

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

BETWEEN:

CLAUDE BELVAL

grievor,

AND:

THE TREASURY BOARD
(Ministry of Transport)

employer.

DECISION

Before: J.D. O'Shea, Q.C., Board Member and Adjudicator.

For the grievor: Catherine Maclean, F. Jodozi, counsel.

For the employer: W. Corbett, M. Mayrand, counsel.

Heard at Montreal on March 16, 1978.

ART 10
CODE 402/m

~~SICK LEAVE~~

REQUEST SPECIAL LEAVE
WHEN WAS SICK

DECISION

This matter arose and came on for hearing under the provisions of the Collective Agreement which was binding on the parties as a result of a legislated settlement which came into effect on August 10th, 1977, when the Air Traffic Controllers returned to work following a strike. The relevant provisions of the Collective Agreement read:

" ARTICLE 9

SICK LEAVE

9.01 An employee shall earn sick leave credits at the rate of one and one-quarter (1¼) 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.

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 describing the nature of his illness or injury and 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; 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.

9.04 An employee is not eligible for sick leave with pay during any period in which he is on leave of absence without pay or under suspension.

9.05 Where an employee has insufficient or no credits to cover the granting of sick leave with pay under the provisions of 9.02, sick leave with pay may, at the discretion of the Employer, be granted for a period of up to fifteen (15) days subject to the deduction of such advanced leave from any sick leave credits subsequently earned.

9.06 The amount of sick leave with pay already credited to an employee by the Employer at the time this Agreement is signed shall be retained by the employee.

9.07 The Employer agrees that an employee released from employment under Section 31 of the Public Service Employment Act for incapacity by reason of ill health may exhaust his accumulated sick leave credits prior to his release.

ARTICLE 10

SPECIAL LEAVE

10.04 Leave for Other Reasons

At the discretion of the Employer, special leave with pay may be granted when circumstances not directly attributable to the employee, including illness in the immediate family as defined in Clause 10.02, prevent his reporting for duty.

10.05 Educational and Other Leave Without Pay

At its discretion, the Employer may grant leave without pay for any purpose, including upgrading of formal education qualifications, enrolment in the Canadian Armed Forces and election to a full-time municipal office.

ARTICLE 14

PAY

14.01 Except as provided in this Article the terms and conditions governing the application of pay to employees are not affected by this Agreement.

14.02 An employee is entitled to be paid for services rendered at:

- (a) the pay specified in Appendix "A" for the classification of the position to which he is appointed, if the classification coincides with that prescribed in his certificate of appointment; or

- (b) the pay specified in Appendix "A" for the classification prescribed in his certificate of appointment, if that classification and the classification of the position to which he is appointed do not coincide.

14.03

- (a) When an employee is required by the Employer to perform the duties of a higher classification level for a period of at least four (4) consecutive working days, he shall be paid the pay of the higher level, calculated from the date on which he commenced to perform the duties of the higher level.
- (b) An employee required by the Employer to assume the responsibility for air traffic control duties requiring the possession of a valid air traffic controller licence, or letter of authority, and which duties are the responsibility of a position classified at a higher level, shall be compensated as established in (a) above.

14.04 The Employer will notify the Association in writing thirty (30) days in advance of the creation of any new jobs within the bargaining unit or the establishment of a new classification plan for jobs within the bargaining unit. "

The grievor, J. J. C. Belval, was hired by the Employer as an Air Traffic Controller on January 3rd, 1970 and was employed at the Montreal Area Control Centre under the provisions of the Collective Agreement in this matter at all relevant times. As an Air Traffic Controller, the grievor was required to have annual medical assessments in order to certify that he continued to have the necessary health standards which are required of controllers and are a condition for the renewal of his Controller's licence. The annual medicals are conducted on the employee's own

time.

The grievor testified that following his return to work at the conclusion of the strike on August 10th, 1977, the atmosphere amongst the employees was "lousey". The employees resented being legislated back to work and there was also resentment and animosity towards those controllers who had continued to work during the strike. On August 11th, 1977, a petition was circulated amongst the controllers and the petition advocated that a boycott be instituted against the "scabs" who had not supported the strike. It was the grievor's evidence that while he had supported the strike, he also had friends among those controllers who had continued to work during the strike. The grievor foresaw a revival of the conflicts which had existed at the time of the 1975 strike. He anticipated that animosities between the Francophone and Anglophone controllers would be promoted as a result of the petition and he did not agree with this course of action.

The Boycott Petition therefore caused additional aggravations for the grievor which he found to be an unacceptable working condition. Accordingly, on August 11th, 1977

the grievor submitted the following memo to his supervisor:

"Subject - Stress

Due to actual conditions of work, I do not feel I can work effeciently. I request to have an interview with Dr. Spitzer, as soon as possible realizing that any mistake on my part could lead to a catastrophy." (traduction)

When the grievor's memo was brought to the attention of the Unit Chief at about 10:55 a.m. on August 11th, the grievor's supervisor indicated that about 25 more such memos were on the way. Since Dr. Spitzer was not on the premises, the grievor was immediately referred to Dr. Clement, who was the Chief Medical Office assigned to the Dorval Airport. Within 15 or 20 minutes after the grievor's memo was received, he was interviewed by Dr. Clement. Dr. Clement testified that although he could recognize sytoms of stress, he was not a specialist and did not feel competent to make a final determination with respect to the matter. Dr. Clement further testified that he noted that the grievor appeared nervous and slightly aggressive during the interview. It was Dr. Clement's evidence that since the reasons for the inter-view concerned the mental state of the grievor and since

the grievor stated that he couldn't carry out his work because of the scabs who would still be there after the grievor might believe he was fit to return to work, Dr. Clement wanted to be assured that the grievor would be able to work with the scabs on his return to work. Accordingly, Dr. Clement recommended that the grievor go home until he felt better, at which time he would be evaluated by a psychiatrist to determine his ability to return to work. The grievor raised no objection concerning the recommendations of Dr. Clement on August 11th.

Having ascertained that the persons who sponsored the Boycott Petition had changed their minds and had withdrawn the petition, the grievor telephoned and advised that he was able to return to work on August 17th. The Employer arranged an appointment with Dr. Rios, a psychiatrist. Dr. Rios conducted a psychiatric assessment of the grievor at meetings on August 17th, 18th and 22nd. Dr. Rios determined that the grievor was fit to return to duty and the grievor was accordingly instructed to report on his next scheduled shift following August 22nd.

The grievor filed a grievance which reads:

"This grievance is being filed pursuant to Article 9 of the Collective Agreement between CATCA and the Treasury Board.

The grievor had clearly made it known that he was willing and able to resume his duties commencing Aug. 17/77 after two days of absence (Aug. 12-13). His absence from his place of work during the period of Aug. 17-21 inc. cannot be attributed to him but was forced upon him by the Employer. At no time did Mr. Belval request sick leave.

Corrective action requested

That the sick leave credits between Aug. 17-21 incl. be restored to Mr. Belval and that the above mentioned days be considered as leave with pay."

The Employer replied to the grievance on September 20th as follows:

"To C. Belval

DECISION OF AUTHORIZED EMPLOYER REPRESENTATIVE

This is in reply to your grievance dated September 16, 1977 on the subject of a period of sick leave between August 11, 1977 to August 21, 1977.

The following is a breakdown of events leading up to such a period:

(a) on August 11, 1977 you wrote a memorandum indicating that because of stress you could not work efficiently and therefore requested to see Dr. Spitzer as soon as possible.

(b) since Dr. Spitzer was not available, the medical officer Dr. M. Clement from the National Health and Welfare Ministry interviewed you in order to determine the situation. The findings of Dr. M. Clement were to the effect that you were temporarily inapt to work and that prior to your return for work you must be seen by a psychiatrist for evaluation.

(c) subsequently you received two (2) clinical interviews on August 17 and 18, 1977 by Dr. O. Rios and a further meeting with him on August 22, 1977 prior to a written report submitted to Dr. M. Clement. At which time you were declared fit for work.

Such events did satisfy the employer of your condition and therefore, action was taken to deduct the appropriate days of sick leave, August 11, 1977 to August 21, 1977 inclusively from your sick leave credits.

However, if you wish to change your sick leave days between August 17 to August 21, 1977 o leave without pay please advise this office.

To summarize, I cannot support your grievance and the corrective action requested."

The Employer also replied to the grievance on November 17, as follows:

"DECISION OF AUTHORIZED EMPLOYER
REPRESENTATIVE

The subject matter of your grievance has been reviewed and discussed with your Association representative.

As stated to you by Dr. Clement, the Regional Aviation Medical officer, you had to be evaluated by a psychiatrist prior to resuming your duties. Interviews were arranged for you on August 17, 18 and 22 with Dr. Rios and you met with him on those days.

As you had sufficient sick leave credits to cover this period your absence was charged against these sick leave credits. If you do not wish to use sick leave for this period of time, leave without pay could be authorized for you as stated in the Level One reply. If you choose to exercise this option which is available to you please notify the appropriate office.

In view of the above I have no alternative but to deny your grievance."

It was the grievor's position that although he was properly paid sick leave for the balance of his shift on August 11th, as well as August 12th and 13th; since the next 3 days were the grievor's scheduled days off, he should have been permitted to return to work on August 17th since he had advised his supervisor in advance of August 17th that he felt able to resume his duties.

The grievor testified that Dr. Clement had misconstrued the reasons for the stress which prevented

him from efficiently performing his duties. While Dr. Clement believed that working with scabs caused the stress, it was the grievor's position that the cause of the stress was the Petition which was being circulated to boycott the scabs. Once the decision was made to abandon the petition, the cause of the stress was removed and the grievor therefore believed that he should have been able to return to work at that time, i.e. on August 17th.

Counsel for the Union filed a letter which she received from Dr. Rios on the day of the hearing. This letter reads:

"RE: PUBLIC SERVICE STAFF RELATIONS
BOARD HEARING

Dear Miss MacLean,

Following Mr. Claude Belval's letter authorizing me to release to you his medical dossier, I am sending you a photocopy of the report I sent to Dr. M. Clement.

Such report summarizes all the aspects dealing with the questions posed to me in the consultation about Mr. Belval's complaint. I should point out to you that no specific question about the length of any "disability", apprehended or real, was posed to me. Furthermore, there is no reliable means to measure the exact time of

recovery from a psychological distress. That consideration led me to state in my report that, "the time elapsed up to the delivery of this report could be safely considered to be enough as far as providing relief for Mr. Belval's "stress".

Yours sincerely,

Oscar Rios, M.D.,
Department of Psychiatry.

N.B. The above quotation does obviously not necessarily imply that Mr. Belval would not have been able to resume his activities at an earlier date. It simply does not deal with that issue."

The dispute in this matter therefore involves one week's pay for the period between August 17th and August 21st. It was the grievor's position that the pay should not be taken from his sick leave credits since he was not sick at that time and had indicated that he wanted to return to work. The grievor therefore took the position that since he was improperly prevented from working during the period in question, the period should be treated as a paid leave of absence. The Employer took the position that it was entitled to require medical evidence of the grievor's fitness to return to work and that as soon as that evidence became available, the grievor was permitted to return. The

Employer also took the position that it was not requiring the grievor to use his sick pay benefits. Although the Employer was prepared to waive the requirement that the grievor file a physician's certificate of disability for duty (blue form) for the period in question because it was fully aware of the reasons for the absence and was therefore prepared to pay sick pay, the Employer offered the grievor the option of taking leave without pay for the week in question if the grievor did not wish to use up his sick pay benefits.

In response to a question from the adjudicator at the hearing in this matter, the grievor indicated that if it was determined that his only choice was to take an unpaid leave of absence for the period in dispute or to receive sick pay benefits for that period of time, he would opt for sick pay benefits.

It was argued on behalf of the grievor that since Dr. Clement's decision was based on a misapprehension of the cause of the stress, he had directed that the grievor undergo a psychiatric assessment before he returned to work. By doing so the Employer had forced the grievor

to take sick leave. Since the factual basis for Dr. Clement's decision was incorrect, the grievor should not be forced to take sick pay or an unpaid leave of absence but should be paid pursuant to the provisions of Article 14 and be granted a paid leave of absence for the period in question, in the Union's view.

In support of the grievor's position the Union relied on the reasoning in "Re Niagara Regional Board of Commissioners of Police and Niagara Regional Police Assoc." 9 L.A.C. (2d) 272; "Vezina v. Regina et al" 70 CLLC 14,188 Paragraph 14,018 and the decision of J. H. Brown, Q.C. in the "Robert J. Kelly grievance" dated December 17th, 1975, File No. 168-2-96.

Having considered all the evidence and the representations of the parties, I find that the facts of the instant case are readily distinguishable from the facts of the cases cited above. In the instant case there is no dispute between the parties concerning the fact that the grievor suffered from stress and was therefore unable to perform his duties efficiently. Indeed, this was the substance of the grievor's memo dated August 11th, 1977.

Although the grievor had requested an immediate interview with Dr. Spitzer, but was interviewed by Dr. Clement due to the unavailability of Dr. Spitzer, nothing turns on that fact. There is nothing in the Collective Agreement which would give an employee the right to select the staff doctor in these circumstances. While Dr. Clement may have misconstrued the cause of the grievor's stress, he recognized that symptoms of stress existed. Since he was not a specialist in the field of mental illness, he referred the grievor to Dr. Rios for psychiatric assessment as soon as the grievor felt that he might be able to return to work. The grievor did not challenge Dr. Clement's actions on August 11th. However, when the grievor decided that he wanted to return to work as of August 17th, he was required to remain off work until cleared by Dr. Rios. It cannot be suggested that an undue period of time elapsed before the grievor was given medical clearance to return to work. Dr. Rios met with the grievor on August 17th, 18th and 22nd and informed the Employer immediately following his meeting on August 22nd that the grievor was fit to return. The grievor returned to duty on his next scheduled shift.

The issue to be determined therefore is whether the Employer had the right to compel the grievor to submit to a psychiatric assessment in these circumstances.

I find that just as the grievor's controller's licence is predicated on his having a valid medical certificate, it is therefore not unreasonable that the Employer should refuse to permit the grievor to function as a Controller if there is a valid medical reason for doing so. In the instant case it was the grievor's own assertion that he suffered from stress and was therefore unable to perform his duties that caused the Employer to take the action it did. A distinction must be made between external factors which may cause stress and the psychological disability which is referred to as "stress". The stressful conditions caused by the Boycott Memo were conditions which existed for all controllers, yet all controllers did not suffer from the psychological disorder of "stress" so as to be unable to perform their duties. However, the grievor suffered from stress to the point where he requested immediate medical attention. Because of this request, Dr. Clement authorized the grievor to go on sick leave and the grievor accepted sick pay up until August

13th because of his condition. Accordingly, the fact of the condition of stress is not in dispute.

We are not dealing in this case with a controller who asked for time off because of fatigue. Normal fatigue can be alleviated by a day or two of rest and relaxation. On the other hand, stress is a psychological disorder which takes time and treatment to overcome.

Although the removal of the conditions which caused the stress may be necessary for the successful treatment of the disorder, the psychological condition of stress is not immediately cured by the removal of the cause anymore than a fractured arm is cured by the removal of the pressure which caused the fracture.

If an employee is required to obtain medical permission to leave work because of stress, it is not unreasonable that the Employer should require medical evidence that the employee is free from the psychological disorder before allowing the employee to return to work. This was the condition imposed by the Employer in this case and I find it to be reasonable in the circumstances. Although the condition of stress is subjective in nature

and does not effect everyone in the same manner, it is a personal, psychological disorder rather than merely an external condition.

Since the stress of which the grievor complained caused him to be unable to properly function as a controller on August 11th and since stress could cause a controller to make errors which, as the grievor stated, could result in a catastrophe, the Employer was entitled to obtain reasonable medical assurances that the condition which caused the grievor to remain off work would no longer interfere with his performance when he felt that he was able to recommence his duties. I find that the Employer acted expeditiously when it arranged for Dr. Rios to examine the grievor.

Although it was the grievor's subjective opinion that he was able to return to work on August 17th, it is noted that the professional opinion of Dr. Rios does not specifically support that position. Indeed, Dr. Rios' report which was prepared after the August 22nd meeting indicates "the time elapsed up to the delivery of this report could be safely considered to be enough as

providing relief for Mr. Belval's "stress".

We therefore find that the grievor failed to meet the onus which rests on him to establish that he was able to report to work prior to the time that he did and that the Employer improperly prevented him from doing so.

We further find that there is nothing in the facts of this case which would entitle the grievor to claim leave with pay under Article 10.04 of the Collective Agreement since the circumstances of his leave were "directly attributable" to his claim that he was suffering from stress.

For the foregoing reasons we find that the grievor has failed to establish that the Employer violated any of the provisions of the Collective Agreement in this matter and the grievance must accordingly fail.

My award therefore is that the grievance is dismissed and in view of the election made by grievor at the hearing in this matter, I direct that the period in question be treated as sick leave with pay.

For the Board,

J.D. O'Shea,
Board Member and Adjudicator.

TORONTO, April 7, 1978.