

PARTIES of DECISION

File: 166-2-24117

No. ~~98~~ 40

Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

MARTIN SITTING

Grievor

and

TREASURY BOARD
(Transport Canada)

Employer

Before: Yvon Tarte, Deputy Chairperson

For the Grievor: Sean McGee, Counsel, Canadian Air Traffic Control
Association

For the Employer: Roger Lafreniere, Counsel, and Jock Climie,
Student-at-Law

Heard at Montreal, Quebec and Ottawa, Ontario,
October 27, 1995 and April 30, 1996

DECISION

This case was originally heard by adjudicator Marguerite-Marie Galipeau on May 19, 1994. Her decision dated June 27, 1994 was referred to the Federal Court of Canada for judicial review (Court file no. T-1684-94). Mr. Justice Teitelbaum decided on May 8, 1995, that the matter should be returned to a different adjudicator "for an entirely new hearing".

The grievance relates to the interpretation and application of clause 15.04 of the collective agreement entered into between the Treasury Board and the Canadian Air Traffic Control Association (code 402/91, Exhibit G-1).

THE QUESTION OF TIMELINESS

The timeliness of the presentation of Mr. Sittig's grievance has always been an issue. The question was initially raised by the employer at the first level of the grievance procedure when it rejected Mr. Sittig's grievance because it had been presented outside the time limits set out in the collective agreement. The timeliness of Mr. Sittig's grievance was also raised by the employer at the other levels of the grievance process and before adjudicator Galipeau who did not decide the issue.

Both in Montreal and in Ottawa the question was again raised by the two counsel for the employer. I therefore decided to hear evidence on the employer's objection before hearing the case on its merits.

EVIDENCE ON THE ISSUE OF TIMELINESS

Martin Sittig, an Air Traffic Controller, and Gaston Labonte, the Unit Chief at the Mirabel Control Tower both testified. The events leading to this dispute are largely uncontested.

Beginning March 12, 1992, the grievor worked for nine consecutive days until March 20. On Saturday, March 21, Mr. Sittig was scheduled to work but instead called in sick. On Sunday, March 22, Mr. Sittig reported for work. As is the practice he was about to enter his sick leave absence in the status book when he realized that March 21 had been his 10th scheduled day of work.

Because of the provisions of clause 15.04 of the collective agreement which state that, except in emergencies, no operating employee shall work more than nine consecutive days, the grievor believed he was entitled to an earned day off (EDO) and consequently would not be required to use up a day of sick leave. The exact nature of the EDO practice was not fully discussed at this hearing which dealt only with the timeliness of Mr. Sittig's grievance.

By way of round trip memorandum dated March 22, 1992 to Mr. Labonte, the grievor explained his situation and requested that an EDO be granted pursuant to clause 15.04.

Mr. Labonte replied on March 30, 1992, that since the grievor had been off sick on March 21, the grievor could not, after the fact, change his request for sick leave to a request for another type of leave.

On April 1, 1992, Mr. Sittig wrote another memorandum to Mr. Labonte stating his position. The matter was discussed between the two on that day. Mr. Sittig left that discussion with the impression that his supervisor had come around to his way of thinking. Mr. Labonte, on the other hand, was certain he had told the grievor that sick leave would have to be used to cover the absence on the 21st.

On April 7, 1992, Mr. Sittig submitted a leave application and absence report covering the month of March 1992. The document (Exhibit G-3) contained no request for sick leave on March 21. The form was signed by both Mr. Sittig and Mr. Labonte. The grievor testified that the presence of his supervisor's signature on the leave application and absence report reinforced his belief that an EDO had been granted for the 21st of March.

That belief was quickly shattered on June 3, 1992, or the next few days, when Mr. Sittig received a memorandum from Nicole Martel, Mr. Labonte's assistant, asking that he submit a corrected version of the leave application and absence report for March. This amended document was to include a day of sick leave for March 21.

On June 3rd, 4th or 5th, Mr. Sittig discussed the matter with Ms. Martel. By his own testimony, Mr. Sittig acknowledged that he knew at that time that his request for an EDO for March 21 had been refused. He told Ms. Martel he would grieve.

On June 18, 1992, Mr. Labonte wrote to the grievor (Exhibit E-5) to remind him that the sick leave request had still not been submitted and that failure to do so in a timely manner could lead to the unilateral imposition of leave without pay. Mr. Labonte testified that he met Mr. Sittig at work on or about June 18th, and reminded him to submit a sick leave application form. Mr. Sittig denied this meeting took place.

When the grievor failed to deliver the requested document, Mr. Labonte prepared and signed on June 30th, a sick leave request on Mr. Sittig's behalf. Mr. Sittig presented his grievance on August 4, 1992.

THE COLLECTIVE AGREEMENT

The right to present grievances is enshrined in Article 5 of the collective agreement. Clause 5.03 deals in part with the question of timeliness:

5.03 Right to Present Grievances

Subject to and as provided in Section 90 of the Public Service Staff Relations Act an employee who feels that he or she has been treated unjustly or considers himself or herself aggrieved by any action or lack of action by the Employer in matters other than those which are dealt within the classification grievance process is entitled to present a grievance in accordance with the procedure provided by this Article except that:

- (a) where there is another administrative procedure provided in or under any Act of Parliament to deal with an employee's specific complaint such procedures must be followed,
- (b) where the grievance relates to the interpretation or application of this Collective Agreement or an arbitral award relating thereto the employee is not entitled to present the grievance unless the employee has the approval of and is represented by the Association.

A grievance must be presented not later than twenty-five (25) days from the day on which the employee was notified or informed of the decision or circumstance that is the subject of his or her grievance.

ARGUMENT ON TIMELINESS

For the Employer:

The collective agreement clearly states that Mr. Sittig has 25 days from the day on which he was informed that he would not be given an EDO. The grievor knew or should have known as early as March 30 that Mr. Labonte would not grant him his request. On or about June 3, Mr. Sittig was aware that his EDO had been refused.

The June 30th leave document signed by Mr. Labonte amounts to nothing more than an administrative action taken by the employer. Nothing turns on this form. The grievor has never requested an extension of time to file his grievance. In Lusted (Board File 166-2-21370) adjudicator Tenace ruled that issues of timeliness must be corrected at the earliest opportunity. A grievor cannot in normal circumstances wait until the adjudication hearing to request an extension of time when he was aware of the problem some time before.

The Achtemichuk et al decision (Board files 166-2-19683 to 19694) further supports the employer's position. This reference to adjudication cannot be heard since the grievor has failed to comply with the strict requirements of clause 5.03 of the collective agreement.

For the Grievor:

In order to properly resolve the question of timeliness, we must first determine the nature of Mr. Sittig's grievance. That grievance relates to the fact that the employer had no right to impose the liquidation of sick leave credits in a situation where the grievor was entitled to an EDO.

Although Mr. Labonte threatened Mr. Sittig in mid-June, it was not until June 30th, that the grievor was finally told of the action the employer would take. The timeliness clock starts to run when the issue crystallizes (see Suchma, Board file 166-2-19518).

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Since the action being complained of in this case is the employer's imposition of the sick leave day, the issue crystallized on June 30th, 1992. In other words, Mr. Sittig's complaint is that the employer took unilateral action to remove a sick leave credit when an EDO was appropriate. The grievance was filed within 25 days of June 30th and is therefore timely.

Reply:

The Suchma (supra) case relied upon by the grievor in fact supports the employer's position. This case relates to the application of section 15.04 of the collective agreement. The issue therefore crystallized as soon as the grievor was informed of the employer's refusal to grant the EDO. At the end of the first week in June, Mr. Sittig knew his EDO had been denied. His grievance is out time.

REASONS FOR DECISION

I must conclude that the employer's objection as to the timeliness of Mr. Sittig's grievance is well-founded.

At the very latest on June 5th, 1992, Mr. Sittig knew that his request for an EDO, which allegedly flows from the application of clause 15.04 of the collective agreement, was being denied.

Mr. Sittig's grievance document itself specifically refers to clause 15.04 and demands by way of remedy that March 21, 1992, be considered an EDO. The grievor clearly understood the employer's position when he talked to Ms. Martel on or about June 5th. It is extremely telling to note that it was during that discussion that Mr. Sittig indicated that he would grieve the employer's refusal. Nothing was said or done by the employer after June 5 to lead the grievor to believe that it had changed its mind or that the issue was somehow still unresolved. The grievor has provided no reason to permit me to relieve him of the limitations of clause 5.03 and indeed, the grievor has not requested an extension of time.

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In view of the clear mandatory language of clause 5.03 of the collective agreement, I have no alternative but to conclude that I am without jurisdiction to hear Mr. Sittig's grievance.

Yvon Tarte,
Deputy Chairperson

OTTAWA, May 24, 1996.

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