Date: 20031201

Files: 166-2-32390
166-2-32394

Citation: 2003 PSSRB 108

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

DENIS BRUNELLE AND GAVIN SHANKS

Grievors

and

TREASURY BOARD
(Transport Canada)

Employer

Before: Joseph W. Potter, Vice-Chairperson

For the Grievors: Phillip Hunt, Counsel

For the Employer: Richard Fader, Counsel,
Hasna Farah, Articling Student

Heard at Ottawa, Ontario,
November 14, 2003.

[1] This matter concerns two separate but related grievances. Both Gavin Shanks and Denis Brunelle are classified as Civil Aviation Inspectors (AO-CAI-3) and are members of the Aircraft Operations Group.

[2] Messrs. Shanks and Brunelle grieved the fact that they were each required to pay the cost of providing a medical certificate to their employer due to a one-day absence because of illness. The grievances were filed in December 2002.

[3] Each grievor requested to be reimbursed for expenses incurred in producing the medical certificate.

[4] On September 5, 2003, the employer informed the Public Service Staff Relations Board (PSSRB) that the matter did "... not fall within the realm of section 92(1) of the Public Service Staff Relations Act" and, as such, the PSSRB was without jurisdiction to hear the reference.

[5] On October 24, 2003, counsel for the bargaining agent replied to the jurisdictional issue by stating that:

> 1. *The employer has failed to properly interpret and apply the medical certification provision of the Collective Agreement in respect of the grievor, insofar as the party demanding the production of the medical certificate is obligated to bear the cost of obtaining the certificate; and/or, in the alternative*
>
> 2. *The employer has effectively meted out discipline resulting in a financial penalty to the grievor.*

[6] The parties agreed that this issue would be dealt with at the hearing.

[7] An Agreed Statement of Facts was arrived at between the two parties and presented at the outset of the hearing (Exhibit E-1). It states:

> ***Draft Joint Agreed Statement of Facts***
>
> *31/10/01 - PSSRB decision on designations - both grievors are designated employees*
>
> *02/07/02 - CFPA commences lawful strike activity that continues throughout the autumn*
>
> *06/09/02 - Brunelle calls in to claim sick leave with pay*

Unknown - Brunelle is asked by his manager to submit medical certification for the sick leave

21/11/02 - Shanks calls in to claim sick leave with pay; is asked by J. Dow, Chief, Flight Training to submit medical certification for the sick leave

28/11/02 - Brunelle submits medical certificate which is accepted by the employer - request for reimbursement is refused (Tab 2)

02/12/02 - Brunelle grievance submitted (Tab 3)

Unknown date - Shanks submits medical certificate which is accepted by the employer - request for reimbursement is refused

03/12/02 - Shanks grievance submitted (Tab 7)

Grievance replies are filed; grievances are referred to adjudication (Tabs 4,5,6,8,9)

The employer did not amend the disciplinary record for either grievor

The parties are agreed on the amounts to be paid if the grievances are allowed at adjudication - Brunelle $10.00, Shanks $15.00

[8] The reference to tab 2 above consists of e-mails, one of which was the employer's instructions to all employees that illnesses must be supported by the production of a medical certificate.

[9] The hearing then proceeded by way of oral arguments.

Argument for the Bargaining Agent

[10] The collective agreement (Exhibit E-2) contains a provision that permits the employer to request a medical certificate from an employee who has requested sick leave. This provision is contained in clause 24.02, and it reads:

> ***24.02*** *An employee shall be granted sick leave with pay when the employee is unable to perform his or her duties because of illness or injury provided that:*
>
> *(a) he or she satisfies the Employer of this condition in such a manner and at such a time as may be determined by the Employer,*

and

(b) he or she has the necessary sick leave credits.

[11] Clause 24.03 also applies here, and it reads:

> ***24.03*** *Unless otherwise informed by the Employer, a statement signed by the employee describing the nature of illness or injury and stating that because of this illness or injury the employee was unable to perform his or her duties shall, when delivered to the Employer, be considered as meeting the requirements of clause 24.02(a):*
>
> *(a) if the period of leave does not exceed five (5) days,*
>
> *and*
>
> *(b) if, in the current fiscal year, the employee has not been granted more than ten (10) days' sick leave wholly on the basis of statements signed by him or her.*

[12] Normally, the introductory portion of clause 24.03 is the one that applies, and it provides that employees can self-attest to the fact they were unable to perform their duties due to illness. However, the employer has discretion to require production of a medical certificate by virtue of the language contained in clause 24.02.

[13] The question that needs answering here is, was it reasonable to expect the employees to pay for the cost of producing a medical certificate, given the fact the employer was the one that required its production.

[14] In this case, there was a legal strike by members of the Aircraft Operations Group commencing July 2, 2002. Both grievors were designated employees, meaning they were legally prevented from engaging in strike activity because of the requirements of their position. They were required to go to work while other bargaining unit members were on strike.

[15] On September 6, 2002, Mr. Brunelle called in sick and was asked to provide the employer with a medical certificate. Mr. Brunelle complied with the request but at a cost to him of $10.00. He seeks to have this out-of-pocket expense reimbursed.

[16] On November 21, 2002, Mr. Shanks called in sick and was asked to provide the employer with a medical certificate. He, too, complied, at a cost to him of $15.00. He also seeks to have this out-of-pocket expense reimbursed.

[17] Should the employees bear the cost of securing the certificate that the employer required?

[18] In reading both clauses 24.02 and 24.03 it is clear that the employer has the discretionary right to ask for a medical certificate. The employer does so in order to monitor its own sick leave system to ensure that employees are not taking sick leave to which they are not entitled. Since it is the employer who benefits from the production of a medical certificate, it is the employer who should pay for it.

[19] Established case law shows that where there is a discretion conferred on the employer, that discretion must be exercised reasonably (see *Re Nav Canada and Canadian Air Traffic Control Association*, 86 L.A.C. (4th) 370 and *Re NAV Canada and Canadian Air Traffic Control Association*, 74 L.A.C. (4th) 163. See also the *Re Meadow Park Nursing Home and Service Employees International Union, Local 220*, 9 L.A.C. (3d) 137.).

[20] In the instant case, the employees are being asked to compromise their fundamental right to privacy for the employer's benefit in policing its sick leave plan. An employee can refuse to produce the certificate but administrative action could follow, such as withholding pay (see *The International Brotherhood of Electrical Workers, (I.B.E.W.), Local 2228 and Nav Canada*, an unreported decision of Innis Christie, September 4, 2003).

[21] It is clear from the case law that management has discretion to ask for a medical certificate but that discretion must be exercised with reason. When they ask, they should have to pay for its production.

Argument of the Employer

[22] Collective agreements have to be read as a whole and they should be construed as they stand. Also, where an agreement is silent on an issue, there is no authority to deal with that issue (see *Collective Agreement Arbitration in Canada*, Palmer, Third Edition, 1991, at Chapter 4).

[23] Nothing in the collective agreement lists an entitlement as is being asked for here. The parties specifically turned their mind to the issue of permitting the employer to request a certificate, and they must have considered the cost issue, too. Nothing in the agreement provides for this.

[24] Clause 41.01 of the collective agreement does deal specifically with the issue of reimbursement of fees and it states:

> ***41.01*** *The Employer shall reimburse an employee for his or her payment of fees incurred in:*
>
> *(a) obtaining medical examinations, including but not limited to electrocardiograms, specialist reports and x-rays, when required by the licencing authority, for the purpose of the renewal of a Flight Crew licence:*
>
> *and*
>
> *(b) renewing his or her Flight Crew licence including ratings and endorsements thereto, when required by the Employer as a condition for the continuation of the performance of the duties of his or her position.*

[25] This is what the grievors request be read into clause 24.02. Given the fact that the parties negotiated this provision in one article, for the purpose of renewing one's licence, if they had wanted it included in Article 24, they would have done so. They chose not to.

[26] The case law cited by counsel for the bargaining agent all stand for the proposition that discretion must be exercised reasonably. That is trite law, and it is not the issue here. No one has asserted it was unreasonable to ask for a medical certificate in these circumstances. None of the cases permits the insertion of an entitlement when that entitlement is not there.

[27] Counsel for the bargaining agent states, as an alternative position, that these cases could be viewed as disguised discipline. This is the first time this position has been advanced in the context of this grievance and this cannot be done (see *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109).

[28] In the alternative, section 92 of the *Public Service Staff Relations Act* (*PSSRA*) states:

> *92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> *(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*

> *(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),*
>
> *(i) disciplinary action resulting in suspension or a financial penalty, or*
>
> *(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or*
>
> *(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,*
>
> *and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.*

This was not disciplinary action resulting in a financial penalty. The legislation does not contemplate a financial penalty to include such things as bus fare or the cost of a doctor issuing a medical certificate, as is being asked for here (see for example, *Schofield v. Treasury Board (Department of Foreign Affairs and International Trade)* 2002 PSSRB 47).

[29] Finally, this action was not disciplinary in nature. On June 25, 2002, the employer sent out an e-mail to its employees informing them, among other issues, that requests for sick leave would require the production of a medical certificate. There was no suggestion at the outset that this request was disguised discipline. When Mr. Brunelle was told he would not be reimbursed the cost for his certificate, there was no hint of discipline.

Reply of the Bargaining Agent

[30] This is not a request to insert a new provision into the collective agreement. Rather, it is a request to hold the employer to its legal obligation to act reasonably in applying Article 24 of the collective agreement. The right of the employer to ask for a medical certificate is not in dispute. However, the agreement is silent on who shall pay for this, and it is only reasonable to expect the employer to pay.

[31] With respect to the alternative position that the issue is disciplinary in nature, the bargaining agent raised this as soon as the employer advanced its jurisdictional objection.

[32] The requirement to produce a medical certificate unfolded in the context of job action. When the employer sent out its e-mail instructing designated employees who took sick leave to produce a medical certificate, there was implied misconduct on the part of the employees. It was implied that if designated employees were off work, they were doing so in support of their fellow workers who were on strike. Requiring the employees to pay for the certificates is a penalty for misconduct.

Reasons for Decision

[33] Counsel for the bargaining agent advances the position that the denial of compensation for the grievors, who had to produce a medical certificate, was unreasonable and is therefore a violation of the collective agreement. An alternative position is that the denial is disciplinary in nature and the PSSRB would have jurisdiction to deal with the matter in that light. I will deal with the alternative position first.

[34] Tab 2 of Exhibit E-1 contained the notice to employees that the employer sent out advising the designated employees that illnesses must be supported by medical certificates. This requirement occurred during a legal strike period.

[35] I could find no basis to support the bargaining agent's position that the taking of sick leave by designated employees implies misconduct on their part. In most situations, employee illness is verified by having the employee submit a letter attesting to the fact that the employee was ill. During a legal strike, certain employees are prevented from participating in the strike by virtue of the fact that they have been declared essential for the safety and security of the country. By law, these employees must continue to work. Only the most naïve of individuals could not see the reasons why there would be a need to move away from the self-assertion that one was ill, to a requirement for production of a medical certificate in a strike situation. Designated employees could be under extreme pressure from others, in a strike situation, to absent themselves from work, under the guise of illness, if all they had to do to substantiate it and continue to get paid was self-attest to the fact that they were too ill to work.

[36] The employer's requirement that a designated employee submit a medical certificate if the employee were ill, while the legal strike occurred, cannot, in my view, be viewed as disciplinary. In fact, there was no disagreement that the employer has

the right to ask for a medical certificate under the provisions of clause 24.02 whether there is a legal strike occurring or not. It can do so at any time, but it has to use some discretion when it does so. In my view, to ask for the certificate under the circumstances of this case was appropriate.

[37] There was no evidence that I was made aware of that could support the proposition that denying payment for the production of the required certificate to either of the two grievors was disciplinary. The e-mail sent to Mr. Brunelle (Exhibit E-1, Tab 2) denying reimbursement does not, in my view, indicate that the decision was disciplinary. It was simply a statement denying payment, nothing more and nothing less.

[38] Having found no evidence of discipline, I will now turn to the main argument of the parties concerning the purported violation of the collective agreement.

[39] The bargaining agent states that, at a minimum, implicit in clause 24.02 is a requirement for the employer to pay for the cost of producing a medical certificate.

[40] I can find nothing either explicit or implicit in clause 24.02 which would require the employer to pay for such costs. The fact that clause 41.01 specifically deals with the issue of having the employer pay for the cost of a medical certificate in licensing renewals indicates to me that the parties, at a minimum, thought of this issue in the last round of negotiations. The parties were clear in what they drafted in clause 24.02, and that is what I am obliged to interpret. The collective agreement provides discretion to the employer to ask for production of a medical certificate. That is not in dispute. It does not provide an obligation that the employer pay for the production of the medical certificate. In my opinion this, too, is clear.

[41] For me to agree with counsel for the bargaining agent here would, I believe, result in my amending the collective agreement. I have no jurisdiction to do this. Absent a clear provision compelling the employer to pay in this case, I cannot find in favour of the grievors.

[42] The legal cases referred to by counsel for the bargaining agent are helpful when dealing with the issue of the employer's discretionary right to promulgate a policy requiring production of a medical certificate, or its right to require one in a variety of circumstances. Neither of these is, in my view, applicable here. The parties do not

dispute the fact that the collective agreement contains a provision enabling the employer to ask for a medical certificate, and the employer simply exercised the right it had. Furthermore, the parties were in agreement that there was no collective agreement provision dealing with the requirement that the employer pay for the production of a medical certificate. In my view, absent such a requirement, there is no obligation that the employer make such a payment.

[43] The bargaining agent states that the employer has a duty to act reasonably, and it is only reasonable to expect the employer to pay for the cost of the medical certificate since it was the employer who required its production. The employer states that the duty to act reasonably applies to the request for production of the medical certificate. I agree with the employer's position. Given the facts of this case, I have no hesitation in concluding the employer was reasonable in requesting the production of a medical certificate. Absent a provision compelling the employer to pay for its production, I cannot conclude that the employer is liable for such payment.

[44] For all of these reasons, these grievances are denied.

Joseph W. Potter,
Vice-Chairperson

OTTAWA, December 1, 2003.