

200
Files: 166-2-257
166-2-283
166-2-284
166-2-285

PUBLIC SERVICE STAFF RELATIONS BOARD

DECISION

BETWEEN:

KATHERINE M. WOOD, MAURICE V. BRAGER,
J.A. PAXTON AND B. HART

Grievors,

AND:

TREASURY BOARD
(Ministry of Transport)

Employer.

Before

Edward B. Jolliffe, Q.C., Chief Adjudicator.

For the Grievors

John Nelligan, counsel.

For the Employer

G. Terkel, counsel.

Date and Place of Hearing: June 17, 1970, Ottawa.

In their grievances, supported by the bargaining agent, Canadian Air Traffic Control Association, four employees raised the same issue. It is necessary to determine their rights under the applicable collective agreement when they are absent on sick leave throughout a period in which one or more statutory holidays occur.

The evidence and argument heard relate almost entirely to the case of Miss Wood, who was absent on sick leave from November 20, 1969, to January 4, 1970, inclusive, except for one shift worked on November 24. During the period in question, there were three statutory holidays: December 25, December 26 and January 1. I was informed by counsel that the same problem arises in the grievances of Messrs. Brager, Paxton and Hart, although the facts are a little different; they do not work at the same locations and they were each absent on sick leave when only one holiday occurred. The issue to be disposed of is therefore the same in all four cases.

Miss Wood is employed at Ottawa International Airport in the Military Liaison Section of the Air Services Branch, Ministry of Transport. She is classified as AI4 in the Operational Category and therefore works rotating shifts which are scheduled in advance. She had been scheduled to work 32 days during the period between November 20, 1969, and January 4, 1970, inclusive, on either the day shift, the evening shift or the midnight shift. Her leave of absence with pay was supported by a medical certificate. It was leave with pay because she had earned more than sufficient sick leave credits under Article 9

of the applicable collective agreement. In her grievance Miss Wood stated:

"This involved 32 days of scheduled work, three of which are designated holidays as defined in Article 16 of the Collective Agreement. Over the period I received 29 days of sick leave.

"I claim to be entitled to 32 days of sick leave and to premium pay and a day in lieu for each of Dec. 25, Dec. 26 and Jan. 1st.

"On the basis of Articles 9, 15 and 16 of the Collective Agreement and section 3.6 of the Department of Transport Personnel Manual, I feel I am entitled to the relief specified above.

"Corrective action requested.

1. Use of 32 days sick leave credits as per the number of scheduled working days on which I was ill.
2. Return of credit for three lieu days.
3. Payment of premium pay at the rate of $\frac{1}{2}$ days premium pay for each of the three statutory holidays."

It appears that the Department applied the provisions of the agreement as follows: twenty-nine days were charged against Miss Wood's sick leave credits, and for these she was paid; another three days were treated as statutory holidays not worked and for these she was paid at straight time rates. Her claim is that all the 32 days should be charged against her sick leave credits, that she should be credited with three lieu days and that she should also receive payment for the three statutory holidays at time and one-half rather than straight time.

Several distinct provisions of the collective agreement were relied upon or referred to by counsel. It is necessary to specify which of these are applicable and also those which are irrelevant.

The only applicable sick leave provisions are found in Article 9.01 and 9.02 as follows:

"9.01 An employee shall earn sick leave credits at the rate of one and one-quarter ($1\frac{1}{4}$) days for each calendar month for which he receives pay for at least ten (10) days.

"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."

It is common ground that Miss Wood qualified for sick leave with pay under the provisions quoted above.

Article 16.01 designates certain statutory holidays as follows:

" Subject to 16.02 the following days shall be designated holidays for employees:

- (a) New Year's Day;

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- (i) Christmas Day;

- (j) Boxing Day;

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"An employee shall not be paid for the holiday if he is absent without pay on both the working day immediately preceding and the working day following the holiday."

The last sentence quoted above is not relevant in the case of Miss Wood because she was absent with pay, she was not absent without pay, on the days preceding and following the holidays, December 25 and 26 and January 1.

Reference was also made to 16.02 as follows:

" When a day designated as a holiday under 16.01 coincides with an employee's day of rest, the holiday shall be moved to the employee's first working day following his day of rest."

The language as quoted is obviously not applicable to Miss Wood's case.

Article 16.04 states the result when an operating employee actually works on a holiday:

" Where an operating employee works on a holiday he shall:

- (a) be paid at one and one-half ($1\frac{1}{2}$) times his straight-time hourly rate for all hours worked by him on the holiday, and
- (b) be granted a day of leave with pay at a later date in lieu of the holiday."

It was suggested that since Miss Wood had been scheduled to work on all three holidays and presumably would have done so had

she not been absent on sick leave, she should be deemed to have worked on such holidays and would be eligible for payment at overtime rates. Such an interpretation is unrealistic. The language clearly applies to an operating employee who actually works on a designated statutory holiday. It has no application to an employee who does not work on a holiday, whatever the reason for not working may be.

Provision for lieu days is made in Article 16.05, as follows:

- " (a) The designated holidays in a fiscal year shall be anticipated to the end of the year and "lieu day" credits established.
- " (b) Lieu days may be granted 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.
- " (c) Consistent with operational requirements of the service and subject to adequate notice, the Employer shall make every reasonable effort to grant lieu days at times desired by the employee.
- " (d) Any leave granted under the provisions of this clause in advance of holidays occurring after the date of an employee's separation or commencement of retiring leave or after he becomes subject to clause 13.01 shall be subject to recovery of pay."

The application of similar lieu day provisions in the Firefighters' agreement has been discussed at some length in the Webb case (166-2-113), in the decision relating to grievances of Kenna,

Graham and Murphy (Files 166-2-11, 166-2-112 and 166-2-119) and also the Battcock case (166-2-244). However, there is nothing in those decisions relating to the rights of the employee while absent from work on sick leave with pay. Lieu-day credits are established in advance to enable an employee to arrange for a day off with pay at another time if, by reason of operational requirements, he must work during hours when most employees are free to enjoy the holiday as it occurs. The lieu-day system is related to but distinct from the provision for overtime rates on a holiday actually worked, and wholly separate and distinct from the provision for payment at straight time when an employee with sufficient credits is absent on sick leave.

My attention has also been drawn to the provisions of Article 17.07 and 17.08 which deal with a situation described as an "analogy." The language there, however, relates exclusively to periods of vacation leave and has no application whatever to Miss Wood or the other three employees when they grieve in respect of a period of sick leave. It is as follows:

"17.07 Where a day that is a designated holiday for an employee falls within a period of vacation leave with pay, the holiday shall not count as a day of vacation leave.

"17.08 Where, in respect of any period of vacation leave, an employee:

- (a) is granted bereavement leave, or
- (b) is granted special leave with pay because of illness in the immediate family, or
- (c) is granted sick leave on production of a medical certificate,

the period of vacation leave so displaced shall either be added to the vacation period, if requested by the employee and approved by the Employer, or reinstated for use at a later date."

The Employer's position, as stated at the 3rd level of the grievance process over the signature of the Deputy Director, Air, on behalf of the Deputy Minister, was as follows:

"Under the terms of Clause 16.01 of the Collective Agreement, the Employer was required to grant you holiday pay on December 25 and 26, 1969, and on January 1, 1970. To have granted paid sick leave in addition to holiday pay would amount to double payment for the three days. This is neither provided for nor intended in the Collective Agreement.

"Clause 16.04 of your Collective Agreement provides for premium pay for work performed on a designated holiday. Therefore, your request for lieu day credits and time and one-half compensation for the three days in question cannot be granted as you did not work on December 25 and 26, 1969, and January 1, 1970.

"Your claim for sick leave pay on a designated holiday is contrary to well-established policy and practice in this regard and is not provided for in the Agreement."

At the hearing testimony was given by Mr. Gordon Allan, Staff Relations Officer, Air Services. He said the past practice was not to grant sick leave under Article 9 "where there is any other form of paid leave coinciding with the period of sickness."

Counsel for the Employer at the hearing argued that if an employee does not work on a statutory holiday he is not entitled to either premium pay or a lieu-day. He pointed out that Article 9 is silent as to the result if sick leave happens to coincide with a designated holiday. Article 16 is also silent, although it states the result when a holiday coincides with a day of rest and Article 17 states the result when a holiday coincides with a day of vacation leave. Counsel urged unless the language of the agreement is clear there is a presumption against "double compensation."

On behalf of the aggrieved employees, it was argued that rights arising under Article 9 must not be confused with or submerged in rights arising out of other articles of the agreement. There was no evidence, he said, that lieu-days had been assigned as requested by the employee under Article 16.05 (c).

Both in the grievances and in the Employer's replies, there were references to the Employer's Personnel Manual, particularly Section 3 thereof. I find no mention of that document in the collective agreement and my duty is to determine the issue upon the language of the agreement and only the agreement.

There were also references in argument to the decision of Adjudicator W.S. Martin in the Warren case (166-2-89). That case required the interpretation of Article 16.02. The aggrieved employee

had his day of rest on November 11, a holiday; but on November 12 he reported sick and did not work. His first working day after the holiday was November 13 and he claimed payment for that day at overtime rates. The adjudicator upheld the grievance, holding that the term "first working day following his day of rest" referred to the first working day actually worked rather than the first day he was scheduled to work. Obviously the circumstances of the Warren case were very different from the circumstances here, and the issue decided had arisen under Article 16.02, which is not applicable to any of the cases before me now.

What actually happened in the case of Miss Wood became clear in a report — a copy of which was sent to her — made by the Chief, Airspace Reservation Co-Ordination Office, on January 7, 1970, some time before the grievance was presented. His report may be summarized as follows:

1. Miss Wood had applied for a total of 32 days of sick leave, with appropriate medical support.
2. The application had been amended (by the Chief) to reduce the number of days by three, "the number of designated holidays that fell within the leave period as leave credits are not charged for designated holidays."
3. As the employee had not worked on the three designated holidays, her previously established lieu-day credits should be reduced by three days, "which represents the unearned credits involved."

The first point to be decided is the scope of Miss Wood's

rights under Article 9 during the period between November 20, 1969, and January 4, 1970.

Miss Wood's status was that of an employee on leave of absence with pay. In other words, she was entitled to be absent and she was entitled to be paid with respect to each and every scheduled working day she was absent. This was not a privilege granted at the discretion of the employer, nor was it something which could be taken away from her by an administrative decision. She had earned it: Article 9.01 states "An employee shall earn sick leave credits at the rate of" It is not disputed that she had satisfied the requirements of 9.02 — — she had the necessary sick leave credits and produced appropriate medical evidence. I conclude that she was entitled as of right to 32 days of sick leave, and there is nothing in the agreement permitting the Employer to decide unilaterally that she should receive only 29 days of sick leave and that the other three days should be classified differently.

The next question is the rate of pay she was entitled to receive for each of the three designated holidays on which she happened to be absent. She would be entitled to the overtime rate under Article 16.04 if she actually worked on a holiday, and not otherwise. She did not work on any of the three days and she is therefore not entitled to overtime rates. Her entitlement was to straight time as an employee legitimately absent on sick leave. The fact that she

had been scheduled to work on all three days does not bring her within the very clear language of Article 16.04.

I do not accept the assumption that Miss Wood's status on December 25, 26 and January 1 was that of an employee enjoying a holiday at home. Her status was that of an employee who had been scheduled to work on each of those days but was in fact excused from work by reason of illness and in accordance with her rights under Article 9. Her entitlement to payment at straight time rates arose out of Article 9, not Article 16. It would be unrealistic to pretend that she was not at work as one of those lucky enough to be scheduled "off" on the holiday. The reality is that she was not at work because she was ill.

The final question to be decided is what Miss Wood's rights were under Article 16.05. In other words, were her lieu-day credits affected?

In reporting on the problem, Miss Wood's chief said that, as she had not worked on the three holidays, her previously established lieu-day credits should be reduced by three days, "which represents the unearned credits involved." The last words quoted reveal a misconception or misunderstanding of the lieu-day provisions in Article 16.05.

Lieu days are neither "earned" nor "unearned." A bank of 11 lieu-day credits is established in advance or "anticipated" under 16.05 (a). These may be drawn upon or liquidated in one of several

different ways. Employees on rotating shifts work about five days out of seven. It is a mathematical probability, if not a certainty, that such an employee will have to work on most, but not all, holidays. The following alternatives become apparent. First, the employee may have the good luck to be scheduled "off" on a designated holiday, in which event he is paid at straight time for that day, he is not entitled to a lieu day and his credits are reduced by one. Second, if he must work on a holiday, he may under 16.05 (b) be granted a day off with pay on another occasion, which would reduce his credits by one. Third, (if he worked on a holiday), one or more lieu days may be added to his vacation leave, also under 16.05 (b) and charged against his credits accordingly.

It is important to note that both the second and third alternatives are subject to the following requirement in 16.05 (c):

"(c) Consistent with operational requirements of the service and subject to adequate notice, the Employer shall make every reasonable effort to grant lieu days at times desired by the employee."

There is no evidence to suggest the Employer made any effort to grant the three lieu days in question "at times desired by the employee," and there is evidence to the contrary. The three days were selected by the Employer after the event, thereby reducing retroactively lieu-day credits by three and increasing sick leave credits by three; the decision was contrary to the "times desired by the employee," and unnecessarily.

It may be that if Miss Wood had exhausted her sick leave credits (so that she would no longer be entitled to the status of an employee on leave with pay) she could have applied to the Employer for lieu days remaining to her credit, and presumably the Employer would in that event have made "every reasonable effort" to comply with her wishes. However, that did not happen and the point does not arise.

What did happen was that the Employer chose unilaterally to subtract three days from the sick leave to which Miss Wood was entitled and charge them against her lieu-day credits. I find nothing in the agreement to justify that decision.

My conclusion on this branch of the case therefore is that Miss Wood's lieu-day credits were not affected by her absence on December 25, December 26 and January 1 - - - while she was on sick leave. Her lieu-day credits were neither increased nor reduced. Her status rested upon Article 9 rather than Article 16.

In my view, it is a fallacy to regard the claim as one for "double compensation." Miss Wood's sick leave credits were reduced by 32 days - - not 29. Her right to be paid for each of those 32 days had been "earned" under Article 9.01. As for lieu-day credits, they were unaffected. She did not on December 25 or 26 or on January 1 receive a day "off" in lieu of a lost holiday; what she received and what she was entitled to receive was leave with pay, because she was ill and because she had earned it.

For the reasons given, these grievances succeed in part, and my decision with respect to the three issues may be summarized as follows:

1. An employee scheduled to work on a designated holiday but absent that day on sick leave with pay is entitled to be paid at straight time in respect of that day, not at the overtime rate.

2. Such a day must be charged against the employee's sick-leave credits, unless the employee requests that it be charged against lieu-day credits.

3. Such a day cannot be charged against the employee's lieu-day credits unless the employee so requests.

In the four cases referred, employee records and credits should be amended accordingly.

Ottawa, November 5, 1970.

"Edward B. Jolliffe"
Chief Adjudicator.