Date: 20090213

File: 566-02-579

Citation: 2009 PSLRB 21

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

CHERYL FERGUSON

Grievor

and

TREASURY BOARD

(Statistics Canada)

Employer

Indexed as
Ferguson v. Treasury Board (Statistics Canada)

In the matter of an individual grievance referred to adjudication.

REASONS FOR DECISION

Before: Margaret E. Hughes, adjudicator

For the Grievor: Evan M. Heidinger, Regional Representative, Professional Institute of the Public Service of Canada

For the Employer: Ward Bansley, Counsel

Heard at Vancouver, British Columbia,
November 4, 2008.

I. Individual Grievance referred to adjudication

[1] Cheryl Ferguson ("the grievor") filed a grievance on September 1, 2005 related to a decision of Statistics Canada ("the employer") denying her request for leave without pay for personal needs (LWPPN). At the date of filing, the grievor was a Computer Systems professional (CS-02) with Statistics Canada and was covered by the collective agreement between the Treasury Board and the Professional Institute of the Public Service of Canada ("the PIPSC") for the Computer Systems Group ("the collective agreement"), which had an expiry date of December 21, 2004.

[2] Prior to the date of filing, the grievor had received official notice that her position had been identified as surplus, and she had been offered Work Force Adjustment (WFA) options.

[3] Her grievance states the following:

> *I grieve the Employer's decision to unreasonably deny my request for Leave without Pay for Personal Needs in contravention of Article 17.10 of the CS Collective Agreement.*

[4] The corrective action requested is as follows:

> *My request for Leave without Pay for Personal Needs be granted and I be made whole.*

[5] The September 14, 2006 reply at the final level of the grievance process from Wayne Smith, Assistant Chief Statistician, Communications and Operations, reads as follows:

…

> *In your grievance you state that Statistics Canada is in violation of Article 17.10 of the CS Collective Agreement by denying your request for Personal Needs Leave because there were no operational requirements to justify doing so. Therefore the Employer should have granted the leave.*
>
> *Based on all of the correspondence and information on file, it is clear to me that Statistics Canada has reviewed this matter at length and sought advice from Senior Personnel at Treasury Board prior to making decisions with respect to this Work Force*

> *Adjustment situation. It is documented that every reasonable effort was made to provide more options to employees who found relocation unacceptable. In doing so, the department went above and beyond in providing employees the broadest set of options under the directive. The argument that the Employer cannot deny your leave request as there were no operational requirements is irrelevant. According to WFA 6.3.2, "management will establish the departure date for opting employees who choose b) or c). Since you opted for c), your expected date of departure from the Public Service was October 18, 2007. Had the Employer granted your request for leave prior to you becoming subject to the WFA provision, this leave would have been rescinded. Once you had opted to take "any" WFA benefit, you were agreeing to relinquish your right as a "regular employee". The entitlements provided to you under the WFA supersede the entitlements of the Collective Agreement.*
>
> *Although I can appreciate your wishes to extend your employment status for 10 months in order to minimize the impact on your pension, I must also acknowledge the efforts taken by the department to treat all of the employees facing this Workforce Adjustment situation in a fair and equitable manner, while at the same time respecting the provisions of the WFA Directive. Consequently, your grievance is denied.*

[6] The grievance was referred to the Board for adjudication on October 2, 2006.

II. Summary of the evidence

[7] The parties submitted a joint statement of facts at the hearing, with exhibits numbered 1 through 9 attached. The Agreed Statement of Facts reads as follows:

> 1. *At the date of filing the grievance Cheryl Ferguson occupied the position of Computer Systems professional (CS-02) with Statistics Canada in Vancouver, B.C.*
>
> 2. *At the date of the filing of the grievance Cheryl Ferguson was subject to the Treasury Board and PISPC Computer Systems Collective Agreement with an expiry date of December 21, 2004.*
>
> 3. *Incorporated into the Collective Agreement is Appendix F Work Force Adjustment directive.*
>
> 4. *In January 2005 several employees in different regions, including Cheryl Ferguson, are informed that*

Work Force Adjustment is being implemented at a future date.

5. *On April 18, 2005 Cheryl Ferguson requested Personal Needs Leave without Pay under article 17 of the Collective Agreement in combination with Transition Support Measure Two Year Education Leave without Pay under the Work Force Adjustment directive option 6.3.1 (c)(ii).*

6. *On April 29, 2005 management told Cheryl Ferguson they would not be granting the April 18, 2005 request.*

7. *On June 20, 2005, Cheryl Ferguson received official notice that she had been declared surplus.*

8. *The 120 day period under WFA 6.1.2 ends October 17, 2005.*

9. *On June 30, 2005 Cheryl Ferguson submitted a request for Leave without Pay for Personal Needs under article 17, section 17.10 of the collective agreement.*

10. *On August 12, 2005 Cheryl Ferguson's representative wrote to Jerry Page and requested a response to Cheryl Ferguson's June 30, 2005 leave request.*

11. *On August 15, 2005 Jerry Page, Regional Director, Western Region confirms his July 11, 2005 email and denies Cheryl Ferguson's request for personal needs leave.*

12. *On September 16, 2005 Cheryl Ferguson signs the Work Force Adjustment Option Selection Form and chooses option 6.3.1 (c)(ii).*

13. *On September 19, 2005 Jerry Page, Regional Director, Western Region, certifies Cheryl Ferguson's choice of option.*

14. *On September 21, 2005 Cheryl Ferguson presents her grievance. The grievance states:*

    I grieve the Employer's decision to unreasonably deny my request for Leave without Pay for Personal Needs in contravention of Article 17.10 of the CS Collective Agreement.

15. *On September 26, 2005 Cheryl Ferguson's grievance is denied at the first level by Jerry Page, Regional Director, Western Region.*

> *16. On October 18, 2005 WFA option (c)(ii) effective [sic] and the Transition Support Measure Education Leave without pay starts.*
>
> *17. On August 11, 2006 Cheryl Ferguson's grievance is denied at the second level by Deborah Sunter, Director General Regional Operations.*
>
> *18. On September 14, 2006 Cheryl Ferguson's grievance is denied at the final level by Wayne Smith, Assistant Chief Statistician Communications and Operations.*
>
> 19. *On October 18, 2007 Cheryl Ferguson's TSM Education Leave without pay ends.*

A. Additional Evidence

[8] No witnesses were called by either party. The PIPSC submitted one additional document (Exhibit 10), entitled "Questions and Answers – Work Force Adjustment Agreements," prepared by the Treasury Board of Canada Secretariat. The document states the following: "Date Modified: 2006-09-18."

III. Summary of the arguments

A. For the Grievor

[9] The representative for the grievor submitted that the issue in this grievance is whether the employer correctly interpreted and applied the collective agreement provision, Article 17.10, relating to leave without pay for personal needs. He argued that when the parties use clear and unambiguous wording in the collective agreement, as was the case in Article 17.10, the words must be given their ordinary and clear meaning.

[10] The representative for the grievor submitted that, on June 30, 2005, the grievor applied for a LWPPN under Article 17.10 of the collective agreement for periods of three months (under clause 17.10 (a)) and seven months (under clause 17.10 (b)) running consecutively, starting October 1, 2005. By so doing, the grievor wished to extend her employment status for 10 months to minimize the impact on her pension of the WFA decision to declare her a surplus employee.

[11] The representative for the grievor noted that there is no provision in the collective agreement preventing an employee from applying for consecutive leave periods, and "it happens all the time." He also noted that there would have been no cost to the employer by allowing the leave application since the grievor would have been required to pay both the employer's and the employee's contributions during the leave period.

[12] The representative for the grievor argued that the language of Article 17.10 of the collective agreement is mandatory. It provides that leave without pay "will be granted." There is no discretion given to the employer to deny the leave except when the operational requirements of the organization justify doing so.

[13] The representative for the grievor submitted that the phrase "subject to operational requirements" appears in many public service documents but that the phrase is not defined in either the collective agreement or in the other public service documents. He argued that the phrase "subject to operational requirements" has been interpreted by a number of adjudicators in different situations. Six decisions of the Public Service Staff Relations Board dealing with applications for leave that were "subject to operational requirements" were referred to and summarized in turn. These were: *Lauzon v. Treasury Board (Transport Canada),* PSSRB File No. 166-02-15728 (19860929); *Lefebvre v. Treasury Board (Solicitor General Canada – Correctional Services)*, PSSRB File Nos. 166-02-16101 and 16490 (19871023); *Power v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-17064 (19880225); *D. Nichols-Nelson v. Treasury Board (Agriculture Canada*), PSSRB File No. 166-02-21429 (19910830); and *Degaris v. Treasury Board (Transport Canada)*, PSSRB File Nos. 166-02-22490 and 22491 (19930104). These decisions examined various factors that could be relevant to an "organizational requirements" test such as whether the employer has to pay overtime or will be short staffed given the nature of the work required to be done. The representative for the grievor stressed that the cases establish that an employer cannot just claim "organizational requirements" as justification for denying leave sought by an employee. The employer must relate the denial of the leave to the priority and amount of work the employer has to have performed.

[14] The representative for the grievor argued that the employer never linked the denial of the grievor's leave applications to the work the employer needed to have performed. With respect to the grievor's leave application of June 20, 2005, he noted that the employer's reply at the second-level of the grievance process on August 11, 2006, by Deborah Sunter, Director General of Regional Operations, stated the following: "Given the entitlements provided to you under the transition support measures, you were not entitled to combine these measures with other leave provisions. Consequently your grievance is denied." Furthermore, Mr. Smith's final level reply at the grievance process on September 14, 2006 states that

> *[t]he argument that the Employer cannot deny your leave request as there were no operational requirements is irrelevant…. Once you have opted to take 'any' WFA benefits you were agreeing to relinquish your right as a 'regular employee'. The entitlements provided to you under the WFA supersede the entitlements of the Collective Agreement.*

[15] The representative of the grievor noted that the grievor was declared a surplus employee by letter of June 20, 2005 and that a surplus employee under the WFA "is an indeterminate employee who has been formally declared surplus, in writing, by his or her deputy head" (Exhibit 1, at 70). While the term "surplus employee" is not clearly defined, linking the definition of surplus employee with the objectives of the WFA (Exhibit 1 at 68) where it is stated that ". . . every indeterminate employee whose services will no longer be required because of a work force adjustment situation" must mean that by declaring the grievor a "surplus employee," the employer stated that there was no work for her to perform.

[16] The representative for the grievor also submitted that when the grievor initially applied on April 18, 2005 for a ten-month personal leave without pay, she was still a regular employee, and the employer must deal with her leave request within the operational requirement provision of Article 17.10. This it did not do.

[17] The representative for the grievor argued that the employer tried to get around the clear mandatory provisions of Article 17.10 of the collective

agreement by saying that, once the grievor was declared a surplus employee, she was no longer a regular employee and that the collective agreement provision therefore did not apply to her. He argued that Mr. Smith had no authority for his statement at the final level of the grievance process that, once an employee has opted under the WFA, the employee is agreeing to relinquish his or her right as a regular employee. He noted that the grievor continues to be employed even though she has been designated a surplus employee.

[18] The representative for the grievor also argued that when the grievor applied for leave on June 30, 2005, she was still a regular employee. She had been declared a surplus employee, but she had not yet opted for one of the three options available to her.

[19] The representative for the grievor submitted that the employer's position seemed to be that once an employee has been declared surplus, only the WFA provisions in Appendix "F" of the collective agreement ("the WFA Appendix") apply. He argued that the only reference to whether one can combine a transition support measure (TSM) with any other measures is in the WFA Appendix, clause 6.3.3, which states that an employee cannot combine a TSM ". . . with any other payment under the WFA." Nothing expressly prohibits an employee from combining a TSM with any other benefits provided in the collective agreement.

[20] In conclusion, the representative for the grievor submitted that the employer, by not linking its denial of the grievor's request for a LWPPN to the employer's operational needs, is in violation of Article 17.10 of the collective agreement. He argued that the employer had no operational requirements to justify denying the grievor's leave request, and the grievance must be allowed.

[21] The representative for the grievor referred to the grievor's request for corrective action and noted that she requested that she be made whole. He referred to a document prepared by the Treasury Board of Canada entitled "Questions and Answers – Work Force Adjustment Agreements" (Exhibit 10). He noted that Question 14 of that document provides as follows:

> *Q14. What if an employee is on leave when a WFA situation occurs in his or her department?*

> *If an employee is away on leave without pay, and if the employee's position has not been staffed indeterminately, then the employee is to be notified about the WFA situation at the same time as other affected employees. The decision as to whether a guarantee of a reasonable job offer or access to the Options will be accorded to the employee will only be made when the employee returns to work at the end of the leave period.*

[22] The representative for the grievor argued that the situation described by Question 14 is the situation the grievor would have been in had her 10-month personal leave request been granted. Therefore, a declaration that the employer has contravened the collective agreement is insufficient as a remedy. He argued that the grievor would have been on leave before the WFA was implemented and if there was no work for her when she returned at the end of the leave period, she could have been declared a surplus employee at that time and been entitled to a TSM. Instead, the grievor was no longer employed as of October 1, 2005. She took the WFA TSM at that time and then chose early retirement.

[23] The representative for the grievor submitted that the employer's wrongful denial of the grievor's request for personal leave without pay cost the grievor 10 months of service, thus reducing her pension entitlement. The grievor requests that those 10 months of service be reinstated and that the adjudicator remain seized of the matter until the parties find a way to reinstate the 10 months of service.

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

[24] Counsel for the employer began by directing my attention to the WFA Appendix. He noted that it is clearly stated that WFA Appendix is part of the collective agreement (Exhibit 1, at # 68) and he submitted that, when interpreting a collective agreement, each of its clauses must be read in context.

[25] Counsel for the employer drew my attention to the scheme of the WFA Appendix (Exhibit 1, at 83 to 114). He noted that in Part VI entitled "Options for Employees," it is provided (clause 6.1.2) that employees who are not in receipt of a guarantee of a reasonable job offer from their deputy head have 120 days to consider the three options available to them before a decision is required. It is further provided (clause 6.1.3) that the opting employee must choose, in

writing, one of the three options set out in clause 6.3 within the 120-day period (clause 6.1.4). If the employee fails to select an option, the employee will be deemed to have selected option (a). He stressed that the deeming provision is important because it confirms that the employee must chose one of the three available options during the 120-day opting period, or he or she will be deemed to have chosen option (a).

[26] Counsel for the employer also reviewed clause 6.3 of the WFA Appendix of the collective agreement, entitled "Options." He noted that clause 6.3.1 outlines that those surplus employees who are not in receipt of a guarantee of a reasonable job offer from the deputy head will have access to the choice of the three options listed therein. He stressed that clause 6.3.2 provides that management will establish the departure date of opting employees who choose option (b) or option (c). He argued that if "will" is to be read as mandatory as the representative for the grievor claims in regard to interpreting Article 17.10 of the collective agreement, then the word "will" should equally be read as mandatory when interpreting clause 6.3.2 of the WFA Appendix. Under that clause of the collective agreement, management has an unfettered decision to decide the departure date for the surplus employee unless the employee chooses option (a) of the three options available.

[27] Counsel for the employer noted that the grievor was informed in January 2005 that WFA was to be implemented at a future date. On June 25, 2005, she was officially notified that she had been declared surplus. The grievor had until October 18, 2005 to opt for one of the three WFA options available to surplus employees in her situation. By applying on June 30, 2005 for a 10-month personal leave without pay to commence on October 1, 2005, the grievor was attempting to put off her departure date beyond that provided by the three options available to opting employees under the WFA. It is expressly stated in clause 6.3.2 of the WFA Appendix of the collective agreement that management has the right under the WFA to determine the surplus employee's departure date unless the employee opts for option (a).

[28] Counsel for the employer noted that the grievor signed the WFA Option Selection Form on September 16, 2005 and chose option (c)(ii) — a TSM Education Leave without pay. The grievor's option was effective on

October 18, 2005 and terminated on October 18, 2007. Counsel for the employer argued that once the grievor opted for one of the three options available to her under the WFA Appendix, she became at that time an "opting employee" as defined by the WFA Appendix (Exhibit 1 at 69) with special status, rights and restrictions. It is in that regard that the reference is made in Mr. Smith's letter at the final level of the grievance process on September 14, 2006 to the grievor not being a regular employee once she has opted under the WFA and to the entitlements provided to the grievor under the WFA superseding the entitlements of the collective agreement.

[29] Counsel for the employer argued that the grievor's application for personal leave without pay was not denied for operational requirements and that the cases referred to by the grievor's representative as helpful in the interpretation of Article 17.10 of the collective agreement on the application of an operational requirement proviso are irrelevant. The grievor's leave application of June 30, 2005 was denied because there were special collective agreement provisions in the WFA Appendix that prevailed over the general employment provisions. Counsel for the employer argued that to allow the grievor's application for a 10-month leave without pay in conjunction with the two-year TSM Education Leave option (c) would defeat the clear provision of clause 6.3.2 of the WFA Appendix that management will decide the departure date of opting employees who choose option (b) or (c).

[30] Counsel for the employer submitted that in Exhibit 10 ("Questions and Answers – Work Force Adjustment Agreements"), Question 14 is clearly distinguishable. As the grievor was not on leave when the WFA situation occurred in her department, Question 14 does not apply to the grievor's situation.

[31] Counsel for the employer argued that it is incorrect for the grievor's representative to claim that the employer was throwing out all of the grievor's rights as a regular employee once she was declared a surplus employee under the WFA Appendix of the collective agreement. The WFA Appendix provisions only prevail when there is a clash with other collective agreement provisions. To illustrate this point, he noted that the grievor was on sick leave with pay both before and after being declared a surplus employee on June 20, 2005.

[32] Counsel for the employer argued that, should the employee's grievance be allowed, a declaration is the only appropriate remedy. He noted that even if the grievor's application for 10 months of personal leave without pay to commence October 1, 2005 had been granted, there was no guarantee that the grievor would have received both the 10-month personal leave without pay and the two-year TSM educational leave when she returned from leave if she were declared to be a surplus employee at that time. It would depend on the workplace situation existing at that time.

[33] Counsel for the employer concluded that the employer's interpretation is the correct interpretation, and the grievance should be denied.

C. Reply of the Grievor

[34] The representative for the grievor noted that it is not pure speculation as to what the workplace situation would have been once the grievor returned from the 10-month personal leave. He argued that the letter of June 20, 2005 from Ivan P. Fellegi, Chief Statistician (Exhibit 4), informing the grievor that her position had been identified as surplus, clearly implies that there would be no job for the grievor at the end of that period.

[35] The representative for the grievor acknowledged that the grievor was receiving sick leave benefits under the collective agreement both before and after she was declared a surplus employee as noted by counsel for the employer, and he clarified his earlier submission. When he had argued that the employer was incorrectly denying the grievor her rights as a regular employee once she was declared a surplus employee, he was distinguishing a surplus employee being able to receive benefits with pay under the collective agreement, such as sick leave and bereavement benefits, from benefits without pay, such as the personal leave without pay benefit that the grievor claims in this grievance. He argued that the grievor should not have been denied her right to benefits without pay provided in the collective agreement just because she was declared a surplus employee.

[36] Article 17.10 is a provision that appears earlier in the collective agreement than the WFA Appendix, and maybe should have more weight given to it.

IV. Reasons

[37] This grievance is about the employer's refusal to grant the grievor's request for a LWPPN. In effect, the grievance is also about the employer's interpretation and application of the provisions of the WFA Appendix of the collective agreement and the relationship between Article 17.10 and the WFA Appendix provisions.

[38] The grievor bears the onus of proving, on a balance of probabilities, that the employer violated the collective agreement as alleged.

[39] The main provisions of the collective agreement referred to are as follows (Exhibit 1, at 28 and 81 to 85):

…

Article 17.10 –Leave without Pay for Personal Needs

Leave without pay will be granted for personal needs, in the following manner:

(a) subject to operational requirements, leave without pay of more than three (3) months will be granted to an employee for personal needs;

(b) subject to operational requirements, leave without pay of more than three (3) months but not exceeding one (1) year will be granted to an employee for personal needs;

(c) an employee is entitled to leave without pay for personal needs only once under each of (a) and (b) of this clause during his total period of employment in the Public Service; leave without pay granted under this clause may not be used in combination with maternity, parental leave without the consent of the Employer.

…

Appendix "F"- Work Force Adjustment

…

Definitions

Opting employee *… is an indeterminate employee whose services will no longer be required because of a work force adjustment situation and who has not received a guarantee of a reasonable job offer from the deputy head and who has 120 days to consider the Options of Part 6.3 of this Appendix.*

Surplus employee *… - is an indeterminate employee who has been formally declared surplus, in writing, by his or her deputy head.*

Surplus status *… - An indeterminate employee is in surplus status from the date he or she is declared surplus until the date of lay-off, until he or she is indeterminately appointed to another position, until his or her surplus status is rescinded, or until the person resigns.*

Part VI – Options for Employees [Exhibit 1 at 81 to 85]

6.1 General

…

6.1.2 Employees who are not in receipt of a guarantee of a reasonable job offer from their deputy head have 120 days to consider the three Options below before a decision is required of them.

6.1.3 The opting employee must choose, in writing, one of the three Options of section 6.3 of this Appendix within the 120-day window. The employee cannot change Options once having made a written choice.

6.1.4 If the employee fails to select an Option, the employee will be deemed to have selected Option (a), Twelve-month surplus priority period in which to secure a reasonable job offer at the end of the 120 day window.

…

6.3 Options

6.3.1 Only opting employees who are not in receipt of the guarantee of a reasonable job offer from the deputy head will have access to the choice of Options below:

(a) (1) Twelve-month surplus priority period in which to secure a reasonable job offer is time-limited….

…

> *(b) Transition Support Measure (TSM) is a cash payment, based on the employee's years of service in the public service (see Appendix "B") made to an opting employee. Employees choosing this Option must resign but will be considered to be laid-off for purposes of severance pay.*
>
> *or*
>
> *(c) Education allowance is a Transitional Support Measure (see Option (b) above) plus an amount of not more than $8000 for reimbursement of receipted expenses of an opting employee for tuition from a learning institution and costs of books and mandatory equipment. Employees choosing Option (c) could either:*
>
> *(1) resign from the public service but be considered to be laid-off for severance pay purposes on the date of their departure;*
>
> *or*
>
> *(2) delay their departure date and go on leave without pay for a maximum period of two years, while attending the learning institution. The TSM shall be paid in one or two lump-sum amounts over a maximum two-year period. During this period, employees could continue to be public service benefit plan members and contribute both employer and employee share to the benefits plans and the Public Service Superannuation Plan. At the end of the two-year leave without pay period, unless the employee has found alternative employment in the public service, the employee will be laid off in accordance with the Public Service Employment Act.*
>
> *6.3.2 Management will establish the departure date of opting employees who choose Option (b) or Option (c) above.*
>
> *6.3.3 The TSM, pay in lieu of unfulfilled surplus period and the Education Allowance cannot be combined with any other payment under the Work Force Adjustment Appendix.*
>
> …

[40] My task as an adjudicator in construing the collective agreement is to discover the apparent intention of the parties who agreed to it. In determining the intention of the parties, it is presumed that they intended what they wrote in the agreement. Clear words must be given their ordinary and plain meaning. Where the language is unclear, an adjudicator must look at the provision or

provisions in question and provide the interpretation that best represents the intention of the parties in the context of the collective agreement as a whole.

[41] In construing the collective agreement, adjudicators in their search for the parties' intentions have sought to determine the purpose of the particular provision or group of provisions in question.

[42] In this case, the parties to the collective agreement, namely the Treasury Board and the PIPSC, have expressly made the WFA Appendix part of the collective agreement. That Appendix contains 46 pages of detailed provisions (Exhibit 1, at 67 to 113). Its stated objectives (Exhibit 1, at 68) are as follows:

> *It is the policy of the Treasury Board to maximise employment opportunities for indeterminate employees affected by work force adjustment situations, primarily through ensuring that, wherever possible, alternative employment opportunities are provided to them… .*
>
> *To this end, every indeterminate employee whose services will no longer be required because of a work force adjustment situation and for whom the deputy head knows or can predict employment availability will receive a guarantee of a reasonable job offer within the public service. Those employees for whom the deputy head cannot provide the guarantee will have access to transitional employment arrangements (as per Part VI and VII).*

[43] As the WFA Appendix is expressly stated to be part of the collective agreement and the collective agreement must be interpreted as a whole, the issue is whether the provisions of Article 17.10 and WFA Appendix can be reasonably interpreted to avoid a conflict in application. If they cannot be so interpreted, do the later, more detailed provisions of the WFA Appendix prevail over the more general, earlier provisions of Article 17.10 to the extent of the conflict?

[44] The WFA Appendix of the collective agreement does not expressly provide that an overriding effect shall be given to its provisions in the event of a conflict with other provisions of the collective agreement.

A. <u>The grievor's first leave application</u>

[45] The grievance before me relates to the employer's denial of the grievor's leave application of June 30, 2005. However, the representative for the grievor in argument raised the employer's earlier denial of the grievor's first leave request of April 18, 2005. The representative for the grievor claimed that both leave applications were subject to the operational requirement proviso and that the employer had failed in both instances to link the denial of the leave request to the work the employer needed to have performed. As the grievor's earlier leave application arguably provides relevant context to the grievor's subsequent leave application of June 30, 2005, which is the subject of this grievance, I have chosen to deal with the arguments raised.

[46] When the grievor received a general notice in January 2005 that the WFA was being implemented at a future date, the grievor had almost 30 years of public service, and she needed a little more than 3 more years of pensionable service to be eligible for an unreduced pension in July 2008.

[47] The grievor was frank with her employer regarding her pension situation (Exhibit 2). She sought to ensure that she would receive the needed three years of pensionable service by applying in mid-April 2005 for a LWPPN under Article 17.10 of the collective agreement, composed of a three-month leave under clause 17.10(a) and a seven-month leave (under clause 17.10(b) to run consecutively (Exhibit 2), combined with a TSM Education Leave under the WFA Appendix provisions. The grievor's stated intention was that the requested personal leave would start after the 120-day opting period provided for in clause 6.1.2 of the WFA Appendix expired, and would be followed by the TSM Two Year Education Leave without Pay under option (c)(ii) (Exhibit 2). Thus the timeline would be the 120-day (4 months) opting period, followed by 10 months of personal leave (3 months and 7 months taken consecutively) and then 24 months of TSM Education leave for a total of 3 years and 2 months of pensionable service.

[48] The grievor received an initial response from Connie Graziadei, Statistics Canada, on April 18, 2005 (Exhibit 2) informing her that requests for leave for personal needs had to be submitted through the regional director and noting that the grievor had not as yet received a letter indicating that she was affected by the WFA and therefore eligible for a TSM. Later that day, the grievor

submitted her combined leave request to Jerry Page, Regional Director, who, on April 29, 2005, denied her request, stating that he could "not approve this leave as requested" (Exhibit 3). The grievor did not grieve the employer's denial of her combined leave request.

[49] The grievor at that time also chose not to resubmit a request only for leave without pay for personal needs under Article 17.10 of the collective agreement. Presumably, the grievor had no need for a leave unless she was going to be personally affected by the implementation of the WFA Appendix provisions in her department. However, had she done so, she arguably still would have been a regular employee, and the employer would have been required to deal with her leave application within the operational requirement proviso of Article 17.10 as argued by the representative for the grievor.

[50] Furthermore, had the grievor resubmitted a request for leave at that time, it appears that she later would have fit within the situation described in Question 14 in the Treasury Board Secretariat's document entitled "Questions and Answers – Work Force Adjustment Agreements" (Exhibit 10). Question 14 describes what happens if an employee is on leave when a WFA occurs in his or her department. It states the following:

> *If an employee is away on leave without pay, and if the employee's position has not been staffed indeterminately, then the employee is to be notified about the WFA situation at the same time as other affected employees. The decision as to whether a guarantee of a reasonable job offer or access to the Options will be accorded to the employee will only be made when the employee returns to work at the end of the leave period.*

[51] While it may be debatable whether the phrase "when a WFA occurs in his or her department" refers to when the employee receives general notice that a WFA is being implemented in her department at a future date, as the grievor was informed in January 2005, or whether the phrase refers to the time when the employee receives official notice that her position has been declared surplus under the WFA Appendix provisions of the collective agreement, as the grievor did on June 20, 2005, it does not matter for the purposes of this grievance. It is clear from the agreed facts that the grievor did not resubmit her request for leave under Article 17.10 until June 30, 2005, 10 days after she had received

official notice that her position had been declared surplus and that she had been given 120 days to choose between the options available to her under the WFA Appendix provisions. (Exhibit 5)

B. <u>The grievor's second leave application</u>

[52] On June 20, 2005, the grievor received the official notice that her position had been declared surplus and that she was eligible for WFA options (Exhibit 4). According to the definitions in the WFA Appendix of the collective agreement, the grievor became an opting employee under the WFA Appendix at that time, and her 120-day opting period was to end on October 17, 2005.

[53] On June 30, 2005, the grievor requested a 10-month LWPPN (three and seven months to run consecutively) in accordance with Article 17.10 of the collective agreement, with the leave to commence October 1, 2005 (Exhibit 5). By so doing, the grievor sought to put herself into a position similar to that described in the "Questions and Answers – Work Force Adjustment Agreements" (Exhibit 10), Question 14. The representative for the grievor argued that, if there was no job for the grievor when she returned from a 10-month personal leave on August 1, 2006, she would have been entitled at that time to the two-year TSM Education leave, which would have extended the grievor's years of service to August 2008 which would have made her eligible for an unreduced pension.

[54] I cannot accept that argument. The grievor would not have fit within the situation described in Question 14 had her June 30, 2005 leave request been granted because the WFA had already occurred in her department before she applied for the leave.

[55] The issue is what the proper interpretation and application of Article 17.10 of the collective agreement should be when the employee applies for leave, as the grievor did, after he or she has been notified that he or she is a surplus and opting employee under the WFA Appendix provisions.

[56] On August 15, 2005, Mr. Page confirmed his July 11, 2005 email and denied the grievor's request for a 10-month leave without pay commencing October 1, 2005. Mr. Page noted (Exhibit 7) that, since the grievor's option

period for the WFA ended on October 18, 2005, he could not authorize a leave without pay that extended beyond that date. That is a reasonable interpretation looking at the collective agreement as a whole, but it was obviously not the leave period that the grievor needed nor wanted, and it was not pursued.

[57] With her leave request denied, the grievor had no choice as a designated surplus and opting employee except to opt for one of the three options available to her or to be deemed to have chosen option (a). On September 16, 2005 she signed the Work Force Adjustment Option Selection Form and chose WFA Appendix option (c)(ii) — TSM Educational Leave. Her choice of option was certified by Mr. Page on September 19, 2005. Her TSM Educational Leave commenced on October 18, 2005 and ended on October 18, 2007.

[58] On September 21, 2005, the grievor filed her grievance. She was unsuccessful at each of the three levels of the grievance procedure. On September 14, 2006, Mr. Smith stated the following in his final-level response:

> *In your grievance you state that Statistics Canada is in violation of Article 17.10 of the CS Collective Agreement by denying your request for Personal Needs Leave because there were no operational requirements to justify doing so. Therefore the Employer should have granted the leave.*
>
> *…*
>
> *The argument that the Employer cannot deny your leave request as there were no operational requirements is irrelevant. According to WFA 6.3.2, "management will establish the departure date for opting employees who choose b) or c). Since you opted for c), your expected date of departure from the Public Service was October 18, 2007. Had the Employer granted your request for leave prior to you becoming subject to the WFA provision, this leave would have been rescinded. Once you had opted to take "any" WFA benefit, you were agreeing to relinquish your right as a "regular employee". The entitlements provided to you under the WFA supersede the entitlements of the Collective Agreement.*
>
> *Although I can appreciate your wishes to extend your employment status for 10 months in order to minimize the impact on your pension, I must also acknowledge the efforts taken by the department to treat all of the employees facing this Workforce*

> *Adjustment situation in a fair and equitable manner, while at the same time respecting the provisions of the WFA Directive. Consequently, your grievance is denied.*

[59] The statement in the second paragraph of Mr. Smith's letter at the final-level of the grievance process to the effect that had the employer granted the grievor's request for leave "…prior to [her] becoming subject to the WFA provision, this leave would have been rescinded" is confusing. The grievor's situation could not have been one of being granted leave prior to her becoming subject to the WFA provision unless Mr. Smith meant that the grievor did not become "subject to the WFA provision" until she either had opted for one of the three options available to her or her opting period had expired and she was deemed to have opted for option (a). The grievor's June 30, 2005 application for leave was made 10 days after she had become a surplus and opting employee under the WFA Appendix provisions. Furthermore, had the grievor been in the position of being granted leave prior to her becoming subject to the WFA Appendix provisions, Mr. Smith's statement that the leave would have been rescinded does not seem to be in accord with the situation described in Question 14 of the Treasury Board Secretariat's document (Exhibit 10).

[60] However, with respect to Mr. Smith's statements about the lack of relevance of the operational requirements proviso to the grievor's leave application of June 30, 2005, I have concluded that the employer's interpretation and application of Article 17.10 in the context of the whole collective agreement is the correct interpretation and that the employer did not violate the collective agreement when it denied the grievor's leave request of June 30, 2005 without justifying its refusal on the basis of its operational requirements.

[61] The WFA Appendix of the collective agreement contains a detailed scheme with very specific provisions for implementing the WFA agreement. If there is a conflict in applying the specific, later provisions of WFA Appendix and the earlier, more general provisions of Article 17.10, the WFA Appendix provisions prevail to the extent of the conflict.

[62] Clause 17.10(c) of the collective agreement specifically provides that leave without pay granted under Article 17.10 may not be used in combination

with maternity or parental leave without the employer's consent. It makes no reference to combining a TSM Education Leave under the WFA Appendix, nor should it, as Article 17.10 was written before the WFA Appendix provisions were added to the collective agreement.

[63] In the WFA Appendix of the collective agreement, clause 6.3.4 specifically prohibits combining the TSM, the pay in lieu of an unfulfilled surplus period and the Education Allowance with any other payment under the WFA Appendix. It does not specifically prohibit combining the WFA options available to an opting employee with a leave under Article 17.10. However, this does not necessarily mean that such leaves can be combined in the grievor's circumstance as argued by her representative. Nor does it make Ms. Sunter's reply at the second-level of the grievance process, on August 11, 2006 incorrect where it is stated that "[g]iven the entitlements provided to you under the transition support measures, you were not entitled to combine these measures with other leave provisions." Express language in the WFA Appendix prohibiting an opting employee from combining a WFA option with leave under Article 17.10 is not needed to reach this conclusion. It flows from reading the collective agreement as a whole.

[64] As previously noted, had the grievor applied only for personal leave under Article 17.10 of the collective agreement before she had received official notice on June 20, 2005, of her designation as a surplus and opting employee, the employer would have had to deal with her personal leave request within the operational requirement proviso of Article 17.10 of the collective agreement. It remains open whether the employer could have rescinded any leave granted once the WFA Appendix provisions were implemented in her department as Mr. Smith claimed in his letter at the final level of the grievance process, on September 14, 2006. However, the grievor did not so apply. Once the WFA provisions were implemented in her department and she was declared a surplus employee required to opt within 120 days for one of the three options provided to surplus employees in her situation, her right to personal leave under Article 17.10, subject only to operational requirements, was no longer available. Other collective agreement benefits such as sick leave and bereavement leave would continue to be available to the surplus employee since there is no conflict between them and the WFA Appendix provisions.

[65] If the grievor's interpretation were upheld, the employer would be required to grant personal leave without pay to any employee designated under the WFA Appendix of the collective agreement provisions as an opting employee after his or her position had officially been declared surplus, unless the employer had operational requirements with respect to the priority or amount of work to be performed by that employee that would justify denying the leave request. Such an interpretation would nullify the effect of the parties' later agreement to implement a WFA scheme as provided in the WFA Appendix. Being declared a surplus employee logically means, as the grievor's representative ably argued, that there is no work for that employee to perform in the restructured workforce.

[66] The grievor's interpretation of Article 17.10 of the collective agreement also would substantially modify the provisions of Part IV of the WFA Appendix. These provisions make available three options, and only three options, to the designated surplus employee. It is clearly stated that the opting employee must choose between the three options available within the 120 day opting period or the employee will be deemed to have chosen option (a). It also is clearly stated in clause 6.3.2 of the WFA Appendix that should the employee choose option (b) or (c), management will establish the departure date. To accept the grievor's interpretation of the relationship between Article 17.10 of the collective agreement and the WFA Appendix of the collective agreement would allow the opting employee to create a fourth option and delay his or her departure date beyond the date provided for in the three options available in the WFA Appendix of the collective agreement.

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

(The Order appears on the next page)

V. Order

[68] The grievance is denied.

[69] In view of the fact that I have denied the grievance, I do not need to retain jurisdiction to address the issue of the appropriate remedy for the grievor.

February 13, 2009

Margaret E. Hughes,
adjudicator