FILE NO. AA93-05-006

EMPLOYER: Manitoba Telephone System

UNION: Telecommunications Employees Association of Manitoba

ARBITRATOR: B. Schwartz

APPEARANCES: K. Lercher, for the Employer
C. Martin, for the Union

GRIEVOR: Policy Grievance

DECISION RENDERED: May 17, 1993

EXPEDITED ARBITRATION: Yes

ISSUES: MANAGEMENT RIGHTS - Reasonableness and fairness; DISCIPLINARY PENALTIES - Types of penalty - monetary penalties; DISABILITY - Sick leave - pay-out; SECTION 3 of The Payment of Wages Act: In 1977, the Employer circulated a newsletter which defined its "sick leave credit vesting" plan. The newsletter was signed by all members of the Joint Benefits Committee, including a representative of the Union. The plan enabled employees to bank and accumulate credits from year to year which were paid out at the employee's rate of pay at the time of: superannuated retirement; voluntary separation; permanent lay-off; or death. In 1990, a new annual pay-out system was introduced which provided that at the end of the calendar year, an employee received payment for credits accumulated for the year. Credits built up from 1977 to 1990 would be frozen and paid out at the time of "termination or death". In 1992, the Employer added a footnote to the policy stating that a employee terminated for cause forfeited the sick leave credits. The Union filed a grievance claiming that the Employer acted unfairly because the footnote amounted to a change in policy. It also argued that employers could not "fine" employees as a disciplinary measure by taking away the entitlement to wages from the credits built up between 1977 and 1990. The Employer argued that its past practice was to never pay out sick leave credits to an employee terminated for just cause. It added that the intent of the footnote was only to affirm existing practice and to make sure it continued to be applied consistently.

AWARD: GRIEVANCE DENIED. The Arbitrator found that the failure to include "dismissal for just cause" in the 1977 newsletter had to be read as a deliberate exclusion. He also found that since 1977 the Employer consistently followed the practice of not paying sick leave credits to employees who were dismissed for just cause. He interpreted the footnote in the context of the various agreements and communications between the parties and found that there was no change in policy as all documents regarding the plan implicitly excluded pay-outs to employees discharged for just cause. In addition , he found that "forfeiting credits" did not mean that an employee had lost an existing right to money or was being fined. The monetary "entitlement" was only established when the employee met the essential conditions of completing a calendar year's worth of service, or leaving part-way through a calendar year for the "right" reasons. In addition, he found that credits built up from 1977 to 1990 were not "wages" that an employee who leaves his employment would be entitled to as per Section 3 of **The Payment of Wages Act.** He also found that the 1977 and 1990 policies did not violate Article 17.03 of the collective agreement which required the Employer to act reasonably, fairly and in good faith. He was not prepared to decide whether the Employer's duty to act fairly might in some individual cases required it to make exceptions to its rule. However, he did find that generally the 1977 and 1990 policies were fair, especially since the policies were freely negotiated and a representative of the Union had agreed to the 1977 system.

AA93-05-006

*** AWARD ***

Telecommunications Employees Association of Manitoba

and

Manitoba Telephone System

Policy Grievance
Re: Sick leave credit vesting policy.
Manitoba Labour Board Case # 1078/92/LRA

Date of hearing: 17 April 1993
Place of Hearing: Place Louis Riel, Winnipeg, Manitoba
Counsel for grievor: Mr. Chris Martin
Counsel for employer: Ms. Kris Lercher
Arbitrator: Dr. Bryan Schwartz

Date of Award: 17 May 1993

10 May 1993 AWARD

Telecommunications Employees Association of Manitoba

and

Manitoba Telephone System

Policy Grievance
Re: Sick leave credit vesting policy.
Manitoba Labour Board Case # 1078/92/LRA

Introduction

This is a policy grievance. It concerns "sick leave vesting credits". Employees have the right, at least in some circumstance, to be paid extra money in return for not using their right to paid sick leave.

Since 1990, the system has been roughly this:

-after every calendar year, the employer calculates an employee's credits, and issues a cheque for them;
- an established employee with perfect attendance earns 3.5 credits;
- an employee gets 0.5 credits less for every day of sick leave used;
- an employee's credits never drop below zero;
-a credit is worth a day's pay.

A different pay-out system was used from 1977-1990. It still applies to credits accumulated during that time. Under the 1977-1990 system, there is no annual pay-out. Credits build up from year to year of service. A cheque can only be issued when an employee leaves a full-time job.

The reasons for leaving may be relevant as well. In fact, the point of contention between the parties is this: what happens with respect to accumulated sick leave credits if an employee is dismissed for just cause? The union says the employer must recognize the credits, and issue a cheque for them. The employer disagrees.

The development of the sick leave credit vesting policy

(i) First step: an employee survey leads to an initial recommendation by the Joint Benefits Committee.

The employer and the grievor are among the participants in a

Joint Benefits Committee. Other unions participate as well. The mandate of the J.B.C. concerns benefits that can apply to all the employees represented, even though they have differing collective agreements.

In 1977, when the sick leave credit vesting program was first established, the grievor had one representative on the Committee. At the time, the grievor was not yet formally certified as a union.

Early in 1977, employees were surveyed about benefits. The results included some support for a sick leave vesting credit program. The J.B.C. then met, and made a proposal, dated 6 April 1977, to the top management of the Manitoba Telephone System:

> In addition to all other amounts due, an employee, on separation or retirement after completion of any amount of service, shall be entitled to a cash payment in recognition of [sick leave days not used].... For the purposes of determining eligibility for such payment, an employee who dies while in the employ of the system shall be deemed to have retired on the day he or she dies.

In support of the proposal, the J.B.C. attached a memo arguing that:

> -the plan would promote employee "satisfaction" and "morale";
> -the plan would cut down on absenteeism and overtime costs by creating "an incentive for better attendance";
> -there were precedents at other companies, such as Manitoba Hydro;
> -the effectiveness of the plan could be measured by existing tracking methods.

(ii) Second Step: the employer conducts its own study. It proposes a different scheme than that first suggested by the J.B.C.

The employer's personnel department prepared a memo, the "G.H.O. Critique", for consideration by top management. It analyzed the J.B.C. proposal and three alternatives.

The "G.H.O." Critique included a detailed cost analysis of the J.B.C. proposal and the other options. The financial analysis of the options specifically took into account the different "pay-out lists" that might be established. The employer specifically considered these:

> -pay-out in three cases: retirement, early retirement, death;
> -pay-out in an additional case: voluntary separation;
> -pay-out in case of all terminations.

From the employer's point of view, then, the failure to

include "dismissed for just cause" in the plan was no accident. It was a deliberate decision, based on a detailed cost analysis.

Specifically, here is how the "G.H.O. Critique" analyzed the options:

Option # 1: J.B.C. proposal:
-pay-out list: all "terminations". (The "G.H.O. Critique" does not define terminations", but it seems clear that the term includes dismissal for just cause");
-cost estimate, based on 1976: 1239 events that year (terminations of all sorts) would have cost $306,950 in pay-outs.

Option # 2: Manitoba Hydro Sick Leave vesting plan:
-pay-out list: three events only (regular retirement, early retirement, retirement due to disability);
-an employee can accrue up to 6.5 credits/year;
-cost estimate, based on 1976: 44 events, all retirements, would have cost $298,870.

Option # 3: Manitoba government severance allowance:
-pay-out list: three events only (retirement, payment lay-off, death;
-employee accrues a week's pay for each day of service;
-cost to employer, 1976: 49 events, including 44 retirements, 0 lay-offs, 5 deaths, would have cost $216,150.

Option # 4: "Mercer vesting plan".
-pay-out list: four events (retirement, permanent lay off, death, voluntary separation);
-cost to employer, 1976: 993 events, including 44 retirements, 0 layoffs, 5 deaths, 944 voluntary separations, would have cost $182,069.

The "G.H.O. Critique" recommended option # 4. It was the cheapest to the employer. It saved costs partly by imposing a cap of 3.5 credits per year. Including "voluntary separations" was not expected to cost much, as the employees involved usually have only a few credits. Option # 4 also saved costs by limiting pay-outs to four specific events. Comparing options # 1 and #4, it seems there were 246 "terminations" in 1976 that did not involve "retirement, early retirement, death or voluntary separations".

The "G.H.O. Critique" specifically suggested that senior management consider" a variation on option # 4, in which all terminations would be covered. Doing so, cautioned the G.H.O. Critique, would "add some cost". Top management decided to propose Option # 4 with its limited pay-out list.

(iii) Step three: <u>The employer formally proposes its scheme to</u>

the Joint Benefits Committee, which unanimously approves it.

According to an internal memo from the employer's personnel manager, dated 25 July 1977:

-the J.B.C. met on July 22, 1977;
-the personnel department presented option # 4:
-it was unanimously accepted by the J.B.C.

On August 8, 1977, the employer issued an "employee newsletter". It explained that a new sick leave vesting credit program would come into effect, retroactive to June 1, 1977. Here is the third paragraph of the newsletter:

> Sick leave vesting plan.
>
> The Sick Leave Vesting Plan is a program whereby employees who are eligible for the System's Sickness Disability Program will be able to bank and accumulate credits which will result in a cash payment upon superannuated retirement, voluntary separation, permanent lay-off or death.

Later in the newsletter, the following section appears:

> Benefits.
>
> The plan provides for credits which are payable at the employee's rate of pay at time of:
>
> (a) Superannuated Retirement;
> (b) Voluntary Separation;
> (c) Permanent Lay-off;
> (d) Death.

The newsletter is signed by all members of the Joint Benefits Committee, including the representatives of management, and of three different employee unions or associations - including T.E.A.M., the grievor in this case.

In August, 1977, the employer issued a "General Circular" - a statement of company policy - that defined the new sick leave program on similar terms.

At the hearing in this grievance, several of the signatories to the newsletter were called by the employer. One of them was T.E.A.M.'s own member of the 1977 J.B.C., Mr. Campbell. He participated in the discussions that resulted in the sick leave credit vesting program. He signed the August 8 newsletter. Was dismissal for just cause ever directly discussed at the J.B.C.? Mr. Campbell could not recall its being directly discussed. He remembers, though, that the four pay-out events were seen as "fairly positive", except for death, which was at least "not

negative".

Mr. Scoles was an employer representative on the J.B.C. in 1977. His recollection is similar to that of Mr. Campbell. The J.B.C., he said, was focusing on the use of sick leave credits as "positive benefit". They never specifically discussed dismissal for just cause.

The Joint Newsletter of 1977 makes the right to a pay-out strictly dependant on the circumstances in which an employee leaves.

Let me assume, for the sake of argument, that no one at the J.B.C. specifically directed his mind to the consequences of dismissal for just cause. The fact would remain that both the employer and a T.E.A.M. representative agreed on a joint text. Several other unions did as well. It is in the interests of both employers and unions that written agreements be given great respect by arbitrators. Agreed-upon texts can provide a framework of stability and predictability in labour relations.

The text here - the newsletter of August 1977, signed by the employer and the unions - does have a reasonably clear meaning. The list of four pay-out events is an integral part of the definition of the benefit itself. The sentence that initially defines the program mentions the four pay-out events. So does the later explanation of the "benefit".

In other words, as defined by the newsletter, the "benefit" does not exist independently of the pay-out list. The latter is not a merely administrative matter.

The pay-out list implicitly excludes "dismissals for just cause". A text should ordinarily be read as though its authors were careful and consistent. Here, the authors expressly list "voluntary separation" and "permanent lay-off". Including these items obviously raise the question of what happens in case of dismissal. Reading the documents at "face value", the failure to include "dismissal for just cause" must be read as a deliberate exclusion.

Now from the point of view of the top management of M.T.S., the exclusion of "dismissal for just cause" actually was intentional. If the unions had insisted on including "dismissal for just cause", it is possible that M.T.S. would have modified their proposal,or even withdrawn it. The T.E.A.M. representative back in 1977 either understood, or reasonably ought to have understood, the meaning of the joint newsletter: that "dismissal for just cause" was implicitly excluded from the events that resulted in pay-outs.

Actual practice has been consistent with the view that the 1977 policy statements does not require pay-outs to employees who are dismissed for just cause.

The actual practice by the parties to a collective agreement can sometimes be a valid guide to its interpretation. The same principle might apply to an agreed-upon policy statement, like the 1977 newsletter explaining the new sick leave credit vesting program.

In this case, the post-1977 practice of the parties does not alter my interpretation of the original program.

There is some evidence (though some of it is hearsay) that the employer consistently followed the practice of not paying sick leave credits to employees who were dismissed for just cause. Mr. Luce, the Industrial Relations Manager since mid-1989, understood that to be the consistent practice. According to minutes of a May 1990 meeting, Mr. Dooley, a representative of another union, I.B.E.W., apparently objected to the employer's "existing policy" of not paying out sick leave credit monies to dismissed-for-just-cause employees.

It is not clear whether the issue ever arose with respect to an employee represented by T.E.A.M.. Mr. Hales, its business manager, was not specifically aware of a case of a member of his union being dismissed for just cause. At the hearing, however, he did not dispute that the general practice of the employer had been to deny pay-outs to dismissed-for-just-cause employees. In a newsletter to his members, dated May 1990, Mr. Hales stated:

> The system identified it intends to withhold Sick Leave Credits from any employee "terminated for cause". This matter is being disputed as a questionable practice by the unions, even though the practice has been in place since the plans (sic) inception.

The system was altered in 1990.

In March 1990, the Joint Benefits Committee met to consider a new system, which used annual pay-outs. A consensus was reached in favour of it. It was agreed that credits built up from 1977 to 1990 would be "frozen" and paid out at the time of "termination or death". According to the minutes:

> ...Mr. Bob Dooley, I.B.E.W., Business Manger, I.B.E.W. local 435 expressed his opposition to the existing policy of not paying out Sick Leave Vesting credit moneys to employees who are terminated for cause. He requested that the minutes reflect his position on this matter.
>
> A discussion ensued, with the System not in favour of changing

the existing policy at this time. However, Denis Sutton, Vice President Human Resources, stated that this policy would receive further consideration.

At the end of April, 1990 the employer's Director of Industrial Relations sent a letter to the Joint Benefits Committee. It was issued by Mr. Luce, the Director of Industrial Relations:

> In keeping with the March 14 meeting, further consideration was given to paying-out sick leave vesting monies to employees who are terminated for just cause.
>
> The System has decided not to amend its current practice regarding this matter, and therefore, employees who are terminated for just cause will not be eligible to receive a pay-out of sick leave credits.

On May 15, 1990 the employer issued a newsletter and a General Information Circular 206.4, explaining the new annual pay-out system, and the use of the old system for credits acquired from 1977-1990.

Mr. Hales, the Business Manager for T.E.A.M., sent a letter to Mr. Luce. dated 23 May 1990. Mr. Hales stated that:

> -T.E.A.M. "accepted the presentation" in the System's newsletter of 15 May;
>
> -T.E.A.M. requested a letter of understanding that would detail the new system. Failure to provide one would constitute a breach of Article 2.03 (which says that the parties may amend or interpret the Collective Agreement via letters of understanding);
>
> -T.E.A.M. "must formally state that it cannot support any consideration by Manitoba Telephone System to withhold an employee's earned vested credits in the event of such an employee being dismissed for cause".

Mr. Hales appeared at the hearing. He stated that he did not grieve immediately for several reasons. T.E.A.M. was a "young" union. He hoped the employer would change its mind. The union also wanted to study, and discuss at collective bargaining talks, the right of the employer in general to unilaterally change General Circulars.

In June, 1992, the employer sent out revised General Circular 206.4. A footnote was added :

> If the employee was terminated for cause, Sick Vesting Credits are forfeited.

In September 1992, the union brought a policy grievance.

Spurred by the addition of the footnote, the union filed a grievance on 17 September 1992. The union said that the footnote amounted to a "change in policy". As a remedy, it asked the employer to:

> -make pay-outs on separation to all employees;
> -to change its General Circular accordingly;
> -to stop telling certain employees "you better resign, or else we'll fire you and you'll lose your pay-out".

The proper interpretation of the disputed footnote.

Mr. Luce was responsible for General Circular, and he wrote the disputed footnote. He testified that the intent of his footnote was only to affirm existing practice, to make sure it continued to be applied consistently.

In my view, Mr. Luce's footnote must be interpreted in the context of the various agreements and communications between the parties. "Forfeiting credits" does not mean that an employee has lost an existing right to money. An employee who steadily abstains from using sick leave does not steadily build up a right to extra money. The right is only established fully when other essential conditions are met.

Under the 1977-1990 system, an essential condition was to leave a job for the "right" reason. Under the new system, the essential conditions are: complete a calendar year's worth of service; or leave part-way through a calendar year for the "right" reason.

Do the Demands of Fairness Require the addition of "dismissal for just cause" to the pay-out list?

Article 17.02 of the Collective Agreement states that:

> The system has the right to make and alter from time to time, rules and regulations to be observed by employees provided that such rules and regulations do not violate or conflict with the provisions of this agreement.

Article 17.03 states that:

> In exercising its Corporate Rights in administering this Agreement, the System shall act reasonably, fairly and in good faith.

Does article 17.02 actually apply here? Maybe not. The article arguably refers to directing employees, not creating benefits for them. Article 17.03, however, is more general. It can apply to the

creation of a new benefits program.

As I have tried to emphasize in some other awards, a clause like 17.03 must be treated as an integral and enforceable part of a Collective Agreement. It has the same legal status as any other clause. The duty to act "reasonably, fairly and in good faith" must be taken seriously by both employers and arbitrators.

Let me present a hypothetical case, based in part on representations by T.E.A.M.'s counsel:

> Suppose an employee had a perfect record of attendance from 1977 to 1990. He came to work every day, despite some bona fide health problems, such as headaches, colds and back pains. In so doing, the employee was enticed by the prospect of making some extra money under the sick leave credit vesting program. The employee's supervisor regularly reminded employees of the prospect of making some extra money through exceptional attendance. The employee was diligent, competent and respected by the employer, and it never occurred to the employee that he might one day be fired for just cause. But around 1990, due to stress related to health problems in his family, the employee became increasingly unable to perform capably, and eventually was dismissed for just cause. The employer denies him any pay-out at all for sick leave credits.

The hypothetical case does give me concerns about fairness. But it does not enable me to rewrite the system that has been established, and add the entire category of "dismissals for just cause". Such a step would be unwarranted for two main reasons:

First, it is a weighty consideration that a T.E.A.M. representative agreed to the 1977-1990 system. This case might be different if the employer had acted unilaterally in creating the sick leave credit vesting program. It was the product of negotiations, however, among the employer, T.E.A.M. and other unions.An arbitrator must be somewhat reluctant to question the "fairness" of a system that has been freely negotiated.

While T.E.A.M. generally agreed to the 1990 system, it certainly did object to the ongoing denial of pay-outs to dismissed employees. The new system, however, is actually more favourable with respect to the "fairness" issue raised by T.E.A.M.. An employee who is dismissed in 1993 does not "lose" credits built up in 1990, 1991 and 1992. The employee will have already received a cheque for those years. The "worst case scenario" is that the employee will be fired late in the year, and forego a pay-out of 3.5 days worth of pay. The 1990 system uses essentially the same "pay-out" list as the original one, and T.E.A.M.'s original consent to that list remains relevant.

Second, I do not have a solid evidentiary basis for saying

that the 1977-1990 system will cause unfairness in many, let alone most, cases of unjust dismissal. Perhaps most dismissed employees have worked only a few years in the system, and therefore have very few credits. Perhaps employees were not, in practice, significantly influenced by the prospect of gaining sick leave credits. Maybe the average employee thought "I feel sick today, and I'm not struggling into work just so I can get an extra half-day's pay in twenty years when I retire".

In some situations, an arbitrator might be able to say "the employer's policy is generally consistent with the Collective Agreement; but it will definitely be unfair in a certain class of cases, and is invalid to that extent". With the employer's policy here, I am not able to confidently identify a well-defined class of cases where the policy would work unfairly. The mere fact that a dismissed employee might lose a lot of credits would not, in isolation, convince me that a legal injustice is taking place. I would have to consider a variety of questions; for example, why the employee was dismissed, and whether the employee's attendance was actually influenced by the existence of the sick leave credit vesting plan. I feel unable to make a considered judgment about fairness without having a real and detailed set of facts to consider.

In all the circumstances, then, I must conclude that the 1977-1990 system, as a general policy, did not violate the employer's duty to act fairly. It can still apply to pay-outs for employees who retire after 1990, but who have credits based on attendance from 1977-1990.

Similarly, the 1990 system does not, as a policy, run afoul of the employer's duty to administer the Collective Agreement reasonably, fairly and in good faith.

Let me return to the hypothetical case presented a little earlier. Might Article 17.03 give that employee an enforceable claim to a pay-out, even though the employee has no right to a pay-out under the terms of the policy itself? I do not think it would be proper for me to hazard a guess. I simply want to make it clear that I am not ruling out the possibility that in some individual cases, Article 17.03 might require the employer to make a pay-out even though the terms of the sick leave credit policy do not require it.

With respect to credits built up since 1990, an established employee who is dismissed for just cause will "lose", at most, 3.5 days worth of pay. The maximum "stakes" are much less than under the 1977-1990 system. So it might be more difficult for employees to establish a right to a pay-out under the "fairness" requirement of article 17.03. Perhaps, though, the right could be established in some very exceptional cases. Again, I do not want to decide hypothetical cases.

My task is to pass judgment on several policy statements. My conclusion is that they do not violate the Collective Agreement. I am not prepared to decide, one way or the other, whether employer's duty to act fairly might, in some individual cases of sick leave credit pay-outs, require it to make an exception to its rules. If that issue is to be tested, it should be in the context of a specific fact situation.

The General Principle that Employers Cannot "Fine" employees as a disciplinary measure: application to credits built up from 1977-1990.

Counsel for the union, in his very able presentation, drew my attention to a well-settled principle that is summarized in Brown and Beatty, Canadian Labour Arbitrations (3rd edition), s. 8:1420:

> To the extent that entitlement to the various wage and fringe benefits must be founded on the strict terms of the collective agreement, it follows that once entitlement is established, or wages earned, management may not unilaterally withhold those benefits other than as part of a valid change in the method of payment....
>
> Similarly, as noted earlier, arbitrators have said that unless it is explicitly authorized by the terms of the agreement or some statutory instrument to do so, or unless the deduction is compensatory in nature, management may not impose monetary penalties or fines on an employee as a matter of disciplinary sanction.

The principle does not apply to this case, because the monetary "entitlement" does not steadily accumulate as an employee abstains from using sick leave; other essential conditions must be met before there is a right to a pay-out.

An arbitrator's mandate under the Labour Relations s. 121(1), is to "have regard to the real substance of the matter in dispute between the parties", rather than being confined to a "strict legal interpretation". In some cases, an arbitrator might be justified in cutting through the formal trappings surrounding a "potential benefit" and concluding that employees routinely and reasonably regard it as an entitlement. But in this case:

- the parties agreed to a policy statement in 1977;
- the change offered an additional benefit to some employees, and did not damage any existing employee rights;
- the language of the policy statement indicates that the right to a pay-out depends on strict conditions;
- the very limited evidence I heard about "workplace realities" did not establish that employees generally had a moral right to expect more than the policy statement allows.

Implications of the Payment of Wages Act on Credits Built up from 1977-1990.

The Payment of Wages Act, R.S.M. 1987, c P31, section 3, says that employees who leave their employment must be paid all their wages. The term "wages" includes "salary, commission or any compensation for labour or services by time, piece or otherwise..." As I interpret the facts of this case, the Act does not apply. The right to "compensation" for outstanding attendance is not a right that steadily accumulates. There is no right to a cash payment until certain other conditions are met - such as leaving a job for the "right" reason.

Timeliness of this Grievance.

In view of the conclusions I have reached on the merits of this case, there is no need for me to deal with the employer's complaint that this grievance was not brought in a timely manner.

Conclusion.

The employer did not violate the Collective Agreement by adding the disputed footnote to its 1992 General Circular. Since its inception, the employer's policy statements have implicitly excluded pay-outs to employees who are dismissed for just cause. On the facts of this case, the policy statements by the employer do not violate its duty to administer the Collective Agreement "fairly, reasonably and in good faith".

There may - or may not - be individual cases where the employer must make an exception to its rules about sick leave credit pay-outs. Perhaps there are some special cases where the "duty of fairness" requires a pay-out to a dimissed employee, even though no pay-out is required as a matter of standard policy. The matter would have to be tested in the context of a particular fact situation.

My task is confined to passing legal judgment on the validity of the employer's policy statements. My conclusion is that the grievance must be denied.

Bryan Schwartz
17 May 1993