

**Date:** 20100504

**File:** 166-02-36781

**Citation:** 2010 PSLRB 59



*Public Service  
Staff Relations Act*

Before an adjudicator

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BETWEEN

**DEBORAH GARDNER COSTA**

Grievor

and

**TREASURY BOARD  
(Canada Border Services Agency)**

Employer

Indexed as

*Gardner Costa v. Treasury Board (Canada Border Services Agency)*

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

**REASONS FOR DECISION**

***Before:*** [Renaud Paquet, adjudicator](#)

***For the Grievor:*** [Patricia H. Harewood, Public Service Alliance of Canada](#)

***For the Employer:*** [Philippe Lacasse, counsel](#)

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Heard at Windsor, Ontario,  
April 20, 2010.

**Grievance referred to adjudication**

[1] When she filed her grievance, Deborah Gardner Costa (“the grievor”) was a customs inspector at the Ambassador Bridge in Windsor, Ontario. She was employed by Customs Services, part of the Canada Customs and Revenue Agency (CCRA). Customs Services is now part of the Canada Border Services Agency (“the employer”). The grievor was covered by the collective agreement between the CCRA and the Public Service Alliance of Canada (“the bargaining agent”) for the Program Delivery and Administrative Services bargaining unit; expiry date: October 31, 2003 (“the collective agreement”).

[2] On May 21, 2003, the grievor filed this grievance because she was denied a four-month care and nurturing leave. She alleged that the employer violated clause 41.02 of the collective agreement in denying her leave. The employer denied the grievance at the first, third and final levels of the grievance procedure. The parties agreed to waive the second level. The grievor referred the grievance to adjudication with the approval of the bargaining agent on November 29, 2005.

[3] At the first level of the grievance procedure, the employer denied the grievance on the basis that the collective agreement gave preference to annual leave and personal leave over other types of leave. Also, the employer wrote that it could not grant the leave because of contractual and continued service delivery obligations. At the third level of the grievance procedure, the employer reiterated that the leave request was denied based on the need to ensure continued service delivery over the busy summer season. At the final level of the grievance procedure, the employer referred again to the service delivery obligations.

[4] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35.

**Summary of the evidence**

[5] The parties adduced four documents in evidence. The grievor testified. She called Cathy Meloche as a witness. At the time of the grievance, Ms. Meloche was a customs inspector. She was also a local representative for the bargaining agent. The

employer called David MacRae as a witness. Mr. MacRae was the district director of operations at the Ambassador Bridge at the time of the grievance.

[6] On April 1, 2003, the employer sent a directive to all employees in Customs Operations, Windsor District. In that directive, the employer specified that all leaves requested by May 10, 2003, to be taken between June 1 and August 31, 2003, would be granted on a seniority basis.

[7] On April 25, 2003, the grievor submitted a request for a care and nurturing leave from June 2, 2003 until September 26, 2003. That request was denied by Customs Superintendent Pat Malone on May 2, 2003. On April 25, 2003, the grievor also submitted a request for a care and nurturing leave from June 2, 2003 until September 25, 2004. Mr. MacRae approved that request on May 2, 2003. Subsequently, the grievor asked the employer to allow her to return to work on November 9, 2003, and the employer accepted her request.

[8] Before 2003, the grievor had been granted care and nurturing leave during the summer to care for her three young children. At the time of the grievance, the grievor's children were aged 4, 8 and 12. The grievor testified that she had been advised by Customs Superintendent Gail Brophy that her request for a four-month leave would be refused in 2003. Considering that the employer could not refuse a leave of more than one year, the grievor decided to present her two leave requests on the same day. She testified that she made it clear to the employer that she preferred the four-month leave over the leave of more than one year. She felt that she was forced to take leave longer than she really wanted.

[9] Ms. Meloche testified that, even though she was a bargaining agent representative, the employer never explained to her what it meant by "continued service delivery obligations." Historically, short-term care and nurturing leave requests during the summer months were approved. However, beginning in 2003, requests for that type of leave were treated as the last priority to be approved.

[10] The grievor was a part-time employee, working 15 hours per week. She always worked night shifts on weekends. That allowed her to be with her children during the day. The employer hired many students in the summer months to replace employees on annual leave. However, the grievor was not replaced while on leave between June and November 2003. The grievor and Ms. Meloche testified that it would have

been easy for the employer to replace the grievor with a student during her requested four-month care and nurturing leave if necessary.

[11] Mr. MacRae testified that, in 2003, leave requests for more than one year required approval at his level and that leave requests for less than one year were approved by customs superintendents. On May 2, 2003, he approved the grievor's request for a care and nurturing leave for June 2, 2003 to September 25, 2004. He explained that he had no choice but to approve that request considering the wording of the collective agreement. He also explained that, once that leave had been approved, the other leave request, for a four-month care and nurturing leave, became obsolete. Consequently, it was not considered or analyzed, and it was refused. Mr. MacRae did not verify with the grievor which of her two leave requests she would prefer. Mr. MacRae testified that he was not consulted on the contents of the three grievance replies that were given to the grievor.

### **Summary of the arguments**

[12] The grievor argued that the employer violated article 41 of the collective agreement by not considering and by refusing the grievor's request for a care and nurturing leave from June 2, 2003 to September 26, 2003. When Customs Superintendent Malone was presented with the grievor's leave request, she did not have her other request for a longer-term leave because that request was transferred to Mr. MacRae. Ms. Malone refused the leave request based on continued service delivery, but she never justified her decision in detail.

[13] The grievor argued that the leave request was important to her because she needed to be at home with her preschool-age child and her other children that summer. The employer did not even consider her leave request, even though it had committed to recognizing the importance of that type of leave at clause 41.01 of the collective agreement. No balance was sought between the employee's needs and rights and the necessity for the employer to maintain continued service delivery.

[14] The grievor argued that Mr. MacRae should have verified which of her two leave requests she preferred, but he did not. Even though he testified that the shorter leave was denied because the longer leave was approved, the employer did not use that as a reason to deny the grievance. Rather, it denied the leave on the basis of continuous service delivery.

[15] The grievor recognized that she was granted leave for summer 2003. She is now simply asking for a declaration from the adjudicator that the employer violated the collective agreement by denying the care and nurturing leave that she requested for June 2, 2003 to September 26, 2003.

[16] The employer argued that the issue is moot because the grievor has already taken a care and nurturing leave for the summer of 2003. Even though the employer refused her four-month leave request, it granted her a longer leave and agreed to the grievor's request to return to work in early November 2003. There is no remaining live controversy for the adjudicator to decide.

[17] In the alternative, the employer argued that the grievor simultaneously submitted two leave requests. The employer approved one of them. At this point, the second request became obsolete, and the employer did not violate the collective agreement by denying that request.

[18] The grievor referred me to: *Dufour et al. v. Treasury Board (Department of Human Resources Development)*, 2004 PSSRB 123. The employer referred me to: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; and *Fording Coal Ltd. v. United Steelworkers of America, Local 7884 (2001)*, 95 L.A.C. 4th 78.

### **Reasons**

[19] To decide if the employer violated the collective agreement in refusing the grievor's request for a four-month care and nurturing leave, I must examine the relevant clauses of the collective agreement which read as follows:

...

**41.01** *Both parties recognize the importance of access to leave for the purpose of care and nurturing of preschool age children and the personal care of non-preschool age children under the age of eighteen (18).*

**41.02**

- (a) *An employee shall be granted leave without pay for the personal care and nurturing of the employee's preschool age children (including children of common-law spouse).*
- (b) *Subject to operational requirements, an employee may be granted leave without pay for the personal*

*care of an employee's non-preschool age children under the age of 18 (including children of common-law spouse).*

- (c) *Leave granted under (a) and (b) will be in accordance with the following conditions:*
- (i) *an employee shall notify the Employer in writing as far in advance as possible but not less than four (4) weeks in advance of the commencement date of such leave, unless because of an urgent or unforeseeable circumstance such notice cannot be given;*
  - (ii) *leave granted under this Article shall be for a minimum period of three (3) weeks;*
  - (iii) *the total leave granted under this Article shall not exceed five (5) years during an employee's total period of employment in the Public Service;*
  - (iv) *leave granted for periods of one year or less shall be scheduled in a manner which ensures continued service delivery.*

**41.03** *An employee who has proceeded on leave without pay may change his or her return to work date if such change does not result in additional costs to the Employer.*

...

[20] The grievor had a preschool-age child. Pursuant to clause 41.02(a) of the collective agreement, the employer had to grant her four-month leave request if the conditions of clause 41.02(c) were met. The grievor requested her leave more than four weeks in advance (clause 41.02(c)(i)), her leave was for a period of longer than three weeks (clause 41.02(c)(ii)) and she did not exceed the five-year limit for that type of leave (clause 41.02(c)(iii)). The only remaining condition was that the leave needed to be scheduled in a manner which ensured continued service delivery (clause 41.02(c)(iv)).

[21] Absolutely nothing was adduced at the hearing to indicate that granting the four-month leave would have prevented the employer from ensuring continued service delivery. In fact, the employer did not replace the grievor when she was on leave from June to November 2003. Furthermore, had there been a necessity to replace the grievor, the employer could have offered those 15 hours per week to students.

[22] Considering those facts, there was no reason for the employer to refuse the four-month care and nurturing leave requested by the grievor. She met all the conditions of the collective agreement. I do not agree with the employer's grievance response, which stated that annual and personal leave have preference over care and nurturing leave. That verges on discrimination based on family status. Furthermore, the employer could not argue that, for the reasons mentioned earlier, granting that leave could have prevented it from ensuring continued service delivery.

[23] Mr. MacRae testified that the four-month request for care and nurturing leave was refused because it became obsolete after the longer term request was approved. However, the four-month request was not refused by him but by Ms. Malone who did not testify at the hearing. The employer was made aware by the grievor that she wanted a four-month leave, and that her request for a leave for more than one year was not her preferred option. If the real reason for refusal of the four-month request was its mootness after the longer term request had been approved, that would have been mentioned in the employer's grievance replies at the first, third and final level of the grievance process. Rather, those replies explicitly referred to continued service delivery as the motive to refuse the four-month leave request and to deny the grievance.

[24] Even though the employer approved a care and nurturing leave for the grievor in 2003, I find that the issue raised in her grievance is not moot. Live controversies between the parties continue and need to be resolved. First, the employer cannot consider care and nurturing leave as a kind of second-class type of leave. Second, continued service delivery was wrongly used as a motive for denying the grievance. The grievor was not even replaced during her leave. Consequently, the employer violated the collective agreement, and the grievor is entitled to a declaration from the adjudicator that such a violation occurred.

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

*(The Order appears on the next page)*

**Order**

[26] The grievance is allowed.

[27] The employer violated the collective agreement in refusing the grievor's request for care and nurturing leave from June 2, 2003 to September 26, 2003.

May 4, 2010.

**Renaud Paquet,  
adjudicator**