Decision request/Demande de décision
992999

CANADA

PROVINCE OF QUEBEC

ARBITRATION
DECISION NUMBER 2015- 14
NUMERO
SENTENCE ARBITRALE

In the matter of the arbitration between

Translation/Traduction
"Internal use only"
"Usage interne seulement"

The Canadian Postmasters and Assistants Association hereinafter the "Association"

and

Canada Post Corporation

hereinafter the "Employer," "Management" or the "Corporation"

Grievances of N. Pomerleau (QC-14-054), D. Roy (QC-14-055) and K. Reichman (QC-14-056)
976126-976128-976130

Representing the parties

Sean T. McGee
Lawyer — for the Association

Patrick Galizia
Lawyer — for the Corporation

Arbitrator: **Jean Denis Gagnon.**

Arbitration hearing: July 9, 2015

Decision rendered August 14, 2015

Acting on behalf of Ms. Pomerleau, the Association presented a grievance to the representatives of the Corporation on June 14, 2014, alleging that they had breached the provisions of article 30.01 and other texts of the collective agreement, by "unreasonably" refusing a request for 1.5 hours of leave without pay that the employee had submitted to her superior for May 28, 2014.

The other two grievors, Ms. D. Roy and Ms. K. Reichman, had each asked for 2 hours of leave without pay, respectively for June 12, 2014, and for the following day. They are also disputing the decisions of one of the Corporation's managers, Mr. Sylvain Roy, who rejected their requests.

He had informed these three grievors that their requests could not be granted because each of them *had unused personal days.*

Relevant provisions of the agreement

The leave without pay refused to the three grievors in this case is provided for in article 30.01 of the collective agreement applicable to the parties. The provision that appears in this article reads as follows:

> *The Corporation may grant leave without pay for any purpose. Such leave will not be unreasonably withheld.*

In addition to the provision cited above, the counsel for the parties or the witness at the arbitration hearing referred to the following provisions:

> **Article 25.11** - *Other than in urgent situations, an employee wishing to use a personal day shall notify his team leader at least three (3) days in advance.*

Article 26.03 – Leave for other reasons

Where conditions warrant it and an employee has exhausted his personal days, special leave with pay shall be granted, when circumstances not directly attributable to the employee, including illness in the immediate family *(...) The employee shall make every reasonable effort to arrange matters to allow him to report to work at the earliest opportunity.*

Article 25.12 – *Requests for non-urgent personal days shall be approved subject to operational requirements.*

Finally, the following provision, which deals with amendments to the collective agreement by the parties, is of particular importance here.

Article 57.01 – Mutual Agreement

This Agreement may be amended during its term by mutual agreement of the parties.

Evidence

Documentary proof was produced by both parties during the hearing. Furthermore, one person, Sylvain Roy, the person who issued the Employer's responses to the three grievances from the Association and the grievors involved in this case, was questioned as a witness during the arbitration hearing.

Testimony of Mr. Roy

Mr. Roy has been employed by Canada Post since 1991 and has held his current position, *Operations Manager, Côte du Sud sector*, since August 2012. During his testimony, Mr. Roy referred to a note addressed to the Corporation's supervisors on May 21, 2014, that is, before the occurrence of the events behind this case. This document, which was issued by the Corporation's national office, stipulates the following:

> *Only grant leave without pay once the employee has exhausted all of their Personal Days.*

The text addressed to the supervisors on May 21, 2014, also lists a number of specific reasons for which leave without pay may be granted, including to employees who have not used all their personal days, operational requirements permitting.

These reasons are the following:

- *Education leave*
- *Military leave*
- *Relocation of spouse*
- *Long-term care of an elderly person*
- *Compassionate care leave*
- *Care and education of pre-school children*
- *Personal obligations (subject to operational requirements)*
- *Requests for special leave (limited to local emergencies, such as flooding or fire)*
- *Leave without pay for group 2 (for a maximum period of 3 months)*
- *Sabbatical leave (as outlined in the Work Options Program)*

Finally, the last two paragraphs of the note issued to the supervisors on May 21, 2014, are important in this case. They read as follows:

> *Use Sick Leave Unpaid (code 9050) only when the employee has exhausted all his or her Personal Days and indicates that the absence is due to illness.*
>
> *Ensure you apply the proper leave codes for each and every absence and ensure that discretionary leave is only approved if operational requirements can be met.*

During his testimony, Mr. Roy mentioned that after they were informed about the rule on May 21, some members of the management staff working on the Quebec north shore followed through on it, while others did not apply it.

Finally, at the end of his statement, the witness declared that during discussions with Union representatives about the applicants' grievances, they reported no specific facts to support their request for leave without pay.

Arguments of the parties' counsel

Argument of the Union's counsel

At the beginning of his presentation, the Union's counsel referred to the text of article 30.01 of the collective agreement, titled *Leave without pay,* and pointed out that a request from an employee who wishes to be given leave cannot be *unreasonably withheld.* He stated that in terms of requests for leave submitted to the Corporation's representatives by the three applicants, no motive was given to justify the refusal.

Commenting on the rule adopted by Management on May 21, 2014, the Union's counsel asserted that it is hard to reconcile with the texts of articles 26.03 and 32.10, concerning the specific situations employees may find themselves in.

The first of these two articles deals with a *special paid leave* that may be granted to employees who have used their personal leave but who cannot come to work for a variety of reasons, including the illness of an immediate family member. As for the provision in article 32.10, it deals with leave without pay that may be granted to sick or injured employees who have not accumulated sick leave or who have already used the sick leave they had.

Comparing the two provisions just mentioned, the Union's counsel asserted that when they want to say that special leave can only be granted to an employee when the specific situation justifies it, the parties have clearly expressed themselves on this subject. He maintained that no restrictions comparable to those found in the two above-mentioned provisions are found in article 30.01 of the collective agreement concluded by the parties.

Continuing his presentation, the Union's counsel referred to the ruling rendered in ***Re Government of Nova Scotia and Nova Scotia Government Employees Association*** (1).

The plaintiff in that case had submitted a request for leave without pay to the government representatives in order to take part in an annual meeting of the union representatives of the Nova Scotia Federation of Labour, and her request had been denied. The provision of the collective agreement applicable to the parties that deals with requests for leave without pay for union activities read as follows:

> 13.01- *Where operational requirements permit, and on reasonable notice, the employee shall be entitled to special leave without pay to employees who are elected:*
> *(...)*
> *Such permission shall not be unreasonably withheld.*[1]

The arbitrator upheld the employee's request in this case. He wrote:

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[1] 11, L.A.C. (3d) 181- On page 182.

The plain meaning of article 13.01 (c) is that where an employee is a delegate to the Nova Scotia Federation of Labour convention and has given reasonable notice of his or her desire for special leave without pay the employer must grant that leave unless it can show that management has not acted unreasonably in concluding that operational requirements do not permit a special leave.[2]

As in the above-mentioned case, the Corporation's representatives *unreasonably* refused the requests for leave without pay. Contrary to what is stated in the note to the supervisors on May 21, 2014, the rule set out in article 30.01 of the collective agreement, which deals with *leave without pay*, does not in any way stipulate that employees must have used *all their personal days* in order to request leave without pay.

Finally, the Union's counsel declared that none of the evidence produced at the arbitration hearing suggested that there were any valid reasons justifying Management's rejection of the requests of the three employees involved in this case.

In light of the foregoing, the Union's counsel concluded that the grievances of the three applicants should be upheld and that the undersigned should reverse Management's decision to refuse their requests for leave without pay.

Argument of the Corporation's counsel

At the beginning of his presentation, the Corporation's counsel referred to article 7.21 of the collective agreement applicable to the parties, where it is specified that in making a decision in respect of a grievance, the arbitrator has all the powers conferred under section 60 of the *Canadian Labour Code.* He referred also to the work by F. Morin and R. Blouin, *Droit de l'arbitrage de griefs,* which specifies that:

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[2] *Ibid,* page 191.

The arbitrator may not impose obligations on them [the parties] *or confer on them rights that the collective agreement or the law does not impose or grant.*[3]

As for the jurisdiction of the arbitrator, the Employer's counsel referred likewise to two arbitration rulings. On this topic, the author of the first *Re International Brotherhood of Boilermakers and Howden & Parsons (Canada) Ltd.*[4] wrote as follows:

Though the arbitrator is not confined to an overly literalistic or legalistic reading of contract language, he must base his decision on the sense or purpose of the original understanding of the parties. as reflected in the language they have used .[5]

In the other ruling – *International Union, United Automobile. Aircraft and Agricultural Implement Workers of America (UAW-CI0) v. Canadian Industries Limited (Windsor Works (Rudge Grievance)*[6] – the members of the arbitration board cite the following passage of an arbitration ruling rendered in another case:

Where the parties to a *Labour Agreement fail to make provision in their agreement for* a *contingency which happens, The Arbitrator cannot supply it, even if he might have some idea in his mind as to what the parties would put in their writing to take care of that contingency if it had occurred to them before the Agreement was written.*[7]

Referring back to the facts of this case, the Employer's counsel asserted that it would be difficult to believe that the employees who wanted to take advantage of leave without pay under article 30. 01 of the collective agreement simply wanted not to use up their personal days provided under article 25 of the collective agreement so as to use them if they found themselves in an unforeseeable situation, before the end of the current financial year.

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[3] On page 302 of the work. [translation]

[4] (1970) C.L.A.D. No. 18.

[5] *Ibid.*, on page 180.

[6] (1951) 3 L.A.C. 853.

[7] *Ibid.*, on page 857.

In reality, he asserted, their purpose is rather to keep their paid leave in order to use it during certain periods, such as Christmas, when the workload increases in the services of Canada Post Corporation.

Continuing his presentation, the Corporation's counsel referred to the note addressed to the Corporation's supervisors on May 21, 2014, which sets out numerous situations which, when they occur, allow employees to take leave without pay, even if they have not used up their paid leave. The various reasons cited in the note dated May 21, 2014, are not in the least unreasonable, declared the Corporation's counsel. According to him, the same is true of the restriction mentioned in the second-last paragraph, which stipulates that employees can only take unpaid sick leave *if they have already used all their personal days...*

Referring, finally, to the grievances of the three employees in question, the Corporation's counsel maintained that they are unfounded. He asserted that, actually, the Union is asking the undersigned to add to the collective agreement restrictions of the Employer's recognized rights, a request that cannot be upheld.

Ruling

The requests for leave without pay submitted to the Employer's representatives by the three employees in question in this case were refused for the same reason. Mr. Roy, who wrote Management's responses to each of these grievances, wrote:

> *The grievance has been heard and it is denied. Canada Post has complied with article 30 of the collective agreement by not accepting the request for leave without pay, since the employee has personal days in reserve.*

The personal days to which Mr. Roy is referring in his responses to the grievances are the paid leave outlined in article 25 of the collective agreement. It is stated in paragraph a) of article 25.01 that:

> *Each full-time employee will be allocated seven (7) Personal Days on the first day of each fiscal year.*

And article 25.03 of the collective agreement provides as follows:

> *An employee who has carried over Personal Days (or portion thereof) from the previous fiscal year may have those days paid out, if they remain unused at the end of the year, in addition to the maximum pay out of five-sevenths (5/7) of the employee's annual entitlement as per the above paragraph.*
> *For greater certainty, an employee may not have more than twelve (12) Personal Days in any one fiscal year.*

It is important to note that none of the articles cited above and none of the other provisions in the collective agreement state that employees cannot have leave without pay if they have not first exhausted all their personal days. These are the grounds, as Mr. Roy mentions in his responses to the grievances of the three applicants, that would, in his opinion, justify his decision to refuse the requests of these three employees, who wanted to take leave without pay before using all their personal days.

The employees' obligation to use all their personal days before applying to Management for leave without pay is not stipulated in the collective agreement, however, and more specifically, it is not mentioned in article 30.01 concerning the granting of leave without pay to employees who request it. It stems, in fact, from the above-mentioned document that was sent to the Corporation's supervisors on May 21, 2014.

Do the rules adopted on May 21, 2014, by the Corporation modify the collective agreement?

This question is decisive in this case. It is a known fact that even when an employer is bound by a collective agreement, it maintains a power, known as *residual power,* allowing it to adopt rules in order to ensure the effective operation of its business or service. Initiatives taken in this regard cannot, however, modify the provisions of the collective agreement or limit their effects. If it involves the adoption of a rule that requires the amendment of a clause in the collective agreement or that has the effect of increasing or limiting its scope, it is clearly established that the changes made to the agreement must be the subject of an agreement between the parties, as is clearly stated in the text of article 57.01 of the collective agreement in effect between the parties.

What is the situation in this case? Interpretation of article 30.01.

The text of article 30.01 of the collective agreement stipulates that *the Corporation may grant leave without pay for any purpose* and provides for no restrictions concerning employees who have personal days and have not used them all. If the parties had wanted to restrict the granting of leave without pay to only those employees who had already used all their personal days, they would no doubt have mentioned it in article 30.01 of their agreement.

Even though the rule adopted by the Corporation's representatives on May 21, 2014, provides for a certain number of cases which, when they arise, allow employees to take leave without pay before using their personal days, it nevertheless restricts the scope of the provision contained in article 30.01 of the collective agreement.

This article applies to all cases where a request for leave without pay is submitted to a Corporation representative, not only requests from employees who have already used all their personal days. As such, it must be concluded that the rule issued on May 21, 2014, by the Employer breaches the collective agreement. To be admissible, it would have to have been adopted by both parties, which would have agreed to amend the text of article 30.01 of the collective agreement, in compliance with the provision set out in article 57.01 of that same agreement.

Reasons to justify the refusal of requests for leave without pay.

The only reason raised by Mr. Roy to justify the decisions of the Management representatives to refuse the three applicants' requests for leave without pay is that they still had personal days in reserve. As explained above, this reason is not mentioned in article 30.01 of the collective agreement and cannot be considered a reasonable justification for refusing their requests.

It cannot be deduced from the foregoing, however, that requests for leave without pay must always be accepted. It is important, first of all, to underscore that people who wish to take such leave must submit their requests in advance to the team leader of their work unit, perhaps three days in advance, as mentioned in article 25.11 of the collective agreement, which deals with requests for *personal days*.

> In addition, it is important to recall that certain facts, when they exist, constitute a reasonable justification to refuse requests for leave without pay. We are thinking, first of all, of situations where an employee submits an excessive number of such requests in the same period.

In addition to the foregoing, in certain cases, Management representatives may also be justified in refusing requests for leave without pay due to their duration.

Such decisions would be founded, except for requests for a long absence justified by specific reasons invoked by the employee, several of which are mentioned in the text addressed to the supervisors on May 21, 2014. In this case, it is important to point out that the requests of the three employees involved in this case were certainly not excessive in terms of the duration of the leave, that is, 1.5 hours for Ms. Pommerleau and 2 hours for the other two employees.

It should also be mentioned that the situation within the work unit of an employee who requests leave without pay may justify the refusal of the request. This is the case when other employees are absent from work for various reasons during the period in which the employee wishes to be absent. This additional absence may have a negative effect on the capacity of the workers remaining on the job to collectively carry out the tasks of the work unit in question.

Finally, it is important to point out that the facts or situations mentioned above do not constitute an exhaustive list of the causes justifying the refusal of a request for leave without pay. The Corporation's service chiefs will undoubtedly be confronted with other situations ruling out an employee's absence from work for such leave.

How does this affect the grievances addressed to Management with regard to the refusal of the three applicants' requests for leave without pay?

In light of the foregoing, it appears indisputable that these grievances were founded. Management cannot be ordered to follow through on them, however, since the days when the applicants wished to take leave from work for very short periods of time have long since passed. If, however, these employees still wish to take leave of the type mentioned in their original requests, they may submit new requests to their supervisors. These supervisors will then be obliged to rule on these requests, upholding the principles and rules explained in this ruling.

Management representatives shall also have to comply with these same rules to decide on the admissibility of any other requests for leave without pay that may be presented to them in the future.

Drawn up and signed in
Montreal, this 14th day of
August 2015

Jean Denis Gagnon
Arbitrator