

JUN 17 1983

File: 166-2-13798

N. 59.

PUBLIC SERVICE STAFF RELATIONS ACT
BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

DONALD G. JARRELL,

Grievor,

AND:

TREASURY BOARD
(Transport Canada),

Employer.

DECISION

Before: J. Maurice Cantin, Q.C., Vice-Chairman

For the Grievor: Catherine H. MacLean, counsel

For the Employer: Sheila Ray, counsel

Heard in Ottawa, May 18, 1983.

ART 10
CORR 402/79

LWOP FOR ICAD EMPLOYMENT

DECISION

This matter concerns a grievance referred to adjudication under paragraph 91(1)(a) of the Public Service Staff Relations Act.

The grievor, Donald Gordon Jarrell, an air traffic controller, contends that in December 1981 he was "unreasonably" denied a request for "leave of absence without pay, for a two-year period in order to fulfill an ICAO posting in a developing nation (Saudi Arabia)".

The grievor claims that the Employer failed to apply the following provision of the collective agreement between the Treasury Board and the Canadian Air Traffic Control Association (code 402/79):

10.07 It is agreed that, operational requirements permitting, employees in the Air Traffic Control Group who are selected for employment by ICAO, CUSO, or under Canada's External Aid Programme, will be granted leave of absence without pay on presentation of a letter indicating their acceptance by such an organization.

The Employer's response is twofold: first, the operational requirements at the time were such that the leave of absence could not be granted and secondly, the grievor cannot and could not file a request for leave as prior to such request he had tendered his resignation and such resignation had been accepted.

The grievor who was originally posted at the Oshawa Tower is now in Saudi Arabia. He was not present at the hearing.

THE FACTS

The parties filed through counsel an agreed statement of fact and they also asked a few witnesses to testify, namely Bernard Ronald

Labrosse and Frank Salter on behalf of the grievor and Leo Middlestadt
for the Employer.

The Agreed Statement of Fact reads as follows:

1. On May 1, 1978, the Grievor was appointed to the position of VFR Controller at the Oshawa Control Tower.
2. On September 21st, 1981 the Grievor submitted a letter to Mr. R.L. Millikin, Unit Chief, a copy of which is attached to this Agreement as Annex "A".
3. On September 22nd, 1981 Mr. R.L. Millikin submitted a letter to Mr. Jarrell a copy of which is attached to this Agreement as Annex "B".
4. On October 19th, 1981 the Grievor submitted a letter to Mr. R.L. Millikin, a copy of which is attached to this Agreement as Annex "C".
5. On October 19th, 1981, Mr. Millikin submitted a letter to Mr. Jarrell, a copy of which is attached to this Agreement as Annex "D".
6. On November 10th, 1981, Mr. Jarrell submitted a letter to Mr. R.L. Millikin, a copy of which is attached to this Agreement as Annex "E".
7. On November 12th, 1981, Mr. R.L. Millikin submitted a memorandum to OATO regarding Mr. Jarrell, a copy of which is attached to this Agreement as Annex "F".

8. On November 30th, 1981, Mr. L. Middlestadt of OATO submitted a memorandum to Mr. R.L. Millikin, a copy of which is attached to this Agreement as Annex "G".

9. On December 7th, 1981, Mr. R.L. Millikin submitted a memorandum to Mr. Jarrell, a copy of which is attached to this Agreement as Annex "H".

10. The relevant Collective Agreement in effect when considering the Grievor's request for leave without pay is the one between the Canadian Air Traffic Control Association and Treasury Board, Code: 402/79.

11. This Agreement is entered into without prejudice to either party's right to adduce other oral or documentary evidence in this case.

DATED at Ottawa this 17th day of
May 1983.

The various annexes referred to in the Agreed Statement of Fact are as follows:

Annex "A"

Don Jarrell
R. R. 2
Port Darlington
Bowmanville, Ontario
L1C 3K3

September 21, 1981

Mr. R. L. Millikin
Unit Chief
Transport Canada
Oshawa Control Tower
Oshawa Municipal Airport
Oshawa, Ontario
L1J 5P5

Dear Robbie:

I wish to advise you that I will be tendering resignation with Transport Canada within the next 6 months. I will provide at least one month's notice when actual resignation is tendered. Could you please advise me now, in writing, that you will accept my resignation when tendered and that you have no objection of my gaining employment with ICAO.

I have enjoyed my past 10 years working with Transport Canada, and hope the Department might consider my application for employment in 2 years.

Yours truly,

Don Jarrell

Annex "B"

Oshawa Control Tower,
Oshawa Airport,
Oshawa, Ontario
L1J-5P5

September 22, 1981

Mr. D. Jarrell,
R.R. #2
Port Darlington, Ontario
L1C--3K3

Dear Don:

Reference is made to your letter of September 21, 1981 in which you advise me of your intention to resign from the Public Service of Canada within the next six months.

I appreciate the advance notice of your plans, and will, with reluctance, accept your resignation if tendered. With respect to my objecting to any future employment you may have with ICAO, I have none, and indeed wish you well in any future endeavours.

Regarding your seeking re-employment with the Department of Transport as an air traffic controller in two years hence, I cannot make any commitments but would certainly hope that the Department would consider your past background and application taking into consideration the staffing conditions that may exist at the time.

Yours truly,

R.L. Millikin,
Unit Chief.

Annex "C"

D. G. Jarrell,
RR#2, Pt. Darlington,
Bowmanville, Ontario,
L1C 3K3

R.L. Milliken,
Unit Chief,
Oshawa Control Tower,
Oshawa Airport,
Oshawa, Ontario

October 19, 1981

Subject: Resignation

Dear Robbie,

It has been my pleasure to work for Transport Canada for the past ten years. In order to further my career plans, I find it is necessary to tender my resignation with Transport Canada. Please accept this letter as my resignation, effective date to be January 15, 1982.

I would appreciate receiving your acceptance of my resignation as soon as possible, in writing.

Yours truly,

Donald G. Jarrell

Annex "D"

Oshawa Control Tower,
Oshawa Municipal Airport,
Oshawa, Ontario.
LLJ-5P5

October 19, 1981.

D.G. Jarrell
R.R.#2, Port Darlington,
Bowmanville, Ontario.
LLC-3K3.

Dear Mr. Jarrell:

Reference is made to your letter of October 19, 1981 in which you inform me of your resignation from the Public Service of Canada, effective January 15, 1982.

It is with regret that, on behalf of the Department of Transport, I accept your resignation effective January 15, 1982.

R.L. Millikin,
Unit Chief.

Annex "E"

D.G. Jarrell,
RR#2, Pt. Darlington,
Bowmanville, Ontario,
L1C 3K3

R.M. Milliken,
Unit Chief,
Oshawa Control Tower,
Oshawa Airport,
Oshawa, Ontario.

November 10, 1981.

re : Request for Leave

Dear Robbie,

As you are aware, my resignation letter of October 19 was tendered due to Transport Canada policy which prevented my gaining employment with I.C.A.O. It has recently come to my attention that this policy has, or is about to be, changed.

In light of this fact, I am therefore requesting a two-year leave of absence to fulfill an I.C.A.O. posting in Saudi Arabia. Should this leave be granted, it is my intention to withdraw the resignation.

Yours truly,

Donald G. Jarrell

Annex "F"

TO: OAT
OATO
OATT
OPA November 12, 1981

FROM: Unit Chief,
Oshawa Control Tower.

SUBJECT: Donald G. Jarrell - 408 - 751 -
428

The attached letter, which is self explanatory, has been received from Mr. Donald G. Jarrell who is an employee at this unit.

As you may be aware Mr. Jarrell has been the Unit Training Officer at this unit since I arrived in May, and his absence from this position will be sorely felt. His ability as a VFR controller is not open to question. Because of the foregoing I would like to be in a position to recommend that the two year leave of absence be approved and to have him back on the staff in two years rather than lose him completely from the service.

Nevertheless I am aware of the present staffing constraints that may preclude such an assignment. Therefore it would be appreciated if you would ascertain if Transport's policy on ICAO secondments has been changed and, if it has, consider Mr. Jarrell's application favourably.

R.L. Millikin
Unit Chief.

Annex "G"

TO: UNIT CHIEF, OSHAWA CONTROL TOWER

FROM: OATO

November 30, 1981

SUBJECT: DONALD G. JARRELL

The critical staff shortage that exists within our organization does not permit consideration of leave without pay for Mr. Jarrell.

L. MIDDLESTADT
Superintendent, Operations
Air Traffic Services

Annex "H"

TO: D. G. Jarrell,

FROM: Unit Chief,
Oshawa Control Tower

December 7, 1981

SUBJECT: Request for Leave

Reference is made to your letter of November 10, 1981. Regional authorities have now advised me that due to the critical staff shortages that exist within the organization leave without pay will not be considered.

R. L. Millikin,
c.c OATO

The evidence is to the effect that ICAO stands for International Civil Aviation Organization and that from time to time it applies to member nations for personnel support and expert help to fill a position. The policy calls for a request to be sent first to the representative of Canada on the council of ICAO. Such request gives amongst other things the name of the proposed appointee, his present position, the post for which he has been nominated, the duty station and the date he would be required to report for duty. This policy was followed in the grievor's case as seen in Exhibit G-1. The Canadian representative however did not approve the grievor's release as well as that of other controllers, the reason reportedly being "operational requirements and shortage of qualified air traffic controllers" (see Exhibits G-2 and G-3).

According to Bernard Ronald Labrosse, chief, ICAO Policy and Coordination, at Transport Canada, there was at the time a severe shortage of IFR controllers since a number of air traffic controllers had resigned previously in the Ontario region and had been hired by ICAO. These controllers had resigned after being denied leave.

Frank Salter, an air traffic controller at the Oshawa Tower, stated that the usual minimum staff complement at the Oshawa Tower is nine controllers. There are two shifts daily and a minimum of two controllers are required at all times. The complement allows for one controller to be on leave at any given time. In May 1981, Tony Carter, an air traffic controller, submitted his resignation to be effective on or about December 21, 1981. Another controller, Miss St. Andrews, previously at the Sault-Ste-Marie Tower, reported for training at the Oshawa Tower at the beginning of December. Tony Carter withdrew his resignation at about the same time. The grievor had submitted his resignation on October 19, 1981. Another controller, David Turton, started training at the Oshawa Tower on or about January 4, 1982.

The grievor left in the middle of January 1982. Miss St. Andrews completed her training in March 1982 and David Turton in June 1982. Tony Carter was ill and absent on a few occasions until he left his assignment on sick leave on June 6, 1982. Exhibit G-4 shows the Oshawa shift schedule for October 1981 and the distribution of overtime.

Leo Middlestadt is the superintendent for Ontario of operations of air traffic. He has the general supervision of 13 control towers. He relies on staffing multipliers to maintain an adequate and safe level in air traffic services. He is called upon to make the ultimate recommendations under article 10.07 of the collective agreement. He was informed prior to October 19, 1981 of the grievor's resignation. The result was that the complement for the Oshawa Tower would fall to seven controllers instead of nine. Arrangements were made to relocate Miss St. Andrews from Sault-Ste-Marie to Oshawa. It was clear that the loss of two air traffic controllers would mean additional overtime and more stress on the remaining staff. The loss, it was feared, would have an impact on days of rest, annual leave, training and sick leave. A serious staff shortage was already expected due to the employer's early retirement program and the number of new air traffic controllers being trained was being increased. In the Ontario region, there was a total shortage of 20 air traffic controllers. The policy to which the letter of November 10, 1981 (Annex E of Agreed Statement of Fact) refers has never been changed. The grievor's request for leave was denied on the basis of the situation which prevailed not only in Oshawa but also in Ontario. In Oshawa, the loss of two controllers meant a reduction of the complement by almost one third. The grievor did not withdraw his resignation prior to submitting his request for leave.

Under cross-examination, Mr. Middlestadt added that the grievor's request is not the only one that was denied. Others were similarly denied. Only one controller so far took advantage of the

early retirement program but eleven more appeared to show interest and were briefed in 1983. A trainee adds nothing to a unit during training and the success rate is only 50%. Air traffic is lower in the winter. At the end of 1981, there was a great number of air traffic controllers on leave.

ARGUMENTS

Counsel for the grievor agreed that there is no question that the latter had been selected by ICAO and that he was still an employee when he filed his request for leave. The denial of the request was reported to be based on operational requirements. Was this the real reason? The real reason appears in annex G attached to the Agreed Statement of Fact. It is obvious that Leo Middlestadt had in mind the shortage of controllers in Ontario rather than in Oshawa. He should have looked at the operational requirements in Oshawa and not elsewhere, such as in Toronto. This has been decided in Hollier and Willis (Board file no. 166-2-10526 and 10527). The Employer never really considered the situation at the Oshawa Tower. It is only in May 1983 that Leo Middlestadt asked questions about the situation in Oshawa, as evidenced by Exhibit E-1. At the beginning of December 1981, it was clear that the unit would be short by only one controller and not two. The leave program might have been affected but for all other purposes, there was enough personnel.

Counsel for the Employer replied that the grievor decided to resign before submitting his request for leave. The situation is such that the grievor asked for leave commencing when he was no longer an employee and the collective agreement did not apply to him anymore. It is obvious that the grievor could not have been granted leave after having resigned and after the resignation had been accepted. Otherwise it could be argued that after his resignation, an employee could

still apply for sick leave, which is absurd. Article 1.02 of the collective agreement refers to the safety of the public which is the public at large and not solely the public at Oshawa. Leo Middlestadt had reason to be concerned with the safety of the public throughout Canada and throughout Ontario and not solely at Oshawa. The operational requirements in Ontario cannot be separated from the operational requirements at a particular unit. When he resigned, the grievor was leaving not only Oshawa but the entire region and it is the region that was losing. Reference is made to the decisions in Hollier and Willis (supra) at the bottom of p. 7 and in Tremblay (Board file no. 166-2-9742). If the grievance is maintained, it will have the effect of more or less rewriting the collective agreement, which only the parties can alter. It will also have the effect of directing the Employer to accept a withdrawal of the resignation.

REASONS FOR DECISION

The events which surrounded the grievor's request for leave can be summarized as follows, in chronological order:

1. May 1981: Tony Carter, an air traffic controller at the Oshawa Control Tower, submits his resignation to be effective on or about December 21, 1981;
2. September 21, 1981: the grievor, another air traffic controller at the Oshawa Control Tower, advises his unit chief that he will tender his resignation within the next six months to take employment with ICAO. He asks to be advised "now" that his resignation will be accepted when tendered. He also states that he hopes that the Department might consider his application for employment in two years;
3. September 22, 1981: the unit chief replies that the resignation will be accepted with reluctance if tendered and that without

making any commitments, he would hope that the Department would consider his application "two years hence";

4. September 28, 1981: ICAO sends an office memorandum to the representative of Canada on the Council of ICAO, asking for the release of the grievor "on loan to ICAO";
5. October 19, 1981: the grievor tenders his resignation, effective date to be January 15, 1982 and he asks for an acceptance of the resignation "as soon as possible, in writing";
6. October 19, 1981: the Unit Chief accepts "with regret" the resignation, effective January 15, 1982;
7. October 28, 1981: telex to ICAO from the Assistant to the Canadian Representative advising that the request for release of a number of controllers, including the grievor, has not been approved;
8. October 29, 1981: letter confirming the above telex;
9. November 10, 1981: the grievor refers to a change of policy which has come to his attention and he asks for a two-year leave of absence to fulfill an ICAO posting in Saudi Arabia, adding that should the leave be granted, it is his intention to withdraw the resignation;
10. November 12, 1981: the Unit Chief sends the above request to Leo Middlestadt, the superintendent of operations for Ontario;
11. November 30, 1981: Leo Middlestadt advises that "the critical staff shortage that exists within our organization does not permit consideration of leave without pay for Mr. Jarrell";
12. December 7, 1981: the grievor is advised accordingly by his Unit Chief;
13. Beginning of December 1981: Miss St. Andrews reports to Oshawa for training as an air traffic controller; at about the same

- time, Tony Carter withdraws his resignation;
14. On or about January 4, 1982: David Turton reports to Oshawa for training as an air traffic controller
 15. January 15, 1982: the grievor leaves his employment at the Oshawa Control Tower and joins ICAO;
 16. March 1982: Miss St. Andrews completes her training and joins the Oshawa Control Tower as an air traffic controller;
 17. June 1982: David Turton completes his training and joins the Oshawa Control Tower as an air traffic controller;
 18. June 6, 1982: Tony Carter leaves his assignment on sick leave.

It seems to me that when the grievor filed his request for leave of absence without pay, he acted as if he had not previously submitted his resignation and as if this resignation had not been accepted, which is not the case. It is true that when the request was filed, the grievor was still employed by the employer but his contract was to expire on January 15, 1982, definitively and unconditionally, and both parties had agreed to this. I am of the opinion that since the request concerned a period of time after the effective date of the grievor's resignation, it would have been necessary for the grievor to withdraw his resignation and for the employer to accept such withdrawal of the resignation before the request could be considered.

Even if the grievor's request for leave was to be considered as having been made validly and at the right moment, it is clear that as of October 19, 1981, the Oshawa Control Tower was faced with the prospect that its staff of air traffic controllers would soon be reduced from nine to seven, or by about 22%. The shortage was such that arrangements were made to relocate two employees from other Control Towers to Oshawa. The staff shortage in Oshawa was not unique.

Such a shortage also existed elsewhere in the Ontario region and, according to the superintendent of operations, it was feared that it could become serious.

I come to the conclusion from the evidence which was adduced that the facts support the Employer's conclusion that operational requirements were such that it could not grant leave of absence without pay to the grievor.

This grievance is dismissed.

For the Board,

J. Maurice Cantin, Q.C.
Vice Chairman

Ottawa, June 14, 1983