



ONTARIO  
CROWN EMPLOYEES

GRIEVANCE  
SETTLEMENT  
BOARD

EMPLOYÉS DE LA COURONNE  
DE L'ONTARIO

COMMISSION DE  
RÈGLEMENT  
DES GRIEFS

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GSB #0409/00  
OPSEU#00B215

**IN THE MATTER OF AN ARBITRATION**

**Under**

**THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT**

**Before**

**THE GRIEVANCE SETTLEMENT BOARD**

**BETWEEN**

Ontario Public Service Employees Union  
(Dupuis)

**Grievor**

- and -

The Crown in Right of Ontario  
(Ministry of Northern Development & Mines)

**Employer**

**BEFORE**

Nimal V. Dissanayake, Vice-Chair

**FOR THE  
GRIEVOR**

Alison Kabuyama-Hun (Counsel)  
Grievance Officer  
Ontario Public Service Employees Union

**FOR THE  
EMPLOYER**

Carol Ann Witt  
Legal Services Branch  
Management Board Secretariat

**HEARING**

February 2, 2001.

## DECISION

This is a grievance dated May 31, 2000 filed by Ms. Joanne Dupuis, wherein she claims that the employer has denied her entitlement to sick leave with pay in contravention of the collective agreement and/or the Ontario Human Rights Code.

The grievance was argued solely on the basis of certain documents filed on consent and a statement of agreed facts. The agreed facts are as follows:

1. The grievor, Joanne Dupuis, began employment with the Ontario Public Service in February, 1982.
2. At times during her employment due to her number of sick days, the grievor drew on her accumulated vacation credits pursuant to article 44 of the Collective Agreement in order to receive her full regular biweekly pay.
3. At a regularly scheduled meeting attended by the grievor and her colleagues at which no manager was present, one or more of the grievor's colleagues expressed frustration to her about her higher than usual rate of absence from the workplace and lower productivity. The grievor believes this criticism arose due to a lack of knowledge on the part of her colleagues about her state of health.
4. A short time after this meeting, on October 4, 1999, the grievor began a medical leave from employment.
5. The grievor returned to work on an accommodated work plan on February 28, 2000, by which time she had used all her accumulated sick leave credits.
6. In accordance with the accommodated work plan agreement, the grievor works 3 of the 5 working days of each week, has a work-space on a different floor from her colleagues and has limited contact with them.
7. For the period from April 20, 2000 to September 30, 2000, the grievor received Long Term Income protection for the 2 days of the 5-day workweek that she does not work in accordance with the accommodation agreement.

8. The grievor appealed the Insurer's decision not to continue payment for the 2 unworked days of each 5-day workweek after September 30, 2000. The Insurer has denied the grievor's appeal.

The collective agreement includes the following provisions relating to full-time employees=Short-Term

Sickness Plan:

- 44.1 An employee who is unable to attend to his or her duties due to sickness or injury is entitled to leave of absence with pay as follows:
  - (1) with regular salary for the first six (6) working days of absence,
  - (2) with seventy-five percent (75%) of regular salary for an additional one hundred and twenty-four (124) working days of absence, in each calendar year.
  
- 44.2 An employee is not entitled to leave of absence with pay under Article 44.1 until he or she has completed twenty (20) consecutive working days of employment.

. . .
  
- 44.12 For the purposes of this article, twenty (20) consecutive working days of employment shall not include vacation leave of absence or any leaves without pay, but days worked before and after such leave shall be considered consecutive. Notwithstanding the above, where an employee is unable to attend to his or her duties due to sickness or injury, the days worked before and after such absence shall not be considered consecutive.

The relevant provisions of the agreement dealing with the Short-Term Sickness Plan for Regular Part-

Time Employees are:

- 71.1 An employee who is unable to attend to his or her duties due to sickness or injury is entitled in each calendar year to leave of absence with pay as follows:
- (1) at regular salary for the portion of six (6) days that the ratio of the employee's weekly hours of work bear to full-time employment,
  - (2) at seventy-five percent (75%) of regular salary for an additional period of that portion of one hundred and twenty-four (124) days that the ratio of the employee's weekly hours of work bear to full-time employment.
- 71.2 An employee is not entitled to leave of absence with pay under Article 71.1 until he or she has completed all of his or her regularly scheduled hours of work within a period of four (4) consecutive weeks.

It is common ground that although the grievor worked less than full-time hours since she returned to work under the accommodated work plan, under the collective agreement she still had the status of a full-time employee. She was a full-time employee performing part-time hours under an accommodated work plan due to her disability. It is to be noted also that the employer did not dispute that the grievor's disability constituted a handicap within the meaning of S. 10(1) of the Ontario Human Rights Code. With that background, I turn to the union's two-pronged argument in support of the instant grievance.

Violation of Article 44

the union's initial position is that quite apart from the grievor's handicap and the Ontario Human Rights Code, the grievor has met the condition for eligibility set out in article 44.2 that she complete twenty consecutive working days of employment. It is agreed that in accordance with the accommodated work plan the grievor did not work on Tuesdays and Thursdays. Thus it is apparent that she worked alternate days and not consecutive days. However, union counsel points out that article 44.12 states, inter alia, that for the purposes of article 44, days worked before and after any leave without pay shall be considered consecutive. The union takes the position that since the grievor did not work Tuesdays and Thursdays with the employer's consent, i.e. pursuant to the accommodated work plan, her absences on Tuesdays and Thursdays constitute leaves without pay. Therefore under article 44.12 the days worked before and after those absences are deemed to be consecutive. If that is the case, the grievor had worked twenty consecutive working days as required by article 44.2 and had qualified for paid sick leave under article 44.1.

The collective agreement does not define the phrase leave with pay. However, I have concluded that the union's interpretation of article 44.12 is not supportable by a reasonable reading of the article as a whole. While article 44.12, in the first part, states that days worked before and after leaves of absence without pay are deemed to be consecutive, the parties have, in the last sentence of the article, clearly stipulated that days worked before and after an absence due to sickness or injury are not to be considered consecutive. The only reason the grievor absented herself from work on Tuesdays and Thursdays was due to her disability, which was a health problem. In other words, her absences on those days were due to sickness. Therefore, days worked before and after are not to be considered consecutive.

It follows that the grievor has not completed twenty consecutive working days of employment as contemplated in article 44.2 and therefore she was not entitled to paid sick leave under article 44.1.

#### Contravention of the Ontario Human Rights Code

The second aspect of the union's argument is that even if the employer had acted in compliance with the collective agreement, by doing so the employer had contravened the Ontario Human Rights Code by discriminating against the grievor because of her handicap.

Employer counsel drew my attention to a number of authorities which draw a distinction between rights in the nature of compensation on the one hand, and non-compensatory rights related to access to employment on the other, when imposing the obligation on employers to treat its employees without discrimination. Re Versa Services Ltd., (1994) 39 L.A.C. (4<sup>th</sup>) 196 (R.M. Brown) affd. Ont. Div. Ct. Feb. 7, 1995; Re Golden Manor Home For The Aged, (1996) 53 L.A.C. (4<sup>th</sup>) 353 (Davie); Re Cambridge Memorial Hospital, (1999) 79 L.A.C. (4<sup>th</sup>) 392 (Barrett); Re George Brown College of Applied Arts and Technology, unreported decision dated August 3, 2000 (Howe).

The foregoing decisions follow and apply the principles established by the leading authority on the matter, Re O.N.A. v. Orillia Soldiers Memorial Hospital, (1999), 169 D.L.R. (4<sup>th</sup>) 489 (Ont.C.A.). In that case the Court of Appeal restored the award of a Board of Arbitration (which had been partially quashed by the Divisional Court). In so doing, the Court of Appeal found that since accrual of seniority was not

compensatory in nature, depriving disabled employees of seniority accrual during periods when they were unable to work constituted discrimination prohibited by the Ontario Human Rights Code. On the other hand, the court agreed with the Board of Arbitration that denying those same employees service accrual and employer contribution to benefits during such periods was not prohibited by the Human Rights Code because those were a form of compensation in exchange for work performed. The court held that requiring work for compensation was a bona fide occupational requirement which could not be accommodated without undue hardship.

Based on the foregoing authorities, the employer submits that disallowing the grievor paid sick leave in circumstances where she had not met the service requirements in article 44.2 does not constitute discrimination prohibited by the Ontario Human Rights Code. Counsel points out that paid sick leave is compensatory in nature. As an employee holding a full-time position, the grievor was governed by article 44.2 with regard to entitlement to paid sick leave. She was treated in exactly the same manner as all other full-time employees with regard to paid sick leave. Doing so in relation to a compensatory entitlement, it is submitted, does not constitute discrimination violative of the Ontario Human Rights Code.

The mere fact that paid sick leave is a form of compensation does not, by itself, assist in determining whether there was discrimination contrary to the Code. As the Court of Appeal did in Re Orillia Soldiers Memorial Hospital (*supra*), one must first determine the appropriate group for comparison. Relying on the fact that the grievor was a full-time employee for purposes of the collective agreement, the employer has treated other full-time employees in its employ as the appropriate comparator group. Since it treated the

grievor the same as the members of that group, the employer's position is that there was no violation of the Code.

In the Board's view, in the grievor's particular circumstances, the appropriate comparator for the grievor is not the group of full-time employees. The employer's reliance on the fact that the grievor occupied a full-time position under the collective agreement is misplaced. Compliance with the strict terms of a collective agreement is not always an answer to an allegation that the Ontario Human Rights Code has not been complied with. Sometimes, the application of the strict terms of the collective agreement must be altered in order to comply with the Code provided it can be done without undue hardship. This, in the Board's view, is such an instance.

Although the grievor's position was categorized as "full-time" under the terms of the collective agreement, in reality, the grievor was only expected to, and did only perform, part-time hours. She did not perform full-time duties as the other full-time employees did. In these circumstances, according to the employer's approach, she could never satisfy the "twenty consecutive days" requirement applicable to full-time employees because by the very terms of employment agreed to, she only worked alternate days. At the same time, since her position was categorized as "full-time", she was not entitled to earn paid sick leave the way other employees performing part-time hours did. The result is she continues to work regularly, but is denied the right to earn paid sick leave altogether. Whereas every other employee working part-time hours earned paid sick leave in proportion to the amount of work performed, she earned nothing in return for the work she performs.

In the Board's view, in determining the appropriate group for comparison, the grievor's de facto status must govern. Since she regularly worked only part-time hours under an arrangement with the employer, the appropriate group for comparison purposes is the group of regular part-time employees in the employer's employ.

Once a comparator group is determined, the employer's obligation under the Code of affording equal treatment with regard to matters relating to compensation is aptly described by arbitrator Davie in Re Golden Manor Home for the Aged, (supra) at p. 370 as follows:

*A narrow notion of equal treatment is applied when it is said that all must be treated the same without regard to handicap. It is this narrow notion of equal treatment which is brought to bear on matters relating to compensation with the result that persons with a handicap are to be remunerated in the same way as those without a handicap. Conversely, if employees without a handicap do not receive compensation in particular circumstances, then handicapped employees have no complaint if they are similarly treated and also do not receive such compensation. Applying such a narrow notion of equal treatment to matters of compensation has the result that handicapped employees absent from work are not entitled to wages any more than non-handicapped employees absent from work are entitled to wages.*

Regular part-time employees of the employer are afforded paid-sick leave under articles 71.1 and 71.2 in proportion to the amount of work performed. The grievor, like the members of that group, also worked part-time hours. The grievor is entitled to no more, and no less, than the entitlement enjoyed by those part-time employees. She is not entitled to earn paid sick leave for work not performed. However,

for there to be equal treatment, she must earn paid sick leave in proportion to the work she does perform, in the same way other employees performing part-time work do.

The parties agreed that the Board should determine the liability issue and remain seized, giving the parties the opportunity to agree upon a remedy for any liability found. I have concluded that the employer had an obligation under the Human Rights Code to treat the grievor under article 71 in the same manner as the employer's other employees who performed part-time work. Given that the employer did not assert that doing so would cause the employer an undue hardship, I hereby find that the manner the grievor was treated with regard to paid sick leave constituted discrimination because of her handicap in contravention of the Code. The parties are directed to attempt to agree upon the remedy flowing from the Board's finding. I remain seized in the event the parties are unable to do so.

Dated this 14<sup>th</sup> day of February, 2001 at Hamilton, Ontario.

A handwritten signature in black ink, appearing to read 'Nimal V. Dissanayake', with a long horizontal line extending from the end of the signature.

Nimal V. Dissanayake  
Vice-Chairperson