

Date: 20090528

File: 566-32-1361

Citation: 2009 PSLRB 63



*Public Service  
Labour Relations Act*

Before an adjudicator

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BETWEEN

STEPHEN SHAW

Grievor

and

CANADIAN FOOD INSPECTION AGENCY

Employer

Indexed as

*Shaw v. Canadian Food Inspection Agency*

In the matter of an individual grievance referred to adjudication

**REASONS FOR DECISION**

***Before:*** Michele A. Pineau, adjudicator

***For the Grievor:*** Mélanie Chenier

***For the Employer:*** Pierre Marc Champagne, counsel

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Heard at Ottawa, Ontario,  
April 14, 2009.

## REASONS FOR DECISION

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### **I. Individual grievance referred to adjudication**

[1] Stephen Shaw (“the grievor”) is an employee of the Canadian Food Inspection Agency (CFIA or “the employer”). He works as a microbiology specialist (at the BI-03 group and level) in the Food Safety Division of the Food and Safety Directorate of the Programs Branch of the CFIA. Mr. Shaw has been employed by the public service for about 28 years and has been a CFIA employee since 1997.

[2] On August 23, 2006, Mr. Shaw filed a grievance alleging that the employer violated clause B11.07(a) of the collective agreement for the Scientific and Analytical Group between the CFIA and the Professional Institute of the Public Service of Canada, expiry date June 13, 2007 (“the collective agreement”), by unilaterally scheduling vacation leave credits from previous years, purportedly limiting the amount of vacation leave credits that he is entitled to accumulate. Mr. Shaw also alleged that he had been denied a request to liquidate vacation leave credits, contrary to clause B11.07(b) of the collective agreement, but that allegation was withdrawn at the beginning of the adjudication proceedings.

[3] Accordingly, the issue to be decided is whether the collective agreement allows the employer to compel an employee to take vacation leave and, if so, under what conditions.

[4] The parties submitted a joint statement of facts, many of which concern Mr. Shaw’s request for leave with income averaging (LIA) and for the liquidation in cash of some of his vacation leave balance. In view of the questions to be decided, the following facts are the ones relevant to the adjudication of this grievance.

### **II. Summary of the evidence**

[5] On April 1, 2006, Mr. Shaw had unused vacation leave credits totalling 754.534 hours accumulated from carrying over unused vacation leave from previous fiscal years. Mr. Shaw also became entitled to a further 187.5 hours of vacation leave credits for the 2006-2007 fiscal year. It should be noted that, on February 14, 2006, Mr. Shaw declined an offer from the employer to liquidate his accumulated vacation leave from previous years. On April 10, 2006, Mr. Shaw’s immediate supervisor, Dr. Burton Blais, denied the request to take a LIA and asked Mr. Shaw to provide him, by the end of May, with a schedule to reduce his excess annual leave balance. (The deadline was extended to July 7, 2006.) Mr. Shaw did not respond directly to the

request but wrote to Dr. Blais and stated that he would seek assistance from senior management to resolve their disagreement. He wrote to Shelagh McDonagh, Acting Director, Ottawa Laboratory (Carling), which is his workplace. Ms. McDonagh advised him to work out a plan with Dr. Blais concerning his annual leave balance because "...excessive annual leave needs to be managed."

[6] On June 22, 2006, Mr. Shaw requested the liquidation of 450 hours of vacation leave. Ms. McDonagh denied the request because it was too early in that fiscal year to ensure that the funds were available but stated that the request would be revisited in January 2007.

[7] On July 25, 2006, Mr. Shaw renewed his request for the LIA. Dr. Burton denied the request based on operational requirements. Mr. Burton noted that Mr. Shaw had a very large vacation leave balance (five to six months) and encouraged him to submit a vacation leave request in lieu of the LIA period being requested or, alternatively, to submit a plan to use up his vacation leave. On July 26, 2006, Dr. Blais renewed his request that Mr. Shaw provide him with a plan for the use of his vacation leave and gave him until August 4, 2006 to comply. On August 2, 2006, Mr. Shaw informed Dr. Blais that he was not planning to take any vacation leave that year.

[8] On August 4, 2006, Dr. Blais wrote to Mr. Shaw, informing him that, since he had not responded with a plan to start using his large balance of vacation leave within that fiscal year, a plan had been devised for him to take four weeks of leave in accordance with the employer's operational requirements. Mr. Shaw was asked to respond with his preferences. On August 9, 2006, Mr. Shaw refused Dr. Blais' proposed vacation leave dates. Dr. Blais responded that the plan was not "optional" but that he was requiring Mr. Shaw to take the leave according to the plan. Mr. Shaw agreed to schedule a block of two weeks of vacation leave in September and, after some further negotiation, agreed to take another block of two weeks in December. In the meantime, Mr. Shaw filed this grievance about the employer's unilateral scheduling of his vacation leave.

[9] On January 4, 2007, Mr. Shaw requested the liquidation of 466.648 hours of vacation leave, which was approved by the employer on January 24, 2007. Mr. Shaw has accordingly withdrawn that part of his grievance related to clause B11.07(b) of the collective agreement.

[10] Ms. McDonagh was the only witness. Her testimony was that, in 2006, overall accumulated vacation leave was considered a serious financial liability for the CFIA because excessive leave, when liquidated, could strain an already tight salary budget. Salary dollars were needed that year for potential emergency responses and for overtime on certain projects. As a result, she was directed by senior management to manage the excess leave of her staff. Ms. McDonagh acknowledged that, when she directed Mr. Shaw to reach an agreement with Dr. Blais for a vacation leave plan, she did not take into consideration the provisions of the collective agreement but simply the instructions that she had received.

### **III. Summary of the arguments**

[11] The Professional Institute of the Public Service of Canada (“the bargaining agent”) argues that unilaterally scheduling the grievor’s vacation leave is contrary to clause B11.07(a) of the collective agreement, which allows unused vacation leave to be carried over. The bargaining agent submits that the unilateral scheduling of vacation leave was done to address the employer’s financial liability for the accumulated vacation leave of its employees and that it had nothing to do with operational requirements. The bargaining agent also argues that so-called concerns about operational requirements exclude concerns about financial liability. The bargaining agent underscores the many references in the exchange of emails between the grievor, Dr. Burton and Ms. McDonagh to the grievor’s large vacation leave credit balances.

[12] The bargaining agent argues that clause A5.01 (Management Rights) of the collective agreement has been modified by clause B11.07(a), which allows an employee the right to carry over a vacation leave balance. It argues that there is no provision in the collective agreement that limits the amount of vacation leave that may be carried over or that directs employees to take vacation leave in the year in which it is earned. Had the parties wished to create such limits to employees’ rights, those limits would have been clearly expressed in the collective agreement. Employees have the right to use or liquidate vacation leave as they see fit; the employer cannot impose the means by which employees take their vacation leave, nor can the employer compel an employee to take accumulated vacation leave credits to satisfy budgetary requirements.

[13] The bargaining agent asked me to consider the following awards in support of its position:

- *Bozek et al. v. Canada Customs and Revenue Agency*, 2002 PSSRB 60;
- *Tremblay v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-02-17538 (19890214);
- *Power v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-17064 (19880225); and
- *Professional Institute of Public Service of Canada v. Canadian Food Inspection Agency*, 2008 PSLRB 78.

[14] By compelling the grievors to schedule vacation periods to reduce accumulated vacation leave credits, the bargaining agent submits that the employer violated clause B11.07(a) of the collective agreement. The bargaining agent requests that I issue a declaration stating that the employer has violated the collective agreement and that it must take steps to avoid the recurrence of unilateral scheduling of vacation leave. The bargaining agent also requests that the grievor be reimbursed all the vacation leave credits that he was compelled to take (158.327 hours).

[15] The employer argues that it has the right to consider financial liability as part of its operational requirements and that the accumulation of excessive vacation leave credits by its employees constitutes such a financial liability. The grievor was asked on multiple occasions to schedule vacation leave. Each time, the grievor either did not respond, proposed something else that did not include taking vacation leave or simply refused to take vacation leave. Accordingly, the employer scheduled the grievor's vacation leave in keeping with clause A5.01 (Management Rights) and clause B11.05 (Provision for Vacation Leave) of the collective agreement, in accordance with its operational requirements.

[16] The employer submits that the only restriction to its right to schedule an employee's vacation is that every reasonable effort must be made to grant an employee's vacation leave in the amount and at the time he or she requests it. In the grievor's case, 19 of the 25 days to which he was entitled in fiscal year 2006-2007 were scheduled after he was consulted. The employer does not have to justify its operational requirements to schedule vacation leave, and financial considerations are indeed part of operational considerations.

[17] The employer submits that, the carry-over of vacation leave is a right that arises only when an employee has not been granted vacation leave in the current year. Carry-over is not a discretionary right of the employee.

[18] The employer agrees that in some past decisions of the Public Service Labour Relations Board, the adjudicator's decision was predicated on a clause in the collective agreement stating that there was an expectation that an employee would take vacation leave in the year in which it was earned. The employer argues that the absence of such a clause in this case should not be fatal to its case. The broader principle is that the employer has the right to schedule vacation leave to meet its operational requirements, unless there is clear language to the contrary. There is no such limitation in the collective agreement.

[19] The employer asked me to consider the following decisions in support of its position:

- *Rosekat v. Treasury Board (Department of Public Works and Government Services)*, 2005 PSLRB 149;
- *Rosekat v. Canada (Attorney General)*, 2006 FC 769;
- *Rosekat v. Canada (Attorney General)*, 2007 FCA 117;
- *Ladouceur v. Treasury Board (National Defence)*, 2000 PSSRB 51;
- *Ladouceur v. Treasury Board (Department of National Defence)*, 2006 PSLRB 89;
- and
- *Marin v. Treasury Board (Human Resources Development Canada)*, 2002 PSSRB 109.

#### **IV. Reasons**

[20] This reference to adjudication concerns the interpretation of the following three clauses of the collective agreement:

Clause A5.01 is a general management rights clause:

*A5.01 All the functions, rights, powers and authority which the Employer has not specifically abridged, delegated or modified by this Agreement are recognized by the Institute as being retained by the Employer.*

Clause B11.05 describes the employer's right to schedule an employee's vacation leave, subject to operational requirements:

*B11.05 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 such employee has proceeded on vacation leave.*

Clause B11.07(a) provides for the carry-over of vacation leave where it has not been granted:

*B.11.07 (a) Carry-Over*

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

[21] In 2006, based on those clauses of the collective agreement, the employer compelled the grievor to take vacation leave to avoid a further accumulation of an already significant carry-over of vacation leave credits. The employer gave the grievor the opportunity to submit a plan to use his vacation leave, and when the employee was uncooperative, it offered him its own plan based on its operational requirements. The employer's operational requirements related to its decision to control a growing future financial liability with respect to the liquidation (cash out) of such leave. It wished to devote its salary budget to current operations rather than to past liabilities. To decide whether the employer violated the terms of the collective agreement, I must decide the following three questions:

- (1) Does the employer have the right under clause B11.05 of the collective agreement to unilaterally schedule vacation leave?

If the answer to question (1) is yes,

- (2) Is the employer's right to schedule vacation leave restricted in any way by clause B11.07(a) of the collective agreement?

In the alternative,

- (3) Does an employee have a discretionary right to accumulate unlimited vacation leave credits?

**A. Does the employer have the right under clause B11.05 of the collective agreement to unilaterally schedule vacation leave?**

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[22] I find clause B11.05 of the collective agreement to be clear: the employer may schedule vacation leave, subject to its operational requirements; the only restriction is that every reasonable effort must be made to provide the leave in an amount and at such time as the employee may request. This clause goes hand in hand with the general management rights clause found in clause A5.01, whereby the employer retains all the functions, rights, powers and authority that have not been specifically abridged, delegated or modified by the collective agreement.

[23] Thus, if the employee does not communicate a request for an amount of leave and the time at which the leave is to be taken, there is nothing to prevent the employer from unilaterally scheduling an employee's vacation leave. In this case, the grievor was asked to submit a vacation plan on several occasions before being compelled to take vacation leave according to the employer's choice of a vacation plan. When the grievor requested different dates for the second block of leave in December 2006, the employer accommodated those dates. Therefore, I must conclude that the employer made every reasonable effort to provide the leave in an amount and at such time as the grievor requested.

[24] This would be a different matter had the grievor been denied requested vacation. The fact that the grievor wished to take the LIA instead of vacation leave or that he made a request to liquidate a certain amount of his accumulated vacation leave credits does not equate to a "vacation plan" or to a legitimate request for vacation leave. Since I take the view that those alternatives were not requests for vacation leave as understood by clause B11.05 of the collective agreement, the employer was within its rights to compel the grievor to take vacation leave in 2006.

[25] I also am satisfied that the grievor's leave was scheduled in light of the employer's operational requirements. The employer had a concern about its growing financial liability because accumulated vacation leave credits could potentially hamper current operations in the fiscal year. The bargaining agent did not challenge or



contradict that evidence. It only argued that I should narrowly construe clause B11.05 of the collective agreement to limit the application of “operational requirements.” No convincing argument was made that operational requirements exclude legitimate financial considerations. In fact, *Rosekat* (FC) and *Rosekat* (FCA) are quite unambiguous on that point.

**B. Is the employer’s right to schedule vacation leave restricted in any way by clause B11.07(a) of the collective agreement?**

[26] I have not been convinced that the employer’s right to schedule vacation leave is limited by any provision of the collective agreement. Clause B11.07 states that vacation leave can be carried over when it has not been granted in a vacation year. For the purposes of this case, I must assume either that the employer did not grant vacation to the grievor in previous years or that it allowed Mr. Shaw to accumulate the unused portion of previous vacation leave. When or why vacation leave was allowed to accumulate is not at issue before me and is not relevant to my decision. Simply put, vacation leave credits were allowed to accumulate, and at the time the grievance was filed, the employer decided to limit vacation carry-over for that year by exercising its right to schedule under clause B11.05.

[27] In answer to my questions, the bargaining agent and the employer took different positions as to precisely what part of the grievor’s vacation leave entitlements were unilaterally scheduled by the employer. The bargaining agent’s position was that the employer compelled the grievor to take vacation leave out of carried over vacation credits and that this was the type of unilateral scheduling prohibited by the collective agreement.

[28] The employer’s position was that it scheduled the grievor to take 19 days of vacation leave out of his then current fiscal year credits, as it was entitled to do under clause B11.05 of the collective agreement. Nineteen days were only part of the grievor’s 25-day vacation leave entitlement for 2006-2007.

[29] While the bargaining agent raises a thoughtful argument that the collective agreement only allows the employer to schedule vacation leave owing in the current fiscal year, I have come to the conclusion that the origin of vacation leave credits is immaterial to this grievance. Vacation leave credits accumulated from year to year comprise a single bank of vacation leave credits. Vacation leave is taken from that

single bank of vacation leave credits, which is depleted as the leave is taken. There is no evidence that older credits are taken first. To the extent that the employer did not unilaterally schedule leave in excess of the grievor's entitlement for 2006-2007, it is reasonable to conclude that the employer scheduled days in that current fiscal year to avoid the grievor carrying over an ever-greater amount of vacation leave credits for which it would have a financial liability. The bargaining agent did not convince me otherwise.

[30] Therefore, I conclude that the employer's right to schedule vacation leave is not restricted by article B11.07(a) of the collective agreement.

**C. Does an employee have a discretionary right to accumulate unlimited vacation leave credits?**

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[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.

[32] Consequently, I find that the grievor did not have an unlimited discretionary right to accumulate vacation leave credits. If the employer required him to schedule his leave in a given year, he had to do so. The only choice he had was in regards to the dates of his leave.

[33] For these reasons, I find that the employer did not violate clause B11.07(a) of the collective agreement.

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

*(The Order appears on the next page)*

**V. Order**

[35] The grievance is dismissed.

May 28, 2009.

**Michele A. Pineau,  
adjudicator**