

SEP 6 1983

File: 166-2-13804

No. 83

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

BETWEEN:

G. CROMPTON,

grievor,

AND:

TREASURY BOARD
(Department of Transport),

employer

DECISION

Before: J. Galipeault, Board Member and Adjudicator

For the grievor: Ms. C.H. MacLean, counsel

For the employer: P. Hamel, counsel

Heard in Montreal, April 19, 1983.

ART 10
CODE 402/79

~~LEAVE~~ SPECIAL LEAVE } TO ATTEND
WITH PAY } COURT HEARING

DECISION

The following grievance was presented on April 27, 1982, by Mr. G. Crompton, an air traffic controller, AI-4, for Transport Canada, at Dorval Airport:

In April, 1981, I was served with a Show Cause Order issued from the Federal Court Trial Division requiring my attendance at Court (action #T-4640-80 on April 21st 1981.

As a result of such Show Cause Order, I was required to be absent on the 21st of April, 1981.

The Employer on the 19th day of April, 1982 refused in writing to grant me special leave with pay for the above mentioned date contrary to article 10.04 of the CATCA Treasury Board Collective Agreement #402/79

The corrective action requested is:

A declaration that the Employer has breached article 10 of the CATCA Treasury Board Collective Agreement No. 402/79. An order requiring the Employer to pay special leave for the date mentioned in accordance with article 10.04 of the CATCA/TB agreement.

In its reply at the last step of the grievance procedure, the employer stated:

Your grievance of April 27, 1982 dealing with a request for special leave was reviewed carefully and discussed with a representative of your association.

I have reviewed the circumstances surrounding your request for leave for your absence of April 21, 1981 and I am satisfied that leave with pay as requested was properly denied.

Accordingly, the corrective action requested is not granted and your grievance is denied.

THE EVIDENCE

No witnesses were heard. Two exhibits were filed by the grievor, that is, as G-1, copy of the memorandum sent by the grievor to his supervisor, April 20, 1981; and, as G-2, copy of the Show Cause Order issued by the Federal Court of Canada, Trial Division, April 2, 1981.

Both counsel agreed that on April 21st, 1981, the grievor was supposed to work the day shift of 7:00 AM to 3:00 PM. His court appearance ended between 12:30 PM and 1:00 PM.

In lieu of testimonies, an agreed statement of facts was filed by the parties. It contains the following:

1. The Grievor is an Air Traffic Controller employed by Treasury Board, Department of Transport, at the Montreal Area Control Centre.
2. At all material times, the Grievor's terms and conditions of employment were governed by Collective Agreement 402/79 between Treasury Board and the Canadian Air Traffic Control Association.
3. In April, 1981, the Grievor was served with a Show Cause Order in the Federal Court Trial Division (Action No. T-4640-80) which required him to appear before the Court on April 21st, 1981 to show cause why he should not be cited for contempt of Court. Fifty-three other controllers from the Montreal Area Control Centre received similar orders.

4. The Grievor was scheduled to work on April 21st, 1981. Since he would be unable to be at work because of the requirement that he appear in Court, the Grievor requested special leave pursuant to Article 10.04 of the Collective Agreement. He did in fact attend at Court on April 21st, 1981.
5. Approximately one year later, the Employer offered the Grievor the possibility of requesting annual leave, "lieu day" credits or accumulated time off in lieu of over-time in order to compensate for his absence on April 21st, 1981.
6. When the Grievor rejected this offer and again asked for special leave under the Collective Agreement, he was advised (in a reply at the second level of the Grievance procedure) that the absence would be considered as leave without pay and appropriate pay action would be taken to deduct the salary he had been paid for his shift on April 21st, 1981.
7. In December of 1981, the Grievor was discharged by the Court when the Crown withdrew its case against him.

THE ARGUMENTS

Counsel for the grievor argued that since there are no specific articles in the relevant collective agreement with respect to court appearance, the article which one should refer to is article 10.04. Ms. MacLean said that the reason given by the employer to refuse the special leave with pay asked by the grievor was clearly not a circumstance directly attributable to him. After he had been served a copy of the Show Cause Order, emanating from the Federal Court of Canada, Trial Division, the grievor had no other choice but to attend.

When he failed to grant the special paid leave, the employer was unreasonable. The way the employer proceeded in the present instance is unusual. He first granted to the grievor his special leave with pay then, one year later, withdrew it offering instead "lieu day" credits or accumulated time off in lieu of overtime as per his accumulated credits in order to compensate for his absence on April 21, 1981. In acting this way, the employer was unreasonable. As may be seen in the above-mentioned agreed statement of facts, the employer is giving no reasons at all why he refused to grant the special leave with pay asked. By reason of article 10.04 of the collective agreement, the grievor is entitled to his special leave with pay.

Counsel for the employer argued that the employer never prevented the grievor from obeying the Federal Court of Canada's Show Cause Order. His absence without pay was authorized by the employer. The grievor's demand was in limbo for twelve months. The employer never decided that the grievor would be granted his special leave with pay. Article 10.04 of the relevant collective agreement has no application here. Since there is nothing in the collective agreement with respect to requests for court leave, one should then refer to the Public Service Terms and Conditions of Employment Regulations. Section 15 deals with Court Leave and it is easy to see that its content does not apply in the present case. The employer was then right in refusing to grant the special leave with pay. Article 11 of the relevant collective agreement, titled: Leave of absence on association business, deals with a form of court leave, not with court leave such as mentioned by the grievor in his application filed as G-1. Mr. Hamel was further of the opinion that if article 10.04 is applicable in the present instance, the grievor has not made a *prima facie* case that he qualified for his special leave with pay. The grievor caused his own misfortune. He should not get his special leave with pay because he had to answer

why he should not be found in contempt of Court. Fifty-four air traffic controllers were cited for contempt of Court. The employer was not unreasonable in refusing them their demands for special leave with pay. On April 21, 1981, the grievor was released, by the Court, between 12:30 and 1:00 PM. He could have resumed his work after his court appearance but he chose not to do it.

Ms. MacLean replied that since the air traffic controllers which appeared in Court at 10:00 AM on April 21, 1981, had to be replaced beforehand, there was no use for the grievor, as for others, to go to his work station that same day after being released by the Court between 12:30 and 1:00 PM, since he was on the day shift ending at 3:00 PM. There was no case in the Federal Court of Canada, Trial Division, against the grievor since the Crown decided to withdraw its charges against him. The employer was then unreasonable in refusing to grant the special leave with pay. Article 45 of the Public Service Terms and Conditions of Employment Regulations does not deal with the present particular situation. It is article 10.04, and nothing else, of the relevant collective agreement which deals with it. 10.04 overrides the Regulations. There was no evidence adduced that the employer's refusal was based on reasonable grounds.

REASONS FOR DECISION

When she argued before me, counsel for the grievor said that since there is no specific article in the relevant collective agreement with respect to court appearance, the article which one should refer to is article 10.04. I must agree with her and therefore disagree with counsel for the employer who argued that article 15 of the Public Service Terms and Conditions of Employment Regulations, and not article 10.04 of the relevant collective agreement, should apply.

The Public Service Terms and Conditions of Employment Regulations cannot apply in the present grievance because they are not part or incorporated to the relevant collective agreement. The above are only Regulations of the Treasury Board, pursuant to section 7 of the Financial Administration Act. The above Regulations are not part of the Financial Administration Act. Furthermore, section 91(1)a) of the Public Service Staff Relations Act determines that "where an employee has presented a grievance up to and including the final level in the grievance process with respect to the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award, and his grievance has not been dealt with to his satisfaction, he may refer the grievance to adjudication."

Section 10.04 of the relevant collective agreement reads as follows:

Leave for Other Reasons

At the discretion of the Employer, special leave with pay may be granted when circumstances not directly attributable to the employee, including illness in the immediate family, as defined in clause 10.02, prevent his reporting for duty. Such leave shall not be unreasonably withheld.

(emphasis added)

It is my utmost opinion that the grievor, after he had been personally served a copy of the Show Cause Order issued by the Federal Court of Canada, Trial Division, to attend on April 21, 1981, had no other choice but to attend. When, for that reason, the grievor applied for special leave with pay, I think the employer was unreasonable when it denied it later, considering the fact that these were then circumstances not directly attributable to the grievor. As

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the evidence showed, the employer never gave any reasons whatsoever why it refused to grant the special leave with pay. I therefore find that the grievor, notwithstanding the fact that the charges laid against him in the Federal Court of Canada, Trial Division, were withdrawn by the Crown, proved, at least on the balance of probabilities, that he qualified for his special leave with pay.

FOR ALL THESE REASONS, I maintain the grievance and declare that the grievor is entitled for special leave with pay for April 21, 1981.

For the Board,

Jean Galipeault,
Adjudicator and Board Member

OTTAWA, August 17, 1983