

Date: 20061006

File: 166-02-36116

Citation: 2006 PSLRB 110



*Public Service
Staff Relations Act*

Before an adjudicator

BETWEEN

MAUREEN BENNET

Grievor

and

TREASURY BOARD

(Department of Human Resources and Skills Development)

Employer

EXPEDITED ADJUDICATION DECISION

Before: [Ian R. Mackenzie, adjudicator](#)

For the Grievor: [Lynn Whittaker, Public Service Alliance of Canada](#)

For the Employer: [Virginie Emiel](#)

Note: The parties have agreed to deal with the grievance by way of expedited adjudication. The decision is final and binding on the parties and cannot constitute a precedent or be referred for judicial review to the Federal Court.

[Heard at Ottawa, Ontario,
September 29, 2006.](#)

[1] Maureen Bennet grieved the failure of her employer to advance sick leave credits pursuant to clause 35.04 of the *Program and Administrative Services Collective Agreement* (expiry: June 20, 2003). The grievance was filed on June 3, 2004, and was referred to adjudication on May 20, 2005.

[2] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (“the former Act”).

[3] The parties submitted a book of documents, including an “Agreed Statement of Facts” that reads as follows:

...

1. *At the time of the grievance, the grievor, Maureen Bennet, was an indeterminate CR-05 employee of the Department of Human Resources and Skills Development Canada.*
2. *At the time of his [sic] grievance, the grievor was covered by the Program and Administrative Services Collective Agreement that expired June 20, 2003.*
3. *The employee filed the present grievance on June 3, 2004, regarding management's decision to deny her request for the advancement of sick [sic] as per Article 35.04.*
4. *On May 18, 2004, Ms. Bennet left the office at 2:00 pm because of illness and submitted a leave form for 2.5 hours of sick leave without pay as she did not have any sick leave credit left.*
5. *On May 27, 2004, Ms. Bennet sent an email to her manager requesting an advancement of 2.5 hours of paid sick leave for May 18, 2004, to allow her to have the waiting period for Employment Insurance (EI) disability benefits waived (replace the sick leave without pay by sick leave with pay). The employee intended to be back at work by May 31, 2004. This request was denied.*
6. *On June 1, 2004, the employee sent another email to her manager requesting an advancement of 55 hours*

of sick leave covering the period of May 18, 2004 to May 28, 2004. This request was also denied.

...

[4] The grievor's representative submitted that the employer had not exercised its discretion to advance sick leave in good faith and was arbitrary. The employer changed its reasons for denying the advancement of sick leave during the grievance process. The blanket statement of the employer that it would not advance the credits did not take into account the circumstances of the grievor. The employer never discussed Ms. Bennet's sick leave usage with her. Ms. Bennet also self-identified as a person with a disability, and the employer failed to consider its duty of accommodation. The requirement of the employer that Ms. Bennet use compensatory leave or vacation leave before being advanced sick leave credits was also contrary to the collective agreement.

[5] The employer's representative argued that, since the grievance was governed by the former *Act*, an adjudicator had no jurisdiction to address human rights issues. Also, it was not open to the grievor to amend the grounds for her grievance at the hearing. Ms. Emiel also submitted that there was no abuse of discretion. She referred me to the history of use of sick leave of the grievor to support the employer's conclusion that reimbursement of those credits was a legitimate concern of the employer.

[6] I stated that the question for me to determine was whether the employer's decision not to advance sick leave credits was an abuse of its discretion. With regards to the allegations that the employer had a duty to accommodate, I held that there was nothing in the agreed facts or documents to show that Ms. Bennet was disabled or that the employer knew of her disability. I can only make a factual determination on the basis of the agreed facts. Also, Ms. Bennet did not allege a breach of her human rights in her grievance. Even if she had, I would be without jurisdiction as the grievance is subject to the former *Act*.

[7] Although the initial reason for denying an advance of sick leave did not contain fulsome reasons, there was no evidence of bad faith or arbitrariness in the denial. The employer had legitimate concerns about the change from a request for unpaid sick leave to an advance of sick leave credits in order to obtain a waiver of the waiting period for Employment Insurance benefits. It was also legitimate for the employer to

consider past use of sick leave credits in order to forecast Ms. Bennet's ability to cover the advanced sick leave credits.

[8] Sick leave is an earned benefit, and the employer is not obligated to advance credits, even though the financial consequences for the employee may be significant. The employer made a reasoned assessment and exercised its discretion appropriately. The employer can suggest the use of other leave to cover absences from the workplace because of illness, but cannot require the employee to take compensatory or vacation leave. An employee has a right to take unpaid sick leave instead of using other leave.

[9] For all of the above reasons, I made the following order:

(The Order appears on the next page)

Order

[10] The grievance is denied.

October 6, 2006.

**Ian Mackenzie,
adjudicator**