

File No. 166-2-16318 No. 110

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

BETWEEN:

CLAIRE GINGRAS,

Grievor

AND:

TREASURY BOARD
(Transport Canada),

Employer

Before: J. Galipeault, Board Member

For the grievor: C. MacLean, counsel

For the employer: R. Piché, counsel

Heard at Montreal, January 8, 1987

ART 16

CODE 402/85

ASSIGNMENT OF
KICK DAYS.

DECISION

The grievor, C. Gingras, is an air traffic controller, AI-3, employed by Transport Canada at Montreal International Airport at Dorval, Quebec. In the details of her grievance, Miss Gingras states that, in February 1986, she had eight lieu days to her credit. She intended to carry her eight unused lieu days forward into the 1986-87 fiscal year. However, Miss Gingras was ordered by her employer to take the eight unused lieu days commencing on March 17, 1986. This decision by the employer gave rise to her grievance.

Counsel for the grievor argues that the present case involves the interpretation of clause 16.05 of the Collective Agreement between the Treasury Board and the Canadian Air Traffic Control Association, January 1, 1985 - December 31, 1986, code 402/85. Ms. MacLean contends that the eight lieu days that the employer unilaterally forced Miss Gingras to take between March 17 and 31, 1986 should be restored to her.

Paragraphs (c), (d) and (e) of clause 16.05 of the relevant collective agreement read as follows:

16.05 For operating employees:

.....

- (c) Lieu days may be scheduled as an extension to vacation leave or as occasional days and shall be charged against the lieu day credits on the basis of one shift for one day.

- (d) Consistent with operational requirements of the service and subject to adequate notice, the Employer shall make every reasonable effort to schedule lieu days at times desired by the employee.
- (e) Where in any fiscal year an employee has not been granted all of the lieu days credited to him, he may elect to carry forward into the next fiscal year the unused portion of his lieu days.

EVIDENCE

The grievor testified on her own behalf. She filed five exhibits. Mr. N. Salomon testified for the employer.

Under the provisions of her collective agreement, Miss Gingras is entitled to twenty days' vacation leave plus eleven lieu days per year. On February 19, 1985, the employer issued memorandum No. 7/82 which states the following under the heading Procedure:

... before March 1st of each year, personnel shall indicate in writing their precise choice of dates for vacation leave and lieu days for the total number of days to be credited to them during the coming year. Should you fail to indicate your choice, leave will be scheduled in accordance with the articles of the collective agreement.

(unofficial translation)

Prior to 1985-86, Miss Gingras had one or two lieu days left at the end of the fiscal year. On March 1, 1985, the grievor, in compliance with memorandum no. 7/82, made her leave request for the 85/86 fiscal year. She requested some 31 possible leave days. She requested leave principally in the form of long weekends by taking one day's leave at the beginning or at the end of the week. The employer granted some of the leave days requested and denied others. At Christmas, the employer granted Miss Gingras only three of the five days she requested. In February 1986, Miss Gingras still had eight unused lieu days to her credit, the reason being that the employer had unfairly denied her request, during the 85-86 fiscal year, to use them.

Miss Gingras was thinking of taking vacation leave in the fall of 1985 and the spring of 1986. She had to cancel her vacation leave planned for the fall of 1985 because management asked her to take charge, at the time, of the training of a trainee. The training period lasted five to six months. The grievor provided training to her trainee during the entire training period. Miss Gingras was able to take only a few days' leave here and there between September 1985 and March 1986 because the training of her trainee had first priority. The grievor was waiting until this training ended to chose the dates of her vacation leave. At the beginning of February 1986, Miss Gingras' unit chief asked her when she intended to take her eight remaining lieu days. The grievor told him that she could not take them immediately because her trainee's training had not finished yet. The supervisor

stated that Miss Gingras could schedule her lieu days in March, but she replied that she was entitled to carry them forward into the next fiscal year. On February 17, Miss Gingras learned that she had to use her eight lieu days between March 17 and 31, 1986. Having no other choice, and without any prior reservation or planning, she took a two-week vacation in Guadeloupe. She used her eight lieu days plus five leave days from the next fiscal year.

Miss Gingras testified that her vacation leave for the fall of 1985 was not specifically planned. No one asked her to cancel it. She added that she could request, at the last minute, the vacation leave she had planned for the end of March 1986. At the end of February or the beginning of March 1986, the period of training that Miss Gingras trainee underwent ended. The grievor said nothing to management per se about the three-to-four-week trip she was planning to Chile in the spring of 1986 because, at the times in question, she had no specific dates chosen because she did not know when her trainee's training would end. Miss Gingras received only a few days' advance notice of the precise date on which the training that she was giving her trainee was to end.

According to Mr. N. Salomon, the unit chief of air traffic controllers at Dorval airport, the training of trainees was part of the responsibilities of air traffic controllers. A trainee's training period might last five to six months. When management spoke to Miss Gingras at the beginning of January 1986 about her remaining lieu

days, she said that she did not want to take them for the time being because she was busy with her trainee and she asked to carry them forward into the next fiscal year. When employees planned to take special trips and notified management in advance, management, Mr. Salomon said, tried to accommodate them. Had Miss Gingras told management about her planned trip to Chile, management could have made arrangements with her, even though she had to train a trainee. Mr. Salomon did not think for one minute that the grievor would not use all her lieu days and her vacation leave during the 85-86 fiscal year.

Mr. Mainville, who was responsible for the air traffic controllers' work schedule, tried, insofar as possible, to grant the maximum possible amount of leave to those who made their requests to him in the course of the 85-86 fiscal year. Even after the monthly schedule was posted, Mr. Mainville could make changes to it. In deciding whether or not to grant such leave, Mr. Mainville had to follow the rules. Even though a trainee sometimes changed training officers in the course of his training, it was preferable that he remain with the same person throughout the training period. Management was neither surprised nor unhappy that Miss Gingras decided to remain with her trainee for the duration of his training. This decision was hers alone.

The witness met with Miss Gingras at the beginning of January 1986, before the February schedule was posted, because he wanted to know how she had chosen to use her remaining leave. The grievor stated that she did not know

when she would liquidate the leave days in question in view of the training she had to give her trainee. She did not plan to use them before the end of the fiscal year. In reply, Mr. Salomon told Miss Gingras that her trainee was doing well and that he did not think that this should stand in the way of her using her eight remaining lieu days before March 31, 1986. Other controllers could take charge of Miss Gingras' trainee. The grievor did not want to use her remaining lieu days before the end of the fiscal year. She said nothing at the time about her possible trip in the spring of 1986. Mr. Salomon told Miss Gingras to indicate to him how she intended to use her leave; otherwise, it would be scheduled for March. It was not included in the February schedule in order to give her the chance to chose the dates that best suited her. The grievor knew, at the beginning of January 1986, that her eight lieu days would be scheduled if she herself did not decide to take them on the dates of her choice, before the end of the 85-86 fiscal year.

ARGUMENTS

Counsel for the grievor began her arguments by citing the decisions in Anderson et al. (166-2-9005 to 9008) and [1982] 1 F.C. 714, and Derrien et al. (166-2-13805 and 13807) which, she maintained, applied in the present case. The question one must ask, according to Ms. MacLean, was whether, by unilaterally forcing Ms. Gingras to take her eight remaining lieu days between March 17 and 31, 1986, the employer contravened the provisions of clause 16.05(d) of the relevant collective agreement. She believed so.

According to Ms. MacLean, the facts of the present case were consistent with the principles established in Derrien et al. Miss Gingras very early made her request for thirty-one days of vacation leave and lieu days. What she wanted, especially during the summer, was to be able to take long weekends. The employer approved only 50 per cent of her requests, far less, however than the amount of leave she wanted to take. The employer did not grant her all the leave to which she was entitled. For example, at Christmas, it approved only three of the five days she requested. Miss Gingras made every effort, during the 85-86 fiscal year, to liquidate all her leave and lieu days. She had made plans to take a trip south in the fall of 1985 and to visit Chile at the beginning of April 1986.

When management asked Miss Gingras to take charge of the training of a trainee, she gave this assignment priority. She was not therefore able to take advantage of the discount prices for her planned trips south. When the employer wrongly forced the grievor to liquidate her eight lieu day at the end of March 1986, it made her take leave against her will, even obliging her to take five days of vacation leave from the 86-87 fiscal year. Miss Gingras received only a month's advance notice that she had to liquidate her remaining leave beginning on March 17. In Derrien et al., the grievor received four months' advance notice. Adjudicator Williams nevertheless found in his favour.

Citing the decisions in Bourne (166-2-15136 and 15188) and Minchin and Newell (166-2-14607 and 14608),

counsel for the employer argued that they applied in the instant case. Mr. Piché noted that, in her grievance, Miss Gingras stated that she requested twenty-five days of leave in March 1986, whereas she spoke of some forty days during her testimony. The grievor could not contradict her written statement, which spoke of twenty-five days, whereas she was entitled to thirty-one. Miss Gingras knew that she had to liquidate her thirty-one days. The grievor knew the employer could not grant her all the specific days she had requested. The employer approved a substantial number and denied some. Miss Gingras was obliged to request other days but did not do so, with the result that, in January 1986, she still had eight unused days. Mr. Salomon told her that she had to take them before the end of March, on dates that best suited her, but she refused. She wanted to carry them forward into the 86-87 fiscal year. However, Miss Gingras' leave had to be taken before the end of March 1986. Since Miss Gingras did not choose any dates, the employer was justified in scheduling these dates for the latter part of March 1986.

Mr. Piché argued that the issue here was not whether the employer made every reasonable effort as required by clause 16.05(d) of the relevant collective agreement. The evidence revealed that, if Miss Gingras had requested more leave, the employer would have approved it. If the grievor found herself in January 1986 with eight unused lieu days, it was not the employer's fault. Miss Gingras knew at the beginning of March 1985 that, during the 85-86 fiscal year, she had to liquidate her

thirty-one days of vacation leave and lieu days, but she was not unduly concerned about it. The grievor knew, moreover, at the beginning of January 1986, that if she did not choose dates prior to March 31, 1986 on which to take her eight unused lieu days, the employer would schedule them for her. The fact that Miss Gingras was obliged, according to her testimony, to complete the training of the trainee under her supervision had no bearing on the outcome of the present case. According to counsel for the employer, management never forced Miss Gingras to take the trip she took between March 17 and 31, 1986. This was her own decision. Nowhere did the relevant collective agreement say that the employer must grant employees all the leave they requested. Mr. Piché argued that, were I to allow the grievor's grievance, all I could do was order that Miss Gingras be paid for the eight lieu days she liquidated between March 17 and 31, 1986.

Ms. MacLean rebutted that the grievor did not change the contents of her grievance during her testimony. She merely said that she in fact asked the employer for six days more than the twenty-five referred to in her grievance. Management never told Miss Gingras that she had to liquidate all her thirty-one days. If she was unable to use all her days prior to February 1986, it was through no fault of hers. The employer denied a significant number of her requests. Since the 14th was the first day of January 1986 that the grievor worked the day shift, she was unable to have a conversation with Mr. Salomon at the beginning of that month. It was not

until February 17, 1986 that the grievor first realized that she had to begin liquidating her eight lieu days in a month.

REASONS FOR DECISION

Pratte J. of the Federal Court of Appeal, in his decision in Anderson et al., (supra), had this to say at page 717:

The sole limitation that article 16.05 places upon the right of the employer to determine when lieu days will be used is contained in paragraph (d) which obliges the employer to make every reasonable effort to grant lieu days "at times desired by the employee."

In the present case, did the employer make every reasonable effort as required by clause 16.05(d) of the relevant collective agreement? I believe that it failed to do for a number of reasons.

The evidence reveals that, on March 1, 1985, the grievor, in compliance with memorandum no. 7/82, requested some thirty-one possible days of leave for the 85-86 fiscal year which began on April 1, 1985 and ended on March 31, 1986. Miss Gingras was entitled to twenty days' vacation leave and eleven lieu days. The evidence reveals that, between April 1 and September 30, 1985, the grievor could not take all the leave she had requested because some of her leave requests were denied by the employer. According to Exhibit G-4, during these six months, Miss Gingras took sixteen leave days.

In September 1985, management asked the grievor to take charge of the training of a trainee. She agreed. Miss Gingras personally supervised her trainee throughout the training period. This training ended at the end of February or the beginning of March 1986. The grievor did not know the precise date on which the trainee's training was to end until a few days before this date. The evidence revealed that, even though a trainee sometimes changes training officer in the course of his training, it is preferable that he remain with the same person throughout the training period. Management was neither surprised nor unhappy at Miss Gingras' decision to remain with her trainee through his training period.

Between October 1, 1985 and March 1, 1986, Miss Gingras was able to take only seven leave days, at the rate of a day here and there, bearing in mind that some of her requests were denied by the employer, because the continuous training that she gave her trainee had first priority. At Christmas, the employer granted Miss Gingras only three of the five leave days she requested. Because of the continuous training she gave a trainee between September 1985 and March 1986, during this period she could not take leave of any duration which could have allowed her to take a trip south as, moreover, she had planned.

In mid-February 1986, the grievor found herself with eight remaining lieu days. She could not liquidate them immediately because the training she was responsible for giving a trainee had not yet ended. A few days before

the end of February, she learned that this training would finish at the end of February or the beginning of March. According to the employer, it had already told Miss Gingras in January that it wanted her to liquidate her eight lieu days before the end of March 1986. However, it was not until around the end of February, a month before the end of March 1986, that Miss Gingras was really in a position to decide, if she wished, to use her eight lieu days between then and end of March 1986. She did not wish to. Instead, she asked that they be carried forward into the next fiscal year. The employer refused and obliged Miss Gingras to take her eight lieu days commencing on March 17, 1986. The grievor filed the present grievance on March 16, 1986.

I conclude that, when the employer asked Miss Gingras to take charge of the training of a trainee for the entire period from September 1985 to March 1986, not only did it put itself in a situation where it could not make every reasonable effort to schedule the lieu days when Miss Gingras wished to take them, but also the grievor had the right, in February 1986, also bearing in mind that several of her requests to take a day of leave here and there had been denied by the employer, to carry forward her eight remaining lieu days into the next fiscal year.

I read memorandum no. 7/82 and there is nothing in it stating that all vacation leave and lieu days must necessarily be taken by an employee concerned in the same fiscal year. There is, moreover, clause 16.05(e) of the

relevant collective agreement. There is a reason for this clause. It states that "where in any fiscal year an employee has not been granted all of the lieu days credited to him, he may elect to carry forward into the next fiscal year the unused portion of his lieu days." Pratte J., in his decision in Anderson et al., states that, "normally, lieu days are used in the year when they have been earned". The learned judge, in using the word "normally", implies, in my opinion, that there are cases where lieu days or some lieu days are not taken during the year in which they were earned. At that point, clause 16.05(e) permits the carrying forward of these days into the next fiscal year. For all the reasons that I gave earlier in the present decision, this is what should have happened in Miss Gingras' case.

Accordingly, I allow the grievor's grievance and order the employer to restore to Miss Gingras the eight lieu days that she was obliged to liquidate between March 17 and 31, 1986.

Jean Galipeault,
Board Member

OTTAWA, April 28, 1987

Certified true translation

Serge Lareau