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File: 166-02-30513

Citation: 2002 PSSRB 36

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

KEVIN MORHART

Grievor

and

TREASURY BOARD
(Solicitor General Canada - Correctional Service)

Employer

Before: Francine Chad Smith, Q.C.

For the Grievor: Neil J. Harden, Employment Relations Officer, Professional Institute of the Public Service of Canada

For the Employer: Renée Roy, Counsel

Heard at Saskatoon, Saskatchewan,
January 8 and 9, 2002

INTRODUCTION

[1] The grievor, Mr. Kevin Morhart, was denied a request for annual leave on February 21, 2001. He filed a grievance claiming the employer failed to make every reasonable effort to grant his request and, accordingly, violated clause 15.05(a) of the collective agreement between Treasury Board and the Professional Institute of the Public Service of Canada covering all employees in the Health Services Group, Codes 207/00, 213/00, 217/00, 219/00, 220/00, 221/00, 223/00, 226/00 and 228/00, expiry date September 30, 2000 . The corrective action sought is as follows:

> *That management complies with the spirit of the Collective Agreement and I be given my annual leave in the time and the amount as I request in the future. I be compensated financially for the stress and hardship I have endured as a result of having to make alternate child care arrangements due to the refusal of my leave. I be given a written acknowledgment of wrongdoing. I be made whole in full.*
>
> *(Exhibit A3)*

THE FACTS

[2] The parties filed an Agreed Statement of Facts, which reads as follows:

1. *Kevin Morhart is a Nurse employed by Correctional Services of Canada at the Regional Psychiatric Centre in Saskatoon.*

2. *On February 3, 2001, Mr. Morhart applied for annual leave for the February 21, 2001 shift.*

3. *Mr. Morhart's leave request was denied on February 5, 2001.*

4. *Mr. Morhart was denied leave because the quota for annual leave for nurses for the shift in question had been met.*

5. *The quota for annual leave for nurses is contained in the vacation leave policy established by the employer.*

6. *The annual leave policy for the period in question allowed three nurses on annual leave at one time.*

7. *In early December 2000, 12 hour shifts (from 7.5 hour shifts) were introduced.*

8. *Mr. Morhart did not attempt to arrange a shift exchange with another nurse for the February 21, 2001, shift.*

9. *There are 3 shifts for nurses working on the units each day, consisting of an A shift from 0645 hours to 1945, a B shift from 0915 to 2215 and a night shift from 1945 to 0815.*

10. *The minimum staffing requirement per day for nurses working in the units is 17, consisting of 15 on the combined A and B shifts, and 2 on the night shift.*

11. *The full complement staffing requirement per day for nurses working in the units is 23, consisting of the minimum requirements plus 6 additional nurses on the substitute board. The policy allocates 3 nurses from the substitute board for annual leave replacement and 3 nurses for unscheduled leave.*

12. *The parties reserve the right to call witnesses and to present additional evidence at the hearing of this matter.*

(Exhibit A1)

[3] The grievor had requested leave for February 21, 2001 in order to provide child care for his children. His wife is also a nurse, employed by another employer. He and his wife work opposite rotations so that one of them is generally available to care for their children.

[4] The grievor has been employed at the Regional Psychiatric Centre for 11 years and has served as a union steward for a number of those years. He is past chair of a sub-group of the bargaining agent, a member of the institute's bargaining committee, and serves on the joint management employee scheduling committee.

[5] At the relevant time the grievor believed there were approximately 10 part time employees and 15 casual employees in addition to the roster complement of nurses available to the employer. The grievor testified that it was his understanding that the employer could have hired a part time employee or a casual employee, at straight time, to replace him and that he was not aware of any effort made by the employer to find a replacement for him on the date in question.

[6] The grievor was aware of the employer's practice to allow employees to switch shifts among themselves; however, he did not pursue this option as it was impractical given the inflexibility of his time as a result of the arrangements he and his wife had made to work opposite shifts to provide care for their children. He was also aware that he could have called in one hour prior to his shift to find out if any of the employees on the substitution board for unscheduled leave were available. However, he did not pursue this course of action because he had to make suitable arrangements for child care if leave was not to be granted.

[7] In the end result, the grievor worked on February 21, 2001 and made arrangements with a neighbour's daughter to look after the children.

[8] Notwithstanding his grievance, the evidence disclosed that seven months prior to the end of the employer's April 1,2000 - March 31,2001 fiscal year, the grievor had been able to take 19.5 days of his 20 days allotted leave and had also been able to use 13.78 days of 20 days credited leave (Exhibit E22). Approximately one-third of the grievor's leave was taken in one block during the summer peak period, and the balance was taken on twenty-six separate occasions throughout the course of the year in blocks of time ranging from one to twelve hours (Exhibit E9). With respect to time taken in blocks of twelve hours or less, the grievor testified that there were times he obtained the leave requested and other times when his requests for leave were refused.

[9] With the change from 7.5 hour shifts to 12 hour shifts in December 2000, the grievor worked an average of 13 shifts in 28 days, which resulted in approximately 15 days off and 13 days worked each month. The employer had a written leave policy addressing annual leave in two week blocks, which included a priority system, and thereafter provided for other annual leave being granted on a first come, first serve basis. All annual leave was subject to a maximum of three persons being on annual leave on any given day. (Exhibit 4.)

[10] Prior to the change to 12 hour shifts, the employer's staffing requirement was based upon twenty-nine posts. To fill those twenty-nine posts, the employer utilized a staffing multiplier of 1.82 to calculate the number of full-time equivalent positions it required to meet its staffing needs and the benefit obligations under the collective agreement. The evidence disclosed the full complement of nurses required over a 24 hour period was twenty-three, which included six nurses on the substitution board (Exhibit A1: paragraphs 10 and 11). Of the six nurse substitution board, three positions were reserved to fill in primarily for persons on annual leave, and secondarily, for persons taking compensatory or banked time; the remaining three positions were reserved for unscheduled leave, such as sick leave or family leave.

[11] Ms. Diane Neufeld, the Acting Associate Clinical Director at the Regional Psychiatric Centre, testified the 1.82 multiplier used in the staffing formula was provided to the employer by the Treasury Board. She understood the multiplier, when used with the number of posts, provided the number of full time equivalent positions required on the roster to provide coverage for all forms of leave stipulated in the

collective bargaining agreement. The multiplicand of the formula being 52.78 resulted in the employer maintaining a roster of 53 persons. She noted at one time the multiplier provided by the Treasury Board was 1.77; however, that multiplier proved to be too low because it did not account for the fourth week of annual leave nurses were entitled to.

[12] Ms. Neufeld testified that 8 hour shifts were in place until May or June of 1999 when the shifts were changed to 7.5 hours. Following the change to 7.5 hour shifts, a management retreat was held in order to review the staffing requirements and specifically to consider any changes that might be necessary. In utilizing the staffing formula, the employer concluded they had one too many nurses for their allotted salary dollars and as a result, reduced the number of posts from 30 to 29 to provide full coverage without taking into account any leave. That reduction of posts resulted in coverage on the night shift being reduced from three nurses to two nurses. Around the same time a substitution board policy was implemented. That policy provided a substitute board of six nurses would be maintained: four nurses were to be available to provide coverage for persons on annual leave or taking compensatory time and two nurses were designated to cover unscheduled leave.

[13] With the introduction of the 12 hour shifts at the end of December 1999, a leave utilization review was conducted, and while the same number of posts was maintained with the 12 hour shifts, only seventeen nurses were required on duty to cover a 24 hour period as opposed to twenty-nine nurses with the 7.5 hour shift. With the introduction of the 12 hour shifts it was also determined that two positions from the substitution board were not adequate to cover the unscheduled leave and, accordingly, the designations for the substitution board were changed to provide three nurses would be available to cover the unscheduled leave, thus leaving three nurses available to cover annual leave. That was the rationale behind the operative leave policy (as reflected in Exhibit U4), stipulating that three positions from the substitution board would be available to cover annual leave, that came into effect contemporaneously with the 12 hour shifts.

[14] Ms. Neufeld calculated that with the 12 hour shifts, the cost of adding one more person from the substitution board to be available for vacation leave would have been $22,000 just for the 91 day peak period in the summer months. She noted this was a considerable cost given the total overtime budget allowance was $55,000 for each year.

She also noted the change from 7.5 hour shifts to the 12 hour shifts amounted to an additional cost of $100,000 each year in order to pay staff for statutory holidays.

[15] Ms. Neufeld testified that even maintaining the substitution board reserve of three persons to cover annual leave and three persons to cover unscheduled leave, the overtime costs incurred by the employer consistently exceeded the budget figure. In the fiscal year 2000-2001, the total overtime costs for nursing was $329,805 and for the fiscal year 2001-2002, cut off as of September 3, 2001, was $100,176. (See Exhibits E15 and E16 and note the fiscal period runs from April 1 to March 31). With respect to the overtime costs, it should also be noted that the evidence disclosed some staff training costs were included in the calculations. The explanation provided by Ms. Neufeld for the inclusion of training costs in the overtime statistics was that the employer was not obligated to provide training under the collective bargaining agreement; however, based upon requests from the employees and considering training to be mutually beneficial to both employees and the employer, the employer undertook to provide it.

[16] Ms. Neufeld did testify that the leave policy as reflected in Exhibit A4 was in fact designed to control the overtime costs of the employer; however notwithstanding that, the overtime costs remain, in her words, "still out of control". Nevertheless, she did note that the objective of controlling overtime costs had been met because they had been reduced, notwithstanding that the $100,000 cost for statutory pay, as a result of moving to the 12 hour shifts, was now included in the overtime costs.

[17] The last significant point of Ms. Neufeld's testimony was that the employer does make exceptions to its leave policy to accommodate employee requests for leave in special circumstances such as weddings, family occasions or travel out of the country.

[18] Ms. Janice Nachtegaele, the Associate Program Director for the nursing unit the grievor worked on, gave evidence regarding the manner in which the grievor's request for leave was addressed and she also explained in greater detail the employer's leave policy. The grievor's request was received on February 3, 2001 and on February 5, 2001 the request was denied. A review of the briefing book determined that as of February 3 the employer had already granted three requests for annual leave for February 21, the date requested by the grievor. The three leaves were all granted prior to the grievor submitting his request. In addition, a request by one employee for compensatory time was granted on January 10, 2001 for February 21 in order to

accommodate a special circumstance for that employee. As it turned out, on the actual date in question, February 21, the total number of nurses on planned and unplanned leave was 10. The six nurses on the substitution board were all used; one casual was hired from the overtime budget, and no one else was called in. The employer was able to avoid calling in more than one casual nurse because two of the persons on unscheduled family leave were on training days and therefore there was no need to replace them, one person was away for only four hours, and the employer was able to do some juggling of the staff.

[19] Ms. Nachtegaele filed a vacation day report for the fiscal year 2000-2001 (Exhibit E22), which indicated most nurses took their allotted vacation days, and that some of the nurses had also been able to use carry over of vacation days from the previous year. Ms. Nachtegaele also testified that from her discussions with staff, it was her opinion that the staff appreciates the efforts made by the employer to accommodate requests for leave.

[20] Statistics were filed on behalf of both the employer and the grievor showing persons on leave during various periods of time. The statistics were contained in Exhibit U8 and in Exhibit E13. There was some crossover with respect to dates covered in the statistical exhibits, which disclosed inconsistencies. Another problem with the statistics filed was the components they purported to include were not clear: for example, did both sets of statistics include training time and compensatory time. Nevertheless, without going into detail of the statistics filed at this juncture, the statistics did disclose the number of persons on leave, be it scheduled or unscheduled, was less than six persons on some occasions, and on other occasions the number exceeded six persons.

ARGUMENT

Argument on Behalf of the Grievor

[21] The argument of the representative of the grievor was twofold. First, he argued the employer did not make every reasonable effort to allow the grievor leave on February 21, 2001. Secondly, the representative of the grievor argued the employer's policy to maintain excess staff on the reserve board for vacation leave and unscheduled leave was unreasonable. Inherent in the twofold argument was the representative's reliance on the test contained in the *Lauzon* decision, *infra*, that

unless it was certain or almost certain that the employer would incur overtime costs, failure to grant leave was unreasonable.

[22] The representative of the grievor also argued the onus of proof lay with the employer to establish that it made every reasonable effort to grant the grievor's request for leave.

[23] With respect to the first argument, the grievor's representative relied upon the evidence of the grievor that the employer could have enlisted the services of part time or casual staff at straight salary.

[24] With respect to the second argument, the grievor's representative argued the employer's leave policy, including its utilization of the substitution board, was unreasonable. Firstly, he maintained the policy of allocating three nurses to cover scheduled leave and three nurses to cover unscheduled leave was unreasonable because the allocations were not based upon the actual leave experience of the employer. Secondly he maintained the allocation of three nurses to unscheduled leave exceeded the requirements demonstrated in the leave statistics.

[25] The representative of the grievor maintained the statistics presented by the employer regarding leave were not reliable because of inconsistencies. He also maintained the numbers on the substitution board allotted for annual leave and unscheduled leave must be based on the actual experience in the facility as opposed to national or other standards. In this regard, he relied upon the statistics contained in Exhibit U8 and calculations based upon those statistics to demonstrate how many hours per month were actually used in unscheduled leave. The thesis of the calculations was that the three employees from the substitution board allotted for the coverage of unscheduled leave greatly exceeded the actual experience of the employer when compared with calculations of average requirements. According to his calculations, based on the fiscal year 2001 to September 3, 2001 date, the average monthly sick leave of 8.04 hours per employee per month, which when multiplied by the 53 full time equivalent positions, equalled 426 hours per month being required for unscheduled leave. Then considering three people were reserved on the substitution board each day, for a total of 36 hours per day (3 nurses x 12 hours), he divided the average monthly hours of sick leave of 426 by 36 hours each day of available coverage to arrive at coverage of 34 days per month which the employer's policy provided for. He ultimately concluded, pursuant to his calculations, that the employer only required

1.2 employees to cover the unscheduled leave for each day. The effect of that calculation meant the employer's substitution board reserved 1.8 more employees for unscheduled sick leave than was necessary.

[26] Alternatively, he based his calculations upon statistics that were more favourable to the employer, that the three year average requirement for unscheduled leave amounted to 1.6 employees per day, which also demonstrated the employer's policy exceeded its needs for unscheduled leave coverage, although the excess coverage was reduced from 1.8 nurses to 1.4 nurses per day. [See generally Exhibit U18, which contains calculations submitted at my request.]

[27] The grievor's representative argued that in addition to the excess capacity for unscheduled leave demonstrated by the calculations, the employer had added protection for unscheduled leave when the allocated three positions on the substitution board for annual leave were not fully utilized. In this regard, he relied upon statistics showing annual leave on December 14, 1998, where seven people were sick and no one was scheduled on annual leave.

[28] He pointed out that overtime will always be an issue regardless of the policy as demonstrated by the previous statistics relating to December 14, 1998. The issue then is where does one draw the line and who chooses to draw that line.

[29] The authorities relied upon by the representive of the grievor were: *Lauzon and Treasury Board (Transport Canada)*, Board file 166-2-15728, [1986] C.P.S.S.R.B. No. 240, (1986) 10 PSSRB Decisions 30 (Digest) (Deputy Chairman M. Bendel); *A.E. Graham and Treasury Board (Transport Canada)*, Board file 166-2-21414, [1991] C.P.S.S.R.B. No. 217, (1991) 20 PSSRB Decisions 27 (Digest) (Board Member T.O. Lowden); *Re Government of Nova Scotia and Nova Scotia Government Employees Association* (1983), 11 L.A.C. (3d) 181 (Arbitrator I. Christie); *Re Intercraft Industries of Canada, Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2679* (1985), 22 L.A.C. (3d) 281 (Arbitrator V. Solomatenko); *Re Pinehaven Nursing Home and London & District Services Workers' Union, Local 220* (1993), 36 L.A.C. (4th) 440.

Argument on Behalf of the Employer

[30] Counsel argued the grievor had not met the burden of proof and had failed to establish the collective agreement was breached. The grievor failed to demonstrate the employer did not make every reasonable effort to grant the leave requested;

conversely, she argued the employer has shown every reasonable effort was made on the date in question, and generally, to meet employees' requests for annual leave.

[31] In support of her position that the employer made every reasonable effort to meet the grievor's request for leave and to generally meet employees' requests for annual leave, counsel relied upon a number of facts.

[32] The employer had a fair and reasonable vacation policy based upon its review of unscheduled leave in the past and upon a review of past years of leave in general. In addition, it employs a full complement of nurses to meet its roster requirements in light of its obligations pursuant to the collective agreement.

[33] The evidence shows that the employer actually increased the multiple of full time equivalent positions required to meet its contractual obligations from 1.77 to 1.82 thereby increasing the number of nurses available to cover each post according to Ms. Neufeld's evidence. By then decreasing the number of posts from 30 to 29, better coverage for the actual number of employees was provided.

[34] The substitution board arrangement provided for in the leave policy takes into account planned and unplanned leave. The employer has stipulated that three of the six positions on the substitution board will always be available for scheduled leave and that annual leave will take precedence over compensatory leave. In addition, the employer has formulated a policy of entertaining requests for annual leave made one hour before the commencement of a shift which enables it to utilize any of the three nurses on the substitution board allotted for unscheduled leave who are not required, for annual leave at the last minute. This is a necessary step because the very nature of unplanned leave is that it is uncertain and speculative. Furthermore, even by utilizing the leave policy it has in place, the employer still incurs significant overtime costs.

[35] Lastly, counsel for the employer pointed out that it was not clear from all the statistics filed whether training days and compensatory leave were accounted for and accordingly, the calculations relied upon by the representative for the grievor to argue the employer maintained excess capacity in its substitution board, were unreliable. Although training was not a requirement *per se* in the collective agreement, it is an operational matter that is mutually beneficial to the employer and the employees. Furthermore, the evidence of Ms. Neufeld disclosed the employees had requested training be provided.

[36] Here, counsel for the employer, indicated the leave policy appears to be working as noted by the evidence of Ms. Nachtegaele that the staff appreciated the efforts made by the employer. With respect to the specific dates the grievor requested leave, the evidence disclosed three requests for annual leave had been approved prior to his application and one compensatory leave, based on special circumstances, had also been granted before the grievor's request. In this regard, counsel for the employer relied upon the demonstration of the employer's reasonableness contained in the fact it was prepared to consider special circumstances and make exceptions to its policy for the benefit of its employees. That fact, combined with the fact the grievor did not make any attempts to change his shift and failed to utilize the flexibility in the one hour call provision, the fact the grievor has more days off than he actually works, and the fact the scheduling rotation allowed calculation of days off well in advance, demonstrated the reasonableness on the whole of the employer's policy. Lastly, the employer relied upon the fact the grievor was able to take 19.5 days of his 20 days allotted leave in the fiscal year 2000-2001 (Exhibit E22): approximately one-third of his leave was taken in one block during the summer peak period, and the balance was taken on twenty-six separate occasions throughout the course of the year in blocks of time ranging from one to twelve hours.

[37] Counsel for the employer took the position the *Lauzon* case, being the main authority relied upon by the grievor, did not represent the law regarding this issue and filed the following cases to support her position: *Nicholson and Treasury Board (Transport Canada)*, Board file 166-2-16080, [1987] C.P.S.S.R.B. No. 27, (1987) 11 PSSRB Decisions 36 (Digest) (Board Member T.W. Brown); *Whyte and Treasury Board (Transport Canada)*, Board file 166-2-17992, [1989] C.P.S.S.R.B. No. 260, (1989) 16 PSSRB Decisions 19 (Digest) (Board Member R. Young); *Oates and Treasury Board (Transport Canada)*, Board file 166-2-26597, [1996] C.P.S.S.R.B. No. 3, (1996) 29 PSSRB Decisions 21 (Digest) (Vice-Chairperson L.M. Tenace); *Milette and Treasury Board (Transport Canada)*, Board file 166-2-15368 and 15369, [1986] C.P.S.S.R.B. No. 93, (1986) 9 PSSRB Decisions 35 (Digest) (Vice-Chairman J.M. Cantin, Q.C.); *Milne and Treasury Board (Transport Canada)*, Board file 166-2-18376, [1989] C.P.S.S.R.B. No. 226, (1989) 16 PSSRB Decisions 27 (Digest) (Board Member R. Young).

THE ISSUE

[38] The primary issue is whether the employer violated the collective agreement by failing to make every reasonable effort to provide the grievor's annual leave on

February 21, 2001? Implicit in the issue is what the collective agreement requires of the employer, which party bears the onus of proof, and whether the onus of proof has been met.

REASONS FOR DECISION

[39] Clause 15.05(a) of the collective agreement provides:

> *15.05 Provision for Vacation Leave*
>
> *In order to maintain operational requirements, the Employer reserves the right to schedule an employee's vacation leave but shall make every reasonable effort:*
>
> *(a) to provide an employee's vacation leave in an amount and at such time as the employee may request;*

[40] The grievor alleges the employer failed to make every reasonable effort to grant his request for leave for February 21, 2001.

[41] The primary case relied upon by the representative for the grievor was *Lauzon.* In that case, the clause in question (17.06(b)), provided:

> *Consistent with efficient operating requirements the Employer shall make every reasonable effort to schedule vacations in a manner acceptable to the employees.*

[42] In *Lauzon,* the adjudicator, accepting earlier conclusions expressed by then Vice-Chairman Cantin, Q.C. held that paying overtime was not within the ambit of "making every reasonable effort". The adjudicator then went on to conclude at pages 9 and 10:

> *In my opinion, under article 17.06(b), the employer can cite an obligation to pay overtime as grounds for denying a request for vacation leave only if it reasonably anticipates that it is certain or almost certain that it will have to pay overtime if it grants the leave requested. . . .*
>
> *I wish to repeat here what I said earlier, namely, that practically speaking, postponement of a decision on Mr. Lauzon's request was tantamount to a denial of leave because he could not plan his daughter's baptism without knowing whether he would be granted his leave. I note that, according to article 17.06(b), the employer shall make every reasonable effort to schedule vacations "in a manner acceptable to employees". Mr. Lauzon not only wanted the employer to grant him leave on August 11; he also wanted it*

> *to grant this leave in advance. According to the collective agreement, refusal to grant leave in a manner acceptable to an employee, except of course, where operational requirements or other relevant circumstances are a consideration, constitutes in itself a violation of article 17.06(b), as does a refusal to grant leave on the dates requested by the employee.*

[43] The representative for the grievor also relied upon the decision in *Graham*, which held at pages 8 and 9:

> *Training commitments are not a valid reason for not meeting contractual obligations because training in most areas is relatively constant. For training to be accepted as a reason for not meeting contractual obligations would render certain aspects of a Collective Agreement worthless.*

[44] To bolster his case, the representative of the grievor has relied upon statistics regarding leave tendered in evidence and calculations thereon to demonstrate excess capacity in the substitution board by reserving three persons for unscheduled leave. I have reservations about the statistics relied upon. As stated in the discussion under the heading "Facts", it was not clear what components the statistics included, and whether, in fact they included all appropriate data. In short, while data relating to leave was filed in Exhibits U8 and E13, questions remained regarding what they represented and accordingly, whether it was appropriate to use them. In addition, because of the complexities of scheduling, including the primary use of 12 hour shifts, coupled with some shorter shifts (for example, 8 hour shifts for training and other shorter shifts), I had reservations about the dependability of the calculations performed by the representative of the grievor given the employer's utilization of staff.

[45] Even if I accept the calculations presented on behalf of the grievor that the substitution board policy contained excess capacity, the calculations were all based upon averages. The actual statistics themselves demonstrated numerous occasions where the leave significantly exceeded the averages, and of course also showed examples where the leave was under the averages. The actual statistics also demonstrated there were days where the full substitution board complement was not required and days when more than the substitution board complement was required.

[46] Even if the calculations submitted on behalf of the grievor are reliable, I am not prepared to conclude the employer is required to govern itself based upon averages and accordingly be considered to be unreasonable if it provides for cushioning in its

scheduling operations. In this case, the cushioning would have been in maintaining substitution capacity in excess of average statistics. However, if the maintenance of excess substitution capacity, by itself or together with other policies, amounted to a failure on the employer's part to make every reasonable effort to provide vacation leave as requested, then of course, there may well be a problem with such excess capacity. As clause 15.05 provides, the employer does have a right to control scheduling of vacation leave. That right is set out initially in the clause and accordingly, the "every reasonable effort" the employer is required to make pursuant to the collective agreement must be read in the context of its scheduling operations and the right to actually schedule employees' vacation leave to maintain its operational requirements. I am reluctant to interpret such a clause as creating an obligation on the employer to grant every request for annual leave made by every employee.

[47] The test accepted in the *Lauzon* case was that unless it was certain, or almost certain, at the time a request for vacation leave was made, that overtime would result from granting it, an employer would not be reasonable in refusing to approve the request. In the instant case the issue of the efforts of the employer were considered in the context of its leave policy - including the use of its substitution board and that related policy, as well as the need to control overtime costs. Because of this broader context, I found the *Lauzon* test wanting. Nevertheless, although the question was not directly put to any of the employer's witnesses, I find as a fact that at the time the grievor made his request for vacation leave on February 21, 2001, it would not be certain, nor almost certain, that the employer would have had to pay overtime in order to facilitate the grievor's leave. Even though the employer had already utilized four of the six employees from the substitution board for February 21 by the time the grievor requested leave, two employees from the board were potentially available. At best, a reasonable employer would have to say that it may have to pay overtime.

[48] With respect to the issue of the employer paying overtime, if the ultimate issue is to be determined solely on the basis of overtime, or if overtime becomes a significant factor in any decision, the employer's attribution of some expenses - such as straight salary of part time and casual employees, salaries for training, and costs incurred in relation to statutory holidays - being posted as overtime expenses may be open to question.

[49] The *Lauzon* test was troubling in light of the actual experience of this grievor; and in light of this employer's operations, including the twelve hour shifts being used in combination with shorter shifts, the staff complement being measured in relation to the number of positions, the written vacation policy, the substitution board and the substitution board policy, the employer's willingness to allow employees to exchange shifts, and the employer's willingness to make exceptions to vacation and leave policies in special circumstances. In the *Lauzon* decision there was no discussion of these types of factors, although there was a discussion of the leave policy.

[50] Counsel for the employer argued that *Lauzon* does not reflect the correct approach to the issue. In the *Nicholson* decision the "overtime test" was stated in broader terms than in the *Lauzon* decision. In *Nicholson* the adjudicator found at pages 13 and 14:

> *. . . The employer, in the instant case, was faced with a request for ad hoc vacation leave at a time when it legitimately could staff to avoid the need to resort to overtime and the grievor could not rightfully complain that it had so staffed and had not used the "extra" controller to cover for him in order that he be granted the leave. Had he been granted the leave, overtime would have resulted if another scheduled employee had called in sick at the last minute. But the employer did not want to shut the door on the grievor's request or on similar requests and so adopted a new basis for granting ad hoc vacation leave: the employee requesting the leave could call in 30 minutes before the start of his shift for confirmation of the leave or be on "standby" for 30 minutes into the shift, during which time he could be called in to work if a need developed because of unforeseen absences of other employees.*
>
> *The grievor had the right to exchange his shift with another willing employee, which he was fortunate enough in arranging, and attended the wedding on time. His grievance that the employer, in so conditioning its approval of his request for as hoc vacation leave, violated clause 17.06 of the collective agreement has not been established before me and for that reason is denied.*

[51] Actually, it would be a more accurate reflection of the 1987 *Nicholson* decision to say that it reflected the seed for a new approach to the issue of the reasonableness of the efforts of an employer to grant vacation leave. The adjudicator noted at pages 12 and 13:

> *The question becomes one of determining whether the employer in changing its staffing patterns and thus the basis for granting "ad hoc" annual leave, thereby violated the collective agreement at article 17. The employer's obligation under that article is to accommodate an employee's request to schedule vacation leave and make every reasonable effort to do so "consistent with efficient operating requirements". The employer must, accordingly, determine its staffing requirements to meet anticipated air traffic and in doing so, it has been recognized in various arbitral decisions, it can staff in such a way as to avoid the need to resort to overtime. Ad hoc vacation leave requests were always permitted in the past, if there were employees scheduled to work who were deemed surplus to requirements. Considerations developed during the time surrounding the grievor's request for ad hoc leave which precluded the use of overtime to the extent possible and to ensure this result an employee was scheduled to work the swing shift. Depending upon absences which occurred at the last minute, the presence of this swing shift employee might or might not have resulted in there being an employee who was surplus to requirements. For instance, if an employee reported sick, then this "extra" employee would cover for the absent employee and no longer would he be "extra". Otherwise, in the absence of such an extra employee, another employee would have to be called in on overtime. But, as has been held generally by adjudicators in the past, the requirement to schedule vacations "consistent with efficient operating requirements" did not include for the employer the obligation to resort to overtime.*

[52] The new approach to what an employer is required to do to make reasonable efforts, subject to operational requirements, to grant vacation leave appears in the 1989 *Milne* and *Whyte* decisions of Adjudicator Young. In *Milne*, Adjudicator Young noted at page 15:

> *Ordinarily, the employer need not go to the extra expense of paying for overtime shifts in order to cover leave requests. The reason for this is that adequate staffing of any particular operation incorporates within it sufficient personnel resources to cover contractual leave provisions. That this is so is evident in this case from the "staffing multiplier" (Exhibit 9).*

[53] Then in the *Whyte* decision, he expanded upon the thesis at pages 15 to 17:

> *There must be, it seems to me, a presumption which underlies the formulation of a collective agreement that, having reached an understanding between management and labour as to what the terms and conditions of work will be, management will then take on adequate staff, not only to*

> *produce the goods and services which it desires to supply to its clientele, but sufficient also to allow it to meet its commitment to labour as to the length of the normal work week, the covering of leave requests, etc. These presumptions form the basis of the mathematical formulae or "staffing multipliers" which allow management to predetermine how many employees are needed to perform a certain function. This is particularly so in the case of operational or rotational shift employees.*
>
> *It seems to me that just this presumption is at the base of the jurisprudence of this Board that, when normal staffing complements are met, the employer is not obliged to resort to paying for extra overtime coverage in order to allow a whole group of employees to opt to take annual leave at the same time. The employer is entitled to rely upon labour (i.e. the complement of employees on staff) to show up and to perform its duties according to the posted schedule. A full staff complement will allow for some leave requests to be met while ensuring coverage of all necessary working functions. The employer is entitled to plead "operational requirements" as a bar to being forced to go beyond this point in granting further leave.*
>
> *However, when less than a normal complement of employees is on hand, overtime shifts are frequently necessary both to meet normal coverage requirements as well as leave requests. The payment of overtime premium becomes an operational reality and necessity; a refusal to pay overtime to cover leave requests on the basis of the "defence" of operational requirements is no longer valid. If it were, then, taken to the extreme, employees could be forced to work long hours of overtime and would likely never get to take holidays.*
>
> *This serves to bear out one of the dangers of chronic staff shortages: the remaining employees must work overtime to make up for the shortfall of available labour. By doing so, they have less days of rest. Less rest leads to increased fatigue. Increased fatigue leads to greater need for rest and vacation. But this is difficult because to take a vacation leads to increased pressures and fatigue on the remaining staff. The circle is indeed a vicious one and local management suffer as much as anyone in attempting to cope and to meet operational demands as well as staff needs.*

[54] The move to avoid framing the issue of the reasonableness of the efforts made by the employer to grant vacation leave as one of overtime, is also apparent in the 1996 *Oates* decision of then Vice- Chairperson Tenace, at page 6 :

> *The Board jurisprudence relied upon by the grievor does not stand for the proposition that the employer can never deny leave on the basis that the granting of leave would occasion the payment of overtime premiums. The payment of overtime premiums is a factor among others in assessing operational requirement.*
>
> *This jurisprudence, as I understand it, advances the proposition that in cases of chronic understaffing, the employer will contravene the provisions of the collective agreement if it denies leave to prevent the payment of overtime premiums where it is responsible for the chronic understaffing in the first place. There is no evidence of chronic understaffing in the case before me. Thus, in a case such as this one, the payment of overtime is but one factor to assess in determining whether the employer has made every reasonable effort to grant leave in view of operational requirements. Other factors include the steps undertaken by the employee such as the amount of notice given to the employer.*

[55] See also the *Milette* decision, which was issued prior to *Lauzon*, where then Vice-Chairman Cantin, Q.C. notes at pages 8 and 9:

> *I cannot accept the reasoning of the grievors' representative. To do so would mean that, on any given day, where one employee has already been granted vacation leave, two or even three other employees could in turn request paid vacation leave for the same day, and the employer would simply have to approve the requests because it would then merely be a matter of finding replacements and paying overtime. What use would a work schedule serve and what would be the point of choosing vacation leave using a so-called rotating list?*

[56] It is clear the cases following *Lauzon* broaden the test for whether the employer made every reasonable effort to grant leave as requested and present an approach that measures the efforts of the employer in terms of the entirety of its operations. In my opinion this is the correct approach because it is a more accurate measurement than a single component such as the payment of overtime, and it allows an appropriate measurement as workplace operations, workplace values, and perhaps even collective bargaining language or practices, undergo change.

[57] This approach rejects the *Lauzon* test as the definitive test, or even as one test. However, the approach does not exclude payment of overtime or other premiums as a consideration because such payments relate to operations. Depending upon the

sophistication of the employer's operations, policies and practices, payment of overtime, or any other single factor, may always become a major consideration. Furthermore, as adjudicator Young noted in the *Whyte* decision, where an employer does not have adequate staffing or policies in place, an employer may well be required to pay overtime or other premiums to enable employees to take the vacation leave they seek.

[58] Rejecting then the *Lauzon* test of reasonableness based upon the certainty, or almost certainty, of paying overtime, the question of whether the employer made every reasonable effort to grant the grievor's request for *ad hoc* vacation leave, subject to operational requirements, remains.

[59] The evidence demonstrated that prior to the grievor's request, the employer had granted three requests for annual leave for February 21 in accordance with its leave policy. In addition, the employer allowed a fourth employee to take compensatory leave on the same date because of special circumstances. The leave granted to the fourth employee amounted to leave beyond the terms of its employment policy and demonstrated, in my view, a willingness on the part of the employer to be flexible in order to accommodate its employees. In addition, the leave policy included a provision whereby an employee previously denied leave, could make a request for leave one hour before his or her shift was to commence, thus enabling the employer to move one or more of the three employees on its substitution board allocated to cover unscheduled leave into the position to fill in if otherwise unneeded. Lastly, with a view to further accommodating its employees, the employer allowed employees to switch shifts among themselves in order to provide them with specific time off.

[60] The foregoing policy and accommodations by the employer, particularly when regarded in the overall circumstances of the 12 hour shift schedule, the 29 posts and the fact the employer maintained a roster of 53 full time equivalent positions to meet its obligations, appears to provide a very reasonable approach to address employees' requests for annual leave.

[61] On the other hand, the grievance alleges the employer's failure to approve his request for one day of annual leave on February 21, 2001 was a breach of the employer's obligation to make every reasonable effort to comply with his request. In addition, although not providing specific details, the grievor did state that there had been other occasions when his requests for annual leave were not met. In the face of

those facts was the evidence that the grievor had no vacation days carried over from 1999-2000, and that as of August 30, 2001, seven months before the expiration of the employer's fiscal year, he had utilized 19.5 days of his 20 day vacation allotment for that year (Exhibit E22). With respect to his vacation leave during the 1999-2000 fiscal year, approximately one third of the leave was taken in a block during the peak summer vacation period (June 27 to July 3, 2000) and the balance of the vacation leave was taken on 26 separate occasions throughout the course of the year, in blocks of time ranging from one to twelve hours. The actual annual leave allocation afforded to the grievor in itself, with only one specific complaint, as noted in the grievance and from the evidence of the grievor, suggests the employer's leave policy is not only reasonable but very flexible.

[62] However, the issue is whether the employer failed to comply with clause 15.05 (a) of the collective agreement, which provides:

> *15.05 Provision for Annual Leave with Pay*
>
> *In order to maintain operational requirements,* ***the Employer reserves the right to schedule an employee's vacation leave but shall make every reasonable effort:***
>
> *(a) to provide an employee's vacation leave in an amount and at such time as the employee may request;*
>
> *[emphasis added]*

[63] The grievor's request for ad hoc vacation leave on February 21, 2001 was not approved and the evidence demonstrated that at the date of his request, the employer had two unassigned employees on the substitution board available to work that day. An alternative expression of the grievor's case would be that his request for leave was refused even though it was his opinion that the employer could have brought in part-time or casual employees to work that day at straight time pay. The grievor, as a member of the scheduling committee, testified there were approximately 15 casual and 10 part-time employees on the employer's roster. That evidence, separately or taken together, satisfied the grievor's initial burden of proof. In the *Oates* decision the employer failed to establish why the request for vacation leave was denied, and accordingly, Mr. Oates, having established a *prima facie* case that his request was denied, his grievance was upheld. See also *Re Government of Nova Scotia*, at page 193, that concludes the burden of proof regarding operational requirements lies with the employer because that information is within the employer's specific knowledge.

[64] In the instant case the employer elicited evidence from the grievor and presented evidence through its own witnesses to explain why the grievor's request for *ad hoc* vacation leave was denied. The evidence demonstrated the employer did not arbitrarily deny the grievor's request. The request was denied pursuant to the employer's written annual leave policy. The annual leave policy allowed up to three employees to be on scheduled vacation leave each day of the year, with advance notice, out of a total daily staff complement of twenty-three nurses. Other provisions of the annual leave policy and other formal and informal policies could also have been relied upon to facilitate obtaining leave where three vacation leaves had already been granted for a specific day. The annual leave policy included a provision whereby an employee could request approval one hour before a scheduled shift when the employer would know whether other persons reserved for unscheduled leave would be available to cover the shift. The employer allowed the employees to make arrangements, subject to approval, to switch shifts between themselves to facilitate leave. Lastly, the employer did grant leave outside its policy parameters in special circumstances. The vacation leave policy and other formal or informal policies in place should then be considered in the context of the entire operation to assess the reasonableness of the employer's efforts. In this case, there has been no suggestion that the employer did not have adequate staff to fulfil its operational requirements together with its benefit obligations under the collective agreement. I have also considered the impact of the twelve hour shift rotation (which includes some shifts that are less than twelve hours) and the fact that employees are generally only scheduled to work some thirteen days per month and the extensive use made by the employees of requests for vacation leave in one day blocks. Lastly, I have had regard to the evidence of the overall vacation leave experience at the workplace, particularly in the context of the specific grievance. I agree with Adjudicator Young in the *Whyte* decision and do not accept that making every reasonable effort to grant vacation leave when requested requires an employer to approve every request for leave. Similarly, I do not believe it is necessarily incumbent upon the employer to reinvent the wheel or change established policies that have proven to be effective, even where incidental changes are possible, in order to accommodate every request for vacation leave. Operational requirements include systems and policies that generally meet needs and obligations. It is not operationally viable for an employer to devise methods to accommodate each and every request for vacation leave, particularly requests for isolated days or hours. Workable systems and policies will never be foolproof or guarantee every request can be, or even will be, met.

[65] This approach is consistent with the quotation of then Vice-Chairman Cantin, Q.C. in the *Milette* decision, *supra.* However, I would go further than Vice-Chairman Cantin by amending his reference to overtime to include straight time. Generally speaking, while it may be possible for the employer to call in people at straight time to replace a person requesting leave, it is not reasonable to expect an employer to do this when it has a flexible and workable leave policy in place, such as this employer has. Employers do not have unlimited resources.

[66] In this case, the employer did not act arbitrarily in refusing the grievor's request for vacation leave. It had an appropriate number of posts and an appropriate staff complement for those posts. It had in place workable systems and policies (including informal policies) to address the issue of vacation leave and it followed those systems and policies. Its systems and policies were reasonable and applied reasonably in light of the employer's operations. The fact the grievor's own unique circumstances made it impractical for him to take advantage of the one hour before shift request for leave or the policy enabling employees to switch shifts, does not undermine the reasonableness of the employer's systems and policies. Although having so noted, I appreciate that there are times and circumstances where advance approval of leave is necessary and that in this case, the shift switching policy would not have effected a vacation leave, but merely facilitated taking a specific day or period of time off. While I do not believe it was a necessary consideration in this case based upon the facts, if there had been some equivocation, the evidence that the employer does in fact make exceptions to its policies to accommodate employees in special circumstances would have, in my view tipped the scales in the employer's favour. As important as childcare is, I would be hard pressed to conclude normal childcare is a special consideration in these types of cases, and more specifically on the basis of the facts presented here. However, the willingness of an employer to be flexible in special circumstances may be an important consideration in other cases.

[67] In summary, while the grievor established a *prima facie* case, the response of the employer met the *prima facie* case by establishing that it had not acted arbitrarily, that it followed its vacation leave policy, and that its vacation leave policy and other related policies were sufficiently reasonable in the context of its operations, to fulfill its obigation to make every reasonable effort. Accordingly, I conclude the grievor has failed to prove the employer violated clause 15.05(a) of the collective agreement by failing to make every reasonable effort, subject to operational requirements, to grant annual leave to the grievor on February 21, 2001, or on any other occasion.

Francine Chad Smith, Q.C.

REGINA, March 25, 2002.