

Date: 20060714

File: 166-02-33915

Citation: 2006 PSLRB 89



*Public Service Labour
Relations Act*

Before an adjudicator

BETWEEN

PIERRE LADOUCEUR

Grievor

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as

Ladouceur v. Treasury Board (Department of National Defence)

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

REASONS FOR DECISION

Before: Jean-Pierre Tessier, adjudicator

For the Grievor: Valérie Charette, Professional Institute of the Public Service of Canada

For the Employer: Jeff Laviolette, Treasury Board Secretariat

(Decided without an oral hearing)
(P.S.L.R.B. Translation)

Grievance referred to adjudication

[1] Pierre Ladouceur (“the grievor”) was working as a scientist at the Department of National Defence when he filed a grievance in February 2002 concerning his vacation leave. The grievance was referred to adjudication in March 2004.

[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] On June 8, 2005, the grievor asked to have his grievance decided on the basis of written representations. The employer agreed to his request on June 17, 2005. The exchange of written representations was concluded on September 8, 2005.

Summary of the evidence

[4] The parties agreed to the following facts:

[Translation, except for material between quotation marks]

...

The Professional Institute of the Public Service of Canada and the Treasury Board (National Defence) agree that the following facts concerning the grievance of Pierre Ladouceur (File 166-02-33915) are not at issue:

1. *On February 4, 2002, the grievor filed a grievance which read:*

“I grieve the order to provide signed leave requests for days not of my choosing.”

The corrective action requested was as follows:

“Reinstate all the leave in question:

27 Feb - 1 Mar

11 Mar - 15 Mar

25 Mar - 28 Mar”

2. *The grievance appears at clause 16.05 of the collective agreement for the Research Group expiring on September 30, 2003.*

3. *When he filed his grievance, Mr. Ladouceur was working at the Department of National Defence (DND) as a Defence Scientist (DS-04) for the Contracts Service in the War Games Division.*
4. *Mr. Ladouceur had been employed with DND since 1969 and was an indeterminate employee.*
5. *At the time he filed his grievance, Mr. Ladouceur was covered by the Research Group collective agreement signed on December 12, 2001, and expiring on September 30, 2003.*
6. *Under paragraph 16.02 of the Research Group collective agreement, Mr. Ladouceur was entitled to six (6) weeks of vacation leave per year.*
7. *The grievor filed four grievances in all in relation to the employer's demands concerning his vacation leave. The grievances in question, with a few exceptions, involved similar facts. They were filed on July 21, 1999, March 21, 2001, December 21, 2001, and February 4, 2002, respectively.*
8. *Joseph W. Potter, adjudicator, rendered a decision on May 29, 2000, denying the grievance of July 21, 1999.*
9. *The same adjudicator also rendered a decision on May 29, 2002, regarding the grievance of March 21, 2001. This grievance was heard under the expedited adjudication procedure. This decision also denied the grievance.*
10. *The grievance of December 21, 2001, had been placed in abeyance at the third level of the grievance process while awaiting a decision on the grievance of March 21, 2001. To date, it is still pending at the final level.*
11. *The subject of this reference to adjudication is the fourth grievance, dated February 4, 2002.*
12. *For the 2001-2002 fiscal year, Mr. Ladouceur had a total of seven (7) weeks' vacation leave (six (6) weeks earned during the year and one (1) week carried over from the preceding fiscal year).*
13. *At the time he filed his grievance, Mr. Ladouceur had taken twenty-three and three-fourths (23¾) days of vacation for the 2001-2002 year.*
14. *On February 27, 2004, Mr. Ladouceur retired.*

15. *On February 10, 2004, the employer dismissed the grievance at the final level. This response was received by Mr. Ladouceur on February 19, 2004.*
16. *The grievance was referred to adjudication on March 31, 2004.*
17. *The parties reserve the right to submit additional evidence.*

...

Summary of the arguments

[5] Over the course of the last few years, the grievor filed four grievances against the employer's demands. This grievance is the fourth and last grievance in this series. The grievor objects to the fact that, in February 2002, the employer wanted to force him to use up all his vacation credits by making him take 11 and one-fourth (11¼) days of vacation leave in February and March 2002.

[6] In November 1997 the vacation leave policy of the Deputy Chief of Staff, National Defence, for military and public service members of the DCDS group and capability component (CC) 4A (the "1997 Policy") asked employees to submit a utilization plan for all their vacation leave during the fiscal year, one that provided exact dates.

[7] According to the grievor, the collective agreement entered into between the Treasury Board and the Professional Institute of the Public Service of Canada on December 12, 2001, for the Research bargaining unit, did not permit the employer to schedule vacation times, because the 1997 Policy does not meet the requirements of the collective agreement.

[8] According to the grievor, the adjudicator must consider the following issues:

[Translation]

- a) *What is meant by "operational requirements"?*
- b) *Can the employer invoke future (and hypothetical) "operational requirements" to schedule an employee's vacation leave?*
- c) *In what circumstances can the employer schedule an employee's vacation leave?*

- d) *Can an employee decide on his own initiative to carry over unused vacation credits in a given year?*
- e) *Can the employer unilaterally impose a limit on the carry-over of annual leave?*
- f) *Has the employer made every reasonable effort to provide the grievor's vacation leave in the amount and at such time as the grievor has requested?*

[9] The grievor compared successive versions of the collective agreement in order to explain the employer's motivation in issuing a policy on leave and the use of accumulated vacation leave credits. Thus, in the collective agreement prior to the grievance, the clause concerning the carry-over of leave reads as follows:

...

14.07 Carry-over Provisions

- (a) *The amount of earned but unused vacation leave which may be carried over from one vacation year to the next vacation year shall not exceed the maximum amount which an employee is entitled to earn in one vacation year.*
- (b) *Notwithstanding clause 14.07(a), where in any vacation year an employee requests vacation leave which cannot be granted in total or in part because of operational requirements, the unused portion of his vacation leave shall be carried over into the following vacation year.*
- (c) *Immediately following the end of the vacation year, upon application by the employee and with the approval of the Employer, earned but unused vacation leave credits in excess of twenty (20) days may be paid in cash at the employee's daily rate of pay as calculated from the classification prescribed in his certificate of appointment of his substantive position on the last day of the vacation year.*

...

[10] The collective agreement that applies to this grievance provides as follows:

...

16.05 Provision for Vacation Leave

In order to maintain operational requirements, the Employer reserves the right to schedule an employee's vacation leave but shall make every reasonable effort:

- a) to provide an employee's vacation leave in an amount and at such time as the employee may request;*
- b) not to recall an employee to duty after he has proceeded on vacation leave.*

...

16.07 Carry Over of Annual Leave

- a) Where in any vacation year an employee has not been granted all the vacation leave credited to him, the unused portion of the employee's vacation leave shall be carried over.*

- b) *Liquidation***

During any vacation year, upon application by the employee and at the discretion of the Employer earned but unused vacation leave credits shall be compensated at the employee's daily rate of pay as calculated from the classification prescribed in the employee's certificate of appointment of the employee's substantive position on March 31st.

...

[11] Finally, the collective agreement subsequent to this grievance provides as follows:

...

16.05 *Provision for annual leave*

- a) Employees are expected to take all their vacation leave during the vacation year in which it is earned.*
- b) In order to maintain operational requirements, the Employer reserves the right to schedule an employee's vacation leave but shall make every reasonable effort:*
 - i. to provide an employee's vacation leave in an amount and at such time as the employee may request;*

- ii. *not to recall an employee to duty after he has proceeded on vacation leave.*

...

16.07 Carry Over

- a) *Where in any vacation year, an employee has not been granted all of the vacation leave credited to him, the unused portion of the employee's vacation leave credits, up to a maximum of two hundred and sixty-two point five (262.5) hours, shall be carried over into the following vacation year. All vacation leave credits in excess of two hundred and sixty-two point five (262.5) hours shall be automatically paid in cash at the employee's daily rate of pay as calculated from the classification prescribed in the certificate of appointment of the employee's substantive position on the last day of the vacation year.*

...

[12] According to the grievor, the 1997 Policy states that the collective agreements stipulate the amount of vacation credits that an employee may accumulate. According to him, this statement is false in the case of the collective agreement that is applicable to this grievance, because there is no limit on the carry-over of vacation leave. Therefore, absent a specific provision in the collective agreement to that effect, the employer could not impose a policy limiting the carry-over of vacation leave credits

[13] On the "operational requirements" issue, the grievor argued that the employer was hiding behind the employees' so-called need to rest whereas, in reality, the 1997 Policy was designed to avoid having to pay unused vacation credits. Financial reasons are not the same thing as operational requirements. Thus, in *Tremblay v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-02-17538 (1989) (QL) the adjudicator wrote as follows:

...

A number of decisions have examined the expression "operational requirements" and the adjudicators concluded that this expression "refers to the nature of the work required to be done and not the nature of the book-keeping and expense analysis performed at headquarters. . . ."

...

[14] The employer could not argue operational requirements for financial reasons or for future and hypothetical needs, as expressed in *Power v. Treasury Board (Transport Canada)*, PSSRB File 166-02-17064 (1988) (QL):

...

It would be unwise to attempt to provide a universally valid definition of bona fide operational requirements. For present purposes it will suffice to say that policies established unilaterally by the employer solely for financial reasons cannot be accepted as valid operational requirements if they have the effect of denying employees their rights under a collective agreement. . . .

...

In any case, the words of Article 16.04 of the present collective agreement lead me to conclude that it would only be under very peculiar circumstances that the employer could justify a refusal to carry over leave on the basis of operational requirements. How can the employer know in advance that operational requirements will prevent the scheduling of carried-over leave during the whole of a forthcoming fiscal year? . . .

...

[15] In addition, as the grievor argued in his written submissions, he could decide to carry over his unused vacation leave on his own initiative.

[Translation, except for material between quotation marks]

...

According to the employee, the wording of this clause is not the same as it was in 1983. At that time, clause 14.07(b) provided that where “an employee requests vacation leave which cannot be granted in total or in part because of operational requirements, the unused portion of his vacation leave shall be carried over. . . .” A comparison of the two clauses shows that the conditions for their application, according to the 1983 wording, were no longer present when the employee filed his grievance.

*Finally, as stated in **Power** (supra), the adjudicator seems to confirm the right of employees to carry over their unused leave and emphasizes that the employer always retains the right to refuse a request for leave subsequently if it is not in keeping with operational requirements. Accordingly, it*

would be wrong to assert that the employer alone can decide to carry over vacation leave under paragraph 16.07(a).

...

[16] In this case, it is alleged that the employer did not make every reasonable effort to provide the grievor's vacation leave in the amount he requested. The grievor chose the dates for the vacation leave and the length of that leave, which was to be nearly five weeks. The employer added other leave dates, thereby extending the length of the leave.

[17] For his part, the employer submitted as follows:

[Translation]

...

The facts in this case clearly show that the employer gave the grievor a number of opportunities to submit a specific vacation schedule indicating the date when he planned to use the vacation credits he had earned for the vacation year in progress. . . .

For the 2001/2002 fiscal year, Mr. Ladouceur had a total of thirty-five (35) days of vacation credits (30 days of vacation credits for the vacation year in progress and 5 days carried over from the previous fiscal year). He submitted a vacation schedule to the employer specifying that he would take twenty-three and three-fourths (23¾) days of vacation leave. It should be noted that he was granted these vacation days pursuant to his request; therefore, the requirements of clause 16.05(a) were met.

However, the grievor did not comply with the employer's directives, because he did not specify a date for the remaining eleven and one-fourth (11¼) vacation days. Consequently, the employer scheduled the grievor's remaining eleven and one-fourth (11¼) vacation credits for the end of February and during March based on operational requirements.

Clause 16.05 of the collective agreement is very explicit. It authorizes the employer to schedule vacation leave provided it makes every reasonable effort to provide the employee's remaining vacation leave in an amount and at such time as the employee may request; the argument submitted by the grievor's representative with respect to "operational requirements" is without foundation.

The employer submits that it did not violate the provisions of the collective agreement by scheduling the grievor's vacation leave. The evidence clearly shows that the employer made every reasonable effort to grant the grievor vacation leave in the amount and at such time as he requested. However, since the grievor did not submit a vacation schedule for using his leave credits for the year in progress, the employer availed itself of its right to schedule the remaining leave credits according to operational requirements.

...

[18] In *Ladouceur v. Treasury Board (National Defence)*, 2000 PSSRB 51, involving the grievor and similar facts, the adjudicator wrote as follows:

...

[66] *I find the language of the collective agreement allows the employer the right to schedule annual leave but the employer must make every reasonable effort to provide the leave to the employee in an amount and at a time which the employee may request.*

...

[19] In reply, the grievor argued as follows:

[Translation]

...

The problem is that the employer forced the grievor to take the leave credits remaining in his bank, i.e., eleven and one-fourth (11¼) days. With respect, we submit that the employer errs when it claims in paragraph one on page 2 of its submissions that “[c]onsequently, based on operational requirements, the employer scheduled the grievor's remaining eleven and one-fourth (11¼) days of leave credits at the end of February and in March, 2002. . . .”

*The operational requirements test is generally used to deny leave, as the adjudicator in **Power** (166-2-17064) emphasized, or to schedule the date of a vacation when an employee wants to take his leave but cannot do so on the date chosen because of operational requirements. Since the various clauses in the collective agreement should be interpreted in relation to each other, to admit the employer's position would make clause 16.07(a), allowing an employee to carry over to the next year the unused portion of his vacation leave, meaningless.*

...

[Emphasis in the original]

Reasons

[20] The joint statement of facts and the submissions of the parties indicate that the issue raised in this case fits within a particular context. Over the last 10 years or so, leave credits accumulated in the grievor's sector. The employer developed a policy to promote the utilization of leave credits in the period in which they are earned, and to eliminate the carry-over of unused credits.

[21] I do not think it is necessary to refer to the texts of the previous and subsequent collective agreements in order to interpret article 16 of the collective agreement applicable to this grievance.

[22] In this case the grievor was entitled to six weeks of leave for the year in progress. Credits for a seventh week had been carried over from the previous year. For the year in progress the grievor had requested 23 and three-fourths ($23\frac{3}{4}$) days of vacation leave. In February, the employer asked him to provide dates for the remaining 11 and one-fourth ($11\frac{1}{4}$) days, 6 and one-fourth ($6\frac{1}{4}$) days of which were earned during the year in progress and 5 days of which were carried over from the previous year.

[23] Let us begin by examining whether the employer can schedule the taking of the five days of leave credits carried over from the previous year. Clause 16.07 of the applicable collective agreement governs the carry-over of vacation leave. This clause provides as follows:

16.07 Carry over

a) *Where in any vacation year an employee has not been granted all the vacation leave credited to him, the unused portion of the employee's vacation leave shall be carried over.*

b) **Liquidation**

During any vacation year, upon application by the employee and at the discretion of the Employer earned but unused vacation leave credits shall be compensated at the employee's daily rate of pay as calculated from the classification prescribed in the employee's certificate of appointment of the employee's substantive position on March 31st.

[24] The wording of the collective agreement is specific: a leave credit not granted in the year is carried over to the following year. This is true for the five days carried over in this case.

[25] Subclause 16.07(b) of the collective agreement applicable to this grievance provides for a single method to use up one's leave. Upon application by the employee, and at the discretion of the employer, the vacation leave credits can be compensated at the employee's daily rate of pay. This single method of liquidating accumulated leave credits would at first appear restrictive and difficult to apply. However, in practice, the fact that the employer has complete discretion to compensate vacation leave credits may force the parties to agree on the use of leave credits in lieu of payment. However, to conclude that clause 16.07 has the nature of an incentive does not mean that it has no real weight and does not preclude its functional character, and this confirms that the parties to the collective agreement did not speak to no effect. This analysis leads me to conclude that the employer could not unilaterally schedule five days of carried-over vacation leave.

[26] The matter of the six and one-fourth (6¼) days of vacation leave credits for the year in progress remains to be considered. The issue in dispute is the application of clause 16.05 of the collective agreement, on the granting of vacation leave. This clause reads as follows:

16.05 Provision for Vacation Leave

In order to maintain operational requirements, the Employer reserves the right to schedule an employee's vacation leave but shall make every reasonable effort:

- a) to provide an employee's vacation leave in an amount and at such time as the employee may request;*
- b) not to recall an employee to duty after he has proceeded on vacation leave.*

[27] To understand the procedure applicable to granting vacation leave, it is necessary to examine article 16 in its entirety. For an understanding of this article, it may be summarized as follows:

16.01

The vacation year is from April 1 to March 31.

16.02

The employee earns vacation credits.

16.04

The employee is entitled to paid vacation leave in accordance with the credits he has earned.

16.05

The employee may take vacation leave in the amount and at such time as the employee may request.

16.07

Where in a vacation year all the vacation leave has not been used, the unused portion of the vacation leave shall be carried over into the next year.

[28] In the collective agreement applicable to this grievance, clause 16.05 provides that the employer grant vacation leave in the amount and at such time as the employee may request. Clause 16.07 provides that unused leave shall be carried over to the next year.

[29] The carry-over of vacation leave is not a practice of granting leave, but rather a consequence when the leave requested by the employee cannot be granted. The employer's strict obligation is to respect the employee's wishes. These wishes are expressed through the employee providing an amount and a time. Thus, the grievor must specify an amount (e.g. five days) and a time (e.g. from June 4 to 8).

[30] In this case the grievor did not specify an amount and a time for his leave; he refused to indicate an amount and a time for taking the six and one-fourth (6¼) days of vacation leave, but preferred to carry them over.

[31] The grievor referred to *Power* on the issue of operational requirements. I believe it is helpful to cite a few passages from this decision:

...

It would be unwise to attempt to provide a universally valid definition of bona fide operational requirements. For present purposes it will suffice to say that policies established unilaterally by the employer solely for financial reasons

cannot be accepted as valid operational requirements if they have the effect of denying employees their rights under a collective agreement.

...

In any case, the words of Article 16.04 of the present collective agreement lead me to conclude that it would only be under very peculiar circumstances that the employer could justify a refusal to carry over leave on the basis of operational requirements. How can the employer know in advance that operational requirements will prevent the scheduling of carried-over leave during the whole of a forthcoming fiscal year? . . .

...

[32] In *Power*, the adjudicator refers to operational requirements and financial reasons that would have “. . . the effect of denying employees their rights under a collective agreement”.

[33] As I have indicated above, the carry-over of unused vacation credits is not a right but the consequence of the impossibility of using all the vacation leave credits. Thus, there is no choice but to pay compensation for the credits or to carry them over.

[34] In this case, there was no operational requirement that prevented vacation leave from being taken. The grievor did not tell the employer when and for how long he wanted to use the balance of his vacation leave credits. The employer did not point to operational requirements in order to violate the grievor's rights. In fact, it told him in January that no operational requirements prevented the grievor from specifying an amount and a time for taking vacation leave in February and March.

[35] In his grievance, the grievor charged that the employer contravened article 16 of the collective agreement. The employer told the employee that operational requirements in February and March would allow the employee to chose the time and amount of unused vacation leave credits that he would take. The grievor refused to provide a time and amount. The employer scheduled a time and amount of vacation leave. Under the circumstances, the grievor cannot plead his own wrongdoing and charge that the employer did not respect his wishes, since it was he who had refused to indicate when and for how long he would take his vacation leave.

[36] For all of the above reasons, I make the following order:

(The Order appears on the next page)

Order

[37] The grievance is allowed with respect to the five days of carried-over vacation leave credits that the employer forced the grievor to use against his wishes. I order the employer to pay to the grievor the equivalent of five days' vacation leave at the daily rate of pay he enjoyed immediately before his retirement.

[38] The grievance is dismissed with respect to the six and one-fourth (6¼) days of vacation leave that were not used in the year in which they were earned but were scheduled by the employer in terms of amount and time.

July 14, 2006.

**Jean-Pierre Tessier,
adjudicator**