1979

File No. 166-2-4798

PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

ROBERT J. LUSH,

grievor,

AND:

TREASURY BOARD,
(Transport Canada)

employer.

DECISION

Before: Donald MacLean, Board Member and Adjudicator.

For the Grievor: John C. Butt, of the Canadian Air Traffic Control Association

For the Employer: Pierre Hamel, counsel

ARTIO
Code 402/78

Heard at Gander on December 15, 1978.

SPECIAL LEAVE WHEN SPOUSE IN HOSPITAL

1. The Grievor, Robert Lush, has been an Air Traffic Controller at the Gander Air Control Centre for the past 21-22 years. His allegation in his Grievance Form, Exhibit 1, is to the effect that the Employer has violated Article 10.04 of the Collective Agreement in force between the Treasury Board and the Canadian Air Traffic Control Association (Group: Air Traffic Control, All Employees) Code: 402/78, which Collective Agreement has an expiry date of December 31, 1978.

2. Article 10.04 is in the following terms:

> "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."

3. In February - March, 1978 the Grievor had occasion to make application for 10 days special leave. When he was informed that he would be allowed only 2 days out of the 10 days which he requested, he filed a grievance and subsequently referred this matter to adjudication.

4. The circumstances surrounding his request for special leave were that on Friday, February 24, 1978, the Grievor's wife was notified that she would be entering hospital on Sunday, February 26 in order to undergo an operation. The Grievor immediately started to make contacts in order to try to get help.

5. He went to the Canada Manpower Centre to see if a live-in maid was available on their lists. He telephoned both local radio stations in order to ask them to put announcements on his behalf during their respective public service programs. He made further contacts with Manpower and the radio stations during the following week. However, the only response which he had was from a 17-year-old girl, who, as he learned during his only conversation with her, was not really interested in seeing to housekeeping and the feeding of the Grievor's seven children.

6. Although the Grievor and his wife first learned that she would have to undergo her operation in the late summer/early autumn of 1977, the waiting list for surgery at the Gander Hospital was such that they were lead to believe that the operation could be done only in the summer of 1978. It was, accordingly, a surprise to both the Grievor and Mrs. Lush that she would have to undergo surgery on Monday, February 27, 1978. They had expected to receive more advance notice of the date. Because of the uncertainty of the date, they did not make any inquiries in advance as to whether live-in housekeepers or other help was available in the Gander area. It was only after the Grievor became aware of the date, that the Grievor began his inquiries. Besides the Manpower Centre, and the radio stations, he asked his wife's physician, Dr. Blackie. However, the doctor did not know of any agency or source of help in the Gander area in getting aid. Nor did the Grievor know any agency there. He felt that both his mother and mother-in-law, who reside in the Gander area,were too elderly for the task.

7. Prior to his wife going into the hospital, and also later on during her convalescence, the Grievor kept his supervisor informed of the reasons for his inability to get to work. The latter did not tell the Grievor of any agency in Gander which might help him. The Grievor did not ask any of his friends or neighbours if they knew of any agency or person who would provide housekeeping services. Nor, did the Grievor consider requesting of his fellow workers that they exchange shifts with him. He thought that the latter option was not readily open to him. Mr. Cornick, for the Employer, said that the Employer is not adverse to such exchanges provided that the provisions of Article 13.04 are followed, e.g. that 24 hours notice is given, and that the replacement be of similar rank to the person he is replacing.

8. The main complicating factor in the Grievor's search for a live-in housekeeper was the fact that he has 7 children (from 5 to 18 years of age). Further, the second eldest boy, 16-year-old David, has epilepsy and is subject to convulsions at any time, even though he does take medication both for the epilepsy and for a behavioural problem of hyperactivity. The Grievor indicated that, although David attends school, it is a special class in which the teachers have had training to cope with these special students. He is picked up by private bus at home and returned at night. A supply of pills at the school allows the teachers to give him his required medication at noon hour.

9. Although the Grievor's oldest boy and girl were respectively 18 and 17 at the time, he felt that it would

be impossible to leave them to care for all the family during the 7 days while his wife was in the hospital, and during her 2 weeks non-working recuperation period at home. His oldest boy was still going to school and his daughter was working at Reigman's clothing store.

10. The Grievor was scheduled to report for work on that week-end. He notified his supervisor that he would not be able to do so. He also missed the nine succeeding shifts for which he was scheduled to work in the period to March 15. Although the doctor did not say that it was specifically necessary for the Grievor to remain home, the Grievor considered that,since no suitable domestic help was available,he had to remain home to provide for his family.

11. Despite objections from Mr. Hamel as to the question of relevancy, I allowed evidence (Exhibit G-7 and the Grievor's own testimony) on behalf of the Grievor showing that he was allowed special leave for one day,on November 16, 1978,for the reason that his wife had been sick throughout the previous night and could not look after the children. I allowed the evidence at the hearing on the basis as suggested by Mr. Butt that it shows how the employer's discretion is exercised. I refer to it now as being relevant in the same context as did Chief Adjudicator Jolliffe in the Delle Palme case (166-2-128) at Page 5, (and Page 6):

> "I considered it to be relevant
> but obviously not decisive,"

12. Mr. Butt made much of the circumstances surrounding the November, 1978 special leave in his argument to

have the evidence admitted. He even went so far as to say that the situations were "identical". On a simple reading of the Applications for Leave, Exhibits G-6 and G-7, it may seem that there are similarities between the two situations. However, the November incident is not identical to the one in February. It was a sudden illness of one day's duration. In point of fact, the evidence of the incident in November not only does not help the Grievor's case, it adds weight to the Employer's rationale as to when it will grant special leave: i.e. when an unexpected illness occurs in the family which requires attendance at home by the employee.

13. When the Exhibit G-6 was submitted to the Employer, the application had to be referred to Mr. Ed Smith, the Regional Manager of Air Traffic Services in Moncton, since the request was for more than 3 days. He reviewed the documentation that had been submitted and he also made further inquiries of Mr. Cornick, the Grievor's supervisor in Gander, about the visit to the Manpower Centre, and the calls to the Radio stations. In the letter Exhibit G-7, Smith says (through Mr. Cornick) that the Grievor's efforts "were not as timely or as extensive as they might have been." At the hearing he viewed the approaches made by the Grievor as being "passive" in nature. There was no indication in the information that he received that the Grievor "actively" pursued inquiries to other agencies or persons. He had not made any personal planning prior to the operation of which he had prior knowledge that it was to take place. He made no efforts to exchange shifts. Therefore, only 2 days were allowed to the Grievor.

14. No interview was held by Smith with the Grievor nor with any of the doctors involved in this matter.

15. While authorization for special leave in excess of 3 days has to be obtained from Mr. Smith, any discussions concerning advancing of annual leave is done by the unit manager, i.e. Mr. Cornick.

16. Mr. Cornick also testified to the matter of shift exchanges in accordance with Article 13.04. He said that although requests for shift exchange between employees for family matters have been rare, it has been known to occur. All the employer is concerned with in such exchanges is that it be given 24 hours notice, that the employees concerned agree and that the qualifications of each employee be similar.

17. Mr. Cornick suggested that his granting approval for the Grievor's special leave in November was a case where something happens suddenly.

Articles of the Collective Agreement

> 13.04 Equally qualified employees may exchange shifts provided:
>
> (a) the provisions of clause 13.05 (2) or clause 15.04 are not violated,
>
> (b) the employees shall make every reasonable effort to provide a minimum of twenty-four (24) hours' advance notice of the

change,

(c) the shift change receives the approval of the Employer, which shall not be unreasonably withheld,

(d) it will not require the payment of overtime,

(e) once such an exchange of shifts has been approved, it will be the responsibility of the employee involved to report for duty in accordance with the approved revision.

Conclusion and Reasons for Decision

18. I agree with Mr. Butt that there is no question that Mrs. Lush's illness prevented the Grievor from reporting for work on the days in question. However, as a result of a review of the cases that have been decided by other adjudicators, as well as the Supreme Court of New Brunswick, my inquiry into the refusal to grant the 8 extra days, in addition to the 2 days that were allowed, is strictly limited to whether or not the Employer has in fact exercised its discretion.

19. The Employer did not act on simply the Application for Leave, Ex. G-6, but made further inquiries, through Mr. Cornick, as to how the Grievor had tried to seek assistance. He told them of his visit to Manpower and his calls to the radio stations.

20. In reply to the Employer's contention that the Grievor's oldest son and/or daughter could have helped

the Grievor, Mr. Butt suggested that it would have been unreasonable to have required the Grievor to have his son and/or daughter help out their father in these circumstances. However, the unreasonableness of the Employer's suggested alternatives is not an issue here. Article 10.04 here does not prevent the employer from acting unreasonably. However, because of the callousness of such a proposition, I do not rely on it.

21. Rather, I think that the Grievor has been remiss in not doing all in his power to try to get assistance. And this is so for the very reasons espoused by the Grievor and his representative: a)his son who has epilepsy, b)the uncertainty of the date of the operation, the large family, only one of whom was not attending school, c)the "apparent" (according to the Grievor) lack of agencies in the Gander area which could help him, d)his decision not to call on friends and relatives for whatever valid reason. These all indicate that the Grievor should have been making at least preparatory inquiries of agencies, friends, relatives and associates with a view to trying to find someone who would have been suitable in the circumstances. I agree that it is not just anyone, who would be available, who could have been suitable. I point this out to show that in such circumstances, where the Grievor knew beforehand of an event which would possibly prevent him from reporting to work even if the date was uncertain, it would be incumbent upon him to seek out as many possible avenues as he could. This the Grievor did not do in the instant case. He did not even make inquiries as to the possibility of changing shifts with some of his fellow workers.

22. There is absolutely no evidence which suggests that it was only the Grievor who could provide aid to his wife and family. There was no suggestion from the Grievor's doctors that the domestic help from outside the family circle could not have been substituted or that the nature of the surgery required the Grievor's presence or that it would be unsuitable to have someone else. (see Re Andrews, 166-2-1786 (Beatty), at Page 10, and compare Re Jean, 166-2-4230 (Garant)).

23. Mr. Butt suggested that the Re McDermott decision is of assistance here, at page 10-11, 166-2-2432, (Norman):

> "Further, I have determined that the Employer failed to properly exercise its discretion to reasonably consider the matter of the Grievor's application for special leave with pay, to the exclusion of other matters bearing upon personnel and union relations, but quite irrelevant to the Grievor's claim. To have thus found that the Employer failed to properly exercise its discretion under Article 21.05, is to find that the requested leave with pay was indeed unreasonably withheld."

24. He also cited the decision of the same adjudicator, Norman, in Re Curniski, (166-2-3692), at Page 7:

> "Whether the employee has some outstanding annual vacation

> leave is entirely beside the point. To the extent that the Employer gave weight to this consideration, the decision taken is unreasonable...
> ...a decision-maker who takes into account an extraneous consideration, acts in excess of his jurisdiction."

25. Mr. Butt also made mention of the fact that, in his argument, Mr. Hamel suggested that the Grievor's oldest daughter could have left her job and helped out at home for the three weeks of Mrs. Lush's hospital confinement and her recuperation at home. He characterized this as not being a solution, certainly not a reasonable solution.

26. I agree with Mr. Butt on that point, but the question to be answered here is the same as that which I decided in the Drummond case, 166-2-4799. The test as formulated in Re Delle Palme, 166-2-128, (Jolliffe), and as followed recently by Adjudicator Clarke in Re Gallant et al, 166-2-3268 to 166-2-3270, does not speak of the reasonableness (or the unreasonableness) of the Employer's decision in those instances where the wording of the Article is the same or similar to Article 10.04.

27. At page 11 of Re Delle Palme, then Chief Adjudicator Jolliffe has this to say:

> "I have indicated that the circumstances proved before me were such as to justify special leave under Article 23.05 and I have

> also expressed my view that the requirement of a medical certificate in Mr. Delle Palme's case was inappropriate and unreasonable. However, it is necessary not to lose sight of the precise language of Article 23.05, upon which the grievance is based. That language is not ambiguous. It provides that "special leave with pay may be granted" where the conditions are those proved here. The word is "may" and not "shall".

Because of s-s. 95(2), Mr. Jolliffe continued,

> "It is not open to me to substitute the word 'shall' for the word 'may', even if I consider the Employer's discretion has been unwisely or unfairly exercised. It is an administrative, not a judicial discretion, and it may be deplored but must be upheld."

28. I can see nothing wrong in this reasoning and I further subscribe to Adjudicator Clarke's analysis, at Page 4, in Re Gallant et al, where he deals with a clause that is identical to the instant Article 10.04:

> "It is not for me to say the end result of the exercise of an administrative discretion is re-

> viewable so long as the relevant circumstances are before the employer and the exercise thereof does not appear discriminatory or capricious. And so the fact that I would have exercised my discretion in favour of the grievors is neither in the essence of the exercise or the language of the article. Once the discretion of the employer is exercised, it then remains for the employer to grant or not to grant the special leave with pay. In this case it chose not to grant the special leave with pay. The parties have accordingly agreed again by their language that in circumstances such as these it becomes the option of the employer to decide. The language does not impose an obligation upon the employer to grant the relief sought."

29. On return to Moncton, after the hearing in Gander, I noted the following case had just been published: Re Hatt (1978), 23 N.B.R.(2d) 688, (N.B.S.C.)(Stevenson J.). Although I do not rely on it conclusively, it is well to review the salient points in this decision. The clause therein is as follows:

> 28.01..."leave with pay may be granted to an employee by:
> (a) the Deputy Head for a period not exceeding five working days.
> 28.02 Leave may be granted:
> (b) where circumstances not directly attributable to the employee prevent his reporting for duty."

30. In granting the Employer's application therein for an order of certiorari to quash the decision of the Adjudicator under the Public Service Labour Relations Act (R.S.N.B.), which statute is to a large extent modelled after the Public Service Staff Relations Act, Mr. Justice Stevenson said at P. 693:

> "The real issue in this case is whether the adjudicator had authority to substitute his discretion." [for that of the Deputy Head],

and, at P. 694:

> "Here there was no misinterpretation or misapplication."
> [of the statute by the employer]
> "nor was there any breach of any obligation owed by the employer to the employee. While on the face of the matter the employer's decision may seem insensitive or callous, that decision was within the sole discretion

> of the employer and the adjudicator exceeded his jurisdiction by substituting his view as to the manner in which the discretion should have been exercised."

31. Mr. Justice Stevenson suggests as an added point on Page 694 that

> "the grievance was not one that was referable to adjudication under S.92 of the Act."
> [S.91 of the Federal statute].

However, I would agree with Mr. Hamel as noted on Page 12 of my decision in Re Drummond. I think the question may be referred to adjudication to determine if the Employer's discretion has been exercised judiciously. That is, has it considered all the relevant circumstances that have been presented to it without capriciousness, without mala fides, etc.? Once the answer to this question is in the affirmative, then no further inquiry by an adjudicator may be made.

32. Had the Grievor in the instant case at least attempted to make arrangements to exchange shifts with his fellow employees, had he started his search for a live-in maid before the call was received from the hospital, and, if such further efforts had been fruitless, then I could consider a refusal by the Employer as being unreasonable. However, as I have indicated previously, that is not the question to be answered here, it is, rather, whether or not the Employer did exercise its discretion at all.

33. In this light it is my decision that the Employer did exercise its discretion and considered the material

that was presented to it by the Grievor. Management decided that the Employer should not pay the Grievor for all of his absence. That was its prerogative. It could have decided to grant no special leave at all or up to the 10 days requested. That was something for it alone to decide. The only right given to the Grievor (and other employees) by Article 10.04 is to apply for the special leave. In Article 10.04 there is no curtailment of the Employer's discretion once it has considered the Grievor's situation.

34. In reply to Mr. Butt's allegation that the employer's suggestion that the Grievor use 1978 annual leave is an extraneous consideration in the sense suggested by Re McDermott and Re Curniski, I would suggest that the evidence is that Mr. Smith did not consider that annual leave be used by the Grievor. It was Mr. Cornick who made the suggestion that the Grievor use his annual leave. The Employer did exercise its discretion, which is an absolute discretion, and saw fit to grant 2 days special leave to the Grievor. In fact, I would go so far as to characterize the 2 days of special leave as being reasonable in the circumstances; nothing was added at the hearing which would change my view of the non-action by the Grievor while he had ample time to try to set up a contingency plan.

35. There are three points, to which Mr. Hamel referred, which I must answer. Firstly, Mr. Hamel suggested in his argument for the Employer that the Grievor did not contact all his relatives, nor all his neighbours or friends to try to get a housekeeper. Of course, that is a ridiculous suggestion, no one can be expected to call all his

possible contacts in such circumstance. All that could be required is that he make some effort, but certainly more effort than that which the Grievor did here.

36. Another suggestion of Mr. Hamel in his summation is that the Grievor should have called upon his oldest son to miss school and/or his oldest daughter to miss her work. Apart altogether from the point of their respective capabilities, I think that such suggestions are reprehensible. The Employer and the Grievor should be able to work out their difficulties between themselves, and not involve other employers or persons.

37. Thirdly, the doctor's certificate, page 2 of Exhibit G-6, appears to have been signed by Dr. Blackie before the remainder of the page was filled in by the Grievor. Although Mr. Hamel made allusion to this at the hearing, no objection was made by the Employer when the Grievor initially submitted it as part of his application for leave to the Employer. I would suggest, in any event, that the certificate as Page 2 of the application for leave, is of little value other than to indicate that the doctor saw or had "satisfactory knowledge of the ill person named above" and that he considered "assistance was/is necessary for the period requested."

38. I also recognize that these types of certificates are hearsay and I admit it as an exhibit in such light, bearing in mind the preliminary decision of the Board in Cuillerier et al and Dandurand et al (194-2-46 and 194-2-48). It should be noted that the Cuillerier et al and Dandurand et al decision is of a special nature in that it dealt with an application for consent to prosecute. Therefore, I also accept as exhibits the two letters from each of Gander's

radio stations (Exhibits G-3 and G-4), the letter from an employee of the Canada Manpower Centre (Exhibit G-2, and two memos from the Grievor's physician and surgeon (Exhibits G-5 and G-5A). Such statements are acceptable by virtue of paragraph 22(c) of the Act. Even though they be hearsay they are relevant to the grievance. In fact, they add nothing to the testimony of the Grievor himself, and are not conclusive of the reasons for this decision one way or another.

39. In the result the grievance is dismissed.

For the Board,

Donald MacLean,
Board Member and Adjudicator.

MONCTON, February 5, 1979.

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