Date: 20140331

File: 166-32-35436

Citation: 2006 PSLRB 37

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

DR. HARRIS KING

Grievor

and

CANADIAN FOOD INSPECTION AGENCY

Employer

Indexed as
King v. Canadian Food Inspection Agency

In the matter of a grievance referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Beth Bilson, Q.C., adjudicator

For the Grievor: Neil Harden, Professional Institute of the Public Service of Canada

For the Employer: Stéphane Hould, counsel

Heard at Regina, Saskatchewan,
January 10, 2006.

Grievance referred to adjudication

[1] This decision arises from the adjudication of a grievance filed by Dr. Harris King and presented by his bargaining agent, the Professional Institute of the Public Service of Canada (PIPSC), alleging that his employer, the Canadian Food Inspection Agency (CFIA) violated clause C17.01 of the collective agreement between PIPSC and the CFIA for the VM group with an expiry date of September 30, 2003, by failing to grant him Injury-on-Duty Leave (IODL) of reasonable length.

[2] Clause C17.01 of the collective agreement reads as follows:

> ***C17.01***
>
> *An employee shall be granted injury-on-duty leave with pay for such reasonable period as may be determined by the Employer where it is determined by a Provincial Worker's Compensation Board that such employee is unable to perform their duties because of:*
>
> *a) personal injury accidentally received in the performance of such employee's duties and not caused by the employee's wilful misconduct,*
>
> *b) sickness resulting from the nature of such employee's employment,*
>
> *or*
>
> *c) exposure to hazardous conditions in the course of such employee's employment,*
>
> *if the employee agrees to pay to the Receiver General of Canada any amount received by him for loss of wages in settlement of any claim such employee may have in respect of such injury, sickness or exposure.*

[3] 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 6 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*").

Summary of the evidence

[4] The facts that gave rise to the grievance are not in dispute. Dr. King has been working as a veterinarian for the Government of Canada for approximately 20 years.

From 1995, he was employed by Agriculture and Agrifood Canada, and this employer subsequently became the Canadian Food Inspection Agency. Dr. King is currently at the top of the VM-02 pay scale.

[5] In January, 2003, Dr. King became District Veterinarian in Moose Jaw, Saskatchewan, and in this capacity performs a variety of duties including the surveillance of veterinary disease, monitoring the transport of animals, supervising the work of contract veterinarians and supervising district office staff. On December 9, 2003, Dr. King went to the premises of a small abattoir in Avonlea, where he had planned to carry out an inspection. He fell on the icy surface of the parking lot and sustained severe fractures to his leg. He was in hospital for approximately one week, following which his leg was in a cast for nearly four months. The prognosis for recovery was that over a period of three to four months his leg should heal and he would be able to return to work without difficulty.

[6] Dr. King informed his supervisor promptly of his injury, and the employer filed an accident report with the Saskatchewan Workers' Compensation Board (WCB). The documents made available at adjudication indicate that Dr. King also applied for IODL and that this leave was ultimately granted to him from December 10, 2003, to January 14, 2004, a period of 26.5 days.

[7] In his evidence, Dr. King described the adjustments he made after his accident. He was unable to continue to live alone in his apartment in Moose Jaw, so he moved into accommodations offered to him by a friend in Regina. This meant that he received mail on an irregular basis and he could not be certain about the exact dates when he received the sequence of letters and other documentation sent to him by the employer and the WCB. He did get letters from the WCB advising him that his claim had been approved and providing him with information about the benefits available to him. At this stage, that is, in January 2004, the correspondence spoke of his eligibility for "full wage replacement benefits", which he understood to mean as covering 90% of his net income. He also understood from the correspondence that when his IODL came to an end in mid-January he would be placed on leave without pay for the period during which he was in receipt of workers compensation benefits. He was informed, as well, that the federal government would not be pursuing legal action against the third party responsible for the premises where his accident occurred, but would accept the option of workers' compensation.

[8] Early in February 2004, he received a communication from the WCB indicating that his benefits were being adjusted to bring them into conformity with the statutory provision capping available benefits at $53,000 per year. This news caused Dr. King considerable concern, as this amount was significantly less than his annual income as a veterinarian. He raised the question with his supervisor and then with Mr. Bill Morse, the Regional Director for the employer in Saskatchewan, as to whether it would be possible to have his IODL extended rather than being expected to continue at the reduced income level represented by the workers' compensation benefits. Mr. Morse answered that having him placed on workers' compensation benefits once his claim had been approved by the WCB was consistent with the policy followed by the employer and that the IODL would not be extended in this circumstance.

[9] Following some further exchanges with Mr. Morse, Dr. King met with a representative of PIPSC and filed a grievance. While discussion of the grievance proceeded, Dr. King made other efforts to mitigate the situation. He asked for an opportunity to do part-time work, and the employer agreed to assign him some part-time work that he could do out of his home. He did not seek medical approval for undertaking this work, and it was not part of any formal return-to-work program. He did advise the WCB of the additional income he was receiving and his benefits were adjusted accordingly. Around March 24, 2004, by which time he was in a walking cast, he went back to work full time in an acting position that involved administrative office duties. Once his recovery was complete, he returned to his position as a District Veterinarian in Moose Jaw.

[10] Mr. Bill Morse was the manager responsible for administering the IODL policy. He testified about the development of the policy, which he said had been formulated following discussion among federal public service managers in Western Canada in the early 1990s. The policy was not in written form, but he said that it was understood that this was the approach to take regarding the determination of IODL applications. Under this policy, IODL would be granted once an accident report had been filed with a Provincial Workers' Compensation Board. Once the workers' compensation claim was approved, the employee would be transferred from IODL to workers' compensation benefits. The exception to this would be if the projected absence from work was of short duration – on the order of two or three weeks – in which case the employee would normally be kept on IODL until returning to work.

[11] Mr. Morse testified that he had dealt with two or three claims of this kind each year and that the policy had not been subject to any challenge prior to this grievance. His understanding was that the purpose of the IODL was to provide a bridge for the employee while the claim to workers' compensation benefits was being processed so that there would be no interruption of income. Mr. Morse said that he had never understood IODL to be designed to cover the entire period of an employee's absence from work as a result of injury, as this was the function of the workers' compensation system. He said that he followed the policy in this case and arranged for Dr. King to be "rolled over" to workers' compensation benefits once his claim had been approved. He acknowledged that one of the features of the policy is that the employer can use the injured employee's salary to cover the cost of paying someone to perform the work that the injured employee cannot do.

[12] In his evidence, Mr. Morse frankly conceded that, when he transferred Dr. King to workers' compensation benefits, he was completely unaware that there was a statutory cap on the benefits available. The cap was brought to his attention by Dr. King in early February. He said that he felt that his hands were tied by the policy in place. He had no desire to create financial difficulties for Dr. King; indeed, he was happy to make the arrangements that eventually permitted Dr. King to work part-time.

[13] It should be noted that Dr. King had been seriously injured in an earlier accident in May 2003, when he was mauled by a bull. His injuries had kept him off work until August. In that instance, no workers' compensation claim was filed, and Dr. King remained on paid sick leave throughout this period. Mr. Morse conceded that this was a "mistake" in that it was not consistent with the usual policy for dealing with injured workers; he said that representatives of the unions had pointed this out.

Summary of the arguments

For the grievor

[14] For the grievor, Mr. Harden pointed first of all to the obligation of the employer under section 124 of the *Canada Labour Code*, S.C. 1985, c. L-2, to maintain a safe workplace for employees. Any injury on the job, he suggested, represents a breach of this obligation, and the provision of the collective agreement dealing with IODL should be seen in this light. This provision should be interpreted to ensure that the burden of this violation of a statutory obligation falls on the employer, not the employee. The

policy that the employer has put in place for administering IODL is not directed to this goal, but simply to making funding available to pay replacement staff.

[15] Mr. Harden argued that the implication of reading the policy in light of the obligation to maintain a safe workplace is that the objective in granting IODL should be to provide full income support for the employee during the period of absence due to injury. He found support for this interpretation by submitting to me in argument a Treasury Board policy dated October 1, 1992, containing commentary on the administration of collective agreement provisions with respect to IODL. He pointed out that the policy clearly contemplates that IODL may be granted for extended periods of time. For example, the policy provides for a formal review of the employee's status after 130 days of IODL. The policy also refers to ongoing verification of the inability of an employee to return to work. He also referred to a document dated February 10, 2000 (Exhibit E-2), indicating that this Treasury Board policy was adopted in the transition to the Canadian Food Inspection Agency and was to apply until superseded by a policy on this issue formulated by this employer.

[16] The implication of this interpretation – that the overriding Treasury Board policy contemplates a period of IODL that will cover the absence from work of the injured employee – is that the employer is estopped from implementing a different policy without negotiating with the bargaining agent.

[17] In any case, Mr. Harden argued, the decision concerning the length of IODL for Dr. King did not meet the standard of reasonableness as required by clause C17.01. The employer did not fully consider the implications of this decision for Dr. King, or his particular circumstances, but just mechanically implemented a policy that was primarily designed to achieve financial savings.

<u>For the employer</u>

[18] Counsel for the employer, Mr. Hould, argued that clause C17.01 of the collective agreement confers discretion on the employer to determine the length of IODL that will be given to an employee and that the only restriction on the exercise of this discretion is that the length of leave granted must be "reasonable." He suggested that the leave is not intended to replace workers' compensation benefits and that there is nothing unreasonable about relying on the workers' compensation system to provide compensation to injured workers over much of the time they are recovering. The fact

that a provincial legislature has decided that there will be an upper limit to the amount of this compensation may have unfortunate implications for employees with high incomes, but that is a feature of a legislative scheme and not something that lies within the power of the employer to change. The existence of such a cap does not render unreasonable the decision of the employer with respect to the length of Dr. King's IODL.

[19] Mr. Hould said that, whether or not the Treasury Board policy governs the administration of the IODL provision by this employer, that policy does not commit the employer to provide IODL at full pay for the employee's entire absence, and it should not be interpreted as doing so. Since the policy of the employer is perfectly consistent with clause C17.01 of the collective agreement, the doctrine of estoppel can have no application to this case.

Reasons

[20] The parties provided a number of adjudication decisions addressing the interpretation of clause C17.01 or analogous provisions. Though none of these decisions are very recent, they are nonetheless of assistance in understanding the implications of clause C17.01.

[21] One thing that is clear from a review of these earlier decisions is that there has been considerable variation in the length of IODL considered "reasonable" by the employer. In *Sabiston v. Treasury Board (Department of National Defence)*, PSSRB File No. 166-2-10395 (1982) (QL), the length of the leave totalled 272 working days; in *Colyer v. Treasury Board (National Defence)*, PSSRB File No. 166-2-16309 (1987) (QL), the total time was "at least" 156 days; in *Juteau v. Treasury Board (Solicitor General of Canada)*, PSSRB File No. 166-2-15113 (1985) (QL), and *Demers v. Treasury Board (Solicitor General of Canada)*, PSSRB File No. 166-2-15161 (1986) (QL), the initial length of the leave granted by the employer was five days, though this was amended upwards by the adjudicator, who considered 20 and 15 days respectively to be reasonable periods.

[22] There is also considerable variation in the basis on which adjudicators in these cases assessed the reasonableness of the employer's decision. In *Juteau* (*supra*) and *Demers* (*supra*), though it is not clear what basis the adjudicator used for fixing a "reasonable" period, the length of the IODL was certainly not calculated in relation to

the entire period of absence of the employees. On the other hand, one way of interpreting both *Sabiston* (*supra*) and *Haslett v. Treasury Board (Department of National Defence)*, PSSRB File No. 166-2-20616 (1991) (QL), is that a reasonable period of IODL would cover the entire absence.

[23] On closer examination, however, this is less clear. In *Haslett (supra*), the issue giving rise to the grievance was that the employer had refused IODL on the grounds that the employee's absence was due to an injury the grievor had brought on himself, notwithstanding that the Manitoba Workers' Compensation Board had rejected this characterization of the injury and found the grievor to be eligible for workers' compensation benefits; such eligibility was a threshold requirement for the granting of IODL under the relevant collective agreement, as under the one here. The adjudicator remitted the decision concerning IODL to the employer, suggesting that a reasonable period of leave under the circumstances might be the total period of absence; it is to be noted, however, that the adjudicator may have been influenced by the fact that this period was "relatively short."

[24] In *Sabiston* (*supra*), the dispute concerned the process for considering an extension of IODL after 130 days. The central issue seems to have been whether the process used by the reviewing body to decide on the period of IODL took into account all of the relevant considerations. On deciding that important factors had not been considered in granting the leave and that the decision had been prompted by "the mere effluxion of time," the adjudicator's remedy was to adjust the period of leave to cover the entire period of absence. It is not clear, however, that the adjudicator was of the view that the employer would necessarily have had to grant leave for the full period in the first instance if the decision had been made properly.

[25] It is important to note that the adjudicator in *Sabiston* (*supra*) concluded that the scope of adjudication in relation to this issue should include not only an assessment of whether the period of leave itself is reasonable, but also whether the procedure used for arriving at a particular length of leave is reasonable:

> *However, I do not agree…as to the scope of my inquiry in this case is limited in determining whether or not their decision was a reasonable one [sic]. Instead, it is my view that the question of whether or not the period accorded to the grievor was a reasonable one must be determined objectively by looking at the factors that were considered by the employer in reaching its decision.*

This focus on the reasonableness of the decision-making process was echoed by the adjudicator in *Colyer* (*supra*), who stated: "I am satisfied that these criteria are reasonable and that the Review Board made a reasoned decision based thereupon."

[26] The cumulative effect of this jurisprudence is to suggest a number of things. The first of these is that, in determining the period of leave that should be granted to an employee, the employer enjoys discretion to determine what constitutes a "reasonable period." Secondly, though employers bound by provisions analogous to clause C17.01 have sometimes decided to grant IODL that is coterminous with the length of absence due to injury, the provision does not represent a commitment to grant leave on this basis in all cases. The adjudicator in *Colyer* (*supra*), observed:

> *While injury-on-duty leave is predicated upon the existence of a valid claim for worker's compensation benefits, I can find no suggestion in the collective agreement that the extent to which injury-on-duty leave shall be granted must necessarily coincide with worker's compensation. If such were the case, there would be no need here in permitting the employer to exercise reasonable discretion since injury-on-duty leave would almost automatically be the preferred form of relief. Such an intention surely would have been more clearly expressed by simply allowing employees, once they had a claim approved by a worker's compensation board, to substitute a claim for injury-on-duty-leave. That is not what the collective agreement provides here. It permits the employer to grant injury-on-duty leave for as much of the period of absence due to accident or injury as it feels is reasonable.*

[27] I agree with this characterization of the nature of provisions like clause C17.01. If the parties had intended that IODL should be a means of covering the full income of injured employees while they are absent from work, they could have made this clear in the collective agreement. Couching the provision in terms of an employer determination of a "reasonable period" indicates that their intention was to allow the employer some latitude in deciding what combination of IODL and other forms of support, including workers' compensation benefits, should be used to address the situation of an injured employee. Though this discretion is not perhaps as unlimited as counsel for the employer in this adjudication would suggest, in the sense that the employer's view of what is reasonable is open to scrutiny, there is nothing in the provision to support the proposition that only a period of leave that coincides with the absence of the employee is reasonable. Indeed, the variation in lengths of leave in the

cases put before me suggest that it is open to the employer to decide on different periods of leave, at least within the range of what is considered reasonable.

[28] Nor do I think that the Treasury Board policy cited by Mr. Harden lends support to the view he advances that the employer has committed itself in administering the provision to an interpretation that would make a "reasonable period" of leave coterminous with the absence of the injured employee. To be sure, the policy contemplates that lengthy periods of IODL may be awarded, but there is nothing in the policy to suggest that either a lengthy period, or a period the same length as the employee's absence, are to be granted in all cases.

[29] An implication of this conclusion is that there is no commitment or policy constituting an augmentation of the terms of the collective agreement to which the idea of estoppel might have some relevance. Nor could it be said that Dr. King relied on the policy to his detriment. I must therefore reject the application of the doctrine of estoppel in this context.

[30] The other point to be drawn from previous cases has already been alluded to; several of these cases support the proposition that the determination by the employer of what constitutes a "reasonable period" is open to scrutiny. In *Juteau* (*supra*) and *Demers* (*supra*), the adjudicator assessed whether the period itself was reasonable, given the surrounding circumstances, and substituted a different period for the one initially granted by the employer. In other cases, notably *Colyer* (*supra*) and *Sabiston* (*supra*), the adjudicator focused on whether the process used by the employer in determining the length of leave was reasonable rather than on whether some particular length of time could be seen as reasonable or unreasonable. In *Colyer* (*supra*), the adjudicator, once satisfied that the criteria applied in determining whether the length of leave was reasonable, expressed reluctance to second-guess the decision made by the Review Board in question about the actual length of leave, despite a finding that a more generous period of leave "would not have been inappropriate." In *Haslett* (*supra*), having made a finding that the employer had failed to appreciate the significance of a particular factor in the decision, the adjudicator remitted the decision to the employer to be reconsidered and did not dictate any particular length of leave that would be reasonable.

[31] Given that the wording of clause C17.01 is indicative of a degree of employer discretion in determining the appropriate length of leave, the approach in this latter

group of cases, which emphasizes the process used for making the decision, seems helpful in that it offers a way to ensure that an employer does not determine the length of IODL in an arbitrary way without eliminating the discretion which the provision seems to contemplate.

[32] Though I have concluded that there is nothing in either clause C17.01 or the Treasury Board policy constituting a requirement that the period of IODL granted must be the same as the absence from work of the employee, and that the employer has discretion to fix the length of the leave, it seems to me a corollary of this finding that the employer must exercise the discretion in accordance with the circumstances of the case. If the provision does not dictate that "reasonable" always means that IODL will be the same length as the employee's absence, neither does it dictate that another formula adopted without regard to the particular situation of an employee will be "reasonable."

[33] In *Sabiston* (*supra*), the adjudicator noted that the written criteria to guide the decision-making of a Review Board about whether to extend a period of IODL included the following:

> *a. the extent of the injury;*
>
> *b. whether it is almost certain that the person will be returning to duty in a short time;*
>
> *c. the circumstances of the injury;*
>
> *d. the length of service of the employee and his employment status (term or indeterminate);*
>
> *e. the general worthiness of the employee;*
>
> *f. his rate of pay; and*
>
> *g. replacement problems.*

The adjudicator viewed this list, though not exhaustive of possible factors that could be considered, as presenting "objective criteria to enable a reviewer to make a reasoned assessment of any given situation." The adjudicator went on to find that the Review Board had not really considered these factors and had based its decision on the "mere effluxion of time." It is clear from this that an important aspect of the exercise of the discretion under provisions like clause C17.01 is that the employer must

consider the circumstances of each case. If some rigid formula is to be used to calculate the leave to be granted to injured employees, it would be easy enough to specify this in the collective agreement. The parties have chosen instead to permit the employer some discretion to determine what length of leave is "reasonable". This provides the employer with a degree of flexibility and an opportunity to address different circumstances in different ways. On the other hand, it also imposes an obligation on the employer to take into account the circumstances in which the application for leave is made.

[34] In this case, the employer had recourse to a policy that, according to Mr. Morse, was used regularly to determine what leave would be granted. There was some flexibility in this policy as the employer applied it, in the sense that the employer could decide that the projected absence for the employee would be sufficiently short so that IODL should be granted for the whole period. Otherwise, the sequence of accident report, IODL, workers' compensation approval and transfer of the employee to workers' compensation benefits was routinely followed. For most of the employees to whom the policy applied, this does not seem to have been challenged or to have been the subject of complaint. This is perhaps because, as Mr. Morse described it, the other employees to whom IODL was granted would have received 90% of their regular salary as workers' compensation benefits.

[35] For Dr. King, however, the application of this policy had different implications than it did for these other employees. To him, the switch to workers' compensation benefits would mean a loss in salary of over 30%. Mr. Morse was candid in saying that, when the policy was followed in the case of Dr. King, he was not aware of the cap in the Saskatchewan workers' compensation legislation, and thus, no thought was given to the repercussions for Dr. King of granting a period of leave no different than that for other employees. It is impossible to assess what effect this factor might have had if it had been considered in deciding what length of leave to grant Dr. King. As the adjudicator pointed out in *Colyer* (*supra*), it would not necessarily be unreasonable for the employer to expect employees to be supported by workers' compensation benefits for part of this absence, even if this were less favourable to employees than being covered by IODL for the entire time. The requirement is that the employer consider all of the factors relevant to the employee requesting leave and that the decision be reasonable in this context. In the case of Dr. King, the employer's obliviousness to the existence of a significant factor relevant to his circumstances during the period of his

absence from work meant that the decision could not be a reasonable one in the sense described in *Colyer* (*supra*) and *Sabiston* (*supra*).

[36] Adjudicators who have concluded that the grant of IODL by an employer fails to meet the standard of reasonableness have outlined two different remedial options. One of these, the approach taken in *Sabiston* (*supra*), was for the adjudicator to decide on the appropriate length of leave and make an order accordingly. The second approach, that taken in *Haslett* (*supra*), was to remit the decision as to length of leave back to the employer, having drawn the attention of the employer to the flaws in the initial decision.

[37] It would be the more direct course for me, having concluded that the employer failed to consider a factor that might have had some effect on the decision and that the decision was therefore not reasonable, to substitute a period of leave that I consider to be reasonable. The parties to this adjudication did not argue that I would not have the jurisdiction to issue an order of that kind, and there seems to have been no suggestion that the decisions of previous adjudicators who chose this path had been challenged.

[38] My view, however, is that the more appropriate remedy for this kind of procedural error on the part of the employer is to permit the employer an opportunity to make a decision that takes all relevant factors into account and that properly considers the individual circumstances of Dr. King. This is consistent with my analysis of this case as an error in process rather than an instance of bad faith by the employer, and it provides the employer with a chance to make a decision that will appropriately reflect all of the dimensions of the situation surrounding the request for leave.

[39] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

Order

[40] I am ordering that the grievance filed on behalf of Dr. King be allowed in part and that the employer reconsider the request for IODL in light of the grievor's rate of pay.

March 31, 2006.

Beth Bilson, Q.C.,
adjudicator