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File: 166-2-30199

Citation: 2001 PSSRB 131



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

ERIC BRUSHETT

Grievor

and

TREASURY BOARD
(Department of Fisheries and Oceans)

Employer

Before: [Yvon Tarte, Chairperson](#)

For the Grievor: [Mark Murray, counsel, Canadian Merchant Service Guild](#)

For the Employer: [Jennifer Champagne, counsel](#)

(Decision rendered without an oral hearing)

DECISION

[1] On October 20, 1998, Eric Brushett, who is employed as a Marine Officer, SO-MAO-4, with the Canadian Coast Guard on board the CGCS CAPE ROGER submitted the following grievance:

I grieve that I was put on forced leave when I was not called back to work for Annual Refit on the "CAPE ROGER" or any other vessel, when Seaman worked in a watchkeeping level.

[2] He seeks the following remedial action:

Credit the leave to my bank that was used while been on forced leave.

[3] In denying Mr. Brushett's grievance at the final level of the grievance process on August 10, 2000, the Deputy Commissioner of the Coast Guard stated:

I have carefully reviewed the circumstances surrounding your grievance. I have also given consideration to the arguments presented by your representative from the Canadian Merchant Service Guild, Mr. Larry Dempsey, on March 31, 2000.

I have verified with the Fleet Crewing Office and have been assured that they did attempt to identify an alternate assignment for you during the lay-up period of the CCGS Cape Roger. I understand that this effort was unsuccessful, and that you were therefore required to proceed on annual leave.

However, I note that it is within the discretion of management to determine appropriate crew complement during the refit period. In addition, the selection of staff is made on the basis of operational and regulatory requirements, as well as the qualification of individuals. Management is not required to limit their selection to indeterminate employees, or to terminate acting assignments to accommodate displaced staff.

In view of the foregoing, I am not able to grant you the redress you request and your grievance is denied.

[4] The grievance was referred to adjudication on September 27, 2000. The Reference to Adjudication form (Form 14) was signed by an official of the Canadian Merchant Service Guild (CMSG); clause 20.07 of the collective agreement between the Treasury Board and the CMSG, covering all employees in the Ships' Officers group, Code 410/98, is specifically invoked by the CMSG on the grievor's behalf on that form.

[5] In a letter to the Board dated July 30, 2001, the employer alleged that an adjudicator appointed under the *Public Service Staff Relations Act* (PSSRA) lacks the requisite jurisdiction to hear and determine Mr. Brushett's grievance. In so doing, the employer stated:

...It is respectfully submitted that an adjudicator lacks jurisdiction to hear this matter since management's decision not to reassign the grievor on another vessel in the fleet and to assign other employees instead is not adjudicable under the Public Service Staff Relations Act.

Background:

Eric Brushchett, Second Officer, SO-MAO-03 is an indeterminate employee who was assigned to the CCGS Cape Roger on the 1998 Officer's assignment plan.

The CCGS Cape Roger was scheduled for its annual refit during September/October 1998. As is the usual practice, the vessel's management team reviewed on-board requirements for maintenance and repair functions, and determined the crew complement required during the refit. The ship's complement was determined in accordance with the Coast Guard Vessel Competency Profile, and all positions established as essential for the refit were staffed.

Operational plans for 1998-1999 had been distributed on March 31st, 1998, and the schedule clearly identified the period of September 2 to September 30 as a refit period for the CCGS Cape Roger. Officers who would not be required were advised that they should advise the crewing office should they wish to be reassigned to other regional vessels or on training during this non-operational period.

The grievor notified the crewing office of his interest in placement on another vessel at the beginning of the refit period. However, no vessel was available for this officer during the period in question. He therefore was required to proceed on annual leave.

Jurisdictional Arguments:

Mr. Brushett's grievance reads as follow: "I greive (sic) that I was put on forced sick leave when I was not called back to work for annual refit on the "Cape Roger" or any other vessel, when Seaman worked in a watchkeeping level." In his grievance, Mr. Brushett has failed to quote any section of the collective agreement that the employer has allegedly violated. On the contrary, the wording of his grievance suggests that management used other people to staff positions on other vessels and that he should have been

offered these opportunities instead of management offering them to term employees or have employees act in them. It is argued that the collective agreement does not confer a right to be re-assigned to other positions in non-operational periods. This is clearly a management's right and as such is clearly not a matter that falls under section 92 of the Public Service Staff Relations Act (PSSRA). The employer therefore would request that the Board order that these jurisdictional arguments be resolved through written submissions.

[6] Mark D. Murray, counsel for the grievor, responded to the employer's jurisdictional objection in a letter to the Board dated August 14, 2001, in the following terms:

Please be advised that it is our position that we would agree to having the jurisdictional argument resolved through written submissions. We would like the employer in this matter, to file his brief with the Board and then we would be allowed a short period of time, to prepare and forward our brief to the Board.

We do dispute the allegation that Section 92 of the Public Service Staff Relations Act does not contemplate a grievance of this nature. We will, in our submission, review at length the provisions of the Public Service Staff Relations Act and the Collective Agreement which we will be relying upon in support of our argument that the Board has jurisdiction to hear the matter.

[7] In light of the joint agreement of the parties, the Board advised them in a letter dated August 15, 2001, that the jurisdictional objection raised by the employer would be determined on the basis of the written submissions of the parties. The following is a summary of those submissions.

Position of the grievor

[8] Counsel for the grievor first reviewed the facts underlying Mr. Brushett's grievance. At all relevant times Mr. Brushett was a member of the Ships' Officers bargaining unit for which the CMSG is the bargaining agent. He was employed as a Second Officer by the Department of Fisheries and Oceans, Canadian Coast Guard, Marine Division. Mr. Brushett was assigned to the CGCS CAPE ROGER on the 1998 Officer's assignment plan.

[9] The CGCS CAPE ROGER was scheduled for its annual refit for the period September 2 to September 30, 1998. The grievor was advised he would not be required

for work during the refit period and that he should advise the Crewing Office if he wished to be reassigned to another vessel. He so advised the Crewing Office but he was informed that there was no other vessel available for him during the period in question. Therefore, the grievor was forced to use his annual leave credits to cover this non-operational period.

[10] An adjudicator has jurisdiction to hear this grievance under paragraph 92(1)(a) of the PSSRA as it relates to a violation of a provision of the collective agreement applicable to the grievor; in particular, it relates to a violation of clause 20.07 dealing with the scheduling of annual leave. The employer did not make every reasonable effort to schedule the leave in question in a manner acceptable to the grievor, as clause 20.07 requires. In support of his submissions, counsel referred to the following adjudication decision: *Re Canada (Treasury Board) and MacGregor* (1996), 30 L.A.C. (4th) 330.

Position of the employer

[11] Counsel for the employer also reviewed the facts leading up to the filing of Mr. Brushett's grievance. She submitted that the substance of the grievance relates to the employer's failure to re-assign the grievor to work on another vessel during the period when the CGCS CAPE ROGER was undergoing a refit. This is a staffing matter which falls within the employer's exclusive managerial authority. It is not a matter which falls under subsection 92(1) of the PSSRA and, therefore, an adjudicator appointed under the PSSRA has no jurisdiction to hear and determine Mr. Brushett's grievance.

[12] The employer's managerial authority flows from paragraphs 7(1)(a), (b), (e) and (f) and 11(2)(a), (c), (d) and (i) of the *Financial Administration Act* (FAA). The jurisprudence of adjudicators and the Federal Court recognizes the employer's authority with respect to human resources management. Any limitation on this managerial authority must be specifically located in either a statute or a collective agreement. In support of her position, counsel referred to the following decisions: *Zadow* (Board file 166-2-9448); *P.S.A.C. v. Canada* (Canadian Grain Commission) (1986), 5 F.T.R. 51; [1986] F.C.J. 498 (F.C.T.D.).

[13] There is no specific provision in the collective agreement that prohibits the employer from placing an employee on off-duty status or, alternatively, requiring him

or her to use any leave credits available as he or she chooses. The grievor is inviting an adjudicator to conclude that the employer had an obligation to call him back to work regardless of operational requirements, as opposed to other employees. Such a conclusion by an adjudicator would be inconsistent with the employer's powers enunciated in the FAA. Furthermore, the substance of the grievance does not deal with an issue that can be referred to adjudication. Accordingly pursuant to subsection 96(3) of the PSSRA, the employer's reply at the final level of the grievance process is final and binding for all purposes of the PSSRA.

[14] The grievor is now invoking clause 20.07 of the collective agreement to substantiate the adjudicability of his grievance; however, the substance of the grievance has nothing to do with leave. The grievor's invoking of clause 20.07 is a sham designed to allow the grievance to go to adjudication. The grievor did not refer to clause 20.07 in the grievance itself; rather it was first referred to by the grievor in his written submissions. Therefore, the employer had no opportunity to address this issue during the grievance process. The employer denied the grievance at all levels of the grievance process on the basis that it related to a management decision arising out of the exercise of managerial discretion. The grievor's invoking of clause 20.07 of the collective agreement for the first time at adjudication amounts to a modification of the substance of the grievance and this is not permitted: *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109.

[15] The grievor was not denied annual leave, nor was he forced to take such leave. Rather he chose to cover the period of the refit while he was on off-duty status with his annual leave credits, which the employer allowed him to do. There was simply no work available for the grievor during the annual refit period. Accordingly, this is not a situation which falls within clause 20.07 of the collective agreement. The grievance is based solely on a staffing issue.

[16] The employer properly exercised its managerial authority with respect to staffing during the annual refit period. There is no specific provision in the collective agreement, or in a statute, that prohibits the employer from acting in accordance with operational requirements. The collective agreement does not guarantee employment during refit and this grievance should not be used to obtain what was not negotiated in collective bargaining. Thus the substance of the grievance is not adjudicable under the PSSRA and the grievance should be dismissed without a full hearing on the merits.

Reply of the grievor

[17] Counsel for the grievor reiterated his position that, as Mr. Brushett's grievance relates to the interpretation or application of a provision of the relevant collective agreement, it falls within paragraph 92(1)(a) of the PSSRA. Accordingly, an adjudicator appointed under the PSSRA has the requisite jurisdiction to hear and determine the grievance.

[18] The grievor does not deny that the employer has managerial authority pursuant to the FAA. However, this managerial authority does not preclude the application of paragraph 92(1)(a) of the PSSRA which gives an adjudicator jurisdiction to hear and determine a grievance when the substance of the grievance relates to the interpretation or application in respect of the employee of a provision of a collective agreement.

[19] Although the employer does possess managerial authority, the employer must also comply with the provisions of the collective agreement. When an employer fails to do so and the employee has presented a grievance in that regard to the final level of the grievance process, paragraph 92(1)(a) of the PSSRA provides for the adjudication of that grievance.

[20] The grievor disagrees with the employer's characterization of the grievance as being one that relates to management rights; the substance of the grievance clearly relates to Mr. Brushett's being forced by the employer to take annual leave, as the grievance itself specifically states. Article 20 of the collective agreement is the only provision thereof which addresses the leave of employees. Clause 20.07 specifically deals with the requirements for scheduled leave.

[21] Counsel for the grievor disputed the employer's allegation that the grievor's invocation of clause 20.07 for the first time at the adjudication level is a modification of the substance of the grievance as originally filed. The grievor's position has always been that leave was forced upon him, thereby invoking the application of the relevant provision of the collective agreement: clause 20.07.

[22] The grievor had no choice but to cover the annual refit period with annual leave. He requested that he be placed on another vessel and this was denied by the employer, even though the employer presented this option to the grievor when the annual refit period was announced. In this way, the grievor was forced to take annual leave. This

clearly calls into play clause 20.07 of the collective agreement which addresses the scheduling of vacation leave by the employer.

[23] The grievor does not deny that the employer may operate within operational limits. However, the employer did not make this decision based on operational requirements. The decision it made to force the grievor to take leave was an arbitrary one and was, therefore, a violation of clause 20.07 of the collective agreement dealing with scheduled leave.

[24] Furthermore, the employer's written submissions go beyond the scope of the issue to be determined at this stage of the proceedings, which is whether the substance of Mr. Brushett's grievance is such that an adjudicator appointed under the PSSRA has the jurisdiction to hear and determine the matter. It is the grievor's submission that an adjudicator does have that jurisdiction pursuant to paragraph 92(1)(a) of the PSSRA.

Reasons for decision

[25] The following are the relevant statutory provisions:

Public Service Staff Relations Act

92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to

(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,

(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),

(i) disciplinary action resulting in suspension or a financial penalty, or

(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or

(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,

and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.

...

96. (1) Subject to any regulation made by the Board under paragraph 100(1)(d), no grievance shall be referred to adjudication and no adjudicator shall hear or render a decision on a grievance until all procedures established for the presenting of the grievance up to and including the final level in the grievance process have been complied with.

(2) No adjudicator shall, in respect of any grievance, render any decision thereon the effect of which would be to require the amendment of a collective agreement or an arbitral award.

(3) Where a grievance has been presented up to and including the final level in the grievance process and it is not one that under section 92 may be referred to adjudication, the decision on the grievance taken at the final level in the grievance process is final and binding for all purposes of this Act and no further action under this Act may be taken thereon.

Financial Administration Act

7. (1) The Treasury Board may act for the Queen's Privy Council for Canada on all matters relating to

(a) general administrative policy in the public service of Canada;

(b) the organization of the public service of Canada or any portion thereof, and the determination and control of establishments therein;

...

(e) personnel management in the public service of Canada, including the determination of the terms and conditions of employment of persons employed therein;

...

(f) such other matters as may be referred to it by the Governor in Council.

...

11(2) Subject to the provisions of any enactment respecting the powers and functions of a separate employer

but notwithstanding any other provision contained in any enactment, the Treasury Board may, in the exercise of its responsibilities in relation to personnel management including its responsibilities in relation to employer and employee relations in the public service, and without limiting the generality of sections 7 to 10,

(a) determine the requirements of the public service with respect to human resources and provide for the allocation and effective utilization of human resources within the public service;

. . .

(c) provide for the classification of positions and employees in the public service;

(d) determine and regulate the pay to which persons employed in the public service are entitled for services rendered, the hours of work and leave of those persons and any matters related thereto;

. . .

(i) provide for such other matters, including terms and conditions of employment not otherwise specifically provided for in this subsection, as the Treasury Board considers necessary for effective personnel management in the public service.

[26] The relevant provisions of the collective agreement provide:

Article 20 - Vacation Leave with Pay

20.01 Vacation Year

The vacation year shall be from April 1st to March 31st inclusive of the following calendar year.

20.02 Accumulation of Vacation Leave Credits

An officer who has earned at least eighty (80) hours' pay during any calendar month of a vacation year shall earn vacation leave credits at the following rates provided he/she has not earned credits in another bargaining unit with respect to the same month:

(a) ten (10) hours per month until the month in which the anniversary of his eighth (8th) year of continuous employment occurs;

or

(b) thirteen decimal three-three (13.33) hours per month commencing with the month in which his eighth (8th) anniversary of continuous employment occurs;

or

(c) sixteen decimal six-seven (16.67) hours per month commencing with the month in which his nineteenth (19th) anniversary of continuous employment occurs;

or

(d) twenty (20) hours per month commencing with the month in which the officer's thirtieth (30th) anniversary of continuous employment occurs.

20.03 For the purpose of clause 20.02 only, all service within the Public Service, whether continuous or discontinuous, shall count toward vacation leave except where a person who, on leaving the Public Service, takes or has taken severance pay. However, the above exception shall not apply to an Officer who receives severance pay on lay-off and is reappointed to the Public Service within one year following the date of lay-off.

20.04 Vacation leave with pay shall be granted on an hourly basis with the hours debited for each day of vacation leave being the same as the hours the officer would normally have worked on that day.

Entitlement to Vacation Leave With Pay

20.05 An officer is entitled to vacation leave to the extent of his/her earned credits but an officer who has completed six (6) months of continuous employment may receive an advance of credits equivalent to the anticipated credits for the vacation year.

Scheduling of Vacation Leave With Pay

20.06 Officers are expected to take all their vacation leave during the vacation year in which it is earned, and the Employer shall, subject to the operational requirements, make reasonable effort to schedule the officer's vacation leave during the vacation year in which it is earned.

20.07 Vacation leave may be scheduled by the Employer at any time during the vacation year. However, consistent with efficient operating requirements, the Employer shall make every reasonable effort to schedule vacations in a manner acceptable to officers and to give the officer two (2) months notice.

20.08 The Employer will advise the officer within thirty (30) days of receiving a request for vacation leave that the vacation leave has or has not been approved.

20.09 When during a period of vacation leave, an officer is granted bereavement leave, the period of vacation leave so displaced will either be added to the vacation period if requested by the officer and approved by the Employer or reinstated to the officer's credit for use at a later date.

20.10 Carry-over Provisions

With the consent of the Employer, vacation leave credits not utilized in the vacation year in which they are earned may be carried over into the following vacation year. Carry-over beyond one (1) year will be by mutual consent.

20.11 Recall From Vacation Leave With Pay

(a) The Employer shall make every reasonable effort to assign available officers in such a manner that an officer who is on vacation leave is not recalled to duty.

(b) When during any period of vacation leave or combination of vacation and compensatory leave, an officer is recalled to duty, he/she shall be reimbursed for reasonable expenses, as normally defined by the Employer, that he/she incurs:

(i) in proceeding to his/her place of duty,

and

(ii) in returning to the place from which he/she was recalled if he/she immediately resumes vacation upon completing the assignment for which he/she was recalled,

after submitting such accounts as are normally required by the Employer.

(c) The officer shall not be considered as being on vacation leave or a combination of vacation and compensatory leave during any period in respect of which

he/she is entitled under clause 20.11(b) to be reimbursed for reasonable expenses incurred by the officer.

Leave When Employment Terminates

20.12 When an officer dies or otherwise ceases to be employed, he/she or his/her estate shall be paid an amount equal to the product obtained by multiplying the number of hours of earned but unused vacation leave with pay to his/her credit by the hourly rate of pay to which he/she is entitled by virtue of the certificate of appointment in effect at the time of the termination of his employment, but such rate of pay shall not include a rate of pay pertaining to a position held for a temporary period.

20.13 Notwithstanding clause 20.12, an officer whose employment is terminated by reason of a declaration that he/she abandoned his/her position is not entitled to receive the payment referred to in clause 20.12 unless he requests it in writing within six (6) months following the date upon which his employment is terminated.

Article 35 - Pay Administration

35.01 Except as provided in this Article, the terms and conditions governing the application of pay to officers are not affected by this Agreement.

35.02 An officer is entitled to be paid for services rendered at the pay specified in Appendix "A", "B", "C" or "D" for the group, sub-group and level prescribed in the officer's certificate of appointment.

[27] The employer objects to the adjudicability of the grievance, among other things, on the basis that the grievor changed the nature of his grievance by raising for the first time at adjudication clause 20.07 of the collective agreement. I find that this objection has no merit as it was clear from the grievance as filed that it always related to leave entitlements. The fact that no specific provision of the collective agreement was referred to until adjudication does not alter the nature of the grievance.

[28] The grievor submits that his grievance is adjudicable under paragraph 92(1)(a) of the PSSRA as it relates to the interpretation of application in respect of him of a provision of the relevant collective agreement, namely clause 20.07. In his grievance as filed, the grievor specifically refers to having been placed on "forced leave" during the refit period.

[29] The employer maintains that it was entitled to place Mr. Brushett on off-duty status during the refit of the ship to which he was ordinarily assigned. The employer referred to the decision of the Federal Court, Trial Division in *P.S.A.C. v. Canada (Canadian Grain Commission)* (*supra*) in support of this position. In addition, the employer maintains that it was under no obligation to find the grievor another work assignment during the refit period and, in fact, it did not do so. Therefore, the grievor had the choice of not being paid during the period in question, in light of the principle of “no work, no pay”, or he could choose to utilize his leave credits. According to the employer, there is no provision, either in a statute or in the applicable collective agreement, which precludes it from adopting this approach. Indeed, subsections 7(1) and 11(2) of the FAA authorize the employer to do so and therefore, the employer submits that an adjudicator appointed under the PSSRA has no jurisdiction to interfere in the employer’s exercise of its statutory discretion. Furthermore, such an adjudicator has no authority to hear and determine Mr. Brushett’s grievance as, in substance, it relates to the employer’s exercise of its statutory discretion.

[30] Having carefully considered the submissions of the parties, I have reached the conclusion that the substance of Mr. Brushett’s grievance relates to his entitlement to be paid during the refit period of the CCGS CAPE ROGER without having to resort to his vacation leave credits. This clearly relates to Article 20, dealing with vacation leave, and Article 35, dealing with pay, of the collective agreement. His grievance, therefore, falls squarely within paragraph 92(1)(a) of the PSSRA as it involves the interpretation or application in relation to Mr. Brushett of these provisions of the collective agreement. The employer’s objection to the adjudicability of the grievance, namely that the employer was legally entitled to do what it did, really relates to the merits of Mr. Brushett’s grievance.

[31] Accordingly, I hereby direct the Assistant Secretary, Operations, of the Board to contact the parties for the purpose of scheduling a hearing into the merits of Mr. Brushett’s grievance.

Yvon Tarte
Chairperson

OTTAWA, December 20, 2001