Files: 166-2-26849 to
166-2-26855

Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

**P.S.E. FARRELL, W.D. FRASER, K. HENDY,
T. McLELLAN, I. MACK, R. PIGEAU, P. SHEK**

Grievors

and

**TREASURY BOARD
(National Defence)**

Employer

Before: Yvon Tarte, Deputy Chairperson

For the Grievor: Dan Rafferty, The Professional Institute of the Public Service of Canada

For the Employer: Gina M. Scarcella, Counsel

Heard at Toronto, Ontario,
February 29, 1996

The Grievances

These six grievances are all concerned with the interpretation of subclause 15.08(b) of the Master Agreement between the Treasury Board and the Professional Institute of the Public Service of Canada (Exhibit P-1) which deals with the liquidation of earned but unused vacation leave credits.

Agreed Statement of Facts

At the outset of the hearing, the parties submitted the following Agreed Statement of Facts (Exhibit P-2):

> 1. *The grievors were at all relevant times employed as Defence Scientists (DS) at the Defence and Civil Institute of Environmental Medicine (DCIEM), Canadian Forces Base in Downsview, Ontario.*
>
> 2. *In February and March of 1994, DCIEM employees were invited by management to liquidate outstanding annual leave credits if they so wished. All the grievors applied to cash out their leave before March 31, 1994 and were paid out on March 25, 1994. The liquidation of vacation leave credits for the grievors is governed by Article 15.08(b) of the PIPSC Master Agreement, attached.*
>
> 3. *On receipt of their cheques comprising the cashed-out value of their annual leave credits, the grievors noticed that calculations had been predicated on their respective salaries as they existed for their substantive positions at the end of the previous fiscal year, i.e., March 31, 1993.*
>
> 4. *The pay increment date for employees in the Defence Science Group, levels DS-2 through DS-7, is April 1. (PIPSC Master Agreement, Pay Note (5)(b), p. A-137, attached).*
>
> 5. *The names and PSSRB file numbers of the grievors, their group and level at the time of the leave liquidation, respective salary information and number of days liquidated are as follow:*

Name	*PSSRB File (166-2-)*	*Group and Level*	*Salary Mar. 31/93*	*Salary Mar. 31/94*	*Days Liquidated*
Farrell, Philip	*26849*	*DS-3*	*$45,290*	*$47,031*	*10*
Fraser, William	*26850*	*DS-4*	*63,900*	*65,437*	*20*
Hendy, Keith	*26851*	*DS-4*	*70,058*	*71,598*	*10*
McLellan, Tom	*26852*	*DS-4*	*59,282*	*62,360*	*15.67*
Mack, Ian	*26853*	*DS-3*	*48,774*	*50,516*	*6.06*
Pigeau, Ross	*26854*	*DS-4*	*57,774*	*59,282*	*24.5*
Shek, Pang	*26855*	*DS-6*	*75,955 (DS-5)*	*78,239 (DS-6)*	*20*

6. *The parties reserve the right to adduce additional oral and documentary evidence.*

The parties also agreed that Dr. Shek's promotion from DS-5 to DS-6 had occurred prior to the making of his application to cash out his unused vacation leave credits.

During the hearing, the parties further agreed that the employer's interpretation had governed the application of the clause in the past.

Although subclause 15.08(b) contains the language which gave rise to the contract interpretation dispute, the parties referred to the following provisions of the Master Agreement:

> *9.04 Upon application by the employee and at the discretion of the Employer, compensation earned under this Article may be taken in the form of compensatory leave, which will be calculated at the applicable premium rate laid down in this Article. Compensatory leave earned in a fiscal year and outstanding on September 30 of the next following fiscal year shall be paid at the employee's daily rate of pay on September 30.*
>
> *10.03 Upon application by the employee and at the discretion of the Employer, compensation earned under this Article may be taken in the form of compensatory leave,*

which will be calculated at the applicable premium rate laid down in this Article. Compensatory leave earned in a fiscal year and outstanding on September 30 of the next following fiscal year shall be paid at the employee's daily rate of pay on September 30.

13.04 Upon application by the employee and at the discretion of the Employer, compensation earned under this Article may be taken in the form of compensatory leave, which will be calculated at the applicable premium rate laid down in this Article. Compensatory leave earned in a fiscal year and outstanding on September 30 of the next following fiscal year shall be paid at the employee's daily rate of pay on September 30.

15.01 The vacation year shall be from April 1st to March 31st, inclusive.

15.08 ***Carry Over***

This clause does not apply to the MT or CO Groups.

(a) Where in any vacation year an employee has not been granted all the vacation leave credited to him, the unused portion of his vacation leave shall be carried over.

(b) ***Liquidation***

During any vacation year, upon application by the employee and at the discretion of the Employer earned but unused vacation leave credits shall be compensated at the employee's daily rate of pay as calculated from the classification prescribed in his certificate of appointment of his substantive position on March 31st.

15.09 ***Carry-Over Provisions***

This clause applies to the MT Group only.

(a) Where in any vacation year all of the vacation leave credits to an employee has not been scheduled, the employee may carry over into the following vacation year up to a maximum of thirty-five (35) days credit. All vacation leave credits in excess of thirty-five (35) days will be paid in cash at the employee's daily rate of pay as calculated from the classification prescribed in his certificate of appointment of his substantive position on the last day of the vacation year.

(b) During any vacation year, upon application by the employee and at the discretion of the Employer, earned but unused vacation leave credits in excess of fifteen (15) days may be paid in cash at the employee's daily rate of pay as calculated from the classification prescribed in his certificate of appointment of his substantive position on March 31st, of the previous vacation year.

15.10 ***Carry-Over of Vacation Leave***

This clause applies to the CO Group only.

(a) Where in any vacation year all of the vacation leave credited to an employee has not been scheduled, the employee may carry over into the following vacation year up to a maximum of thirty-five (35) days credits. All vacation credits in excess of thirty-five (35) days will be paid in cash at the employee's daily rate of pay as calculated from the classification prescribed in his certificate of appointment of his substantive position on the last day of the vacation year.

(b) During any vacation year, upon application by the employee and at the discretion of the Employer, earned but unused vacation leave credits in excess of fifteen (15) days may be paid in cash at the employee's daily rate of pay as calculated from the classification prescribed in his certificate of appointment of his substantive position on March 31st, of the previous vacation year.

ARGUMENTS

For the Grievors:

Mr. Rafferty read the following text:

The grievances before you today relate to the interpretation and application of Article 15.08(b) of the PIPSC Master Agreement. Specifically, you are being asked to decide whether the rate of pay at which the grievors' annual leave credits were liquidated in March of 1994 should have been based on their respective rates of pay in their substantive positions as of the previous March 31 (1993) or as of the date of their applications for liquidation.

It is the grievors' contention that the latter rate of pay is the one required by a proper interpretation of Article 15.08(b). For your information, there is one grievor who would not benefit from the argument I am about to make in this regard, that being Dr. Pang Shek. However, he has asked to have his grievance stand and his situation will be addressed in an alternative argument later.

I turn now to Article 15.08 which applies to the Defence Scientists and most of the occupational groups covered by the Master Agreement except the MT and CO groups.

Article 15.08(a) has the effect of carrying over all of the vacation leave credits not granted during that vacation year; the vacation year is defined by Article 15.01 as the period from April 1st to March 31st, inclusive.

Article 15.08(b) provides for the liquidation, under certain conditions, of earned but unused vacation leave credits. The conditions are that the employee must apply to liquidate such credits and the employer must then exercise its discretion to approve the liquidation. In this case, both conditions were satisfied.

It should be noted that 15.08(b) does not restrict the liquidation of vacation leave credits to those earned in a previous vacation year. Thus, for example, an employee who has not been granted any vacation in a vacation year could apply to liquidate all leave earned to date in that vacation year.

As I have mentioned, the focus of the dispute between the parties as to the interpretation and application of Article 15.08(b) centers on the rate of pay at which the leave is to be liquidated. The Employer has taken the position that the applicable rate of pay is the one that was in existence for the grievors' substantive positions as of March 31 of the previous vacation year.

In our view, a careful reading of the clause does not support such an interpretation. According to the clear language of the Article, "unused vacation leave credits shall be compensated at the employee's daily rate of pay as calculated from the classification prescribed in his certificate of appointment of his substantive position on March 31st," (emphasis added). Accepting that the March 31st referred to is, in fact, the March 31st of the previous year, it is nevertheless clear on the face of the Article that it is the classification of the employee on March 31st which forms the

basis for the calculation of the rate of pay for the purpose of liquidation. The Article does not provide, as it could have, that "vacation leave credits shall be compensated at the employee's rate of pay on March 31st." Compare the language of 15.08(b) with, for example, Article 9.04, which relates to the liquidation of compensatory leave earned as a result of overtime.

> *"Compensatory leave earned in a fiscal year and outstanding on September 30 of the next following fiscal year shall be paid at the employee's daily rate of pay on September 30."*

Identical wording appears in Article 10.03 (discretionary pay out of accumulated call back compensatory leave) and Article 13.04 (discretionary pay out of accumulated travel time compensatory leave).

In these three Articles, the parties have clearly linked the rate of pay to a fixed date, as it was equally open to them to do in Article 15.08(b), had they so wished.

I would like to refer now to another clause within Article 15, that being Article 15.15:

> *"When an employee dies or otherwise ceases to be employed, he or his estate shall be paid an amount equal to the product obtained by multiplying the number of days of earned but unused vacation and furlough leave with pay to his credit by the daily rate of pay as calculated from the classification prescribed in his certificate of appointment on the date of the termination of his employment."*

This Article is very similar to Article 15.08(b) in that the daily rate of pay is to be calculated from the classification of the employee on a fixed date, the date in this case being the date of termination of employment. The main difference between "March 31st" in Article 15.08(b) and "the date of termination of his employment" in Article 15.15, is the existence of the word "substantive" in front of "position" in 15.08(b).

In order to explore the implications of this in the context of the present grievance, I would like to refer to the 1993 decision of Deputy Chairman Chodos in Windley, [Board file 166-2-22140].

In that case, Mr. Windley grieved against the manner in which the Employer had calculated his severance pay upon retirement. His substantive position at retirement was AU-2; however, Mr. Windley had been in an acting AU-3 position for approximately 1 1/2 years prior to his retirement, including his date of termination. Nevertheless, he received his severance pay calculated on the basis of his AU-2 position.

The relevant clause in the AU Collective Agreement relating to the calculation of severance pay on retirement read as follows:

> *"24.03 The weekly rate of pay referred to in the above clauses shall be the weekly rate of pay to which the employee is entitled for the classification prescribed in the employee's certificate of appointment on the date of the termination of the employee's employment."*

Argument in the Windley case focused on whether Mr. Windley's classification prescribed in his certificate of appointment was his substantive AU-2 or his acting AU-3. The grievor succeeded mainly on the basis of a technical argument relating to what constituted a "certificate of appointment", but also on the basis that "the term 'certificate of appointment' is not modified by 'substantive' or any similar expression" (page 11, bottom paragraph). It had been argued by the employer's representative that clause 24.03 "assumes the notion of a substantive position" (page 7). This argument was rejected by the adjudicator.

The Windley case is of significance in relation to the present grievance in two ways. First of all, it reinforces our view that, in a clause similar to Article 15.08(b), the words "on the date of the termination of the employee's employment" refer back to "the classification prescribed in the employee's certificate of appointment" and not to "the weekly rate of pay". This is evident if the words "on March 31st" are substituted for the words "on the date of the termination of the employee's employment" in the AU Article 24.03 in the Windley case. Is there any doubt that the central issue in the Windley case would still have been "what was Mr. Windley's classification prescribed in his certificate of appointment" as of that date?

This brings us to the second way in which the Windley decision is of significance in the present case. One obvious difference between the manner in which the parties have expressed themselves in Article AU 24.03 in Windley and Article 15.08(b) here relates to the presence of the words "of his substantive position" in 15.08(b). Had these words been present in Article 24.03 to modify the words "certificate of appointment", there is no doubt that Mr. Windley would not have been entitled to his severance pay at the acting rate of pay.

Put another way, the presence of the words "of his substantive position" in 15.08(b) is of considerable significance and assistance in relation to the interpretation of the clause. In our view, the main purpose of these words is to limit the liability of the employer in the course of liquidating accumulated leave credits. The presence of the words "substantive position" ensures that an employee who happens to be in an acting position as of March 31st does not receive his liquidated credits at the rate of pay of the acting position. Instead, he will be paid on the basis of the classification of his substantive position as of March 31st.

Of course, the employer's interpretation of 15.08(b), as we understand it, would also have the effect of limiting the employer's liability, to an even greater extent. The employer would have the employee's leave credits liquidated not only on the basis of the classification of the employee's substantive position, but also as of the end of the previous vacation year, prior to any potential increments taking place on April 1st. Unfortunately for the employer's position, the manner in which the clause is constructed does not bear that interpretation. The "employee's daily rate of pay" is not followed by words which would have had that effect (for example, "as it existed for his substantive position on March 31st") but rather "as calculated from" the classification of his substantive position on March 31st. In short, the purpose of specifying March 31st is to fix not the rate of pay, but rather the classification of the substantive position on that date.

One of the primary tenets in construing a contract is that the parties are assumed to have intended to say what they said unless an absurd result will follow. We contend that our interpretation of Article 15.08(b) is consistent with this tenet and has the effect of giving meaning to all of the words in the clause, in spheres both grammatical and logical.

I refer now briefly to the French version of Article 15.08(b) (page 41):

> *"Pendant une année de référence pour congé, les crédits de congé annuel acquis mais non utilisés doivent, sur demande de l'employé et à la discrétion de l'employeur, être payés en argent au taux de rémunération journalier de l'employé, calculé selon la classification stipulée dans son certificat de nomination à son poste d'attache le 31 mars."*

I draw attention to the comma following the words, "au taux de rémunération journalier de l'employé." The effect of this, we argue, supports even more strongly our contention that it is the classification of the position as of March 31st which governs the liquidation of leave credits, not the employee's daily rate of pay as it existed on that day.

In the end, we believe that the interpretation of Article 15.08(b) which we have advanced is consistent with the rules of grammar and logic and has the effect of giving meaning to all the words used by the parties. This interpretation does not have the effect of meeting the concerns of employees such as Dr. Shek, who was promoted as of April 1, 1994 and whose leave must therefore be liquidated as calculated from his previous level as of March 31, 1994. However, should you agree with the interpretation we have advanced here today, employees in Dr. Shek's position will at least be aware of the implications of applying to liquidate credits in the vacation year immediately following a promotion.

Before I close, I wish to refer to one result of the employer's interpretation of Article 15.08(b) which I believe is, at the least, unfair and at the extreme, absurd. Given the fact that the clause permits the liquidation of earned but unused vacation leave credits, the result of an employee applying to liquidate leave credits earned in the current vacation year, at a higher rate of pay within the same classification level, will be to have them paid out at the lower rate as of the end of the previous fiscal year. This would constitute a <u>de facto</u> rollback in the employee's rate of pay. Surely the parties did not intend this effect. The interpretation we have advanced avoids this result, except of course in the case of employees promoted after March 31st.

Finally, I wish to refer to the wording of the grievances as submitted. You will note that the corrective action requested is "an adjustment of the cash-out at a rate

> *equivalent to our salary as of March 31, 1994 representing the end of the 1993-94 fiscal year". The interpretation we have advanced on behalf of the grievors today is not inconsistent with this request, in that all of the grievors' salaries as Defence Scientists do not change during a vacation year, and therefore the salary at the end of the fiscal year is the same as the salary as of the date that liquidation is requested.*
>
> *However, the wording of the corrective action also refers to an alternative argument on behalf of the grievors, that being that the March 31st referred to in Article 15.08(b) should be taken to mean the March 31st of the previous vacation year. In support of this argument, the grievors cite the wording of similar articles, 15.09(b) which applies only to the MT Group and 15.10(b) which applies only to the CO group.*
>
> *In each of these articles, the words "March 31st" are followed by "of the previous vacation year". The grievors argue that given the absence of a reference to the previous vacation year in the Article 15.08(b), the parties should be assumed to have intended this omission and therefore that March 31st should apply to the current vacation year. This interpretation would have the effect of eliminating the anomaly of Dr. Shek's situation, in which he effectively suffers a financial penalty due to his promotion. There are admittedly also some practical difficulties with this approach, but I will leave it to the employer's representative to point these out to you. Nevertheless, this particular construction is one which, we believe, the Article is capable of bearing and we place it before you for your consideration.*

For the Employer:

Counsel for the employer made the following submissions. The rules of interpretation which should govern this case can be found in Canadian Labour Arbitration by Brown and Beatty (3rd Edition). Of particular interest are the following extracts:

> ***4.2100 The Object of Construction: Intention of the Parties***
>
> *It has often been stated that the fundamental object in construing the terms of a collective agreement is to discover the intention of the parties who agreed to it. As one arbitrator, quoting from Halsbury's Laws of England, stated in an early award:*

> *"The object of all interpretation of a written instrument is to discover the intention of the author, the written declaration of whose mind it is always considered to be. Consequently, the construction must be as near to the minds and apparent intention of the parties as is possible, and as the law will permit."*

And further:

> *"But the intention must be gathered from the written instrument. The function of the Court is to ascertain what the parties meant by the words they have used; to declare the meaning of what is written in the instrument, not of what was intended to have been written; to give effect to the intention as expressed, the expressed meaning being, for the purpose of interpretation, equivalent to the intention."*

Accordingly, in determining the intention of the parties, the cardinal presumption is that the parties are assumed to have intended what they have said, and that the meaning of the collective agreement is to be sought in its express provisions. Thus, where, for example, the parties had detailed in the collective agreement specific elements of management rights, without limitation as to the manner in which they would be applied, the arbitrator was held to have erred in implying that those rights were to be exercised fairly and without discrimination. When faced with a choice between two linguistically permissible interpretations, however, arbitrators have been guided by the reasonableness of each possible interpretation, administrative feasibility, and which interpretation would give rise to anomalies.

(...)

In searching for the parties' intention with respect to particular provision in the agreement, arbitrators have generally assumed that the language before them should be viewed in its normal or ordinary sense unless that would lead to some absurdity or inconsistency with the rest of the collective agreement, or unless the context reveals that the words were used in some other sense. Furthermore, where there are French and English versions the interpretation to be sought is one which is coherent in both texts. It has been stated, however, that where there is no ambiguity or lack of clarity in meaning, effect must be given to the words of the agreement, notwithstanding that the result may be unfair or oppressive, or that they were deliberately vague to permit continuing consensual adjustments.

> *The context in which words are found is also a primary source of their meaning. Thus, it is said that the words under consideration should be read in the context of the sentence, section and agreement as a whole.*

The issue in these cases is not the rate of pay at which earned but unused vacation leave will be cashed out but rather which March 31 does subclause 15.08(b) refer to, for in the end that critical date will serve to define both the classification level and actual rate of pay to be used to make the necessary calculations.

Grammatically, the interpretation advanced by the grievors is not supportable. The reference to March 31 in subclause 15.08(b) must refer to the March 31st which precedes the application for cash out. This interpretation provides the only reasonable solution to the dispute between the parties. It is the only interpretation which carries with it "administrative feasibility" and does not give rise to "anomalies" as mentioned in Brown and Beatty (supra).

The grievors' interpretation would give rise to a serious anomaly in Dr. Shek's case whose substantive position changed between March 31 of the previous year and the date of this application. That problem was recognized by the grievors' representative. In order for the grievors' position to be correct, subclause 15.08(b) would have had to have said that in cash out situations the employee will be compensated on the basis of his or her substantive classification as of March 31 but at the rate of pay of the employee at the time the request for cash out is made. Subclause 15.08(b) contains no words that provide any relevance to the date of an employee's application for cash out under 15.08(b).

The March 31st which follows the employees' application cannot be used as the basis for calculations since it provides no actual basis for remuneration at the time of the application. That interpretation would create anomalies and serious administrative problems if an employee were demoted or promoted between the date of his or her application for cash out and the March 31st which followed.

The longer an employee waits to cash out, the higher the remuneration level. The employer has agreed to that. However, the point in time which sets the remuneration must be defined. The only possible date for a proper application of the clause is the March 31 which precedes the application for cash out.

The other clauses referred to by Mr. Rafferty in his argument are irrelevant since they do not relate to a situation where a choice must be made between a date in two different years. Similarly, the Windley case is unhelpful since it deals with a totally different issue.

Reply of the Grievors:

The employer has steadfastly avoided the presence of the word "classification" in subclause 15.08(b). The word must be given some meaning. The words "during any vacation year" establish the time frame for the application of the clause.

The employer has raised the anomaly created by Dr. Shek's situation. The fact remains that if the employer's interpretation is allowed to stand, all employees will be in Dr. Shek's predicament.

The Master Agreement allows the automatic carry-over of unused vacation leave. Vacation leave is always granted at the employee's current rate of pay even though earned in previous years.

REASONS FOR DECISION

This case raises a fairly straightforward contract interpretation problem which the parties could easily have avoided by the use of clear, concise and complete language.

Subclause 15.08(b) allows for the liquidation of earned but unused vacation leave credits during any vacation years. The vacation year runs from April 1st to March 31st inclusive. The liquidation of any such leave is at the discretion of the employer.

It is interesting to note that the Canada (Attorney General) v. Dupuis (1992) 137 N.R. 349 case referred to in the Windley decision (supra) dealt with a similar provision with one exception: the words "the previous year" are included after March 31st while they are not in the subclause before me.

The words "shall be compensated" refer to the salary owed to the employee for whom the employer has agreed to liquidate earned but unused vacation leave credits. The liquidation of unused vacation leave credits is a privilege not a right since it requires the consent of the employer.

Subclause 15.08(b) further stipulates that the rate of pay at which vacation leave credits will be liquidated will be "calculated from the classification prescribed in [the employee's] certificate of appointment of his substantive position on March 31st".

Taken in a vacuum the interpretations advanced by the grievors may in most cases provide a workable solution for the calculation of compensation in cash out cases. The fact remains however that requiring two separate dates for the calculation of compensation in these cases can only lead to incongruities and serious administrative problems.

The case of Dr. Shek provides a good example of why the employer's interpretation of subclause 15.08(b) is preferable. This interpretation provides for a uniform and fair application of the liquidation clause as it is written.

I am supported in my interpretation of the subclause by the fact that the employees may control the level of compensation by simply adjusting the timing of their requests for cash out. I must therefore conclude that for liquidation purposes under subclause 15.08(b) of the Master Agreement, compensation shall be at the rate of pay for the employee's substantive position on March 31 preceding the request for cash out.

For all these reasons, these grievances are denied.

Yvon Tarte,
Deputy Chairperson

OTTAWA, March 29, 1996