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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

GUY LÉVESQUE

Grievor

and

CANADA CUSTOMS AND REVENUE AGENCY

Employer



Before: Jean-Pierre Tessier, Board Member

For the Grievor: Martin Ranger, Professional Institute of the Public Service of
Canada

For the Employer: Hélène Brunelle

Heard at Ottawa, Ontario,
January 14 and 15, 2003.

DECISION

[1] Guy Lévesque works at the Canada Customs and Revenue Agency and is part of the CS Group (Computer Systems Administration).

[2] On March 25, 2002, he filed a grievance referring to article 22 of the collective agreement and objected to the employer's not taking appropriate corrective action for him following a complaint of harassment.

[3] In parallel, the grievor requested paid leave under clause 17.17. When the employer refused, he filed another grievance on May 22, 2000.

[4] These grievances were referred to adjudication in July 2002 and the hearing was held on January 14 and 15, 2003.

[5] The employer agrees that the grievance process was followed but argues that the grievance referring to article 22 of the collective agreement should be dismissed *de facto* since the facts alleged are totally unrelated to the application of this article. The parties agreed to file joint evidence for these two grievances. Two witnesses were heard in English and a simultaneous interpretation system was then used. A number of the documents relating to the file are in English.

The Facts

[6] The following facts can be accepted based on the testimony of Mr. Lévesque and the documents filed in evidence: Mr. Lévesque testified that he had been employed with the Canada Customs and Revenue Agency since 1997; previously, he worked for the Canada Security Intelligence Service. Although he was legally employed in the Travellers, Enforcement and Open Systems Database Support Section at 875 Heron Road, he was assigned to a special project, the BASIS team, located at 1495 Heron Road. (Investigation report, Exhibit F-2)

[7] In summer 1999, there was confusion about the date on which Mr. Lévesque was to take his holidays. Mr. Lévesque asked his line superior Mr. Williams for permission to take two weeks of holidays at the end of August 1999, specifically, the third and fourth weeks rather than the second and fourth week as previously discussed. Mr. Williams left a message for Mr. AuCoin, the project leader, to this effect and when he did not receive any comment from Mr. AuCoin, Mr. Williams approved the holiday period.

[8] However, during the second week of August, Mr. AuCoin noted that Mr. Lévesque was at work. Mr. Lévesque told him that he had received permission for holidays in the third and fourth weeks of August. Mr. AuCoin stated that this disrupted his plans because he had planned work for Mr. Lévesque and the other employees for that time. Mr. Lévesque told him that Mr. Williams had duly authorized his holidays and that he would be absent starting on August 16.

[9] Upon his return from holidays, Mr. Lévesque learned that there had been complaints from the project leader and that consequently he was to return to work at 875 Heron Road and that his assignment to the special project had been terminated. Mr. Lévesque was told that the project leader was dissatisfied with his work.

[10] Mr. Lévesque stated that he was very disappointed by this turn of events. He wanted to explain things to the project leader but it was impossible. The atmosphere between Mr. Lévesque and Mr. Williams, as well as another superior, Mr. Whitworth, subsequently became poisoned.

[11] Mr. Lévesque stated that his superiors harassed him during September and October 1999 to the point that his health was affected. On October 5, 1999, he consulted a psychiatrist, Dr. Bütter, for treatment of his anxiety problems. He met regularly with Dr. Bütter thereafter.

[12] On October 13, Mr. Lévesque filed a complaint of harassment. The employer contracted with a private company to investigate the complaint and the final report was filed on May 29, 2000.

[13] The report was filed for information purposes (Exhibit F-2). A letter from the Assistant Commissioner, Ken J. Cochrane, is attached to it. In the letter, Mr. Cochrane confirmed that Mr. Lévesque was the victim of harassment by his superiors. He notes that their actions contributed to a hostile work environment.

[14] Between October 5, 1999 and April 8, 2001, Mr. Lévesque was absent from work on numerous occasions. A letter dated April 23, 2001 (Exhibit F-4) provides the following information:

52 hours

appointments (with the physician)

71.25 hours

sick leave (without certificate)

52.5 hours

sick leave (with medical certificate)

204 hours

annual leave

20.5 hours

meetings with union representatives

[15] Dr. Bütter testified as an expert witness. He is an associate professor of the Faculty of Medicine at the University of Ottawa. He testified that he has met with Mr. Lévesque on several occasions since October 5, 1999, to treat him for anxiety problems related to harassment at his work.

[16] In a letter dated January 23, 2001 (Exhibit F-3 bundled), he reported that, on that date, Mr. Lévesque [Translation] "... is less anxious and depressed but he is still vulnerable when he feels he is not being respected..." It seems "... that his symptoms (lack of concentration, false memory, feeling of smothering and fear of certain situations, etc.) will diminish. Needless to say the quality of Mr. Lévesque's life and that of his family has been significantly affected by these events. I recommend that Mr. Lévesque continue psychosocial therapy for his anxiety-depression problems."

[17] Dr. Bütter explained that Mr. Lévesque often spoke to him of unfairness during appointments with his physician. Mr. Lévesque spoke in particular of decisions or rules imposed in other harassment cases. He felt frustrated at having to take sick leave or vacation leave to deal with the consequences of the harassment he experienced. In particular, he informed Dr. Bütter of the report of the harassment investigation (June 2000) and asked why the employer was not helping him.

[18] Dr. Bütter testified about a call he received from Léonard Courchesne (Staff Relations Officer). He regarded the latter as an employer representative. Dr. Bütter explained that at the time he was recommending that Mr. Lévesque take a one-year sabbatical leave. During the telephone conversation with Mr. Courchesne, the latter explained to him that it would be difficult to justify a one-year leave, but that it would be easier if the leave was for six months.

[19] Dr. Bütter said that he recommended to his "client", Mr. Lévesque, that he take the six-month leave because it was preferable that the treatments begin as soon as possible. In a letter dated May 13, 2002 (Exhibit F-8), Dr. Bütter explained his position in detail. He wrote:

[Translation]

I met with Guy Lévesque on 10-04-02 and noted that he showed moderate anxiety-depression symptomatology with a tendency toward aggressiveness. The reason for my letter, as the person treating Mr. Lévesque, is as follows:

- (a) to note this individual's current state*
- (b) the disappointment regarding my recommendations (Drs. S Tara and Spies)*
- (c) to find a reasonable solution to resolve the patient's state of mental health before it deteriorates.*

...

I wish to remind you of my recommendations in this case (regarding the granting of six months of annual leave to Mr. Lévesque), which was supported by Dr. Tara of Health Canada.

Mr. Lévesque was asked to sign documents following the indication that he would receive six months' annual leave. All that remained was to determine the nature of the leave: six months continuous or six months intermittent.

[20] Dr. Bütter stated that he was disappointed in the turn of events. He noted that significant time had passed and that Mr. Lévesque's case had still not been resolved. He recalled that his recommendation had been made in early 2001. The same points are found in the letter that Dr. Bütter wrote to Mr. Courchesne on March 5, 2001 (Exhibit F-7):

Pursuant to our telephone conversation 1st of March 2001 regarding the utilization of Mr. Levesque's six-month sabbatical leave, I am proposing that he stays in therapy during the forthcoming year and that this six-month period will be used with therapeutic involvement that will provide him with stress and anxiety management and self-development growth exercises.

Without a therapeutic structure, the privilege of the six-month sabbatical period leave will not be proactive for Mr. Levesque and consequently would jeopardize the professional growth and function of Mr. Levesque as an employee of the Federal government.

[21] Dr. Bütter concluded by indicating that Mr. Lévesque is still anxious at work, even now; he is required to take leave at least once a week. On several occasions, Mr. Lévesque has asked him to provide medical certificates for these weekly absences.

[22] Dr. Bütter testified that he is furious that he has to deal with this case on a day-by-day basis through medical certificates. He believes that there should be an understanding between Mr. Lévesque and his employer. In his opinion, the longer the matter drags on, the worse Mr. Lévesque's state becomes. He believes that he will soon have to increase the dose of Mr. Lévesque's prescription to calm his anxiety and that augurs very badly.

[23] For its part, the employer called as a witness Ken J. Cochrane and Ms. Carucci. Mr. Cochrane is the Assistant Commissioner and has been in charge of the Information Technology sector at the Canada Customs and Revenue Agency since June 1999.

[24] Mr. Cochrane reiterated the comments that he made in his letter of June 30, 2000, that accompanied the harassment investigation report relating to Mr. Lévesque (Exhibit F-2). He is aware that Mr. Lévesque was harassed and that the latter has health problems.

[25] It was in good faith that he kept abreast of Mr. Lévesque's case and that he had discussions with Mr. Lévesque and union representatives in fall 2000. According to Health Canada officials, Mr. Lévesque was able to return to work although he might need a period of rest.

[26] In December 2000, he met with Mr. Lévesque and his union representative but no agreement was reached.

[27] Throughout the discussions with Mr. Lévesque, Mr. Cochrane understood that the latter, on the recommendation of his physician, was asking for six months of leave to be taken at his discretion. In spring 2001, Mr. Cochrane asked the Agency's Human Resources Branch and Health Canada to look into this case.

[28] He received advice from Ms. Carucci, Assistant Director, Human Resources, on the application of the collective agreement and the possibilities of recourse to the Workers' Safety Insurance Board (WSIB) and Sun Life's long term disability plan.

[29] The discussions with Mr. Lévesque and his union representative took place over a long period. Mr. Cochrane was not familiar with the role that Mr. Courchesne (Human Resources Officer) may have played in the file.

[30] Mr. Cochrane wanted to resolve this matter; however, he did not want to go against the advice of his advisers regarding the application of the collective agreement. According to the advice provided, he could not grant Mr. Lévesque any sick leave other than that provided for in the agreement.

[31] In an effort to bring the matter to a close, and given that the union was requesting a written response, Mr. Cochrane sent a written offer of settlement to Mr. Lévesque (in April 2002 - Exhibit F-5). He offered to reimburse the leave that Mr. Lévesque had taken since the period of his harassment until March 31, 2001. That represented 102.75 hours of sick leave. He also offered not to count his absences for medical appointments as sick leave to a total of 104.75 hours. The grand total was 207.5 hours of leave as compensation. However, Mr. Lévesque was required, as of April 2002, to use up his bank of sick leave for any absence related to his health condition.

[32] For her part, Ms. Carucci, Assistant Director, Human Resources, explained that she joined the Agency in July 2001. During the summer, she learned of Mr. Lévesque's case but she did not give it priority given that the investigation report had been filed and the harassment had ceased.

[33] It was in September 2001 that the file was reactivated because Mr. Lévesque and his union representative wanted to resolve the matter of leave. At that time, the discussion was about six months of intermittent leave.

[34] According to Ms. Carucci, since fall 2001, and in December 2001, she indicated to Mr. Lévesque that it was not possible to approve additional sick leave. She also looked into the possibilities with Sun Life, but it was impossible to get a precise answer without Sun Life's receiving a formal claim.

[35] It was the union that insisted that she ask her boss, Mr. Cochrane, to provide a formal response to Mr. Lévesque, that is, the letter of April 8, 2002 (Exhibit F-5).

[36] Asked about Mr. Lévesque's current state of health, Ms. Carucci stated that Health Canada recently (late 2002) approved a four-day work week for Mr. Lévesque. (This element of evidence was taken under reserve.)

Arguments

[37] According to the grievor's representative, the question is whether the employer can be held responsible for the consequences of the harassment against Mr. Lévesque.

[38] By requiring Mr. Lévesque to use his sick leave, the employer imposed on Mr. Lévesque the burden of the consequences of the harassment he suffered.

[39] According to Mr. Lévesque's representative, the employer unduly stretched out the delays. Almost two years passed between the end of the harassment investigation (May 2000) and the employer's final response (April 2002).

[40] The employer must accommodate the employee and not have him suffer the consequences of the harassment against him.

[41] According to the employer, the grievance based on clause 22.01 is unfounded and is solely aimed at forcing the employer to respond in writing to the request for leave submitted by Mr. Lévesque. The clause in question deals with safety and health.

[42] With respect to the request for paid leave, the employer points out that the adjudicator must adhere to the wording of the grievance and examine clause 17.17 and that he does not have jurisdiction to examine the complaint of harassment.

[43] As for clause 17.17, the employer argues that the scope of the clause and the exercising of discretion must be considered. In the latter case, it is not a question of replacing the employer's decision, but of determining whether it was arbitrary or in bad faith.

Reasons for decision

[44] I must first decide on grievance 166-34-31394 related to article 22 of the collective agreement. This article deals with safety and health and talks about collaboration between the employer and the union to prevent or reduce the risk of employment accidents.

[45] No evidence was submitted regarding the application of this article and I rule the grievance to be unfounded.

[46] With respect to grievance 166-34-31393, referring to a request for paid leave and relying on clause 17.17, I will first examine the nature of the request and then the scope of clause 17.17.

[47] Mr. Lévesque's initial request was for leave for one year on the recommendation of his physician, Dr. Bütter. This request was later reduced to six months. In the letter of March 5, 2001, Dr. Bütter is essentially speaking of a "bank" of six months of leave useable over a one-year period of therapy (Exhibit F-7).

[48] In a letter of May 13, 2002 (Exhibit F-8), Dr. Bütter stated "... all that remained was to determine the nature of the leave: six months continuous or six months intermittent." In a letter dated January 23, 2001 (Exhibit F-3), the physician recommended that Mr. Lévesque continue "psychosocial therapy for his anxiety-depression problems".

[49] The testimony shows that, in practice, Mr. Lévesque is absent about one day a week.

[50] From the analysis of the evidence, I must find that the request for leave is related to Mr. Lévesque's state of health and is supported by medical expertise. As presented, this request can appropriately be likened to a request for sick leave.

[51] Clause 17.17 is worded as follows:

17.17 Leave with or without pay for other reasons

At its discretion, the Employer may grant leave with or without pay for purposes other than those specified in this Agreement.

[52] This clause mentions the employer's discretion and stipulates that the leave can be granted for purposes other than those specified in the collective agreement.

[53] I mentioned earlier that, as presented, Mr. Lévesque's request related to the granting of leave related to his state of health and was motivated by an order from his physician. The collective agreement already provides for sick leave in article 16; clause 16.05 also sets out the specific accounting that applies to injury-on-duty leave.

[54] I support the principles set out in *St. Jacques* and *Grignon* (Board files 166-2-13467 and 166-2-27602) whereby the role of the adjudicator is to determine whether or not the employer reasonably exercised its discretionary authority by refusing special leave. In the circumstances, I believe that, in this case, the employer had reason to liken Mr. Lévesque's request to a request for additional sick leave and that it correctly applied clause 17.17.

[55] It is quite clear, as I have already mentioned, that my role consists in determining whether the employer's refusal was justified, and that I cannot substitute my decision for the employer's. However, I find it unfortunate that the parties were unable to reach agreement.

[56] In fact, it is the question of the harassment that Mr. Lévesque suffered that should have been settled satisfactorily. Based on the quality testimony of Mr. Cochrane and Dr. Bütter, I am going to make three recommendations to the parties.

[57] First recommendation: That the employer maintain its offer of settlement of April 8 and that Mr. Lévesque accept it to the extent that the employer agrees to comply for the most part with recommendations two and three below.

[58] Second recommendation: That the employer clarify its position on the origin of the misunderstanding that led to Mr. Lévesque's problems and to this end, it sends a letter to Mr. Lévesque confirming that his relocation from 1495 Heron Road was a purely administrative decision and does not in any way call into question the quality of his work or his competency.

[59] Mr. Lévesque needs to realize the difference between a medical recommendation for sabbatical leave and the resolution of his case by the employer. Mr. Lévesque cannot confuse Dr. Bütter's role as a medical specialist and try to make him his staff relations officer. It is my understanding from the file that Mr. Lévesque can regain his stability by a show of respect from the employer and an effort on the latter's part to improve the situation by enabling Mr. Lévesque to again find satisfaction in being at work, to establish a better personal balance, to renew his relations with his family, and to regain an interest in personal renewal through sports.

[60] Third recommendation: In order to enable Mr. Lévesque to recover, Mr. Lévesque should be allowed to take paid leave for the purposes of personal growth. This leave could take the form of a reduced work week and, initially, be equivalent to 7 hours and 30 minutes (1 day) of paid leave per week for eight weeks and, in the second phase, could be equal to 3 hours and 45 minutes (1/2 day) per week for eight additional weeks.

[61] I hope that the recommendations that I have made will enable the parties to finally resolve their difficulties and to re-establish harmonious working relations. I must, however, as I explained earlier, on purely legal grounds, dismiss Mr. Lévesque's grievances.

Jean-Pierre Tessier
Board Member

OTTAWA, March 3, 2003

P.S.S.R.B. Translation