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Citation: 2010 PSLRB 73



Public Service  
Labour Relations Act

Before an adjudicator

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BETWEEN

EVELYN KIDD

Grievor

and

NATIONAL RESEARCH COUNCIL OF CANADA

Employer

Indexed as

*Kidd v. National Research Council of Canada*

In the matter of individual grievances referred to adjudication

**REASONS FOR DECISION**

**Before:** Renaud Paquet, adjudicator

**For the Grievor:** Martin Ranger, Professional Institute of the Public Service of  
Canada

**For the Employer:** Stephan Bertrand, counsel

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Heard at Ottawa, Ontario,  
May 17 and 18, 2010.

## REASONS FOR DECISION

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

[1] Evelyn Kidd (“the grievor”) worked for the National Research Council of Canada (“the employer” or NRCC) in a position classified at the IS-04 group and level. She was covered by the collective agreement for the Information Services group, signed on June 28, 2006 between the Professional Institute of the Public Service of Canada and the employer (“the collective agreement”). She retired on September 5, 2007. On September 28, 2007, she filed three grievances claiming that the employer violated the collective agreement.

[2] In the first grievance (PSLRB File No. 566-09-2094), the grievor claimed that the employer violated article 11 of the collective agreement in denying her request for compensatory leave. In the second grievance (PSLRB File No. 566-09-2095), the grievor claimed that the employer violated articles 17 and 18 in denying 13 of her 14 requests for sick leave. In the third grievance (PSLRB File No. 566-09-2096), the grievor claimed that the employer violated article 19 in denying her requests for volunteer leave and personal leave. In each grievance, the grievor requested that the employer grant the leave and that her retirement date of September 5, 2007 as well as her benefits be adjusted accordingly.

[3] The employer denied the three grievances at the final level of the grievance process on April 24, 2008, based on a settlement agreement with the grievor that stated that she would be on vacation leave starting April 1, 2007, and that she would retire after exhausting all her vacation leave credits. The employer also denied the grievances because the grievor was not entitled to another type of leave while on vacation leave. The grievances were referred to adjudication on June 10, 2008.

[4] Before the hearing, the employer objected to the jurisdiction of an adjudicator because the subject-matter of the grievances relates to the interpretation and enforcement of a settlement agreement signed by the parties on December 20, 2006. At the hearing, the employer objected to the jurisdiction of an adjudicator to hear the grievances because the grievor had lost her employee status when she filed her grievances. I decided at the hearing to hear the case on its merits and to reserve my decision on the objections.

**II. Summary of the evidence**

[5] The parties adduced 26 documents in evidence. Most of those documents were certificates from health specialists attesting that they met with the grievor on different dates between April and August 2007. The grievor testified. The employer called Patricia Mortimer as a witness. Ms. Mortimer is Vice-President, Technology and Industry Support, for the NRCC. She denied the leave requests on behalf of the employer.

[6] On December 20, 2006, the grievor and the employer signed a settlement agreement to resolve several outstanding issues between them. Sections 12 and 13 of that agreement read as follows:

*12. Mrs. Kidd will commence vacation leave on April 1<sup>st</sup>, 2007 and will exhaust all available, earned but unused vacation-leave credits.*

*13. Mrs. Kidd hereby confirms her retirement from her employment at NRC effective at the end of business day on which her vacation credits are exhausted.*

[7] As of April 1, 2007, the grievor carried over 83.55 days of vacation leave from previous years and had an opening balance of 130 days of sick leave and 5 days of compensatory leave. As per the December 20, 2006 settlement agreement, the grievor went on vacation leave starting April 2, 2007; April 1 was a Sunday.

[8] On July 27, 2007, the grievor asked the employer for five days of compensatory leave in late July and early August 2007. The employer denied her request on August 21, 2007, but it paid the grievor the five days of salary that she was entitled to in addition to vacation pay.

[9] The grievor asked the employer to replace her vacation leave with sick leave from May 7 to 18, 2007. She provided a medical certificate attesting that she was sick, and the employer approved her request. Between May 24 and August 2, 2007, the grievor submitted to the employer several other requests to change her approved vacation leave to paid leave to consult health specialists. The grievor submitted 15 health specialist certificates proving that they saw her on those dates but providing no details of the purposes of the visits. Each request was for an average of two hours. Had the employer accepted them, it would have meant that the grievor would have been credited 28 hours of vacation leave. The grievor testified that most of the

appointments were for medical treatments and that it was the employer's policy to grant sick leave for medical treatments. The employer denied those requests on August 21, 2007.

[10] The grievor adduced in evidence the employer's policy on granting employees time off for dental and medical appointments. According to that policy, the employer grants leave for up to half a day for appointments without charging the employee's leave credits. When a series of appointments are necessary for treatment, employees must take sick leave.

[11] On May 23, 2007, the grievor asked the employer for volunteer leave on May 25, 2007. On July 13, 2007, the grievor asked the employer for personal leave on July 23, 2007. The employer denied both requests on August 21, 2007.

[12] The grievor was on vacation in Prince Edward Island in August 2007. She received the employer's letter of August 21, 2007 informing her of the denial of her leave requests only on August 28, 2007.

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

#### **A. For the grievor**

[13] The grievor argued that the adjudicator has jurisdiction to decide her grievances since they were filed within the time limits of the collective agreement. Even though the grievor filed her grievances after she retired, she was an employee when the employer denied her leave requests. On August 28, 2007, when she received the employer's letter denying her leave requests, she had not yet retired.

[14] The grievor referred me to *Canada (Treasury Board) v. Lavoie*, [1978] 1 F.C. 778 (C.A.), and *Glowinski v. Treasury Board (Department of Industry)*, 2007 PSLRB 91. Those decisions support the argument that the status of an employee is determined by his or her status when the aggrieved matter occurred. To decide otherwise would deprive employees of their right to grieve violations of the collective agreement, which could occur immediately before or after retirement. In addition, subsection 236(1) of the *Public Service Labour Relations Act* ("the Act") deprives employees of any right of action other than by grievance against the employer for disputes related to their working conditions.

[15] The employer did not deny the grievances because the grievor did not have the credits for the requested leave but rather because of the settlement agreement signed on December 20, 2006. However, the grievor did not give up her right to other types of leave when she agreed to go on vacation leave, effective April 1, 2007. The settlement did not cover those other types of leave, and the collective agreement must be applied.

[16] The collective agreement granted a right to the grievor to take one day of volunteer leave and one day of personal leave. The grievor followed the proper procedure by asking for those two days of leave, but the employer denied her requests. The same applies to the grievor's request for compensatory leave. The grievor had the credits to take the leave, and she followed the proper procedure to request it, but the employer denied her request. When it denied those requests, the employer violated the collective agreement.

[17] The grievor submitted a series of health specialist certificates asking for paid time off for appointments with those specialists. The employer never asked for more details following her requests. Some of those appointments were for medical treatments for which the grievor was entitled to sick leave with pay. She was also entitled to displace her vacation leave. The employer denied those requests, and it violated the collective agreement.

[18] The grievor is asking that the adjudicator allow the grievances and order the employer to adjust or delay her retirement date by 95.5 hours. Those hours include 7.5 hours of volunteer leave, 7.5 hours of personal leave, 33.75 hours of compensatory leave, 28 hours of sick leave, and 18.75 hours of vacation leave that the grievor would have earned had she been on staff for those extra hours.

#### **B. For the employer**

[19] The employer argued that an adjudicator does not have jurisdiction to hear these grievances because, when the grievor filed her grievances, she was not an employee as defined by subsections 206(1) and 2(1) of the *Act*. Those subsections define an employee as a person employed in the public service. When the grievor left the public service on September 5, 2007, she lost her right to file a grievance and to refer it to adjudication. In addition, section 63 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13, specifies that a person ceases to be an employee on retirement.

[20] Former employees cannot file grievances except with respect to disciplinary action or termination of employment, as per subsection 206(2) of the *Act*. The grievor was not disciplined or terminated. She retired and then lost her right to grieve. She had control over her decision to leave the public service. She could have grieved before retiring but chose not to. After she retired, it was too late.

[21] The employer argued that this case differs from *Glowinski* and *Lavoie*. In those cases, the grievors did not have control over the ends of their employment. In *Glowinski*, the grievor was a term employee who tried to negotiate an appropriate salary on the renewal of his term. He did not accept the employer's offer, and he grieved. He could not file his grievance when he was an employee because his term was not renewed, and he could not have known when he was employed that the salary issue would not be resolved. In *Lavoie*, the employer rejected the grievor on probation. In this case, the grievor retired.

[22] If the adjudicator were to decide that he has jurisdiction, the employer argued that the grievances must be rejected on the basis of the settlement agreement. The grievor agreed that, starting April 1, 2007, she would be on vacation leave and that she would retire when she exhausted her vacation leave credits. She could not unilaterally change that agreement by requesting other types of leave after April 1, 2007.

[23] The employer also argued that it did not violate the collective agreement because the grievor was not entitled to the leave that she requested. The grievor was on approved vacation leave from April 2, 2007 until her date of retirement. Clause 16.07 of the collective agreement specifies that an employee shall not be granted two different types of leave for the same period. Clause 17.04 specifies that vacation leave may be displaced only if an employee is granted bereavement leave, special leave because of illness in the immediate family or sick leave on production of a medical certificate. None of the employee's leave requests fell under those categories.

[24] When the grievor submitted health specialist certificates to the employer and requested sick leave, she never mentioned that some of those certificates were for medical treatments. Also, there is nothing in the collective agreement that allows for paid time off for health specialist appointments. The grievor adduced in evidence the employer's policy on the matter, but that policy is not part of the collective agreement. Consequently, an adjudicator does not have jurisdiction over it. Further, the employer

did not violate the policy because it was never informed that some of the appointments were for medical treatments.

#### IV. Reasons

##### A. Was the grievor an employee when she filed her grievances?

[25] The employer argued that the grievor was not an employee when she filed her grievances on September 28, 2007 since she retired on September 5, 2007. She did not have standing and did not qualify as an employee pursuant to the Act. The grievor argued that she was an employee when the facts giving rise to the grievances occurred and that she filed her grievances within the time limits outlined in the collective agreement.

[26] The term “employee” is defined as follows in Part 2 of the Act:

...

**206.** (1) *The following definitions apply to this Part.*

*“employee” has the meaning that would be assigned by the definition “employee” in subsection 2(1) if that definition were read without reference to paragraphs (e) and (i) and without reference to the words “except in part 2”.*

...

(2) *Every reference in this Part to an “employee” includes a former employee for the purposes of any provisions of this Part respecting grievances with respect to*

*(a) any disciplinary action resulting in suspension, or any termination of employment, under paragraph 12(1)(c), (d) or (e) of the Financial Administration Act; or*

*(b) in the case of a separate agency, any disciplinary action resulting in suspension, or any termination of employment, under paragraph 12(2)(c) or (d) of the Financial Administration Act or under any provision of any Act of Parliament, or any regulation, order or other instrument made under the authority of an Act of Parliament, respecting the powers or functions of the separate agency.*

...

[27] The relevant part of subsection 2(1) of the Act, to which subsection 206(1) refers, reads as follows:

2. (1) *The following definitions apply in this Act.*

...

*“employee”, except in Part 2, means a person employed in the public service, other than*

...

[28] It is clear that the grievor was not employed in the public service when she filed her grievances and that her grievances do not deal with termination or discipline. It is also clear that she was an employee when she was informed of the employer’s decision to refuse her leave requests. Even though the context was different, the Federal Court of Appeal decided in *Lavoie* that a person does not necessarily lose employee status on departure for non-disciplinary reasons. The Court wrote the following at paragraph 10:

*... In my view, the introductory words of section 90(1) of the Public Service Staff Relations Act must be read as including any person who feels himself to be aggrieved as an “employee”. Otherwise a person who, while an “employee” had a grievance -- e.g. in respect of classification or salary -- would be deprived of the right to grieve by a termination of employment -- e.g. by a lay-off. It would take very clear words to convince me that this result could have been intended.*

[29] In *Lavoie*, the Federal Court of Appeal was interpreting the 1970 version of the *Public Service Staff Relations Act (PSSRA)*. However, there is no meaningful difference between that version and the *Act* on the issue of defining an employee and on the right to grieve of a former employee. In its decision, the Court interpreted those provisions of the *PSSRA* in such a way that an employee could not be deprived of his or her right to grieve by a lay off even were the grievance not a disciplinary grievance. In *Glowinski*, the adjudicator applied that logic in a case involving the granting of an extension on a grievance about the salary level to be paid to the grievor while he was an employee. The adjudicator decided that the grievor had employee status.

[30] The Federal Court of Appeal in *Lavoie* stated that very clear words are required to deprive an individual of his or her right to grieve. It could be argued that the distinction between an employee and a former employee is based on whether the matter being grieved occurred while the individual was an employee versus after the individual was an employee. In other words, the adjudicator must look at the status of the individual when the situation giving rise to the grievance occurred.



[31] In the case of a termination, an individual becomes a former employee on the effective date of termination. However, subsection 206(2) of the *Act* provides for an exception in considering a former employee as an employee for the application of Part 2 of the *Act*. But for that exception in the *Act*, it could be argued that, since the right to grieve arises only after an action by the employer, the terminated employee cannot grieve the termination since he or she has ceased to be an employee as soon as the decision to terminate becomes effective.

[32] In other cases, as *Lavoie* holds, it could not have been the intent of the legislature to deprive employees of a right to grieve matters that occurred while they were employees.

[33] Taking into consideration *Lavoie* and *Glowinski* and given the fact that the grievor was an employee when the situations that led to the grievances occurred and that the grievances were filed within the time limits of the collective agreement, I reject the employer's argument that the grievor does not have standing.

**B. Did the employer violate the collective agreement?**

[34] For both parties, these grievances are directly related to the settlement agreement that they signed on December 20, 2006. For the employer, the grievor committed herself to taking her vacation leave starting April 1, 2007 and to retire after that. She was not entitled to any other leave. The grievor argued that she did not renounce her right to other types of leave when she signed that agreement. My role is not to interpret that agreement and make a ruling on what it really means. As far as these grievances are concerned, the only relevant point is that paragraphs 12 and 13 of the settlement agreement prove that the grievor was on approved vacation leave starting April 2, 2007. In signing the agreement, the grievor asked for vacation leave, and the employer approved it.

[35] First, the following two clauses of the collective agreement need to be examined to decide the grievances:

...

**16.07**

*An employee shall not be granted two (2) different types of leave with pay in respect of the same period of time.*

...

**17.05**

*Where, in respect of any period of vacation leave, an employee:*

- (a) is granted bereavement leave, or*
- (b) is granted special 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 Council or reinstated for use at a later date.*

...

[36] Clause 17.05 of the collective agreement is unequivocal: an employee cannot displace vacation leave except if the employee requests bereavement leave, leave for illness in the family or sick leave on production of a medical certificate and if his or her request is approved by the employer. Clause 16.07 is also unequivocal: an employee cannot be granted two types of paid leave at the same time.

[37] The grievor would have been entitled to one day of personal leave and to one day of volunteer leave after April 1, 2007. However, she lost that entitlement while she was on vacation leave. There is no provision in clause 17.05 of the collective agreement to displace vacation leave in order to be granted personal leave or volunteer leave. Further, there is nothing in clauses 19.19 or 19.20, that give entitlement to those types of leave, to override clause 17.05. Clauses 19.19 and 19.20 read as follows:

**19.19**

***Volunteer Leave***

- a) *Subject to operational requirements as determined by the Council and with an advance notice of at least five (5) working days, the employee shall be granted, in each fiscal year, a single period of seven decimal five (7.5) hours of leave with pay to work as a volunteer for a charitable or community organization or activity, other than for activities related to the National Research Council Workplace Charitable Campaign.*
- b) *The leave shall be scheduled at a time convenient both to the employee and the Council. Nevertheless, the Council shall make every reasonable effort to grant the leave at such a time as the employee may request.*

## **19.20**

### ***Personal Leave***

- a) *Subject to operational requirements as determined by the Council and with an advance notice of at least five (5) working days, an employee shall be granted, in each fiscal year, a single period of seven decimal five (7.5) hours of leave with pay for reasons of a personal nature.*
- b) *The leave shall be scheduled at a time convenient both to the employee and the Council. Nevertheless, the Council shall make every reasonable effort to grant the leave at such a time as the employee may request.*

[38] The grievor would have been entitled to five days of compensatory leave after April 1, 2007. However, as with the personal and volunteer leave, she lost that entitlement while she was on vacation leave. There is no provision in clause 17.05 of the collective agreement to displace vacation leave in order to be granted compensatory leave. Further, the employer already paid the grievor for her five days of compensatory leave. There is nothing in clause 11.04, which deals with compensatory leave, to override clause 17.05. Clause 11.04 reads in part as follows:

## **11.04**

- (1) *An employee shall receive overtime compensation for earned credits by means of payment by cheque, which will be issued as soon as practicable after the first day of the month following the month during which the overtime was worked, or upon request of an employee, and with the approval of the Council, receive compensatory leave in lieu of monetary*

*payment. Such leave with pay will be computed at the same premium rate as if the overtime had been compensated monetarily.*

- (2) Consistent with operational requirements and subject to adequate advance notice by the employee, the Council shall grant compensatory leave at times that are mutually acceptable to the employee and to the Council.*

...

[39] The grievor adduced in evidence a series of health specialist certificates stating that she consulted them on several dates. Nothing in those certificates states that the grievor was sick. In fact, the grievor testified that some were for consultations and some for treatments. Even had she convinced me that receiving medical treatment could be considered as being sick and as being eligible for sick leave, I would have rejected her grievance because she never provided that information to the employer. It was her responsibility to provide that information, and it was not the employer's responsibility to enquire with the grievor as to why she was seen by those specialists.

[40] Furthermore, there is nothing in the collective agreement that provides paid leave to an employee who decides to see a health care specialist. The sick leave provisions read as follows:

### **18.02**

#### ***Granting of Sick Leave***

*An employee shall be granted sick leave with pay when he/she is unable to perform his/her duties because of illness or injury provided that*

- (a) he/she satisfies the Council of this condition in such a manner and at such time as may be determined by the Council,*

- (b) he/she has the necessary sick leave credits.*

[41] The employer has established a practice to accommodate employees by not debiting their leave credits when they need to see a health specialist for a few hours during working hours. Employees already on vacation leave do not need to be accommodated and obviously are not entitled to displace vacation leave to meet with a health specialist, because they are not at work.

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

*(The Order appears on the next page)*

**V. Order**

[43] The grievances are dismissed.

June 2, 2010.

**Renaud Paquet,  
adjudicator**