Date: 20091223

File: 566-02-0574

Citation: 2009 PSLRB 183

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

SHIRLEY MILLER

Grievor

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
Miller v. Treasury Board (Department of National Defence)

In the matter of an individual grievance referred to adjudication pursuant to section 209 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Michel Paquette, adjudicator

For the Grievor: Krista Devine, Public Service Alliance of Canada

For the Employer: Virginie Emiel-Wildhaber, Treasury Board Secretariat

Decided on the basis of written submissions
filed May 4 and 27 and June 4, 2009.

I. Grievance referred to adjudication

[1] Eight grievances were filed by Shirley Miller, Richard Wayne Nieradka (PSSRB File No. 166-02-37400), Marcel St. Amand (PSSRB File No. 166-02-34054), Mark Walsh (PSSRB File No. 166-02-36580), Jerome Clouthier (PSLRB File No. 566-02-01171), Glen Johnston (PSLRB File No. 566-02-02121), Brian D. Mann (PSLRB File No. 566-02-02122) and Randy Walker (PSLRB File No. 566-02-02299) ("the grievors"), all employees of the Department of National Defence ("the employer"), between February 2003 and February 2007. The eight grievances raise a question about the proper interpretation and application of the vacation leave provisions in the collective agreements for the Technical Services Group (TC), which expired on June 21, 2003 and June 21, 2007, for the Operational Services Group (SV), which expired on August 4, 2003 and August 4, 2007, and for the Program and Administrative Services Group (PA), which expired on June 20, 2003. The parties agreed to proceed via an agreed statement of facts and written submissions.

II. Summary of the evidence

[2] This section of the decision reproduces in its entirety the substantive paragraphs of the Agreed Statement of Facts concerning the grievor, which read as follows:

> *The collective agreement that applies* [PSLRB File No. 566-02-574] *is the agreement signed by the Treasury Board Secretariat and The Public Service Alliance of Canada for the Program and Administrative Services, which expired on 20 June 2003 (Exhibit 66) . . . .*
>
> ***a) Shirley Miller – 566-02-574***
>
> *Shirley Miller is a CR 05 working in Purchasing/Client Services at CFB Shilo in Manitoba.*
>
> *On March 3, 2005 she submitted a request to carry-over 44.95 hours of leave, stating that the leave would be taken April 1, 2005 and April 25-29, 2005. . The carry-over of leave was not approved by the Base Commander (Exhibit 67).*
>
> *As a result she was required to take the leave prior to the end of March and she complied and took leave from March 17-31, 2005 (for a total of 67.45 hours)*
>
> *The grievor filed a grievance on April 4, 2005 (Exhibit 68).*

> *The second level grievance response was issued on 3 May 2005 denying the grievance (Exhibit 69)*
>
> *The final level reply dated July 5, 2006 granting the grievance in part was issued by Diane McCusker (Exhibit 70).*
>
> [*Sic* throughout]

III. Summary of the arguments

A. For the grievor

[3] The grievors' representative indicated that each grievor requested that accrued annual leave be carried over into the next vacation year. In each instance, the employer refused to carry over the leave or a portion of the leave and subsequently unilaterally scheduled the leave at a time and in an amount that it dictated.

[4] The grievors are challenging the employer's refusal to allow them to carry over annual leave credits and its consequent unilateral scheduling of the leave. It is important to note that the leave carry-over requested in each case falls within the maximum allowed for carry-over specified in all the applicable collective agreements.

[5] The grievances were filed under different collective agreements but were heard together as they all concern the conflict between the rights of the employer to unilaterally schedule vacation leave and the grievors' rights to carry over accumulated vacation leave and are all based on similar or identical provisions of the collective agreements in question.

[6] Ms. Miller's grievance was granted in part, but the issue of remedy remains outstanding for her.

[7] The first issue that the employees' representative dealt with was the grievors' right to carry over leave. Vacation leave is an earned benefit related to an employee's length of service and as such should be enjoyed by the employee or paid out. This is recognized in the terms of the collective agreements at the centres of these grievances, each of which provides for the accrual, granting, carry-over and, ultimately, the liquidation of vacation leave credits.

[8] Each party recognized the importance of vacation for employees, and each encourages them to use their accrued vacations. The ability to take vacation at a time and in the amount preferred by employees is of critical importance to individuals and

allows them to enjoy the benefit as they see fit. The ability to carry over an amount of leave may serve a variety of purposes since an employee might have been unable to take it during the fiscal year.

[9] Each collective agreement provides that the vacation year runs from April 1 to March 31 of the following year and contains provisions for the advancing of credits. Requiring zero carry-over has the effect of requiring employees to use credits either in advance or within a very short time of them being credited. The employer's actions, as demonstrated by the facts in these grievances, fell short of what is required in the collective agreement provisions about carry-over. The employer did not allow the grievors to carry over vacation leave upon request when they did not use the entirety of their accrued credits during a year. Rather than trying to accommodate the individual requests, it appears that a blanket approach was used under which requests were routinely denied simply because, from the employer's perspective, carry-over should not take place. It occurred despite collective agreement language providing for carry-over if the leave has not been exhausted.

[10] The language in each collective agreement is clear. It specifies that, when vacation leave credits are not used, they "shall be carried over." That language is mandatory, not discretionary.

[11] However, it appears from the policy documents that the employer is purporting that there is no entitlement to carry over vacation leave credits. Also, repeated in the employer's responses to individual carry-over requests, is the statement that no carry-over is allowed. A zero balance of leave by the end of the fiscal year appears to be the objective.

[12] That approach ensures that no one accrues any leave bank, let alone accrues leave to the caps outlined in the collective agreements. It amounts to a blanket denial and is not consistent with the requirement that every effort be made to schedule leave in a manner consistent with employees' wishes. The grievors submit that it violates the requirements of the collective agreement. They request that their wishes be accommodated and that carry-over be permitted up to the stated maximums in the respective collective agreements.

[13] The language in each collective agreement is the same for all the carry-over provisions with the exception of the amount that may be carried over. The term

"granted" is used. For example, clause 38.08(a) of the TC agreement states the following:

> ***38.08***
>
> *(a) Where in any vacation year, an employee has not been granted all of the vacation leave credited to him or her, the unused portion of his or her vacation leave up to a maximum of two hundred and sixty-two decimal five (262.5) hours credits shall be carried over into the following vacation year . . . .*

[14] The grievors' representative submitted that the general carry-over clause does not grant the employer additional discretion to unilaterally schedule vacation leave, and if it does, it does not allow the employer to deny the carry-over of leave credits.

[15] The grievors' representative also pointed out that it is important to consider article 3 of each collective agreement when interpreting the carry-over provisions. That article is identical in each collective agreement and clause 3.02 states as follows:

> ***3.02*** *Both the English and French texts of this agreement shall be official.*

[16] Given the different interpretations of the term "granted" as used in the vacation carry-over provisions of the collective agreements, examining the French versions of the collective agreements helps clarify the meaning of the provisions. For example, clause 35.11a) of the SV agreement states as follows:

> *a) Lorsque, au cours d'une année de congé annuel, un employé-e-s n'a pas épuisé tous les crédits de congé annuel auquel il ou elle a droit, la portion inutilisée des crédits de congés annuels jusqu'à concurrence de deux cent quatre-vingts (280) heures sera reportée à l'année de congé annuel suivante. Tous les crédits de congé annuel en sus de deux cent quatre-vingts (280) heures seront automatiquement payés en argent au taux de rémunération journalier de l'employé-e-s calculé selon la classification indiquée dans son certificat de nomination à son poste d'attache le dernier jour de l'année de congé annuel.*

[17] The terms *épuisé* and *épuisement* are also used in the French versions of the PA and TC agreements. When translated, the terms mean "exhausted," which suggests that carry-over is to be made available when employees have not used all their available credits.

[18] The second issue addressed by the grievors' representative was the right of the employer to schedule vacation leave. The employer relies heavily on articles in the applicable collective agreements that mention that employees are expected to take all their vacation leave during the vacation year in which it is earned and it's right to schedule an employee's vacation leave. The grievors' representative argued that none of those provisions is absolute.

[19] Turning first to the expectation that employees must take vacation leave during the year in which it is earned, the language is not mandatory. The leave provisions, with the exception of the TC agreement, state an expectation. If the intent were to require employees to take all vacation leave within the year earned, the language would have used words such as "shall." It does not provide the employer with the authority to unilaterally schedule any remaining leave at the end of the fiscal year.

[20] The grievors' representative cited *Bozek et al. v. Canada Customs and Revenue Agency*, 2002 PSSRB 60, at para. 35 and 36 as follows:

> *[35] Clause 15.05(a) creates an obligation for the employees who are expected to take all their vacation leave during the vacation year in which it is earned. The grievors' counsel argued that it was meant to encourage the employees to utilize vacation leave credits within the vacation year in which they are earned. I agree with the meaning given to the word "expected" by the grievors' counsel. The word "expected" has to be understood as encouraged rather than imposing a mandatory obligation on the employees. If the parties wanted to state an obligation for the employees to take all their vacation leave credits within the vacation year they are earned, they would have used the word "should" instead of "are expected to" in clause 15.05(a).*
>
> *[36] Clause 15.05(b) provides that, in order to maintain operational requirements, the employer reserves the right to schedule an employee's vacation leave, but shall make every reasonable effort to provide an employee's vacation leave in an amount and at such time as the employee may request. Taken alone, this clause can be interpreted as giving the right to the employer to schedule unilaterally vacation leave as concluded by the then Deputy Chairperson J.W. Potter in* Ladouceur v. Treasury Board (National Defence) (supra). *The reasoning of Deputy Chairperson Potter cannot be applied in the present cases because the interpretation of the word "expected" of clause 15.05(a) and of the clause 15.07AU(a) (automatic carry-over of the unused vacation credit in the following year) were not an issue in* Ladouceur, (supra). *For*

> *the same reasons, the decision rendered in* Low and Duggan (supra) *cannot be applied here.*

[21] The grievors' representative acknowledged that all the collective agreements in issue grant the employer the right to schedule leave but argued that the right is circumscribed. The language in each collective agreement requires the employer to make every reasonable effort to provide an employee vacation leave in an amount and at such time as the employee may request. The following cases, amongst others, were submitted in support of that point: *Pinard v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-15381 (19860304), *Lawson v. Treasury Board (Statistics Canada)*, PSSRB File No. 166-02-5883 (19800220), and *Brown v. Treasury Board (Fisheries & Oceans Canada)*, 2002 PSSRB 59.

[22] Finally, the issue of remedy was addressed. Given that the employer unilaterally scheduled the time off, the bargaining agent requested that the leave credits that the grievors were forced to take be reinstated and that a declaration be issued that the employer contravened the collective agreements. *Bozek* and *Power v. Treasury Board (Transport Canada),* PSSRB File No. 166-02-17064 (19880225), were cited.

B. <u>For the employer</u>

[23] The employer's representative took the position that the correct interpretation of the provisions at issue leads to the following conclusions:

- The parties to the collective agreements recognize the importance of vacation leave.
- Employees earn vacation leave credits based on the criteria specified in their respective agreements.
- It is the employer's residual right, subject to the applicable collective agreement, to schedule and grant vacation leave to employees. Subject to operational requirements, the employer, in the exercise of this residual right, is entitled to take into consideration factors including employee requests.
- Employees are expected to take their vacation leave during the vacation year in which it is earned.

- Where vacation leave earned during a vacation year has not been used, the parties agree that an employee may be allowed to carry over the unused credits up to a maximum. Leave credits in excess of the maximum must be cashed out.

[24] In a written submission dated May 27, 2009, the employer's representative provided the following:

> *The grievance of S. Miller is filed under the PA collective agreement. The relevant provisions are the following:*
>
> ***34.01*** *The vacation year shall be from April 1st to March 31st, inclusive, of the following calendar year.*
>
> *(a) Employees are expected to take all their vacation leave during the vacation year in which it is earned.*
>
> *(b) Subject to the following subparagraphs, 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 the employee has proceeded on vacation leave;*
>
> *(iii) not to cancel nor alter a period of vacation or furlough leave which has been previously approved in writing.*
>
> ***34.07*** *Where, in respect of any period of vacation leave, an employee:*
>
> *(a) is granted bereavement leave,*
>
> *or*
>
> *(b) is granted leave with pay because of illness in the immediate family,*
>
> *or*
>
> *(c) is granted sick leave on production of a medical certificate,*
>
> *the period of vacation leave so displaced shall either be added to the vacation period, if requested by the employee and approved by the Employer, or reinstated for use at a later date.*

> *34.11 (a) Where in any vacation year, an employee has not been granted all of the vacation leave credited to him or her, the unused portion of his or her vacation leave up to a maximum of thirty-five (35) days credits shall be carried over into the following vacation year. All vacation leave credits in excess of thirty-five (35) days shall be automatically paid in cash at his or her daily rate of pay as calculated from the classification prescribed in his or her certificate of appointment of his or her substantive position on the last day of the vacation year.*
>
> . . .

[25] She submitted that I ought to adopt a purposive and contextual approach in interpreting the vacation leave provisions of the collective agreements in order to give effect to their meanings. A purposive approach entails determining the purposes of the vacation leave provisions, including the carry-over provisions. The carry-over provisions of the collective agreements are triggered when the employer does not grant all of an employee's vacation leave during the vacation year, resulting in an unused portion remaining. The collective agreements do not contemplate that there will always be an unused portion of vacation leave credits for the sole purpose of carry-over. To the contrary, the collective agreements contemplate that the employer will grant and that employees will take all of their vacation leave during the vacation year.

[26] On the question of employees' right to carry over leave credits, most agreements clearly provide for the following scheme:

- Employees earn vacation leave credits each month of every fiscal year.
- Vacation leave credits are expected to be used in the year in which they are earned.
- To use vacation leave credits, employees must send a request to their manager.
- If a vacation request is denied for operational requirements, then carry-over may be permitted.

[27] Carrying over vacation leave is possible only when an employee's request for leave is denied. The employer has no record of any leave request having been denied during the fiscal years specified in each grievance. Vacation leave credits are earned.

However, the carry-over of vacation leave is not a right. It is a protection for employees should the employer not be able, due to operational requirements, to grant a vacation leave request in a given fiscal year.

[28] In *Ladouceur v. Treasury Board (Department of National Defence),* 2006 PSLRB 89, the adjudicator states the following:

. . .

> *[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. . . . Thus, the grievor must specify an amount (e.g. five days) and a time (e.g. from June 4 to 8).*
>
> . . .
>
> *[33] . . . the carry-over of unused vacation credits is not a right but the consequence of the impossibility of using all the vacation leave credits. . . .*
>
> . . .

[29] As for of the French translation of the clause prescribing the carry-over of vacation leave, the employer's argument stands. For the employee to *épuiser* all his or her leave credits, the employee needs to request the leave from his or her manager. The manager then decides whether or not to grant the request. Should the manager not grant the request, the employee may be able to carry over the leave.

[30] As for the right of the employer to schedule vacation leave, the PA collective agreement clearly states that: "[e]mployees are expected to take all their vacation leave during the vacation year in which it is earned." The term used is "expected" not "shall" because the employer may need to deny vacation leave requests for operational requirements.

[31] In *Ladouceur v. Treasury Board (National Defence),* 2000 PSSRB 51, the adjudicator states the following at paragraph 66:

> *[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.*

[32] The grievors argue that the employer's right is fettered by the requirement that it must accommodate employees' wishes. The employer disagrees. The requirement as specified is to ". . . make every reasonable effort to schedule vacation leave in accordance with the employee's wishes" and does not constitute a fetter on the employer's right. Rather, it provides guidance and direction to benefit employees. The language does not lend itself to an interpretation in which an employee's preference must necessarily always prevail. The employer is to consider an employee's preference as to time and amount of leave as factors when scheduling leave.

[33] The employer's representative argued that the three cases that the grievors cited on reasonable effort in support of their submissions do not establish a standard definition for what constitutes reasonable effort. Whether the employer made "every reasonable effort" is a question of fact to be determined in each case. It must be emphasized that those cases dealt with granting leave at specific times and not with the entitlement to carry over unused leave credits.

[34] Despite the employer partially granting Ms. Miller's grievance at the final level of the departmental grievance procedure, the employer took the position that, had it, at the final level, maintained the decisions from the first and second levels (i.e., to deny the grievances), the collective agreement would not have been violated.

[35] The employer argued that in the event that I found in favour of the grievor, a declaration is the appropriate remedy since the grievor had already taken the leave. An order reinstating the credits would result in granting benefits to her over and above her entitlement under the collective agreement and would result in an unjust enrichment.

[36] The employer's representative cited the following decisions: *Marin v. Treasury Board (Human Resources Development Canada)*, 2002 PSSRB 109; *Rosekat v. Treasury Board (Department of Public Works and Government Services),* 2005 PSLRB 149: *Higgs v. Treasury Board (Solicitor General Canada — Correctional Services)*, 2004 PSSRB 32; *Pronovost v. Treasury Board (Department of Human Resources and Skills Development),* 2007 PSLRB 93; and *Shaw v. Canadian Food Inspection Agency*, 2009 PSLRB 63.

IV. Reasons

[37] The question put before me is as follows:

- Do the grievors have the right to carry over vacation leave and, if so, under what circumstances?

[38] The vacation leave scheme included in the PA collective agreement in question can be summarized as follows:

- vacation leave is an earned benefit related to an employee's length of service and is earned each month of every fiscal year;
- the vacation year is from April 1 to March 31 of the following calendar year;
- vacation leave can be accrued, granted, carried over and liquidated;
- the employer has some obligation to consider the wishes of the employee as to the time and the amount of vacation leave;
- employees are expected to take all their vacation leave in the fiscal year in which it is earned; and
- the employer reserves the right to schedule an employee's vacation leave.

[39] The PA collective agreement contains a general carry-over provision. It is interesting to note that the TC collective agreements contain a clause that enables employees to have vacation leave earned in the current fiscal year of four days or more in the next fiscal year if requested before January 31. The portion of the 2003 SV collective agreement that applied to the Firefighters' classification (Marcel St. Amand) states the same. This clause reads as follows:

> ***1.03 Scheduling of Vacation Leave***
>
> *In scheduling vacation leave with pay to an employee the Employer shall, subject to the operational requirements of the service, make every reasonable effort:*
>
> . . .
>
> *(c) to comply with any request made by an employee before January 31 that the employee be permitted to use in the*

> *following fiscal year any period of vacation leave of four (4) days or more earned by the employee in the current year;*
>
> . . .

The PA collective agreement applicable here does not contain this clause.

[40] That, along with a review of the provided jurisprudence, leads me to conclude that employees, under the PA collective agreement in question, have the right to carry over vacation leave earned in a fiscal year to the next only when a specific leave request by an employee with a time and an amount has been denied by the employer.

[41] *Bozek* is the only decision of this or the former Board that validates the grievors' interpretation that she can carry over vacation leave under any circumstances. All the other decisions specify that carry-over can occur only when a vacation leave request has been denied.

[42] Paragraphs 33 to 35 of *Higgs* reads as follows:

> *[33] The word "expected" in paragraph 34.05(a) interrelates with paragraphs 34.05(b) and 34.11(a). The grievor was expected to use all his vacation leave during the year, as per paragraph 34.05(a) of the collective agreement. The employer has the right to schedule an employee's vacation leave. However, the onus on the employer is to ensure that the scheduling of an employee's vacation leave be reasonable in that:*
>
> 1. *it is in an amount and at such time as the employee may request;*
>
> 2. *an employee will not be recalled to duty after he/she has proceeded on vacation leave; and*
>
> 3. *an employee's vacation leave will not be cancelled or altered if it had been previously approved in writing.*
>
> *[34] Although an employee is <u>expected</u> to use his vacation leave during the year in which it is earned, in reality there are instances when this is not always possible. Operational requirements may demand that an employee be recalled to work, an employee's vacation leave may be cancelled or altered, or an employee may request that vacation leave be replaced by other leave such as bereavement, sick or family-related leave (clause 34.07). Therefore, the parties agreed upon subclause 34.11, the carry-over and liquidation of vacation leave.*

> *[35] The parties chose not to prescribe additional reasons to justify the carry-over of vacation leave, such as time for building a house, extended vacation plans, etc. It is clear by the absence in this collective agreement of such provisions that the intent was to expect employees to use all vacation leave credits during the fiscal year in which they are earned.*
>
> [Emphasis in the original]

[43] Paragraph 51 of *Rosekat* reads as follows:

> *[51] As of January 3, 2003, the grievor had only taken seven days of vacation leave. The grievor's representative argued that the word "expected" does not impose a mandatory obligation and referred to* Bozek (supra). *In that decision, the adjudicator concluded that if the employer wanted to impose an obligation, the word "should" would have been incorporated into the provisions of the collective agreement. I find in this case that the word "should", as defined in* Webster's Ninth New Collegiate Dictionary, *means "to express what is probable or expected."*

[44] Paragraph 33 of *Ladouceur,* 2006 PSLRB 89, reads as follows:

> *[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.*

[45] Paragraph 31 of *Shaw* reads as follows:

> *[31] Vacation leave is a condition of employment negotiated between the employer and the bargaining agent. The collective agreement provides that vacation leave is an annual entitlement. Employees are allowed to carry-over such leave when it is not granted. There is no language in clause B11.07(a) of the collective agreement that gives an employee the discretion to override the employer's right to schedule vacation under clause B11.05. The employer can schedule vacation leave in accordance with clause B11.05 to the extent of the limitations of that clause. Clause B11.07(a) does not restrict the employer's ability to do so, nor does its language give the employee a right to override the employer's decision to schedule vacation leave (clause B11.05) so as to accumulate an unlimited amount of vacation leave credits.*

[46] The grievance was allowed in part in Ms. Miller's case, and I am being asked to restore hours of vacation leave as a remedy since the employer declined to do so because they had been used. Again, I cannot.

[47] The grievance was allowed because the employer acknowledged that it should have made the leave policy clearer and that it had to be delivered to each civilian employee, and not because there was a contravention of the collective agreement. The decision to allow the grievance was based on management and policy considerations, not legal ones. In order for me to award the grievor a remedy, I must first find a violation of the collective agreement. Under the *PSLRA*, my jurisdiction does not extend to enforcing undertakings made by the employer. Instead, my jurisdiction, in collective agreement interpretation matters, covers hearing the merits of a grievance and, if I find a violation of the collective agreement, to ordering the appropriate remedy. In the absence of a violation I am unable to order a remedy.

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

(The Order appears on the next page)

V. Order

[49] The grievance is dismissed.

December 23, 2009.

Michel Paquette,
adjudicator