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Files: 566-02-1864 and 1865

Citation: 2013 PSLRB 54

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

RYAN DEWEY and HAWLEY MOULTON

Grievors

and

TREASURY BOARD

(Correctional Service of Canada)

Employer

Indexed as
Dewey and Moulton v. Treasury Board (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Michael Bendel, adjudicator

For the Grievors: Sheryl Ferguson, Ontario Region, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada – CSN

For the Employer: Christine Diguer, counsel

Heard at Toronto, Ontario,
March 1, 2013.

The facts

[1] The grievors, Ryan Dewey and Hawley Moulton, both classified at the Correctional Officer II group and level and employed at the Fenbrook Institution, in Gravenhurst, Ontario, have presented grievances to challenge the employer's denial of their requests for marriage leave with pay under the collective agreement between the Treasury Board ("the employer") and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada – CSN, having an expiry date of May 31, 2010 ("the collective agreement").

[2] The facts are not in dispute. The parties filed an agreed statement of facts, which was supplemented by other facts agreed to at the hearing.

[3] The grievors had been granted marriage leave with pay for a week in January 2007, for the purpose of marrying each other. They went to the Dominican Republic for their wedding and went through a form of marriage there. However, the marriage certificate obtained from the Dominican authorities contained errors in the spelling of names. They consulted a consul for the Dominican Republic in Canada and an Ontario lawyer. They were advised that, as a result of the spelling errors, they were not validly married and that, if they wanted to be legally married, they should do it all over again in Canada.

[4] Accordingly, on April 14, 2007, they requested marriage leave for a week in July 2007. The employer denied their request. It proposed to them that, if they so desired, the leave granted for January 2007 could be retroactively converted into vacation leave, in which case they could be granted marriage leave for a week in July. Alternatively, it was proposed to them that they could take vacation leave in July. They accepted to take vacation leave in July, but maintained their claim for marriage leave for that week, which they have since pursued through these grievances. They were married on July 7, 2007, in Ramara Township, County of Simcoe, Ontario.

[5] Clause 30.01(a) of the collective agreement reads as follows:

> *After the completion of one (1) year's continuous employment in the Public Service, and providing an employee gives the Employer at least five (5) days' notice, the employee shall be granted forty (40) hours' marriage leave with pay for the purpose of getting married.*

Parties' submissions

[6] The grievors' representative argued that the language of the collective agreement was clear and unambiguous. The grievors met the conditions in clause 30.01(a) for being granted marriage leave with pay. They wanted the leave in July 2007 for the purpose of getting married since, through no fault of their own, their Dominican marriage was not valid. The employer had no discretion in the matter. In the course of her submissions, the grievors' representative referred to *Poole v. Treasury Board (Department of National Defence),* 2006 PSLRB 69, and *Central Care Corp. (Lakeview Care Centre) v. British Columbia Nurses' Union*, [2007] B.C.C.A.A.A. No. 89 (QL).

[7] Counsel for the employer maintained that clause 30.01(a) of the collective agreement did not give the grievors a right to marriage leave for a second marriage. From the perspective of clause 30.01(a), an employee could be married only once. If that was not sufficiently clear from the language of the clause, counsel argued, the adjudicator should find an implied term to that effect. The grievors' interpretation of the clause created a burden for the employer. The employer was not an "insurer," with the result that it had no responsibility for the fact that a valid marriage did not result from the Dominican wedding. It was of no concern to the employer what employees did with their time during their marriage leave, just as it was of no concern to it whether there was any need for as much as 40 hours' leave. The grievors' interpretation would cause hardship to the employer, which should lead the adjudicator to favour the employer's interpretation. In the course of her submissions, employer counsel referred to Palmer & Snyder, *Collective Agreement Arbitration in Canada*, 4th ed. (2009), at page 29, *Saigeon v. Treasury Board (Transport Canada),* PSSRB File Nos. 166-02-14486 and 14489 (19840316), and *Poole*.

Reasons

[8] According to the agreed statement of facts, when the grievors requested leave for July 2007, they were not legally married, despite having gone through a form of marriage in the Dominican Republic earlier that year. This result was attributable to errors by the Dominican authorities. The grievors had a good faith desire to correct that result. According to the agreed statement of facts, they were advised that the way to remedy the situation was to get married in Canada. There was no suggestion by the employer that that was not their intention when they requested the leave for July 2007.

[9] The language of clause 30.01(a) of the collective agreement, as it relates to those facts, is quite clear and unambiguous, in my view. According to that provision, the grievors were entitled to the marriage leave they requested. To quote from clause 30.01(a), they sought the leave "for the purpose of getting married." This is not a case of a grievor who was already married and sought marriage leave for some marriage-related purpose (although I note that, in *Central Care Corp.,* where the grievor had been legally married some three years earlier in a small civil ceremony, the union in that case successfully argued that she was entitled to paid marriage leave when she and her husband decided to go through a much larger religious ceremony in her home country with family and friends). The grievors' intention in the present case was simply to be legally married to each other, a status that, according to the agreed statement of facts, they had failed to achieve earlier in the year in the Dominican Republic. The facts in this case are so out of the ordinary that it is difficult to believe that the parties actually envisaged this situation when they negotiated clause 30.01(a). Nevertheless, given the language of the clause, it is impossible to interpret it as meaning that the grievors failed to qualify for the leave. It is trite law that the interpretation of a contract has to be grounded in the language used by the parties rather than in speculation about what they would likely have intended if they had directed their minds to the specific issue in dispute.

[10] The employer has argued that the grievors' interpretation would produce such an unreasonable and burdensome result for the employer that I should reject it. Without commenting on the employer's characterization of that result, I would note that hardship resulting from a particular interpretation is not, in itself, a reason to reject that interpretation. As is stated in Palmer & Snyder, at page 29, ". . . hardship is not a reason to alter a clear meaning," although it might be ". . . a reason to choose one of two equally plausible meanings."

[11] The employer has also argued that I should rule that the collective agreement contains an implied term according to which an employee could not benefit from marriage leave more than once in respect of the same union. In my view, there is no proper basis in this case for implying a term of the kind proposed by the employer. Implying a term in a collective agreement is not an exercise that is lightly undertaken. There must be some necessity to do so arising from the need to give efficacy to the agreement. I understand the employer's opposition to granting leave to the grievors in this case, but it falls well short of the required standard for finding an implied term.

[12] It follows that the grievances must be allowed.

[13] I heard no argument on what the appropriate remedy would be for this violation of the collective agreement. I note that the agreed statement of facts is vague as to the number of days of vacation leave the grievors took in July 2007 for the purpose of getting married. If they in fact took 40 hours' vacation leave, they are undoubtedly entitled to have those vacation leave credits restored. But if, after being denied marriage leave, they decided that they would take vacation leave for only a day or two, for example, the question arises whether the real measure of their compensable loss is limited to the vacation leave credits they used to cover their planned absence from work or extends to something more than that.

[14] In principle, a grievor is entitled to be compensated for a breach of the collective agreement by being placed in the position in which he or she would have been if the agreement had been fully respected. If the employer had complied with the agreement in the present case, the grievors would each have been granted 40 hours of paid leave without having to use their vacation leave credits, and without being subject to any restrictions at all as to how the time off work could be spent. I have therefore decided that the appropriate remedy in this case would be to grant each of the grievors 40 hours of vacation leave credits.

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

(The Order appears on the next page)

Order

[16] The grievances are granted and I order the employer to grant each of the grievors 40 hours of vacation leave credits.

May 22, 2013.

Michael Bendel,
adjudicator