

No. 82  
APR 1 1989

File No.: 166-2-17528

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

BETWEEN:

MICHEL PINARD,

Grievor,

- and -

TREASURY BOARD  
(Transport Canada),

Employer.

ARTICLE 9  
COLL AGREEMENT  
402/85

Before: Thomas W. Brown, Board Member.

For the Grievor: Catherine MacLean, Counsel.

For the Employer: Gabriel Terkel, Counsel.

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copy MONTREAL BOARD  
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Heard at Montreal, Quebec, January 27, 1989.

DETAILS OF SICK LEAVE

7/7/89  
ACE

## DECISION

The grievor, Michel Pinard, is an air traffic controller, employed at the Dorval Airport, Dorval, Province of Quebec. He is covered by the collective agreement between the Treasury Board and the Canadian Air Traffic Control Association (Code 402/85). The grievor grieves the employer's denial of his request for sick leave for June 14, 1987, and requests that he be compensated for his loss of pay for that day, together with interest on the amount owing and monetary damages in a reasonable amount to be determined by an adjudicator for abuse of power by the employer and the consequent attack on his integrity and professionalism, and that all reference to this incident be cleared from his file.

During the hearing, the grievor testified on his own behalf and two witnesses were called to testify by the employer, namely Mr. Larry Lachance, the manager of the shift on which the grievor was working at all relevant times, and Dr. Linda Fraser, who was on the job site at the time to perform routine medical examinations of air traffic controllers and who issued the medical certificate which the grievor submitted in support of his request for sick leave. In addition, 11 documents were filed as exhibits.

From the evidence, it appears that on June 6, 1987, the grievor submitted a request for annual leave for June 14, 1987. He considered that he would be entitled to be granted such leave because on that day he was a "supernumerary" employee and, as such, because June 14 fell on a weekend, when air traffic is normally low,

there would be no reason to deny him his request for annual leave. In addition, he was, apparently, the recipient of a favourable adjudication decision on a matter involving this very issue which, in the grievor's opinion, would preclude the employer from denying him his request. His request for leave was in a sense, the grievor explained, his own test of whether or not the employer would abide by the adjudication decision rendered in his favour.

The employer had, however, in the meantime issued a new policy dealing with the granting of annual leave (filed as Exhibit P-11), which stipulated that during the months of June, July, August and September and between December 15 and January 15, only a certain number of air traffic controllers would be allowed to be on annual leave. During those periods, on the other hand, additional employees could be granted annual leave if a request is made for the very day on which the request is received and the request is received prior to 06:00 hours and, in addition, the requesting employee is "supernumerary". Other rules applied to the remainder of the year. The grievor considered that this new policy was a flouting by the employer of the arbitral decision which had recently been handed down in his favour and so prior to June 14, 1987, he filed a grievance in this connection, which was ultimately abandoned in the grievance process when the grievor's bargaining agent withdrew its support of the grievance, causing it to be withdrawn.

The grievor was on his scheduled days of rest on June 10, 11, 12 and 13, 1987. During the evening of June 13, 1987, he experienced headaches and stomach aches and did not sleep well. At that time or prior to the commencement of his shift at 06:45 hours on June 14, 1987, the grievor called the air traffic control office where he worked and he spoke to someone there and stated that he was sick and would not be reporting to work. He did not report to work on June 14, 1987.

On June 15, 1987, the grievor reported for work and, during the day, reported to Dr. Linda Fraser for his scheduled routine and obligatory medical check-up. During this meeting with Dr. Fraser, the grievor told her that he had been sick on June 13 and 14 and described the symptoms of his illness to her. Although the grievor was well at the time Dr. Fraser examined him, she considered that the symptoms described to her by the grievor indicated that he was sick at the time claimed and unable to report for work. Dr. Fraser did not keep any record of this additional consultation with the grievor. Following this, the grievor submitted a written application for sick leave for June 14, 1987, together with Dr. Fraser's medical certificate in support of this application.

From Mr. Lachance's testimony, it is seen that management considered that the grievor was testing the system and endeavouring by one means or another to succeed in getting June 14 off. He had been refused annual leave for that day and had grieved the refusal. The grievor

had refused to accept the employer's policy regarding the granting of annual leave and was challenging it. The grievor had refused to wait until the morning of June 14 to learn whether he could be granted leave for that day, in keeping with the employer's annual leave policy. Only a certain number of employees could be allowed to be away at the same time. When the request for sick leave, supported by a medical certificate, was received by Mr. Lachance, he questioned the grievor as to what in particular was ailing him on the day in question which had prevented him from reporting. Mr. Lachance was met with the response that the grievor need not divulge this confidential and personal information. Mr. Lachance told the grievor that he would speak to Dr. Fraser and the grievor, apparently, agreed that he could.

Dr. Fraser explained to Mr. Lachance and testified to the same effect during this hearing that, based entirely on the grievor's own description of the symptoms he experienced on June 13 and 14, 1987, she concluded that he had been sick and unable to report for work at the time. During the interview with her, the grievor appeared to be well and claimed to be well. The grievor had not informed her that he had asked for the day off on June 14 nor had he told her that he had been off, on scheduled days of rest, on June 10, 11, 12 and 13. She affirmed that she could not speculate now whether, if she had been so informed at the time, it would have made any difference to her when deciding to provide the grievor with a medical certificate attesting to the fact that the grievor was sick and unable to report due to such illness on June 14, 1987.

Mr. Lachance testified that he knew the grievor well and had frequently played hockey and golf with him. He did not, prior to June 14, 1987, have reason to question the grievor's honesty but because of the coincidence of the grievor wanting the day off and being refused and then claiming that he was sick on June 14 and unable to report for work, he did not believe him. He considered the grievor's story concocted and untrue. Nothing short of some significant happening which prevented the grievor from reporting, such as hospitalization or a broken leg, would have convinced Mr. Lachance that the grievor was indeed sick. He just did not believe him. He had suspended the grievor for two days, as well as denying him pay for June 14 when he did not report for work. Later, he was convinced by the grievor's union representative that he should withdraw the two-day suspension without pay and substituted instead a letter of reprimand.

#### ARGUMENT FOR THE GRIEVOR

Counsel for the grievor argued that the grievor had met the conditions precedent to being granted sick leave under the governing provisions of the collective agreement, clauses 9.02 and 9.03. The grievor had sufficient sick leave credits in his account, had affirmed on his honour that he was sick and unable to report for work and, in addition, although he was not requested to do so, he submitted a medical certificate attesting to his illness and his inability to report for work. He supplied the medical certificate because by chance he was undergoing a scheduled medical examination and

took advantage of the opportunity to consult the examining doctor about his illness of the day before. The doctor found that the symptoms which he described amounted to an illness which prevented him from reporting for work and provided him with a certificate to that effect. And so, the grievor in providing a medical certificate went beyond what was required of him to be granted sick leave under the collective agreement.

Instead, however, of being granted sick leave, counsel stated, the grievor was accused of submitting a false medical certificate, was denied sick leave and was disciplined. This attitude was adopted by the employer because it considered that there was just too much of a coincidence between the fact that the grievor had asked for the day off as leave and had been denied his request and his booking off sick. The employer was not prepared to believe the grievor, short of his establishing that he had broken a leg or was hospitalized. There was a heavy onus upon the employer to establish that the grievor was not entitled to the ordinary benefits of the collective agreement. This onus was addressed in Reidy (Board File 166-2-538). Once the grievor has satisfied the conditions of the collective agreement he must be granted the requested sick leave, unless the employer is able to prove that the request for leave is unwarranted. In the instant case, the employer bases its refusal simply on the coincidence above-mentioned. This is not enough, counsel argued.

Counsel argued that there was another context in which the grievor's request for sick leave must be evaluated and that is the context of the nature of the grievor's duties as an air traffic controller. As such, he must be in a proper physical and mental condition to perform his duties, the whole as required by the Aeronautics Act, under which he is licensed as an air traffic controller. The grievor's assessment of his physical and mental condition on the day in question should be sufficient to justify his absence for reasons of illness, counsel stated.

ARGUMENT FOR THE EMPLOYER

Counsel for the employer referred to a number of adjudication decisions to demonstrate that the employer has the right to question an employee's request for sick leave and to deny sick leave if the employer is not satisfied that the employee was in fact sick. He cited the decisions in Trepanier (Board File 166-2-16082), Trevethan (Board File 166-2-16391) and Levesque (Board File 166-2-13675).

In the instant case, the doctor who provided the grievor with a medical certificate did so simply based on the declarations of the grievor as to his condition on the previous day. There was no evidence of a physical examination of the grievor to establish the grievor's condition on that day. Based on the decision in Jones et al (Board Files 166-2-9010 to 9012) the employer was, in the circumstances, entitled to deny



the sick leave. In Bobinski (Board File 166-2-14412) it was held that a medical opinion was not decisive. Counsel referred also in support of his position to the decision in Mallette (Board File 166-2-10203) and Barker (Board File 166-2-13902).

Counsel did not wish to suggest that the grievor had perjured himself in testifying that he was ill and unable to report for work on the day in question but suggested that the test in this case was whether or not the employer was unreasonable in denying the grievor sick leave in the face of the coincidences involved and the grievor's refusal to divulge to the employer at the time the nature of the illness which prevented him from reporting for work.

The coincidences involved here are the fact that on June 6 the grievor requested leave for June 14 and was refused. He was, upon his own admission, angry at this refusal and immediately filed a grievance. He later attempted to proceed to adjudication with this grievance but was thwarted in his attempt when his bargaining agent withdrew its support of the grievance. On June 10, 11, 12 and 13 he was off work on his days of rest. On June 14 he reported in sick. On June 15 he submitted an application for sick leave for the 14th. This request was for a day of certified sick leave. It was the grievor's own decision to ask for certified sick leave.

However, counsel continued, when on June 22, Mr. Lachance met with Dr. Linda Fraser she explained to him that she had issued the medical certificate based simply on the description by the grievor of the symptoms he suffered on the day prior to the examination. She had not determined by a physical examination that the grievor had in fact suffered the symptoms which he declared he had. The grievor was in good health at the time of seeing Dr. Fraser.

Counsel argued that the coincidences involved here are sufficient to have led the employer to have concluded that the grievor was not in fact sick on June 14 to the point of not being able to report for work on that day. Its conclusion was not unreasonable and should, therefore, not be set aside. The situation was, indeed, very suspect and the employer, in the circumstances, had a right to demand explanations of the grievor, which he refused on the basis that the information concerning the nature of his illness was personal and confidential to him. The employer in so acting did not violate the collective agreement. If on the other hand, I should find that the employer contravened the collective agreement at article 9, I should simply award the grievor his normal pay for the day. Counsel suggested that the remainder of the grievor's requested corrective action was beyond my jurisdiction.

REASONS FOR DECISION

From the evidence in this case, it appears that during the evening of June 13, 1987, the grievor was suffering from headaches and a stomach ache and that that condition persisted throughout the evening of that day and throughout the next day, June 14, 1987. He did not feel well enough to report for work on June 14 and so, either during the evening of June 13 or early morning on June 14, he telephoned the Air Traffic Control Centre where he worked and advised someone there that he was ill and would not, because of his illness, be reporting for work. In the normal course, this would have been sufficient to excuse the grievor from reporting to work, with pay, for the day. He had sufficient sick leave credits in his sick leave account.

However, because the grievor had already asked for June 14 off as annual leave and had been refused and because he had been off on days of rest on June 10, 11, 12 and 13, the manager of his shift, Mr. Lachance, considered that there was just too much of a coincidence involved. He disbelieved the grievor and confronted him. He asked the grievor why he had not reported on June 14 and was simply told by the grievor that he was sick. The grievor refused to give him any details and, apparently, referred him to Dr. Linda Fraser who had provided the grievor with a medical certificate attesting to his illness and consequent inability to report to work. It was only on June 27 that Mr. Lachance was able

to speak to Dr. Fraser and the latter told him that she did not have any written record of her examination of the grievor but remembered that, after having been told by the grievor of his aches and pains, she considered that the symptoms which he had suffered were indicative of illness and inability to report for work.

Mr. Lachance continued to disbelieve the grievor concerning his illness and did not give any value to the medical certificate received. He was convinced that the grievor had contrived an alibi of sickness in order to take the day off on June 14, as he had planned to do when asking for annual leave for that day, which had been refused. Mr. Lachance denied the grievor his request for sick leave, deducted a day's pay because he was absent without leave and assessed him a two-day suspension, without pay, which was later, in the grievance procedure, reduced to a letter of reprimand.

The issue here is whether or not the grievor satisfied the conditions of the collective agreement which would allow him to be granted sick leave. The governing clauses of the agreement are clauses 9.02 and 9.03, which read:

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 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, (effective April 1, 1986 five (5) days),

and

- (b) if in the current fiscal year, the employee has not been granted more than seven (7) days' sick leave wholly on the basis of statements signed by him, (effective April 1, 1986 ten (10) days).

There is no dispute that the grievor had the necessary sick leave credits. The grievor submitted

a signed declaration stating that he was sick on June 14, 1987, and unable to report for work because of this illness. Although not required by the employer, the grievor, in addition, submitted a medical certificate attesting to his illness on June 14, 1987, and his inability to report for work on that day due to his illness. That this may have resulted in "certified" sick leave being requested does not open to the employer the opportunity to question the medical certificate which was supplied by the grievor, over and above what was required of him by the collective agreement, except, perhaps to the extent that the leave becomes "uncertified" sick leave, that is, sick leave wholly based on the grievor's own statements.

Although Mr. Lachance may have had his own reasons for believing that the grievor had feigned his illness in order to have the day off on June 14, 1987, the grievor has satisfied the requirements of the collective agreement at clauses 9.02 and 9.03. The medical certificate was not obtained under false pretenses and constitutes, in any event, a document of proof of illness additional to that required in the circumstances. No evidence has been advanced during the hearing which would lead me to conclude that the grievor was not sick on June 14, 1987, and was able to report for work on that day but failed to do so for some unproven ulterior motive.

In the circumstances, the grievance must be upheld to the extent that the grievor is to be granted sick leave with pay for June 14, 1987, based wholly on the

statements made by him that because of his illness he was unable to perform his duties on that day. There is no interest assessable against the Crown and that portion of the requested corrective action, as well as the claim for exemplary or punitive damages, is denied as being unfounded.

Thomas W. Brown,  
Board Member.

OTTAWA, April 5, 1989.