

FEB 16 1979

File No. 166-2-4799

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

BETWEEN:

ROBERT F. DRUMMOND,

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

Heard at Gander on December 15, 1978.

SPECIAL LEAVE WHEN SPOUSE  
REQUIRED ASSISTANCE DUE  
CAST ON HAND

ART 10  
CODE 402/78

### Summary of the Evidence

1. The Grievor in this reference to adjudication is Robert F. Drummond. He is an Air Traffic Controller with Transport Canada at Gander. He has been employed as a controller for 9 years and is classed as a controller AI 4. The Grievor is a member of the Canadian Air Traffic Control Association, and is covered under the Collective Agreement made between Treasury Board and CATCA - Group: Air Traffic Control (All Employees), Code 402/78.
2. The Grievor testified that he was unable to report for work for a total of four shifts in January 1978, through no fault of his own. He had to remain home to care for his wife who had a cast placed on her left hand. She also had been told by her doctor not to use her right hand. All of this due to an arthritic condition which had worsened over the fall of 1977 and early winter of 1978, such that the medication which was prescribed for her was not as effective as it had been.
3. On the totality of the evidence there is no question that Mrs. Drummond required someone to be with her and their 16 months old child. From the Grievor's testimony, Mrs. Drummond's hands were effectively both immobilized from January 6, 1978 until January 16, 1978, when the cast was removed. However, because of the lingering inflammation and pain, she remained still unable to see to her household chores and the care of their child for a couple more days. She was advised by her doctor not to do any work in all this period of time.
4. The Grievor attempted to get help to do the housework and care for the baby, but that was to no avail. He

said that his mother-in-law offered to come if an emergency developed, but the Grievor recognized that she had her own responsibilities with her own husband, who was 95 at the time, and their young son. Accordingly, he did not prevail upon her to help him. He said that his sister-in-law is his only other relative in the area, but, because she runs a shop and has her own child to take care of, the Grievor thought that she would be unable to care for his family as well as her own. He did ask one of his neighbours, where he lived, in Frederickton. (It is a community of about 350 inhabitants, located about 38 to 43 miles from Gander.) However, she was unable to help him.

5. The Grievor informed his supervisor by telephone in the late afternoon of January 6, that he would be unable to report in for his next shift from 12:00, midnight, to 8:00 A.M. on January 7, and for his next succeeding shifts on January 8 and January 9. He said that his supervisor did not tell him of any agency where he could turn to get a housekeeper to assist his family. However, it was admitted by the Grievor that, other than the inquiries already noted, he did not make any further inquiries of his other relatives, friends, neighbours, the doctor who treated his wife, nor the staff of the Paton Memorial Hospital in Gander, to see if they knew of anyone or any agency who would be able to help him and his family during the period. He did contact the Canada Manpower Centre on the next Monday, following the weekend, but the proposed referrals of domestic help by the Gander office were considered by the Grievor to be too young (17 years of age) and unreliable.

6. Although the Grievor's wife had been told in the Fall of 1977, by her physician, that it was a possibility that she would have to have a cast to immobilize her hand, there was no definite word that she would need the cast until x-rays were taken at the Hospital on Wednesday, January 4, and until her physician performed further tests on Friday, January 6, at the Hospital. From the results of these tests, he then decided that the cast would be necessary. This is why, in the opinion of the Grievor, he found it impossible to get help. Further, he said he did not know of any agency which would be located in Frederickton where he could get some help.

7. According to his supervisor, Mr. Cornick, the Grievor, at first, submitted an application form for special leave around January 22 or 23. Since there was insufficient information on the form, Cornick returned the form to the Grievor and asked him to complete paragraphs 6 and 7 (on Page 2 of Exhibit G-2). The Doctor's certificate was not fully completed, since there was no elaboration by the doctor as to why the Grievor's 16 months old child needed care (see doctor's certificate on Page 2 of G-2. Other reasons (state) "care of 16 mos. child.").

8. Mr. Cornick, as the Grievor's supervisor in Gander, is allowed to grant or refuse requests for special leave on his own if the request is for no more than 3 days at a time. He said that if the request is for more than 3 days the application is referred to the regional manager for Air Services in Moncton.

9. When the Grievor re-submitted his application for leave, Exhibit G-2, on February 10, 1978, Mr. Cornick re-considered the application, and he also recalled a conversation that he had had with the Grievor to get further particulars on the circumstances surrounding the Grievor's application for special leave. This conversation had occurred in late January or early February of 1978. At the hearing in this matter Mr. Cornick recalled that the Grievor had told him he had not contacted the Canada Manpower Centre to get domestic help, nor had he contacted any agency or other people in Frederickton. Accordingly, it was Mr. Cornick's decision that the application for special leave be approved only for one day, i.e. for January 7, 1978 only; and the applications for special leave for the 2 more days, in Exhibit G-2, and for another day, in Exhibit E-2, were not approved.

10. Mr. Cornick suggested that special leave is granted on the basis of the circumstances of each individual case. It is used among other reasons to permit an employee to obtain outside help if it is required, to care for his family. His rationale for refusing to approve the Grievor's application in this case is that there was a lack of justification for approving special leave for all the days that he missed. There was no indication that the Grievor contacted anyone for assistance.

11. Mr. Cornick suggested that, in addition to the Canada Manpower Centre in Gander, there is an agency at the Paton Memorial Hospital which has contact with people in the Gander area who are prepared to provide Home Nursing Care.

12. When he refused to approve the Grievor's application for special leave, he indicated to him, in Exhibit E-3, that

"The remainder of the absence will be charged to your annual/ lieu leave credits. Please complete the appropriate forms, CGSB 178B".

When the Grievor completed these forms, Mr. Cornick approved the use of part of the Grievor's annual leave that was due to him for 1978 to cover the 3 days for which he was not granted special leave.

Summary of Representations of the Parties

- Argument for the Grievor

13. Mr. Butt suggested on behalf of the Grievor that there is no question that there was an illness in the Grievor's immediate family, and that he found that he had to remain home to care for them. This brings his case within Article 10.04 of the Collective Agreement:

"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."

14. The Employer suggests in Exhibits G-5 and G-7 that the Grievor could have obtained help in order to allow him to go to work. However, the Grievor lives in Frederickton, a community some distance from Gander. No home care services are available there. He had no relatives who could help him in his situation. The one person in Frederickton, whom he did call, and who he thought would be appropriate, was not able to come to his aid. Finally, the cast was put on his wife's wrist on Friday afternoon. This time factor is important here, he had little time between then and his scheduled shift at midnight, that evening, to try to get help. Because of the lateness of the hour there was little time to go to the Canada Manpower Centre.

15. Further, the Employer has introduced extraneous considerations, when Mr. Cornick considered and approved advancing annual leave to the Grievor. In support of this he cited Re McDermott, 166-2-2432, a decision of Adjudicator Norman, at page 10:

"The fact that these extraneous matters were in his mind at the time of the first level grievance cannot help but colour the Employer's actions, from the outset, in responding to the Grievor's claim...

...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."

16. Mr. Butt also cited the following passage from Re Curniski, 166-2-3692, at page 7, where Adjudicator Norman states:

"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."

17. It was the submission of Mr. Butt on behalf of the Grievor that the Employer, in this case, has failed to properly exercise its discretion.



Argument for the Employer

18. Mr. Hamel drew my attention to Article 10.04 of the Collective Agreement and gave emphasis to the words "discretion" and "may" in the first line of the article. It is said for the Employer that the discretion spoken of here is an absolute administrative discretion, even though he recognized that it is to be exercised judiciously. Further, Article 10.04 is not subject to additional sentence that sometimes appears in other collective agreements to the effect that:

"such leave is not to be unreasonably withheld."

19. In the circumstances of this instant case, the Grievor has to show that there was an illness in his family, that this prevented him from reporting for work and that the circumstances are not directly attributable to him. If he establishes these grounds, the discretion still remains in the Employer to approve or not approve the application for special leave.

20. Mr. Hamel allowed that there was evidence that Mrs. Drummond was not able to use her hands and that someone was needed at home to look after her and their 16 months old child. However, he suggested that the Grievor's efforts to obtain assistance were not all that they could have been.

21. The Grievor testified that he went to contact the Canada Manpower Centre to try to get domestic help. However, this was not made known to Mr. Cornick as the latter was not aware of this attempt by the Grievor. In addition, there was the Grievor's evidence that he did not

apply to any agencies in Gander or Frederickton to try to get domestic help. It is immaterial whether or not these agencies exist. The Grievor did not ask his doctor nor any of the hospital staff in Gander if such facilities were available. Nor did the Grievor inquire further to see if his friends, neighbours or relatives knew of any person who would be able to help him. This would have been a relatively easy task which he failed to do.

22. Mr. Hamel suggested that it would have been relatively easy to get one of the 17 year old girls, who had been on the Manpower list, since Mrs. Drummond would have been home in any event to be able to supervise her work.

23. He also was of the opinion that the Grievor's remoteness from Gander and the fact that there are less services available in Frederickton, have no solid grounds, since these facts would make this case analogous to the 'snow-storm' cases, in the sense that the Grievor left himself available to not be in a position to report for work. In support of this he cited Re Tutti 166-2-1833, at Page 9, (Adjudicator Beatty):

"...although I need not make any specific finding on this matter [Mr. Hamel admitted that it was obiter in this context]

"it might well be proper in light of certain comments made by other adjudicators in the "snow-storm" cases, for the employer to argue that the fact that...some professional agency

might not provide assistance to such rural and outlying communities (if that were the case) is a function of Mr. Tutti's own doing and directly attributable to his decision to live in such communities."

24. Although Mr. Cornick did not instruct his staff about the availability of services from private agencies in the area, it is the contention of counsel for the Employer that it is up to the Grievor (and other employees) to look after himself. It is incumbent upon the Grievor to look for assistance, and not up to the Employer to do so.

25. In addition to objecting to the admissability of the Doctor's certificate on Page 2 of Exhibit G-2, because it is hearsay and should be given the weight that hearsay deserves, Mr. Hamel questioned the contents of the certificate in the sense that there is no indication in it as to who is required to stay home, nor for how long he should stay, nor was there any indication that the Grievor's services in particular were required.

26. From the testimony at the hearing, it is clear that the assistance which his wife and child required in the instant case was not of a medical nature.

27. The main issue suggested by Mr. Hamel is that the Grievor has not shown that he was prevented from reporting for work for reasons that are not attributable to him. He pointed out that there were other avenues open to the Grievor to obtain assistance but these were not pursued

by him. Accordingly, he contributed in part to the circumstances which prevented him from reporting to work. He cited in support Re Andrews 166-2-1786 (Beatty), at page 10:

"If that be so, it necessarily follows that an employee such as Mr. Andrews must show at the outset, if an adjudicator is to conclude that the special leave was unreasonably withheld, that the illness in his immediate family did in fact (a) prevent his reporting for duty and (b) that the circumstances which caused his failure to report are not directly attributable to him. In cases such as the one before me, where an employee claims that illness in the immediate family was the operative cause of his inability to report for duty, it is therefore incumbent on him to prove that owing to (1) the nature of the illness, (2) the physician's instructions, (3) the actual unavailability of paid or voluntary assistance, (4) the financial resources available to him or (5) some other similar cir-

cumstance, voluntary or professional assistance was either unsuitable or unavailable to him and he was therefore himself required to provide the necessary care and assistance."

28. Mr. Hamel also referred me to the cases of Re Pelouquin 166-2-2008 (Descoteaux), Re Jean 166-2-4230 (Garant), and Re Leo 166-2-1118 (Jolliffe).

29. Counsel for the Employer distinguished the 2 cases submitted by Mr. Butt. In McDermott the Employer failed completely to look into the facts in that case, see page 5, and pages 9 & 10. In the instant case the Employer did make inquiries beyond the application itself.

30. In Curniski the special circumstances of the nature of the illness of the daughter required the presence of the mother, and the fact that the grievor therein had annual leave credits remaining, was one of the reasons cited for refusing the one-day's leave. This is clearly not the case here.

31. The final point put forward by Mr. Hamel was based on the question: What is the extent of the jurisdiction of an adjudicator to review in these cases? He answered the question to the effect that where special leave clauses such as Article 10.04 are concerned, the test is not as to the reasonableness of the Employer's decision, but it is whether the Employer exercised his discretion judiciously i.e. that it was exercised by the proper authority, on the particular facts of each case, that it was not tainted by capriciousness, bad faith, totally ex-

traneous considerations, or irrelevant or non-pertinent factual findings, Reid, Administrative Law and Practice, 1971, at Page 296 to 300.

32. It is incumbent on the Grievor to show that the Employer's discretion has not been properly exercised.

33. He cited in support Re Gallant et al, 166-2-3268 to 166-2-3270 (Clarke), which follows the decision of the Chief Adjudicator Jolliffe in Re Delle Palme, 166-2-128, and the quote in the latter case, at Page 11:

"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. 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."

34. Mr. Hamel said that the Grievor has not met the onus placed on him, and he requested that the grievance be dismissed.

35. Although I may sympathize with the Grievor in his predicament, and I might have allowed him 2 days to make arrangements to get help in his circumstances, the cases decided in Re Delle Palme, and in Re Gallant et al are of great weight. The question to be decided in the instant case is not whether the discretion as exercised was unreasonable, but whether it was exercised at all. There is no doubt that Mr. Cornick considered the individual circumstances of the Grievor and formed his opinion that the Grievor's failure to broaden his search beyond calling one neighbour indicated that he was in part the cause of the circumstances which prevented him from reporting for duty. If the Grievor had continued his calls by asking his family physician, his relatives and friends on Saturday and Sunday and had not met with success, it would have been reasonable to have granted him the first 3 days as special leave as he requested.

36. However, the test as formulated in Re Delle Palme and in Re Gallant et al do not speak of the reasonableness of the Employer's decisions in those instances where the wording of the Article is the same or similar to Article 10.04.

37. I do not think that I can review Mr. Cornick's decision just because he suggested to the Grievor in Exhibit E-3 that he apply to use part of his annual leave credits for 1978. The suggestion, as noted supra at page 5, implies that Mr. Cornick was suggesting an alternative after the refusal to grant special leave in the sense that it would be better to resolve the matter by the Grievor applying for advancement of annual leave rather than to apply for leave without pay, which was his other option.

38. I further distinguish the Curniski case in that there, no leave at all was granted as requested, whereas, here we are asked to consider increasing the special leave, 2 additional days for one occasion, plus one single day later on.

39. I subscribe to the language in the quote from the Re Delle Palme case, supra. I also note that Adjudicator Clarke in Re Gallant et al, at page 4, in dealing with a clause that is identical to Article 10.04, said:

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



sence 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."

40. 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."

41. 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."

42. The onus on the Grievor herein is much greater than that which was the test in Re Andrews supra. It is not simply whether the Employer failed to act reasonably

or did in fact act unreasonably in the circumstances. Rather, it is for the Grievor to show that the Employer has failed to consider the circumstances which the Grievor has seen fit to provide him by way of his application for leave, and by way of supplementary information subsequent to receipt of the application for leave. This the Grievor has failed to do. In fact, Mr. Cornick did consider all the relevant information which the Grievor saw fit to pass on to him. In the result the grievance is denied.

43. Before I close this decision I make the following comments on three points which were raised by Mr. Hamel in his argument.

44. With all due respect to the position of Mr. Hamel when he questioned the submission of "hearsay" evidence in the use of Doctors' certificates, Page 2 of Exhibit G-2, such evidence was never questioned by the Employer's counsel in any of the cases to which he and Mr. Butt have referred. Counsel in these latter cases and the adjudicators may have questioned some of the comments made by the medical practitioners when such comments were made outside of the field of their medical competence or their personal knowledge (see Tutti, supra, at P.9). I recognize that such medical statements or certificates are "hearsay" in the sense spoken of in the preliminary decision of the Board in Cuillerier et al and Dandurand et al, (194-2-46 and 194-2-48). I accept them as "hearsay" evidence in the same manner that the employer accepts them when the application for special leave is submitted. They are not conclusive of any statement that is made in them, especially where such statements may be inconsistent with testimony at a hearing or statements made by the Grievor

to the Employer. In the instant case the Doctor's certificate is quite consistent with the Grievor's testimony and his previous statements to his supervisor, although it is not conclusive evidence that the Grievor's presence at home was necessary. If the Doctor's certificate had certified that it was necessary for the Grievor to remain at home such that he was the only person suitable to undertake the care of his wife and child, the preliminary decision in Cuillerier and Dandurand suggests that, in such an instance, it would then be preferable for the doctor to testify and to submit to cross-examination on his opinion.

45. Another argument of Mr. Hamel had to do with the fact that the assistance required at the home of the Grievor was not of a medical nature. However, there is nothing in Article 10.04 which suggests that the assistance at home need be of a medical nature, it only requires that the employee show that ... "circumstances not directly attributable to the employee, including illness in the immediate family ... prevents his reporting for duty." I would suggest that it is exactly what led the Employer to grant approval for the one day that it did.

46. The third point is Mr. Hamel's reference to the snowstorm cases. I do not think that the location of the Grievor's residence is necessarily a factor in the facts of this case. I would subscribe to the reasoning of Adjudicator Moali in the recent decision Re Charbonneau and Brisebois, 166-2-4825 and 166-2-4826. Although the test therein is on the question of the reasonableness of the Employer's decision, distance from work, nevertheless, is not automatically a factor. Nor was it in the instant

case. Rather, it was primarily the Grievor's decision not to try to contact other persons who might be able to direct him to someone who could help him either on a voluntary basis or otherwise.

In the result the grievance of Mr. Drummond is dismissed.

For the Board,

Donald MacLean,  
Board Member and Adjudicator.

MONCTON, January 29, 1979.

