

Date: 20130801

File: 566-02-5259

Citation: 2013 PSLRB 92



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

RUSSELL KIRBY

Grievor

and

**TREASURY BOARD
(Correctional Service of Canada)**

Employer

Indexed as

Kirby v. Treasury Board (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Stephan J. Bertrand, adjudicator

For the Grievor: Jack Haller, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada (UCCO-SACC-CSN) Atlantic

For the Employer: Allison Sephton, counsel

Heard at Moncton, New Brunswick,
February 27 and 28 and May 24, 2013.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Russell Kirby (“the grievor”) is a correctional officer who has been employed with the Correctional Service of Canada (“the employer”) since October 2006. On November 4, 2010, he filed a grievance because he felt that the employer’s decision to place him on an attendance awareness and management program (AAMP), which required him to provide a medical certificate every time he requested sick leave, violated clause 31.03 of the agreement between the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN, which expired on May 31, 2010 (“the collective agreement”).

[2] Clause 31.03 of the collective agreement must be read in conjunction with clause 31.02. Those provisions read as follows:

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

(a) he or she satisfies the Employer of this condition in such manner and at such time as may be determined by the Employer

and

(b) he or she has the necessary sick leave credits.

31.03 A statement signed by the employee stating that because of illness or injury he or she was unable to perform his or her duties, shall, when delivered to the Employer, be considered as meeting the requirements of paragraph 31.02(a). However, the Employer may ask for a medical certificate from an employee, when the Employer has observed a pattern in the sick leave usage.

[3] The employer has taken the position that it has the authority and responsibility to monitor its employees’ leave usage, that a pattern in the sick leave usage of the grievor had been observed and that, therefore, it was justified placing the grievor in the AAMP and requiring medical certificates from him when he requested sick leave.

[4] The employer denied the grievance at every level of the grievance procedure. It was eventually referred to adjudication on April 5, 2011. At the hearing, I was informed that a number of other similar grievances had been filed by other correctional officers and were awaiting adjudication. While the parties indicated that they were treating this matter as a test case, I am of the view that this decision applies

solely to the facts that were presented to me during the hearing. Nevertheless, the parties are at liberty to rely on this decision as they see fit, to resolve any outstanding grievances involving them.

II. Summary of the evidence

[5] At the hearing, I heard the testimonies of the grievor, of Jeff Earle, the warden of Springhill Institution, of Tara Harrison, a correctional officer, and of Sean McLeod, a correctional manager.

[6] The grievor testified that he was hired by the employer as a CX-01 correctional officer in October 2006 and that he joined its Springhill Institution, in Springhill, Nova Scotia, in December 2008.

[7] Shortly before joining the Springhill Institution, the grievor underwent surgery on a leg because of injuries he had suffered while competing in bobsled events. The surgery, which was performed on September 29, 2008, and the subsequent rehabilitation treatments, resulted in the grievor having to request 331.25 hours of sick leave, which the employer granted. He was off work, on certified sick leave, from September 26 to November 26, 2008. According to the grievor, he did not have the necessary sick leave credits at that time to cover the required 331.25 hours and had to borrow a significant amount of sick leave hours, which he could do under the provisions of clause 31.04 of the collective agreement. That clause reads as follows:

31.04 When an employee has insufficient or no credits to cover the granting of sick leave with pay under the provisions of clause 31.02, sick leave will be granted to the employee for a period of up to two hundred (200) hours, subject to the deduction of such advanced leave from any sick leave credits subsequently earned.

[8] According to the grievor, it meant that he was joining Springhill Institution with a substantial negative sick leave balance. In fact, a leave monitoring chart produced by the employer indicated that before joining Springhill Institution, the grievor had earned approximately 260 hours of sick leave credits over a period of roughly 26 months but that he had requested and been granted 423.75 hours of sick leave, 331.25 hours of which were related to his September 2008 surgery, 79.75 hours of which were related to other certified sick leave and 12.75 hours of which consisted of uncertified sick leave. That suggests that the grievor joined Springhill Institution with a negative sick leave balance of roughly 163 hours.

[9] The grievor indicated that had it not been for his leg surgery, he would have likely joined Springhill Institution with a positive sick leave balance in December 2008, a proposition that the leave monitoring chart seems to support.

[10] In April 2009, the employer put the AAMP in place in its Atlantic Region. According to its guidelines, its objective was to encourage communication between employees and management, to improve attendance in the workplace, and to create a healthy, safe and secure environment where employees would attend work regularly, as scheduled. Under the AAMP, supervisors and managers were expected to review unscheduled sick leave on a monthly basis and to note cumulative amounts, unusual duration, apparent excessive frequency and any significant history of patterns of usage that in their judgment was unusual. The guidelines also provided the following list of examples of absence patterns indicative of possible misuse or abuse by employees:

1. *Employees with a negative balance of sick leave.*
2. *Employees who use unscheduled leave for shift exchanges.*
3. *Employees who have used 3 or more separate occasions of Unscheduled Sick leave and/or Family Related Responsibility leave in a month.*
4. *A pattern of unscheduled leave is taken on the employee's first or last day of their work schedule.*
5. *A pattern of unscheduled leave is taken in conjunction with annual leave.*
6. *A pattern of using unscheduled leave is taken in conjunction with statutory holidays.*
7. *A pattern of unscheduled leave being used on a specific day of the week or a certain day each month over a period of several months.*
8. *A pattern of unscheduled leave coinciding with other events.*
9. *A pattern of unscheduled leave following double shifts, overtime.*

[11] Although the employer did not immediately enforce the AAMP, the warden of Springhill Institution, Mr. Earle, testified that in August 2009 the amount of sick leave requests and of resulting overtime assignments had reached levels that caused concern. According to him, one third of the correctional officers had a negative sick leave balance, which resulted in higher overtime costs and less productivity. However, no corroborating evidence was filed to support those statements.

[12] On September 14, 2009, Mr. Earle issued a memo to all staff announcing the implementation of the AAMP and providing details on the objective and on the responsibilities associated with it. The memo cautioned employees who had negative sick leave balances that a meeting with their supervisors would be scheduled shortly to discuss their sick leave accounts. For more information about the AAMP, employees were encouraged to consult the employer's "Standing Order 066."

[13] According to the grievor, a meeting was scheduled with his correctional manager, Mr. McLeod, but no real discussion ever took place. He was simply told that since he had a negative sick leave balance, his sick leave account would be referred to the AAMP committee and that he could expect to be required to certify all future sick leaves. The grievor testified that, during what he described as a very brief meeting, Mr. McLeod never inquired into his particular circumstances or referred to any unusual pattern with his past sick leave usage. Mr. McLeod confirmed as much when he testified. In fact, Mr. McLeod indicated that he had not reviewed the grievor's leave file or records before meeting with him, that he was unaware as to why or how the grievor had arrived at a negative sick leave balance, and that he had never inquired into it.

[14] On October 20, 2009, during a weekly management meeting, Mr. Earle informed the Springhill supervisors and managers that from that point on, employees were to be directed to certify all future sick leave absences when any of the following criteria were met:

- *A negative sick leave balance of 100 hours or greater;*
- *Staff who are still on probation having a negative sick leave balance;*
- *Staff showing negative balances who have continued to use sick leave since participating in discussion with their immediate supervisor or delegate.*

[15] According to Mr. Earle's testimony, carrying a negative sick leave balance of more than 100 hours was excessive and was something that the AAMP ought to capture. He was of the view that a negative sick leave balance essentially consisted of a loan or an overdraft on an employee's sick leave account.

[16] On October 23, 2009, the grievor received a formal notice from Mr. McLeod informing him that since he had a negative sick leave balance, that all future sick leave would have to be certified by a medical practitioner and that the requirement would

remain in effect until his sick leave account returned to a positive balance. That notification made no reference to a 100-hour threshold. In cross-examination, Mr. McLeod admitted that since he had never reviewed the grievor's leave file or inquired into why or how he had arrived at a negative sick leave balance, the only reason for requiring the certification of all future sick leave requests was the fact that the grievor had a negative sick leave balance. Mr. McLeod neither looked into other examples of a pattern nor referred to any during his testimony. He also admitted that he had not noticed any absences of unusual duration or any correlation between the grievor's use of sick leave and his behaviour. His only concern was the apparent excessive frequency of the grievor's sick leave requests and the resulting negative balance in his sick leave account.

[17] Between December 2008, when the grievor joined Springhill Institution, and October 23, 2009, when he was informed of the requirement to certify all future sick leaves, the grievor had earned approximately 110 hours of sick leave credits and had used approximately 75 hours of uncertified sick leave credits. While he had earned more than he had used during that 11-month period, the grievor recognized that he still carried a significant negative balance at that time, most of which was attributable to the September 2008 surgery to his leg.

[18] The grievor indicated that the requirement to certify all his sick leave requests has remained in effect since October 23, 2009, as he has been unable to bring his sick leave account to a positive balance, in great part because of three subsequent surgeries he underwent. According to the evidence, two hernia surgeries and a vasectomy accounted for approximately 231 hours of certified sick leave that were requested and granted to the grievor after October 2008.

[19] Under cross-examination, Mr. Earle admitted that the main reason for requiring the grievor to provide medical certificates for all future sick leaves was his negative sick leave balance and added that the fact that the grievor failed to show improvements by using the credits he earned in recent years to return his sick leave account to a positive balance was of concern to him. He did not refer to or comment on the grievor's post-October 2008 surgeries.

[20] According to the grievor's calculation, he has requested and been granted only 79.25 hours of uncertified sick leave during his 6 years with the employer. However, it

must be noted that all leave post-October 23, 2009 had to be certified as a result of his being placed on the AAMP.

[21] Finally, the grievor indicated that he feels that he has been treated unfairly given his medical history and that he should not be required to certify his sick leaves simply because he has a negative sick leave balance, especially given the absence of a pattern in his sick leave usage. He deplors the fact that every time he has a migraine or the flu, he must attend his doctor's office and obtain a medical certificate within 10 days, failing which his leave request will be considered unauthorized and he will receive no pay. He added that, in his view, he has not abused or misused his sick leave credits and that his negative sick leave balance is for the most part due to the four surgeries he had to undergo during the past three years.

III. Summary of the arguments

A. For the grievor

[22] The grievor argued that a precondition for requiring an employee to provide a medical certificate when requesting sick leave under clause 31.03 of the collective agreement is the observation by the employer of a pattern in the employee's sick leave usage. According to the grievor, that requires the employer to demonstrate the pattern it has observed before requiring medical certificates from its employees.

[23] The grievor's contention is that, in this case, the employer did not observe any pattern before requiring medical certification from him and that it considered but a single factor before imposing such a requirement, that is, his negative sick leave balance. According to the grievor, that does not constitute, in and of itself, a pattern, and therefore, it violates clause 31.03 of the collective agreement.

[24] The grievor argued that clause 31.03 of the collective agreement contemplates a predictable and consistent behaviour on the part of an employee about the usage of his or her sick leave and that simply having a negative sick leave balance cannot be considered a pattern.

[25] According to the grievor, what put him in a negative sick leave balance, and has kept him there since, are four surgical interventions, over which he had no control. He argued that he should not be penalized or treated differently because he had to be operated on four times over a period of three years.

[26] The grievor contended that since the employer failed to demonstrate the observance of a pattern in his sick leave usage, placing him on the AAMP and requiring a medical certificate each and every time he requested sick leave until his sick leave account returned to a positive balance is a clear violation of clause 31.03 of the collective agreement.

B. For the employer

[27] The employer argued that it has an inherent right to manage its operations and, by the same token, absences in the workplace. It argued that the AAMP's aim is to effectively manage the use of sick leave in the workplace.

[28] The employer also argued that, under clause 31.03 of the collective agreement, it has the right to require its employees to provide medical certificates.

[29] According to the employer, while clause 31.03 of the collective agreement refers to an observable pattern, the collective agreement does not define what constitutes a pattern. In determining the meaning of the word "pattern," it argued that I should be guided by a bulletin it issued in November 2006, which stated the following:

A pattern can be defined further to a review of sick leave records, taking particular care to note the cumulative amounts, unusual duration, apparent excessive frequency and any correlation between the usage and behaviour over time, which appears to be unusual.

[30] The employer also referred me to the definition of the word "pattern" in the Merriam-Webster Dictionary, which defines it as follows: "... a reliable sample of traits, acts, tendencies, or other observable characteristics of a person, group, or institution."

[31] The employer argued that the pattern that had been observed in the grievor's case was the cumulative amount of sick leave being claimed. It added that, in such cases, an employer enjoys a continuing right to look into and monitor its employees' absenteeisms.

[32] The employer suggested that the onus was on the grievor to prove that he had legitimate reasons to be absent from work and that it was incumbent on him to offer an explanation as to his use of sick leave and to bring the surgeries he had undergone to the attention of management, all of which he had failed to do.

[33] According to the employer, sick leave credits are a benefit rather than a right, and legitimate efforts on its part to control absences in the workplace and to ensure the proper use of sick leave credits ought not to be viewed as a violation of the collective agreement.

[34] The employer argued that the fact that the grievor had a negative sick leave balance and that he failed to return his sick leave account to a positive balance, despite earning 10 hours of sick leave credits per month, justified requiring the medical certificates and keeping that requirement in place.

[35] The employer referred me to the following authorities: *Bencharski v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 75; *Honda Canada Inc. v. Keays*, 2008 SCC 39; *Salvation Army Grace Hospital and U.N.A. Loc. 47, Re*, [1995] A.G.A.A. No. 4; *Alcan Smelters and Chemicals Ltd. And Canadian Auto Workers, Local 2301 (Pegley Grievance)*, [1997] B.C.C.A.A.A. No. 285; *Dashwood Industries Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 3054 (Innes Grievance)*, [1998] O.L.A.A. No. 430; *Re City of Toronto and Canadian Union of Public Employees, Local 43*, [1987] O.L.A.A. No. 51 and *Toronto Hydro v. Canadian Union of Public Employees, Local 1* [2003] O.L.A.A. No. 573.

IV. Reasons

[36] As I stated at the outset, the collective agreement that applies to this matter is the agreement between the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN, which expired on May 31, 2010. The AAMP is not part of or otherwise incorporated into that collective agreement. The sole question before me is whether or not certain provisions of the collective agreement have been violated by the imposition of an employer policy. To answer this question, I must determine whether or not there was a pattern that justified the employer's requirement for certification of medical leave every time leave is requested, upon the grievor having attained a negative sick leave balance.

[37] While I do not disagree with the well-intended objectives of the AAMP, the bottom line is that the implementation and application of such a program cannot infringe on the negotiated terms of the collective agreement, particularly article 31.

[38] There is no doubt that the employer has the right to manage its operations and to request medical notes when it has cause to believe that its employees are not using

their sick leave credits for their intended purposes. That is essentially what clause 31.03 of the collective agreement purports to do by allowing the employer to require a medical certificate when a particular pattern in the usage of its employees' sick leave usage has been observed. The employer is not at liberty to exercise the right to manage its operation in a manner that is inconsistent with that clause.

[39] According to the employer, a pattern should be observed following a review of an employee's sick leave records, taking particular care to note the cumulative amounts, unusual duration, apparent excessive frequency, and any unusual correlation between the usage and the employee's behaviour over time. In this case, Mr. McLeod indicated that he had never reviewed the grievor's leave file or records and that he was unaware as to why or how the grievor had arrived at a negative sick leave balance. He provided no evidence of a pattern with respect to the grievor's use of sick leave, other than the fact that he had a negative sick leave balance in October 2009. Nevertheless, he required the grievor to certify all future sick leave requests until his sick leave account returned to a positive balance. In my view, that is not indicative of any pattern whatsoever and is a clear violation of clause 31.03 of the collective agreement.

[40] I do not share the employer's position that it was incumbent on the grievor to offer an explanation of his use of sick leave and to raise with management the surgeries he had undergone. Under clause 31.03 of the collective agreement, an employee's onus of establishing that he or she has a legitimate reason to be absent is satisfied once the employee has provided the employer with a signed statement affirming that he or she was unable to perform his or her duties because of illness or injury. The observation by the employer of a pattern in the use of sick leave by the employee is a precondition for requiring an employee to provide a medical certificate when requesting sick leave under that clause. That requires the employer to, at the very least, assert the pattern it has observed before imposing the requirement to provide medical certification. The grievor's medical history was easily verifiable through his sick leave records and was available to the employer at all times. In any event, given the position taken by the employer in its memo of October 23, 2009, and the earlier directions of Mr. Earle to Springhill management, I doubt that bringing the surgeries to its attention would have made any difference.

[41] While the employer argued that the pattern that had been observed in the grievor's case was the cumulative amounts of sick leave being claimed, that is not what

the evidence demonstrated. Based on the evidence I have seen and heard during the course of the hearing, the employer relied on only one ground to place the grievor on the AAMP and to require that he certify his sick leaves: his negative sick leave balance. That is obvious from reading the sole notification the grievor received on the requirement to certify all future sick leave. Mr. McLeod's memo of October 23, 2009 referred to only one reason for requiring certification and made it clear that the requirement would remain in effect until the grievor's sick leave account returned to a positive balance.

[42] No evidence was placed before me to suggest that the grievor's leave records were reassessed at some further date and that the employer observed some other pattern that justified keeping in place the requirement to certify all sick leave requests. The sole observation that was communicated to the grievor stems from the October 23, 2009 memo, which refers only to his negative sick leave balance.

[43] Displaying a negative sick leave balance, in and of itself, is not in my view a pattern. If it were, the employer would have included language to that effect in clause 31.04 of the collective agreement, but it did not. In fact, clause 31.04 states that the employer will grant up to 200 hours of sick leave when an employee has no credits, without requiring certification. Obviously, granting 200 hours of sick leave to an employee who has no sick leave credits will create a negative sick leave balance, yet no certification is required under clause 31.04. That fact strongly suggests that the negative balance that would automatically result from requesting and being granted sick leave credits under clause 31.04 should not be considered a pattern. Having a negative sick leave balance is not, in and of itself, a reliable sample of a person's traits, acts, tendencies or observable characteristics; nor is it automatically indicative of an unusual behavior, duration or frequency.

[44] This is not a case in which an employer required a medical certificate in connection with a specific sick leave request, to determine whether the alleged sickness was *bona fide* or what impact it would have had on the employee's work attendance. Rather, this case pertains to a requirement to certify all sick leave requests until such time as the employee's sick leave account displays a positive balance. The employer did not present any compelling evidence that suggested that the grievor misused or abused his sick leave credits; nor did it establish that he had exhibited any of the nine examples of absence patterns listed in the AAMP guidelines (see

paragraph 10 of this decision), with the exception of one, having a negative sick leave balance.

[45] In this case, it is obvious that what caused the grievor to have a negative sick leave balance in October 2009 and has kept his sick leave account in the negative are the four surgeries he had between September 2008 and May 2012. They account for roughly 562 hours over a period of 44 months, a period during which the grievor could have earned no more than 440 hours of sick leave credits, without taking one day of sick leave. They were not events over which the grievor had any control and should not be considered a pattern for any intent or purpose. I am of the view that a requirement to medically certify all sick leave absences once an employee has reached a certain threshold, in this case a negative sick leave balance, is contrary to the collective agreement.

[46] If the employer was concerned with granting up to 200 hours of sick leave to its employees who have no sick credits and considered such action and its resulting effect to represent a pattern, it should have included language in clause 31.04 of the collective agreement requiring medical certificates. It did not and must now live up to the terms and conditions of employment it negotiated. Nothing prevents the employer from proposing such language during the negotiations in the next bargaining round.

[47] The present grievance differs from those authorities cited by the respondent in that it does not display a failure by an employee to follow an order or to adequately explain an absence when asked to do so, nor does it arise in the context of progressive discipline. Rather, this grievance deals with a clause in the collective agreement that organized the fashion in which medical absences would be addressed, as well as the exception through which the employer could ask for certified medical leave, as a matter of course.

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

(The Order appears on the next page)

V. Order

[49] The grievance is allowed.

[50] I declare that the employer's direction requiring the grievor to provide a medical certificate each time he is absent from work due to illness, simply because he has a negative sick leave balance, and to continue to provide such certificates until his sick leave account returns to a positive balance, violates clause 31.03 of the collective agreement.

[51] I order the employer to cease and desist from keeping that requirement in place simply because the grievor's sick leave account has a negative balance.

August 1, 2013.

**Stephan J. Bertrand,
adjudicator**