Date: 20240131

File: 566-02-41783

Citation: 2024 FPSLREB 14

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

JOHN BURNS

Grievor

and

TREASURY BOARD
(Department of Fisheries and Oceans)

Employer

Indexed as
Burns v. Treasury Board (Department of Fisheries and Oceans)

In the matter of an individual grievance referred to adjudication

Before:	Augustus Richardson, a panel of the Federal Public Sector Labour Relations and Employment Board
For the Grievor:	Derek MacLeod, Unifor
For the Employer:	Peter Doherty, counsel, Treasury Board Legal Services

Decided on the basis of written submissions, filed May 26, July 21, and August 14, 2023.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] On or about August 14, 2019, John Burns ("the grievor") grieved that the employer, the Department of Fisheries and Oceans, breached the collective agreement between the Treasury Board and the union, Unifor Local 2182, for the Radio Operations group (expired on April 30, 2022; "the collective agreement"). He grieved that the employer breached clause 20.12(a) by denying him leave with pay for other reasons. He requested the following corrective action:

> 1) leave with pay when circumstances not directly attributable to the officer (per the wording of clause 20.12(a)) prevented him from reporting for duty, effective July 1, 2019 (the date on which the employer changed his pay status from leave with pay for other reasons to sick leave);
> 2) the reinstatement of the sick leave credits that were exhausted from his sick leave balance for the period dating back to July 1, 2019; and
> 3) the reinstatement of the vacation leave credits that were exhausted from his vacation leave balance for the period dating back to July 1, 2019.

[2] Having carefully considered the facts and submissions offered by the parties, I have concluded for the reasons set out below that the grievor was not entitled to receive leave with pay for other reasons, and that his grievance should accordingly be dismissed.

II. Process and procedure — using a hybrid hearing procedure

[3] Following my review of the grievance and clause 20.12(a) of the collective agreement, I convened a case management teleconference with the parties' representatives on March 15, 2023.

[4] At the teleconference, I advised the parties that I had reviewed the grievance and the provisions of clause 20.12(a) of the collective agreement. That review indicated that the issues appeared relatively straightforward and that they involved the following five questions:

> 1) Did the grievor request "Leave for other reasons" under clause 20.12(a), and, if so, when?
> 2) What circumstances prevented the grievor from reporting for duty?
> 3) Were those circumstances "not directly attributable to the officer"?
> 4) Did the employer refuse the leave request?
> 5) If so, what were the reasons, and were they unreasonable?

[5] I also advised the parties that the answers to the questions appeared to involve factual issues that did not depend on credibility or that they involved questions of law or interpretation with respect to whether the facts fit within the meaning of clause 20.12(a). With that in mind, I proposed to exercise my powers and jurisdiction pursuant to ss. 20(e) and 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) to proceed by way of a hybrid hearing. In taking that approach, I also relied on my observations in *Drouin v. Professional Association of Foreign Service Officers*, 2023 FPSLREB 3 at paras. 71 to 73, and *Rukavina v. Treasury Board (Department of Western Economic Diversification)*, 2023 FPSLREB 4 at para. 64.

[6] By "hybrid hearing" I meant that the grievance would be determined primarily if not entirely by written evidence and submissions, subject to a party's right to request a hearing from a witness or witnesses on an issue or fact that appeared to turn on credibility.

[7] Accordingly, I issued the following direction:

> 1) Acknowledging that the hybrid hearing model was proposed without the parties' representatives having had a chance to consult their clients, the parties had two weeks from the date on which the direction was delivered to them (no later than March 31, 2023) to file any strong objection to the proposed hybrid hearing approach.
>
> 2) Any objection was to be made in writing, with the other side having a right to reply. The objection was to then be considered and ruled on.
>
> 3) In the absence of any such objection,
>
> - The grievor or the union was to have six weeks from the date that was two weeks after the direction's delivery date (no later than May 12, 2023) to file evidence, including any signed statements or affidavits, upon which they would rely, together with their submissions.
> - The employer was to then have six weeks from the delivery date of that evidence (no later than June 23, 2023) to file evidence, including any signed statements or affidavits, upon which it would rely, together with its submissions.

- The grievor or the union was to then have two weeks from the delivery date of the employer's evidence and submissions (no later than July 7, 2023) to reply.
- If for any reason, a party experienced difficulty meeting those deadlines, it was to apply to the Federal Public Sector Labour Relations and Employment Board ("the Board") for an extension of time, which was not to be denied unreasonably.
- In the event that a party, after considering the other party's filings, believed that an oral hearing on an issue or issues was necessary, it was to apply for a hearing to the Board, which was to then consider and rule on it.
- The Board was then to decide the grievance.

[8] As it turned out, on reflection, the parties did not oppose the proposed hybrid hearing procedure; nor did they request the right to call witnesses. They did request and were granted extensions of time to file their respective materials.

[9] The parties provided, and I reviewed, the following written submissions:

- the grievor's written submission ("GSubs") and book of book of documents ("GBOD"), on May 26, 2023;
- the employer's submissions dated July 21, 2023 ("ESubs"), together with a book of documents ("EBOD") and a book of authorities; and
- the grievor's reply submissions on or about August 14, 2023 ("GRSubs"; front page dated May 26, 2023).

III. The facts

[10] Having reviewed those submissions and documents, I took the following facts to be true, on a balance of probabilities, and I proceeded on that basis.

A. The events that led to filing the grievance

[11] At all material times, the grievor lived (and still lives) in Ontario. He started his career with the employer as a marine communications and traffic services ("MCTS") officer in 2011.

[12] In May 2015, he was appointed to an indeterminate MCTS instructor position (classified RO-04) with the Canadian Coast Guard College in Sydney, Nova Scotia. Instructors train new MCTS officers in communicating with marine vessels in Canadian waters, monitoring marine traffic, and handling distress and other calls from marine

vessels and in other functions related to the safe navigation of Canada's waterways. The appointment required the grievor to move from his home in Ontario (north of Lake Superior) to Sydney.

[13] On June 8, 2015, the grievor went on sick leave, due to stress. In support, he presented the employer with a medical note from the Cape Breton Regional Hospital in Sydney stating that "… it would be helpful for him emotionally to be able to focus his attention either on his work or his pending move of house/home." The note added that he "… seems most interested in focusing on the work which may be therapeutic for him in the short term" (EBOD, tab 1A).

[14] The grievor submitted a second note on August 6, 2015, this one from the North Bay Regional Health Centre in North Bay, Ontario. It said that he had been "… assessed and requires extension of his mental health leave to Sept. 4/2015" (EBOD, tab 1B).

[15] At about that time, the grievor also submitted disability claims to Sun Life and the Workers' Compensation Board of Nova Scotia ("WCBNS").

[16] Both the Sun Life and WCBNS claims were rejected, the Sun Life one on October 30, 2015, and the WCBNS one on December 2, 2015 (EBOD, tabs 2A and 2B, and GBOD, tab 9). Both denials turned on decisions that stress related to alleged difficulties with situational issues involving communicating with the employer is not compensable.

[17] In the WCBNS claim, the grievor alleged that he suffered mental and psychological trauma related to the work transfer that started on January 5, 2015, and that then manifested with physical signs that appeared on June 8, 2015. The WCBNS report that ultimately denied his claim (in December 2015) noted the grievor's evidence that he had become stressed while trying to juggle his work schedule with planning a move from Ontario to Cape Breton. He felt that the manifestation of his stress — yelling at his boss — was not a typical response for him and that accordingly, it was in his best interests to leave work. He did not submit any medical information to the WCBNS to substantiate his claims. The WCBNS noted that the employer had a relocation policy that provided time off for house hunting and a relocation advisor and that the employer had no expectation that the grievor would make up the time missed or work overtime (EBOD, tab 2B).

[18] As for the grievor's Sun Life claim for total disability, the insurer was not persuaded that the medical information that he submitted established a total disability from being able to perform each and every one of his work tasks. As well, Sun Life in its August 23, 2016 letter rejecting his appeal concluded that the information "… indicates that [his] condition is caused by employment and that the stress is due to the inability to get effective communication/answers from [his] Employer" and that it was "… directly related to situational issues at [his] place of work" (GBOD, tab 10).

[19] On or about December 15, 2015, the grievor proposed to return to active pay through a telework arrangement with the employer (GBOD, tab 4).

[20] On December 16, 2015, the employer requested a fitness-to-work evaluation ("FTWE"), to which the grievor consented (EBOD, tab 3).

[21] In June 2016, Health Canada completed the FTWE. It concluded that the grievor was then considered unfit to work in any capacity. Nor was a return to work, and hence the possibility of undertaking a workplace relocation process, considered foreseeable in the next six months (EBOD, tab 4).

[22] On July 28, 2016, the grievor was struck off strength and placed on leave without pay ("LWOP") as a result of the FTWE report. (At paragraph 21 of its submissions, the union stated that the telework arrangement had continued until June 24, 2016.)

[23] Later, on September 8, 2016, the employer cancelled the LWOP. Instead, it placed the grievor on paid leave for other reasons (effective June 24, 2016) under clause 20.12(a) of the collective agreement. It explained that its decision was for "… an exceptional situation [that was] only pending him receiving treatment and being approved by Sun Life" (EBOD, tab 5, and GBOD, tab 5). (In its submissions on the grievor's behalf, the union described the employer's decision "as a means for Mr. Burns to avoid financial penalty while the grievor followed the Employers [*sic*] recommendations to apply for disability benefits and seek treatment for an unknown illness or disability" (GSubs, paragraph 21).)

[24] I pause to note that the grievor appealed Sun Life's October 30, 2015, denial of his total disability claim. Sun Life denied the appeal on August 23, 2016 (GBOD, tab 10). His appeal of that appeal decision was also denied. A final appeal to the National

Joint Council resulted in a decision (in January 2023) to allow his claim but only for the period from October 23, 2015, to May 31, 2017 (GBOD, tab 14).

[25] Returning to the time during which the grievor remained on leave with pay for other reasons, on February 16, 2018, the employer wrote to him. It noted that he had been away from work since June 15, 2015, and that he had been on paid leave for other reasons since June 24, 2016. Given the time that had passed and the workplace changes since he had last reported for work, it provided him with these three options that were contingent on an FTWE that he was fit to return to work (EBOD, tab 5, GBOD tab 7):

- he return to his substantive position as an instructor at the Canadian Coast Guard College;
- he return to his previous MCTS officer position in Ontario or another available location; or
- he return to a position to be determined at its National Headquarters in Ottawa, Ontario.

[26] The letter asked the grievor to provide an assessment of his fitness to return to work from his treating physician by March 16, 2018. If he was unable to return to work in the foreseeable future, the letter noted that the following options would be available:

- he exhaust his sick leave credits (129 hours) and be granted sick leave without pay for up to 2 years (subject to disability insurance benefits);
- he apply to retire on medical grounds; or
- he resign from the core public administration.

[27] On February 20, 2018, the grievor emailed the employer to state that he was prepared to honour any request for an FTWE, although he added this: "… without first dealing with issues in the work environment it seems like a waste of resources and time to have me simply state again how 'Without investigating and dealing with these workplace issues I will not be fit to return to work.'" He also had concerns with the amount of time that it would take him to obtain an FTWE report (EBOD, tab 7).

[28] On March 14, 2018, the grievor wondered how he could be asked to return to work, given the following: "… my work refusal from June 8, 2015 is consistently being ignored and I am consistently being asked to return to work without even having had

conducted an investigation into the work refusal as well as the work injury received at the time." He added this: "… this continued reluctance to even acknowledge what I am pointing out continues to fall in the category of workplace violence as far as I'm concerned" (EBOD, tab 7). He raised similar objections on April 3, 2018 (EBOD, tab 7).

[29] The "work refusal" that the grievor mentioned referred to a complaint that it appears he made to Employment and Social Development Canada, Labour Program (referred to in the submissions as "Labour Canada") around March 2018 (if not before) stating that what had happened in June 2015 was a work refusal based on "… a claim of violence in the workplace." As he explained in an email on March 12, 2018, he was receiving treatment "… that falls directly in line with the psychological violence [he was] receiving at the hands of the employer" (EBOD, tab 7). The complaint was investigated by both the 'competent person' appointed by the Employer, and by ESDC/Labour Canada. Both investigations concluded that the complaints were unfounded (EBOD, Tabs 7 and 11).

[30] In response to the grievor's time concerns, the employer arranged for an FTWE to be conducted in April 2018. The grievor attended the appointment but refused to undergo the FTWE due to concerns that the physician was a general practitioner, that her first language was French, and that she was not a psychologist (EBOD, tab 12).

[31] On or about March 26, 2019, the employer advised the grievor that it had reviewed his status of being on leave with pay for other reasons. It noted that his status had been approved but that it was not the appropriate leave, given that Labour Canada had deemed that there was no danger in the workplace. The letter went on to advise him that he would be placed on sick leave, effective May 1, 2019, and that that status would continue until he completed an FTWE and received clearance to return to work (EBOD, tab 12).

[32] The grievor and the union challenged the employer's decision (see, for example, EBOD, tab 13, and GBOD, tab 6). The employer did not alter its position, although the date on which he ceased to be on leave with pay for other reasons was set to July 1, 2019 (see GBOD, tab 6).

[33] Around August 14, 2019, the grievance before me was filed.

B. Events that occurred after the grievance was filed

[34] The grievor exhausted all his accumulated sick leave credits on or about January 10, 2020. He has been living on social assistance since that date.

[35] In its submissions, the union stated that the grievor was diagnosed in January 2022 as presenting with symptoms of autism spectrum disorder with obsessive-compulsive personality traits (GBOD, tab 17). In support of a submission that he was fit and ready to return to work in some form or fashion, the union also submitted reports from Dr. Tiffany Desruisseaux, dated January 11, 2022; Dr. Chintan Shah, dated February 2 and October 4, 2022; and Dr. Gilles Hébert, dated December 7, 2022 (GBOD, tabs 13, 15, 16, and 17).

[36] In its submissions, the union also spent a fair amount of time dealing with the grievor's appeal of Sun Life's denial of his claim for total disability benefits and the appeal's apparent eventual success in February 2023 (although only for the period up to May 31, 2017).

[37] However, the issue before me concerns only the employer's decision to change the grievor's status from being on leave with pay for other reasons as of July 1, 2019, to being on sick leave.

IV. Summary of the submissions

A. For the grievor

[38] The union addressed my five questions. In doing so, it mixed its version of the facts with its answers. This version was based in part on the documents in the GBOD and in part on the inferences it drew from them.

1. Did the grievor request "Leave for other reasons" under clause 20.12(a), and, if so, when?

[39] Dealing with the first question, the union noted that the grievor was first placed on LWOP as a result of the June 2016 FTWE. It happened while the telework arrangement was in place. The union submitted that the employer's subsequent decision to place him on leave with pay for other reasons was the result of an agreement that the parties made around September 9, 2016, "so that the grievor could remain on a pay status that would prevent financial hardship while he was undergoing what the employer had requested: conducting a Fitness to Work Evaluation (FTWE) and

applying for benefits" (GSubs, paragraph 25). It added that the grievor had continually engaged in these activities until well past July 2019, when his status was changed.

2. What circumstances prevented the grievor from reporting for duty?

[40] Turning to the second question, the union submitted that the main things preventing the grievor from reporting for duty were the two FTWEs that the employer had requested. He could not return to work without a positive FTWE report. Since the reports were negative, he could not return to work.

3. Were those circumstances "not directly attributable to the officer"?

[41] The union acknowledged that the Health Canada FTWEs indicated that the grievor was not medically fit to return to work. However, it submitted that his treating physician's 2022 report indicated that he was capable of returning to work. It noted that the psychological assessments that it said Health Canada received in 2020 related to the grievor's ability to work but that they appeared to have been overlooked. It noted that as of 2022, the grievor acknowledged that he had a disability (autism spectrum disorder), that he remained willing to work, and that his disability would not prevent him from working for the employer.

[42] The union turned to the Sun Life appeal and the eventual grant of disability benefits until May 31, 2017. It submitted that that decision did not preclude the grievor being eligible for leave with pay for other reasons from July 2019 until now. It maintained that the grievor has always been willing to return to work and that he and it have had discussions to clarify his leave situation, explore a potential return to work, or both.

[43] I take these submissions to mean that the negative FTWE reports were the reasons "not directly attributable to the officer" (per clause 20.12(a)) that prevented the grievor from returning to work and that were it not for them, he would have been able to return to work in some fashion.

4. Did the employer refuse the leave request?

[44] The union noted that it had advised the employer of its objection to the employer's decision in July 2019. The employer continued to deny its requests that the grievor be reinstated on leave with pay for other reasons.

5. If so, what were the reasons, and were they unreasonable?

[45] The union submitted that the employer was unreasonable in thinking that the grievor did not cooperate with the assessment or return-to-work processes. It submitted that he acted reasonably throughout the investigations. It referred to what it said were the employer's delays carrying out the assessments. It also focussed on reports prepared in December 2020 by a psychologist (Dr. Hébert) that it said contained a recommendation that the grievor could return to work via telework or in another federal department. It also referred to a report prepared by a psychiatrist (Dr. Shah) in February 2022 that diagnosed the grievor as having features consistent with autism spectrum disorder and that expressed hope that the employer could make accommodations in the workplace. It submitted that given those reports, the employer, not the grievor, was being uncooperative (GSubs, paragraphs 47 to 66).

6. Conclusion

[46] At paragraph 74 of its submissions, the union submitted the following as its conclusion:

> - *That Mr. Burns does in fact meet the criteria for leave with pay as defined in Article 20.12 a) and that Mr. Burns be placed back on Leave With Pay as defined in this article.*
> - *In finding so, the grievor would be in a position to be reinstated on this Leave With Pay and as such the Union requests that the grievor should be made whole in every respect to his loss of RO4-INS wages, benefits, full pension credits, service, vacation, and sick leave credits and any other entitlements deemed applicable.*
> - *In the alternative, if it is found that Mr. Burns did not meet the criteria as outlined in Article 20.12 a), the Union requests that Mr. Burns unpaid leave be replaced with disability leave, and that Mr. Burns be made whole in every respect to his loss of RO4-INS disability income, benefits, full pension credits, service, vacation, and sick leave credits and any other entitlements deemed applicable.*
> - *The Union further requests that the Board rule that Employer meaningfully engage with Mr. Burns and the Union to offer him a suitable position in the Federal Government that complies with the return to work recommendations and accommodations of both Dr. Shah and Dr. Hebert.*
>
> …
>
> [*Sic* throughout]

B. For the employer

[47] The employer first presented its version of the facts that, as with the union, was based on the documents in the EBOD as well as the inferences it drew from them.

[48] However, rather than respond directly to my five questions, the employer's representative instead focussed on the question that was at the base of all five questions — the meaning of clause 20.12(a). He referenced the Board's decision in *Public Service Alliance of Canada v. Treasury Board*, 2022 FPSLREB 12 ("*PSAC*"), which considered a similar article in a different collective agreement that provided as follows:

…	[…]
53.01 *At its discretion, the Employer may grant:*	***53.01*** *L'employeur peut, à sa discrétion, accorder :*
a. leave with pay when circumstances not directly attributable to the employee prevent his or her reporting for duty; such leave shall not be unreasonably withheld;	*a. un congé payé lorsque des circonstances qui ne sont pas directement imputables à l'employé-e l'empêchent de se rendre au travail; ce congé n'est pas refusé sans motif raisonnable;*
b. leave with or without pay for purposes other than those specified in this agreement.	*b. un congé payé ou non payé à des fins autres que celles indiquées dans la présente convention.*
…	[…]

[49] In *PSAC*, the Board described the provision as "discretionary leave with pay", which counsel for the employer in this case then applied to clause 20.12(a). In his submissions, he stated that provisions like this one are designed to provide discretionary leave with pay when employees cannot report to work because of circumstances beyond their control (see *PSAC*, at paras. 155 and 187). They are also intended to cover situations that the parties did not specifically turn their minds to in a collective agreement (see *PSAC*, at para. 166, and *Bitar v. Treasury Board (Statistics Canada)*, 2020 FPSLREB 2 at para. 89).

[50] The employer's representative submitted that the grievor had the onus to establish a breach of the collective agreement and that doing so in this case required the following two points of proof:

- that he could not return to work due to circumstances beyond his control; and

- that if the first point was established, then the employer's denial was unreasonable.

[51] Turning to the first point, the employer's representative noted that the grievor's argument appeared to be that he had no control over Health Canada or its decisions that he was unfit for work, which the employer submitted was irrelevant. Moreover, the collective agreement expressly dealt with leave due to sickness or disability. Hence, those provisions supplanted clause 20.12(a), which was intended to deal only with situations that the parties had not turned their minds to when entering into the collective agreement.

[52] The employer challenged the assertions in the union's submissions that the grievor was ready to work and that he will return to work. It noted that the early Health Canada assessments had not been contradicted by medical evidence at the time. If, on the other hand, the grievor was fit for work at some point, it was within his power to obtain a positive FTWE, which he has not done.

[53] Turning to the second point, the employer submitted that its decision was reasonable. It was based on the evidence that it had at the time as well as its interpretation of the law. It allowed the grievor to remain on leave with pay for other reasons for almost three years and extended it first to allow him to apply for long-term disability benefits (and then appeal the denial) and later to allow for the investigation of his allegation of a work refusal due to alleged workplace violence. The employer always provided him with advance notice of its decisions, whether to ask for FTWEs, options with respect to a return to work, or a decision to change his status.

[54] Accordingly, the employer asked that the grievance be dismissed.

C. The reply on the grievor's behalf

[55] In its reply, the union did not address the interpretation of clause 20.12(a). It submitted that the grievor had been in a situation in which several parallel events took place during the time he was absent from work. He applied for disability payments, participated in an investigation into workplace violence, and had multiple FTWEs. They all played roles in his absence from work. In other words, it was not a case of him being off work simply because of injury or illness. The employer failed to adhere to its agreement to continue his status of leave with pay for other reasons while those events were ongoing.

[56] The union also complained about the employer's failure to answer my five questions. It then focussed on the employer's version of the facts, submitting that it misstated the evidence. For example, it submitted that the grievor's concerns about the physician's qualifications in the second FTWE had to be balanced with the fact that he did show up for the evaluation. It also relied on what it said was the employer's subsequent acknowledgment (in its May 26, 2019, letter) that the FTWE would be premature because of a link between his fitness to return to work and the workplace-violence investigation.

[57] The union submitted that in the alternative, the grievor's refusal to complete the second FTWE was reasonable given that the report was done in response to his complaints of stress-related issues at work and hence, it would have been reasonable for him to expect that the person evaluating him have the necessary medical qualifications. It also submitted that the employer had recognized a link between the grievor's fitness to work and Labour Canada's workplace-violence investigation that had led to delays assessing his fitness for work.

[58] The union also submitted that the employer was obligated to accept the more recent reports of Drs. Hébert and Shah that the grievor was ready to return to work, particularly given the length of time that he had been off work; see *Thompson General Hospital v. Thompson Nurses M.O.N.A., Local 6* (1991), 20 LAC (4th) 129. It concluded by submitting that the employer had been unreasonable by failing to continue the grievor's leave with pay for other reasons until the workplace-violence investigation completed or until Health Canada reached its decision in 2021 given the medical information it had on hand, or to continue to deny the grievor's return to work after he had provided FTWEs from his doctors that confirmed that he could return. It concluded as follows (GRSubs, paragraph 30):

> *… While the Employer may have deemed Mr. Burns to be a difficult or challenging Employee, that does not allow the Employer to ignore or deny him the right to return to work or to deny him the right to the appropriate compensation for the time he has been away from work.*

V. Analysis and decision

[59] It is important at the outset to make clear what the grievance is about. It is that the employer breached clause 20.12(a) of the collective agreement as of July 1, 2019,

when it changed the grievor's employment status from leave with pay for other reasons to sick leave. If a breach occurred, then in the ordinary course, the remedy would be to reinstate his status under clause 20.12(a) as of July 1, 2019, which would then involve the question of how long that status should or would have continued after that date. If no breach occurred, then the grievance would be denied.

[60] This grievance is not about whether the employer should have permitted the grievor to return to work in 2022 or accommodated such a return (and, if so, how) after the 2022 medical reports were issued. The union's alternate submissions to that effect are not within the scope of the grievance before me. They would as well have required an analysis of whether the reports in fact supported a conclusion that the grievor was fit or ready to return to work in 2022 whether accommodated or not, whether he had actually asked to return to work in 2022 or had requested an accommodation to return, whether any requested accommodation was necessary or possible, and whether the employer should have acted in response to such reports. None of those questions are before me.

[61] The issue that is before me is whether, as of July 1, 2019, the grievor remained entitled to be treated as being on leave with pay for other reasons under clause 20.12(a), which, for convenience, I reproduce as follows:

20.12 *At its discretion, the Employer may grant:*	***20.12*** *L'employeur peut, à sa discrétion, accorder :*
a. leave with pay when circumstances not directly attributable to the officer prevent his or her reporting for duty. Such leave shall not be unreasonably withheld;	*a. un congé payé, lorsque des circonstances qui ne sont pas directement imputables à l'officier l'empêchent de se présenter au travail. Ce congé n'est pas refusé sans motif raisonnable;*
b. leave with or without pay for purposes other than those specified in this agreement.	*b. un congé payé ou non payé pour d'autres fins que celles prévues dans la présente convention.*

[62] The grievor had the onus of proving that the employer breached that provision. What, then, did he have to prove?

[63] Examining clause 20.12(a), the grievor had to prove this:

- that the circumstances that he alleged prevented him from reporting for duty in June 2015 or, for that matter, in July 2019 were within the meaning of clause 20.12(a); and
- if they were, whether they prevented him from reporting for duty.

A. Were the circumstances that prevented the grievor from reporting to work "circumstances" within the meaning of clause 20.12(a)?

[64] I will start my analysis with the circumstances that the grievor relied upon for his inability to report for duty in June 2015 or, for that matter, in July 2019. They were the emotional or mental issues that he alleged arose out of the transfer of his work duties from Ontario to Sydney. When he first went off work in June 2015, he made claims for disability benefits on that basis with both his disability insurer (Sun Life) and the WCBNS. He argued that these circumstances remained in effect as of July 2019.

[65] But is workplace stress that prevents an officer from reporting for duty a circumstance within the meaning of clause 20.12(a)? The answer depends upon the interpretation or meaning of that clause. For the reasons that follow, I was not persuaded that the circumstances that the grievor relied upon for his failure to report for duty fell within the meaning of clause 20.12(a).

[66] First, when interpreting a collective agreement's provisions, one must use the ordinary meaning of the words that the parties used unless they have been given some special meaning or unless it would produce an absurd result. The words must also be interpreted within the context of the entire agreement. The context in this case is that clause 20.12(a) is found within a long list that sets out several types of leave and the circumstances under which they may or may not be paid. The list includes the following, by collective agreement article number and name:

- 15: leave, general
- 16: vacation leave with pay
- 17: sick leave with pay
- 18: medical appointment for pregnant officers
- 19: leave with or without pay for Union business or for other activities under the *Federal Public Sector Labour Relations Act*
- 20: other leave with or without pay

[67] Article 20 is titled "other leave with or without pay" and is broken down into this series of those types of leave:

- 20.01: Volunteer leave
- 20.02: Bereavement leave with pay
- 20.03: Court leave with pay
- 20.04: Personal selection leave with pay
- 20.05: Maternity leave without pay
- 20.06: Maternity allowance
- 20.07: Special maternity allowance for totally disabled officers
- 20.08: Parental leave without pay
- 20.09: Parental allowance
- 20.10: Special parental allowance for totally disabled officers
- 20.11: Injury-on-duty leave with pay
- 20.12: Leave for other reasons
- 20.13: Leave with pay for family-related responsibilities
- 20.14: Leave without pay for the care of immediate family
- 20.15: Leave without pay for family-related needs
- 20.16: Leave without pay for relocation of spouse
- 20.17: Caregiving leave
- 20.18: Domestic violence leave

[68] Second, and again as a general rule of construction, the specific takes precedence over the general: see, for e.g., *Brown v. Canada (Attorney General)*, 2023 FC 1748 at paras.54-56, and specifically, *Levesque v. Canada Customs and Revenue Agency*, 2005 PSLREB 154 at paras.50-58 and *Clark and Treasury Board (Transport Canada)*, [1994] CPSSRB No. 45. Article 17 speaks directly to leave for illness. In particular, clauses 17.02 and 04 provide as follows:

17.02 An officer is eligible for sick leave with pay when he or she is unable to perform his or her duties because of illness or injury provided that:	*17.02 L'officier bénéficie d'un congé de maladie payé lorsqu'il ou elle est incapable d'exécuter ses fonctions en raison d'une maladie ou d'une blessure, à la condition :*
a. he or she satisfies the Employer of this condition in such manner and at such time as may be determined by the Employer,	*a. qu'il ou elle puisse convaincre l'employeur de son état de la manière et à un moment que ce dernier détermine;*
and	*et*
b. he or she has the necessary sick leave credits.	*b. qu'il ou elle ait les crédits de congé de maladie nécessaires.*
…	…

17.04 Where an officer has insufficient or no credits to cover the granting of sick leave with pay under the provisions of clause 17.02 (sick leave with pay) may, at the discretion of the Employer, be granted:

a. for a period of up to one hundred eighty-seven decimal five (187.5) hours if he or she is awaiting a decision on an application for injury-on-duty leave,

or

b. for a period of up to one hundred twelve decimal five (112.5) hours in all other cases,

subject to the deduction of such advanced leave from any sick leave credits subsequently earned and, in the event of termination of employment for reasons other than death or lay-off, the recovery of the advance from any monies owed the officer.

17.04 Lorsque l'officier n'a pas les crédits nécessaires ou qu'ils sont insuffisants pour couvrir l'octroi d'un congé de maladie payé aux termes des dispositions du paragraphe 17.02, l'employeur peut, à sa discrétion, accorder un congé de maladie payé :

a. pour une période maximale de cent quatre-vingt-sept virgule cinq (187,5) heures si l'officier attend une décision concernant une demande de congé pour accident du travail,

ou

b. pour une période maximale de cent douze virgule cinq (112,5) heures dans tous les autres cas,

sous réserve de la déduction de ce congé anticipé de tout crédit de congé de maladie acquis par la suite et, en cas de cessation d'emploi pour des raisons autres que le décès ou la mise en disponibilité, sous réserve du recouvrement du congé anticipé sur toute somme d'argent due à l'officier.

[69] I note that clause 17.02 speaks directly to the situation in which the grievor stated that he found himself in June 2015 (or, for that matter, July 2019) — he was unable to perform his duties because of illness or injury. And clause 17.04(a) contemplates the situation of a delay obtaining a decision from a provincial workers' compensation board (i.e., an injury-on-duty claim). Both clauses speak to the situation in which the grievor found himself in and after June 2015. Given that, I cannot see that the parties agreed that such circumstances would also fall under clause 20.12(a).

[70] Third, and flowing from the second, it strikes me as more reasonable to view the parties as having recognized when they negotiated the collective agreement that **unforeseen** circumstances not directly attributable to an employee might prevent him or her from reporting for duty. In other words, they recognized that **something** (such as a global pandemic or the only road to work being washed out) **might** happen that would prevent an employee from reporting for duty. With that in mind, they agreed in clause 20.12(a) to provide the employer with discretion to authorize leave with pay in

the event that such a circumstance should arise (see *PSAC*, at paras. 155, 166, and 187, and *Bitar*, at para. 89).

[71] Fourth, I also take it as a rule of construction that parties to a collective agreement intend to achieve a result that is simple in application over one that is overly complex or that could lead to confusion. But to adopt an interpretation that would read the word "circumstances" in clause 20.12(a) to include all those circumstances already expressly dealt with in articles 17, 18, and 20 would open the door to more than one possible breach of the collective agreement for the same circumstance. For example, if the employer denied a bereavement leave claim under clause 20.02, the employee claiming such an entitlement could grieve the following:

- the denial under clause 20.02; and
- the refusal to exercise the discretion under clause 20.12(a).

[72] An employer that denied (rightly) that bereavement leave claim (because it did not fit the definition in clause 20.02) might still face an objection that it could still have exercised its discretion under clause 20.12(a) in favour of the request. I find it difficult to believe that the parties would have intended a two-for-one in such a situation.

[73] For all these reasons, I was not persuaded that the workplace stress (whether or not caused by workplace violence) that the grievor alleged prevented him from reporting for duty in June 2015 was a circumstance within the meaning of clause 20.12(a) nor was I persuaded that the inability to obtain a positive FTWE report was a circumstance not directly attributable to the grievor. It was rather a circumstance related to his alleged inability to return to work because of stress, and hence something within the scope of article 17. Given that conclusion, I think that it is also fair to say that the employer's decision in September 2016 to change (retroactively) the grievor's status to leave with pay for other reasons was a mistake.

[74] I say this because if the grievor was in fact unable to report for duty because he did indeed suffer from stress that had reached the level of being a mental or physical illness or disability, then his situation fell under the provisions of article 17 (sick leave with pay), in particular clause 17.02, or 17.04 in the event that he lacked sufficient sick leave credits or was awaiting a workers' compensation board decision.

[75] The fact that the grievor was awaiting the results of his claims to Sun Life or the WCBNS did not change the basic question: was he disabled from reporting for work due to physical or mental conditions? If he was, then his absence from work was authorized leave within the provisions of article 17. He was entitled to take sick leave with pay. If he was not, then his failure to report for duty was a breach of his obligations as an employee. The fact that a loss of pay might have been caused by any delay assessing and deciding the grievor's Sun Life or WCBNS claims might have warranted exercising the employer's discretion under clauses 17.04(a) or (b) to grant sick leave with pay for the extra hours specified. But it did not warrant turning to clause 20.12(a). In other words, it did not warrant giving the grievor a different (and indirect) route to circumvent what the parties had agreed to in the collective agreement — that failing to report for duty because of a physical or mental disability would be handled as provided for in article 17.

[76] Given this conclusion, it is clear that the grievor's circumstances in 2015 or 2019 did not fit within the meaning of clause 20.12(a). Hence, leave with pay for other reasons was never authorized by the collective agreement. The employer's error in September 2016 to grant that leave did not entitle the grievor to continue receiving it after July 2019. Neither in June 2015 nor in July 2019 did his situation fall within the scope of the employer's discretion in clause 20.12(a). Thus, the employer's decision to change his status in July 2019 was more than reasonable — it was required.

B. Did these circumstances prevent the grievor from reporting for duty?

[77] It is not necessary to address this question given the conclusion that the circumstances that the grievor alleged prevented him from reporting for duty in June 2016 did not fall within the meaning of clause 20.12(a).

[78] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VI. Order

[79] The grievance is denied, and the file is closed.

January 31, 2024

Augustus Richardson,
a panel of the Federal Public Sector
Labour Relations and Employment Board