

No. 88
AUG

File: 166-2-13952

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

BETWEEN:

THOMAS M. WATT,

Grievor,

AND:

TREASURY BOARD,
(Department of Transport),

Employer.

DECISION

Before: D.G. Pyle, Board Member and Adjudicator.

For the grievor: R.T. Smith, Canadian Air Traffic Control Association.

For the employer: H. Newman, counsel.

Heard June 23, 1983 at Calgary, Alberta.

ART 9
CODE 402/82

MEDICAL CERTIFICATE IF USE MORE
THAN 7 CASUAL SICK DAYS

DECISION

1. This is a reference to adjudication, pursuant to section 91 of the Public Service Staff Relations Act (PSSRA), of a grievance of a Mr. Thomas M. Watt, dated October 1, 1982, in which he has claimed that he was improperly denied two days of sick leave with pay.

2. Mr. Watt is an air traffic controller (AI-3) at the Airport Control Tower, Calgary International Airport, and has been so employed since July 20, 1981. He commenced his employment with the department on July 20, 1979 and was employed as an air traffic controller in the airport control towers at Lethbridge, Red Deer and Yellowknife before his transfer to Calgary. He is represented for collective bargaining purposes by the Canadian Air Traffic Control Association and his terms and conditions of employment are governed by the terms of the collective agreement between the Treasury Board and the Association, Code 402/82, Expiry Date: December 31, 1982 (exhibit 1).

3. At issue is the interpretation of the provisions of article 9, "sick leave" and particularly clauses 9.02 and 9.03, which clauses read as follows:

9.02 An employee is eligible for sick leave with pay when he is unable to perform his duties because of illness or injury provided that:

(a) he has the necessary sick leave credits,

and

(b) he satisfies the Employer of this condition in such manner and at such time as may be determined by the Employer.

9.03 Unless otherwise informed by the Employer before or during the period of illness or injury that a certificate from a qualified medical practitioner, licensed chiropractor, dentist, dental surgeon or orthodontist, will be required, a statement signed by the employee describing the nature of his illness or injury and stating that because of this illness or injury he was unable to perform his duties shall, when delivered to the Employer, be considered as meeting the requirements of clause 9.02(b):

(a) if the period of leave requested does not exceed three (3) days,

and

(b) if in the current fiscal year, the employer has not been granted more than seven (7) days' sick leave wholly on the basis of statements signed by him.

4. The attendance and leave record of the grievor (exhibit 2) is not in dispute. During the fiscal year 1982/83 and prior to the month of September the grievor was absent on sick leave as follows:

April	7 days certified sick leave 1 day casual sick leave
May	3 days casual sick leave
June	4 days certified sick leave 2 days casual sick leave
July	1 day casual sick leave

Mr. Watt had produced a certificate from one or more of the practitioners identified in clause 9.03 for his absences on two occasions and had signed a statement describing his illness, etc., on the other occasions, for a total of 7 days of casual leave. He was absent on September 15 and 16, 1982 and did not file a certificate. In due course the two days were entered on his record as "Leave Without Pay".

5. Under date of September 23, 1982, a memorandum was addressed to the grievor (exhibit 3), signed by a Ms. L. Loepky on behalf of Mr. F.G. Lowe, Unit Chief, Calgary Terminal Control Unit. It reads as follows:

Sick Leave September 15-16, 1982

Reference is made to AI Contract Article 9.

As you have been granted seven (7) days' sick leave wholly on the basis of statements signed by yourself, I am requesting that you provide this office with a medical certificate signed by a qualified medical practitioner for the period September 15 and 16, 1982. If this certificate is not received in this office by September 30, 1982, action will be taken to charge you with "Leave Without Pay" and two (2) days pay will be recovered.

6. Mr. Watt responded to this memorandum by returning a copy with a note in his own handwriting. The note reads as follows:

The contract does not say 7 days wholly on the basis of statements signed by myself. It says more than 7 days. As I have not as yet had more than 7 days the above sick leave form is valid as is.

T.M.W.

7. In his testimony Mr. Watt stated that, prior to September 15, 1982, the employer had not initiated any action to inform him as to his sick leave credits. Periodically he would ask the unit clerk to show him his record and he was never refused. When he took his sixth day of casual sick leave on June 8 and his seventh on July 13 no action was initiated by the employer by way of any discussion with him. Indeed he only became aware of the employer's position in these proceedings when he telephoned the unit clerk, Ms. Loepky, on September 21 to enquire as to an overtime pay cheque. She informed him at that time that he would have to file a medical certificate for his absence on September 15 and 16.

8. In cross-examination Mr. Watt stated that he had been absent on sick leave in the previous fiscal year (1981/82) for a total of seven days of casual sick leave and 10 days of certified sick leave. Asked as to whether he was aware of the employer not allowing more than seven days of casual sick leave in a fiscal year, the grievor responded, "I don't know; I never tried it; no one has tried it." He agreed that he had seen his record in the presence of the unit clerk but he would not accept the use of the word "discuss". In the month of June Ms. Loepky had said that he had used six days of casual sick leave but she did not say that he had one day left. "I have no idea why she told me that". In July he submitted his signed statement but he had no conversation with Ms. Loepky or anyone else. No one informed him, before September 21, 1982, that he had no more casual sick leave and that a medical certificate would be required.

9. Mr. Watt admitted that he was determined to test his conviction as to there being a distinction between the expression "seven (7) days" and "not ... more than seven (7) days" sick leave. He acknowledged that

he could have obtained a medical certificate. Finally, he was surprised that his challenge to the employer's interpretation of clause 9.03 had not raised more of an alarm.

10. Ms. Leslie Loeppky was the one witness called by the employer. Ms. Loeppky is the Unit Clerk (CR-4) at the Calgary Terminal Control Unit and has been so employed since November 24, 1981. She has been employed in the department since June 15, 1969, and previously she was secretary and personnel clerk in Telecommunications and Electronics Branch. Ms. Loeppky maintains all the records relating to annual leave, sick leave, special leave, overtime, etc., for approximately 80 employees and reports directly to Mr. Lowe and to Mr. Fudakowski, Terminal Operations Supervisor.

11. Ms. Loeppky testified that the practice in the unit is to accept the statement signed by an employee for casual sick leave but up to a maximum of seven days in a fiscal year. Thereafter, and for any absence of more than three days duration, a physician's statement is required. She monitors the use of sick leave and for years her practice has been to inform an employee, as he approaches six days of casual sick leave, of that fact. When he has used seven days she then informs the employee that, henceforth, he will need a medical certificate.

12. Ms. Loeppky testified that she noted Mr. Watt's record on June 9, 1982, and telephoned him, in the control tower, to inform him that he had used six days and that he had one day of casual sick leave remaining. His reply was, "fine, thanks". On July 16 (a Monday) she again 'phoned him and advised him that he was no longer eligible for casual leave in the fiscal year. His reply, as she recalled it, was that it was not a matter of any concern to him. After September 16, when the grievor called regarding an overtime payment cheque,

Ms. Loeppky told him that a medical certificate was necessary before he could be paid for his absence on September 15 and 16. The grievor's reply was that he would not be filing a medical certificate. She reviewed the matter with Mr. Lowe and then advised the grievor that he would have until September 30 to furnish a medical certificate. He still refused and she then wrote the letter of September 23, 1982 (exhibit 3).

13. Ms. Loeppky was convinced that she had communicated with Mr. Watt in the same manner as she has communicated with other employees for years. If she was unable to contact an employee when she first tried to do so she would note the fact on her "day-timer" and would then follow the matter up until she was in communication with him. There was no record of her being unable to contact Mr. Watt. Further, she identified a memorandum (exhibit 5) which she wrote early in October, 1982. Mr. Fudakowski had advised her that Mr. Watt had filed his grievance and had recommended to her that she set out her recollection of the events. The memorandum reads as follows:

Casual Sick Leave - T. Watt

Mr. Watt was advised by myself in the month of June that he had only 1 day of casual sick leave remaining. When the last day of casual sick leave was liquidated in the month of July he was advised that any future sick leave taken would have to be certified by a Physician's Certificate of Disability for Duty.

He then had 2 days of sick leave marked on the Tower signing sheets for Sept. 15 & 16. A note was written advising him that a medical certificate was required. When Mr. Watt phoned the office on Sept. 21 to find out if the paycheques were in, he was

told by myself that a medical certificate was required to cover September 15 and 16. He refused. When he arrived for his cheque he was again asked for a medical certificate. He informed me at that time that he would not be supplying the requested form.

14. In cross-examination Ms. Loepky was asked if there was an obligation on the employer to inform employees that they had exhausted their casual sick leave credits. Her reply was that she felt that employees knew what leave credits they had and what leave credits they had used.

ARGUMENT FOR THE BARGAINING AGENT

15. Mr. Smith submitted that clause 9.03 of the collective agreement imposes upon the employer an obligation to inform an employee, before or during an absence, that a medical certificate is required. If the employer does not so advise the employee then the employee's personal statement must suffice. The issue in this dispute is a narrow one: was the grievor notified before or during a period when more than seven days of casual sick leave were being used? As of September 14, 1982, the grievor had used seven days and obviously had not used more than seven days. In that he had only used seven days he was entitled to one further absence, up to a maximum of three days, before he was required to produce a medical certificate.

16. The employer has an obligation to inform an employee and, furthermore, an obligation to prove that it did so inform the employee. The undated memorandum of Ms. Loepky (exhibit 5) was written after the grievance had been filed and hence was self-serving. The grievor's recollection of the events as they affected him is likely to be

extremely accurate. On the other hand, Ms. Loepky is responsible for maintaining the records and communicating with approximately eighty employees in the unit. She could well be confused as to her contacts with the grievor.

ARGUMENT FOR THE EMPLOYER

17. Mr. Newman stated at the outset that he would not argue the meaning of the expression "not more than seven (7) days". He submitted that the accepted practice in the Calgary Terminal Control Unit is that an employee will be allowed up to seven days of casual sick leave. Whether that interpretation is right or wrong can be readily determined by an examination of clause 9.03. That clause stipulates that, provided there is no prior notice to the contrary, only seven days of casual sick leave are allowed to any one employee in one fiscal year. The grievor is seeking an additional period of casual sick leave up to a maximum of three days at one time.

18. The collective agreement clearly states that the employer has the right, at any time, to inform an employee that henceforth his personal statement will not suffice. The employer has consistently held that these employees must produce a medical certificate for sick leave beyond seven days of casual sick leave. The practice alone will establish that no employee has been allowed more than seven days. The practice is "etched in stone" and the grievor is well aware of that fact.

19. The grievor was informed on two occasions that, once seven days of casual sick leave were used, he would be obliged to file a medical certificate in support of an application for sick leave with pay. The grievor was obviously evasive in his response to questions as to the advice he received. Ms. Loepky could state what was standard

practice. She is a very experienced senior systems employee. There is no suggestion of any animosity on her part. Her testimony is convincing and is corroborated by her memorandum (exhibit 5). The grievor, in brief, is seeking to "test the system", to create consternation among the representatives of the employer and to prove that he can use his seven days of casual sick leave and then, unless he had been advised to the contrary, have another three days of casual sick leave without filing a medical certificate.

REBUTTAL ARGUMENT FOR THE BARGAINING AGENT

20. Clause 9.03 of the collective agreement places an obligation on the employer to advise an employee, before or during an absence in excess of seven days casual sick leave, of the requirement for a medical certificate. Mr. Watt was very positive and convincing. He was not informed of any requirement of a medical certificate before or during an absence in excess of seven days of casual sick leave. Finally, he may well be "testing the system" but he is not precluded from doing so.

DECISION

21. To be charitable, it is difficult to follow the argument submitted by and on behalf of the grievor. The parties have agreed, in clause 9.02, that an employee may draw on his sick leave credits provided he is able to satisfy the employer that he was unable to perform his duties because of an illness or an injury. They have agreed further, in clause 9.03, that the employer may accept as proof of his incapacity a statement signed by the employee, for a total of not more than seven days where the absence is of brief duration (i.e. of not more than three days). The acceptance of such a signed statement by the employer is, however, discretionary (assuming good faith). The employer

may decline to accept such a statement for any and all such absences and once the employee is put on notice he must satisfy the employer by filing a certificate from a qualified medical practitioner, etc., if he wishes to draw on his sick leave credits.

22. It follows that the employer is under no obligation to inform an employee that he has exhausted his seven days of casual sick leave. The parties have agreed that seven days is the maximum number an employee may "certify" by his own signed statement. If the grievor has difficulty in appreciating the use of the expression "not... more than seven (7) days" it may be due to his failure to appreciate that an employee is not assured of seven days of casual sick leave, come what may.

23. Absent any ambiguity there is no necessity to relate to the past practice at the Calgary Terminal Control Unit. I would observe, however, that, as between the testimony of Mr. Watt and of Ms. Loepky, I found the latter more credible. Mr. Watt was not convincing in his refusal to accept the representations Ms. Loepky made to him as "discussions", as notice by or on behalf of the employer and, in addition, his alleged failure to understand why Ms. Loepky would tell him, on June, 1982, that he had used six days of his casual sick leave.

24. Accordingly, the grievance of Mr. T.M. Watt is dismissed and these adjudication proceedings are terminated.

D.G. Pyle,
Board Member and Adjudicator.

OTTAWA, August 10, 1983.