

IN THE MATTER OF A GRIEVANCE ARBITRATION

BETWEEN:

BEAUFORT-DELTA HEALTH & SOCIAL SERVICES AUTHORITY
GOVERNMENT OF THE NORTHWEST TERRITORIES
(REFERRED TO AS THE "EMPLOYER")

AND:

UNION OF NORTHERN WORKERS
PUBLIC SERVICE ALLIANCE OF CANADA
(REFERRED TO AS THE "UNION")

Grievance of Anita Pokiak
Application for Special Leave

ARBITRATOR: Allen Ponak

AWARD OF THE ARBITRATOR

For the Union: John Haunholter

For the Employer: Brian Asmundson

Hearing at Yellowknife, Northwest Territories
February 25, 2010

ISSUE

The issue in this case is the eligibility of Ms. Anita Pokiak (the "Grievor"), a community health representative employed by the Delta-Beaufort Health & Social Services Authority, for paid special leave under the collective agreement. The Grievor applied for special leave from September 29, 2008 to November 8, 2008, a period of 29 working days, to care for her mother who lived in an isolated community and was seriously ill. At the time of the application, the Grievor had accumulated 29 days of special leave credits. The Grievor's request was partially approved, the Employer limiting the leave to 10 working days. The Union took the position that the Grievor's request for 29 days satisfied criteria set out in the collective agreement and should have been accepted in full. The Employer argued that the amount of time requested by the Grievor could only be granted in exceptional circumstances and that management had exercised its discretion reasonably in granting ten days off.

COLLECTIVE AGREEMENT

To place the evidence into perspective the relevant provisions of the collective agreement are set out below.

ARTICLE 19 SPECIAL LEAVE

CREDITS

- 19.01 (1) An employee shall earn special leave credits up to a maximum of thirty (30) days at the following rates:
- (a) .50 of a day for each calendar month in which he/she received pay for at least ten (10) days, or
 - (b) .25 of a day for each calendar month in which he/she received pay for less than ten (10) days.

As credits are used, they may continue to be earned up to the maximum.

SPECIAL LEAVE

- 19.02 For the purpose of this article, immediate family is defined as an employee's father, mother, brother, sister, spouse, common-law spouse, child, step-child, foster child, father-in-law, mother-in-law, grandmother, grandfather, grandchild, son-in-law, daughter-in-law, brother-in-law, sister-in-law and any relative permanently residing in the employee's household or with whom the employee presently resides.
- (1) The Deputy Head shall grant special leave earned with pay for a period of up to five (5) consecutive working days:
- (a) when there is a death in the employee's immediate family. The employee may be granted up to three (3) additional days special leave for the purpose of travel;
 - (b) when an employee is to be married.
- (2) The Deputy Head may grant an employee special leave with pay for a period of up to five (5) consecutive working days:
- (a) (i) where a member of the immediate family requires surgery or becomes ill (not including childbirth) and the employee is required to care for his/her dependents or for the sick person;
 - (ii) where a member of the immediate family becomes seriously ill.
- (d) Such leave will not be unreasonably withheld.
- 19.03 Special leave in excess of five (5) consecutive working days for the purposes enumerated in Clause 19.02 may only be granted with the Employer's approval and such approval shall not be unreasonably denied.

AGREED STATEMENT OF FACTS

The parties provided a written agreed statement of facts at the outset of the hearing (Exhibit 9). It is set out below:

1. Anita Pokiak, at all material times was a member of the Union of Northern Workers, and covered by the Collective Agreement dated August 2nd, 2005 with the Employer being the Beaufort-Delta Health & Social Services Authority, of the Government of the Northwest Territories and the union referenced was the Union of Northern Workers (Exhibit 1).
2. The grievance that has given rise to this arbitration is filed under the aforesaid collective agreement with the parties accepting the composition and jurisdiction of the arbitration board to pronounce on this grievance (Exhibit 2), this subject to the ability to have the matter submitted for judicial review.

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3. The aforesaid Collective Agreement's articles 19.02 and 19.03 specifically address the granting of special leave.
 4. The Employer has created a Human Resources Manual - 811 - Special Leave (Exhibit 3) and such was in effect at all material times.
 5. On September 24, 2008, Ms. Anita Pokiak of Tuktoyaktuk, NWT was informed that her mother was very ill and required her care. Her mother resided in Taloyoak, NU.
 6. As of September 24, 2008, Ms. Pokiak had accrued 29 days of special leave credits, pursuant to Article 19.01 of the Collective Agreement.
 7. On September 25, 2008, Ms. Pokiak made a request to her acting Nurse in Charge Wendy Davison, for special leave to attend to her mother.
 8. Attached (as Exhibit 4) to this Agreed Statement of Facts is a copy of Ms. Pokiak's Request for Time Off Work form, dated September 25, 2008.
 9. Ms. Davidson contacted her supervisor in Inuvik, Jane Smith, to relay Ms. Pokiak's request.
 10. As evidenced in Exhibit 4, Jane Smith made notations on Ms. Pokiak's Request for Time off Work form indicating that she recommended 3 weeks' special leave then a review.
 11. Ms. Pokiak left for Taloyoak, NU on September 26, 2008. Her mother had been diagnosed as palliative and was discharged from the health centre to the care of Ms. Pokiak and her sister. She required 24 hour care which was provided jointly by Ms. Pokiak and her sister.
 12. Sometime around October 8, 2008, Ms. Pokiak was informed by Nurse in Charge, Judy Wilson, that her application for special leave had only been approved for a total of ten days. It was suggested to Ms. Pokiak that she would need to exhaust other sources of leave available to her if she wished to continue to be away from work to care for her mother.
 13. As evidenced in Exhibit 4, the notes of Ms. Deborah Tynes, CEO of the Beaufort-Delta Health & Social Services Authority state as follows:

As CEO I can only authorize up to 10 day (sic) special leave which I approve for this request. If any further time is required then annual leave or OT leave have to be utilized. I have already verbally informed the NIC in Tuk on October 2, 2008.
 14. The Employer did not request further medical evidence on this matter from the grievor and accepted that this case falls within special leave, pursuant to article 19.02 (2) (a) of the Collective Agreement. As such, Ms. Pokiak had her leave approved as follows:
 - a. Special Leave - 10 days - September 29, 2008 to October 10, 2008;
 - b. Annual Leave - 8 days - October 14, 2008 to October 23, 2008; and
 - c. Leave without pay - 12 days - October 23, 2008 to November 28, 2008.
 - d. Sick Leave - 32 days - December 1, 2008 to January 16, 2009.

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15. The Beaufort-Delta Health & Social Services Authority has produced a chart entitled Approval Authority For Leaves, attached as Exhibit 5 to this Agreed Statement of Facts. This document has been approved by Ms. Tynes in her capacity as CEO.
 16. On February 11, 2009, Norman Smith, Service Officer for the Union of Northern Workers, grieved this matter at the second level. Attached as Exhibit 6 is a copy of email correspondence from Mr. Smith to Ms. Tynes containing the grievance.
 17. On March 18, 2009, Ms. Tynes responded to the grievance, as such is attached as Exhibit 7 to this Agreed Statement of Fact.
 18. The Union of Northern Workers referred the matter to arbitration. Attached as Exhibit 8 to this Joint Statement of Facts is a copy of Mr. Smith's correspondence to Ms. Debbie Delancey, Deputy Minister of the Department of Human Resources, dated March 20, 2009, informing the Employer that the matter was being referred to arbitration.
 19. An employee, Doug Robertson, of the Fort Smith Health Authority, governed by the same Collective Agreement as the parties herein, on or about January 2008 requested and received 22 days of special leave when required to care for his sister who had just received a bone marrow transplant operation.

OTHER EVIDENCE

Each party called one witness. The Grievor testified by speaker phone from Tuktoyaktuk. Ms. Deborah Tynes, CEO of the Beaufort-Delta Health & Social Services Authority, gave evidence on behalf of the Employer.

The grievance arose as a result of the serious illness of the Grievor's mother who lived in the small Nunavut community of Taloyoak. The Grievor said she received a call from her sister asking for help. Their mother was 90 years old at the time, did not speak English, was bedridden at home, required two people to move her, needed constant care, and was not expected to recover. The Grievor stated that her sister was under a great deal of stress and unable to cope on her own.

The Grievor notified her supervisor and asked for and was granted leave. On her leave application, she wrote "Mother greatly ill" as her reason for the leave. Upon arrival in Taloyoak and after assessing the situation, the Grievor decided to seek a second medical opinion. On

October 6th, her mother was taken by air ambulance to a Yellowknife hospital. During her mother's stay in Yellowknife, which lasted five days, both the Grievor and her sister were in attendance her to provide interpretation and bedside assistance. Upon their mother's return to Taloyoak, the Grievor and her sister continued to provide round the clock care. Their mother's condition initially worsened, but then gradually improved to the point that the Grievor's sister was able to provide necessary care on her own, enabling the Grievor to return to work. In total, the Grievor was away from work for several months.

While in Taloyoak, the Grievor was in contact with her supervisors to keep them informed of the situation and her anticipated return to work. She testified that she was advised on October 16th that Ms. Tynes would only approve ten days of special leave and that the other time off would have to be covered by vacation time. The Grievor stated that she never spoke directly to Ms. Tynes, but was told that there was a "ten day rule" applicable to all employees.

In cross-examination, the Grievor insisted that she could not have returned earlier and that her presence was required in Taloyoak. She provided a letter from the director of the Taloyoak health centre to that effect (Exhibit 10). In terms of her initial leave request, the Grievor explained that she asked for the full 29 days in her special leave account, thinking "that's what I'd start with". Her absence from work ultimately exceeded her special leave credits by a substantial amount.

Ms. Tynes has been CEO of the Beaufort-Delta Health & Social Services Authority since 2005. She reports to the Authority's board of directors, not directly to the government. The Authority runs a hospital in Inuvik, eight community health centres, and medivac services, employing 310 bargaining unit and contract workers. In Tuktoyaktuk, where the Grievor worked,

the Authority operates a community health centre, social services, and a mental health unit, employing a total of 20 people.

Ms. Tynes described the procedure with respect to special leave requests. For leave applications of five days or less, approval can be provided by managers. For more than five days, Ms. Tynes must give approval. The Grievor's application had first gone to Ms. Wendy Davison (acting charge nurse), the Grievor's direct supervisor in Tuktoyaktuk, who sent it to her supervisor in Inuvik, Ms. Jane Smith. Ms. Smith recommended that three weeks of special leave be authorized and then reviewed after three weeks. When Ms. Tynes received the application, she spoke to Ms. Smith who advised her that the Grievor's mother was ill in Taloyoak, was receiving home care, and that the Grievor wanted leave to provide additional support. Ms. Tynes then contacted Ms. Judy Wilson, who had replaced Ms. Davison, and was told the same thing.

Ms. Tynes testified that based on the information she had received she approved ten days of special leave. Any other time off would have to be covered by the Grievor through vacation time and any other eligible leave. Ms. Tynes said she took into account the staffing situation in Tuktoyaktuk, the reasons provided by the Grievor on the leave application, the information provided by Ms. Wilson and Ms. Smith, how other special leave requests had been handled, the human resources (HR) manual, and the collective agreement.

According to Ms. Tynes, she inferred that, because the Grievor's mother was receiving home care, some community resources were available in Taloyoak. The HR manual was also an important factor in her decision. The sections of the manual addressing special leave are set out below (Exhibit 3, Sections 9 & 10):

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9. Where circumstances warrant, Deputy Heads may approve additional days of special leave. The Deputy Head may approve a doubling of special leave for the situation, to a maximum of ten days special leave.
 10. In catastrophic circumstances, Deputy Heads may approve up to the maximum of the employee's banked special leave (maximum of 30 days). Catastrophic circumstances are events that cannot be necessarily predicted, but are often characterized by the following:
 - a. An event covered by special leave provisions that requires the employee to spend significant periods of time away from work with family members:

Example: A car accident involving several family members where those family members are seriously injured.

or
 - b. An event covered by the special leave provisions that requires the employee to leave the home community to be with their family member for a significant period of time.

Ms. Tynes explained her interpretation of this HR policy. In catastrophic situations, she can approve special leave up to thirty days and she had done so on two occasions. In the Grievor's case, while she accepted the seriousness of the situation, she did not consider it catastrophic because "most of us have serious illness and death in the family" at some point. Ms. Tynes testified that she was concerned about the staffing consequences of allowing the Grievor the full 29 days of leave because a lot of the other employees also had family members who lived in remote locations.

In cross-examination, Ms. Tynes acknowledged that she was aware of Ms. Smith's recommendation for three weeks special leave. She said that the information provided by Ms. Wilson was that there was some home health care support available in Taloyoak, the Grievor's sister was in a position to help, and that there were other relatives in Taloyoak who might have been available to assist. Ms. Tynes agreed that she did not follow up on the amount of home support that might be available and never spoke to the Grievor about the special leave request.

She explained that it would have been insensitive to quiz the Grievor about whether or not the situation was “catastrophic”. Ms. Tynes reiterated her concern about the impact of the Grievor’s leave on overall staffing needs and operational costs. In the Grievor’s case, she was able to backfill the position during her absence, but stated that from a business standpoint she could not let everyone go home when family members became ill.

UNION ARGUMENT

The Union began by noting that special leave credits are earned entitlements under Article 19.01 of the collective agreement and an employee can accumulate up to 30 days of special leave credit. Under Article 19.02, employees may be granted an initial five days of special leave and under Article 19.03 additional leave, which “shall not be unreasonably denied” may be granted. Nowhere in these contract provisions, the Union argued, was there any reference to a ten day limitation.

Yet, according to the Union, the evidence made it clear that Ms. Tynes based her decision on the ten day rule set out in the Employer’s HR manual, an Employer promulgated document that was not part of the collective agreement. In particular, the Union pointed to Ms. Tynes’ response on the Grievor’s special leave application form, when she wrote that “as CEO I can only authorize up to ten day special leave...” (Agreed facts, para. 13). The Union submitted that a further explanation provided at the arbitration hearing, that staffing was a crucial consideration, could not have been paramount because the Grievor was allowed the time off through vacation, sick leave, and unpaid leave. The Union also called into question the Employer’s written response to the grievance in which it claimed that “it had been a consistent practice ... to grant special leave to a maximum of ten consecutive days in situations such as

this” (Exhibit 7). There was no evidence to support this assertion and each case required individual assessment, not an automatic response.

The Union asked that the grievance be sustained and the Grievor be granted the 29 days of special leave for which she had originally applied. In support of its position the Union cited several authorities including: *Fanshawe College and Ontario Public Service Employees’ Union* (2005) 148 LAC (4th) 358 (O’Neil) and *Canada Post Corporation and Canadian Union of Postal Workers* (2004) CLAD No. 242 (Ponak).

EMPLOYER ARGUMENT

The Employer began by stating that management’s position that the Grievor’s situation was not catastrophic was in no way meant to minimize the situation. The serious illness of a parent was something that most people have to face in their lives and such situations are of course difficult. According to the Employer, the arbitration question, was not whether the situation was a difficult one for the Grievor, but whether management had exercised its discretion unreasonably under Article 19.03 when it approved ten days of leave for the Grievor rather than the 29 days she had requested.

The Employer argued that Ms. Tynes had exercised her discretion reasonably. She was aware that she could approve requests up to 30 days and was aware of the pertinent facts. The amount of time being requested was very substantial. Ms. Tynes was able to explain and defend her decision and provide the facts upon which her assessment of the application was based. The test, the Employer pointed out, was one of reasonableness, not whether someone else would have come to a different decision. The Employer submitted that management’s decision met this test and urged the arbitrator to deny the grievance.

DECISION

For reasons that will be outlined below, I have concluded that the Grievor's request met the contractual criteria for special leave, the amount of leave requested was justifiable, and the decision to not approve the full 29 days requested was unreasonable in the circumstances.

Under Article 19.01 of the collective agreement, employees earn special leave credits up to a maximum of thirty days. These credits are available if the need arises for their use with eligibility based on meeting the criteria for the leave set out in Articles 19.02 and 19.03. Just because an employee has 30 days of special leave accumulated does not mean an employee is automatically entitled to all 30 days of leave for a situation that meets the purpose of the leave. The amount of leave for which an employee qualifies must be justifiable based on the circumstances. The Employer is granted discretion over the granting and the duration of the leave, but management approval cannot be unreasonably withheld. It is no more appropriate to suggest to an ill employee that she use her vacation time rather than her sick leave credits than it is to tell an employee entitled to special leave to use vacation time instead.

Article 19.02 defines immediate family to include an employee's mother. Under Article 19.02(2), the Employer "may grant an employee special leave with pay of up to five consecutive working days..... where a member of the immediate family becomes ill and the employee is required to care for his/her dependents or for the sick person" [19.02(2)(i)] or "where a member of the immediate family becomes seriously ill" [19.02(2)(ii)]. Article 19.02(d) specifies that the leave cannot be "unreasonably withheld". Article 19.03 then provides for leave beyond five days "for the purposes enumerated in Clause 19.02 with the Employer's approval and such approval shall not be unreasonably denied" [Emphasis added].

There is no dispute that the Grievor's mother was seriously ill, thereby meeting one of the enumerated purposes of special leave. I am also satisfied from the evidence that the Grievor's presence was required to assist her sister in the care and comfort of their mother, thereby meeting another purpose of special leave under Article 19.02(2)(i). The Grievor's mother was in home palliative care, was bedridden, and required round the clock attention. One person (the Grievor's sister) was insufficient to provide such care. It is precisely these type of situations, taking care of a terminally ill mother, that the special leave provisions are designed to meet. I conclude that the Grievor met the criteria for special leave.

The real question in this case, however, is not whether the Grievor was eligible for special leave under the collective agreement -- the Employer has already conceded this point. The key issue is whether the amount of leave she requested, 29 days, was justifiable and whether the Employer's decision to approve only ten days leave was reasonable in the circumstances.

In examining the Grievor's request for 29 days, I am aware that there may have been some question about whether this much time was needed. The amount of time for which the Grievor had applied coincided with the exact amount of credits in her special leave bank. There are ways the Employer could have allayed its doubts about whether the full 29 days were required. The Grievor continued to communicate with her managers during her absence. Management could have requested more information from the Grievor about why she needed to be away for so long, exploring, for example, the resources available in Taloyoak. Alternatively, as Ms. Smith recommended, the Employer might have granted some of the requested leave immediately and then invited the Grievor to apply for more leave time after she had been in Taloyoak long enough to fully assess the situation. In the current case, the

Employer did neither, placing itself in a poor position to claim the amount of requested leave was not justified.

At the arbitration hearing, the explanation provided by the Grievor was that the amount of time she needed was indeterminate and that she viewed her request for 29 days as the starting point. Her mother lived in a remote community, Taloyoak, that was not easily reached from Tuktoyaktuk. She was terminally ill and required full time care by at least two people. The Grievor felt it worthwhile to seek a second medical opinion that necessitated a trip back and forth from Taloyoak to Yellowknife and a five day stay in Yellowknife. Her uncontradicted evidence was that she remained in Taloyoak until her mother had recovered to the point that her sister was able to cope without her. The need for the Grievor's presence was corroborated by a health care provider in Taloyoak. Ultimately, the Grievor's time away from work considerably exceeded her accumulated special leave credits. In short, the evidence suggests that the Grievor's request for all of her 29 days of special leave credit was justified.

Several reasons were advanced by Ms. Tynes for restricting the leave to ten days. One reason was a belief that some community home care was being provided in Taloyoak. The information on the availability of adequate home care was provided to Ms. Tynes by subordinates. The Grievor, who had direct knowledge of available resources, testified that she and her sister needed to provide round the clock care. As I concluded above, if the Employer questioned the Grievor's assessment of her need to be present, it would have been relatively simple to ask the Grievor for an explanation. Without better information on the part of the management, the presumed availability of adequate community home care in Taloyoak was not a reasonable basis for refusing a leave beyond ten days.

A second reason offered was the negative staffing consequences if a lengthy leave was granted. With respect to the Grievor herself, the evidence showed that her position was backfilled during her absence. The more pressing concern, however, were the implications if other employees sought similar lengthy leaves. While Ms. Tynes did not use this word, she was advancing the "floodgates" justification – i.e. if the Grievor was granted a month's special leave, everyone else would ask for it too, creating major staffing and budget problems. I am not unsympathetic to Ms. Tynes' concerns; they are legitimate ones for senior management. The problem with the floodgates approach (aside from lack of evidence demonstrating the validity of the staffing fallout) is that special leaves applications under the collective agreement are individual in nature and are properly considered on basis of the circumstances of each individual applicant. The way to handle a concern about the overall staffing consequences of special leaves is through collective bargaining, not by refusing to approve an otherwise valid individual request that meets the criteria for special leave. A fear of the possible floodgate effect was not a reasonable basis for denying the Grievor's full leave request.

A third reason for denying the full leave was the guidelines set out in the Employer's HR manual. These guidelines set out a "ten day rule" except for catastrophic circumstances. The difficulty with this approach is that the collective agreement does not make catastrophic circumstances the threshold for eligibility for lengthy special leave requests. The criteria are a serious illness or the need to provide care to an immediate family member. Ms. Tynes was candid in citing the HR manual as an important factor in her decision to limit the Grievor's leave to ten days. While it is certainly appropriate for management to establish guidelines for exercising discretion under the collective agreement, these guidelines must be consistent with the contract language and must be applied based on individual circumstances. In this case, I

conclude that limiting leaves beyond ten days to catastrophic situations is not consistent with the terms of the contract. It sets a threshold far above that contemplated in the collective agreement. I am satisfied that the HR manual was very influential, if not completely determinate, on the amount of leave Ms. Tynes was prepared to approve. It can hardly be a coincidence that the manual suggests a maximum of ten days, unless catastrophic, and ten days leave were granted. Relying heavily on unilateral guidelines inconsistent with the collective agreement is not reasonable.

Accordingly, it is my conclusion that in the circumstances of this case the Employer violated the collective agreement by unreasonably denying the Grievor's request for a 29 day special leave. In reaching this conclusion, I am not suggesting that the Employer cannot decline to approve employee special leave requests in part or in whole. Article 19 gives management discretion in that regard. There may well be cases where the contractual criteria have not been met, the length of time requested cannot be justified, or there are compelling operational constraints that need be considered. As long as management adheres to the collective agreement, adopts an individualized assessment of the application, and its conclusions are reasonable based on the particular facts of the situation, the Employer has the right to say no.

AWARD

For all the above reasons, the grievance is sustained. The Grievor is entitled to the 29 days of special leave that she requested on her application on September 25, 2008. I will retain jurisdiction should any questions arise with respect to the implementation of this remedy.

Dated in Calgary Alberta on April 26, 2010.

Allen Ponak