Date: 20141006

File: 566-02-8135

Citation: 2014 PSLRB 91

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

PAUL VIDLAK

Grievor

and

TREASURY BOARD
(Department of Human Resources and Skills Development)

Employer

Indexed as
Vidlak v. Treasury Board (Department of Human Resources and Skills Development)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Margaret T.A. Shannon, adjudicator

For the Grievor: Dan Fisher, Public Service Alliance of Canada

For the Employer: Vanessa Reshitnyk, counsel

Heard at Ottawa, Ontario,
June 17, 2014.

I. Individual grievance referred to adjudication

[1] The grievor, Paul Vidlak, alleged that the employer violated clause 39.02 of the collective agreement between the Treasury Board and the Public Service Alliance of Canada ("the bargaining agent") for the Technical Services Group (all employees); expiry date, June 21, 2011 ("the collective agreement"). The grievor alleged that the employer, Human Resources and Skills Development Canada, refused to grant a period of certified sick leave, which, had it been allowed, would have required deferring his anticipated retirement date.

II. Summary of the evidence

[2] When he filed this grievance, the grievor was employed by the employer as a labour standards officer. He had 30 years of service with the public service. In the past, he had been paid out for his accumulated vacation leave rather than taking time off. The employer denied his request for a payout of his vacation in 2011 as there were no funds for that purpose. It agreed to find the necessary funds if the grievor submitted an anticipated retirement date. The grievor had been counting on the vacation leave payout and had in fact committed this money to a particular purpose. As a result, needing the money and not wishing to take time off in the winter, he worked with the employer's compensation office to determine the appropriate date on which to retire (see Exhibit 5, page 2). In November 2011, the grievor submitted his notice of retirement, to be effective on July 19, 2012, which notice was accepted by the employer.

[3] On February 9, 2012, the grievor contacted Gaston Martin, his manager, to advise him that he had been revisiting his situation with respect to retirement and inquired about the possibility of pre-retirement leave (see Exhibit 6). He submitted his application for pre-retirement leave for the period from May 7, 2012, to May 7, 2014 (Exhibit 7), to Mr. Martin, who supported the request (see Exhibit 6). The grievor submitted his request because his doctor felt that it would be beneficial for him to work part-time rather than retire. The request for pre-retirement leave was put on hold on March 2, 2012, at the grievor's request, pending the outcome of further medical tests (see Exhibit 9). The employer therefore did not respond to the grievor's request, and the July 19, 2012 retirement date was considered binding by it.

[4] In June 2012, the grievor's health declined. He was undergoing radiation treatment for cancer following surgery in 2011. His doctor gave him a medical

certificate indicating that he would require at least a month to recuperate from the side effects of the radiation treatment, which was due to be completed in early July (see Exhibit 8). In an email to the employer (Exhibit 8), the grievor inquired as to the status of his request for pre-retirement leave and sought the employer's agreement that should it be granted, it would start only at the end of the period of certified sick leave. The employer responded via email (Exhibit 10) that the retirement date of July 19, 2012, was firm and that it was not affected by the medical certificate. However, based on the medical certificate submitted, he was granted sick leave until July 19, 2012 (see the application for leave; Exhibit 12).

[5] The grievor submitted an initial request for sick leave from July 11, 2012, to August 10, 2012, which the employer unilaterally changed to July 19, 2012. Despite that change, the grievor submitted two further medical certificates, which he believed entitled him to sick leave until November 13, 2012 (see Exhibit 13). The grievor seeks to be paid for the period of July 19, 2012, to and including November 13, 2012, as sick leave. He argued that he was entitled to change his retirement date when he did because, at the relevant time, he was still an employee. He intended to remain an employee until he was fit to work or had exhausted his sick leave bank.

[6] The bargaining agent's local president followed up with the employer on the grievor's behalf, seeking the source of the employer's authority to refuse to defer the grievor's retirement date, given the circumstances (see Exhibit 14). The response she received was that the grievor had submitted his retirement date in writing via email on November 8, 2011, and that the employer had accepted it and had approved it on that same date. Consequently, the date on which the grievor chose to retire stood (see Exhibit 14).

[7] The grievor did not consider retiring until the employer refused to pay out his accumulated annual leave. Given that he had 30 years with the public service, it was reasonable to assume that he would retire within a couple of years. He attended the retirement planning course offered by the employer in 2010 but had no particular date in mind. The date of July 19, 2012, was worked out with the employer's compensation analyst, taking into account his accumulated leave. Everything was done by email; the grievor spoke to no one else about his retirement options. He had no time to reflect on what he was doing, particularly given his intention to secure a payout of his annual leave in order to meet his financial obligations. When he requested sick leave until

August 10, 2012, the grievor knew that the employer expected him to retire on July 19, 2012, which was approximately one week after the date on which the sick leave began.

[8] Barbara Golding was the grievor's manager between August and November 2011 and from February 2012 until his retirement in July 2012. She approved his retirement date of July 19, 2012, as he had requested. This date was calculated based on the liquidation of all his accumulated leave. His last day in the office was to be May 4, 2012 (see Exhibit 5). Prior to receiving the email notification of his retirement from the grievor (Exhibit 5), Ms. Golding was aware of the grievor's intention to retire and sought to backfill his position in April 2011. Managers need to know their employees' retirement plans for succession planning, staffing, training and budget purposes.

[9] In August 2011, Ms. Golding met with the grievor to confirm his retirement date and to discuss the liquidation of his vacation. The practice in the employer's Ontario Region was not to pay out vacation. The collective agreement allowed for a carryover of 262.5 hours of vacation from year to year. Ms. Golding's expectation is that employees will take their leave in order to avoid a payout of any time in excess of that maximum amount of leave. At the meeting, the grievor raised his plan to retire and indicated that he would be moving west. He had taken leave to travel west to find a place to live. The grievor asked to be allowed to cash out his leave, which Ms. Golding did, since he was retiring.

[10] At the end of fiscal year 2011-2012, the grievor was paid out 262.5 hours of vacation. The rest was carried over and used as part of the calculation of his retirement date.

[11] In February 2012, Ms. Golding received the grievor's request for pre-retirement leave, which his supervisor had endorsed. She did not process this request and held it pending the determination of his medical situation as the grievor had informed her that he was reconsidering the request. However, the July 19, 2012, retirement date remained firm since he had not indicated his intention to cancel his retirement plans. Around the time he filed his application for pre-retirement leave, he put in a request for annual leave (see Exhibit 11, page 2). When the request for pre-retirement leave was cancelled, the request for vacation was also cancelled, and the payout of the leave was reinstated.

[12] At no time did the grievor attempt to rescind his retirement date. Even if he had, only the assistant deputy minister had the authority to agree to rescind a retirement date that management had accepted (see Exhibit 15, tab 4). Ms. Golding had the authority to accept the grievor's resignation but not to allow him to rescind it.

[13] When the grievor was advised of that fact, he asked to reinstate his request for pre-retirement leave and to amend his retirement date. He proposed to start his pre-retirement leave in July 2012, which was denied. He was advised that his retirement date of July 19, 2012, was firm (see the emails in Exhibit 15, tab 5). Ms. Golding then signed the grievor's request for pre-retirement leave (Exhibit 7), denying it. When she received the grievor's request for sick leave on July 3, 2012 (Exhibit 8), she approved only sufficient sick leave to get him through to his retirement date (see Exhibit 12), even though his bank of sick leave exceeded the amount requested. As of July 19, 2012, the grievor was no longer an employee and therefore was not entitled to use sick leave.

III. Summary of the arguments

A. For the grievor

[14] The grievor satisfied all the conditions of clause 39.02 of the collective agreement. When he applied for sick leave in July 2012, he had sufficient credits to cover the period requested. Nothing in that clause stipulates that a retirement date supersedes a request for sick leave. The grievor had every right to avail himself of sick leave until it was no longer certified.

[15] The grievance is clear. The grievor's employee status had to be maintained until he exhausted his accumulated sick leave credits. There is no evidence that he sought sick leave beyond the November date identified in his doctor's certificates submitted as Exhibit 13. The grievor's circumstances had changed. The July 19, 2012, date in Exhibit 5 was calculated based on him using his vacation leave between May 4 and July 19, 2012. He did in fact go on leave on May 4, 2012, as planned, and used vacation leave until he submitted his request for sick leave on July 3, 2012. The issue is whether the grievor was entitled to use sick leave credits past July 19, 2012.

[16] In his email (Exhibit 6), Mr. Martin indicates that the grievor's retirement date was flexible by supporting the grievor's application for pre-retirement leave.

[17] In *Currie v. Treasury Board (Agriculture Canada)*, PSSRB File No. 166-02-14576 (19850521), the grievor in that case sought to exhaust his sick leave credits prior to retirement following an injury on duty, which rendered him incapable of performing the full extent of his duties. The grievor agreed to retire voluntarily if he could first exhaust his sick leave credits. The employer refused, and the grievor retired. Initially the adjudicator dismissed the grievance however the grievance was later allowed following an application for judicial review before the Federal Court of Appeal. The grievor was allowed to exhaust his sick leave, following which he retired.

[18] The grievor in the present case stated that he is not aware of anything that would have precluded him from using sick leave as he requested. The collective agreement management rights clause does not give the employer the right to do anything other than allow him to use his sick leave. This is supported by the decision in *Partridge v. Treasury Board (Solicitor General)*, PSSRB File No. 166-02-15088 (19851216), in which the grievor had specified his retirement date and then fell sick. He attempted to change his retirement date, but that change was denied. His grievance was allowed by the adjudicator.

[19] At the time the grievor made his request for sick leave, he had sufficient leave to cover the period requested. According to paragraph 31 of *Partridge*, he was entitled to any and all rights of an employee under the collective agreement, including the right to use sick leave credits. The obligation on the employer to grant this leave is mandatory. The grievor has met the test in clause 39.02 of the collective agreement. He has established that he had sufficient sick leave to carry him to the end of the dates indicated on the medical certificates, which trumped his anticipated retirement date. The case law recognizes that when leave extends beyond a set retirement date, the employee is entitled to use it before retiring.

B. For the employer

[20] The question to be answered is whether the employer violated clause 39.02 of the collective agreement when it refused to delay the grievor’s retirement date in order to allow him to exhaust his sick leave credits before his retirement. The collective agreement is clear and unambiguous. There is no entitlement to exhaust sick leave prior to retirement. When interpreting a collective agreement, an adjudicator must give its wording its ordinary and plain meaning unless that leads to an absurdity or repugnancy. If faced with two equally reasonable interpretations, an adjudicator must

determine the parties' intent (see Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, at 4:2000, 4:2100 and 2:3220).

[21] When rendering a decision on a collective agreement or arbitral award question, an adjudicator shall not modify the collective agreement (see *Professional Institute of the Public Service v. National Research Council of Canada,* 2013 PSLRB 88, at para 60). In addition to the collective agreement, an adjudicator must also apply the relevant legislation (see *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324 (O.P.S.E.U.)*, 2003 SCC 42, at para 24 to 30, and *Spencer v. Canada (Attorney General)*, 2008 FC 1395, at para 30). In this case, the relevant legislation is the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*), and the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*).

[22] Clause 39.02 of the collective agreement must be read in the broader context of the labour relations scheme under which it arose. Clause 39.02 states that an <u>employee</u> shall be granted sick leave. Clause 2.01 defines "employee" as ". . . a person so defined in the *Public Service Labour Relations Act* and who is a member of the bargaining unit specified in Article 9" of the collective agreement. Subsection 2(1) of the *PSLRA* defines an employee as someone who is employed in the public service. In order to qualify for sick leave under clause 39.02 of the collective agreement, an individual making the request must be employed in the public service.

[23] The grievor ceased to be employed on July 19, 2012, when he retired. Therefore, he did not meet the requirements of clause 39.02 of the collective agreement to qualify for paid sick leave. The Public Service Labour Relations Board ("the Board") lacks jurisdiction to deal with issues arising from resignations. Likewise, it lacks jurisdiction over matters arising from an employee's retirement, which is akin to a resignation (see *Hassard v. Treasury Board (Correctional Service of Canada)*, 2014 PSLRB 32, at para 198). The Board has established that an employee ceases to be an employee on the date confirmed by the deputy head as the employee's retirement date, pursuant to section 63 of the *PSEA* (see *Mutart v. Treasury Board (Department of Public Works and Government Services)*, 2013 PSLRB 90, at para 94; application for judicial review dismissed in 2014 FC 540).

[24] The grievor's argument ignores the impact of section 63 of the *PSEA* and its effect, as discussed in *Mutart*. One cannot interpret the collective agreement so as to undermine the legal framework under which it was negotiated, which the bargaining

agent recognized in article 5 of the collective agreement, which is entitled *Precedence of Legislation and the Collective Agreement*. The grievor's interpretation goes beyond the plain meaning of the collective agreement and confers significant benefit on him beyond what the parties intended to confer.

[25] The facts of this case are simple. Nothing obligated the employer to agree to postpone the grievor's retirement date. The delegated authority accepted a genuine resignation. Pursuant to section 63 of the *PSEA*, the grievor ceased to be employed in the public service on that date.

[26] The grievor was given the opportunity to amend his retirement date when he first discussed putting his application for pre-retirement leave on hold. He chose not to; he directed Ms. Golding to put off processing his request for pre-retirement leave and confirmed July 19, 2012, as his retirement date. There is no evidence that the parties renegotiated that date. There was no challenge to Ms. Golding's authority to accept the grievor's proposed retirement date. The grievor's decision to retire was voluntary; he was aware of his illness at the time he chose the date. The fact that the grievor might have been under stress when he decided to retire does not equate to being coerced or being under duress (see *Hassard*, at para 164). The grievor made a deliberate decision. He had plenty of time to ponder it, yet he did not change it. It was his deliberate decision, and his resignation was voluntary (see *Rinke v. Canadian Food Inspection Agency*, 2004 PSSRB 143, at para 182).

[27] There is no evidence of extenuating circumstances that would justify not holding the grievor to his stated retirement date (see *Robertson v. Deputy Head (Department of National Defence)*, 2014 PSLRB 63, at para 60). The employer hired and trained another employee to backfill the grievor's position in anticipation of his retirement. Keeping him on past his retirement date would have posed a financial burden on the employer.

[28] The *Partridge* case may be distinguished on its facts from this case. At paragraph 30, it states that the parties agreed to delay the retirement date at issue by one month. In this case, there was no evidence of such a mutual reconsideration. In fact, in his email (Exhibit 11), the grievor again confirmed the July 19, 2012, date. The parties did nothing between March and July to indicate that the specified retirement date was waived or amended.

[29] Likewise, the *Currie* case can be distinguished from the grievor's situation. Mr. Currie was injured on duty and agreed to retire voluntarily if he were allowed to use sick leave until his retirement date, which the employer's policies allowed. The intention in the *Currie* case was to allow the grievor in that case to exhaust his sick leave before he went on medical retirement. That is not so in this case.

IV. <u>Reasons</u>

[30] The employer's representative was correct in her analysis that to qualify for sick leave benefits, the grievor had to establish that, for the period requested, he was or would still be an employee and that he was a member of the bargaining unit, as per clause 39.02 of the collective agreement, which reads as follows:

> ***39.02*** *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] The grievor's representative was also correct in his analysis that that provision is a mandatory provision and that the employer has no discretion over it once the criteria are met. However, as argued by the employer's representative, this provision is mandatory only if the grievor satisfies the three conditions outlined in the clause, which are that he is an employee, that he satisfies the employer of the necessity of the leave and that he has sufficient credits to cover the term of the leave. In this case, the parties agreed that the grievor has met two of the three conditions.

[32] The parties disagreed on whether or not the grievor, as an employee at the time that he made his claim for sick leave, was entitled to postpone his retirement date based on the fact that he had in hand a medical certificate which certified that he was unable to work past his scheduled retirement date. The grievor claimed that he was so entitled given that he met the requirements of paragraph 39.02 of the collective agreement at the time that he made the claim. The employer, on the other hand, argued that the grievor only met the requirements of paragraph 39.02 up to the date of his retirement and was therefore ineligible to claim sick leave beyond that date. To

help determine the answer to this question, the employer's representative was correct in stating that one must look to the collective agreement for the definition of "employee." Article 2 of the collective agreement defines employee as ". . . a person so defined in the *Public Service Labour Relations Act* and who is a member of the bargaining unit specified in Article 9." The *PSLRA* defines an employee as follows:

Interpretation

> ***2.*** *(1) The following definitions apply in this Act.*
>
> . . .
>
> *"employee", except in Part 2, means a person employed in the public service, other than*
>
> *(*a*) a person appointed by the Governor in Council under an Act of Parliament to a statutory position described in that Act;*
>
> *(*b*) a person locally engaged outside Canada;*
>
> *(*c*) a person not ordinarily required to work more than one third of the normal period for persons doing similar work;*
>
> *(*d*) a person who is a member or special constable of the Royal Canadian Mounted Police or who is employed by that force under terms and conditions substantially the same as those of one of its members;*
>
> *(*e*) a person employed in the Canadian Security Intelligence Service who does not perform duties of a clerical or secretarial nature;*
>
> *(*f*) a person employed on a casual basis;*
>
> *(*g*) a person employed on a term basis, unless the term of employment is for a period of three months or more or the person has been so employed for a period of three months or more;*
>
> *(*h*) a person employed by the Board;*
>
> *(*i*) a person who occupies a managerial or confidential position; or*
>
> *(*j*) a person who is employed under a program designated by the employer as a student employment program.*

[33] There is no argument that when he submitted the initial doctor's note (Exhibit 12), the grievor met the definition of "employee" in the collective agreement. The employer argued that the collective agreement was not violated, as the grievor was granted sick leave for the period covered by the doctor's note during which he was an employee. According to the employer's argument, the grievor ceased to be an employee on July 19, 2012, when he retired. The grievor argued that this date should have been postponed based on the doctor's note and subsequent doctor's notes (Exhibit 13), based on *Partridge*.

[34] I disagree with the grievor's argument. Nothing in clause 39.02 of the collective agreement refers to retirement; nor is there anything elsewhere in the collective agreement that requires the employer to postpone an agreed-upon retirement date. This is not the same situation as in the *Currie* decision, in which the grievor was allowed to exhaust his sick leave before taking medical retirement. In *Currie* the grievor was already on approved sick leave when he made the decision to retire. In the case before me the facts are reversed.

[35] Although the grievor relied upon this Board's predecessor's decision in *Partridge*, I find that this decision also differs significantly from the present one. In *Partridge*, the grievor found himself in the same position as Mr. Vidlak: following the establishment of his retirement date, the grievor fell ill and sought to obtain sick leave and defer his retirement date. The adjudicator in that case found in favour of the grievor but only because of a key factual finding on his part:

> *(30) Ostensibly, the mutual action of the parties to terminate the employment relationship was agreed to take place at a future date (i. e. 4 October 1984). Before that date arrived, Partidge asked for reconsideration and the employer consented, or offered to delay for a month. It is my opinion that by such actions both parties indicated their willingness to recall or set aside their mutually agreed action to terminate the contract of employment. To me, it is not of crucial importance that the one party now claims it only meant to set aside for as long as one month its consent to the termination of the other's employment. It takes a mutual agreement or action to terminate a contract of employment. Both parties were willing to waive what had been agreed upon. The mutual agreement to terminate was, therefore, no longer in existence and it follows that the original contract of employment must still be in force on 4 October 1984.*

Thus, in *Partridge*, the adjudicator found that there had been a mutual agreement on the part of the parties to set aside the mutually agreed retirement. No such agreement exists in this case, nor is any even alleged.

[36] As was confirmed by this Board recently in *Mangat v. Canada Revenue Agency,* 2010 PSLRB 86, if a resignation is valid, I have no jurisdiction over it. The grievor made no attempt to claim that his actions were taken under duress or any type of psychological incapacity. Nor did the grievor challenge the legitimacy of his intent to retire.

[37] Retirement is a voluntary resignation from the public service governed by the *PSEA* (see *Mutart*, at para 92). The grievor submitted via email his notice that he would retire on July 19, 2012, which the manager with the delegated authority accepted. The grievor's further actions confirmed his intention to retire on that date. There is no indication from the evidence that the grievor requested that the assistant deputy minister postpone this date; even if he had the assistant deputy minister had full authority to refuse. Nor is there any evidence that the assistant deputy minister agreed to defer the grievor's retirement date until he had exhausted his sick leave or until he was certified capable of returning to work. The conclusion is that effective July 19, 2012, the grievor was no longer employed in the public service. Hence, he did not meet the third criteria to qualify for sick leave under clause 39.02 of the collective agreement. In the absence of any obligation on the employer to postpone the grievor's retirement until the end of his sick leave, the existence of which the grievor has failed to establish, there has been no violation of the collective agreement.

[38] I read with interest the numerous decisions provided in support of both parties' arguments. While I have not cited and addressed each and every one, I have taken them into consideration in coming to my conclusion.

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

(The Order appears on the next page)

V. Order

[40] The grievance is dismissed.

October 6, 2014.

Margaret T.A. Shannon,
adjudicator