

Date: 20071214

File: 166-02-36367

Citation: 2006 PSLRB 136



*Public Service
Staff Relations Act*

Before an adjudicator

BETWEEN

SOHAIL ALFRED UMAR-KHITAB

Grievor

and

**TREASURY BOARD
(Department of Social Development)**

Employer

Indexed as

Umar-Khitab v. Treasury Board (Department of Social Development)

In the matter of a grievance referred to adjudication pursuant to section 92 of the
Public Service Staff Relations Act

REASONS FOR DECISION

Before: Barry D. Done, adjudicator

For the Grievor: Dan Rafferty, Professional Institute of the Public Service of
Canada

For the Employer: Andrew Unger, Treasury Board Secretariat

Heard at Kingston, Ontario,
October 25, 2006.

I. Grievance referred to adjudication

[1] Sohail Alfred Umar-Khitab, the grievor, is employed as a microcomputer specialist with the Department of Social Development in Kingston, Ontario. His position is classified at the CS-01 group and level. The collective agreement applicable to the facts of this case is the one signed by the Treasury Board and the Professional Institute of the Public Service of Canada on June 3, 2003, for the Computer Systems Group bargaining unit.

[2] On August 5, 2004, Dr. Umar-Khitab submitted the following grievance:

...

*This is a National Joint Council grievance (Travel Directive
Para 3.3.5 - Dependant Care)*

*I grieve the refusal of the employer to reimburse me for child
care expenses in the amount of \$240 incurred as a result of
my travel on government business from 6th to 8th July 2004.
During this period of time my wife was out of the country on
work related business.*

...

*I am to be re-imbursed my child care expenses in the amount
of \$240*

...

[3] The *Travel Directive* to which the grievance refers is a National Joint Council (NJC) agreement incorporated in the collective agreement pursuant to clause 34.03 of the collective agreement, which reads as follows:

34.03 *The following directives, policies or regulations, as
amended from time to time by NJC recommendation and
which have been approved by the Treasury Board of
Canada, form part of this Collective Agreement:*

...

*(2) Government Travel and Living Accommodations
Directive*

...

[4] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35.

II. Summary of the evidence

[5] The parties submitted the following “Agreed Statement of Facts” dated October 25, 2006 (Exhibit 1):

Agreed Statement of Facts

Dr. Sohail Umar-Khitab (PSLRB File No. 166-02-36367)

- 1. The griever, Dr. Umar-Khitab, was at all material times employed as a CS-01 Computer Administrator with Social Development Canada (now Service Canada) in Kingston, Ontario.*
- 2. The griever is covered by the Computer Systems Collective Agreement (expiry date December 21, 2004).*
- 3. His wife was employed on contract by a Montessori school in Kingston until the end of the 2003-04 school year.*
- 4. During the summer of 2004, Mrs. Umar-Khitab was required to travel to Pakistan on a work-related conference for which she was both a presenter and a coordinator and which had been planned since January, 2004.*
- 5. The Umar-Khitabs have two sons, who were thirteen (13) and nine (9) years old, respectively, in the summer of 2004. They resided full time at the residence of the griever and his wife.*
- 6. During his wife's absence, the griever was responsible for the care of his two sons. He was able to call upon his parents to take care of the children for the greater part of that time while he was at work.*
- 7. The griever was required to travel on government business from July 6 to July 8, 2004. His parents were unavailable to care for his sons on these days.*
- 8. During his absence, he was able to place his sons in a day care facility operated by the wife of a cousin. The cost was \$40 per day per child, for a total of \$240 for the 3 days.*

9. *Following his return from his business trip, the grievor submitted an expense claim for \$240, accompanied by a receipt.*

10. *The claim was denied, on the basis that he was not considered to be a "sole caregiver" for the purposes of Section 3.3.5 of the Travel Directive, which reads as follows:*

The employee who is required to travel on government business shall be reimbursed actual and reasonable dependant care expenses up to a daily maximum of \$35 Canadian, per household, with a declaration, or up to a daily maximum of \$75 Canadian, per household, with a receipt when:

(a) the employee is the sole caregiver of a dependant who is under 18 years of age or has a mental or physical disability; or

(b) two federal employees living in the same household are the sole caregivers of a dependant who is under 18 years of age or has a mental or physical disability and both employees are required to travel on government business at the same time.

Dependant care allowance shall apply only for expenses that are incurred as a result of travelling and are additional to expenses the employee would incur when not travelling.

11. *The parties reserve the right to adduce such further evidence, oral or documentary, as may be required*

...

[Sic throughout]

[6] Sharon Tuckey was called as a witness by the employer. Ms. Tuckey has been the Senior Program and Travel Policy Analyst at the Treasury Board since May 4, 1998. Included in her duties are the responsibilities to respond to enquiries on the intent of the *Travel Directive* (Exhibit 2), to interpret that directive and to negotiate its provisions as a member of the NJC Travel Committee.

[7] Ms. Tuckey explained that the *Travel Directive* came into force on October 1, 2002, and still applied in July 2004. It is a part of the collective agreement. She commented briefly on two of the six principles that guide managers in achieving fair, reasonable and modern travel practices across the public service. Those two principles are flexibility and valuing people.

[8] Ms. Tuckey next commented on clause 3.3.5, “Dependant Care”, of the *Travel Directive*. This clause was a new provision that replaced the provision for child care for single parents in the previous directive. The language in clause 3.3.5 is consistent with the principles of fairness and valuing people. According to Ms. Tuckey the expression “sole caregiver” in clause 3.3.5 refers to “the only adult in a household who is both financially and mentally capable of caring for a dependant”. The expression “sole caregiver” replaced the word “parent” from the previous directive to include other situations. If one spouse is away, the remaining spouse does not become, for the purpose of the *Travel Directive*, a sole caregiver.

[9] Ms. Tuckey explained that the intent of clause 3.3.5 of the *Travel Directive* is to financially cover the costs of a “sole caregiver” where there is only one income in the household and where this caregiver already incurs the cost of providing daycare and now must assume the additional cost of providing overnight care.

[10] Ms. Tuckey was asked what the difference was between Dr. Umar-Khitab’s factual situation and one involving someone who is divorced or widowed, as the cost would be the same in either case. Her reply was that, in the grievor’s case, there were two adults and two incomes, and that perhaps the other spouse had coverage for this situation - double-dipping was a concern. The difference in the grievor’s case was that there were two incomes.

[11] Ms. Tuckey concluded her testimony by saying that, in any case, the *Travel Directive* provides a safety net for expenses not otherwise covered by the inclusion of an incidental allowance of \$17.30 per day.

III. Summary of the arguments

A. For the grievor

[12] The grievor submitted that the grievance asks for a reimbursement of a total of \$240.00 for three days (July 6 to 8, 2004). He acknowledged that the maximum allowance for three days was \$225.00. However, he observed that the issue was the entitlement and not the specific amount.

[13] The operative section of the *Travel Directive* is clause 3.3.5. The parties agree that Dr. Umar-Khitab’s children meet the *Travel Directive*’s definition of “dependant” (“Agreed Statement of Facts”, at point 5):

5. *The Umar-Khitabs have two sons, who were thirteen (13) and nine (9) years old, respectively, in the summer of 2004. They resided full time at the residence of the griever and his wife.*

[14] The phrase “sole caregiver” is not defined in the *Travel Directive*, nor is any other definition of that phrase imported by reference. Its meaning must, then, be interpreted by context and circumstances. The preamble of the *Travel Directive* and its guiding principles, set the tone of the *Travel Directive*: respect, fairness, equity and reasonableness with respect to employees’ individual needs. As well, the “Purpose and scope” section of the *Travel Directive* deals with ensuring fair treatment.

[15] The intent and the spirit of the *Travel Directive* are found in its principles and in its “Purpose and scope” section.

[16] There is a common thread in replies given at each level of the grievance process: the *Travel Directive* does not apply to the grievor, whose spouse was away for the summer, because he is not a single parent. The single-parent criterion is objectionable, as it ignores the principles, the purpose and the intent of the *Travel Directive*. Clause 33.01 of the collective agreement states that grievances arising out of the interpretation or application of an NJC agreement will be processed in accordance with section 14.0 of the *NJC By-Laws*. Clause 14.1.2 of those bylaws requires that grievances “... shall be decided on the basis of the intent of the directive or policy being grieved.” There is no reason to determine that a married person whose spouse is unavailable is less worthy of reimbursement than a single parent.

[17] The *Travel Directive* does not support any of the replies given in the grievance process. There is no explanation of how the employer went from the concept of “sole caregiver” to that of single parent. The meaning of the phrase “sole caregiver” can only be determined by looking at individual circumstances. In the grievor’s situation, his wife was out of the country and he was, thus, the same as a single parent during that time. As he required dependant care for three days while on government travel, why should he not be reimbursed?

[18] The grievor argued that no adjudication decisions have dealt with the concept of “sole caregiver” since the coming into force of the *Travel Directive* in October 2002. However, he submitted three decisions of the NJC on this new language, one of which allowed a grievance on the basis of involuntary geographical separation.

B. For the employer

[19] The employer agreed that the dependant-care provisions of the *Travel Directive* must be interpreted within both the spirit and the intent of the directive, but added that each provision has its own spirit. The provisions in clause 3.3.5 are to ensure that a “sole caregiver” does not face financial barriers to career opportunities and advancement that other public servants do not face. Clause 3.3.5 is designed for single-income families/households when one caregiver must travel.

[20] The provisions in clause 3.3.5 of the *Travel Directive* are very restrictive and apply in limited circumstances. Although subclause 3.3.5(b) does not apply in the case at hand, it provides a context for interpretation:

(b) two federal employees living in the same household are the sole caregivers of a dependant who is under 18 years of age or has a mental or physical disability and both employees are required to travel on government business at the same time.

This scenario applies only when two spouses, both of whom are public servants, are required to travel at the same time. It does not apply when one spouse is unavailable for reasons other than travel.

[21] The grievor claims the reimbursement of \$40.00 per child per day while his children attended a daycare facility. Daycare is needed during the day. If the grievor was not required to travel, he would normally have incurred these expenses while at work. In this regard, the last sentence of clause 3.3.5 of the *Travel Directive* applies to his situation:

Dependant care allowance shall apply only for expenses that are incurred as a result of travelling and are additional to expenses the employee would incur when not travelling.

As the grievor would have incurred some portion of these expenses in any case, that portion does not fall within the scope of clause 3.3.5. The employer argued that the only NJC decision upholding a grievance on the meaning of “sole caregiver” is clearly distinguishable from the grievor’s facts. In that case, the two spouses each maintained separate living quarters, incurring duplicate expenses. In this case, there is no evidence that the grievor’s wife established her own residence or paid for separate living quarters. As well, there is no evidence that the grievor’s wife established any financial interest in a property in Pakistan, as required by the *Income Tax Act*, R.S.C., 1985, c. 1

(5th Supp.), as amended. The employer submitted that the grievor's circumstances did not meet the expanded definition of "sole caregiver" found in the NJC communiqué of August 2, 2006, on dependant-care expenses:

. . .

As a guide to the intent of the Travel Directive "dependant care" clauses, the Executive Committee agreed in the short term that the expression "sole caregiver" may be interpreted to include individuals who are involuntarily separated as defined by the Canada Revenue Agency (Income Tax):

Definition - involuntary separation:

"Although you have shown your marital status on your return as married or living in common law, you and your spouse may have occupied principal residences for part or all of the year for medical, educational or business reasons."

. . .

C. Grievor's rebuttal arguments

[22] The grievor replied that he is not claiming an involuntary separation under the *Income Tax Act*, and that the notion of dual versus single income is a red herring, not contemplated by the *Travel Directive*.

IV. Reasons

[23] The *Travel Directive*, at clause 3.3.5, establishes the five elements that one must meet to be reimbursed dependant-care expenses.

[24] The first element relates to the status of "employee". This term is defined in the definitions section of the *Travel Directive* as "... a person employed in the Federal Public Service." The parties agreed that Dr. Umar-Khitab meets this definition ("Agreed Statement of Facts", at point 1):

1. *The grievor [sic], Dr. Umar-Khitab, was at all material times employed as a CS-01 Computer Administrator with Social Development Canada (now Service Canada) in Kingston, Ontario.*

[25] The second element relates to the requirement to travel on government business. Again, the parties agreed that this element has been met (“Agreed Statement of Facts”, at point 7): “The grievor [sic] was required to travel on government business from July 6 to July 8, 2004. . . .”

[26] A third element relates to the status of dependant. The word “dependant” is defined in the *Travel Directive* as follows:

Dependant (personne à charge) - *a person who resides full-time with the employee at the employee's residence and is*

. . .

(b) the biological child, stepchild, adopted child including a child adopted by aboriginal people under the Custom Adoption Practice, or legal ward of that employee or of the employee's spouse who is both dependent on the employee for support and

(i) under 18 years of age, or

. . .

[27] The parties agreed that the grievor's sons are dependants (“Agreed Statement of Facts”, at point 5):

5. *The Umar-Khitabs have two sons, who were thirteen (13) and nine (9) years old, respectively, in the summer of 2004. They resided full time at the residence of the grievor [sic] and his wife.*

[28] Whether Dr. Umar-Khitab meets the remaining elements of clause 3.3.5 of the *Travel Directive* is not as clear, and I must, therefore, answer the following questions:

- a) From July 6 to July 8, 2004, was the grievor a “sole caregiver”?
- b) Are the expenses he incurred on those days expenses covered by the *Travel Directive*, or, in other words, were the expenses incurred as a result of travelling and additional to expenses he would have incurred had he not been travelling?

A. “Sole caregiver”

[29] While much hinges on the meaning of the phrase “sole caregiver”, the *Travel Directive* itself does not define it. The term “caregiver” does not appear to be the problem, and I give it its plain and ordinary meaning. It has not been suggested to me that Dr. Umar-Khitab did not provide care to his two sons during the summer of 2004. Indeed, the parties agreed (“Agreed Statement of Facts”, at points 4 to 6) that: the grievor’s wife was out of the country during the summer of 2004; his sons were 13 and 9 years old at the time; they resided with the grievor; and, during his wife’s absence, the grievor was responsible for the care of his two sons.

[30] The difficulty in applying clause 3.3.5 of the *Travel Directive* is the adjective “sole” that qualifies the word “caregiver”. As the grievor’s claim is for reimbursement of dependant-care expenses for the period from July 6 to July 8, 2004, his burden of proof is to demonstrate, on a balance of probabilities, that during that period he was the “sole caregiver” of his two sons.

[31] In the absence of a definition of the phrase in dispute, the traditional next step is to look at the *Travel Directive* as a whole to glean its meaning. However, this provides no assistance in this case. The *New Shorter Oxford English Dictionary* defines the word “sole” as follows: “...unaccompanied by another or others; alone; solitary . . .; being or consisting of one person only; one and only; single” There is no dispute that in the norm the grievor is one of two caregivers in his home - the other is his wife. However, the parties agreed that the summer of 2004 was not the norm (“Agreed Statement of Facts”, at point 4), as “... Mrs. Umar-Khitab was required to travel to Pakistan on a work-related conference”

[32] The parties also agreed that the grievor’s parents took care of his sons for the greater part of the time that the grievor was at work, but were unavailable to care for his sons from July 6 to 8, 2004, inclusive (“Agreed Statement of Facts”, at points 6 and 7). Even when they were available, their availability was only “... while [the grievor] was at work.” This begets the question that if the grievor was not a “sole caregiver” at that time, using Ms. Tuckey’s definition of “the only adult in a household who is both financially and mentally capable of caring for a dependant”, what other caregiver was there? The grievor’s wife was not at home and could not provide care to their sons. The parties agreed that she was travelling to Pakistan at that time (“Agreed Statement

of Facts”, at point 4). I have no evidence that she was financially capable of caring for a dependant from another country by employing someone as a caregiver.

[33] I agree with the grievor’s submission that whether or not one is a “sole caregiver” is a matter of fact to be determined in the individual circumstances of each case. One does not, in my opinion, have to be a “sole caregiver” for all time and in all circumstances to be entitled to be reimbursed dependant-care expenses under the *Travel Directive*. It is not a static but a dynamic role, and the fact that the grievor is married, although a consideration, is not an automatic bar to entitlement. While I do not agree with the grievor that the moment one spouse becomes unavailable the other spouse becomes a “sole caregiver”, there are circumstances in which one spouse can become a “sole caregiver”. I note that the NJC came to the same conclusion in August 2006 when it interpreted the phrase “sole caregiver” to include “. . . individuals who are involuntarily separated”

[34] The employer is asking me to make a distinction between single-income families/households and dual-income families/households. I do not see any support in the *Travel Directive* for any such distinction. Surely, if the NJC had intended that dependant-care expenses would not be reimbursed to dual-income families, it would have been easy to clearly provide for it in the *Travel Directive*. Yet, Ms. Tuckey said that the difference between the grievor and a divorced or widowed employee is that the grievor’s household had two incomes.

[35] Turning to the grievor’s point, with which the employer unhesitatingly agreed, grievances relating to the interpretation or application of an NJC agreement are to be determined on the basis of the intent of that agreement. The intent of the *Travel Directive* is clearly stated in its preamble. Words such as: “fair”, “reasonable”, “respect the duty to accommodate and best respond to employees’ needs”, “sensitive”, “appropriate” and “latitude” strongly argue in favour of a broad, liberal, inclusive interpretation of its provisions, as opposed to a narrow, exclusive interpretation. It seems to me that only in adopting such an approach could one achieve the intent and purpose of the *Travel Directive*, which is to be fair, sensitive, reasonable and supportive. I note that the *Travel Directive*’s stated principle of trust is aimed at increasing “. . . the amount of discretion and latitude for employees and managers to act in a fair and reasonable manner.”

[36] The NJC clearly decided in the fall of 2002 to increase managers' discretion and latitude, not to restrict or diminish their latitude. This change in approach is echoed in many ways, including:

- a) an NJC decision of April 28, 2005, which deemed an employee to be a "sole caregiver" by virtue of the employee's spouse residing eight to nine hours away from her home for a period of less than two years;
- b) the expansion of the definition of "sole caregiver" in August 2006 to include those involuntarily separated, as defined by the Canada Revenue Agency;
- c) the change from the word "parent" to "sole caregiver" to reflect modern family situations, such as caring for a parent; and
- d) as previously mentioned, the repeated use of such adjectives as "fair", "reasonable" and "supportive" throughout the "Principles" section of the *Travel Directive*.

These examples serve not only to lend strong support for construing the provisions in a broad, liberal sense but also for the fact that the role of "sole caregiver" is a dynamic role, in flux, and changing as new situations present themselves.

[37] For these reasons, I find that the grievor was, at least during the three days for which he claimed expenses for the care of his sons, a "sole caregiver" for purposes of clause 3.3.5 of the *Travel Directive*.

B. Were the expenses claimed incurred as a result of travel?

[38] As the employer pointed out, some of the restrictions in the *Travel Directive* do not address entitlement but relate to quantum. In other words, having determined that Dr. Umar-Khitab is entitled to be reimbursed for his dependant-care expenses, it remains to be determined what expenses are covered by clause 3.3.5 of the *Travel Directive*, which concludes with these words:

...

Dependant care allowance shall apply only for expenses that are incurred as a result of travelling and are additional to expenses the employee would incur when not travelling.

[39] The parties agreed that the grievor's parents, upon whom he had been able to rely for the greater part of his wife's absence, were not available to provide care for his two sons from July 6 to July 8, 2004 ("Agreed Statement of Facts", at point 7). As his wife was out of the country on those days, the grievor would have had expenses for dependant care even had there been no requirement to travel on government business. The only expenses that were "additional" expenses, as contemplated by the *Travel Directive*, are expenses for dependant care that began after the grievor's working hours each day and ended at the start of the next business day. No evidence was presented at the hearing that would assist me in making this calculation and, as the parties agreed at the hearing, I leave it to them to determine the appropriate amount. I will remain seized for a period of 90 days in the event the parties cannot agree on the amount of the reimbursement of dependant-care expenses to which the grievor is entitled, given the daily maximum of \$75.00 when a receipt is, as in this case, provided.

[40] For all of the above reasons, I make the following order:

(The Order appears on the next page)

V. Order

[41] I order the employer to reimburse the grievor the actual and reasonable dependant-care expenses that he incurred as a result of travelling from July 6 to 8, 2004.

[42] I retain jurisdiction for a period of 90 days from the date of this decision to resolve any issue related to the interpretation or application of this order.

December 14, 2006.

**Barry D. Done,
adjudicator**