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Re Dartmouth (City of) and Dartmouth Police Association, Local 101

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RE CITY OF DARTMOUTH AND DARTMOUTH POLICE ASSOCIATION, LOCAL 101

I. Christie, C. MacDougall, M. J. McPherson. (Nova Scotia) August 25, 1980.

EMPLOYEE GRIEVANCE alleging improper refusal of leave of absence in lieu of statutory holiday.

B. W. Evans, for the union.
M. Moreash and *L. Labelle*, for the employer.

AWARD

There was no dispute about any of the essential facts. The practice in the Dartmouth Police Department is for a leave calendar to be circulated at the start of each year. Each man writes in his preferred vacation leave in accordance with an order of priorities not here in issue. Thereafter as requests are made and granted for leave for statutory holidays, time off in lieu of overtime and compassionate leave and as members of the department go on training courses, those facts are noted on the leave calendar. Staff Sergeant John Friis has responsibility under art. 12(2)(a) of the collective agreement for co-ordinating leaves

but in fact the maintenance of the leave calendar has been delegated to platoon NCO's, and in the case here relevant to Sergeant Binns and Corporal Lowe of C Platoon.

On March 4, 1980, the grievor, Constable David Cluett, submitted a written request for "statutory leave" for "March 14/80 — 1 day 12-8 shift — Friday". This was granted by Corporal Lowe. It was undisputed that the "12-8 shift — Friday" referred to the shift from 12:00 to 8:00 a.m. on the morning of Saturday, March 15th, which as a matter of practice is referred to within the Dartmouth Police Department as the final shift on the 14th because employees going on shift report shortly before midnight.

When the grievor reported for work shortly before midnight on March 12th he glanced over the leave calendar and advised Sergeant Binns, who was taking responsibility for the calendar because Corporal Lowe was on vacation leave, that he should not have been marked down for leave in the March 14th "12-8" block but rather in the March 13th "12-8" block. Sergeant Binns therefore scratched Cluett's name out in the block for the 14th and wrote it in on the 13th.

Upon returning home after the completion of his shift at 8:00 a.m. on the 13th the grievor was informed by his wife that he had made a mistake in changing the leave notation and that plans were made for the Friday night-Saturday morning block in which his name had originally appeared. Thereupon the grievor called Sergeant Binns at home. Sergeant Binns told him to report for work that night so that he would not waste a statutory holiday but, according to Binns' evidence, advised him that there might be a problem since after his name had been stroked off in the March 14th "12-8" block Constable O'Donnell had asked to have his name written in.

When both men reported for work before midnight on the 13th Sergeant Binns confirmed that O'Donnell's name had in fact been entered in the leave calendar and that there were four other names in that block as well. On that basis Sergeant Binns told Constable Cluett that it was beyond his authority to grant leave. Staff Sergeant Friis had directed that the NCO's not allow more than five men to be absent on any shift and that any leaves granted in such circumstances were to be granted by Friis himself. Following this "non-abrasive" discussion Cluett simply said that he would see Friis the following morning after his shift was over.

It was agreed by the parties that in addition to Constable O'Donnell the men who were to be absent from the "12-8" shift

commencing at midnight on March 14th were Corporal Lowe, who was on vacation, Constable Bradley, who was on a training course, Constable Hearst who was taking leave in lieu of overtime and Constable Yeadon who had been given time off at the end of a special training course in Prince Edward Island. There was considerable evidence and argument about the status of Constable Yeadon. In the board's view it is unnecessary to deal with that matter because, whatever Yeadon's status was, Lowe obviously is an NCO and Bradley was admittedly on a training course. Thus, even with O'Donnell having been granted leave, the complement of those entitled to leave under art. 12(3), which is considered below, had not been reached.

At the end of the shift Constable Cluett went to the police station where he waited for some period only to be informed ultimately that Staff Sergeant Friis was on vacation leave and would not be returning to the office until the following Monday. He then left and subsequently filed his grievance.

It was established in evidence that the chief and deputy chief of the Dartmouth Police Department were both on duty on the morning of March 14th but Constable Cluett made no attempt to see them, nor did he attempt to call Staff Sergeant Friis at home. There was considerable evidence relating to whether the chief and deputy chief were out of the office for breakfast at the time Constable Cluett was there and with respect to Staff Sergeant Friis' willingness to receive business calls at home. None of this evidence seems to the board to be of real relevance.

Also introduced in evidence was a document headed "LEAVE" which had been posted on bulletin boards in the police station for some time prior to March 14th. The second last paragraph of this one page document states:

> All leave is to be submitted seventy-two hours prior to when leave commences. No leave is to be taken unless approved by the Staff Sergeant or his delegate.

The grievor and Constable Yeadon both testified to a complete lack of familiarity with this requirement. Sergeant Binns and Staff Sergeant Friis both testified that the "seventy-two hour rule" was never enforced. It was intended as a guideline but both NCO's testified that they had never and would never refuse to grant leave because of non-compliance. In fact Staff Sergeant Friis commented, most fairly, that leave had been granted "hundreds and hundreds" of times when it was requested with less than 72 hours' notice.

The issues

The issue is simply whether under this collective agreement the grievor was entitled to have the leave that he originally requested reinstated, notwithstanding that in the interval Constable O'Donnell had also been granted leave for that shift, with the effect that there would already be five men absent. Did the grievor lose his entitlement to leave by not making his renewed request 72 hours in advance or because he did not pursue the matter with the chief or deputy chief or call Staff Sergeant Friis at home?

Decision

The provisions of the collective agreement which both parties consider to be relevant to this matter are found in art. 12 which is headed "VACATION LEAVE". However, in art. 1(7) "Leave" is defined as follows:

> 1(7) *Leave* — means leave for statutory holidays, vacations and time off in lieu of overtime unless it is specifically characterized otherwise.

In some parts of art. 12 the "leave" referred to is "specifically characterized" but the provisions adverted to by the parties here refer simply to "leave". This board is therefore prepared to agree with the view, apparently shared by the parties, that unmodified references to "leave" in art. 12(2) and (3) should be taken to refer to "leave for statutory holidays" as well as vacation leave, notwithstanding the heading of the article.

The provisions of the collective agreement on issue are:

> 12(2)
>
> (a) The time that members take their leave may be agreed to between the members and the Staff Sergeant. In the case of a dispute, the Chief of Police reserves the right to control the time at which members take their leave so as not to impair the work of the Police Department.
>
> (b) The Chief of Police shall not unreasonably withhold the granting of leave on any shift as required by the members.
>
> (c) The number of members on sick leave, special courses, compassionate leave, association leave shall not effect the number of members allowed on leave.
>
> . . . . .
>
> (3)
>
> (a) Each platoon shall always be allowed four (4) members on leave at any time and Sergeants and Corporals, shall not be included in these four. This sub-section prevails over sub-section 2(a) of this Article.

On the facts before us Constable Bradley was on a special course so art. 12(2)(c) applied to him, and Corporal Lowe did not count by virtue of the provisions of art. 12(3)(a). Thus, when the grievor

requested that the leave in issue be reinstated only O'Donnell, Hearst and perhaps Yeadon could be counted as being "members on leave" within the terms of art. 12(3)(a). Since each platoon was "always to be allowed four (4) members on leave" it seems clear that there was a breach of the collective agreement in denying the grievor his leave. Indeeded, counsel for the city conceded that the grievor would have been entitled to the leave in issue "had he followed the proper procedure".

There were, in the view of counsel for the city, two aspects to the "proper procedure". First, 72 hours' notice was required by the notice posted on the police department bulletin boards. That submission can be shortly disposed of on the basis of the evidence of the city's own witnesses. The "seventy-two hour rule" had simply never been enforced and it is a clear principle "accepted generally among arbitrators" that any such unilateral employer rule can have effect only if it is not inconsistent with the collective agreement and has been consistently enforced: see Brown and Beatty, *Canadian Labour Arbitration* (1977), para. 4:1500, p. 149.

Second, counsel for the city submitted that the grievor was under an obligation to have his leave request approved by Staff Sergeant Friis and in his absence by the chief of police or the deputy, by virtue of art. 12(2)(a). However, art. 12(3)(a) specifically by its own terms "prevails over sub-section 2(a) of this Article". This can only mean that failure to work out an agreement with the staff sergeant or to have the matter determined by the chief of police could not constitute a reason for failing to allow leave to the extent permitted by s-s. 12(3)(a). Thus, while we may agree that Constable Cluett might have shown more initiative in seeking approval when he learned that Staff Sergeant Friis was on vacation leave, in failing to ensure that the duty NCO had sufficient authority in Staff Sergeant Friis' absence to grant the leave to which the grievor was entitled, the city was in breach of the collective agreement. As counsel for the city conceded, Staff Sergeant Friis' "five man rule" would not operate to limit leave entitlement under s-s. 12(3)(a) without constituting a breach of the collective agreement.

The remedy

In the grievance filed March 15, 1980, signed by Constable Cluett and approved by Constable R. Fahie of the union grievance committee, the grievor requests, "that he receive a written apology for this violation due to the personal inconvenience suffered as a result of this action . . .". At the hearing this request

was abandoned and the union sought only a declaration that there had been a breach of the collective agreement. For the reasons set out above the board does hereby declare that denial to Constable Cluett of leave for the "12-8" shift commencing at midnight on March 14th constituted a breach of art. 12(3)(a) of the collective agreement.

Cost of the chairman's fee

This collective agreement contains a most unusual provision in para. (g) of Step 4 of art. 44(2);

> The CITY and the UNION shall each bear the expense of their respective nominee to the Board, but the cost of the Chairman of the Arbitration Board, shall be borne by the CITY and/or the UNION according to their respective degrees of success and the degrees of success shall be determined by the Chairman at the conclusion of the Hearing. (For example, if the UNION is 100% successful, the total cost of the Chairman is to be paid by the CITY).

Not only is the issue posed by this provision unusual, it is unusual in that the decision called for is that of the chairman alone. This part of the award, therefore, is not joined by the members of the board.

On the face of it it might appear that the union has been 100% successful since it got the declaration requested. However, the matter did not go to arbitration nor, indeed, was it presented to the board at the outset of the hearing as a grievance requesting merely a declaration. Rather, as set out above, on the face of the grievance form the grievor was requested a "written apology". Had this request been dropped earlier the matter might never have gone to arbitration. Thus, from the point of view of awarding costs, it seems fair to say that while the union has been successful on the merits it has not got the remedy it sought right down to the commencement of the hearing.

Because the union amended its request at the hearing the board did not have to decide whether it would have ordered a written apology. It is nevertheless apparent that, if the board had power to grant such a remedy at all, it would not have done so as a matter of course merely because the city, acting through Sergeant Binns, and by virtue of Staff Sergeant Friis' absence, did not accord Constable Cluett his rights under the collective agreement. Constable Cluett's failure to actively pursue his leave request once he was informed of Staff Sergeant Friis' absence does not appear to be a proper basis under art. 44(2)(g) for awarding "costs" against the union, but it is part of the context in which the remedy originally sought, that is the written apology, might not have been regarded as appropriate. Having abandoned that remedy at the

last minute the union cannot be regarded, for the purpose of "costs", as having been 100% successful. The cost of the chairman's fee should therefore be borne equally by both parties. The union has won on the substantive issue but, in effect, has failed to get the remedy the request for which may well have been the stumbling block to settlement of this grievance.