

File: 166-2-5940

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

BETWEEN:

GORDON BARRY WATSON,

grievor,

AND:

TREASURY BOARD
(Transport Canada),

employer.

DECISION

Before: A.W.R. Carrothers, Board Member and Adjudicator.

For the Grievor: John R. Pottinger, Pacific Regional
Director, Canadian Air Traffic Control
Association Inc.

For the Employer: Robert F. Lee, Counsel.

Heard on July 13, 1979 at Vancouver, British Columbia.

DECISION

The Statement of Grievance filed 1 September, 1978 reads as follows:

"5 days special leave was requested to care for my wife as per Section 10.04 of our contract after her surgery. See attached letter from her doctor. I was granted 2 days special leave and 3 days annual leave. See attached reply from my Unit Chief."

The corrective action requested reads as follows:

"3 days annual leave converted to special leave and credited back to my annual leave."

The "initiating" article in the Collective Agreement - there are others which are considered later - is Article 10.04:

"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."

This article in identical, similar or amended form, has been the subject of a large number of adjudication decisions. Counsel referred to the following adjudication awards:

Delle Palme (file: 166-2-128 - Jolliffe)
Rosario (file: 166-2-2443 - Norman)
Gallant et al (file: 166-2-3268 to 3270 - Clarke)
Curniski (file: 166-2-3692 - Norman)
Lush (file: 166-2-4798 - MacLean)
Mowchenko (file: 166-2-5030 - Mayes)
Hunter (file: 166-2-5387 - Frankel)

These awards have all been examined, and note has been taken of the thrust of other awards referred to in them.

The Grievor is an Air Traffic Controller at the

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Vancouver Control Tower. Early in 1978 a medical decision was taken that the Grievor's wife undergo elective surgery. The expected date was November, 1978, depending on the availability of a hospital bed. On the afternoon of Friday 4 August, 1978, the Grievor's wife received a call from her surgeon that a bed was available immediately. She entered hospital the next day. On Monday morning (the Grievor at that time was on 4 days annual vacation) the Grievor phoned his Unit Chief and requested special leave. The evidence of this request for special leave was clear and uncontroverted. The reason given for the request was that the Grievor's wife would require constant attention on her return home and that the Grievor was the person closest to her. The request for leave was for a period covering a 5 day cycle of work which would straddle the Grievor's days off, providing a total period to meet the circumstances of post-operative care. The Unit Chief replied: "Go ahead, take the time off and we will sort it out when you come back." That is the sort of compassionate response one would expect from the head of a small group of professionals working in close relationship, as air traffic controllers must do. (It is not irrelevant that in the adjudication hearing it took an effort on the part of the participants to address one another formally. As the Grievor put it, "It is not a tightly regimented relationship.") The surgery occurred on Wednesday, August 9 and the patient was hospitalized for a total of 2 weeks.

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Following the 4 days annual leave the Grievor worked the next cycle and sought special leave for the cycle August 21 - 25, to coincide with the patient's return home, the Grievor making formal application on 17 August. The Unit Chief replied on 21 August: "As stated in previous conversation - 5 days leave will be granted, the first 3 of which will be annual leave followed by 2 days special leave". The Grievor received the reply on his return to work. The reason for the annual leave preceding the special leave was that the Unit Chief had sufficient manpower on hand to service the operations without calling in staff on overtime; for the last 2 days he had no choice. He was of the opinion that one day of special leave should have been sufficient to make satisfactory domestic arrangements and that 2 days special leave was ample. (I do not choose to comment on the allocation of annual leave as considered in Curniski - there is a larger issue here.) The Unit Chief regarded the inversion of the special leave (which one would expect to come first) and the annual leave to be a book-keeping matter which would indicate responsible care respecting overtime costs in relation to the granting of annual leave. (The scheduling of annual leave is easier in the Fall because there is a surplus of air traffic controllers at that time of year, the summer being prime vacation time.)

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The Grievor gave evidence that he did not seek home-making services under the Medical Services Plan, because he was unaware of them, and, he averred, would not have done so inasmuch as he considered the responsibility his and no one else's, nor did he seek the services of his wife's mother who lived in the Okanagan Valley, because he considered his duty was at home and he thought he had a fair claim under Article 10.04 (an understandable mixture of emotion, fact and law). Nor did the Grievor seek to trade shifts, inasmuch as shift trading customarily is directed to 1 or 2 days at a time and is difficult to arrange in the summer.

The Unit Chief - the Chief Controller of the Vancouver Tower - gave evidence that broad policy respecting special leave is laid out in a Ministry of Transport manual (not put in evidence), which gives the Unit Chief discretion of up to 3 days in granting such leave, and in the Collective Agreement. He also explained the inversion referred to above. He also stated his policy that in the case of family illness he would give consent and work matters out later. The 2 days of special leave was based on a history of granting special leave in his particular unit.

It now becomes necessary to examine the Grievor's Attendance and Leave Record (exhibit U2) for the year April 1978 to March 1979. It records that the Grievor started

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with 10½ and 11 Lieu Days and 15 annual leave days plus an accumulation of 60-¾ sick days and 15-¾ days credit balance for special leave. This latter is an incorrect entry inasmuch as special leave is no longer accumulative. Lieu Days are dealt with in Article 16.05:

For operating employees,

- (a) The designated holidays in a fiscal year shall be anticipated to the end of the year and "lieu day" credits established.
- (b) For the purpose of paragraph (a) above only, in those years wherein Good Friday and/or Easter Monday fall in the month of March they shall be deemed to fall in the month of April, except in any case where the application of this paragraph would cause an employee to lose credit for the holiday(s).
- (c) 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.
- (d) 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.
- (e) Where in any fiscal year an employee has not been granted all of the lieu days credited to him, the unused portion of his lieu days shall be carried over into the following fiscal year.
- (f) 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.

Vacations are dealt with in Article 17, of which Article 17.05 and 17.06 should be recorded here for convenience:

- 17.05 Employees shall take vacation leave on the basis of the schedule being worked.
- 17.06 (a) The vacation year extends from April 1 to March 31 and vacation may be scheduled by the Employer at any time during this period.
- (b) Local representatives of the Association shall be given the opportunity to consult with represent-

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atives of the Employer on vacation schedules. Consistent with efficient operating requirements the Employer shall make every reasonable effort to schedule vacations in a manner acceptable to employees.

- (c) It is agreed by the parties, in accordance with the intent of Article 17 that it is both appropriate and desirable that each employee utilize his full vacation entitlement during the vacation year in which such vacation entitlement is earned. However, an employee may elect, for vacation periods scheduled after October 1, to carry forward into the next vacation year unused vacation up to a maximum of ten (10) working days subject to the following conditions:
- (i) that any vacation period carried forward from the previous vacation year and utilized by any employee does not disrupt vacation schedules in the current vacation year nor prevent another employee from taking his regularly scheduled vacation for that year.
 - (ii) that the days which are carried over from the previous vacation year are taken at a time which is acceptable to both the Employer and the employee;
 - (iii) that an employee's vacation earned in the vacation year will be utilized before days carried forward from the previous year;
 - (iv) that in cases where vacation credits from the previous vacation year have not been fully utilized by the end of the next vacation year any outstanding carry-over vacation credits will be paid off at the employee's daily rate of pay in effect at that time. This provision does not apply to vacation leave accumulated prior to April 1, 1976.

Lieu Days are an equivalent of statutory holidays which are made "movable feasts" as an aid to operations. The language of these provisions will be examined in detail later, for it becomes critical to determine who has control over their mobility.

For the cycle with which we are concerned, 3 days are marked A (annual leave). However, by that time the

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Grievor had used all but one half day of his annual leave entitlement. A small L (lieu day) was placed in the top left hand corner of each of 3 squares. This was also done for the 4 days annual leave which the Grievor was on at the time his wife received notice of her pending operation, for by that time the Grievor had but one half day annual leave credit. These changes the Unit Chief stated were a clerical administrative entry.

But it is not that simple. Who has power to allocate lieu days? By Article 17 the Employer clearly has control over scheduling annual vacations, subject to consultation and the standard of reasonableness. By Article 16.05 (a) lieu days credits are established, presumably at the beginning of the year. I read this to mean the number of lieu days credited, not the dates on which they are to occur; among other things they need not be taken at all, but may be accumulated - see Article 16.05 (e). The taking of lieu days would appear to be on the initiative of the employee, with certain control in the Employer: see below.

Article 16.05 (b) does not appear to relate.

Article 16.05 (c) implies that the initiative is taken by the employee and the Employer retains discretion over consenting to the selection to the lieu days.

Article 16.05 (d) by the words "at times desired by the employee" implies that the initiative is in the employee,

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and the consent is in the Employer (subject to "reasonable effort").

Article 16.05 (e) is referred to above.

Article 16.05 (f) does not relate.

The representatives of the parties dealt with the issue as extensively as they could, given the absence of precedent or useful analogue which they could present to the adjudicator. It was argued that on the language of Article 10.04 (since amended) the precedents (see above) established that in the absence of discrimination, capriciousness or mala fides (eg. Mowchenko, but the proposition has its roots in Delle Palme) the adjudicator must not interfere with the Employer's exercise of discretion. I return to this shortly. I read Article 16.05, taken clause by clause and as a whole, to give the employee the power to initiate a request for lieu days off, with a following veto power in the Employer (subject to controls noted earlier), but it does not give the Employer power to allocate lieu days unilaterally. To use an analogy from another place, the Employer has a role of "advise and consent" but not of initiation, in contrast with its role of scheduling vacations. Thus the annual leave could not be converted to lieu days unilaterally. The Grievor is hanging on to his initial request for special leave. His supervisor consented to his taking off the cycle, the details to be worked out later, thereby creating

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an expectation in the Grievor. The supervisor has limited authority to grant special leave. Clerical matters and corrections turn out to be matters of considerable substance.

I am strengthened in the foregoing interpretation of Article 16.05 by the following passage in Low and Duggan (Board file: 168-2-56) (Deputy Chairman Brown and 6 other members), albeit the Board was dealing with a different Collective Agreement and a different principal issue, at page 9: "... dictionary definition, common usage and the contractual context all suggest that a "grant" of leave is a response by the Employer to a request by the employee."

I must conclude that the Unit Chief could not allocate 3 days annual leave because the Grievor was not entitled to them. I must conclude further that the Unit Chief or a clerk could not convert the leave into lieu days because that requires the initiation of the Grievor. The only option apparent on the material before me is that the days be taken as "leave for other reasons" under Article 10.04, for special leave; the option of leave without pay, coming well after the event, was not put forward as a serious option, and in all the circumstances I do not entertain it. Finally, I cannot read the precedents (starting with Delle Palme) as meaning that on the particular language of Article 10.04 the adjudicator cannot go behind the exercise of

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discretion by the Employer if the adjudicator concludes that the decision of the Employer is one which the Collective Agreement will not support - that is, that the result is not available to the Employer.

It is so awarded.

I should like to add a post script. Throughout, the Unit Chief sought to meet the interests and needs of the Grievor insofar as he considered he had discretion so to do; and that because lieu days and annual vacation seem to have become much of a package - they tend to merge in the minds of those concerned with them - their administration appears to have become blurred. It would appear to be an arrangement that worked well in this compact working unit where the exchange of personal interests appears to mark a positive and even enviable relationship - until the interposition of this adjudication. An adjudicator must, however, operate within the terms of the Collective Agreement and the general law of labour relations; he cannot set out to undo any harm of litigiousness by violating the constraints imposed on him.

For the Board, _____

VANCOUVER, August 15, 197


A.W.R. Carrothers,
Board Member and Adjudicator.