File: 166-2-26833

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

KENNETH JOHN HESTER

Grievor

and

TREASURY BOARD
(Transport Canada)

Employer

Before: Albert S. Burke, Board Member

For the Grievor: James L. Shields, Counsel, for the International Brotherhood of Electrical Workers, Local 2228

For the Employer: Jock Climie, Student-at-Law

Heard at Winnipeg, Manitoba,
May 2, 1996.

This grievance, Board file 166-2-26833, was referred to adjudication by Mr. Kenneth John Hester who is employed by Transport Canada, at the Winnipeg Airport in the electronics group as an EL-06. His grievance reads as follows:

> *Annual leave requested for April 08 1995.*
>
> *Leave was denied by supervisor, contrary to the terms of the EL collective agreement.*
>
> *Verbal reason for denial of leave was: "There is no money in overtime budget."*
>
> *Neither denial of leave or reasons for denial were provided to me in writing as requested.*
>
> *Corrective Action Requested*
>
> *1) That in the future, leave not be denied unless there truly is an operational requirement.*
>
> *2) That in the future, the employer give reasons for denial in writing.*
>
> *3) Leave as requested.*

Counsel for the grievor stated at the hearing that the only issue to be dealt with is the denial of leave due to operational requirements.

Counsel for the grievor then called the grievor as his first witness. The witness said he has been employed by Transport Canada since 1975 and has been a Technical Duty Manager (EL-06) since 1983.

The witness said he submitted an annual leave form on March 21, 1995 for one day's annual leave for April 8, 1995. Counsel for the grievor introduced two shift schedules covering the months of March and April 1995 (Exhibit G-2(a) and (b)). The witness identified the exhibits as the schedules that were posted to cover the shifts where he worked. The witness said April 8 was a Saturday. He also said the ELs work eight-hour shifts that cover a 24-hour period, each day of the week.

On March 22, 1995, the witness said he was told by his supervisor, Mr. Don Sauvé, that his request for annual leave for April 8 was being denied because

there was no overtime money in the budget to cover that day. The witness said he requested the reasons in writing but Mr. Sauvé refused.

On March 23, 1995, the witness said he was called into Mr. Sauvé's office and told that all leave requests that affected a day when there was only a single person on shift would require 30 days advance notice. The witness said there is no clause in the collective agreement to that effect, nor any departmental policy to that effect, and that this was the first time that this was being applied.

The witness said he had often worked overtime shifts to cover other employees who were away on leave and this was prior to and after his requested leave for April 8, 1995.

During cross-examination, the witness confirmed that he understood the shift schedules at his workplace, that it was a 24-hour operation, that there were six duty officers to cover the shifts and to the best of his knowledge they were fully staffed at the time in question. The witness said the normal practice is that if one duty officer requests leave, then another duty officer is assigned an overtime shift to cover that leave. He said he is aware of the provision in the collective agreement where staff can exchange shifts.

The employer's representative also referred the witness to a Letter of Agreement between Transport Canada and the International Brotherhood of Electrical Workers, Local 2228 (Exhibit E-1). He referred the grievor to the last paragraph on page 2, which reads as follows:

> *Local 2228 IBEW recognizes that requests for discretionary leave such as annual and lieu, may be denied if it requires changes to the protected days of rest of other employees.*

The witness said he was aware of this. However, the leave he requested would not have interfered with anyone's day of rest.

The employer's representative further referred the witness to the last paragraph on page 1 of Exhibit E-1, which continues to the top of page 2, and reads as follows:

> *Notwithstanding language in the current Collective Agreement, Management agrees that the posted schedule*

> *shall provide each employee 28 days during which his/her days of rest will be protected. These days of rest shall not be rescheduled as regularly scheduled days of work.*
>
> *To meet the above commitment, Management agrees to post shift schedules at least 28 days in advance.*

The witness said that these provisions refer to the number of days the shift schedule is to be posted prior to it starting.

Counsel for the grievor asked the witness in re-examination if he was aware of Article 17 of his collective agreement (Exhibit G-1) and the different ways an employee can take annual leave. The witness said yes and that he has taken annual leave in blocks of days. However, he said, he has always been able to take any annual leave left over one day at a time and has never had to give 30 days notice or give reasons for hardship. The witness said when this was done, someone else worked a double shift and it never interfered with anyone's day of rest. He identified two leave forms that show leave requests which were granted (Exhibit G-3 and G-4). One was submitted on November 14, 1994 for one day's leave for December 3, 1994 and the other a compensation time request submitted on February 16, 1995 to be taken March 13, 1995.

Counsel for the grievor then called as his next witness Mr. Andrew E.G. Webb. Mr. Webb testified that he has been with Transport Canada since July 2, 1969 and became a duty officer on December 2, 1993.

The witness identified the shift schedule for April 1995 (Exhibit G-2(b)) and said that he was scheduled to work the day shift on April 8, 1995, the day the grievor had requested to be off on vacation leave. He also said he was aware that the grievor had requested annual leave for that day.

The witness said he had confirmed in writing and verbally to the grievor that he would work a double shift on April 8, 1995 if requested to do so. The witness said he had worked double shifts before to cover such leave. He also said he was aware of the shift exchange provision in the collective agreement but stopped using it because it was difficult to get the shift paid back on the day that you needed it. The witness also said he has requested leave on short notice and has received it. However, he was not

asked by management if he would work the April 8, 1995 shift to cover the grievor's vacation leave.

During cross-examination, the witness said management has not interfered with the shift exchange provision of the collective agreement. He also said that he did not approach management about working a scheduled double shift on April 8, 1995 because he felt it was management's responsibility to ask him.

The employer's representative then called as his witness Mr. Donald M. Sauvé. The witness testified that he is presently Manager of the Maintenance Response Center in Edmonton, Alberta, and has been since September 1995. Prior to that, he was Manager of that service in Winnipeg, from April 1994 to August 1995. The witness said he was the supervisor of six duty officers during the time the grievance was filed and he made the decision to refuse the grievor's requested leave for April 8, 1995.

The witness said the duty officers worked eight-hour shifts; it was a 24-hour operation and there were times during the day shift, on weekdays, that two duty officers might be on shift. This was to ensure that they worked their required hours per week. However, on weekends there was only one duty officer per shift. This was to allow each duty officer in turn to get their weekends off.

The witness said they were not short-staffed during the time in question. He said if someone requested leave during the week and there were two duty officers on, then he would allow the requested leave Also, he would allow someone to take the day off if there was hardship involved; he would decide if hardship was involved.

The witness said the main reason he refused Mr. Hester's leave was because it would involve overtime being paid. He said he does not recall having approved leave on short notice when overtime was involved. He said in his opinion having to pay overtime justified refusal.

During cross-examination, the witness said that he was familiar with the EL collective agreement. However, he said that he felt that the 30-day requirement to request casual annual leave did "apply" to the collective agreement. He further said that Mr. Hester's leave was refused due to the 30-day notice and the overtime cost.

The witness said that prior to refusing the requested leave, he made no effort to get someone to cover off the requested leave day. He said that employees' days of rest do not have to be interfered with in order to allow the leave; someone could work the double shift.

When questioned about the leave being approved due to hardship, he said the collective agreement does not require employees to give reasons for the requested leave. However, he does ask for reasons and decides if it is hardship; he has the right to do that.

Counsel for the grievor asked the witness if he knew the grievor was due to attend a curling tournament on April 8, the Vacation day requested. The witness said yes, and that he was attending the same tournament. Counsel asked him if he was aware that the grievor was to receive a trophy on that night, and that he would be deprived of that if the leave was refused. The witness said that he would not consider this as hardship, and therefore he had the right to say no to the Vacation leave requested.

The witness was asked about the budget and he said he had to prepare the budget for his section and submit it to his superiors. He allotted overtime money in the budget for blocks of annual leave but did not budget any money for the occasional annual leave request. The witness said when he discussed the annual leave request with the grievor, he felt that he did not have overtime money in his budget. However, he did agree that as of April 1, 1995 he had a new budget to begin with.

The employer's representative asked the witness how he had decided on the amount of overtime money to be put in the budget. He said he had based himself on past years and he allowed for blocks of leave which are normally taken two weeks at a time in the summer. However, he did not allow any money for vacation leave taken one day at a time on a casual basis.

Arguments

Counsel for the grievor gave his arguments and the following is a summary.

The facts before the Board are very clear. The grievor, Mr. Hester, presented a request on March 21, 1995 for annual leave as per Article 17 of his collective

agreement. On March 22, it was denied due to no money being in the overtime budget and on March 23 he was told by his supervisor, Mr. Sauvé, that such requested leave required a 30-day notice. The applicable portions of Article 17 of the collective agreement (Exhibit G-1) read as follows:

> *17.07 An employee's vacation shall normally be taken in the fiscal year in which he/she becomes eligible for it. The Employer shall, subject to the operational requirements of the service, make every reasonable effort:*
>
> *(a) to schedule an employee's vacation leave for at least two (2) consecutive weeks, if so requested by the employee not later than May 1st;*
>
> *(b) to give next priority to periods of vacation for which a request is made by employees prior to June 1st;*
>
> *(c) subject to (a) and (b) above, to schedule an employee's vacation leave at a time acceptable to him;*

Counsel said clause 17.07 is the "most applicable clause to this grievance". Mr. Hester requested vacation leave as per Article 17. The employer was obligated to make every reasonable effort to accommodate his request. Mr. Sauvé, however, decided that if the employer had to pay overtime to accommodate Mr. Hester's leave request, then operational requirements applied. He made no effort to accommodate the grievor, he spoke to no one concerning the possibility of doing the April 8, 1995 shift even though this has been the practice before and after the grievor requested the leave. Both Mr. Hester and Mr. Webb testified to this effect.

The wording of Article 17, and in particular clause 17.07, clearly states "*operational requirements of the service*"; it is tied to the employer being able to provide service. This could have been done by having Mr. Webb work a double shift. The fact that the employer would have had to pay overtime does not bring that under the heading of operational requirements.

Mr. Sauvé has his own interpretation of the collective agreement; he, and only he, can decide if leave will be approved. The employee must give reasons for the requested vacation leave and then if Mr. Sauvé decides it covers hardship, he will grant it and in that case pay overtime. That is not what the collective agreement says.

Operational requirements only apply if the employer is put in a position of not being able to deliver its services to the public, such as no one being available to cover the shift on the day leave is requested or if extreme hours have been worked and no one is willing to cover off the shift. Nowhere in the collective agreement is it stated that you have to give good reasons for the requested vacation leave or that overtime costs apply to the operational requirements.

Counsel referred me to the following adjudication decisions: Rooney (Board file 166-2-21306), Dillon (Board file 166-2-21922), McConaghy (Board file 166-2-22945) and Oates (Board file 166-2-26597).

Counsel said in these decisions, overtime cost was not accepted as the sole reason to apply operational requirements and also short notice was not accepted as a reason to say no. As in the above decisions, there was no reasonable effort made here and therefore the grievance should be allowed.

The employer's representative then gave his arguments and the following is a summary.

The grievance before me deals with an interpretation of the collective agreement and the onus is on the grievor to prove that the employer violated the collective agreement. He referred me to the decision Milette and Landry (Board files 166-2-15368 and 15369) and said as in that decision, here someone would have to be paid overtime to allow the requested vacation leave.

I was also referred to the decisions Bouffard (Board file 166-2-21327) and Oates (supra). In the Oates case the adjudicator was not presented with the required evidence but in the case before me I have all the evidence that I need.

The employer's representative said the evidence by the grievor in this case is that another employee, Mr. Webb, would be willing to work the April 8, 1995 shift. However, the employer had to be concerned about someone working a 16-hour shift as well as paying the overtime.

As for the leave forms that were identified by the grievor where leave was given on short notice, we do not know what the circumstances were when that leave was approved and therefore should not be a factor here.

The employer's representative said Mr. Sauvé has the authority to approve or refuse leave requests. The fact that he considered hardship, he should be complimented for; he does not have to do that.

If overtime is not considered when approving leave, then any number of employees could be off at the same time. The collective agreement does not say that the employee must be told that operational requirements is the reason for refusing leave.

I was further referred to the decisions in Langlois (Board file 166-2-21415), Barry (Board file 166-2-26144) and Earle (Board file 166-2-21407). The employer's representative said the jurisprudence of these cases clearly shows that they are in the employer's favour in the grievance before me. The employer had a full staff and was justified in refusing the leave due to other staff having to work extra hours and be paid overtime. Therefore, this grievance should be denied.

Reasons for Decision

Having considered all of the evidence before me, I have concluded that the grievance must be upheld for the following reasons.

Article 17 of the collective agreement is the applicable article in the grievance before me. Subclauses 17.07(a), (b) and (c) are the ones that I have to be concerned with. They read as follows:

> *17.07 An employee's vacation shall normally be taken in the fiscal year in which he/she becomes eligible for it. The Employer shall, subject to the operational requirements of the service, make every reasonable effort:*
>
> *(a) to schedule an employee's vacation leave for at least two (2) consecutive weeks, if so requested by the employee not later than May 1st;*
>
> *(b) to give next priority to periods of vacation for which a request is made by employees prior to June 1st;*
>
> *(c) subject to (a) and (b) above, to schedule an employee's vacation leave at a time acceptable to him;*

It is clear that the intent of these clauses is for an employee to normally take his or her vacation leave in the year it is earned. The employer is obligated to make every reasonable effort to accommodate an employee's request to take his or her leave and the only justification for refusal is operational requirements of the service. So the question to be answered is: Was the employer in violation of the collective agreement when it claimed operational requirements based on overtime cost and the requirement of a 30-day notice to refuse the requested leave? I conclude that it was.

Nowhere in Article 17 of the collective agreement can I find the requirement for the grievor to give 30 days notice prior to being permitted to take a single day off of vacation leave. The request was made on March 21, 1995 for one-day's leave on April 8, 1995. There is no evidence to suggest that the employer had less than ample time to make every reasonable effort to accommodate the request. Mr. Sauvé testified that he did not even approach another employee to try and make arrangements to accommodate the leave request. Furthermore, Mr. Sauvé testified that he prepared the budget for his section but did not budget any money to accommodate vacation leave other than two-week blocks of leave for summer vacations.

The employer has an obligation to ensure that it is in a position to honour its commitments in the collective agreement. In an operation as the one in Winnipeg where there is a 24-hour operation and only six employees to cover it off, the employer has to know that there will be occasions when overtime will have to be paid in order to meet the vacation commitments in the collective agreement, both in blocks of leave and in occasional single-day vacation leave. The employer did not budget and prepare itself to be in a position to honour the vacation leave commitments that are in the collective agreement.

The employer seems to be of the opinion that employees are obligated, when requesting occasional vacation leave, to inform the employer why they require the vacation leave and the employer will decide if there is sufficient hardship to justify the granting of leave. There is nothing in Article 17 that would suggest such a requirement. An employee is entitled to take his or her earned vacation leave and only operational requirements of the service can be used to refuse such leave. Employees do not have to give explanations as to why they wish to take vacation leave.

Thus, I have concluded that the employer did not make every reasonable effort to accommodate the grievor. In these circumstances, overtime cost did not justify denying leave under the guise of operational requirements. The 30-day requirement does not form part of the collective agreement and thus cannot justify the employer's refusal either. Therefore, the employer violated the collective agreement when it refused the requested vacation leave for April 8, 1995. Obviously, it is too late to order the employer to comply with the request of leave for April 8, 1995. I therefore order the employer to grant one day of vacation leave to the grievor, at a time he requests, and on reasonable notice to the employer within the next six months. This day of leave is not to be deducted from the grievor's accumulated vacation leave credits.

I am mindful of the fact that by making this order the grievor is now entitled to a day's vacation leave in addition to his allotment under the terms of the collective agreement. I am also mindful of the fact that there was no evidence before me that denial of leave for April 8, 1995 caused the grievor financial loss or severe hardship. Nonetheless, the grievor was deprived from attending a social function in which he was to receive an award of recognition. Apart from the deception that one would expect any employee to have experienced, there is the fact that the grievor is a shift worker. Thus, social functions are generally more difficult to attend assiduously and are therefore more likely to be treasured. The grievor has suffered a loss.

I am also concerned by the number of cases dealt with by members of this Board where the wishes of employees are set aside for considerations consistently found to be improper in assessing operational requirements. Some of those cases were cited to me in this hearing. The employer has struck a bargain and must abide by it. In these circumstances, I feel a lesser order than the one I am making would not sufficiently address the concerns stated above, and I note that my remedial authority is broad indeed: Heustis v. N.B. Electric Power Commission, [1972] 2 S.C.R. 768.

Counsel for the grievor informed me that the other issue in this grievance, that of a written explanation of the denial of leave, is not before me and I therefore will not deal with it.

Albert S. Burke,
Board Member

OTTAWA, May 31, 1996.