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File: 166-32-30979

Citation: 2002 PSSRB 33



**Public Service Staff
Relations Act**

**Before the Public Service
Staff Relations Board**

BETWEEN

CORNELL FONTAINE

Grievor

and

CANADIAN FOOD INSPECTION AGENCY

Employer



Before: Colin Taylor, Q.C., Board Member

For the Grievor: Gail Owen, Public Service Alliance of Canada

For the Employer: Jennifer Champagne, Counsel

**Heard at Calgary, Alberta,
February 21, 2002**

DECISION

[1] The Grievor, Cornell Fontaine, is a Meat Inspector employed at Est. 093, Cargill Foods, High River, Alberta. He grieves the Employer's denial of sick leave and relies upon Article 38 of the collective agreement, the relevant provisions of which are as follows: "Granting of Sick Leave

38.02 An employee shall be granted sick leave with pay when he or she is unable to perform his or her duties because of illness or injury provided that:

(a) he or she satisfies the Employer of this condition in such manner and at such time as may be determined by the Employer, and

(b) he or she has the necessary sick leave credits.

38.03 Unless otherwise informed by the Employer, a statement signed by the employee stating that because of illness or injury he or she was unable to perform his or her duties, shall, when delivered to the Employer, be considered as meeting the requirements of paragraph 38.02(a), if the total days of sick leave with pay granted in a fiscal year does not exceed ten (10) days solely on the basis of statements signed by the employee. The Employer may extend the above time limits based on individual circumstances.

38.06 Where, in respect of any period of compensatory leave, an employee is granted sick leave with pay on production of a medical certificate, the period of compensatory leave so displaced shall either be added to the compensatory leave period if requested by the employee and approved by the Employer or reinstated for use at a later date."

[2] On October 8, 2000, the Grievor, accompanied by his family, flew to Mexico for a one-week vacation. He was scheduled to return to Canada on October 15, 2000 and was due back to work on October 17, 2000.

[3] The Grievor testified that on October 13, 2000 at about 8:00 pm, he telephoned Inspection Supervisor Gary O'Laney and requested a one-week extension of his vacation. Mr. O'Laney denied the request.

[4] On October 14, 2000, the Grievor testified that he awoke with a pain in his jaw. He went to a dentist in Puerto Vallarta who gave him a "shot for the pain", a prescription for medication to ease the discomfort and scheduled surgery for the next day. The Grievor said that he telephoned Inspection Supervisor Olov Jones and told him he was sick and unable to return to work until October 24, 2000.

[5] The Grievor testified that on October 15, 2000, he underwent dental surgery. He was advised not to fly because "infection could damage the ear drums". He cancelled the return flight to Canada and rebooked the next available flight on October 22, 2000.

[6] The Grievor said that he returned to the dentist on October 16, 2000 and was advised to return again on October 21, 2000 "to see if I was OK to fly". The Grievor did that and returned to Canada on October 22, 2000. He reported to work on October 24, 2000 and filed a claim for sick leave for the period October 17 to 23, 2000.

The Grievor submitted copies of the following documents bearing the letterhead of Dr. Silvia Contreras Perez:

1. Prescription note dated 14-Oct-2000

- 1) I Caja comprimidos DalacinC
Take 1 tablet each 8/hours
- 2) I Caja comprimidos cataflam.D-D
Tomar 1 comprimido c/8 horas
(Take 1 tablet each 8/hours)

#2 Note from Dr. Silvia Contreras Perez dated 21-October 2000

To Whom It May Concern:

Mr. Cornell Fontaine. He had a fracture and infection and he was attended of 26 tooth emergency. I need to reconstruct and root canal. He need several appointment. He could not fly on October 15-2000 for health reasons. He should be absent from work until October 24-2000.

#3 Receipt #058 dated 21 Octobre 2000
for 600.00 pesos

The Employer denied the claim for sick leave.

[7] In cross-examination, the Grievor said that his original one-week vacation was an all-inclusive flight and hotel package. He was required to vacate his hotel room on October 15, 2000 and seek alternate accommodation for the additional week. He was asked what he would have done about the flight and hotel had Mr. O'Laney granted his request to extend his vacation. The Grievor's response was, "I would just try to do it." It was put to the Grievor that he had originally booked a 2-week vacation which he denied. He was unable to obtain and produce the return flight tickets or evidence of accommodation for the second week.

[8] The Grievor had no credible explanation for failing to seek reimbursement of the money he paid to the dentist in Mexico. He simply did not make a claim.

[9] Inspection Supervisor Gary O'Laney testified that on October 14, 2000 at about 7:00 pm, he took a telephone call from the Grievor. The Grievor said: "I have an opportunity to stay another week and could I have another week?"

[10] Mr. O'Laney said operational requirements did not permit him to grant the request and he so advised the Grievor who replied "OK". That, said Mr. O'Laney, "was it". There was no further discussion. Following the telephone discussion, Mr. O'Laney made the following note:

On Oct. 14/2000 @ 1915 C Fontaine called the plant I answered. He was calling from Mexico and had an opportunity to stay there another week and requested annual leave for the following week Oct 16-20. As the Qualifying exam for 3 of our people was changed to that week and 2 people on sick leave as well as other leave on course, I explained the situation and refused him leave for the week and the conversation ended.

[11] Mr. O'Laney testified that the Grievor said nothing about being sick or having attended a dentist or being unable to fly home the next day. It was a short conversation consisting of a request and denial to extend vacation by one week.

[12] During the telephone conversation with the Grievor, Mr. O'Laney said that Mr. Jones "was standing about 20 feet away from me." He discussed the call with Mr. Jones but said the latter did not speak to the Grievor.

[13] On October 16, 2000 at about 7:00 pm, Mr. Jones told Mr. O'Laney that the Grievor had called in sick and would not be at work until October 24, 2000. Mr.

O'Laney said he found that "peculiar" since the Grievor had told him he had an "opportunity" to stay in Mexico for another week.

[14] On October 19 and 20, 2000, Mr. O'Laney placed telephone calls to the residence of the Grievor in Calgary. On October 20, 2000, a "young" person answered. Mr. O'Laney identified himself and asked for the Grievor. Mr. O'Laney testified that he got the following response:

Well he's still in but he has an infection and he is at the hospital for an appointment and back on Sunday.

[15] The Grievor's testimony was that he had spoken with Mr. O'Laney on October 13, 2000 at about 8:00 pm to request the extra vacation. Mr. O'Laney was positive that did not occur. He left work that day at 4:00 pm and, in any event, he had only one conversation with the Grievor and that occurred on October 14, 2000 in the presence of Mr. Jones.

[16] Until his retirement in November 2001, Mr. Olov Jones was an Inspection Supervisor at the Cargill plant. He testified that on October 16, 2000 at about 3:15 pm he took a telephone call from the Grievor who said he was sick and unable to report for work. Mr. Jones did not ask where he was calling from. He was aware of the telephone call to Mr. O'Laney and the request for extension of vacation which the latter had denied. Mr. Jones told the Grievor to bring medical proof of his illness. It was a very brief conversation.

[17] Mr. Jones testified that he was present when Mr. O'Laney took the Grievor's call on October 14, 2000 at about 7:00 or 7:15 pm. He said he did not speak to the Grievor on that date. He did speak with him on October 16, 2000.

[18] Mr. Jones said that when the Grievor returned to work on October 24, 2000, he declined to answer questions about his absence.

[19] There is a direct conflict in the evidence. The Grievor testified he called Mr. O'Laney on October 13, 2000 and asked him for an extension of his vacation. Mr. O'Laney said he took that call on October 14, 2000 in the presence of now-retired Mr. Jones who gave similar testimony. Mr. O'Laney made a contemporaneous note of the conversation.

[20] The Grievor's evidence was that he awoke on October 14, 2000 with pain and that he called Mr. Jones to inform him that he was unable to return to work. Mr. Jones said that conversation occurred on October 16, 2000.

[21] There are a number of difficulties with the Grievor's case. First, he did not telephone Mr. O'Laney on October 13, 2000 as he testified in direct examination. The telephone call occurred on October 14, 2000 at about 7:00 pm when the Grievor requested and Mr. O'Laney denied an extension of the Grievor's vacation to take advantage of the "opportunity" to stay in Mexico for another week. When this conversation occurred, the Grievor, according to his testimony, had endured a day of pain, received a "shot" to alleviate the pain, had been prescribed medication and was scheduled for dental surgery on the following day; the very day the Grievor was scheduled to fly back to Canada. None of this was related to Mr. O'Laney. The Grievor simply told the Inspection Supervisor that he had an opportunity to stay in Mexico for one week and would Mr. O'Laney approve an extension to his vacation.

[22] Second, how could the Grievor have had an unplanned "opportunity" to stay another week? He testified that he had purchased a one-week package holiday including flight and hotel. The Grievor was required to vacate the hotel room and find alternate accommodation. The so-called "opportunity" obviously required planning. A later flight and alternate hotel accommodation didn't just happen. It had to be arranged in order for there to be an opportunity.

[23] The Grievor testified that once the dentist advised him not to fly on October 15, 2000, he set about making alternate flight and hotel arrangements. Yet, the day before, he had an "opportunity" to stay an extra week. It is difficult to make sense of this.

[24] Third, the Grievor did not call Mr. Jones on October 14, 2000 as he testified. He called Mr. Jones on October 16, 2000 and said he was sick and unable to return to work until October 24, 2000. He did not, on October 14, 2000, tell Mr. O'Laney that he was sick, had been to a dentist and was unable to fly the next day. The Grievor's message on October 14, 2000 was that he had an "opportunity" to stay an extra week. Nor, on October 16, 2000, did he tell Mr. Jones that he was calling from Mexico or provide any details of his malady and the reason for his unavailability until October 24, 2000. He simply said he was sick and would not be at work.

[25] In cross-examination, the Grievor agreed that his claim "looked suspicious". There is no documentary evidence of surgery on October 15, 2000. In cross-examination, the Grievor said the only costs he incurred were 600 pesos for the dentist and 200 pesos for medication. The Employer, however, introduced a document apparently provided by the Grievor to Mr. Jones on October 31, 2000. This purports to be a receipt from the dentist dated October 16, 2000. It is substantially the same as the receipt dated October 21, 2000 but for a different amount.

[26] In Faryna v. Chorney [1952] 2 D.L.R. 354 (BCAA), O'Halloran, J.A. said, at p.357:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances.

[27] When I weigh the evidence in light of those principles and consider the evidence offered in these proceedings by the Grievor, I am compelled to find that it is not in harmony with the preponderance of the probabilities.

[28] In his closing submission, counsel for the Grievor said that the Grievor could have been mistaken with respect to dates and the evidence of Messrs. O'Laney and Jones was preferable. What mattered, it was submitted, is that the Grievor was unable to report to work due to illness and had met the requirements for sick leave under Article 38 of the collective agreement by producing a certificate to that effect.

[29] In Re Fishery Products (Marystown) Ltd. and Newfoundland Fishermen, Food & Allied Workers, Local 1245 (1979) 22 L.A.C. (2d) 439, Arbitrator Hattenhauer said that medical certificates of illness are not "Holy Writ" and their mere existence may not be sufficient to support a claim for sick leave (p.444). There are a number of authorities to the same effect: Mallette and Treasury Board (Revenue Canada, Customs and Excise)

[1982] C.P.S.S.R.B. No. 84 - PSSRB File No. 166-2-10203; Lévesque and Treasury Board (Government House) [1984] C.P.S.S.R.B. No. 73 - PSSRB File No. 166-2-13675; Addley & Brason and Treasury Board (Revenue Canada - Customs & Excise) [1990] - PSSRB File Nos. 166-2-19898/6/7 and 166-2-19898/9; Ford Motor Co. of Canada Ltd. and United Automobile Workers, Local 1520 (1975) 8 L.A.C. (2d) 149 (Palmer); Long and Treasury Board (Department of National Defence) [1988] C.P.S.S.R.B. No. 210 - PSSRB File Nos. 166-2-17139 and 166-2-17140; Gobeil and Treasury Board (National Defence) [1988] C.P.S.S.R.B. No. 82 - PSSRB File Nos. 166-2-15430 and 166-2-15726.

[30] I am not persuaded, on a balance of probabilities, that the Grievor was absent from work between October 17 and 23, 2000 because he was ill. He was absent from work because he decided to take an extra week of vacation despite the Employer's denial of his request to do so because of operational requirements.

[31] The grievance is denied.

Collin Taylor, Q.C.

Vancouver, March 18, 2002