Date: 20131101

File: 566-34-3487

Citation: 2013 PSLRB 133

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

STEPHANIE DELIOS

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Delios v. Canada Revenue Agency

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: David P. Olsen, adjudicator

For the Grievor: Neil Harden and Maria Jordan, Professional Institute of the Public Service of Canada

For the Employer: Pierre-Marc Champagne, counsel

Decided on the basis of written submissions,
filed February 1 and 27 and March 14, 2013.

I. Individual grievance referred to adjudication

[1] This matter concerns a grievance filed by Stephanie Delios ("the grievor") on March 28, 2008, against the decision of her employer, the Canada Revenue Agency ("the CRA" or " the employer"), to deny her request for a day of personal leave with pay, pursuant to clause 17.21 of the collective agreement between the Canada Customs and Revenue Agency and the Professional Institute of the Public Service of Canada for the Audit, Financial and Scientific bargaining unit, expiring on December 21, 2007 ("the CRA-PIPSC collective agreement"). At the time of presenting her grievance, the grievor was employed as an income tax auditor at the AU-01 group and level, and her terms and conditions of employment were covered by the CRA-PIPS collective agreement.

II. Summary of the evidence

[2] The parties agreed on the facts, and the matter proceeded by way of written submissions. The agreed statement of facts reads as follows:

. . .

1. *The Grievor, Stephanie Delios, worked as a Tax Auditor (a PM 02) from November 14, 2005, to October 31, 2007, with the Canada Revenue Agency (CRA). On November 1, 2007, the position was converted to the SP 05 group and level.*

2. *The Grievor's SP 05 position was covered by the Program Delivery and Administrative Services Collective Agreement between the CRA and the Public Service Alliance of Canada (PSAC) ("CRA-PSAC Collective Agreement"). This collective agreement came into effect on December 3, 2007, and had an expiry date of October 31, 2010. A copy of the CRA-PSAC Collective Agreement is attached as* ***Exhibit A.***

3. *The 2007-2008 fiscal year ran from April 1, 2007, to March 31, 2008, inclusively.*

4. *On January 4, 2008, while a SP 05, the Grievor took 7.5 hours of personal leave (i.e. the Personal Leave Day under Article 54.02 of the CRA-PSAC Collective Agreement).*

5. *The Grievor accepted a position as an AU 01 Income Tax Auditor with the CRA, effective January 29, 2008. The Employment Offer letter, dated January 22, 2008, is attached as* ***Exhibit B****. This position fell under the Audit, Financial and Scientific (AFS) Collective Agreement*

between the CRA and the Professional Institute of the Public Service of Canada (PIPSC) ("CRA-PIPSC Collective Agreement"). This collective agreement, attached as ***Exhibit C****, had an expiry date of December 21, 2007, but remained in effect pending collective negotiations.*

6. *On March 20, 2008, the Grievor sent an email to Brian Arnold, Team Leader of Audit, who was the Grievor's team leader at the time, requesting a Personal Leave Day for March 31, 2008, under Article 17.21 of the CRA-PIPSC Collective Agreement. Mr. Arnold forwarded the email to Chris Dudek, the Audit Manager, asking him to respond to the Grievor's request. A copy of this correspondence is attached as* ***Exhibit D****.*

7. *March 25, 2008, Mr. Dudek sent an email to the Grievor and others, copying Mr. Arnold, denying the Grievor's request for a Personal Leave Day on March 31, 2008. A copy of this correspondence is attached as* ***Exhibit E****. (The individuals copied on that correspondence were: Les Zilkie, Manager, Audit; Ron Klippenstein, Income Tax Technical Advisor (PIPSC Steward); Rick Hewson, Assistant Director, Audit; and Denis Kuharski, Manager, Audit).*

8. *The grievor filed a grievance of the decision regarding her requested Personal Leave Day, dated March 28, 2008. A copy of this grievance is attached, as* ***Exhibit F****.*

9. *In response to the grievance, the CRA confirmed its decision as follows:*

    a) *1st Level Grievance Response, dated April 25, 2008, a copy of which is attached as* ***Exhibit G****.*
    b) *3rd Level Grievance Response was issued June 19, 2008, a copy of which is attached as* ***Exhibit H****.*
    c) *4th and Final Level Grievance Response, dated January 5, 2010, a copy of which is attached as* ***Exhibit I****.*

10. *Documents jointly agreed to:*

- *CRA-PSAC Collective Agreement, entitled "Exhibit A"*
- *Employment Offer Letter, entitled "Exhibit B"*
- *CRA-PIPSC Collective Agreement, entitled "Exhibit C"*
- *Email correspondence(s) dated March 20, 2008, entitled "Exhibit D"*
- *Email correspondence(s) dated March 25, 2008, entitled "Exhibit E"*
- *Grievance Presentation, entitled "Exhibit F"*
- *CRA's 1st Level Response to Grievance, entitled "Exhibit G"*

- *CRA's 3rd Level Response to Grievance, entitled "Exhibit H"*
- *CRA's 4th and Final Level Response to Grievance, entitled "Exhibit I"*

. . .

The issue raised by the grievance is whether the grievor was entitled to 7.5 hours of personal leave with pay under clause 17.21 of the CRA-PIPSC collective agreement in spite of the fact that she had already taken the personal leave day under the CRA-PSAC collective agreement in the same fiscal year.

III. Summary of the arguments

A. For the grievor

[3] In summary, the grievor's representative first points out that by virtue of the definition of "employee" in the CRA-PIPSC collective agreement, the grievor became subject to its terms upon her appointment to her position as Income Tax Auditor at the AU-01 group and level on January 29, 2008.

[4] Clause 17.21 provides that personal leave with pay shall be granted if three conditions are satisfied: (i) being an employee covered by the collective agreement, (ii) giving five days' notice to the employer, and (iii) determining a mutually convenient time for taking the leave. Unlike other types of leave provided in the collective agreement, the personal leave provision is not based on the accumulation of "earned credits" for leave but is rather an entitlement for one day in each fiscal year. Other provisions in the collective agreement, such as clause 14.08, reflect the parties' specific agreement to exclude earned leave credits which have already been credited under another collective agreement or other instrument, so as to avoid an employee earning double credits. The same is true for clauses 17.11 (leave for personal needs) and 17.14 (leave for family-related needs), which provide that an employee is entitled to such leave "only once" during the employee's total period of employment in the public service.

[5] There are no such restrictions in clause 17.21, and the plain and clear language of that provision must be given effect. The fact that the grievor has already been granted personal leave with pay under a similar provision of the CRA-PSAC collective agreement is immaterial to her entitlement under the CRA-PIPSC collective agreement and does not lead to an absurd or otherwise unacceptable result.

[6] The grievor's representative cites the following cases in support of his position that the collective agreement must be given its ordinary meaning, and an adjudicator cannot look beyond its words when the text is clear and unambiguous: *Public Service Alliance of Canada v. Communications Security Establishment,* 2009 PSLRB 121; *S.E.I.U., Loc. 268 v. U.S.W.A., Loc. 5481* (1991), 43 L.A.C. (4th) 76; *Klock v. Canada Revenue Agency,* 2009 PSLRB 99; and *United Nurses of Alberta, Local 121-R v. Calgary Regional Health Authority* (2000), 93 L.A.C. (4th) 427. Regarding the distinction to be drawn between earned daily leave, such as vacation or sick leave, and entitlement leave, such as personal leave, the grievor's representative cites the following cases: *Canada (Attorney General) v. King,* 2003 FCT 593; *Breitenmoser and others v. Treasury Board (Solicitor General Canada - Correctional Service) (Citizenship and Immigration Canada) (Human Resources Development Canada) (National Defence),* 2004 PSSRB 103; *Stockdale et al. v. Treasury Board (Fisheries and Oceans Canada),* 2004 PSSRB 4; and *Julien v. Treasury Board (Canada Border Services Agency),* 2008 PSLRB 67.

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

[7] The employer takes the position that the restriction set out in clause 17.21 of the CRA-PIPSC collective agreement, which limits the employee's personal leave entitlement to 7.5 hours every fiscal year, is public service specific and not bargaining unit specific. Once an employee receives this entitlement anywhere in the public service, they are not entitled to it again in that same fiscal year.

[8] Counsel for the employer stressed that one must construe the agreement as a whole and in light of the entirety of the agreement. One must look beyond the ordinary meaning of the collective agreement if the language is unclear, in order to seek out the parties' intention. The employer argued that the words "in each fiscal year" must be construed as providing for a "one time entitlement" that may be claimed by an employee only once every fiscal year. Allowing an employee to benefit from 15 hours of personal leave with pay in a given fiscal year solely by reason of that employee changing bargaining unit affiliation leads to an unfair result and defies the values and principles of equity, integrity and efficiency set out in the preamble of the collective agreement. The end result is clearly not one that the parties envisaged in their negotiations of the collective agreement.

[9] The inequity is further demonstrated, according to the employer, if one applies the grievor's argument to clause 17.13, which uses language similar to clause 17.21 to

grant employees up to 37.5 hours per fiscal year for family-related leave, or to the volunteer leave provision set out in clause 17.22. The fact that an employee could end up benefiting from up to 105 hours of leave under those provisions simply could not have been the intent of the parties.

[10] Finally, counsel for the employer refers to *Professional Institute of the Public Service of Canada v. Treasury Board,* 2011 PSLRB 46, in support of its position that the leave in question is a one-time entitlement and applies as a public-service-specific provision.

C. Grievor's rebuttal

[11] The grievor's representative rebutted each paragraph of the employer's submissions and essentially reiterated his main argument. He stressed that an adjudicator's authority is to interpret and apply the terms of the collective agreement and, in doing so, the adjudicator cannot modify its terms, even if a provision may be seen as unfair (*Chafe et al. v. Treasury Board (Department of Fisheries and Oceans),* 2010 PSLRB 112). As to the preamble of the collective agreement, the grievor's representative argues that it is a general provision that does not create substantive rights and is of no assistance to the employer's position.

[12] The grievor's representative distinguishes the *Professional Institute of the Public Service of Canada* case on the grounds that the issue in that case had to do with the accumulation of vacation leave credits and not an entitlement to leave, and the adjudicator tied the vacation leave article to service-wide factors under the wording of that agreement, an approach that the wording of the CRA-PIPSC collective agreement does not support.

IV. Reasons

[13] The issue raised by this grievance is a relatively simple one. I must determine whether the grievor is entitled to the 7.5 hours of personal leave provided at clause 17.21 of the CRA-PIPSC collective agreement in circumstances where that employee has already benefited from that leave pursuant to an equivalent provision in the CRA-PSAC collective agreement in that same fiscal year (2007-2008).

[14] Clause 17.21 reads as follows:

> ***17.21 Personal leave***
>
> *(a) Subject to operational requirements as determined by the Employer and with an advance notice of at least five (5) working days, the employee shall be granted, in each fiscal year, seven decimal five (7.5) hours of leave with pay for reasons of a personal nature.*
>
> *(b) The leave will be scheduled at a time convenient to both the employee and the Employer. Nevertheless, the Employer shall make every reasonable effort to grant the leave at such time as the employee may request.*

[15] Firstly, it is common ground that the grievor is covered by the definition of "employee" that is found in the collective agreement, at clause 2.01 (j):

> ***2.01 For the purpose of this Agreement:***
>
> . . .
>
> *(j) "employee" means a person so defined by the* Public Service Staff Relations Act *and who is a member of the bargaining unit . . . .*

[16] The grievor is such a person, and she became subject to the terms and conditions prescribed by the CRA-PIPSC collective agreement as of the date of her appointment to an income tax auditor position, classified at the AU-01 group and level, on January 29, 2008, by virtue of clause 4.01 of that agreement. The other conditions for the entitlement of that leave, i.e., the five-day notification and the mutually convenient time, are not questioned; the disposition of this grievance thus turns on the interpretation of the words "in each fiscal year" found in clause 17.21(a). Are those words to be construed as placing a restriction on the entitlement to the personal leave benefit that goes beyond the strict operation of the collective agreement and as somehow importing a notion of "public-service-wide" application, as the employer contends that they do?

[17] After a careful review of the collective agreement and the parties' submissions, I am of the opinion that the position put forward by the employer is not founded, and the grievance must be allowed, for the reasons set out below.

[18] Firstly, the source of the personal leave benefit resides in the CRA-PIPSC collective agreement itself. The words "in each fiscal year" in clause 17.21(a) therefore relate to the entitlement to the leave prescribed by that provision and that applies to

all employees covered by the collective agreement. The fact that the grievor has benefited from a similar type of leave under a collective agreement to which she was subject at an earlier point in time during the fiscal year is of no material relevance to the determination of her entitlement to the benefit set out in clause 17.21 of the CRA-PIPSC collective agreement.

[19] Secondly, where the parties intended to place restrictions on the accumulation of leave entitlements under the collective agreement, they have done so quite explicitly. As an example, clause 14.08 illustrates such an approach:

> *14.08 An employee shall not earn leave credits under this Collective Agreement in any month for which leave has already been credited to him under the terms of any other collective agreement to which the employer is a party or under other rules or regulations of the Employer.*
>
> [Emphasis added]

[20] That clause is obviously meant to avoid situations where an employee who has acquired leave credits under a collective agreement previously applicable to him or her could end up double-banking the leave benefits when appointed to a position comprised in the Audit, Financial and Scientific bargaining unit and thus becoming subject to the present collective agreement. The employer invites me to construe the wording of clause 17.21 as having the same effect. I cannot subscribe to that argument. In my opinion, the personal leave benefit set out in clause 17.21 is not a "leave credit" within the meaning of clause 14.08. Rather, it is a leave entitlement that applies to an employee by virtue of his or her being covered by the collective agreement. The restrictions set out in clause 14.08 simply do not apply to the personal leave entitlement set out in clause 17.21.

[21] Likewise, the leave entitlements provided by clauses 17.11(c) and 17.14(b) are worded in such a way as to expressly limit the benefit to one time only during the employee's total period of employment in the public service. Those clauses read as follows:

> *17.11 (c) An employee is entitled to leave without pay for personal needs only once under each of (a) and (b) of this clause during the employee's total period of employment in the Public Service . . . .*
>
> . . .

> *17.14 Subject to operational requirements, an employee shall be granted leave without pay for family-related needs in accordance with the following conditions:*
>
> . . .
>
> *(b) subject to paragraph (a), up to five (5) years leave without pay during an employee's total period of employment in the Public Service may be granted for the personal long-term care of the employee's family . . . .*
>
> [Emphasis added]

[22] This comparison of wordings leads me to the understanding that where the parties to collective bargaining have agreed to place a temporal or other limitation on a leave entitlement arising under the collective agreement, they have done so explicitly. Since the parties have not done so in clause 17.21, I have no reason to look beyond the plain and ordinary wording agreed on by the parties in that clause. I can find no sound basis in the collective agreement, and certainly not in the preamble of the agreement as argued by the employer, that would persuade me to do otherwise, and I cannot construe that provision as containing an implied limitation that would have the same effect as the clauses quoted above.

[23] The employer relied on the decision rendered in *Professional Institute of the Public Service of Canada* to persuade me to read into clause 17.21 the notion of it containing a "public-service-wide" benefit that can only apply once per fiscal year to an employee, regardless of the collective agreement or instrument under which the benefit arises. In my view, the outcome of that case rested on factors considered by the adjudicator that are not present in the instant case. The issue in that case was whether the benefit expressly described as a "one-time only" vacation leave credit of 37.5 hours could be acquired more than once under different collective agreements that provided for such leave. In his reasons, the adjudicator points out that this clause had replaced the "marriage leave" provision found in all previous collective agreements between the employer and that bargaining agent, further to an agreement reached during the same round of collective bargaining. Accordingly, he clearly stressed the importance of that context for the interpretation of the words chosen by the parties. In addition, the fact that the parties used explicit wording to set out the benefit as a "one-time" leave credit and the fact that an employee could retain that credit if it had been acquired under another similarly worded collective agreement are all considerations that led the adjudicator, in his quest for the intention of the parties, to interpret that clause as

having a "service-wide" application, as the employer urges me to find in the present matter. However, none of these features is present in the instant case.

[24] Accepting the employer's position would require me to read in restrictions in clause 17.21 where no such restrictions exist and would be tantamount to modifying the text of the collective agreement, which, it is trite to say, I am prohibited from doing by section 229 of the *Public Service Labour Relations Act*. The employer argues that the result of the grievor's interpretation of clause 17.21 leads to an inequitable and unfair situation, as it results in the grievor benefiting from personal leave twice in the same fiscal year. It may be so, but it is not a valid reason for me not to give effect to the plain and ordinary language of the collective agreement. Any perceived unfairness or inequity resulting from the application of the collective agreement should be resolved at the bargaining table.

[25] I find that the employer incorrectly applied the collective agreement when it refused to grant a day of personal leave to the grievor as she requested for March 31, 2008. The grievance is hereby allowed.

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

(The Order appears on the next page)

V. Order

[27] The grievance is allowed.

[28] The employer shall pay the grievor one day of leave with pay at the applicable salary rate at the time of the grievance. I shall remain seized of this matter should any question arise as to the implementation of my order.

November 1, 2013.

David P. Olsen,
adjudicator