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File: 566-02-2523

Citation: **2009 PSLRB 69**

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

ROBERT McDERMOT

Grievor

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
McDermot v. Treasury Board (Department of National Defence)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Ian R. Mackenzie, adjudicator

For the Grievor: Rima Zamat, Public Service Alliance of Canada

For the Employer: Jeff Laviolette, Treasury Board

Heard at Vancouver, British Columbia,
May 7, 2009.

Individual grievance referred to adjudication

[1] Robert McDermot ("the grievor") has grieved the denial of a claim for dependant care under the National Joint Council's (NJC) Travel Directive. The grievor is employed at the Department of National Defence in the General Technical (GT) group, and his terms and conditions of employment are governed by the Technical Services collective agreement between the Public Service Alliance of Canada and the Treasury Board (expiry: June 21, 2007) ("the collective agreement").

[2] The parties agreed to proceed with the adjudication by way of an agreed statement of facts and an agreed book of documents. I have summarized the agreed statement of facts below. The statement of facts and the joint book of documents are on file with the Public Service Labour Relations Board. In addition, the grievor testified.

Summary of the evidence

[3] The following summary is based on the agreed statement of facts submitted by the parties and on the grievor's testimony.

[4] The grievor has claimed $75 for dependant care for June 12, 2007. This claim was made under the NJC's Travel Directive, which is incorporated into the collective agreement.

[5] The grievor is employed at the Canadian Forces Base, Esquimalt (Port Operations and Emergency Services Branch), in British Columbia. He is married and has two dependant children who reside with him and his wife. His wife is a registered nurse employed by the Vancouver Island Health Authority. She primarily works evening shifts on weekdays. On June 12, 2007, she was required to work from 15:00 p.m. until 23:00 p.m.

[6] The CanUSPac Exercise was a mock spill-response exercise that involved the United States Coast Guard, the Canadian Department of National Defence and Burrard Clean, a private-sector contractor. On May 30, 2007, the grievor sent an email to Dee Dohm, the union steward for his bargaining agent local, about the training exercise scheduled for June 12 to 13, 2007 and child care expenses (Exhibit J-1, tab 2):

> *Mr. Pope informed me that I would be required to attend… I wouldn't mind being included in this operation, except for the fact that my wife is scheduled to be away* [for] *work the*

> *Tuesday evening from 14:30 until 23:30 and I was going to be responsible for the child care.*

[7] Ms. Dohm replied by email on the same day, confirming a telephone conversation. In the email (Exhibit J-1, tab 2), she confirmed that the Travel Directive applied and that the grievor would be entitled to up to $75 for child care, ". . . if your wife is working when you are away."

[8] The grievor was advised by his manager (Robert Pope) by email on June 4, 2007 that the training exercise was optional and that ". . . If you want/need to stay home that's fine with me" (Exhibit J-1, tab 3). He also stated in the email that it was a great opportunity for the "whole team." The email concluded as follows:

> *I am not sure about the $75 baby sitting cost you were talking about? If you still want to submit your claim please submit your written request to the AFM complete with ARTICLE or applicable references.*

[9] The grievor and his supervisor disagreed on whether the NJC Travel Directive permitted him to claim child care expenses in this instance. The employer signed the travel claim form (Exhibit J-1, tab 4).

[10] Doug Kimmett, the Auxiliary Fleet Manager (AFM), sought advice from human resources on the claim for dependant child care. On July 12, 2007, he emailed the grievor and his supervisor (Exhibit J-1, tab 6). The email address for the grievor was incorrect, and so the email was forwarded to him on July 17, 2007. In the email, Mr. Kimmett stated that the grievor did not meet the criteria for a "sole caregiver" under the Travel Directive and that he was not eligible for a reimbursement of the expense. In the email, Mr. Kimmett referred to a meeting on June 4, 2007, where he stated that before the exercise, a request for the allowance should be made, quoting the applicable portion of the Travel Directive, "to establish eligibility."

[11] The grievor wrote to Ms. Dohm on July 16, 2007, contesting the decision not to reimburse him for the child care expenses (Exhibit J-1, tab 6). In his email, he stated that he was the sole caregiver for that evening as his wife was working a scheduled shift when he was away.

[12] The grievor submitted a travel claim form on July 17, 2007, for the CanUSPac Exercise that included a claim for dependant child care as well as a receipt from the

caregiver who provided the child care (Exhibit J-1, tab 7). The employer denied the claim. The grievor filed a grievance that mistakenly referred to section 3.2.5 of the Travel Directive, instead of section 3.3.5. As corrective action, he requested a reimbursement of $75.

[13] The employer's responses to the grievance were provided on September 18, 2007 and May 9, 2008. The NJC's Executive Committee considered the grievance on September 3, 2008 and determined that the grievor had been treated within the intent of the collective agreement (Exhibit J-1, tab 11). The decision of the Executive Committee was communicated to the grievor on October 24, 2008. The Executive Committee noted that the issue of "clarifying/rectifying the scope of the Travel Directive's 'dependant care' provisions" should be included in the next cyclical review of the Directive.

[14] Section 3.3.5 of the Travel Directive 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.*

[15] At the hearing, the employer conceded that it had requested the grievor to attend the exercise.

[16] The grievor testified that his wife was required to work an evening shift and that nobody else was available to care for his children. He testified that his wife was not able to leave work in the event that his children required care.

Summary of the arguments

[17] The bargaining agent representative stated that, at the time the grievor was on travel status, the grievor was the sole caregiver for his children because his wife was not available to care for them. She also submitted that it was discriminatory to deny dependant-care-expense reimbursement for those families where one spouse is not a federal public service employee.

[18] The bargaining agent representative cited *Umar-Khitab v. Treasury Board (Department of Social Development),* 2006 PSLRB 136, at paragraph 33, where the adjudicator held as follows:

> *. . . whether or not* [an employee] *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*. . . .*

[19] The employer's representative submitted that the grievor's situation was contemplated by the NJC Travel Directive. Section 3.3.5 clearly sets out what happens when both parents are on travel status. If the section had been intended to apply to the situation where one spouse was not in the federal public service, it would have specified so.

[20] In *Umar-Khitab*, the spouse was out of the country for an extended period, and she was unable to perform any of her duties as a caregiver. The situation in this case is distinctly different. The adjudicator recognized such a situation in paragraph 33 of *Umar-Khitab* decision where he stated the following: ". . . I do not agree with the grievor that the moment one spouse becomes unavailable the other spouse becomes a 'sole caregiver'. . . ."

[21] The employer's representative also relied on the *Umar-Khitab* decision citing paragraph 36, as follows:

> *[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;*
>
> . . .

[22] The employer's representative stated that the NJC has been tasked with defining the term "sole caregiver" in the regular bargaining process but that in the interim it has agreed to allow compensation for dependant care when couples are involuntarily separated.

[23] The employer's representative also submitted that I should respect the result of the NJC grievance process, which found that the grievor was treated within the intent of the Directive. The parties best know the intention of the Directive. He also referred me to *Antaya et al. v. Treasury Board (Department of Human Resources and Skills Development),* 2009 PSLRB 25. He submitted that questioning the decision of the NJC would make a mockery of grievance process.

[24] The employer's representative submitted that the grievor was treated within the intent of the NJC Travel Directive. Issues of inequity in the application of the dependant care provision for families where one parent is not a federal public service employee are matters to be addressed at the bargaining table and not at adjudication.

[25] In reply, the representative for the grievor submitted that, if the intention had been to exclude people in the grievor's situation, the Directive would have specified as such.

Reasons

[26] The issue in this grievance is the following: Does the definition of "sole caregiver" in the Travel Directive include an employee whose spouse is unavailable to provide care? There is no dispute that the grievor's spouse was working an evening shift or that the child care expense was paid for by the grievor.

[27] I do not agree that the analysis in *Antaya* is applicable here. In that case, the grievors were challenging the methodology agreed to by the parties in the Isolated Posts and Government Housing Directive. It was not a case where an interpretation of an NJC directive was at issue. The grievor and his bargaining agent have a clear right to

challenge the application of the policy to his circumstances, even when the NJC Executive Committee reaches a consensus on the intent of the Directive.

[28] In *Umar-Khitab,* the situation involved an employee whose spouse was out of the country for an extended period. In that case, the adjudicator concluded that whether or not one was a "sole caregiver" was a matter of fact to be determined in the individual circumstances of each case. He also stated that one does not have to be a ". . . 'sole caregiver' for all time and in all circumstances. . ." to be entitled to reimbursement. I believe that the result in *Umar-Khitab* was very much related to the circumstances of the case involving a lengthy absence from home by the spouse. The circumstances in this case are different.

[29] As noted by the adjudicator in *Umar-Khitab*, one does not become a "sole caregiver" at the moment that one spouse becomes unavailable. The NJC has recognized that lengthy involuntary separations could result in the employee being considered a sole caregiver. The adjudicator in *Umar-Khitab* simply applied this concept to a lengthy absence by one spouse while she was out of the country attending a work-related conference. In this case, the absence of the grievor's spouse was of a short duration.

[30] It is true that "sole caregiver" has not been defined in the Directive. However, the parties have accepted that an involuntary separation of a lengthy period could result in a finding that an employee is a sole caregiver. This is demonstrated by their acceptance of the definition used by the Canada Revenue Agency for involuntary separation. I believe that it was not intended by the parties that short absences from the household by one caregiver would transform the other caregiver into a "sole caregiver." This is made clear through an examination of the situation when two caregivers, who are both federal employees, are on travel status. In that situation, the parties have carved out an exception to the principle that short-term absences do not transform an employee into a sole caregiver. If such short-term absences had been intended to be included in the definition of a sole caregiver, there would have been no need to include this provision. In other words, if an employee were considered a sole caregiver whenever the other caregiver is not in the household, there would be no need to specify the entitlement when both federal employees are on travel status.

[31] In my view, the grievor is being treated no differently than any other federal public service employee in a similar situation. If his wife had been on shift work as a

federal public service employee, he would not have been entitled to payment for dependant care. It is only when both federal employees are travelling on government business that the expense is paid.

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

(The Order appears on the next page)

Order

[33] The grievance is denied.

June 8, 2009.

Ian R. Mackenzie,
adjudicator