

Case In Point

Supreme Court of Canada Affirms Management Rights Must Be Exercised Reasonably and Consistently with the Collective Agreement

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It is critical for employers in the unionized context to remember that when creating policies or workplace rules as an exercise of management rights, the rule must constitute a reasonable “balancing of interests” and must be consistent with the collective agreement.

In [Association of Justice Counsel v. Canada \(Attorney General\)](#), the Supreme Court of Canada weighed in on the proper exercise of management rights under a collective agreement, the application of section 7 of the *Canadian Charter of Rights and Freedoms (Charter)* to workplace rules, and the deference owed to a labour arbitrator’s decision.

In the early 1990s the Immigration Law Directorate in the Quebec Regional Office of the Department of Justice established a standby shift system to deal with urgent immigration matters that may arise during evenings and weekends. The system operated on a volunteer basis and lawyers working standby were compensated with paid leave of 2.5 days time off for each week of evening and weekend shifts that they were on standby, regardless of whether or not they were actually called in to work.

In 2009, the employer and the Association of Justice Counsel negotiated a new collective agreement that entitled more lawyers to overtime pay and as such the employer revised the standby system such that lawyers would only be compensated for standby time if they were actually called in to work on a matter. As a result most lawyers stopped volunteering for the standby shifts. In response, the employer issued a directive making it mandatory for each lawyer to work standby shifts one to three weeks per year. The Association of Justice Counsel grieved the mandatory, unpaid standby directive.

At arbitration, the arbitrator referred to article 5.01 of the collective agreement which stated “all the functions, rights, powers and authority which the Employer has not specifically abridged, delegated or modified by this Agreement are recognized by the Association as being retained by the employer.” The arbitrator also referred to article 5.02 which required the employer to “act reasonably, fairly and in good faith in administering the Agreement.” The collective agreement did not contain any provisions specific to standby shifts.

The arbitrator held that the mandatory standby directive was neither reasonable nor fair and was therefore contrary to the collective agreement. The arbitrator also found that the requirement violated the employees’ section 7 liberty rights under the *Charter*.

The Federal Court of Appeal allowed the employer’s application for judicial review on the basis that the arbitrator had placed an unreasonable burden on the employer to justify the need for mandatory standby. The Federal Court of Appeal also held that the section 7 right to liberty was not applicable in this case.

On appeal, the Supreme Court of Canada upheld the Federal Court of Appeal’s decision with respect to section 7 of the *Charter* but overturned the Court’s finding that the arbitrator had erred in finding that mandatory standby directive was an unreasonable exercise of management rights.

The Supreme Court of Canada determined that while the arbitrator had not specifically referred to the frequently cited [Irving](#) or [KVP\[1\]](#) decisions, he had nonetheless applied the proper approach of “balancing the interests” in order to determine whether the exercise of management rights was reasonable.

Management rights must be exercised reasonably and consistently with the collective agreement. In assessing whether a workplace rule complies with this, arbitrators must apply their labour expertise, consider all of the surrounding circumstances, and determine whether the workplace rule strike a reasonable balance between management and employees' interests.

In this case, the collective agreement required that the employer act reasonably, fairly and in good faith. Any workplace rule imposed by the employer had to comply with those limitations. The fact that the collective agreement did not specifically deal with standby did not mean that the employer could *carte blanche* require uncompensated standby availability from the lawyers. The requirement for standby was not referred to in the collective agreement, the job descriptions or the employment contracts of the lawyers. Therefore, the arbitrator questioned whether the mandatory standby requirement was truly essential. The arbitrator then weighed this against the fact that the mandatory standby requirement affected how the lawyers lived their lives outside of work in such a way that the left the lawyers under the employer's control without providing them any additional compensation.

In addition, while an employer does not necessarily have to prove there were no alternative, less intrusive, options available, the arbitrator was entitled to take the absence of such evidence here into account when balancing the interests. The employer chose this option over other options such as flexible scheduling or compensation for standby, which had been the previous practice. Ultimately the arbitrator found that the requirement was not a reasonable exercise of management rights and that it violated article 5.02 of the collective agreement.

The majority of the Supreme Court of Canada noted that significant deference was owed to the arbitrator's decision and that ultimately his decision was within the range of reasonable outcomes.

On the issue of section 7 of the *Charter*, the Supreme Court of Canada held that the mandatory standby requirement did not affect the lawyers' abilities to make fundamental personal choices and therefore did not engage section 7.

[1] *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.*, (1965), 16 L.A.C. 73