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Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

MIEKE DUFOUR, JANICE REAUME, PAULINE ST-PIERRE, KATHLEEN VANDELINDER, CHIARA VERARDI AND NANCY YORK

Grievors

and

TREASURY BOARD
(Department of Human Resources Development)

Employer

Before: Evelyne Henry, Board Member

For the Grievors: Barry Done, Public Service Alliance of Canada

For the Employer: Rosalie A. Armstrong, Counsel

Heard at Windsor, Ontario,
January 20 to 22, 2004.
(Written submissions filed April 30, May 20 and June 10, 2004.)

DECISION

[1] Mieke Dufour, Janice Reaume, Pauline St-Pierre, Kathleen Vandelinder, Chiara Verardi and Nancy York are grieving that the employer violated Article 41 of the Program and Administrative Services (PAS) Group collective agreement when their requests for leave without pay for the care of immediate family were denied. The employer claimed that the leave requests as requested were denied to ensure continued service delivery in the Department's Windsor office.

[2] Article 41 is a new provision that came into the PAS Group collective agreement between the Treasury Board and the Public Service Alliance of Canada (PSAC) (expiry date: June 20, 2003) on November 19, 2001. The leave requests that were denied were for various periods during the summer of 2002. Article 41 reads as follows:

> ***ARTICLE 41***
>
> ***LEAVE WITHOUT PAY FOR THE CARE OF IMMEDIATE FAMILY***
>
> ***41.01*** *Both parties recognize the importance of access to leave for the purpose of care for the immediate family.*
>
> ***41.02*** *For the purpose of this article, family is defined as spouse (or common-law spouse resident with the employee), children (including foster children or children of legal or common-law spouse) [sic] parents (including stepparents or foster parents) or any relative permanently residing in the employee's household or with whom the employee permanently resides.*
>
> ***41.03*** *Subject to clause 41.02, an employee shall be granted leave without pay for the care of family in accordance with the following conditions:*
>
> *(a)* *an employee shall notify the Employer in writing as far in advance as possible but not less than four (4) weeks in advance of the commencement date of such leave, unless, because of urgent or unforeseeable circumstances, such notice cannot be given;*
>
> *(b)* *leave granted under this article shall be for a minimum period of three (3) weeks;*
>
> *(c)* *the total leave granted under this article shall not exceed five (5) years during an employee's total period of employment in the Public Service;*
>
> *(d)* *leave granted for a period of one (1) year or less shall be scheduled in a manner which ensures continued service delivery.*

> ***41.04*** *An employee who has proceeded on leave without pay may change his or her return to work date if such change does not result in additional costs to the Employer.*
>
> ***41.05*** *All leave granted under Leave Without Pay for the Long-Term Care of a Parent or under Leave Without Pay for the Care and Nurturing of Pre-School Age Children under the terms of previous Program and Administrative services [sic] collective agreements or other agreements will not count towards the calculation of the maximum amount of time allowed for Care of Immediate Family during an employee's total period of employment in the Public Service.*
>
> ***Transitional provisions***
>
> ***41.06***
>
> *These transitional provisions are applicable to employees who have been granted and have proceeded on leave on or after the date of signature of this agreement.*
>
> *(a) An employee who, on the date of signature of this agreement, is on Leave Without Pay for the Long-Term Care of a Parent or on Leave Without Pay for the Care and Nurturing of Pre-School Age Children under the terms of a previous agreement continues on that leave for the approved duration or until the employee's return to work, if the employee returns to work before the end of the approved leave.*
>
> *(b) An employee who becomes a member of the bargaining unit on or after the date of signature of this agreement and who is on Leave Without Pay for the Long-Term Care of a Parent or on Leave Without Pay for the Care and Nurturing of Pre-School Age Children under the terms of another agreement, continues on that leave for the approved duration or until the employee's return to work before the end of the approved leave.*

[3] Leave records for all the grievors were submitted on consent. There is no dispute between the parties that the requests met the requirements of clauses 41.01 and 41.02. The issue is with the application of clause 41.03.

[4] Two grievors testified, Mieke Dufour and Pauline St-Pierre, and the employer called one witness, Michelle Janosik.

[5] Mieke Dufour has been employed at the Department of Human Resources Development Canada (HRDC) for 22 years. She is a CR-5 (Agent 1) working in a Service Delivery Representative (SDR) position in the Windsor office.

[6] Ms. Dufour described her duties as an SDR, which are to calculate the benefit entitlement for employment insurance (EI) and to issue payments for non-contentious, straight-forward claims. She also answers enquiries from claimants, the majority over the phone. If there is a backlog at the front-end office, she may be called, exceptionally, to assist in answering them in person. Ninety-nine percent (99%) of enquiries are over the telephone.

[7] Ms. Dufour introduced the organizational chart for the Windsor office as Exhibit G-1. The chart is effective March 11, 2002. The SDR Section comes under the supervision of a Service Manager and comprises 29 CR-5 positions, one of which is vacant and one is occupied by an employee on long-term sick leave.

[8] Ms. Dufour explained how a claim comes in, how it is handled by an SDR, who works in "the front-end office", where it goes after and who processes the various steps.

[9] Ms. Dufour described in more details her usual work, which consists of obtaining non-contentious files from the "work rack", verifying that all documents are supplied and that all information is accurate. She then effects the calculations and determines if there is an entitlement and what the benefit rate will be. The contentious files need to be reviewed by an Insurance Officer at the PM-2 level, also referred to as Agent II. After a CR-3 has completed his/her work on a file, it goes to an Agent I or Agent II, who approves it, and then the SDR inputs all the information into the computer, which will automatically generate a payment.

[10] Ms. Dufour has been employed at HRDC since 1981. She applied many times for leave without pay to care for her children during the summer months. She had a child in 1984, one in 1986 and another in 1991. She was grandfathered for leave. Prior to 2002, she encountered no difficulty in getting leave without pay to care for her children during the summer.

[11] Ms. Dufour introduced a two-way office memorandum addressed to Robert Melnyk, dated January 2, 2002, as Exhibit G-2. In it, she requested leave without pay from July 2 to August 30, 2002, to care for her son. The collective agreement requires that an employee provide four weeks' notice, but Ms. Dufour gave the employer six months' notice to provide time to replace her.

[12] Mr. Melnyk was Acting Manager and Ms. Dufour stated that he had the authority to grant the leave, but he wanted to talk to Michelle Janosik, the substantive manager. This was indicated orally several times between January and March 2002.

[13] On April 8, 2002, Ms. Janosik told Ms. Dufour that her leave was denied. The reason given was that July and August were months when historically everyone wants vacation time. The manager would look at vacation leave requests first.

[14] The manager approved Ms. Dufour 22 days of paid annual leave during the period for which Ms. Dufour had requested leave without pay. Ms. Dufour wrote an e-mail to her union representative, Dennis Petahtegoose, on April 9, 2002 (Exhibit G-3). In it she stated:

> *Please note that although my request LWOP for the Care of a Family Member has been denied for July and August my request for annual leave for 22 days during this same period has been approved. Apparently it was operationally feasible that I could have these days off for annual leave, but it was not feasible for LWOP.*
>
> *Management requested that we submit a tentative request for any time off we wanted during April to August for their planning purposes.*

[15] Ms. Dufour was told that she was not allowed to take this type of leave during July and August. She was not replaced when she took annual leave during July and August 2002.

[16] Ms. Dufour indicated that the summer of 2002 was not unusual from a backlog point of view. According to her, a backlog occurs every summer because of school-related lay-offs, as well as the automotive industry summer shutdowns, which increases their workload. In previous years, when Ms. Dufour took leave without pay, she was not replaced.

[17] During the summer 2002, Ms. Dufour underwent surgery and was off on sick leave at the end of July and August.

[18] To Ms. Dufour's knowledge, no steps were taken by management between January and April 2002 to enable the leave and continued service delivery.

[19] According to Ms. Dufour, there was a seven-and-one-half-day backlog when, ideally, the backlog should have been five days. According to Ms. Dufour, the heavier workloads are in the winter, from November to March, and in the summer, in July and August. Her request for 22 days of annual leave was approved during that period without any questions. She subsequently decided to take only 12 of the annual leave days approved.

[20] In 2003, Ms. Dufour was granted part of the leave without pay she had requested. She had requested all of July and August and ended up with half of July, August and one week in September.

[21] Ms. Dufour was advised that management would consider leave without pay requests during the months of April, May, September and October. Ms. Dufour considered leave without pay more of a benefit in the summer when her children are out of school. She did take leave without pay in the spring of 2002.

[22] In cross-examination, Ms. Dufour gave more details on her work in the back-end and front-end offices.

[23] Ms. Dufour took leave without pay for the care and nurturing of pre-school-age children in 1985, in 1986 and from 1987 to 1992. It was under a different clause of the collective agreement.

[24] Ms. Dufour applied for 22 days of annual leave when the vacation sheet, with everyone's name on it, was circulated. She did so after her leave without pay was denied to ensure she would get time off during the summer. She would have taken the 22 days of leave without pay instead of the annual leave, which was approved.

[25] Ms. Janosik approved alternate dates of leave without pay between May 27 and June 14, 2002, for Ms. Dufour. Ms. Dufour took her annual leave in hours for partial days, as opposed to full days, in early July 2002. She was on annual leave for five

days, from July 15 to 19, and for three days, from July 22 to 24, 2002. She was then on 30 consecutive days of sick leave, from July 26 to September 6, 2002.

[26] Ms. Dufour was aware that five colleagues had also requested leave without pay for more or less the same period and amount of time. Her position is that annual leave should not be given priority over family-related leave, that both should be looked at equally.

[27] Ms. Dufour commented on some of the staffing actions that took place in the Insurance Section from 2001 to April 2003.

[28] Ms. Dufour agreed that the Insurance Processing Unit is a centralized unit that was set up to take the overflow of files when a local office is unable to keep up. Overtime was another way of having work done.

[29] In re-examination, Ms. Dufour indicated that, in 2002, she was earning five weeks of annual leave and believed that she could carry over three weeks. In May and June 2002, Ms. Dufour's children were in school.

[30] On consent, the parties introduced the PAS Group collective agreement as Exhibit G-4. The leave records for Ms. St-Pierre were entered as Exhibit E-3; the leave records for Ms. Vandelinder became Exhibit E-4; for Ms. York, Exhibit E-5; for Ms. Verardi, Exhibit E-6; and for Ms. Reaume, Exhibit E-7. The work description for SDRs became Exhibit E-8, and for the E&IO, Exhibit E-9.

[31] The parties also agreed that Exhibit E-10 contained the requests for family-related leave from each of the grievors and that Exhibit E-11 contained the answers from Ms. Janosik to each of the grievors.

[32] Pauline St-Pierre has worked at HRDC since November 1981. She has been a member of the B-Unit since October 1986. She is an E&IO (PM-1).

[33] Ms. St-Pierre had no difficulty getting leave without pay for the care of her family prior to the summer of 2002. She is a grand fathered employee.

[34] Ms. St-Pierre's request for leave (Exhibit E-10(c)) was submitted by memorandum to Ms. Janosik, dated January 23, 2002. She applied for leave without pay from July 22 to August 30, 2002, to care for her children and her elderly mother.

[35] Ms. St-Pierre had a five-year-old daughter, an eight-year old, and her oldest child was 12 years old. In the past, she asked and was granted leave without pay to take care of her children every year when she was not on maternity leave. She had no difficulty obtaining leave without pay during the summer months and she was not replaced when she did.

[36] After her request for leave without pay, there were meetings where management indicated that it was going to get clarification as to what "continuous service delivery" meant. After it received clarification, management would then review all applications. Ms. St-Pierre learned that, for management, "continuous service delivery" meant the same as "operational requirements".

[37] Ms. St-Pierre had a meeting with her manager before she was denied leave without pay (Exhibit E-11(c)). The meeting could have been about a month before she received her answer. At that meeting, Ms. Janosik told Ms. St-Pierre that annual leave took precedence over leave without pay. Ms. Janosik debated that if she granted leave without pay during the summer, Ms. St-Pierre would want to use her annual leave during the rest of the year. Ms. St-Pierre earns five weeks of annual leave per year.

[38] Ms. St-Pierre was offered alternate dates for leave without pay in April, May, June or September. She did not want it then because her children are in school during those months.

[39] Ms. St-Pierre took five weeks of annual leave during the months of July and August 2002, as can be seen by Exhibit E-3. She applied for annual leave because she was told to submit her request to cover herself in case that her request for leave without pay was denied. At the time when the annual leave was granted for five weeks, her absence did not pose a problem for continued service delivery.

[40] Ms. St-Pierre attends staff meetings every two weeks. She was aware that the issue of family-related leave without pay was raised at staff meetings in the same way that the issue of vacation leave was brought up.

[41] Ms. St-Pierre is unaware of any steps that were taken in 2002 to accommodate her request for leave pursuant to clause 41.02.

[42] In 2003, she became aware that a person who had retired was called in to accommodate Ms. Reaume and her leave request.

[43] Ms. St-Pierre does not think that the 2002 summer backlog was unusual; backlogs in the summer are usually the norm. She thinks that management knows it risks reducing service when it approves vacation time.

[44] Ms. St-Pierre believes that the number of positions on the organizational chart has remained constant since March 11, 2002.

[45] Ms. St-Pierre explained that the work of an E&IO is, as described by Ms. Dufour, on the insurance side. On the employment side, she would refer clients to outside agencies, discuss labour markets, give out information on foreign-worker recruitment and review job offers with clients.

[46] In cross-examination, Ms. St-Pierre indicated that her position was one of a group of seven E&IOs. There are three bilingual and two part-time positions. Ms. St-Pierre and Chiara Verardi, another grievor, were both full-time E&IOs; the other grievors were SDRs (CR-5s).

[47] Ms. St-Pierre disagreed that granting leave without pay to two out of seven employees in Employment and Insurance would create a strain. She stated that the employment component of their job is small, about five to ten percent per day. It was union intervention that prevented the removal of these duties from their positions. Ms. St-Pierre indicated that part-timers are given the option of working more hours in the summer.

[48] Ms. St-Pierre agrees that overtime is voluntary and that it is almost always offered during peak periods. She is aware that files are sent out of the office to deal with backlogs.

[49] Ms. St-Pierre is aware of a backlog in late 2001 and into 2002, but believes that it was related to a shortage of Agent II (PM-2) officers at the time. Her presence or absence would have had no influence on that backlog.

[50] Ms. St-Pierre believes that it may take up to one year to train a PM-1 to know every aspect of the work and be really good at it. She believes that a person could be trained in two weeks to do just one component of the job. If the person is not adjudicating or doing enquiries, he/she could be trained in two weeks.

[51] In the summer of 2003, Ms. St-Pierre was granted five weeks of family-related leave without pay and one week of vacation leave. Dorothy Lamb was the retiree called to assist in 2003. To Ms. St-Pierre's knowledge, this was not attempted before.

[52] Ms. St-Pierre explained that PM-2s do contentious claims. The backlog was caused by vacancies in PM-2 positions that should have been filled sooner. It takes a long time to train a PM-2.

[53] Michelle Janosik has been employed at HRDC for 28 years. She is the Manager for Service Delivery in the Windsor office. At the time of the grievances, she had been in that position for approximately eight years.

[54] Ms. Janosik explained that her office provides benefits to the unemployed in the community. If not provided in a timely fashion, other agencies, such as social services, are impacted, as well as the home life of the claimants. Claimants expect that their claims will be finalized within 21 days and they will be in receipt of their first cheque within 28 days from the date of their claim. They also expect an answer within two days if they have enquiries about their claims.

[55] Those expectations would be the same for any recalculation of claims in cases of some missing records of employment, if they get those and bring them into the office.

[56] The workflow starts at what is called front-end operations. There, staff consists of mostly SDRs (CR-5s) but also of greeters, at the CR-3 level, who "queue" the clients into the system. It is an automated wait system on a first-come-first-served basis.

[57] Basically, clients come in to file applications for benefits or may have an enquiry concerning their claim. They may be applying for a Social Insurance Number (SIN) or may be requesting employment assistance. They could be there to search the Internet for jobs or to complete a résumé on the stand-alone computer. There are job banks in the front.

[58] There is a kiosk set up to handle job banks or for job searches. At the time, a process called *APPLI-SIS* automated part of the application process. Applications could be both manual or automated, but were mainly computerized. The clients complete their applications but, if they require help, staff provides it.

[59] Once a client has completed an application, he/she is seen by one of the staff at the front-end to go over the application to ensure its accuracy, the completion of the claim and any missing forms would then be requested. The individual is scheduled to attend a general information session to discuss employment opportunities and rights and obligations. This is conducted by a third-party service but its scheduling is done at the front-end.

[60] The office where the grievors work is located in Windsor East. It also has an Investigation and Control Section, as well as the Computer Technology Expert Operations (IT Operations).

[61] There is also what is known as the back-end operation, where all applications taken during the day are registered and coded. Dockets are made and colour-coded and the files are placed on the "agent work rack" from which agents take them to assess them. Claims Prep staff at the CR-3 level does this preparation work.

[62] Enquiries received at the front-end that cannot be answered there are entered in the local office memorandum computer and passed to the back-end. The Claims Prep staff place them in the "Agent I rack". Agents physically remove the files from the work rack to work on them. The files are prioritized according to when the benefit period should commence.

[63] At the back-end, the agents assess claims to determine the benefit rate and entitlement. As for the grievors, they adjudicate non-contentious claims. If a claim is contentious (i.e. if the claimant was fired or quit), the claimant's eligibility is determined by someone in a different position.

[64] Enquiries that go to the back-end come from two different sources: either from the front-end operations or from a call centre. There are two different call-centres in Ontario: one in Toronto and one in Sudbury. They were created several years ago. Enquiries were centralized when claims were automated. The intent was that claimants would phone first before they would come into the office. The staff from

call centres cannot answer all enquiries or all calls. The staff has 48 hours to answer enquiries from a call centre, the same time as for a local office memorandum. A local office memorandum is either an enquiry or additional information supplied in support of a claim. The local office memorandum is normally an enquiry about the status of a claim or the claim in general. A commitment is made to clients that they will receive a reply within 48 hours.

[65] Looking at the organizational chart (Exhibit G-1), Ms. Janosik indicated that Nancy York and Mieke Dufour worked as back-end SDRs (CR-5s); that Janice Reaume and Kathleen Vandelinder worked as front-end SDRs (CR-5s); that Pauline St-Pierre and Chiara Verardi worked as E&IOs; and that Kathleen Vandelinder was trained to do both front-end and back-end work.

[66] During peak periods, the back-end SDRs are often called upon to assist with the "walk-in traffic". They can perform most of the front-end duties, except those dealing with SINs or an employment function. Employment enquiries are directed to Ms. St-Pierre or to an E&IO who is capable of doing employment functions. Ms. Janosik agrees with Ms. St-Pierre's estimate that employment functions represent a small percentage of the E&IOs' work. Ten percent (10%) is not an unrealistic figure.

[67] Ms. Janosik had received care and nurturing leave requests before. The collective agreement article dealing with this leave changed in November 2001. She had always allowed the leave based on the "old previous article" when employees requested it to take care of their pre-school-age children during the summer months.

[68] Ms. Janosik sees the change to the collective agreement as opening that type of leave to the immediate family as opposed to pre-school-age children. She introduced, as Exhibit E-12, the articles of the previous collective agreement dealing with "Leave Without Pay for the Care and Nurturing of PreSchool Age Children" (Article 41), "Leave Without Pay For Long-Term Care of a Parent" (Article 42), "Leave General" (Article 33) and "Vacation Leave with Pay" (Article 34).

[69] Ms. Janosik's concern was that the grievors' leave requests were all for the summer. She was concerned for several reasons. One was a huge backlog dating back to the previous summer, due to rotating strikes, work-to-rule and refusals to work overtime, where the work did not move for days. The first rotating strike started on July 21, 2001 and basically ended on September 11, 2001.

[70] Ms. Janosik introduced as Exhibit E-13 an e-mail sent to Windsor East staff from Windsor management outlining that, on September 13, 2001, they would be dealing with backlog work dating from July 22, 2001. They had an eight-week backlog with a significant amount of enquiries. Clients would have had to deal with social services and communications with them on the strategy and the progress in dealing with the workload were numerous.

[71] In the fall of 2001, there was also an increase in claims because of the effects of September 11, 2001. The Windsor Casino and the hospitality industry suffered from the reluctance of people to cross the border. At the same time, there were lay-offs and notices of lay-offs by Chrysler and Ford, which had a ripple effect.

[72] Ms. Janosik introduced a memorandum dated September 18, 2001 as Exhibit E-14. It outlined employment and workload problems being faced and possible solutions. She also introduced an e-mail (Exhibit E-15), dated September 13, 2001, dealing with public and ministerial inquiries with respect to the backlog.

[73] Ms. Janosik was involved with the situation, in consultation with other managers in Ontario. On October 10, 2001, files were being shipped out of the office to deal with the backlog. Ms. Janosik introduced, as Exhibit E-16, a log that shows the number of files that were shipped out, starting on October 10, 2001 and continuing up to April 30, 2003. She indicated that shipping files out is still on-going.

[74] Ms. Janosik described Ontario Insurance Processing Units (OIPUs) located in Barrie, St-Catharines, Kingston and Toronto. A new initiative was put in place as a result of the increased workload in Ontario in 2002. Processing centres that existed in the past had been eliminated as a result of downsizing in the early 1990s.

[75] Ms. Janosik introduced as Exhibit E-17 the minutes of the Regional Union-Management Consultation Committee Meeting held on Monday, March 11, 2002. She was not in attendance, but the minutes were available to all employees on the Department's Internet site.

[76] Ms. Janosik pointed to page 5 of Exhibit E-17 to show that processing centres were new and were an Ontario Region response to a crisis situation. It demonstrates the approach that, regardless of the geographical location of clients, they should all expect to receive the same service.

[77] Ms. Janosik introduced Circular M2001-4, dated March 2001, as Exhibit E-18. It provides definitions of performance indicators that are mandated nationally. Page 2 refers to the speed of processing and indicates that 90% of clients should expect their claims processed within 28 days. Speed of payment was a new measure introduced at that time. This created increased pressure on staff.

[78] Ms. Janosik introduced, as Exhibit E-19, the "Comparison of Client Service Results by HRDC Ontario region - YTD 2001/2002". This document was produced as of year-to-date (YTD) February 2002. It is produced in the regional office in Belleville on a monthly basis. Ms. Janosik had this report when she considered the grievors' leave requests.

[79] Ms. Janosik introduced, as Exhibit E-20, a "Summary of E.I. Client Service Achievement" report issued by the regional office. The first page deals with the year 1999/2000, where the Windsor office met all its targets. On the other pages, it can be seen that in 2000/2001, Windsor met four of its five targets; in 2001/2002 and 2002/2003, it met only one of its targets.

[80] Ms. Janosik does not have sole access to OIPUs and could not send all her files out. Sending files out of the region is not something that is normally done. OIPUs do not have the capacity to do all of the Windsor work. They were established in the first place because all of Ontario was experiencing workload problems.

[81] Turning to Exhibit E-2, Ms. Janosik explained the staffing steps undertaken from 2001 to April 2003. It shows that on March 4, 2002, S. Esch was transferred into an SDR (CR-5) position on relocation from another office.

[82] Ms. Janosik indicated that after conducting a merit assessment, a call was made to the CR-3 community to ask if anyone was interested in working at a higher level for the summer. Three employees were placed in Acting CR-4 positions in the front-end in January 2002. Of these, one requested to go back to her CR-3 position around August or earlier. Ms. Janosik believes that another requested union leave without pay for several months.

[83] Ms. Janosik indicated that staff in Investigations and Control willing to work in the front-end are deployed there. Part-time staff are asked if they want to work full-time during the summer. Sometimes, they accept to work full-time, sometimes they do not.

[84] At the time of the grievances, an SDR position was posted but there were delays because the Insurance Advisor had broken her leg in January 2002. She was the main person conducting the selection process.

[85] Ms. Janosik indicated that multi-task training is ongoing and started a few years before the crisis. It is a long process that requires intensive monitoring. According to Ms. Janosik, it may take two weeks to train an SDR just on claims assessments; it takes at least one year for an SDR to be fully functional and productive.

[86] In 2002, there were two trainers available: the Insurance Advisor with the broken leg, and another who was performing Agent II work because of the huge backlog at the Agent II level. The sick Insurance Advisor was away from January 2 to April 1, 2002.

[87] Ms. Janosik indicated that some casual employees were hired to fill in in claims prep and that, in the hiring of casuals, she is guided by the office budget. There was also a long-standing agreement with the union not to bring in casual workers. This agreement, however, was changed in January 2003. This change enabled Ms. Janosik to grant leave without pay in 2003.

[88] In April 2003, a computer system called *APPLIWEB* was marketed to the public; it was in existence in April 2002, but had not been marketed to the public. It made it possible for claimants to file on the Internet from home. In April 2003, *APPLIWEB* was installed in several kiosks. According to Ms. Janosik, it had a significant impact on operations and her ability to grant leave without pay in 2003. It will have a greater impact in 2004.

[89] Ms. Janosik indicated that overtime is worked on a voluntary basis. She does not have her own overtime budget; it is an overall office overtime budget. It was all spent and more had to be requested. Overtime had to be paid on the files that were sent out of the office. At the beginning of August 2002, Mr. Melnyk asked for volunteers to give up their leave to work overtime but no one volunteered.

[90] Ms. Janosik stated that she did not consider limiting vacation leave. If everybody had requested maximum vacation leave, then she would have done something.

[91] With regard to Ms. Dufour's statement that the grievors were not replaced during their absences, Ms. Janosik stated: "It's not like we would have someone come in to sit in their spot, but by doing other actions we were staffing up in Insurance." There were no acting CR-5s, but there were acting CR-4s.

[92] Ms. Janosik granted leave without pay, but not on the dates requested. The grievors were offered alternate days. Similar requests were made in other sections in Employment, Investigation Control and Administration. There were other leave-without-pay requests: one for union leave and an extension of the care and nurturing leave that had been previously approved.

[93] Leave under Article 41 is coded as number 659 on the leave application. In Exhibit E-1 it can be seen that Ms. Dufour took leave without pay from May 27 to June 14, 2002, for the care of immediate family. Ms. St-Pierre did not take leave without pay because she was only interested in July and August while her kids were out of school. Ms. Vandelinder took leave without pay from May 27 to June 14, 2002, as can be seen by Exhibit E-4. Ms. York did likewise, as shown by Exhibit E-5. The grievors were provided alternate days in April, May, June and September and they took them. Ms. Verardi took leave from September 3 to 30, 2002, as shown by Exhibit E-6.

[94] Ms. Janosik gave priority to vacation leave because of subclause 34.05(a), which states that: "Employees are expected to take all their vacation leave during the vacation year in which it is earned." She stated that there is a lot of employees who carry over leave but, as a manager, she would never ask an employee to carry over leave. She has to make every reasonable effort to provide an employee's vacation leave in the amount and at such time as the employee requests.

[95] Ms. Janosik feels that she has no options for vacation leave, as employees work all year and earn their vacation. She feels that employees are entitled to vacation leave, especially in times when they need a break. It is her experience that the majority of staff want time off in July and August; it is the peak vacation period. The majority want to take their vacations when it is nice out and not in the winter, unless, of course,

they are planning a cruise. Also, they want to be with their families and spouses during their time off.

[96] Ms. Janosik believes that she acted fairly and appropriately towards the grievors. She consulted with the Regional Office on the application of the new clause in the collective agreement when the grievors requested their leave. Regional Office indicated to her that, according to voting packages received from the union, employees were "absolutely" entitled to the leave and did not feel that it was subject to interpretation, subject to operational requirements. The interpretation received from Staff Relations was that "continued service delivery" was to be treated the same as "operational requirements."

[97] In cross-examination, Ms. Janosik introduced, as Exhibit G-5, an e-mail dated February 21, 2002 from Amy Desjardins, Manager, Corporate Services. She received confirmation that the wording "in a manner which ensures continued service delivery" found in subclause 41.03(d) – "Leave Without Pay For the Care of Immediate Family" - is considered to mean the same as "subject to operational requirements."

[98] When Ms. Janosik learned from Staff Relations the meaning of the term "continued service delivery"; she spoke to a Mr. Chana (or Channa). The conversations, because Ms. Janosik had more than one, took place prior to February 22, 2002.

[99] Ms. Janosik was aware of the leave applications (Exhibit E-10) before she received Exhibit G-5. Exhibit G-5 had an impact on how she considered the leave applications. She had to consider them along with any other leave requests, as mentioned earlier. She would have to look at whether they were maintaining services to clients in addition to reviewing Article 34.

[100] The leave-without-pay requests (Exhibit E-10) were placed in Mr. Melnyk's in-basket and in hers. The normal practice when dealing with vacation leave is to circulate vacation-leave sheets for different areas and classifications. In this case, they were circulated in March for the period of leave from April to September. There were no deadlines set but urgent tags were placed on the sheets. Their whereabouts were monitored.

[101] Ms. Janosik does not recall when she saw the applications (Exhibit E-10) but it was around the time that they were received. She received the applications before the annual-leave sheets were circulated but was waiting for a clear interpretation before granting the leave without pay. When the interpretation came in, she interpreted "operational requirements" as meaning that she had to consider that the applications were during the peak vacation period, which is also the peak summer workload.

[102] On the vacation-leave sheets, there was no indication that July and August were peak workload periods or that employees might have difficulty obtaining vacation leave at that time because of the leave-without-pay requests. They were just sheets for employees to indicate their preferences for time off.

[103] The approval of annual leave depends on the time requested. Requests in April, May or June are granted quickly. In July and August, annual leave requests are approved unless problematic in some areas where some negotiation with staff will take place. That can delay the approval process.

[104] Ms. Janosik does not recall exactly when the vacation-leave requests were approved but she sent an e-mail (Exhibit G-6) on April 8, 2002 informing all staff that annual-leave requests for July, August and September had been approved. Exhibit G-6 was sent within hours of the denials of the leave-without-pay requests (Exhibit E-11).

[105] Ms. Janosik introduced, as Exhibit G-7, the minutes of the HRCC Management-Union Executive Meeting of Tuesday, March 26, 2002.

[106] Ms. Janosik was aware that the grievors had received a different interpretation of Article 41 with their voting package than that provided by Staff Relations. Previously, leave requests under Article 41 involved negotiations with one person because the Article then referred to pre-school-age children. The average age of employees is 47 or 48 years old; the majority of staff does not have small children.

[107] According to Exhibit G-7, the backlog had been reduced to seven-and-one-half days between September 13, 2001 and March 26, 2002 (Exhibit E-15). It also indicated that no overtime would be worked until the end of the fiscal year (March 31, 2002), with the exception being Claim Preps and Agent IIs.

[108] Exhibit G-7 indicates that, in March 2002, they were sending out a lot of Agent II work. Ms. Janosik could not recall all the specifics, but work could flow into the SDR work area. She agrees that, from the moment of the applications for leave to date, eight or nine Agent IIs have been hired. At the end of August 2002, three Agent IIs were hired and then five more, in 2003. It eventually helped with the workload but did not do much for the summer of 2002, as training is lengthy.

[109] Ms. Janosik indicated that a backlog triggers working overtime, although it may also be necessary to work overtime to achieve service targets. A backlog exists when they are behind their 28-day target date.

[110] Ms. Janosik stated that it would have had a significant impact on operations if the six grievors were off for the whole summer. She has a staff of 60 reporting to her. A significant number of staff, up to 50%, is allowed to be off at the same time. Management tries its best to accommodate, knowing it is a struggle during this time. Ms. Janosik acknowledged that she had individual meetings with the grievors and told them that they could not have leave without pay in July and August for that particular year and they were provided with alternate dates.

[111] Ms. Janosik acknowledged that she approved annual leave for Ms. St-Pierre (eight days in July and 16 days in August), as demonstrated by Exhibit E-3. Ms. Janosik did not consider granting those weeks, or part of them, as leave without pay because she considered that time to be the peak vacation period and the summer peak workload. She did not feel that they could meet their clients' expectations and/or provide the appropriate level of service to the community.

[112] Ms. Janosik stated that May, June and September are not peak vacation times and are not considered part of the peak summer workload. She acknowledged that management has the right to deny vacation leave; she can recall employees from vacation, she can cancel vacation leave and she can allow the carry-over of leave. Ms. Janosik acknowledged that she granted vacation leave to the grievors for the periods for which they requested leave without pay.

[113] Ms. Janosik agreed that, traditionally, her office's backlog goes into September because of work not done in August. She gave 20 days of leave without pay to Ms. Verardi during that period because the majority of staff was back from vacation.

[114] Ms. Janosik acknowledged that the grievors did not represent 50% of the staff in their work location.

[115] Ms. Janosik clarified and reiterated some of the testimony that she gave regarding the backlog, staffing actions and the files that were sent out of the office.

[116] In re-examination, Ms. Janosik indicated that Article 41 could apply to all of the 60 employees that she supervised. She feels that "care" means almost anything and there is no mention of the age of children. The grievors did not provide written reasons for requesting leave. She remembers that Ms. St-Pierre has small children but does not remember about the others. She did not question if they all met the criteria for leave under Article 41.

Arguments

For the Grievors

[117] The grievors submitted their arguments by facsimile on April 30, 2004. They read as follows:

> *Written Submission in DUFOUR et al #166-2-31904/9*
>
> *1. In Article 41.01, signatories to the Collection Agreement (G-4) (signed November 19, 2001) agreed that they ..."recognize the importance of access to leave for the purpose of care for the immediate family".*
>
> *The Department's handling of leave applications under this article is not consistent with such a recognition and, in fact, served only to negate the language/benefit.*
>
> *2. Both counsel for the employer and one of its witnesses acknowledge that all applications that are the subject matter of these grievances are valid, legitimate requests and for the purpose of determining whether denials of leave were proper, neither the term "care" nor "immediate family" are at issue between the parties, which is to say that the opening words of article 41.03 ...."subject to article 41.02 (the definition of family) has no bearing in this matter.*
>
> *For greater clarity, the parties agreed that the sole issue which they seek to have adjudicated is whether the department was entitled in the circumstances to deny the leave requests.*

3. The particular provisions that speak to the granting of leave are found in article 41.03. it is the position of the grievors and the Union, who accept the burden of proof, that the Department on acting upon wrong advice that the new language in article 41.03(d) should be treated the same as, and is equivalent to, the words ...subject to operational requirements... both misinterpreted the agreement and violated its provisions.

Exhibit G-5-Testimony on day two by Michell Janosik

Ms. Janosik testified under oath that:

A. All leave applications under Article 41 were received in January '02 (see Exhibit 10, between January 2, '02 and January 23, '02.

B. These applications were not considered / acted upon prior to seeking vacation leave requests "because we didn't have a clear interpretation of the clause..."

C. "once we got the interpretation that the clause (41.03(d)) meant subject to operational requirements, we circulated the vacation sheets, sometime in March..."

D. "...it (the interpretation in G-5) would have had an impact on how I considered the LWOP requests..."

In fact, Exhibit 11, dated April 8, '02 shows that the Department chose to hold on to these article 41 LWOP applications <u>for more than 3 months</u> while first giving preference to any vacation leave requests, before responding to the six grievors / applicants. This, obviously, is not in keeping with the over-riding recognition spoken of earlier in Article 41.01. Clearly, Michelle Janosik chose vacation leave requests, leave with pay over care of family requests, leave <u>without</u> pay, for the same period. This is not only discriminatory on the basis of family status, it totally negates any real benefit for these six grievors who wish to be off during the summer recess from school when their children are home.

Obviously, to offer these same applicants the chance of using leave without pay in April, May, June or September is of little value.

Further, <u>as the adjudicator herself said at the hearing</u>, ..."where operational requirements were intended in the agreement, those words <u>were used</u>..." (underlining is mine)

However, while we reject the advice that "continued service delivery" is the same as "subject to operational

requirements", for argument sake, it makes no real difference.

When one examines exhibit 3 through 7 it's readily apparent that there was no operational requirement precluding the granting of LWOP under article 41 in any case! How can you claim an operational requirement demands your attendance in July and August, then grant you vacation leave in those same months, notably Pauline St. Pierre who was denied LWOP but granted vacation leave for 5 weeks during the same period requested and denied (see exhibit 3, page 5, #3 and #4). So, even that argument is easily defeated. The simple fact is that Ms Janosik effectively blocked out July and August 2002 for LWOP as she told Pauline St. Pierre she would, and as she testified ..."yes, I told them no to any LWOP at all in July and August..."

Frankly, this is tantamount to bad faith bargaining! You cannot, in order to secure the other parties agreement at the table, agree to a benefit and then act so as to block its operation! That, at the very least, sets up an estoppell argument that the members who ratified the agreement's provisions and the bargaining team who tentatively agreed relied upon in good faith to their detriment on a promise made at the table, only to find that when one attempts to make use of a benefit, it, for all intents and purposes, is withheld.

One-hundred percent of these applicants' requests were denied. All six! No counter-offer was made of less time in the summer, as Ms Janosik concedes in her testimony.

Before I leave the comparison to operational requirements, I ask the adjudicator to compare the leave provisions in Articles:

36.01}

38.01}

**41.03}*

43.03} shall grant

45.01}

46.01}

48.01}

and similar leave provisions in Articles:

44.01 Subject to operational requirements

50.01 may be granted

51.02 may be granted

52.01 may be granted at employer's discretion

53.01 at its discretion, the employer may grant

Obviously the parties have agreed to two very different leave entitlements. In the former, the mandatory "shall" is used. Case law is legion on the meaning of the word "shall". In fact, it is our submission that the LWOP provided for in Article 41 is mandatory. Subject only to Article 41.02 which is not an issue between the parties (definition of family).

The remaining provisions are not something the granting of leave is "subject to". If it was, the parties would have included those ideas in the preamble to 41.03 as they did with Article 41.02.

However, I will deal with those ideas now:

a) minimum notice: 4 weeks is required, 6 months was given;

b) minimum usage: 3 weeks is required, approximately 8 weeks are requested;

c) maximum usage: 5 years is the limit, all grievors, with the inclusion of leave requested in exhibit 10, are below the maximum;

d) the real and only issue between the parties. This, of course, is not within an employees control.

Employees can't and don't schedule leave;

As stated earlier, these words are not "subject to operational requirements." Evidence has shown that the Department concedes that it can continue to deliver a service (see exhibits 8 and 9, job descriptions covering all six grievors) while granting them vacation leave in July and August - 5 weeks for grievor St. Pierre, who was not replaced. Testimony of grievor Dufour shows that she was not replaced during the summer months when she was off for surgery for six weeks. Why not, if she really was so vital during the summer?

Moreover, evidence also shows us that even with the denial of all six LWOP applicants, the target goal was still not

achieved (see exhibit 20, last page), and, had that been more closely looked at during the 3 plus months the Department held onto the applications, knowing the backlog, the target the number of available staff and all other relevant considerations, all information within their control, the LWOP applications could be granted.

This brings me to the issue of preference of vacation leave over LWOP. Of course, vacation leave is not a leave directed at family care nor does it have the same acknowledgement / recognition as does article 41.01 in terms of its jointly understood importance. I will not suggest that LWOP shall take precedence here - only that all leave requests shall be fairly and reasonably considered!

In my mind, a fair and reasonable approach is not to hold onto LWOP applications that are recognized as important until all vacation leave applications are dealt with some 3 months later, then deny all requests because there's no time still available. The same as you cannot murder your parents and beg for mercy because you are an orphan. The Department itself created the situation where no summer leave was still available.

Nor is a backlog anything new to this department - rather its an annual problem. Managers must manage. No solution has yet resolved this long-standing problem. It should be anticipated and a fair-minded approach should have long ago been adopted. Contrary to Ms Janosik's testimony, vacation leave requests are not sacred, nor are they automatic. The language in Article 34 is clear in scheduling:

> *Article 34.05 is an "expectation" only.*
>
> *Article 34.11(a) addresses the issue of unused credits by providing a 35 day carry-over. As well, liquidation is also provided for beyond 35 days.*
>
> *Article 34.06 speaks of: denial, alteration, cancellation.*
>
> *Article 34.09(a) speaks of recall.*

While the union does not advocate these avenues, it certainly gives the Department options, contrary to Ms Janosik's testimony that she had no options when it came to the granting of vacation leave. If the Department, to be fair to all who desire summer leave under any provision in the agreement, denies vacation, or alters it, or cancels it, or even recalls an employee from it and credits are not used, Article 34.11(a) provides protection by carry-over and liquidation.

There is no evidence that the Department seriously considered these options before denying LWOP. The evidence, instead, shows that Ms. Janosik.."did not consider limiting leave..." and ..."I wouldn't ask an employee to carry over vacation leave..." This seems to confirm what really happened here, which was that management wanted its employees to use their vacation leave, leave which did not have to be used in 3 week minimum blocks - more flexible leave, in order to exhaust that leave ensuring they would have to be at work in other, traditionally - busy times, when they might take a day here, a day there, and inconvenience the department.

To re-visit the notion that management must manage so as to enable employees to avail themselves of their negotiated benefits, management of HRDC Windsor failed utterly:

A. <u>Staffing was poorly handled:</u>

-A long-term sick employee was not replaced, since 2001.

-Another was lost on secondment and not replaced ..."that position was lost to our office.

-Another position was left vacant for years.

-Insufficient trainers to train replacements in order to approve the LWOP applications. There was no trainer - a trainer broke her leg and the training function was left undone until her return.

-In 2002, in order to accommodate these LWOP requests, steps taken in 2003 were not taken - i.e. return Dorothy Lamb and Irene Nechitaluk, retirees, as replacements.

-Replace vacation leave employees - "we would not ask someone to sit in their spot..."

-Replace Mieke Dufour, off for six weeks that summer for surgery.

-Since 2002, 9 placements at the PM-2 agent two level, too late to help!

-No consideration to using money saved from LWOP to fund terms, acting positions, other forms of replacement.

-No long-term plan to deal with this annual problem by training, even with the acknowledgement that "it is a very long process to train on assessment and requires extensive monitoring..."

And..

-"it takes at least one year before trainees are functional and productive..."

Given this fact / testimony, how can the Department reconcile with ..."eventually there was a trainer" - there was no trainer at all because the trainer broke her leg and Mrs. Séguin, agent II was not yet trained.

In this regard I ask the adjudicator to read the Clouthier and others decision by Mr. Tarte, December 1, 1993, pages 10 and 11 (166-2-23628, 23795, 23797 and 23799)

B. Other management short-comings caused the denials of LWOP:

1. Budget Problems:

- "we exceeded the staff budget for that year (2002).

- "The office budget wouldn't allow the hiring of any terms..."

- "we had no specific budget for overtime, we set aside so much money for insurance overtime and we spent it all..."

"we were over budget for overtime for the region..."

2. Rather than accept its responsibility to manage and come up with a solution, the department instead chooses to blame external factors for their chaotic back-log, like union action (rotating strikes, no voluntary overtime, working to rule, etc) and the 9-11 crisis. Despite this, Ms Janosik conceded ..."we have better guidelines now." again, too late to help!

Articles 1.01 and 1.02 are helpful at the very least as interpretive aids, to better understand how to read what follows. None of the above short-comings serve the purpose of this agreement. The mishandling of LWOP applications does not further the aim of "harmonious and mutually beneficial relationships" nor does it promote the well-being of its employees.

This they have failed to do! The result is that our members have been unfairly deprived of a negotiated benefit since 2002. In order to attempt to make them whole, such as we are able two years down the road as we are today, we seek a decision by this Board to:

1. *Tell the Department in the clearest terms that it was in breach of its obligation to grant LWOP;*

2. *Direct the Department to restore all vacation leave credits used in July or August 2002 to their bank of credits at the grievors option; and*

3. *Direct the Department to manage in such a way that allows access to this important type of leave for this and succeeding years.*

[*Sic* throughout]

For the Employer

[118] The employer's submissions were received on May 20, 2004, and read as follow:

. . .

The issue that you must determine is whether or not the Employer has breached Article 41 of the Program and Administrative Services (PA) collective agreement (in force November 19, 2001, expiry June 2003), pertaining to "Leave without pay for care of immediate family."

Scope of dispute

The Employer agrees with the assertion of the union representative at paragraph 2 of his submissions that the meaning of "care" and "immediate family"—clauses found in Article 41-- are not at issue in this case. Had that issue been in dispute, the parties would have called evidence as to the identities and ages of the persons for whom the grievors were seeking to care, and the reasons, to determine the legitimacy of the request for leave. As these issues were not in dispute in this case before you, the parties agree that the only matter in dispute is whether the union can demonstrate that the Employer violated the collective agreement in denying the leave based on "continued service delivery." Further, there is no dispute that the employees approached management in a timely fashion under 41.03 (a).

Review of Evidence

Ms. Janosik testified that the purpose of the Windsor HRCC is to provide benefits to the unemployed in a timely manner. If these benefits are not provided within key timelines, individuals have to seek help from other agencies for sources of temporary income such as social service agencies. As a manager of service delivery, she was charged with supervising the various functions in both the front and back

ends of the Windsor HRCC, where workers such as the grievors served the public in various capacities.

An important part of Ms. Janosik's job was ensuring that certain targets were met. The standards and targets, found in ***E-18, E-19 and E-20****, were elaborated upon in testimony. Ms. Janosik described in detail the various processes that were involved in answering public inquiries, and that the ultimate goal in most cases was that most clients should expect to receive an employment insurance cheque within 28 days of applying. The union did not offer any evidence at the hearing that calls into question the legitimacy of these standards.*

Ms. Janosik testified that when she received the grievors' requests for Article 41 leave, in January of 2002, the office had been in a "crisis" for several months due to several unforeseeable events. She said that claims were backlogged and that targets were not being met. She said that a backlog had been building up since a series of rotating strikes began in July of 2001, in which workers were not working overtime, and "worked to rule." This meant that claims got behind. Then, the catastrophe of September 11, 2001 occurred, which for all intents and purposes brought an end to the strike action. This tragedy led to a downturn in the economy and unfortunately resulted in many people becoming unemployed, thereby increasing the workload.

*Ms. Janosik testified that there were massive layoffs at the Windsor Casino. As it is located in a border town, travellers stopped coming with the same frequency after the tragedy. Workers were laid off. She testified that as of September 13, 2001 (**E-13**) there was an eight-week backlog of claims. She also testified as to the massive layoffs at the car manufacturers in the region. Some of these occurred every year, but others in her view were a result of the economic downturn flowing from the September 11 tragedy. All of these factors led to an increase in claims.*

*Steps were taken to try to get in control of the backlog in the fall of 2001 (see last pages of **E-16**) and this continued into the spring of 2002 (**E-17**). Ms. Janosik also testified that **E-16** demonstrates that the office was shipping files out to other regional HRCC offices for adjudication, and that this created work for the Windsor office even though adjudication took place elsewhere. Also, the office automated over 11,000 renewal claims between October 2001 and January 2002. Also, senior officials set up Regional Insurance Processing Centres to help Ontario as a whole deal with the fact of the province-wide backlog at the time. In spite of these efforts, there was a limit as to how many claims could be shipped out, since there was a lack of trained resources in the region.*

In spite of these efforts, clients were not being served within the established timelines.

The union has alleged that the Employer failed to take efforts to staff sufficiently so that it could meet "continued service delivery". The Employer refutes this assertion. It was clear in testimony that the office redeployed an Investigation and Control clerk to the insurance area. Secondly, what Ms. Janosik termed a "merit assessment" was conducted so that individuals could be trained to work in the front end of the Windsor HRCC.

Also, Ms. Janosik testified that several job competitions were being held (E-2). The PM-02 board was conducted first as the backlog in that area of work was significant. However CR-03 and CR-05 competitions were underway. Because one person involved in the competition evaluation process broke a limb, the boards were delayed. E-2 demonstrates that these CR-05 positions were filled by three CR-05 incumbents. In November 2002, due to these uncontrollable delays. Two others were transferred in by March and April, 2002. All of these efforts at hiring were made to assist with the backlog.

This individual was also a trainer. After her accident, there was unfortunately no other trainer fully trained. These were unforeseeable events that were not within the control of management. The only possible person who could assist in the training was working on PM-02 -Agent 2 work to help with the ongoing backlog. However, the evidence of Ms. Janosik also showed that this individual was herself not fully trained in CR-05 duties (service delivery work). Therefore, she was unable to train others in this much-needed area.

Mr. Done also asserted that a long-term sick employee was not replaced. The testimony of Ms. Janosik at the hearing refutes this, as the vacancy to which he refers was filled by one Yvette Hartmann, who was deployed from the employment section in 2001/2002.

Ms. Janosik testified that while the overtime budget was exceeded, additional monies were requested.

Overall, Ms. Janosik looked at the targets and the statistics, and determined that there was a real risk that targets would continue to not be met if she allowed all six grievors time off without pay pursuant to Article 41. Contrary to the bargaining agent's submissions, Ms. Janosik did, however, offer alternate dates (E-11) but these were not accepted by the grievors.

Ms. Janosik testified that the 2001-2002 year was an unusual one given the severe backlog. This type of leave had been allowed before, under the predecessor leaves under the old

*collective agreement (**E-12**). Article 41 leave has been allowed since these grievances were filed. She simply was not in a position to grant it when the request was made in 2002. She testified that she did not delay providing an answer to the grievors for any other purpose than determining service delivery requirements, and in trying to ascertain what the new language under Article 41 meant from an operational standpoint.*

Evidence as related to scope of dispute

The Employer wishes to raise one key point pertaining to evidence that also relates to the scope of the dispute. As already stated above, the Employer says that the issue before the PSSRB is whether the Employer improperly denied the leave on the basis of continued service delivery requirements

At the hearing, as well as in the union's submissions, there was and is some suggestion that Ms. Janosik's offer of alternative dates to the grievors for leave without pay was completely without utility, given "child care concerns" in the summer months.

*It is vital, from the Employer's perspective, to be clear about the evidence of the union's two witnesses. While Ms. St. Pierre's evidence was that she had young children, we did not hear evidence from all six grievors that the purpose of the leave was to care for children of school age years, or, alternatively, that all of those children needed someone home with them. While Ms. Dufour testified as to wanting to be home in the summer when her children were home, there is not any evidence before you, either way, as to whether or not her children needed someone at the specific times she requested the leave, nor was there evidence as to whether or not the children were of an age where they absolutely required someone home with them. Indeed, as we did not hear from all of the grievors, we do not know if all the children involved would require care. There may have been adult members of the immediate family that needed care as well, whose care would most likely not be tied to a school break. While **E-10** contains the grievors' requests for leave, none of these documents state the age of family members.*

The Employer agreed at the outset of the matter that all people to be cared for were immediate family members in accordance with Article 41. It does not concede anything beyond that. Under the predecessor provisions in the collective agreement, specifically "Leave without pay for the care and nurturing of pre-school age children, and "Leave without pay for the long term care of a parent," which had been contained in the former PA Agreement (signed May 16, 2000, expired June 2000), these issues as to ages and identities of those to be cared for may have been more at the

forefront had the matter been grieved under the former collective agreement.

Perhaps in another case under Article 41 the identities of such persons would be more of a concern to the Employer. Here, it was not. Article 41 is broader, as under the old provisions the leave was limited to that of a "pre-school age child" or a "parent." Now, broader classes of persons are covered.

While the Employer does not dispute that the purpose of the leave was to care for immediate family, it does not acquiesce to the suggestion of matters not in evidence. Because the Employer does not admit what class of immediate family members were to be cared for, for all six grievors, the Employer does not admit that Ms. Janosik's accommodation of offering alternative dates for leave without pay, was without utility. There is simply incomplete evidence that the leave without pay had to be taken at a specific time, nor is any specific purpose identified for each grievor.

The issues in this case can be resolved by considering whether the Employer was wrong to deny leave for care of immediate family, considering its continued service delivery requirements. There is no need to consider the union's submission that the alternative dates were without utility, since there was no factual foundation laid for such an assertion. The lack of factual foundation is due to an early agreement with the bargaining agent as to the scope of the dispute.

Burden of Proof

The union has acknowledged that it has the burden of proof to establish that the Employer has violated the collective agreement.

In a case of this nature, Re Sault Ste Marie General Hospital (1993), 36 LAC 4th 154 stands for the proposition that the union has the legal burden and the Employer the evidential burden in a case of this nature. The Employer's evidential burden in this case means that it has burden to establish its service requirements. It is the Employer that is in possession of the relevant information with respect to these standards.

The Employer must show that it had reason to believe that the granting of the leave would have led to a loss of efficiency such that it would be unable to maintain continuous service delivery to the public, and that it had a reasonably grounded belief that granting the leave would have or could have led to non-performance of key functions—in this case, the timely payment of claims and the service of clients.

Page 2 of the Re Sault Ste Marie General Hospital decision, supra, refers to how the onus shifts in a case of this nature. Once the grievors establish the reason for wanting the leave, the onus shifts to the employer to show that "...it conducted a ***proper inquiry*** *and the facts support its determination that the granting of the leave would interfere..." (Emphasis added) with the running of a hospital. In the within matter, the interference would be with maintaining service standards and serving the public.*

In the Dufour et al matter, the evidence of Ms. Janosik establishes very clearly that she made a "proper inquiry" that granting the leave would have interfered with continued service delivery.

However, the evidential burden on the Employer is not so high that it had to have predicted service delivery requirements with precise accuracy. According to Re Sault Ste. Marie General Hospital, supra, it only must show that it based its decision on reasonable beliefs that it would fail to meet its service standards and that it made a proper inquiry in doing so. To require Ms. Janosik to have predicted with precise accuracy whether requirements could be met with the grievors on leave places a higher burden on the Employer than the law requires.

In spite of the Employer's evidential burden, the union at all time maintains the ultimate legal burden in the case—to prove a violation of Article 41 when the Employer denied the leave at the times the grievors wished to take it. The Re Sault Ste. Marie General Hospital case clearly establishes, at page 6 of the decision, that the union must show that the employer's decision was wrong—that it "...incorrectly concluded that the interference with its operations outweighed the grievor(s') presumptive right to the leave..."

*To make out its case, the union would have to show evidence that management did not make a proper inquiry into the situation. The union would have to refute not only the statistics kept by management, and dispute the need for service standards (**E-19, E-20**) upon which Ms. Janosik relied, but also refute the "soft' evidence to which she testified, which also influenced her decision. Examples of this evidence from her testimony were things such as long line ups in the Windsor office, the complaints to the Minister from Canadian Autoworkers' (CAW) President Mr. Buzz Hargrove (reference **E-15**, in conjunction with testimony) that clients were not getting benefit cheques in a timely fashion, the increase in local laid off workers having to approach social assistance agencies due to the backlog of EI cheques, as well as the impact that massive factory layoffs and the economic downturn of September 11, 2001 had on the employment*

situation in the Windsor region that increased claim loads and backlogs.

The Employer submits that on reviewing all of the evidence, the union has not demonstrated that management's decision to deny the leave was wrong, and therefore has not discharged its burden of proof.

The article

Article 41 "Leave without pay for immediate family" is an outgrowth of two clauses in the previous agreement, "Leave without pay for the care and nurturing of pre-school age children, and "Leave without pay for the long term care of a parent," which had been contained in the former PA Agreement (signed May 16, 2000, expired June 2000) (see ***E-12****). Article 41 is a new clause, which came into force on November 19, 2001. This has not yet been adjudicated. Therefore part of the task before you is to construe the meaning of the language of the clause. The language is as follows:*

> ***41.01*** *Both parties recognize the importance of access to leave for the purpose of care for the immediate family.*
>
> ***41.02:*** *For the purpose of this article, family is defined as spouse or common law spouse resident with the employee), children (including foster children or children of legal or common-law spouse), parents (including step parents or foster parents) or any relative permanently residing in the employee's household or with whom the employee permanently resides.*
>
> ***41.03*** *Subject to clause 41.02. an employee shall be granted leave without pay for the care of family in accordance with the following conditions*
>
> *a) an employee shall notify the Employer in writing as far in advance as possible but not less than four (4) weeks in advance of the commencement date of such leave, unless, because of urgent or unforeseeable circumstances, such notice cannot be given;*
>
> *b) leave granted under this article shall be for a minimum period of three (3) weeks;*
>
> *c) the total leave granted under this article shall not exceed five (5) years during an employee's total period of employment in the public service;*

d) leave granted for a period of (1) year or less shall be scheduled in a manner which ensures continued service delivery.

The Employer takes the position that in this case it recognized and met the letter and spirit of Article 41.01, in that it offered alternative dates that would still allow the Employer to meet its goals. The nub of the case rests on sub articles 41.03 and 41.03 (d), which contain the phrase "the employee shall be granted" and (d) that "leave...shall be scheduled in a manner which ensures continued service delivery." From the Employer's perspective, the key words from sub article 41.03(d) are the following:

- *"shall"*
- *"in a manner" and*
- *"continued service delivery."*

"Shall"

The grievors and the union have taken the position that by the use of the word "shall," the grievors should be automatically given the requested leave, and for the measure and time frames desired. Further, their position is that the word "shall" meant that granting this leave was absolutely mandatory.

The phrase "shall be granted leave" in Article 41 cannot be read alone. To so argue, in the Employer's submission is to ignore the rest of the article, especially subsection 41.03(d). The subsection contains a second mandatory "shall"—that it "shall be scheduled in a manner which ensures continued service delivery."

The second "shall" demonstrates that the nature of management's obligations is not only to the employee. In Article 41.03(d) the "shall," indicates a mandatory obligation to ensure continued service delivery.

Re Manitoba (2002) 114 LAC 4th 172 offers a similar situation to the facts faced by you, in that the case involved the alteration of language in a collective agreement. It involved a family related leave provision that allowed the person to take off five days a year against sick leave credits. It stated that the leave "shall" be given. Arbitrator Jamieson found that because the leave was "mandatory" not "discretionary," this meant that once the person has brought him or herself within the ambit of the provision, then the person would be automatically entitled to get the leave. This is essentially the legal position that the union is taking in this matter.

The Employer says that the within case can be distinguished from the facts in Re Manitoba, supra. First of all, there was only one "shall" in the specific language of the agreement, and it was the "shall" that created the mandatory leave. In that case, there was no qualifier on the mandatory leave as there is under sub article 41.03(d). That article introduces a second "shall" and says that the Employer "shall" only grant it "in a manner that ensures continued service delivery." Therefore, it is mandatory for the Employer to schedule the leave in a manner that ensures the continued service delivery to the public.

The Employer also again relies on Re Sault Ste. Marie General Hospital, supra. The case involved a clause that was a mandatory type of clause, employing the word "shall". There was no qualifier in the collective agreement article. As a result the arbitrator found that there was a stricter burden on the hospital to show that it could not have granted the leave. However, even with the mandatory "shall," which militates in favour of employees receiving leave once they established that they met the criteria, the arbitrator found that the Employer had denied leave in a reasonable fashion. To have granted it in accordance with the grievors' wishes would interfere with the efficient operation of the hospital. Therefore, Employer says that the word "shall" does not make the granting of the leave a foregone conclusion.

"In a manner"

Article 41.03(d) says that the leave shall be granted "in a manner" that ensures continued service delivery.

In the Employer's position, "in a manner" does not mean that the exact dates requested for Article 41 leave have to be granted to a grievor. Alternative dates can be offered by the Employer if it has reasons to believe it will not be able to ensure that service will not be able to continue if it grants the leave specifically as requested.

The Employer can still meet its collective agreement obligations even if it proposes alternative dates. The evidence demonstrated that the grievors were given alternative dates for the leave, thereby meeting the requirements of Article 41. Although in his submissions at page 2, the penultimate paragraph, the union disputes that alternative dates were given by saying that the requests were denied "one-hundred percent," that cannot be sustained in face of the clear evidence from Ms. Janosik and the record (E-11).

Contrast with vacation leave under Article 34

The Employer says it is helpful to contrast Article 41 Leave without Pay for Care of Immediate Family with vacation leave with pay. The phrase "in a manner" contained in Article 41 is notably absent from Article 34 on vacation leave. In considering vacation leave, the Employer has the obligation to come as close as possible to granting the specific time period requested. Article 34.05, "Scheduling vacation leave with pay"—requires that the Employer make "every reasonable effort to (i) provide an employee's vacation leave in an amount and such time as the employee may request."

If the parties had intended that Article 41 leave be given in the closest possible accordance with a request, the parties would have included such language as is found in sub article 34.05 to ensure that outcome. However, it is clear from the language that this is not the case.

The Employer was unable to find cases in the PSSRB context that squarely address whether annual vacation leave or leave without pay take priority in such a situation. The Barbeau case, PSSRB Board File 166-2-16579 is admittedly different than the within case, but involves a situation where a grievor wanted leave without pay while others were already utilizing vacation leave with pay. Adjudicator Korngold Wexler considered the operational requirements (as they were in that case) of the service after the people on annual leave were "discounted" as being part of the staff complement. While not decided on the same set of facts, this case lends some credence to the argument that vacation leave is to be considered in priority before leave without pay.

The distinction between the Employer's obligations under article 34 and 41 is of key importance in this case. The Employer submits that because there is a different standard applicable to the granting of vacation leave than for leave without pay for care of immediate family, the Employer was correct in placing a greater emphasis on ensuring that employees in the Windsor HRCC office as a whole could get their desired vacation leave before determining whether it could grant the grievors request for leave without pay for the specific times requested. Furthermore, the evidence from Ms. Janosik was that most employees use their annual leave in the summer when their families are home. She testified that the practice was to allow 50% of the staff complement off for vacation. In the summer of 2002, this 50% rate was maintained even though the office was struggling during a peak period and against a backlog.

The fact that the vacation leave with pay article, by its very wording, places a higher premium on employee choice than Article 41 in no way vitiates the requirement of the Employer to carefully consider leave without pay requests. There is,

however, no evidence that this Employer did not carefully consider the grievors' requests or make a proper inquiry into whether it could be granted in the fashion they desired. The Employer has to consider such requests, and if they can be scheduled to allow it to meet is service requirements and collective agreement obligations under other articles, it would be scheduled. In this case, the Employer offered dates to the grievors, consistent with competing obligations.

The Employer submits that had the Employer granted the grievors the requested dates, possibly to the detriment of other workers seeking vacation leave, the union could very well have been faced with multiple grievances from employees whose vacation leave was supplanted by the absolute strict accommodation of these six grievors for leave without pay.

The Employer submits that it must grant leave in accordance with the priority set forth in the collective agreement (i.e. as close as possible to the date and amount requested under 34.05(b)(i)) as opposed to Article 41, where the collective agreement is silent on the dates and the amount.

"Continued service delivery"

One of the factors weighed by management in determining the grievors' entitlement to Article 41 leave was whether it could meet its requirements for "continued service delivery" if it granted the leave as requested. The testimony of Ms. Michele Janosik established that there were legitimate challenges to meeting continued service delivery in the summer of 2002. The matter before you depends in part on the determination made as to the meaning of "continued service delivery."

From the Employer's review of the case law, the phrase "continued service delivery" has never been entertained by a labour arbitrator in any jurisdiction, nor by the PSSRB.

In interpreting a new phrase of the collective agreement, Brown and Beatty, at page 4-42, 4:2000 of Canadian Labour Arbitration is helpful. That passage indicates that the interpretive exercise involves ascertaining the intention of the parties for including the words they used. Where wording is clear and unambiguous, one must look at the ordinary sense of a word.

To assist with the interpretative exercise, the Employer offers the following definitions as interpretative aids:

The word "continued" in the Oxford Dictionary, 10th Edition is defined as follows:

> 1. *"to persist in an activity or process; remain in existence, operation or a specified state. 2 Carry on with.*

(The definition also refers to etymological references, and directs the reader to the word "continuous".)

The Black's Law Dictionary, 6th Edition does not define "continued" but defines "continuing"

> *Enduring; not terminated by a single act or fact; subsisting for a definite period or intended to cover or apply to successive similar obligations or occurrences.*

The Black's Law Dictionary, 6th Edition, also defines "continuous"

> *Uninterrupted; unbroken; not intermittent or occasional; so persistently repeated at short intervals as to constitute virtually an unbroken series. Connected, extended, or prolonged without cessation or interruption of a sequence.*

Drawing on the language contained in the dictionary definitions cited above, as well as the interpretive doctrine that states that words employed in collective agreements have specific meaning, the Employer's position is that "continued service delivery" implies that efforts must be made to ensure that the service delivery to the public does not stop. The Employer's position is that "continued service delivery" goes beyond meeting basic "operational requirements, and is a higher standard than "operational requirements."

Meeting "operational requirements" could be meeting only the minimal standards to run an operation, whereas the addition of the word "continued" to "service delivery" implies that service must be ongoing and uninterrupted.

The Employer urges upon you that, in terms of legal cognates, "continued service delivery" is at the very most a distant cousin of the phrase "operational requirements"--insofar as it allows for a justification by management to exercise its management rights. In the context of Article 41.03(d), the language creates a management related to the granting of Article 41 leave. It provides management with a reason not to grant leave if they cannot meet their service delivery objectives.

The Employer's position is that if the parties intended "operational requirements," the parties would have used that very terminology in the creation of the article. The interpretive doctrine found in Brown and Beatty, supra,

states that words employed in collective agreements have specific meaning.

The determination of what constitutes "continued service delivery" is at all times in the hands of the Employer. It is not up to the grievors to determine the Employer's needs or organize the work. That is the Employer's prerogative under s. 7 of the PSSRA. Management is the one who must determine how to manage the operation to ensure that "continued service delivery" is met. Management has methods of determining this, and it brought forth that evidence at the hearing as to how it planned to meet the mandate of the Windsor HRCC.

The Re Sault Ste. Marie General Hospital, supra, stands for the proposition that an Employer only has to rely on knowledge it has in its possession when it makes the decision—it does not have to predict with perfect accuracy what actually happens. In this case, management had certain indicators it was reviewing to determine if it could meet the targets and give continuous service.

The Employer's service delivery obligations are also tempered by other aspects of the governing collective agreement and its application to all of the other employees in the unit. As already outlined under the section entitled "In a manner," the Employer also has obligations to ensure that other workers get their vacation leave as close as possible to what they requested. Maintaining this obligation also has an impact on the notion of continued service delivery to the public, and on the whole matrix of deciding what resources must be employed to meet the organization's goals.

However, Madame Adjudicator, even if you find that there is no difference between the phrase "operational requirements" and "continued service delivery" the Employer submits that it had legitimate service or operational needs in mind when it denied the exact dates of the leave to the grievors. The evidence was very clear that the Employer took continued service delivery requirements into consideration when deciding to grant alternate dates to the grievors for the requested Article 41 leave.

Relief sought

The Employer asks that you dismiss this case in favour of the Employer. The Employer asks that you find that given the circumstances it faced, that continued service delivery requirements prevented the Employer from granting Article 41 leave without pay for care of immediate family at the exact dates the grievors wanted. However it did offer alternative dates for which the employees could take Article 41 leave.

Furthermore, the relief that the grievors are seeking, even if a ruling were to be granted in their favour, is with respect unsupportable. They are seeking to have vacation leave credits restored to them that they took as a result of being denied leave without pay at the specific desired times.

The grievors took time off, and have already received the benefit of that time off. As what they are seeking through this grievance is a finding that they should have been granted leave without pay pursuant to Article 41, the only manner in which to grant the relief of "restoring vacation leave credits" is that the grievors would owe the Employer money for the leave they actually took. After all, they did desire leave "without pay", under Article 41.

The Employer takes the position that for the grievors to get annual leave credits returned for leave already taken would amount to double recovery.

. . .

Rebuttal

[119] On June 10, 2004, the grievors submitted the following reply to the employer's arguments.

Grievors' reply to employer submission in Dufour et al #166-2-31904/09

1. It is entirely within the employer's control that there was no training ability. This particular Department is called Human Resources Development. Yet, when their only trained trainer can no longer train, they cannot train. Surely this is foreseeable! What if that person quit suddenly, got injured or worse. Where is the contingency plan?

Is this the grievor's fault? If you accept the statutory duties to assign duties and organize the Public Service, you must be held accountable when you are caught without a plan!

2. There is a reference to not being able to allow all six grievors the LWOP. The fact is, they did not allow any grievor. Not one!

3. Alternate dates in the summer - July and August - were not offered!

4. The evidence is clear on the backlog - it was the norm and not unusual or unpredictable in 2001!

5. I am surprised, given the employer's opening comment at P.1 on the scope of our dispute, that there is a reference now

to lack of evidence on ages of children. It was Ms [sic] Janosik herself who admitted under oath that she considered all article 41 requests legitimate and valid. Beyond that, the previous reference to age (pre-school age) children has been removed at the last round of bargaining. The employer acknowledges at P.4 in the third last and penultimate paragraphs, and again on P.5, para 2 "...an early agreement with the Bargaining Agent..." that age or care are not in dispute.

6. No evidence was led by the employer as to their understanding of the words "continuous service delivery" other than to rely on late Headquarters advice that those words meant the same as operational requirements.

7. As the employer says at P.5, para 6, the employer must show it conducted a proper inquiry. We agree! But, they made no inquiry! Their response was simply to hold onto all LWOP requests. Seek advice what the words meant. Meanwhile seek vacation leave preferences and grant them. Then, and only then, using the advice that the words meant the same as operational requirements, deny all LWOP requests.

How then, as the employer suggests, can the union prove that the employer incorrectly concluded that the interference with its operations outweighed the grievors presumptive right to the leave? The evidence shows conclusively that the employer's denial was not based on an inquiry into interference with its operation by granting LWOP. Not in any objective empirical measured way. Instead, the employer followed wrong advice that continued service delivery meant subject to operational requirements, believed then that vacation leave requests had a higher priority and denied LWOP.

So, the LWOP was not denied because the absence for the time requested might mean the service delivery might not continue! No! The LWOP requests were denied because, having held them for months and granting leave with pay first, meant their arbitrary target, honoured more in the breach that the rule, might be effected. It is obvious that had the employer properly considered these requests in a timely manner, within a reasonable period following receipt of the applications, they would have been granted.

Now, a further look at the language. We accept those definitions in Oxford and Black's dictionaries of continued and continuous. Notably, these definitions do not speak to degrees of service! Only that their service continues. Nowhere does the employer suggest that the service would halt or cease or come to an abrupt end by granting LWOP.

Only that granting may effect achieving the target dates/objectives.

With greatest respect to the department, the sad truth is that to "continue" the norm of service would be to continue missing the target dates/objectives! Perhaps it is these targets/goals that need to be re-visited.

The employer argues that words in a collective agreement have a specific meaning. Without even considering the meaning it seems we have a consensus that words found in a Collective Agreement must how [sic] some meaning!

When [sic] then does the employer suggest we make of the inclusion at the bargaining table of Article 41.01? At the very last, as in article 1.01 and 1.02 those words must have some value as an interpretive aid! Interestingly, in comparing Art. 41 LWOP with Article 34 Vacation leave with Pay, it is glaring that the words "...both parties recognize the importance of access to leave for the purpose of care of the immediate family" is missing in vacation leave.

-Both parties - not just the union!

-Importance of access - why did the parties seek to include these words in Article 41, and not in vacation leave? Surely this also suggests how the parties viewed these two types of leaves. Moreover, remembering that all contractual language is to be read in the spirit of Human Rights - and we are speaking of care of immediate family - there is only one inescapable conclusion and that is that the employer was wrong to conclude vacation leave had paramountcy over leave for care of family, and so, wrong to deny these leave requests.

Finally, I will reiterate a point I made in my earlier submission: Section 7 of the Act makes the employer responsible for managing the Public Service, which is what they failed to do. They did not "organize" the Public Service in this department in a way that would allow the proper application of negotiated clauses in the agreement. Worse, the consequence is visited upon the grievors who are expected to forego a contractual entitlement.

This in itself is indefensible and cannot be allowed to stand, and so we urge you to uphold the grievances so as to make this department confront its failings in the hope that the Collective Agreement can operate as it was intended.

. . .

Reasons for Decision

[120] The issue to be determined is whether the denial of leave without pay for the care of immediate family was in accordance with clause 41.03 of the PAS group collective agreement. More specifically, was the denial of the leave necessary to ensure "continued service delivery"?

[121] There is no definition of "continued service delivery" in the collective agreement. The evidence reveals that the employer interpreted "continued service delivery" as "subject to operational requirements".

[122] The expression "operational requirements" is used in several articles, such as articles 14, 25, 28, 30, 31, 42, 44 and 53. It is obvious that, when the parties wished to make a benefit "subject to operational requirements", they used that expression.

[123] The expression "in a manner which ensures continued service delivery" was used in previous agreements in the "Leave Without Pay for the Care and Nurturing of Pre-School Age Children" and the "Leave Without Pay for the Long-Term Care of a Parent" articles. No jurisprudence was cited to describe how that expression was interpreted in relation to these articles.

[124] The grievors reject that "continued service delivery" means the same thing as "subject to operational requirements" but argue that, even if it did, the employer violated the collective agreement because they could have been granted the leave, as they were granted other types of leave.

[125] The grievors accept the employer's reference to the dictionaries definitions of "continued" and "continuous". The grievors argue that it means that the service continues, that it does not halt, or cease or come to an abrupt end by the granting of the leave without pay.

[126] The employer argues that "continued service delivery" is a higher standard than "operational requirements". The employer argues that the determination of "continued service delivery" is at all times in the hands of the employer and that the level of service and usage of resources needed to meet the organization's goals is the employer's prerogative. The employer also argues that scheduling vacation leave takes precedence over the granting of leave without pay under Article 41.

[127] I find that the expression "continued service delivery" is not the same as "subject to operational requirements", as so aptly stated in *Canadian Labour Arbitration* (Third Edition), by Messrs. Brown and Beatty, at paragraph 4:2120: "Where two different words are used, they are intended to have different meanings."

[128] In Article 25, which deals with hours of work, the expression "operational requirements" is used in clause 25.05, dealing with rest periods, and in clause 25.08, dealing with flexible hours. In clause 25.11, the expression used, which is a higher standard than "subject to operational requirements", is "to meet the needs of the public and/or the efficient operation of the service". This expression could have been used in Article 41, but it was not.

[129] I disagree with the employer's position that "ensures continued service delivery" is a higher standard of operational requirements. The words clearly mean, in their ordinary sense, that the service provided by the employer will not be interrupted, cease or come to an end. The degree to which the quality or level of service will be affected is a question of facts that balances the needs of the employees requesting the leave and those of the operations of the employer. It is obvious that the employer cannot expect to provide the highest level of service without the services of an employee. If this was not the case, the person would not be employed, as he or she would not be required in the first place. The standard of service delivery is one that the employer must establish in keeping with the nature of the operations and expectations of the clients, but keeping in mind its obligations under the collective agreement. Had the parties intended the operations to continue at the same level of efficient operations, they would have said so.

[130] The employer cannot structure its operations in a way that prevents the application of the collective agreement. Article 41 provides a benefit that is specific and mandatory. The parties have recognized the importance of that benefit. They have made it subject to conditions that make it somewhat exceptional. It requires at least four weeks notice, it has to be for a minimum period of three weeks, it is limited to a total of five years during an employee's entire career and, finally, it cannot require that the employer put an end to or interrupt its operations, but it does not require that service delivery carry on at the highest standard possible.

[131] In the case at hand, the grievors gave the employer six months' notice. This gave the employer ample time to make arrangements to grant the leave requests. The employer did not make a proper inquiry of the situation when the requests came in. The delay in considering the leave applications was in itself a violation of clause 41.01. The denial of the leave without pay in order to grant vacation leave instead is a violation of subclause 41.03(d). The evidence reveals that service delivery could be maintained in the period requested with 50% of the staff. The employer did not ask itself the right questions. The grievors were required to use their vacation leave for the period for which they requested leave without pay. In the case of Ms. St-Pierre, she used all of her five weeks of vacation leave during that period to care for her children. No evidence was adduced to show that, had she been granted the leave without pay as requested, the employer would not have been able to schedule her vacation leave at another time. To the contrary, the employer offered alternate dates in April, May, June and September for leave without pay. This shows that vacation leave could be scheduled at times other than July and August. The employer should have asked itself what steps needed to be taken to grant the leave without pay while ensuring continued service delivery.

[132] The employer argues that the Department had a backlog when the leave without pay requests were submitted and was, therefore, justified in denying the leave on that basis. The evidence reveals that the backlog was not a consideration in the granting of vacation leave; therefore, it cannot be a consideration in the granting of leave under Article 41. The evidence reveals that the backlog was as a result of rotating strikes and events in 2001, and that it was steadily being reduced in the winter and spring of 2002. Exhibit G-7 shows that staffing actions were taking place for positions at the levels of the grievors in March 2002. The employer had the means to ensure "continued service delivery" had it chosen to put its mind to that requirement instead of waiting for an interpretation of the Article and choosing to make it subject to operational requirements, which, in its opinion, included the granting of vacation leave.

[133] The norm of assessment of service delivery was under revision in March 2002, as evidenced by Exhibits E-17 and E-18. It was subject to consultation with the bargaining agent. It was incumbent on the employer to ensure that the standards it set took into consideration the staff, resources and obligations it had to meet those standards. To deny staff leave without pay because of standards that could not be met, even with the presence of those staff, is unreasonable and contrary to paragraph

1 of Article 41. Exhibits E-19 and E-20 show that even after denying the grievors their benefit under Article 41, the employer did not meet its published goals of service delivery in the Windsor office. Clearly, there was a problem, either with the standard or the level of staffing to meet the standard. The employer, in such circumstances, cannot invoke a standard as a valid reason to deny a negotiated benefit under a collective agreement.

[134] In the circumstances of this case, I find that the denial of leave without pay to the grievors violated Article 41 of the PAS Group collective agreement.

[135] The employer argues that the relief sought by the grievors is unsupportable because they took leave without pay at alternate dates provided by the employer. The employer argues that for the grievors to get "annual leave credits returned for leave already taken would amount to double recovery".

[136] The grievors grieved that they were denied leave without pay in contravention of their collective agreement. I so find.

[137] The grievors were granted leave with pay or they worked during the period for which they had requested leave without pay. There is not much that can be done for the periods that they worked, but for the periods that they had to take vacation leave with pay, it is open to them to restore their vacation leave credits in return for the sums that they were paid at the time. I direct that, if the grievors still wish to do so, that these sums be reimbursed in a manner that is acceptable to them, or in keeping with the employer's directives on reimbursement of a debt to the Crown, and that their vacation leave credits be restored.

[138] As for the request for a direction to the employer on how to manage this leave in the future, I do not feel that it is appropriate. The evidence reveals that the grievors who wished to take leave without pay in the summer of 2003 were able to do so, the employer having taken the steps to make it possible.

[139] In summary, I find that the employer violated Article 41 when it denied the grievors' requests for leave without pay for the care of their immediate families. The grievors may have their leave credits restored in return of the sums paid in keeping with paragraph 137 above.

[140] The grievances are allowed to that extent.

Evelyne Henry,
Board Member

OTTAWA, August 26, 2004.