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Citation: **2007 PSLRB 16**

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

LESLIE GORDON HICKS

Grievor

and

TREASURY BOARD
(Department of Human Resources and Skills Development)

Employer

EXPEDITED ADJUDICATION DECISION

Before: Ian R. Mackenzie, adjudicator

For the Grievor: Yves Rochon, Professional Institute of the Public Service of Canada

For the Employer: Richard Arulpooranam, Human Resources and Social Development Canada

Note: The parties have agreed to deal with the grievance by way of expedited adjudication. The decision is final and binding on the parties and cannot constitute a precedent or be referred for judicial review to the Federal Court.

Heard at Ottawa, Ontario,
January 26, 2007.

[1] Leslie Gordon Hicks grieved the denial of a request for Temporary Dual Residence Assistance (TDRA) under the National Joint Council (NJC) Relocation Directive ("the Directive"). Mr. Hicks filed his grievance on November 29, 2004, and referred this matter to adjudication on July 18, 2006. The parties have agreed that this grievance will be dealt with by way of expedited adjudication.

[2] 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.

[3] The parties provided an agreed statement of facts and an agreed book of documents. The agreed facts are as follows:

. . .

> *[1] Before the relocation, Mr. Hicks was a Principal Advisor, EN-ENG-05 for the Coal Mining Safety Commission in Sydney, Nova Scotia. He spent 20 years of his career in the federally regulated underground coal mining industry in Cape Breton, Nova Scotia.*
>
> *[2] In 1999, the federal government announced a review of coal mining operation in Cape Breton. Mr. Hicks was informed that his position would disappear at the Coal Mining Safety Commission since the coal mines were closing.*
>
> *[3] Mr. Hicks contacted Mr. Gerry Blanchard, Director General of Labour Operations at HRSDC to inquire if a job would be available for him. Mr. Blanchard reassured him that he would be able to find a position for him in NHQ.*
>
> *[4] After those events, Mr. Hicks put his house for sale prior to receiving confirmation of relocation. The reason for this action was that the house market was down as a result of the closing of the coal mines. The house was sold on April 17, 2001.*
>
> *[5] On May 17, 2001, the closing of the last coal mine was confirmed. On the same day, Mr. Hicks received confirmation from Mr. Blanchard that he would have a position for him at NHQ.*
>
> *[6] In June 2001, Mr. Hicks contacted the department by e-mail asking questions and seeking clarification on various*

issues related to relocation expenses. He received a response on July 4, 2001 from Germain Bouchard, Chief Expenditure Operations in FAS.

[7] In the summer of 2001, Mr. Hicks came to Ottawa to meet with H.R. and seek answers to his questions.

[8] Mr. Blanchard agreed to the teleworking arrangement and that it should be revised in September 2006.

*[9] On January 14, 2002, Mr. Hicks received a letter of offer/deployment to Ottawa. He inserted clauses related to the teleworking arrangement (*the work may be performed from Sydney, NS. This will be re-evaluated in September 2002) *and signed the amended offer on February 6, 2002.*

[10] On February 18, 2002, a letter from Warren Edmondson was sent to Mr. Hicks (tab 6) to inform him of the condition of his deployment and with a revised letter of deployment. In his letter, Mr. Edmondson explains to Mr. Hicks that if he accepts the offer, his deployment would be effective March 4, 2002. Also, Management agreed that he would be able to work from the Sydney office from March 4, 2002 to August 30, 2002, however, it was decided that the teleworking arrangement would not continue after August 30, 2002. Mr. Hicks was expected to report to the Hull Office on September 3, 2002 to take up the duties of the position.

[11] On February 21, Mr. Hicks accepted by e-mail the revised offer of deployment. On February 27, 2002, Mr. Hicks received a letter confirming is deployment as of March 4, 2002.

[12] Leslie Gordon Hicks was deployed as a full time indeterminate Industrial Safety Engineer, EN-ENG-05 for Human Resources and Social Development Canada, Labour Branch, Occupational Health and Safety and Injury Compensation Division located in Ottawa, Ontario [Gatineau, QC].

[13] Mr. Hicks started to work in NHQ on September 16, 2002 and he officially relocated on October 17, 2002. His family did not relocate at that time due [to] *his mother in law's serious health problems.*

[14] On September 17, 2003, Mr. Hicks was informed by Accounting Services/Relocation Unit that his relocation file would be closed on October 17, 2004, ie. 2 years following his relocation.

[15] At the end of August 2004, Mr. Hicks' family completed their relocation to Ottawa.

[16] On September 22, 2004, Mr. Hicks filed his claim for Temporary Dual Residence Assistance (TDRA) in the amount of 37 667$. Mr. Hicks explained on his claim that the reason for claiming TDRA is because his wife had to stay in Sydney, NS to take care of his mother in law that could not be moved at the time of the relocation and because his son was attending community college in Sydney. For his mother in law he is requesting 12 months (21 247$) of TDRA and for his son 9 months (16 420$).

[17] On November 23, 2004, Mr. Hicks claim for TDRA was denied.

[18] On November 29, 2004, Mr. Hicks lodged a grievance (HRSDC-NJC-HQ-2004-0031) against management regarding the denial of his claim for Temporary Dual Residence Assistance (TDRA) expenses. Management received the grievance on December 2, 2004.

*[19] The grievance was heard at the first level on January 14, 2005, by Mr. Peter Brander. The decision was received by Mr. Hicks on February 10, 2005. The grievance was denied on the basis that Mr. Hicks was "*not eligible for the Temporary Dual Residence Assistance since he was a renter and not the owner of a house in Sydney"*.*

[20] The grievance was heard at the second level by Ms. Marie-Michèle Robichaud. The decision was received by Mr. Hicks on, June 17, 2005. The grievance was denied on the basis of:

- *His claim for his mother in-law could not be approved as she was not living with him in the principal residence and, as such cannot be considered a dependent"*
- *With regards to the claim for his son, it was denied because he started his course after the relocation began*

[21] The grievance was heard at the third level on March 15, 2006 in front of the Relocation Committee of the National Joint Council. The grievance was denied for the same reasons as the second level response.

[22] On July 18, 2006, Mr. Hicks referred his grievance to adjudication.

. . .

[*Sic* throughout]

[4] The Relocation Directive (signed in 1993 and effective until March 31, 2003) defines "dependant" as:

> *. . . any person who lives with the employee . . . and is either the employee's spouse, a person for whom the employee can claim a personal exemption under the* Income Tax Act, *or an employee's (or a spouse's) unmarried child, step-child, adopted child or legal ward who cannot be claimed as an income tax deduction but is in full-time attendance at school. A family member who is permanently residing with the employee, but who is precluded from qualifying as a dependent under the* Income Tax Act *because the family member receives a pension, shall also be considered as a dependent under this directive.*

[5] The Relocation Directive sets out the criteria for the granting of a TDRA:

> *2.11.2 Financial assistance towards living expenses can be obtained in situations when two residences are temporarily maintained during the initial stages of a relocation, i.e.:*
>
> *(a) when one of the residences is occupied by dependant(s) (a term which includes a spouse):*
>
> *- for reasons of temporary illness, or*
>
> *-in order for a dependant(s) (who has been living with the employee prior to relocation) to attend an educational institution in order to avoid disruption of the school term . . .*
>
> . . .

Submissions for the grievor

[6] The grievor recognized that the claims for the TDRA were not cumulative, and that his claim could only be sustained for either the 12-month claim (relating to his mother-in-law) or the 9-month claim (relating to his son's attendance at college).

[7] The reasons given by the employer for denying the TDRA claim were ill-founded and unjustifiably harsh. Both the Department of Human Resources and Skills Development ("the Department") and the NJC lost sight of the purpose and scope of the Relocation Directive. The Department's responses also demonstrated a complete failure to recognize Mr. Hicks' family situation.

[8] The grievor's mother-in-law should be considered as a dependant. It was not possible for her to live with the family, given her health condition. Mr. Hicks' spouse was the only family member who could care for her mother. Although the mother-in-law does not satisfy the exact definition of a dependant contained in the Relocation Directive (see para 4), she was very much a family member and was dependent on her daughter. She would have moved in with Mr. Hicks' family but their residence was not fit for her medical restrictions. To rule that she was not a dependant would be to let her health condition interfere with a logical and caring assessment of the situation. The definition of a dependant should not exclude persons whose disability prevents them from living at the employee's home. Mr. Hicks also referred me to the purpose and scope clause of the Directive:

> *. . . in any relocation, the aim shall be to relocate the employee in the most efficient fashion, that is, at the most reasonable cost to the public yet having a minimum detrimental effect on the transferred employee and family.*

[9] There is no dispute that Mr. Hicks' son fits the definition of a dependant and was attending college during the period of the relocation. It was agreed between the employee and the employer that the period for the relocation would be exactly two years, not more. The son was considering college and decided to stay in Sydney until the completion of the relocation. The Directive does not state that college attendance cannot start after the relocation begins. The employer's interpretation amounts to rewriting the agreement.

[10] The claim for the TDRA is also supported on the basis of the situation faced by Mr. Hicks' spouse. Mrs. Hicks meets the definition of a dependant. One reason for her staying in Sydney was the temporary illness of a family member; another reason was that her son was attending college. Clause 2.11.2 of the Directive does not specify that the dependant must be temporarily ill.

[11] It was clear that Mr. Hicks was required to maintain two households due to illness in his family. The employer's denial of the TDRA is discriminatory on the basis of family status.

[12] The actions of the employer were also not reasonable. Adjudicators have implied that the employer should act reasonably. I was referred to *Zehrs*

Markets v. United Food and Commercial Workers' Union, Local 1977 (1996) 61 L.A.C. (4th) 24, *Comeau v. Treasury Board (Fisheries and Oceans),* 2001 PSSRB 112, D.J.M. Brown and D.M. Beatty, *Canadian Labour Arbitration*, 4th Edition (Aurora: Canada Law Book, 2006) and a summary of a decision of the British Columbia Court of Appeal (*Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society*, May 10, 2004). I was also referred to *Umar-Khitab v. Treasury Board (Department of Social Development),* 2006 PSLRB 136, which stated that for the Travel Directives, the purpose section argued in favour of a "broad, liberal, inclusive interpretation" of its provisions.

[13] Mr. Hicks would not be in the situation he is in now if the employer had approved the requested extended telework arrangement. This was a very rigid employer that showed no compassion. There were a number of disputes with the employer with regard to the relocation. The request for mediation of this dispute was turned down by the employer, and there was a significant delay in the employer's response.

Submissions for the employer

[14] The reference to mediation in the grievor's submissions was inappropriate. The Department takes mediation seriously and would not enter into mediation if it had nothing to give during the mediation process. The denial of telework was not an issue before me and should not be considered.

[15] No significant weight should be given to the jurisprudence provided by the grievor, since it was not disclosed in advance of the hearing. The expedited process depends on full disclosure and the employer was disadvantaged by the introduction of those materials at the hearing. The jurisprudence on reasonableness provided by the grievor applies in situations of ambiguity. In this case, the Directive is worded very clearly and there is nothing that can be considered ambiguous.

[16] The purpose of the TDRA for college attendance is to avoid disruptions in education. The relocation was in September 2002, and Mr. Hicks' son did not commence his education until September 2003. This does not constitute an interruption of studies.

[17] Mr. Hicks' mother-in-law did not live at the principal residence. In an earlier adjudication hearing (*Hicks v. Treasury Board (Department of Human Resources and Skills Development),* 2006 PSLRB 60), Mr. Hicks testified that his mother-in-law never did live with the family. Therefore, the assumption that she would have been living with the family but for her illness is not correct.

[18] The employer must interpret the Directive in a consistent fashion, and did so in this case. The grievance should be dismissed.

Reply submissions of the bargaining agent

[19] The failure of the employer to respond to the request for mediation added insult to injury. The denial of telework sheds some light on the level of frustration.

[20] There is ambiguity in the provisions relating to the TDRA, and therefore the concept of reasonableness is an appropriate consideration.

Reasons

[21] I noted that in expedited hearings, it was a best practice for a party to provide the case law it was going to rely on to the other party in advance of the hearing. However, I did provide the employer with sufficient time to review the jurisprudence and I did consider it in my determination, giving it the appropriate weight.

[22] I also noted that it was generally not appropriate to raise issues about mediation efforts at an adjudication hearing. I could draw no inference either from the failure of the employer to engage in mediation or from the apparent delays in its decision not to participate.

[23] I recognized the difficult family situation faced by Mr. Hicks during his relocation to the National Capital Region. I also understood that he had had a few disputes with his employer related to his relocation. However, the issue before me was solely related to the claim for the TDRA, and I cannot consider his other disputes.

[24] I stated that with regard to the argument raised by the grievor that the employer's actions were discriminatory, I had no jurisdiction to address any human rights aspects of this grievance.

[25] Turning to the TDRA provisions of the Relocation Directive, I noted that the definition of "dependant" was a family member "permanently residing with the employee." Mr. Hicks' mother-in-law was not permanently residing with him (either before or during her illness) and therefore does not meet the definition of "dependant." If I am wrong, and his mother-in-law does meet the definition, the criteria for granting the TDRA also exclude its granting in these circumstances. The criteria include the situation where two residences are maintained "during the initial stages of a relocation," when one of the residences is occupied by a dependant for reasons of temporary illness. The TDRA claim was not solely for the "initial stages" of the relocation, and the residence was not occupied by his mother-in-law.

[26] The grievor also argued that the provisions could be interpreted as providing for a TDRA if his wife was considered as a dependant. I agree that his wife meets the definition of a dependant. However, from my reading of the provision, the temporary illness must be the illness of the dependant occupying the residence. Mrs. Hicks does not meet that definition.

[27] I also held that the TDRA requested for Mr. Hicks' son did not meet the criteria. The criteria for granting a TDRA is based on avoiding a disruption of schooling, and since the son's education started one year after the relocation, there had not been any disruption caused by the relocation. This is reinforced by the reference to the TDRA being granted in the "initial stages" of the relocation. Accordingly, a TDRA for his son's education was also not required.

[28] The purpose provision of the Relocation Directive does serve to guide the interpretation of the Directive, but it cannot make the Directive provide for something that it does not. Relocation will disrupt the lives of employees and their families, and that level of disruption is necessarily dependent on the personal circumstances of each employee. For Mr. Hicks, the disruption was at the high end of the scale. However, the provisions of the TDRA were not applicable to his personal situation.

[29] I also noted that I gave some weight to the deliberations of the NJC. The Relocation Committee and the Executive Committee determined that Mr. Hicks had been treated within the intent of the Directive. The parties to an agreement are always the best placed to ascertain the intent of their agreement.

[30] For all of the above reasons, I made the following order:

(The Order appears on the next page)

Order

[31] The grievance is dismissed.

February 2, 2007.

Ian R. Mackenzie,
adjudicator