JUN 13 1985

File N°: 166-2-14945 No. 149

PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

DARREN K. WATTS

Grievor,

AND:

TREASURY BOARD
(Transport Canada)

Employer.

Before: Walter L. Nisbet, Q.C., Deputy Chairman

For the Grievor: Catherine H. MacLean, Counsel

For the Employer: Harvey A. Newman, Counsel

Heard at OTTAWA, April 1, 1985.

RELEASED & REINSTATED — ENTITLEMENTS AFTER BEING REINSTATED

DECISION

The grievor is an air traffic controller (AI-02) employed in the Department of Transport at the North Bay Air Traffic Control Tower, North Bay, Ontario. The Canadian Air Traffic Control Association is certified as the bargaining agent for the Air Traffic Control Group bargaining unit in which the grievor is included. On October 6, 1983 the grievor was rejected as a probationer. On October 13, 1983 he presented a grievance against that rejection which states:

> "I grieve that the employer is in breach of the provision of the current Collective Agreement between the Treasury Board and the Canadian Air Traffic Control Association (402/82), in particular but not limited to Article 3.0.1 and Letter of Understanding Number 5-82 in rejecting my employment on probation effective October 6, 1983".

and the corrective action he requested is:

> "Immediate reinstatement as an air traffic controller, AI-02, together will (sic) all lost wages, benefits and privileges as set out in the Collective Agreement".

As a result of this grievance, the grievor was reinstated as an air traffic controller (AI-02) on January 28, 1985. At that time the employer took the position that the grievor was entitled to all the pay and

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benefits he had lost during the period he was unemployed, i.e., October 6, 1983 to January 28, 1985 (15 months and 22 days), and took steps to reimburse him accordingly. The employer also took the position that the grievor's rejection was not a form of disciplinary action but was contrary to the Collective Agreement. The union agrees with this position and, accordingly, the parties submitted that the grievance was properly referred to adjudication under paragraph 91(1)(a) of the Act.

The acknowledged breach by the employer of Letter of Understanding 5/82 has given rise to a dispute between the parties as to the manner in which the grievor is to be treated for the purpose of restoring the pay and benefits he lost during the period he was unemployed from October 6, 1983 to January 28, 1985. For the grievor it was contended that he should have been treated as an "Operational Controller" during that period. The employer has treated him as an "Operational Controller" since the date of his reinstatement. If the grievor is to be treated as an "Operational Controller" during the period of his unemployment, it was contended that his entitlement to holiday pay, the operational facility premium, and an amount to compensate for lost compensation for the overtime work he could reasonably have been expected to be called upon to perform during that period would all be affected.

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Since the date of his reinstatement, the grievor's pay and benefits are governed by the new collective agreement entered into between the employer and the bargaining agent (Code 402/85, effective January 2, 1985; expiry December 31, 1986.) A Letter of Understanding dated February 22, 1985 (#12-85) sets out the intention of the parties with respect to the application of pay to employees in the bargaining unit who change from operating to non-operating status and vice versa. Attached to this letter is a copy of Table "A", Change from operating to non-operating and Table "B" Change from non-operating to operating, as well as a copy of Appendix "A" showing the rates of pay for operating employees and those for non-operating employees. The Letter of Understanding, the Tables and the Appendix were submitted in evidence on consent and marked Exhibit "G-1".

On behalf of the grievor a ruling was requested concerning the effect of a recent amendment to section 50 of the Public Service Superannuation Regulations, a copy of which, together with a copy of that section as it was before the amendment, were submitted in evidence on consent and marked Exhibit G-2. The key to the proper determination of the benefits under those regulations to which the grievor is entitled upon his reinstatement is whether or not his reinstatement in employment is ordered by a "competent authority". This question arises by virtue of the amendment to section 50 of the regulations by the addition of a new subsection which states:

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> "(2.2) Where a competent authority orders that a person described in paragraph (1)(a) who has been relieved of any of the duties referred to in subparagraphs (1)(a)(i), (iii) or (iv) be reinstated in those duties, the period from the day of being relieved from those duties to the day on which it is ordered that he be reinstated, or any shorter period so specified in the order, is operational service."

The question was raised as to whether or not the employer is a "competent authority" for this purpose. The point was also made that this expression may include an authority other than the authority responsible for the grievor's rejection. It was argued that, despite the concession of the employer, these questions remain outstanding and are properly before me for resolution. Where the grievance has been settled by the reinstatement of the grievor, he ought not to be in a weaker position than he would have been had his grievance in its entirety come before me under paragraph 91(1)(a) of the Act. The grievor must not lose more than 15 months of "operational service".

For the grievor it was submitted that I was not being asked to grant any remedies pursuant to the Public Service Superannuation Regulations. I was being asked only to make a declaration in the terms of the employer's

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concession that the grievor's rejection was unlawful, reinstatement of the grievor, and the pay and benefit consequences that must properly follow his reinstatement.

The grievor testified that he was appointed as an air traffic control trainee on June 10, 1981. His training consisted of six weeks of classroom instruction and use of equipment to simulate the control of air traffic. He was a "non-operational" controller during this period. At the end of the period he commenced training at the Sault St. Marie control tower where he was an "operational" employee. After his six weeks of training at Sault St. Marie he went to the training institute operated by the Department of Transport for a period of 14 weeks where he received more classroom and simulated air traffic control training during which he was a "non-operational" employee. He then went to the grade 2 air traffic control tower at North Bay where he "checked out" on June 15, 1982 as an operational air traffic controller (AI-02). Later he was sent to the grade 2 air traffic control tower at Hamilton, a busier tower than the one at North Bay. He failed to "check out" at this tower, whereupon his on-the-job training to meet the required standards at Hamilton ceased. He returned to the air traffic control tower at North Bay where he underwent a brief period of "refamiliarization" training which was required as a result of his not having performed the duties of an operational controller at North Bay for a period in excess of 30 days. The grievor acted as a fully trained operational air traffic controller only for a

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period of 4 months following his first "check out" at North Bay on June 15, 1982. After his return to North Bay the grievor was advised on June 23, 1983 that he would continue to train "conditionally". This meant that a weakness in his performance as an air traffic controller had been identified and, in the case of the grievor, a time limit of 3 weeks had been established to permit him to correct it.

In July 1983 the grievor was advised that a decision had been made that he would cease training but that he was to remain an "operational employee" until August 10, 1983 when his status would change to "non-operational". For a brief period following that change of status the grievor performed perfunctory administrative duties not related to the control of air traffic after which he was placed on leave with pay until further direction. In early September the grievor was advised of his impending rejection as a probationer which became effective on October 6, 1983.

As an air traffic control trainee the grievor never worked overtime. The grievor acknowledged that from August 10 to October 6, 1983 his status was that of a "non-operational employee".

There is uncontradicted evidence to the effect that all positions in the bargaining unit classified AI-02 are ordinarily "operational". The status of the employees occupying these positions may only change from

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"operational" to "non-operational" when they are engaged in classroom or simulation training or are assigned non-operational duties which typically occur when procedural changes are made in the methods of conducting operations at operational units or new designs for controlling air traffic are introduced. When these changes occur the performance of non-operational duties by individual employees lasts only for about a week at a time.

ARGUMENT FOR THE GRIEVOR

Ms. MacLean referred to certain benefits provided by the Collective Agreement to which the grievor would have been entitled had he remained employed during the period of his unemployment, i.e., the "operational facility premium", Article 31, and the right to be paid at one and one-half times his straight time hourly rate for all hours worked on a holiday and to be granted a day of leave with pay in lieu of the holiday, clause 16.04. She also referred to clause 16.02 which provides that when a day designated as a holiday coincides with an employees' day of rest, the holiday shall be moved to the employees' first working day following his day of rest. She submitted that these were benefits the grievor would undoubtedly have been able to enjoy had he remained employed during his period of unemployment.

Ms. MacLean submitted that I have broad powers under section 96 of the act to fashion an appropriate remedy for the purpose of putting the grievor as closely as possible in the position he would have been in had he

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not been rejected improperly. She referred to Gauthier et al (Board Files: 166-2-12727 - 12728 and 12729) where the adjudicator found, on the evidence, that had the grievors not been discharged, they would have continued to make themselves available for overtime work in the same manner that they had in the period prior to their discharge and that the frequency of their performance of such work would have been as shown by certain exhibits in evidence before him. It was argued that I ought to make an award of compensation for the grievor for his loss of opportunity to perform overtime work during the period of his unemployment. In addition, I ought to award compensation for the loss of the "lieu days" lost by the grievor during his period of unemployment.

Ms. MacLean argued that, at the time of his rejection, the only position held by the grievor was that of an air traffic controller in training, an "operational" position. The employer reinstated the grievor in essentially the same position, i.e., that of an air traffic controller in training. The brief period preceeding his rejection does not establish the grievor's status as a "non-operational employee". As a consequence, I must find that the grievor is entitled to be treated as an "operational employee" during the period of his unemployment. She pointed out that none of the requirements of clause 13.08 of the Collective Agreement had been complied with by the employer for the purpose of changing the grievor's status from that of an "operational employee" to a "non-operational employee".

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Ms. MacLean conceded that, while under training, the grievor would not be asked to perform overtime work. However, she submitted that if he had "checked out" as an operational controller he would undoubtedly have been required to perform the amount of overtime work consistent with the amount of such work performed by the other air traffic controllers at North Bay. She conceded that there were some "factual difficulties" facing me in determining the amount of overtime worked at North Bay at the relevant time and the amount of overtime, if any, the grievor might have worked there during the period of his unemployment. Nevertheless, she asked that I consider awarding compensation to the grievor for any opportunity to perform overtime work he might have lost at North Bay during his period of unemployment, suggesting that the parties could agree on the necessary calculations.

The operational facility premium for the grievor ought to be determined by reference to the premium established for the North Bay Tower by Appendix "B" of the Collective Agreement, i.e., $400.00 per year.

Finally, it was submitted that the status of the grievor as an air traffic controller in training could not have lasted for the entire period of his unemployment. The change in his duties prior to his rejection cannot operate to change his status from that of an "operational employee" to a "non-operational employee".

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ARGUMENT FOR THE EMPLOYER

On behalf of the employer, it was submitted that the remedy the grievor requests me to fashion for him is necessarily based on the assumption that the grievor would have "checked out" at North Bay during the period of his unemployment. It is quite possible that he might not have "checked out" during that period. He has not done so to date. There is simply no certainty about it.

On the question of my remedial authority, counsel for the employer referred me to Brown and Beatty, Canadian Labour Arbitration (2d) at page 60 where the authors state:

> "That legislative framework has been recognized and accepted as establishing an arbitral mandate to fashion effective remedies, including the power to award damages, so as to provide redress for violations of the Collective Agreement beyond mere declaratory relief. However, this implied remedial authority has not been perceived as being absolute or all-pervasive. To the contrary, courts have held that there are certain limitations to arbitrators' remedial powers, particularly with regard to their authority to fashion equitable remedies such as cease and desist orders and to rectify the collective agreement. As well, the arbitrators' remedial powers

> may be limited either by the collective agreement or by the submission to arbitration itself. However, the courts have expressly recognized the existence of an extensive remedial authority in the adjudication of discharge and discipline cases in the absence of express statutory or contractual limitations."

Counsel submitted that my remedial authority to "make the grievor whole" is limited to discharge cases. He referred me again to Brown and Beatty, supra, at page 62 where it is stated:

> "As well, arbitrators have accepted the general common law rule that damages should be restricted to remedying the monetary loss and ought not to be awarded for generally hurt feelings or loss of reputation which may flow, for example, from an unjust discharge. Arbitrators have recognized that the general principal is subject to three basic qualifying factors. In the first place, the loss claimed must not be too remote, that is, it must be 'reasonably foreseeable'. Secondly, the aggrieved party must act reasonably to mitigate his loss. Finally, the loss or damages must be certain and not speculative."

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Counsel argued that the grievor is asking me to speculate about his loss. In Gauthier, supra, the employer admitted that the grievors in that case would have worked the exact amount of the overtime claimed. That is not so in this case as there is no certainty that overtime would have been worked by the grievor. I cannot base my award on such uncertainty. Counsel also submitted that air traffic controllers do not all work on holidays and there is no evidence before me that the grievor worked on any holidays. Moreover, the grievor was advised that he would be credited with the designated holidays as they occurred during the period of his unemployment. (See memorandum dated January 24, 1985, Middlestadt to Watts, Exhibit G-5). Counsel finally submitted that the grievor's claim to be paid the operational facility premium is based on speculation. The grievor did not "check out" at North Bay a second time. There is no evidence to show where the grievor would have been employed had he "checked out" during his period of unemployment. As a consequence I cannot base an award of compensation on such uncertainty.

Counsel pointed out that the grievor's unchallenged evidence is that he was a "non-operational" employee at the time of his rejection. His pay and benefits treatment as a "non-operational" employee during the period of his unemployment is therefore proper. The substance of the grievor's submissions amounts to a request for a declaration that he ought not to have been rejected and ought to have been "checked out" as an air traffic controller at North Bay.

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Counsel alluded to the fact that the employer had conceded that, during the period the grievor was unemployed, it failed to provide the pay and benefits required by the collective agreement. However, it was submitted that all that needs to be done has been done as outlined in the memorandum dated January 24, 1985 addressed to the grievor by the Acting Regional Manager for Air Traffic Services, Ontario Region, Exhibit G-5.

Counsel submitted that the only appropriate forum in which the question of the proper interpretation or application of the Public Service Superannuation Regulations may be determined is the Federal Court of Canada.

REPLY FOR THE GRIEVOR

The only speculative aspect concerning the grievor's request for compensation for the overtime work he would have performed had he not been rejected is whether or not such overtime would have been performed. All air traffic controllers classified AI-02 are "operational" controllers and the grievor was employed as such a controller. The lowest operational facility premium is $200.00, the minimum amount the grievor would have received as an "operational" controller. Counsel submitted that it was reasonably foreseable that the grievor would have "checked out" at North Bay and he should receive the premium provided for that operational facility.

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Counsel submitted that there are no duties (except only for a brief period) the grievor could have performed or would have performed that would have changed his status as an "operational" controller.

REASONS FOR DECISION

In my view, the only issue properly before me which I have the jurisdiction to determine is whether or not the grievor is entitled to be treated as an "operational controller" during the period of his unemployment, from October 6, 1983 to January 28, 1985. In particular, I have concluded that I lack the jurisdiction to interpret or apply any provisions of the Public Service Superannuation Regulations in respect of the grievor. For example, if I were to declare that during the period of his unemployment, the grievor must be considered to have been in "operational service" for the purposes of those regulations, I would necessarily be interpreting and applying them in respect of the grievor. There is no evidence before me that establishes that these regulations are incorporated in the applicable collective agreement or are to be considered a part thereof.

After careful consideration of all the evidence, I find that, at the time of his rejection, the grievor had not ceased to be an "operational controller". The evidence discloses that he was considered by the employer to have that status until August 10, 1983 on which date he was assigned perfunctory administrative duties that were

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"non-operational". The grievor performed these duties only until he commenced a period of leave with pay on or about August 15, 1983. The grievor was advised of the employer's intention to reject him while on probation at the end of the first week in September and he was actually rejected on October 6, 1983. I am satisfied, on the evidence, that the employer's decision taken in July to cease the training of the grievor at North Bay, to continue his status as an "operational controller" until August 10, 1983, the assignment of perfunctionary administrative duties for a period of only a few days, and the granting of leave with pay thereafter were decisions or actions taken by the employer in anticipation of his rejection while on probation. I am satisfied that none of these actions or decisions had the effect of altering the status of the grievor as an "operational controller" at North Bay to that of a "non-operational controller". Moreover, upon his reinstatement, the grievor resumed his training as an air traffic controller (AI-02) by completing successfully two weeks of classroom instruction after which he is to engage in a form of on the job training at the control tower at Boundary Bay, B.C., in anticipation that he will "checkout" as an operational air traffic controller at that location. The grievor has been paid at the rate of pay set out in Appendix "A" of the collective agreement applicable to operating employees from the date of his reinstatement.

For these reasons I find that during the period of his unemployment, the grievor is entitled to be treated

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as if he had been an "operational" employee. However, this finding does not mean that the grievor is entitled to be paid the operational facility premium under article 31 of the collective agreement during that period, or that he is entitled to be compensated for any overtime work he might have been asked to perform during that period if he had "checked out" before the end of it, or that he is entitled to be compensated for the loss of any "lieu days" under clause 16.04 of the collective agreement that he might have lost in the event that he had been required to work on a designated holiday during his period of unemployment. In my view these losses are too uncertain and speculative, and therefore too remote, to justify a compensatory award. There is no evidence before me on the basis of which I can properly find that the grievor would have "checked out" at North Bay at any particular time, or at all, during the period of his unemployment.

Accordingly, the grievance is allowed, in part, and the grievor is entitled to be paid in accordance with the rates of pay set out in Appendix "A" of the collective agreement for operating employees during the period from October 6, 1983 to January 28, 1985. I remain seized of this grievance should there be any difficulty in the implementation of this decision.

W.L. Nisbet
Deputy Chairman

OTTAWA, May 29, 1985.