)* ***L'employé-e qui a droit au taux triple (3) prévu à l'alinéa d) précédent continue d'être rémunéré-e à ce taux pour toutes les heures travaillées jusqu'à ce qu'il se voit accorder une période de repos d'au moins dix (10) heures consécutives.***
>
> *(f) À son retour de l'essai en mer, l'employé-e ayant droit à la rémunération prévue à l'alinéa 32.03d) n'est pas tenu-e de se présenter au travail pour son poste d'horaire normal tant qu'une période de dix (10) heures ne s'est pas écoulée depuis la fin de la période de travail qui a dépassé quinze (15) heures.*
>
> [Emphasis added]

III. Issue 1- Whether regular hours worked are included in the 12 hours required to reach overtime at double and triple time

A. Submissions of the parties

[9] The first issue is whether excluding regularly scheduled hours from "all hours worked" to reach overtime at double and triple time under clauses 32.04(c) and (d) breaches the collective agreement.

[10] The bargaining agent's position is that the 12 hours referred to in clause 32.04(b) includes regularly scheduled hours of work. In other words, an employee works his or her regular hours, then moves to time-and-a-half. When the total hours worked (regularly scheduled hours plus overtime at time-and-a-half) total 12, he or she begins to be compensated at double time. When those hours (regularly scheduled hours plus overtime at time-and-a-half plus overtime at double time) total 16, the employee begins to be compensated at triple time.

[11] The bargaining agent submitted that by giving the words used their natural and ordinary meaning, an employee is entitled to overtime at double time for all of the hours worked over and above 12 hours in a day, and that "all hours worked" includes those which are regularly scheduled. Similarly, overtime at triple time would apply to all of the hours worked over and above 16 hours in a day, including regularly scheduled hours.

[12] The employer's position is that the 12 hours referred to in clause 32.04(b) do not include regularly scheduled working hours, meaning that an employee must work 12 hours of **overtime** at a rate of time-and-a-half before he or she begins to be compensated at double time. The hours need not be worked in one day; it is a rolling rate that would typically add up over the several days of a sea trial.

[13] The employer argued that this issue had already been decided in *Ducey v. Treasury Board (Department of National Defence)*, 2016 PSLREB 114. It maintained that the panel of the Board that heard that case had agreed with the employer's interpretation of this language and that it was *res judicata*. The employer submitted that the three pre-conditions for *res judicata* set out by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 were met in this case, as follows:

1. The issue is the same as the one decided in the prior decision;
2. The prior decision was final; and,
3. The parties to both proceedings are the same.

[14] The employer argued that the issue before the Board is the same as the one in *Ducey*. It submitted that the Board must ask itself whether the facts and arguments in the two cases are the same or fundamentally the same. The employer acknowledged that the issue in *Ducey* was described as clarifying what constitutes "regularly scheduled hours of work." However, the analysis examined the calculation of overtime. The bargaining agent stated that the issue in *Ducey* was different, in that, that case was about defining regularly scheduled hours of work. The pre-conditions to establish *res judicata,* in its view were not met.

[15] The employer also argued that the parties in *Ducey* were effectively the same. In fact, the grievors and the bargaining agent were even represented by the same counsel and led the same evidence. John Ducey was one of the grievors in the prior case. Both he and Steven Watters, who testified for the employer, gave evidence in both cases. The only difference was that *Ducey* dealt with two individual grievances, while the bargaining agent initiated this matter as a policy grievance. According to the employer, that does not change the substance of the issue before the Board.

[16] The employer stated that even if the issue is not *res judicata*, re-litigating what is essentially the same issue is an abuse of process, as noted in *International Association of Heat and Frost Insulators and Allied Workers, Local 95*, citing *Toronto*

(City) v. C.U.P.E., Local 79, 2003 SCC 63. In *Toronto (City)*, the Supreme Court of Canada invoked abuse of process to prevent a grievor re-litigating events before an arbitration board in respect of which he had already been found guilty of an offence under the *Criminal Code* (R.S.C., 1985, c. C-46), as amended. The Court stated that re-litigation in those circumstances should not be permitted. It held that the doctrine of abuse of process would be applied even when the strict requirements of *res judicata* were not met if allowing litigation to proceed would violate principles of judicial economy, consistency, finality, and the integrity of the administration of justice.

[17] With respect to the finality of the prior decision, the *Ducey* board had remained seized for 60 days following the release of that decision to resolve any issues arising from implementation. The employer noted that the bargaining agent had not returned to the Board to raise this issue, nor had it initiated judicial review proceedings.

[18] As for the third pre-condition, there was no dispute between the parties that the *Ducey* decision was final.

B. Reasons for Decision

[19] I find that the issue is not *res judicata* by virtue of the *Ducey* decision.

[20] I agree with the employer that the issue is essentially same. Although described differently as a clarification of 'regular hours of work', that issue was argued before the *Ducey* board in order to determine how overtime compensation would be calculated. To determine overtime hours in any work situation one must first define the regularly scheduled hours. They are not separate issues but rather opposite sides of the same coin.

[21] Moreover, the *Ducey* decision itself makes clear that the dispute before it was about overtime. The first paragraph of that decision reads as follows: "This adjudication arose from a dispute about the amount of overtime that should have been paid to John Ducey and Andrew Malloy, the grievors, during sea trials that took place on the submarine HMCS Windsor and the frigate HMCS Halifax". In the course of considering that question the *Ducey* board interpreted several sub-clauses of clause 32.04. It concluded that regularly scheduled hours worked were not included in the 12 hours of work needed to reach overtime at double time.

[22] Are the parties the same? No, they are not. In *Ducey* there were two individual grievors, John Ducey and Andrew Molloy (see s. 208(1) of the *FPSLRA*). This matter is a policy grievance initiated by the bargaining agent, the International Brotherhood of Electrical Workers. Although the IBEW represented the grievors in *Ducey*, it was not, itself, a party (see s. 208(4) of the FPSLRA). The fact that counsel and witnesses were the same, as submitted by the employer, is irrelevant. I also note that the bargaining agent cannot be faulted for failing to return to the Board to ask it to exhaust its jurisdiction or for not initiating judicial review proceedings, when it was not a party in that matter.

[23] Given that the parties are different as between this matter and *Ducey*, the pre-conditions to establish *res judicata* are not met.

[24] Even were that not the case, however, it is not at all evident that the principle of *res judicata* should be applied in labour relations matters. The jurisprudence is clear that the Board is not bound by the principle of *res judicata*.

[25] It has been noted in the case law that both arbitrators and statutory boards should try to avoid giving different interpretations of the same collective agreement language without good reason. For example, see comments of the Federal Court of Appeal in *Canada (Attorney General) v. Bétournay*, 2018 FCA 230, as follows:

> *51 It is true that an administrative decision-maker is not required to conform or adhere to an arbitral consensus and is not bound by the decisions that colleagues may make. While a certain degree of consistency is desirable, departure from an arbitral trend is permissible, provided that the reasons for doing so are convincingly explained. As the Supreme Court noted in Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, *the body of arbitral jurisprudence is a "valuable benchmark" against which to assess the reasonableness of an administrative decision (at para. 6 (Justice Abella)). The demand of predictability requires that rules which are established in earlier cases generally be followed unless an explanation is provided as to why an adjudicator decided to depart from them."*

[26] In this case I must depart from the *Ducey* board's interpretation of clause 32.04(b) for the reasons that follow.

[27] My reading of the English version of clause 32.04 (b) is that the plain and ordinary meaning of the words favour the bargaining agent's interpretation and I cannot, even considering the English version alone, interpret it as the Board did in *Ducey*. Nevertheless, I can see how the language could be interpreted as it was in *Ducey*. It is possible for the words used to bear both meanings.

[28] However, I believe that a consideration of the French version of the collective agreement language reveals the correct interpretation. Both are official versions (see article 4 of the collective agreement) and are of equal status.

[29] The English version of clause 32.04(b) states as follows:

> *(b) He or she shall be paid overtime at time and one-half (1 1/2) the employee's straight-time hourly rate for all hours worked in excess of the regularly scheduled hours of work up to twelve (12) hours.*

[30] The French version of clause 32.04(b) states as follows:

> *(b) L'employé-e touche une fois et demie (1 1/2) son taux horaire normal pour toutes les heures travaillées en sus de son horaire normal de travail jusqu'à ce qu'il ou elle ait travaillé douze (12) heures.*

[31] It is conceivable, as the employer would have it, that the English phrase "**all hours worked** in excess of the regularly scheduled hours of work **up to twelve hours**" could mean the total hours worked over and above the regular hours until they totalled twelve hours of overtime over a few days. However, the French version, by the words used clarifies the meaning in favour of the bargaining agent's interpretation. The phrase " **toutes les heures travaillées** en sus de son horaire normal de travail **jusqu'à ce qu'il ou elle ait travaillé douze (12) heures**" conveys the meaning more clearly.

[32] It is clear, in the French version that double time compensation begins once an employee 'has worked 12 hours'. That means he or she has worked the regular hours at straight time, then overtime at time and a half, and having worked 12 hours in total, begins to be compensated at double time. The employee's regular hours of work are included in the 12 hours needed to reach overtime at double time and, similarly, in the 16 hours needed to reach triple time.

[33] The meaning of the French version is not at odds with that of the English one, as the English version could be understood in two different ways. I find that the French version does in fact clarify the meaning of the English one. I note that *Ducey* did not consider the language of the French version in its interpretation of clause 32.04(b).

IV. Issue 2 – Whether after a mandatory 10-hour rest period, triple-time compensation reverts to time-and-a-half or to double time

A. Submissions of the parties

[34] The second issue is whether overtime at triple time reverts to overtime at time-and-a-half or to overtime at double time after a mandatory 10-hour rest period.

[35] Clause 32.04 (e) states as follows: "Where an employee is entitled to triple (3) time in accordance with paragraph (d) above, the employee shall continue to be compensated for all hours worked at triple (3) time until he or she is given a period of rest of at least ten (10) consecutive hours."

[36] The bargaining agent submitted that after a rest period, triple time should revert to double time, not to time and a half. It argued that the employer, in its interpretation of clause 32.04 (e), relied on *Ducey*, which did not address the rate at which overtime is to be paid after a 10-hour rest period. Neither that decision, nor the clause itself says anything about what the compensation rate should revert to, following a mandatory rest-period.

[37] According to the bargaining agent, this renders the language of clause 32.04 (e) "ambiguous, at best" with respect to how an employee is to be compensated in these circumstances. It submits that when language is ambiguous, the Board may use the parties' conduct or past practice as an aid to clarifying the ambiguity (see Brown and Beatty, *Canadian Labour Arbitration*, 5th edition, at chapter 3:4430; *Maple Leaf Consumer Foods, Inc. v. Schneiders Employees' Assn.* (2008), 170 L.A.C. (4th) 73; and *District School Board Ontario Northeast v. Canadian Office and Professional Employees Union, Local 429* (2017), 282 L.A.C. (4th) 296).

[38] The employer argued that *Ducey* decided this issue as well. The overtime rate increases as the employee works overtime and resets only if the employee receives a mandatory 10-hour rest period after working overtime at triple time. The bargaining agent's interpretation is counterintuitive to the sequential progression of clause 32.04.

[39] As well, a benefit that has a monetary cost to the employer must be clearly and expressly granted, and an interpretation that leads to a clear result is to be preferred to one that produces a messy or uncertain result (see *Wamboldt v. Canada Revenue Agency*, 2013 PSLRB 55 at paras. 25 to 28). The bargaining agent's interpretation defies a plain reading of the provision and produces absurd results, while the employer's interpretation is logical and produces clear results.

[40] Alternatively, the employer submitted that the appropriate compensation after a mandatory 10-hour rest-period reset is within its rights to determine pursuant to clause 7.01 (management rights) of the collective agreement, as long as it is consistent with the logic that the Board applied in *Ducey* and is not expressly prohibited by the collective agreement.

B. Reasons for decision

[41] I agree with the bargaining agent that neither clause 32.04 (e) itself, nor *Ducey*, say anything about the overtime compensation rate after a mandatory 10-hour rest-period reset. In *Ducey*, the grievors raised the issue that in their view, the employer should not mandate rest periods for employees while they are on board ship. However, no issue of the overtime compensation rate following a rest period was argued or determined.

[42] However, I cannot agree with the bargaining agent that the collective agreement's silence on this issue renders the language 'ambiguous, at best' thus opening the door to reliance on the parties' conduct or past practice. Silence alone does not typically raise an ambiguity; rather, it indicates that the parties did not address the issue. See, for example, *Wilson's Truck Lines Ltd. and Industrial Wood and Allied Workers of Canada, Local 700* (1999), 80 L.A.C. (4th) 1, which states as follows:

> …
>
> *27 It is only where the agreement may be said to be ambiguous that "extrinsic evidence" may be relied upon as an aid to interpretation. The fact of differing interpretations does not establish an ambiguity. Similarly, a collective agreement is not ambiguous because it is silent on a particular issue. That is precisely the situation in the instant grievance where the collective agreement is silent as to the number of shunt positions. On the issue of silence in a collective agreement, Brown and Beatty, Canadian Labour Arbitration, 3rd. ed., looseleaf (Aurora: Canada Law Book) at para. 3:4400, p.3-64-65 states:*

> *Arbitrators, however, do appear to have agreed that silence itself cannot amount to ambiguity in view of the fact that silence might signify that the parties did not agree to anything on the issue.*
>
> *28 One of the cases referred to in footnote 21 to para. 3:4400 is Canteen of Canada Ltd. v. Retail, Commercial & Industrial Union, Local 206, supra, where arbitrator Gorsky offered the following rationale at p.367:*
>
> *What we have is silence in the agreement on the question of the right of the company to designate a floater holiday on a non-working day and it has been held in many awards that where a collective agreement is silent it is not to be considered as ambiguous: … As was stated in Re U.S.W. and Uddeholm Steels Ltd. (1971), 22 L.A.C. 419 (Weiler) at p. 421:*
>
> *…a completely silent agreement usually indicates that the parties did not intend a specific meaning regarding an issue, because they have not reached an agreement as to how it is to be governed.*

[43] See also *SGS Canada Inc. v. Unifor, Local 672*, 2020 CanLII 55416 (ON LA), which states as follows:

> *57 Had the parties intended that result, as urged upon me by the Union, they could have clearly provided for such a limitation in the contractual language. Instead, the matter has remained silent leaving the default management rights provisions in article 5, permitting the Company to exercise its good faith discretion in scheduling the overtime work for legitimate business purposes.…*

[44] If the parties had a mutual intent with respect to the issue of the overtime compensation rate after a mandatory 10-hour rest-period reset, they did not attempt to record it in words.

[45] I also agree with the employer that a provision with a monetary cost to it would be expressly stated. I am not prepared to infer it from silence. See *Wamboldt*, at para. 27, which states as follows:

> *[27] …a benefit that has a monetary cost to the employer must be clearly and expressly granted under the collective agreement; see, for example,* Cardinal Transportation B.C. Inc. v. Canadian Union of Public Employees, Local 561 *(1997), 62 L.A.C. (4th) 230, at para 27;* Greater Sudbury (City) v. Ontario Nurses' Association, *[2011] O.L.A.A. No. 471 (QL), at para 23; and* Essex (County) v. Canadian Union of Public Employees, Local 2974.1 *[2006] O.L.A.A. No. 689 (QL), at para 23.*

[46] Residual management rights are set out, in part, at clause 7.01 of the collective agreement, as follows:

> *7.01 … all such rights and responsibilities not specifically covered or modified by this agreement shall remain the exclusive rights and responsibilities of the Employer. Such rights will not be exercised in a manner inconsistent with the express provisions of this agreement.*

[47] Given the collective agreement's silence on the issue and the fact that the employer's interpretation is not inconsistent with the collective agreement's express language or *Ducey*, the employer can exercise its residual management rights to determine the overtime compensation rate after a mandatory 10-hour rest period reset.

[48] The Board can only interpret the words that the parties used and cannot add to or amend their collective agreement (see s. 229 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2)). Any persistent disagreement between the parties on this issue will have to be addressed at the bargaining table.

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

(The Order appears on the next page)

V. Order

[50] I declare that regularly scheduled hours worked are included in the 12 hours of work needed under clause 32.04(b) of the Electronics Group bargaining unit collective agreement to reach overtime compensation at double and triple time.

[51] I further declare that the collective agreement is silent as to the compensation rate after a period of overtime at triple time followed by the 10 hour rest period set out in clause 32.04(e) and that the employer is within its rights to determine the compensation rate that applies after such rest period.

December 18, 2020.

Nancy Rosenberg,
a panel of the Federal Public Sector
Labour Relations and Employment Board