4-3-1987

Re Canada Post Corp and CUPW (Clarke)

Innis Christie
Dalhousie University Schulich School of Law

05:0056

IN THE MATTER OF AN EXPEDITED ARBITRATION 087131030

BETWEEN:

CANADIAN UNION OF POSTAL WORKERS (The Union)

AND:

CANADA POST CORPORATION (The Employer)

Re: Ken Clark -
Special Leave; Sick Leave
C.U.P.W. Grievance Nos. A-52-H-131 and 132
C.P.C. Arbitration Nos. 86-1-3-6884 and 85

Before: Innis Christie, Arbitrator

At: Campbellton, New Brunswick

Hearing Date: March 24, 1987

For the Union:

Wayne Mundle, Atlantic Region
Education and Organization Officer,
C.U.P.W.

For the Employer:

J. Hugh Currie, Labour Relations Officer,
Atlantic Postal Division

Date of Award: April 3, 1987

Employee grievances alleging that the Employer violated Article 21 or Article 20 of the Collective Agreement between the parties relating to the Postal Operations Group (Non-Supervisory): Internal Mail Processing and Complementary Postal Services, Code: 608/81, which expired September 30, 1986, but which remains in effect by virtue of the Canada Labour Code, and in particular of Article 21.03 in that the Employer unreasonably withheld special leave, or, alternatively, Article 20 in that the Employer refused to allow sick leave. The Union requests that the grievor be paid for three hours and twenty minutes of special leave, or, alternatively, that he be allowed to apply for sick leave for the periods in question.

At the outset of the hearing the parties agreed that this matter should be proceeded with in accordance with the expedited procedure set out in Appendix "E", paragraphs 13-26 of the Collective Agreement between the parties. The parties also agreed that I am properly seized of this matter and should remain seized after the issue of this award to deal with any issues arising out of it raised by either party, and waived any time limits, either pre- or post-hearing. The parties agreed that if I find the grievor was not entitled to special leave they would submit written argument with respect to his entitlement to sick leave.

A W A R D

The first grievance before me is a special leave case in which the Union alleges that the grievor should have been

given special leave on May 26, 1986 from 0915 to 1025, on June 2 from 0915 to 1025 and on June 4 from 0915 to 1015, to keep dental appointments, pursuant to Article 21.03 of the Collective Agreement, which provides:

> 21.03 **Leave for Other Reasons**
>
> **Where conditions warrant it, special leave with pay may be granted when circumstances not directly attributable to the employee, including but not limited to illness in the immediate family, as defined in clause 21.02, prevent his reporting for duty. Such leave shall not be unreasonably withheld.**

In Desaulniers (unreported - July 17, 1984) CUPW No. W-350-GG-437; CPC No. 84-1-3-1200, arbitrator Clive McKee dealt with the same provision in the context of a sickness case. He there quoted Andrews (May 8, 1985),for which he does not give the reference number, in which adjudicator Beatty stated:

> Rather, and uniquely, the special leave provision remains in the language of the permissive. The consequence must be as adjudicator Meyer has stated on a number of instances, e.g. Villeneuve, 166-2-629, (p. 6), Leclair, 166-2-631, (p. 10), that an adjudicator must not interfere with the employer's decision if it is reasonable, even and although the adjudicator might well have reached a different decision and even if the adjudicator or some other supervisor might have granted special leave in these circumstances.

Arbitrator McKee then goes on to state, with explicit approval for purposes of this Collective Agreement, that in Andrews adjudicator Beatty found that adjudicators under the Public Service Staff Relations Act,

> ...have in every case explicitly or implicitly sought to determine
>
> (a) whether, in fact, an employee was prevented from reporting for duty, and
>
> (b) whether his inability to report was attributable to reasons within or beyond his control.
>
> Only in those instances where an employee was prevented from reporting and where he could not be held responsible for his inability to report for duty have adjudicators considered whether an employer's decision to withhold special leave under article 23.05 was unreasonable. Indeed, implicit in these decisions is the recognition that it might well be, in certain instances, that even where an employee satisfies these two conditions, an adjudicator might determine that although he personally might disagree with the employer's decision to withhold some or all of the special leave requested, it could not be said that such a decision was in fact unreasonable. Rather, even in such cases where an employee falls within the express language of article 23.05, adjudicators have recognized that there are a number of possible reasonable responses to an employee's application for special leave.

There was no dispute about the fact that the grievor here made the dental appointments in question a month or so in advance. His bridgework was bothering him so he made the appointments to have routine cleaning and maintenance to his teeth and bridgework. When he applied for special leave, the Campbellton Postmaster, Mr. Leo Fournier, denied the leave because, as Mr. Fournier testified, "we don't consider regular dental appointments to be special or sick leave matters. We look at each on its own merits." Mr. Fournier testified that he thought he had granted the grievor

sick leave on other occasions, for periods of less than two hours, but did not think he had ever granted him special leave for such purposes.

When the grievor's application was denied he filed one grievance with respect to the denial of special leave and a second one with respect to the denial of sick leave. The Employer's grievance replies with respect to the sick leave grievance were, at the first stage:

> Management believes that non-emergency dental work is not Special Leave but is Leave Without Pay.
>
> An employee wishing non-urgent dental care is obliged to do so on his own time.

At the second stage the Employer's reply was:

> Following review of the facts surrounding this grievance it has been determined that no violation of Article 21 of the Collective Agreement has occurred.
>
> Under no circumstances is Special Leave granted for absences caused by scheduled appointments.

With respect to the second grievance over the denial of sick leave, the Employer's reply at the first stage was:

> Management believes that non-emergency dental work is not Sick Leave but is Leave Without Pay.
>
> An employee wishing non-urgent dental care is obliged to do so on his own time.

The Employer's reply at the second stage to this grievance was not put before me, but there was no suggestion that it differed in substance from the reply at the first stage.

The grievor did not testify that his dental work was urgent, or that he was in pain, although he did say that his bridgework was "bothering" him. It was clear that Mr. Fournier made no inquiries about the urgency of the dental work. In fact, there is no suggestion that the work was urgent, the appointment having been made a month or so in advance.

The grievor works as a reliever, which means that at the time he made his dental appointments he could foresee that he would be spending two out of three weeks working on the wickets. For those two weeks he would be unable to predict his shift times during the day. For the third week he would be working on the 0600-1400 shift. For the Union,Mr. Mundle argued that because the grievor was a reliever he could not reasonably have been expected to arrange his appointments for a time when he would be off shift. For the Employer, Mr. Currie submitted that the grievor could have arranged to have his dental appointments during the week when he knew he would be off shift by 1400 hours. Mr. Fournier testified that in arranging several dental appointments with two dentists in Campbellton within the past few years he had no difficulty in arranging appointments for late in the afternoon.

Mr. Mundle's other arguments were that the Employer had denied the grievor's request for special leave and for sick leave without considering his particular case, as was demonstrated by the fact that Mr. Fournier had not asked the grievor about his dental work, and had denied the requests in blind adherence to the Employer's general policy.

Decision: It is true that the grievor "was prevented from reporting for duty" if he was going to attend his dental appointments,but I am not satisfied that his inability to report arose from "circumstances not directly attributable to the employee". He did not have to rely on any other form of leave, or even switching R.D.O.'s, to arrange for dental appointments. If he wanted to be absolutely sure that the appointments would not conflict with the time when, as a reliever, he might have been required to work, he could have scheduled them in the weeks that he was working the 0600-1400 shift.

I realize that in Chaffey (unreported - June 6, 1984) CUPW No. A-4-GG-15; CPC No. 84-1-3-1586 arbitrator Outhouse allowed a special leave grievance because the part a policy directive played in the Employer's decision to deny the grievor's request for special leave (at p. 11). Nevertheless, I am not satisfied that Mr. Fournier was prepared to consider any extenuating circumstances here. In my view, there is nothing wrong with the Employer announcing a policy which will usually apply, so long as special circumstances can and will be taken into account. Consistency is, after all, desirable. What the Employer must avoid is "fettering" the discretion of management where, as in Article 21.03, the Collective Agreement clearly calls for its exercise.

I am not troubled by the fact that Mr. Fournier did not seek out the grievor to find out if there was anything unusual about his dental work. That is not to say that I disagree with

arbitrator Outhouse in Chaffey, where he said at p. 15:

> The Employer, when faced with an application for special leave, is under an obligation to fairly consider it. Such an obligation includes the duty to make appropriate inquiries where it appears to the Employer that it does not have sufficient information concerning the circumstances surrounding the application to make an informed decision.

Where, as here, the Employer has an application for special leave for dental work, without more, I do not think it must necessarily be said that "it appears to the Employer that it does not have sufficient information concerning the circumstances...", particularly bearing in mind the statement of arbitrator McKee in Desaulniers (cited above), where he said at p. 19:

> The onus is upon an employee when making application for leave to state why the application is made. The onus is upon the employee to give as many facts as s/he may think pertinent to substantiate an application for leave.
>
> The onus is not upon the employer to seek out the employee and ask questions. In this case, the Supervisor felt that certain pieces of information were not given and he asked questions prior to making a decision. The onus was not upon him to ask. The onus was upon the employee to initially supply all necessary information.

In my view Mr. Fournier did not have to make inquiries unless it appeared to him, or reasonably should have appeared to him, that he needed more information. That is not the case here.

Conclusion and Order: Because the grievor's routine dental work was attributable to reasons within his control, the special leave he requested was not unreasonably withheld. It was not up to Mr. Fournier to inquire whether there were special circumstances when the grievor did nothing to suggest that there were, in fact, any such circumstances. The grievor's special leave grievance is denied.

As agreed at the hearing in this matter, I will receive written argument, which should consist primarily of any relevant decisions by arbitrators or adjudicators, on the question of denial of sick leave. I will consider any such material mailed within two weeks of receipt of this award.

Innis Christie, Arbitrator