Date: 20101103

File: 566-02-2958

Citation: 2010 PSLRB 116

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

JERRY KRAMER

Grievor

and

TREASURY BOARD
(Department of Foreign Affairs and International Trade)

Employer

Indexed as
Kramer v. Treasury Board (Department of Foreign Affairs and International Trade)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Kate Rogers, adjudicator

For the Grievor: Phillip G. Hunt, counsel

For the Employer: Christine Diguer, counsel

Heard at Ottawa, Ontario,
September 23, 2010.

I. Individual grievance referred to adjudication

[1] This decision deals with an individual grievance filed by Jerry Kramer who alleges that the Department of Foreign Affairs and International Trade ("the employer") violated the collective agreement between the Treasury Board and the Professional Association of Foreign Service Officers (PAFSO) (expiry date: June 30, 2007) by denying him reimbursement for orthodontic costs under FSD 39, Health Care Expenses, of the Foreign Service Directives (FSD), which are incorporated by reference into the collective agreement. Mr. Kramer was not present during these proceedings, and no witnesses were called. The parties submitted an agreed statement of facts (Exhibit E-1), which reads as follows:

AGREED STATEMENT OF FACTS

1. Jerry Kramer is a Foreign Service Officer (FS 04) with the Department of Foreign Affairs and International Trade Canada (DFAIT).

2. Mr. Kramer was posted to the Permanent Mission of Canada to the United Nations in New York City (PRMNY) on August 24, 2002, as a Senior Advisor in the UN Management and Finance section. Mr Kramer continues to work at the PRMNY as Senior Advisor, holding the diplomatic rank of Counsellor.

3. Mr. Kramer's son, Raymond received orthodontic treatment prior to Mr .Kramer's posting to the PRMNY. The lifetime limit for reimbursement of eligible orthodontic services under the Public Service Dental Care Plan (PSDCP) was reached prior to Mr. Kramer's posting to the PRMNY.

4. On July 31, 2007, Mr. Kramer submitted a claim for "excess dental" expenses (orthodontics) for treatment received by his son, Raymond, from Dr. Bruce Greenberg, a New York City orthodontist. The claim was in the amount of CAD $17,039.00 for treatment that Raymond received between September 2002 to July 2007.

…

5. The claim was made under the Foreign Service Directives, (FSD), FSD 39 – Health Care Expenses. The FSD forms part of the collective agreement between the Treasury Board (employer) and the Professional Association of Foreign Services Officers (bargaining agent), which represents employees in the Foreign Service (FS) Group.

6. DFAIT forwarded the request to the Working Group A Committee (WGA) for decision. The WGA meets monthly and its membership consists of representatives from the following departments: Citizenship and Immigration Canada; Canadian International Developmental Agency; Department of Foreign Services and International Trade; Department of National Defence; Royal Canadian Mounted Police, and; Treasury Board Secretariat (Chair). The WGA is a forum of joint consultation on the intent of the FSDs where partner department representatives meet to discuss policy interpretations and resolve specific concerns. The WGA committee structure does not provide for bargaining agent participation. Their objective is to ensure consistent interdepartmental interpretation and application of the FSDs.

7. The WGA met on September 8, 2007, to deal with the request but was unable to reach a consensus. The WGA recommended that the TBS Chair forward the claim to the National Joint Council (NJC) for interpretation.

8. DFAIT sent Mr. Kramer an email on November 5, 2007, which attached the following rationale provided by WGA:

Before rendering a decision, WGA sought confirmation that the member submitted a treatment plan to the Administrator before going ahead with these services. The department indicated that the employee did not submit a pre-treatment plan as he was aware that his maximum has been reached.

WGA was unable to reach consensus on this issue and has requested that it be forwarded to the NJC committee for interpretation. Of concern is that although excess "dental" costs are covered within the intent of FSD 39 the directive remains silent in respect to its limits and maximums. In contrast, very explicit wording exists as to how to handle excess costs incurred under the PSHCP after the established maximum has been reached.

Also noted is the fact that the employee acknowledges that they reached their maximum limit for orthodontic treatment prior to being posted.

The Bargaining Agent has raised excessive costs of dental care as an issue to be looked at within this year's cyclical review. Matched with the fact that there is an outstanding issue at the department level to be remedied, we feel it would be best to have a wider interpretation as how to handle excess dental costs after the established maximum has been reached.

As this item has been brought forward through the various FSC committees and upon a fuller NJC interpretation, WGA would consider the submission on an individual case basis until this issue is looked at in greater detail during this year's cyclical review.

Should the full committee approved [sic] this individual case, WGA requests that the comparison of costs incurred while abroad (New York) to those which would have been incurred in HQ be analyzed by a representative from Great West Life. WGA considers the estimate provided by Dr. Chumak to be incomplete and therefore not useful as a comparison basis.

…

9. The TBS was subsequently advised that the WGA process was not the appropriate one for making a request for interpretation to the NJC. WGA therefore met to review the claim on November 26, 2007.

10. DFAIT (Simon Crabtree) sent Mr. Kramer an email on December 5, 2007, which contained the following rationale provided by WGA:

Before rendering a decision, WGA sought confirmation that the member submitted a treatment plan to the Administrator before going ahead with these services. The department has since indicated that the employee did not submit a pre-treatment plan as he was aware that his maximum has been reached. Also noted is the fact that the employee acknowledges that they reached their maximum limit for orthodontic treatment prior to being posted

WGA is sympathetic to the employee and acknowledges that the costs of dental care in certain countries are very high as compared to the cost of equivalent treatments in Canada. Although this is partly addressed through instruction 6 to FSD 39.04, when dental care claims are paid by the Public Service Dental Care Plan (PSDCP) there can be no further compensation once the cost of treatment exceeds the maximum . Therefore WGA concludes that the intent of FSD 39 of the Foreign Service Directives has been applied correctly in this case and denies the claimants request for additional reimbursement.

…

11. Mr. Kramer filed a grievance on December 7, 2007. The second level grievance was heard by the Departmental Liaison Officer (DLO) for DFAIT, Ms, Czesia Czyczyro, on February 22, 2008. The DLO denied the grievance and the requested corrective measures.

…

> *12. The grievance was forwarded to the NJC General Secretary for consideration at the final level of the NJC redress procedure. The grievance was referred to the Foreign Service Directive Committee on November 26, 2008. The Committee members were unable to reach a consensus on a recommendation to the Executive Committee, as to whether the grievor was treated within the intent of the Foreign Service Directives. The NJC Executive Committee met on February 25, 2009 and reached an impasse.*

…

II. Documents relevant to the grievance

[2] The following sections of FSD 39, in effect from June 1, 2003 to March 31, 2009, are relevant to the grievance:

…

> ***Introduction***
>
> *This directive provides financial assistance to employees who incur health care expenses outside Canada which exceed those permissible under the Public Service Health Care Plan (PSHCP) and the Public Service Dental Care Plan (PSDCP), subject to certain conditions as specified in the directive.*
>
> …
>
> ***39.02*** *Subject to the provisions of Section 39.05, where expenses have been incurred for health care, drugs or dental treatment in respect of an employee and/or a dependant which are in excess of eligible expenses under the Public Service Health Care Plan or the Public Service Dental Care Plan, the deputy head may authorize reimbursement to the employee of the amount in excess, provided:*
>
> *(a) the employee pays the deductible share under the Public Service Health Care Plan or the Public Service Dental Care Plan or the share which would have been applicable for insurance under these plans; and*
>
> *(b) the employee pays any co-insurance applicable under the Public Service Health Care Plan or the Public Service Dental Care Plan or the amount of co-insurance which would have been applicable for insurance under these plans; and*

(c) the expenses involved have been incurred pursuant to consultation with a medical practitioner or dentist acceptable to Health Canada;

(d) the employee submits a claim under the Public Service Health Care Plan or the Public Service Dental Care Plan within the time constraints of the plan (usually 12 months) except that;

(e) where a claim is denied under the Public Service Dental Care Plan because it is for treatment which was previously claimed, and the required time has not elapsed before another claim may be made, the deputy head may authorize reimbursement in such amount as may be recommended by the Administrator of the Plan to reflect the amount which would otherwise have been payable under the PSDCP as an initial claim, plus any excess dental costs identified by the Administrator of the Plan and payable under this directive. This provision is designed to provide for those necessary additional costs resulting from initial incompetent/inadequate treatment, where the employee is no longer at the location where the original treatment took place or, in the opinion of Mission administration, cannot obtain redress from the original practitioner.

…

39.04 *The health care referred to in this directive may include para-medical care and the services of medical and dental specialists, provided such services have been recommended pursuant to consultation with a medical practitioner or dentist acceptable to Health Canada.*

Instructions

1. Each Post shall compile a roster of qualified local medical practitioners and dentists whom personnel at the post may consult. The roster should include medical internists, obstetricians, pediatricians and general practitioners and dental general practitioners and specialists.

2. Where costs for medical and hospital care, drugs and/or dental treatment are excessive, and the treatment can be deferred, an employee should explore the possibility of obtaining treatment at an alternative location. In such cases the employee should contact the deputy head who shall determine the cost effectiveness of obtaining treatment at an alternative location, including the cost of health care travel and related expenses under FSD 41 - Health care travel; the

deputy head may thereafter authorize treatment at a location other than the employee's post.

3. Employees shall be required to submit receipted accounts showing the differences between their actual expenses and those admissible under the PSHCP or the PSDCP, or their plan of health or hospitalization insurance.

4. In claiming for health care expenses which are in excess of eligible expenses under the PSHCP, the employee should include the detailed statement provided by the Administrator of the Plan. It should be noted that a claim may not be made for expenses which are not admissible under the PSHCP or which exceed specific dollar limits under the PSHCP as these are expenses which would be incurred by employees in Canada.

5. In claiming for excess hospital costs, an adjustment will be made where an employee has less than maximum coverage. For example, an employee incurs excess costs of $100.00 per day for semi-private hospital coverage and has Level I coverage which provides a benefit of $60.00 per day rather than Level III coverage which provides a benefit of $150.00 per day. The claim would be reduced by the difference between Level III and Level I coverage, that is, $90.00, and the employee would receive an adjusted amount of $100.00 minus $90.00, or $10.00.

6. Employees may claim for dental care expenses to the extent which would place them in the same position as employees in Ontario. Where eligible expenses under the Public Service Dental Care Plan which are incurred outside Canada are higher than in Ontario, employees may submit a claim for that portion of the cost which they are required to pay outside Canada and which would not be incurred in Ontario. For example, and assuming the deductible has been satisfied and reimbursement under the dental plan is at 50%, if in Ontario the eligible expense for a service is $400 (with the employee paying $200) and outside Canada the eligible expense is $600 for the same service (with the employee paying $300), then the cost to the employee is $100 more than it would be in Ontario. The employee could then claim $100 under this directive. This would place the employee outside Canada in the same position as the employee in Ontario.

7. Except as provided for under the Public Service Health Care Plan, dental care expenses are only eligible for

reimbursement under this directive provided the employee, and eligible dependants, were covered, or were eligible to be covered, under the Public Service Dental Care Plan.

8. To assist employees in claiming dental expenses under this directive, the Administrator of the Plan will provide employees outside Canada who claim for dental expenses with the required information on excess dental costs as part of their claims procedure. A copy of the Explanation of Benefits from the Administrator of the Plan identifying the excess dental expenses should be attached to the claim for reimbursement which employees should submit to their departmental headquarters in the same way they would submit a claim for reimbursement of health care expenses under this directive.

9. Section 39.02(e) is designed for those situations where a claim for dental care has been refused by the Public Service Dental Care Plan because the employee is claiming for a specific procedure which was previously paid for under the Plan, under certain circumstances, and the required time has not elapsed before another claim may be made. When, in the opinion of the employee, the duplicate procedure was necessary because of incompetent/inadequate workmanship at a mission outside Canada, the employee should appeal the decision, and request referral to the Board of Management, on the basis of initial shoddy workmanship. While payment cannot be authorized under the Public Service Dental Care Plan, this will enable the Administrator of the Plan to investigate and determine whether a recommendation for payment is justified under this directive.

10. Where a claim for oral surgery has not been paid in full by the Public Service Dental Care Plan, a claim should be submitted to the Public Service Health Care Plan along with copies of the original claim made to the dental plan and the Explanation of Benefits from the Administrator of the Plan. If, following this settlement, there is still an unpaid balance, the employee should submit a claim under this directive, along with copies of the Explanation of Benefits from the Administrators of the Plans.

…

III. Summary of the arguments

A. For the grievor

[3] Counsel for the grievor submitted that to understand the context of the grievor's claim, it is important to keep in mind that foreign services officers on a posting do not have access to their regular physicians or dentists and that when they engage the services of a professional, such as an orthodontist, they do not necessarily face the same costs that they would encounter at home in Ottawa. Further, it is also important to remember that the grievor's son required not just basic orthodontic treatment but treatment for a serious problem (Exhibit E-2).

[4] Counsel for the grievor also stressed that the nature of the monetary claim must be understood. The grievor was not making a claim for the entire cost of the orthodontic treatment. Rather, he was claiming the difference between the cost of the treatment in New York City and the cost of the same treatment in Ottawa, which amounted to $17 039. (Exhibit E-2) That cost differential resulted entirely as a consequence of the grievor's posting to the Permanent Mission of Canada at the United Nations in New York City.

[5] Counsel for the grievor suggested that the employer might argue that the matter was simple: the grievor had reached his maximum entitlement for reimbursement for orthodontia under the Public Service Dental Care Plan and therefore was not entitled to reimbursement for the cost differential under the FSDs. But the matter is not so simple, and even the employer initially had difficulty determining how to deal with it, which is evident from the response of Working Group A (WGA) (Exhibit E-1 -agreed statement of fact).

[6] Counsel for the grievor submitted that the grievor's claim fell squarely within FSD 39.04 (Exhibit E-8), which deals with access to health and dental care. In particular, Instruction 6 of FSD 39.04 is most applicable to this case. He argued that the first sentence of Instruction 6 is the most important: "Employees may claim for dental care expenses to the extent which would place them in the same position as employees in Ontario." Further, counsel for the grievor argued that the example set out in Instruction 6 deals with the same situation faced by the grievor. In particular, he stated that it described an incremental difference that was similar in nature to the $17 000 incremental cost faced by Mr. Kramer.

[7] While counsel for the grievor considered that the case could stand entirely on the language of the first sentence of Instruction 6 of FSD 39.04, as elucidated by the

example that it provides, he submitted that other provisions in the FSDs (Exhibit E-8) supported the grievor's claim.

[8] The introduction to FSD 39 (Exhibit E-8), which states that it "…provides financial assistance to employees who incur health care expenses outside Canada which exceed those permissible under the . . . Public Service Dental Care Plan (PSDCP)…," is clearly applicable to circumstances such as the grievor's, in which an employee faces health and dental care costs significantly higher than those that he or she would pay at home.

[9] Further, the introduction to the FSD (Exhibit E-8) sets out the basic underlying principles and provides at paragraph a) that "the principle of comparability recognizes that insofar as is possible and practicable employees serving abroad should be placed in neither a more nor a less favourable situation than they would be in serving in Canada." Counsel argued that the grievor, serving in New York City, should not be placed in a less favourable position than if he were in Ottawa.

[10] Turning to page 2 of the introduction to the FSDs (Exhibit E-8), counsel for the grievor noted that it provides that:

> *…consideration will continue to be given to situations which may arise which are not specifically dealt with in the Directives but which fall within the intent of the Directives as described in the basic principles outlined above or explained in the Introduction to a specific directive.*

[11] Counsel for the grievor argued that, while the grievor's claim clearly falls within the ambit of Instruction 6 of FSD 39.04, making it unnecessary to look at the intent of the FSDs, nevertheless, the grievor's claim is also consistent with the overall purpose of the FSDs and is consistent with a purposive approach to interpretation. Counsel referred to Brown and Beatty, *Canadian Labour Arbitration*, 4th ed., at 4:2100, and to *Markham Stouffville Hospital v. Canadian Union of Public Employees, Local 3651* (2007), 167 L.A.C. (4th) 425, and *Times-Colonist v. Communications Workers of America, Local 14003* (1997), 67 L.A.C. (4th) 340, for the proposition that, when faced with two possible interpretations of a provision, it is necessary to choose the interpretation that best reflects the purpose or intent of the provision.

[12] Counsel for the grievor addressed the issue of the grievor's failure to seek pre-approval of the dental claim, which he anticipated would be raised by the employer, by

noting that pre-approval is not mandatory but merely recommended, for the sole benefit of the employee to avoid financial surprises.

[13] In conclusion, the grievor's counsel submitted that it is not sufficient to state that because the grievor had reached the maximum reimbursement allowable under the PSDCP even before he was posted to New York, he was not entitled to relief under FSD 39.04 (Exhibit E-8). The grievor's counsel submitted that the PSDCP is an insurance plan designed to cover dental care, with limits on the insurers' liability, whereas FSD 39.04 is an employer policy intended to indemnify employees from incurring financial costs directly and solely attributable to being posted outside Canada. These are significantly different. The grievor was not making an insurance plan claim; he was seeking reimbursement under the FSDs for an expense related solely to his posting outside Canada. Had the grievor been in Ottawa, the costs of the orthodontic treatment that he is claiming would have been about $17 000 less than they were in New York City. He claims that difference, not the entire amount of the dental treatment.

[14] The grievor's counsel asked that the grievance be allowed and that I order a declaration of entitlement to the differential under FSD 39.04. The grievor's counsel asked further that the employer be directed to refer the claim to Great West Life, the dental plan insurer, for a determination of the correct amount of the differential, which the employer should then pay the grievor.

B. <u>For the employer</u>

[15] Counsel for the employer submitted that the issue to be determined was whether the employer correctly applied FSD 39 (Exhibit E-8).

[16] Counsel for the employer argued that the modern approach to statutory interpretation, as approved by the Supreme Court of Canada in *Rizzo v. Rizzo Shoes*, [1998] 1 S.C.R. 27, is to read the words in question in their entire context, in harmony with the object and intent of the legislation. Given that approach, she submitted that the individual provisions of the FSDs must be read in the context of the FSDs as a whole and in the context of the intention of the parties involved.

[17] The employer's counsel noted that the FSDs (Exhibit E-8) contain a guide as to their application in FSD 3.02(b), which provides in part that where "…there appears to

be a discrepancy between the provisions outlined in the introduction to a directive and the operative section of the directive, the latter shall govern." Directive 3.02(b) also provides that the instructions to the FSDs are for the purpose of clarification only.

[18] The employer's counsel stated that FSD 39 (Exhibit E-8) was developed in recognition of the fact that the reimbursement provided under the PSDCP and the Public Service Health Care Plan (PSHCP) might not cover the actual reimbursable expenses incurred by employees posted outside Canada. The employer's counsel argued that there was no evidence of an intention expressed in FSD 39 (Exhibit E-8) to cover situations in which an employee incurred additional costs as a result of a foreign posting for expenses that would not be reimbursable under the PSHCP or the PSDCP. In the view of the employer's counsel, such an intention would require clear language.

[19] Turning to FSD 39 (Exhibit E-8), counsel for the employer pointed out that, in the English version of the Introduction, the language provides that the purpose of the directive is to provide "…financial assistance to employees who incur health care expenses outside Canada which exceed those permissible…" under either the PSHCP or the PSDCP. In French, the phrase "those permissible" is expressed as "*au plafond fixé.*" The employer's counsel argued that, read together, both the English and French versions make it clear that the intention was to cover the gap between what the dental or health care plans covered and what employees actually had to pay for reimbursable services.

[20] Likewise, FSD 39.02 (Exhibit E-8) is a substantive provision, enabling the deputy head of a department to authorize the reimbursement of an amount in excess of eligible expenses, subject to certain conditions. The employer's counsel argued that this provision is consistent with the introduction to FSD 39 in that it is clear that it is intended to bridge the gap between what an employee would be reimbursed under the PSDCP and what the employee would have to pay as a result of a foreign posting. The employer's counsel submitted that the phrase "eligible expenses" could only mean expenses that were eligible under the PSDCP. She noted that the provision does not refer in any way to any other expenses or other types of services that an employee might have to pay for as a result of a foreign posting. Further, she observed that the French version of the phrase "in excess of eligible expenses" in FSD 39.02 is "*ces frais dépassent le plafond fixé,*" which, she argued, made it clear that FSD 39.02 did not mean what the grievor suggested.

[21] The employer's counsel submitted that a full reading of FSD 39.02 (Exhibit E-8) clearly establishes that the directive is only meant to cover insurable expenses. For example, FSD 39.02(a) speaks to the requirement to pay the applicable insurance deductible; FSD 39.02(d) requires employees to submit claims within the time-frames set out in the insurance plan; and FSD 39.02(e) gives the deputy head the authority to extend the time-frames for making a claim in specified circumstances.

[22] The employer's counsel argued that if the FSD 39 were intended to cover the kind of claim being made by the grievor, it would have specifically provided for a process in which to do so, as it has clearly set out a process for claims being made pursuant to the PSDCP. However, no such process is set out for a claim such as the grievor's and the only reasonable inference is that the provision does not contemplate that kind of reimbursement.

[23] Turning to FSD 39.04 (Exhibit E-8), the employer's counsel argued that it is important to note that the substantive provision merely clarifies that the whole of FSD 39 includes the services of specialists, provided that they have been recommended pursuant to a Health Canada consultation.

[24] Counsel for the employer argued that the instructions to FSD 39.04 merely clarify that the provision deals only with bridging the gap between what an employee would be reimbursed under either the PSHCP or the PSDCP and the actual expenses incurred. She noted that the instructions explain and provide processes for making claims for eligible expenses and she contended that a process was missing by which employees not eligible for reimbursement under the PSDCP could make a claim for the difference.

[25] Counsel for the employer submitted that FSD 39 must be interpreted and understood in a manner consistent with the principle of comparability set out in the introduction to the FSDs. That principle provides that "…employees serving abroad should be placed in neither a more nor a less favourable situation than they would be in serving in Canada" (Exhibit E-8).

[26] The employer's counsel suggested that, if the grievor's interpretation of FSD 39 was applied, he would be in a better position than he would have been had he been in Canada. In her view, such an interpretation would be a significant departure from current practice and would give rise to significant costs for the employer.

[27] Counsel for the employer also argued that the provisions of the FSDs cannot be extended through the adjudication process. Rather, such a significant change should only take place through negotiations between the parties that lead to specific and express language in the FSDs to cover the situation. If the interpretation being urged by the grievor were implemented, it would result in a significant change in process and significant costs to the employer.

[28] The employer's counsel referred me to *Trepanier v. Treasury Board* (*External Affairs),* PSSRB File No. 166-02-20089 (12031990), in support of her interpretation of the principle of comparability. The employer's decision not to pay the grievor's claim satisfied the principle of comparability under the FSDs. The grievor was very much aware that he had reached the limit for orthodontic care when he left for New York City. He chose not to consult on the nature and cost of the treatment before making the claim.

[29] Counsel for the employer submitted that the cases cited by counsel for the grievor were not relevant to the issues at hand. She further noted that, in reply to the counsel's suggestion that the WGA did not fully understand the issue at hand, it was clear from its ultimate response that it did understand the issue.

[30] The employer's counsel requested that the grievance be denied, as the grievor did not meet the burden of establishing a claim under FSD 39.

C. <u>Reply for the grievor</u>

[31] On the interplay between the FSDs and the instructions, counsel for the grievor stated that it is important to understand that the substance of the FSDs finds its expression through the instructions. The FSDs themselves are very brief and need the instructions to give them form.

[32] On the principle of comparability, the grievor's counsel noted that the disadvantage to the grievor is about $17 000, solely as a result of his posting, which is what FSD 39 was designed to correct.

[33] In response to counsel for the employer's argument stating that the interpretation being tendered by the grievor would lead to a significant change to practices and costs that should only result through negotiations, counsel for the

grievor submitted that the parties have to work with what exists, and that if the result of the interpretation of FSD 39 is an increased cost to the employer, then the employer must either live with or re-negotiate FSD 39.

IV. Reasons

[34] The grievor is a foreign service officer (classified FS –04) with the employer. He was posted to the Permanent Mission of Canada to the United Nations in New York City in 2002, and he continues to work in that position. While posted to New York City, his son required orthodontic treatments that cost $17 039 more in New York City than the same treatment would have cost had it been provided in Ottawa (Exhibit E-1).

[35] There is no dispute that the grievor had reached the lifetime limit for reimbursement for orthodontic treatment under the PSDCP before being posted to New York City (Exhibit E-1). However, the grievor is not claiming the entire cost of the orthodontic treatment; rather, he is claiming the difference in the cost of the treatment that arose solely as a result of his posting to New York City. Had he been in Ottawa, the treatment would have cost him an estimated $10 095, for which he would not have been entitled to reimbursement, but because he was in New York City, the same treatment cost him $27 134. (Exhibit E-2). That cost difference gives rise to this grievance.

[36] The grievor submitted a claim for $17 039 for the excess dental expenses that arose from his posting to New York City, on the grounds that the claim was consistent with the FSDs, and consistent with FSD 39, in particular.

[37] If the grievor's claim is to succeed, he must demonstrate an entitlement to reimbursement under FSD 39, which deals with health and dental expenses. That FSD creates a substantive right for employees posted outside Canada who incur health and dental care expenses that exceed those permissible under either the PSHCP or the PSDCP to obtain financial assistance.

[38] While at first glance it might appear that an expense such as that faced by the grievor falls within the intent of FSD 39, a closer reading of the entire provision makes it clear that, to be eligible for financial assistance under that Directive, the expense must fall within the coverage of the plan itself but exceed the amount reimbursable as a result of the posting.

[39] For example, the introduction to FSD 39 specifies that the financial assistance provided to employees under that directive is subject to certain conditions, as specified. Those conditions include the requirement in FSD 39.02(a) that the employee pay the deductible required, or that would be required, under the PSDCP; in FSD 39.02(b) that the employee pay any co-insurance applicable or that would be applicable; in FSD 39.02(c) that the expenses were incurred pursuant to a consultation with a dentist acceptable to Health Canada; and, in FSD 39.02(d), that the employee submit a claim under the PSDCP within the required time–limits. All those provisions clearly envision excess expenses in relation to a claim under the PSDCP.

[40] FSD 39.02(e) sets out the only apparent exception to the requirement that the reimbursable expense must fall within the coverage of the PSDCP as it provides a process for situations in which a dental claim was refused under the PSDCP because it was for an expense already paid by that plan. In that circumstance, reimbursement under the FSD 39.02(e) may be made if the claim arose because the original dental work covered by the PSDCP had to be redone because of incompetent or inadequate treatment from a practitioner at the location of the posting outside Canada, and either the employee is no longer at the Mission or redress cannot be obtained from the original practitioner.

[41] The instructions to FSD 39.04 concerning dental care expenses also support the argument that the Directive is intended to deal with expenses that fall within the coverage of the PSDCP. They include, for example, the requirement in Instruction 3 that employees submit receipts to demonstrate the difference between their actual expenses and those admissible under the PSDCP. Instruction 7 provides that dental care expenses are eligible for coverage under the directive only if the employee and dependents were covered, or were eligible to be covered, under the PSDCP, and Instruction 8 provides that the Administrator of the dental plan will provide employees who make a claim for dental expenses with information about excess dental costs that should be attached to a claim for reimbursement. As counsel for the employer observed, no process is provided for claims that do not arise under the PSDCP, other than the very specific process detailed in FSD 39.02(e) about duplicate procedures.

[42] The language and internal logic of FSD 39 clearly support the contention that the Directive is intended to provide reimbursement for excess dental expenses that fall

only within the coverage of the PSDCP. It seems clear that, had the parties intended otherwise, they would have provided so explicitly.

[43] Counsel for the grievor argued that the overall intention of the FSDs, as expressed in the principles set out in the introduction to them, is to ensure that employees posted outside Canada are "…placed in neither a more nor a less favourable situation than they would be in serving in Canada." He noted that, as a result of his posting to New York City, the grievor faced dental expenses that put him in a much less favourable position than he would have been had he been serving in Canada.

[44] There is no doubt that the provisions of FSD 39 must be read in a manner that is consistent with the overall objective of the FSDs. However, the expression of a general intent in the introduction to the FSDs cannot override the specific Directive on health care expenses, FSD 39, which deals with excess medical and dental expenses. That Directive, read in context, makes it clear that the parties intended to deal only with excess expenses that fall within the coverage of the PSDCP.

[45] Counsel for the grievor also argued that the first sentence of FSD 39.04, Instruction 6, was sufficient to found the grievor's claim. That sentence reads as follows: "Employees may claim for dental care expenses to the extent which would place them in the same position as employees in Ontario."

[46] Those words, taken on their face and without reference to the rest of Instruction 6, or indeed, without reference to the rest of FSD 39, might support the grievor's claim. But a single sentence, taken out of context, is not an appropriate basis for such a claim. Instruction 6, in its entirety, provides:

> *6. Employees may claim for dental care expenses to the extent which would place them in the same position as employees in Ontario. Where eligible expenses under the Public Service Dental Care Plan which are incurred outside Canada are higher than in Ontario, employees may submit a claim for that portion of the cost which they are required to pay outside Canada and which would not be incurred in Ontario. For example, and assuming the deductible has been satisfied and reimbursement under the dental plan is at 50%, if in Ontario the eligible expense for a service is $400 (with the employee paying $200) and outside Canada the eligible expense is $600 for the same service (with the employee paying $300), then the cost to the employee is $100 more than it would be in Ontario. The employee could then claim $100 under this directive. This would place the employee outside Canada in the same position as the employee in Ontario.*

[47] By overlooking the second sentence, which clearly links the example given to expenses covered by the PSDCP, the grievor is fundamentally changing the context of the example. Furthermore, Instruction 6 is not an operative clause in the FSDs; FSD 3.02, relating to the application of the FSDs, provides that the instructions and guidelines are for the purposes of clarification.

[48] It is easy to be sympathetic to the grievor's situation. As a result of his posting to New York City, necessary dental treatment for his son cost him considerably more than it would have had he been in Ottawa. I do not agree with the employer's assertion that, if the grievor succeeded in this grievance, he would be in a better position than similarly circumstanced employees in Ottawa. The grievor seeks to be in the same position as employees in Ottawa.

[49] Unfortunately, the grievor’s claim is not supported by FSD 39. Having reached the lifetime limit for reimbursement for orthodontic treatment under the PSDCP before being posted to New York City, the expenses incurred by the grievor for his son's orthodontic treatment while in New York City were not eligible expenses under the PSDCP, and therefore, based on the language of FSD 39, those expenses do not give rise to reimbursement.

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

(The Order appears on the next page)

V. Order

[51] The grievance is denied.

November 3, 2010

Kate Rogers,
adjudicator