File: 166-2-28245

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

GLEN BALL

Grievor

and

TREASURY BOARD
(National Defence)

Employer

Before: P. Chodos, Vice-Chairperson

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

For the Employer: Harvey Newman, Counsel

Heard at Victoria, British Columbia,
June 17, 1998.

DECISION

The grievor was employed as a Communications Technologist (EL-6) at Canadian Forces Base Esquimalt prior to the termination of his employment effective January 16, 1997. He has grieved the employer's decision to deduct from money owing to him an amount equivalent to certain periods of vacation and sick leave which he took prior to his termination, and for which he did not have sufficient credits.

The facts in this case are for the most part not in dispute, and were the subject of a partial Agreed Statement of Facts which provides as follows:

AGREED STATEMENT OF FACTS

1. *Mr. Ball was employed as an EL-6, Communications Technologist, with the Department of National Defence, since October 1, 1985. At the time of his departure from the public service, he was employed at CFB Esquimalt in British Columbia.*

2. *Mr. Ball was a member of the bargaining unit represented by the IBEW, local 2228, and accordingly his terms and conditions of employment were governed by a collective agreement entered into between the IBEW and the Treasury Board of Canada.*

3. *In November 1996, Mr. Ball received correspondence from the Department, per Captain B. Blattmann, informing Mr. Ball that due to downsizing his position was declared surplus. Pursuant to the provisions of the Work Force Adjustment Directive, Mr. Ball was to be placed on paid surplus status from November 28, 1996 to May 28, 1997. If he did not receive a reasonable job offer during that time, he would be laid off at the end of the paid surplus period.*

4. *The correspondence further provided Mr. Ball with the option of an Early Departure Incentive ("EDI"), which would consist of, inter alia, severance pay at the lay-off rate. On November 28, 1997, Mr. Ball opted into the EDI program by signing the EDI election form.*

5. *On December 4, 1996, Mr. Ball completed an application form for vacation leave, to be taken from December 9, 1996 to December 13, 1996. This application was approved on December 5, 1996.*

6. *Following the completion of his vacation leave, Mr. Ball remained absent from the workplace from December 16,*

1996 to January 3, 1997, due to a back injury. On January 6, 1997, he completed an absence report for this period, and he attached his physician's certificate confirming his inability to work. Mr. Ball's application was approved on January 9, 1997.

7. *Mr. Ball departed the public service on January 15, 1997.*

8. *An amount reflecting the time taken for vacation leave from December 9 to 13, 1996, and sick leave from December 23, 1996 to January 3, 1997, was deducted in the amount of $2,263.27 from the final payment to Mr. Ball. It was the Department's position that Mr. Ball did not have sufficient leave credits available to him at the time of his applications, and accordingly he was not entitled to be paid for these periods of time.*

9. *On January 15, 1997, Mr. Ball submitted a grievance form to the Department, requesting that the Department compensate him for his annual and sick leave taken. Mr. Ball maintained that in denying him payment for the periods mentioned above, the Department failed to honour clauses 17.18 and 19.09 of the collective agreement, as well as the Work Force Adjustment Directive, sections 1.1.35 and 1.1.36 of which provide as follows:*

   > *1.1.35 Severance pay and other benefits flowing from other clauses in the collective agreements are separate from, and in addition to, those in this directive.*
   >
   > *1.1.36 Any surplus employee who resigns under this directive shall be deemed, for the purposes of severance pay and retroactive remuneration, to be involuntarily laid off on the day as of which the deputy head accepts in writing the employee's resignation.*

10. *Mr. Ball's grievance was denied at all levels of the grievance procedure, on the basis that by accepting the EDI, Mr. Ball was not laid off but had in fact resigned.*

11. *Following the decision of the Deputy Minister at the Final Level, the IBEW, on behalf of Mr. Ball, referred the grievance to adjudication.*

The above facts are agreed without limiting the right of either party from presenting additional evidence or facts.

Agreed to this 17th day of June, 1998.

It should be noted that the correspondence referred to in paragraphs 3 and 4 of the Agreed Statement of Facts was submitted in evidence on consent (Exhibit 1), as were several other documents, including a form entitled EARLY DEPARTURE INCENTIVE (EDI) ELECTION (Exhibit 2). The grievor chose not to adduce further evidence. The employer called two witnesses, Mr. Keith Laverty and Ms. Laura Legh.

Mr. Laverty is an Engineer with the Department of National Defence and was Mr. Ball's immediate superior. Mr. Laverty reported to Lieutenant Commander John Dewar, whose superior was Commander William Myles, who in turn reported to the Commanding Officer, Captain Blattmann. Mr. Laverty testified that he received a memorandum from Mr. Ball dated September 16, 1996 (Exhibit 8); in this memorandum Mr. Ball notes that:

> 1. *IAW Ref A, dated July 04, 1996 my position was changed to Communications Technical Officer (Developmental). My previous position was as EW/ECM TECH (Electronic Warfare/Electronic Counter Measures Tech) ref D position number 13222-00931. My position is now 13221-10323(O) Communications Technical Specialist. This new position has been classified as an EL-5 (Ref. F).*
>
> . . .

In this memorandum Mr. Ball goes on to state:

> *... I request that I be offered ERI/EDI under the current Workforce Adjustment Directive.*

Prior to receiving this memo Mr. Laverty was not aware of any plans to declare Mr. Ball surplus; he showed the memorandum to Lieutenant Commander Dewar; Mr. Dewar advised him that he intended to discuss with Commander Myles whether the EDI was available to Mr. Ball. Some time later Mr. Dewar indicated to Mr. Laverty that there was a "*good possibility*" that Mr. Ball could be offered the EDI; he asked Mr. Laverty whether there would be any impact on operations. Mr. Laverty replied that it would not have a significant impact; at that point, he was aware that an offer of the EDI would result in Mr. Ball's position being declared surplus.

Mr. Laverty observed that Mr. Ball was on vacation, then sick leave from December 9, 1996 to January 6, 1997; this leave was duly approved by both Mr. Laverty and Lieutenant Commander Dewar (Exhibits 5 and 6). According to

Mr. Laverty, when these leave applications were approved, he was not aware that Mr. Ball had insufficient leave credits.

In cross-examination Mr. Laverty was questioned concerning the various documents that were identified as references in Exhibit 8. Mr. Laverty stated it was his assumption that the offer of the EDI in November 1996 was in respect of the position identified in reference "G", although he could not attest to that with any certainty. He noted that he had only taken on his position as of July 6, 1996, and therefore had limited familiarity with what had occurred before that date. He was aware that Mr. Ball had submitted a grievance concerning his appraisal, although he is not familiar with the results of that grievance. He maintained that while he was aware in December that Mr. Ball was leaving his position in January, he did not know the status of the grievor's sick leave and vacation leave credits when he signed Exhibits 5 and 6. He believes that the base was closed on December 30th and 31st, 1996 because of inclement weather; he is not aware of whether Mr. Ball was paid for those days as a consequence of the subsequent denial of paid leave. He acknowledged that at the time there had been some downsizing in the Ship Repair Operations and that there was general uncertainty about the future of that operation. He did not recall any discussions about downsizing of his unit.

Ms. Laura Legh has been employed as a Civilian Personnel Officer at Canadian Forces Base Esquimalt since 1994. During the relevant period, she was responsible for providing advice on staffing and other personnel management matters, including work-force-adjustment issues. Mr. Laverty had brought to her attention Mr. Ball's memorandum of September 16, 1996 shortly after that date. According to Ms. Legh, Mr. Laverty asked her whether Mr. Ball was eligible for EDI; Ms. Legh noted that there were no plans at that time to abolish Mr. Ball's position. Ms. Legh observed that the memorandum did not have any attachments or enclosures.

Ms. Legh stated that Mr. Ball's position was not classified downwards while he was occupying it. She noted that those who are subject to downward reclassification are salary protected. She stated as well that reference "G" refers to a document which explains the distinction between "new" and "existing" positions for purposes of determining the status of a position and consequent staffing action (Exhibit 9). She understood from paragraphs 3 and 4 of Mr. Ball's memorandum that he was under the

impression that the duties of the position he then held were new and that he may not be qualified for that position, and therefore would be entitled to the EDI. She had advised Messrs. Dewar and Myles that it was her opinion that the duties had not changed significantly enough to warrant a determination that Mr. Ball's position was a "new" position; in any event, it was also her opinion that Mr. Ball was qualified for the position, and therefore a request for EDI was not warranted. She suggested that, in order to accommodate his request, they could look at whether there could be further downsizing in the organization. Accordingly, they examined the workloads and concluded that Mr. Ball could be made surplus.

In argument counsel for the grievor submitted that the issue in this case is whether the grievor was effectively laid off, as that term is used in clauses 17.18 and 19.09 (see below) of the relevant collective agreement. There is no dispute that if the grievor's termination was by way of lay-off, pursuant to these provisions the employer was not entitled to deduct pay because the grievor had insufficient sick and vacation leave credits at the time of his termination. Mr. Shields noted the definition of "lay-off" in the collective agreement refers to termination because of lack of work or discontinuance of a function. Counsel noted that Captain Blattmann's letter to Mr. Ball makes reference to "*downsizing"* and states that "*... your services have been identified as surplus to departmental requirements....*" Mr. Shields also referred to the testimony of Ms. Legh to the effect that management concluded that they could downsize the operation where Mr. Ball worked because of lack of work and thereby meet the requirements of the early departure incentive. According to counsel, these circumstances fall directly within the definition of lay-off in the collective agreement.

Counsel also referred to section 12 of the *Interpretation Act* (R.S.C. 1985, I-21) which provides that every enactments shall be given a fair and liberal construction so that the objects of the enactment are met. In light of this principle of interpretation, the terms "lay-off" and "resignation" should be construed to reflect the true intention of the parties. In this respect, counsel for the grievor argued that Mr. Ball's memorandum (Exhibit 8) focussed entirely on the existence of a new position, and his request for EDI was premised on the erroneous assumption that his new duties constituted a new position. However, the employer took it upon itself to downsize the operations. Mr. Shields noted that no one had advised Mr. Ball in response to his memorandum that his assumption about reclassification was wrong.

Counsel maintained that Exhibit 1 is a typical surplus declaration and deals with two courses of action that can be taken, that is, either to go on a surplus list or to elect EDI. While the election form (Exhibit 2) speaks of a "resignation" counsel maintained that this was in fact subject to management approval and is not the usual resignation contemplated in the collective agreement. The Work Force Adjustment Directive (WFAD) of December 12, 1997 provides support for this view. Thus, paragraph 1.1.35 of the WFAD notes that even though the EDI is accepted by the employee, he/she is still entitled to take advantage of all the provisions of the collective agreement; paragraph 1.1.36 states specifically that an employee who resigns under this Directive is deemed to be "laid off". Thus, the employer is able to get what it wants, that is, the employer is out of the employment stream, and in return the employee is entitled to the advantages under the lay-off provisions of the collective agreement. Counsel also referred to Article 22 of the collective agreement which concerns severance pay; he noted that the entitlement to severance pay is calculated differently in respect of terminations arising from a resignation, as opposed to a lay-off; Mr. Ball received the benefits under the lay-off clause, that is 22.02, which provided him with one week's severance per year of service, rather than a half week which is the entitlement under clause 22.03, the resignation provision.

Mr. Shields also submitted that a Treasury Board publication entitled *"The Public Service's Post-Employment Regime"* provides further support for the grievor's position. Thus, paragraph 19 states that an employee under the Early Retirement Incentive is treated *"... as if you had been laid off although technically you are resigning."*

Counsel also cited the adjudication decision in *Bonhomme* (Board file 166-2-23779). In that case an employee was declared surplus and took EDI in lieu of the remaining surplus period. According to counsel, the issue was whether the employee should have her previous years of service counted in the calculation of vacation leave benefits in light of subparagraph 16.02(j) of the relevant collective agreement, which provided that previous service would not be taken into account where an employee receives severance pay, except if the employee receives severance pay on lay-off and is reappointed within one year following the date of lay-off. The adjudicator concluded that while the grievor had resigned, in reality this was a lay-off situation, and as a consequence the grievance was upheld. Likewise, the instant case

is not a true resignation situation and accordingly Mr. Ball is entitled to the benefits of the collective agreement accorded to laid-off employees, as provided in paragraphs 1.1.35 and 1.1.36 of the WFAD.

Counsel for the employer maintained that Mr. Ball requested "a package" based on EDI which in this instance, was outside the context of the Work Force Adjustment Directive. Counsel argued that the EDI provided to Mr. Ball is authorized pursuant to the Early Departure Incentive Program Order (P.C. 1995-1086, June 27, 1995) which was promulgated pursuant to subsection 7.2(1) of the *Public Sector Compensation Act*.

Counsel for the employer disputed Mr. Shields' assertion that Mr. Ball did not want to terminate his employment with the Public Service; Mr. Newman maintained that this is not a reasonable inference from the material; he noted that Mr. Ball was, and remained an EL-6 until his departure. He also observed that the grievor did not testify in these proceedings and accordingly there is no evidence as to his actual intentions beyond inferences that can be made from the documentation. According to Mr. Newman, this material demonstrates that he was clearly looking for a package; in light of Mr. Ball's request, Ms. Legh had suggested that one way of accommodating him was to have his position declared surplus. While there is no dispute that Mr. Ball's position was in fact eliminated following his departure, Mr. Ball had never raised any concerns about being made surplus; he wanted to leave, and therefore he submitted his resignation.

Mr. Newman maintained that Exhibit 1 is the standard letter for someone being declared surplus for purposes of obtaining the EDI. He was granted surplus status for six months; if Mr. Ball chose not to resign, as a surplus employee he could have worked until May 1997, in which case he would have been able to build up further leave credits and thereby reduce his credit deficit. However, he chose to leave in January.

Mr. Newman noted that paragraph 2 of Exhibit 1 states that the grievor is "*eligible to <u>opt</u> for the Early Departure Incentive....*" It further goes on to state that *"If you decide to accept";* that is, the EDI is entirely at the option of the grievor. Mr. Newman also submitted that there is a distinction between obtaining severance pay at the lay-off rate, and actually being laid off. He noted that there is a clear

demarcation between resignation and lay-off. Furthermore, a declaration of surplus does not automatically lead to lay-off; the grievor could only be laid off if certain events happen, and a number of events could lead to circumstances other than lay-off. According to Mr. Newman, Mr. Ball knew his options and chose to resign rather than try to find another job, or wait to be laid off.

Counsel for the employer also noted that the EDI Program Order refers to the calculation of EDI at the lay-off rate, i.e. the only reference to lay-off is to establish the rate for the severance pay out. Mr. Newman insisted that the Treasury Board guidelines noted by Mr. Shields only provides that an employee is guaranteed severance pay at the lay-off rate, notwithstanding that the employee is legally resigning; it does not support the submission that a resignation under EDI is a lay-off for every purpose.

Counsel for the employer also argued that the *Bonhomme* case (supra) addressed only the question of continuous employment in the context of a deemed lay-off. Mr. Newman contended that this is not what happened to Mr. Ball. Mr. Newman also submitted that the employer's position is fair to the grievor, as the provision with respect to credits is intended to protect employees who are in fact involuntarily laid off and therefore cannot build up further vacation and sick leave credits. It ensures that a laid-off person does not suffer additional hardship by having to pay back unearned benefits. Mr. Newman insisted that the interpretation that "best ensures the attainment of the objects of the collective agreement" per the *Interpretation Act* is not to confer the benefits of these provisions on persons in Mr. Ball's circumstances.

In rebuttal Mr. Shields noted that Mr. Ball's leave applications were in fact approved by management; there is no attempt to seek a bonus here, only what the grievor was entitled to until his January resignation. Counsel submitted that the same argument with respect to resignation was made in *Bonhomme* (supra) and rejected. Mr. Shields observed that Exhibit 2 does not state that the employee hereby resigns; rather, it speaks of the acceptance of the EDI and "the terms and conditions herewith" which includes the benefits which flow from a lay-off.

Reasons for Decision

Both parties are in agreement that essentially this case concerns the interpretation and application of clauses 17.18 and 19.09 of the relevant collective agreement (i.e. the Agreement between the Treasury Board and the IBEW, Local 2228 expiring August 31, 1991, Code 404/89); the definition of "lay-off" found in paragraph 2.01(j) is also relevant. These clauses provide as follows:

> *17.18 When the employment of an employee who has been granted more vacation leave with pay than he/she has earned is terminated by lay-off, the employee is considered to have earned the amount of leave with pay granted to him/her if at the time of his/her lay-off, the employee has completed two (2) or more years of continuous employment.*
>
> *19.09 When the employment of an employee who has been granted more sick leave with pay than he/she has earned is terminated by lay-off, the employee is considered to have earned the amount of leave with pay granted to him/her if at the time of his/her lay-off, he/she has completed two (2) or more years of continuous employment.*
>
> *2.01 (j) "lay-off" means an employee whose employment has been terminated because of lack of work or because of the discontinuance of a function;*

The resolution of this matter turns on whether the grievor had been laid off, as that term is used in clauses 17.18 and 19.09, as the grievor maintains, or rather whether he had resigned, which is the contention of the employer. The issue therefore is quite straightforward and in my view, so is the appropriate conclusion. The critical document is Exhibit 2 entitled "Early Departure Incentive (EDI) Election"; there are a number of provisions in that document which are relevant to these proceedings, including the first two bullets under the subheading "TERMS AND CONDITIONS", which state the following:

> - *You must accept the EDI option in writing within 60 calendar days following the date of the offer.*
> - *You must terminate your employment with the Public Service on a date acceptable to management within six months from the date of the offer.*

Under the subheading "EMPLOYEE'S ACCEPTANCE" the following provisions are found:

> ☐ *I hereby accept the offer of the EDI and the terms and conditions herewith and I request the approval of my resignation effective Jan 16/97 (day following my last day of work). I understand that this offer is subject to the approval of the CO/Director.*
>
> *If I do not respond to this offer by deadline date, I understand that I will be subject to the following conditions:*
> - *I will be in paid surplus status in return for services rendered for a period of six months from the day following the offer.*
> - *If I am not appointed by the end of the six months paid surplus period, I may be placed on unpaid surplus status for a period of 12 months during which I will continue to be entitled to priority appointment rights. (For further information on benefits and entitlements consult your compensation specialist.)*
> - *If I have not been appointed to a position by the end of the 12 month period of unpaid surplus status, I will be laid-off.*
> - *If I refuse a reasonable job offer during the period of surplus status, I will be laid-off.*

Near the bottom of this form, there is the following printed statement:

> *THE EMPLOYEE'S RESIGNATION DATE WILL TAKE EFFECT ON* 16 JAN 1997.

(It should be noted that this date was written in by hand and is followed by Mr. Ball's initials. In addition, there is a box for the employee's signature which Mr. Ball signed and dated.)

By any reading of this document, it is readily apparent that Exhibit 2 constitutes a written request for resignation, which was duly accepted by representatives of the employer, to take effect on January 16, 1997. It is true that this request was made in the context of the impending abolition of the grievor's position. It is also true that for some purposes (i.e. severance pay) the Work Force Adjustment Directive provides that a resignation shall be deemed a lay-off (see paragraph 9 of the Agreed Statement of Facts). However, the simple question before me is: do these circumstances constitute a resignation, or a lay-off for purposes of clauses 17.18 and 19.09? In my view, what occurred here is a classic resignation situation; the grievor voluntarily chose to sever his employment relationship, he so advised management in writing, who then accepted his resignation, thereby completing the process. There

are, as is usually the case, consequences flowing from the resignation, and indeed there would have been different consequences had the grievor decided to remain until the end of his surplus period. This however does not change the nature and quality of his act, which can only be properly characterized as a resignation. In all the circumstances, this seems to have been an informed, rational decision on the part of the grievor which was freely arrived at by him and from which he received some benefit. In this context, I would note the following passage from *Brown and Beatty*, Canadian Labour Arbitration, 3rd ed., at § 7:7100:

> *In determining whether or not an employee has quit his employment, arbitrators are generally agreed that the basic task confronting them is to ascertain the intention of the employee involved. That is, the arbitrator must determine whether or not the employee actually intended to voluntarily sever the employment relationship. There is also a consensus of arbitral opinion stemming from the earliest cases, that the act of quitting embraces both a subjective intention to leave one's employ, and some objective conduct which manifests an attempt to carry that intention into effect. Thus, it has been said that:*
>
> > *The act of quitting a job has in it a subjective as well as an objective element. An employee who wishes to leave the employ of the Company must first resolve to do so and he must then do something to carry his resolution into effect. That something may consist of notice, as specifically provided for in the Collective Agreement or it may consist of conduct, such as taking another job, inconsistent with his remaining in the employ of the Company.*
>
> *In erecting this dual standard arbitrators have recognized that a simple assertion of resignation may, without more, and if made in certain contexts, reflect more a sense of frustration or anger on the part of the employee than an intention to quit. As a consequence, arbitrators have consistently required some evidence of conduct or action taken by the employee which is confirmatory of, and consistent with, an intention to resign. Moreover, in assessing the employee's conduct, arbitrators have recognized that certain conduct, such as a part-time employee holding down two jobs, or severe psychiatric illness, may imply some intention other than a desire to sever one's employment.*

The facts of this case go well beyond satisfying the conditions set out above in establishing a *bona fide* resignation.

It is also my conclusion that paragraphs 1.1.35 and 1.1.36 of the Work Force Adjustment Directive (supra) are of little assistance to the grievor. I do not believe that these provisions have any implications for clauses 17.18 and 19.09 of the collective agreement; it should be noted, parenthetically, that 17.18 is found under an Article entitled "Vacation Leave", while 19.09 is found under Article 19 which is entitled "Sick Leave". Thus, neither of these provisions deal with "severance pay and retroactive remuneration", which is the subject matter of paragraph 1.1.36 of the WFAD. I would also add that in my view, the *Bonhomme* decision (supra) sheds very little light on the issues in this case. The matter in dispute in *Bonhomme* was the application of the provision in the relevant collective agreement respecting the counting of service towards vacation leave benefits. The decision does not stand for the proposition that an employee on surplus status who resigned during the surplus period is, for all purposes under a collective agreement, considered to have been laid off. Such an interpretation would certainly fly in the face of the clear and simple language of clauses 17.18 and 19.09 of the collective agreement; nor is it warranted or mandated by the terms of the Work Force Adjustment Directive.

Accordingly, for the reasons noted above this grievance is denied.

P. Chodos,
Vice-Chairperson.

OTTAWA, July 16, 1998.