

Date: 20111012

File: 566-02-3607

Citation: 2011 PSLRB 114



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

JEANNOT PILON

Grievor

and

**TREASURY BOARD
(Department of Transport)**

Employer

Indexed as
Pilon v. Treasury Board (Department of Transport)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Stephan J. Bertrand, adjudicator

For the Grievor: Lloyd Fucile, Canadian Federal Pilots Association

For the Employer: Michel Girard, counsel

Heard at Ottawa, Ontario,
June 27, 2011.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] On November 14, 2008, Jeannot Pilon (“the grievor”) filed a grievance concerning a dispute over a reimbursement for overnight stays while on government travel in Canada. The grievance was based on an interpretation of the National Joint Council’s (NJC) Travel Directive (“the directive”), which came into effect on April 1, 2008.

II. Summary of the evidence

A. For the grievor

[2] The grievor testified on his own behalf and called no other witnesses.

[3] The grievor stated that he was hired by the Department of Transport on June 2, 2008, as a civil aviation security inspector at the AO-CAI-02 group and level. Before then, he had been a member of the Royal Canadian Mounted Police for 31 years.

[4] Before being hired by the Department of Transport, the grievor resided with his family in Gatineau, Quebec. Since the position at the Department of Transport was located in Dorval, Quebec, the grievor decided to move nearby and to rent an apartment in Pierrefonds, Quebec, while his family continued to stay in Gatineau. According to the grievor, his employer knew of that arrangement. The grievor added that, when he moved to his Pierrefonds apartment, he was reimbursed for his moving expenses under the NJC relocation directive.

[5] Although he lived in Pierrefonds from Monday to Friday, the grievor admitted in cross-examination that he returned regularly to the family residence in Gatineau most weekends, unless he was meeting his family elsewhere for a vacation.

[6] The grievor stated that his employer required him to attend two training sessions in Ottawa. The first was held from October 14, 2008 to October 17, 2008, and the second from October 20, 2008 to October 29, 2008, totalling nine overnight stays outside his headquarters area.

[7] According to the grievor, before travelling outside the Dorval headquarters, he was required to fill out a travel authority and advance form that itemized the projected costs associated with the upcoming trip and to obtain his manager’s approval before

leaving. When he returned, he had to submit a formal claim for the actual expenses incurred and/any claimed allowances.

[8] The grievor filed and submitted two travel authority and advance forms for the two October 2008 trips, which itemized projected expenses for the use of his personal vehicle, for meals and incidentals, and for his accommodations. The grievor estimated that \$450 in reimbursement would be required for his private non-commercial accommodation, in accordance with section 3.3.1 of the directive, representing a \$50 allowance for each of nine overnight stays.

[9] The grievor's manager approved both travel authority and advance forms before the grievor's respective October 14, 2008 and October 20, 2008 departures. In addition, the grievor indicated to his manager before both departures and before obtaining his approval that he would reside at the family residence in Gatineau while attending the training sessions in Ottawa. In other words, the grievor made it clear to his manager that he would be claiming the \$50 per night allowance for private non-commercial accommodation while residing in his family residence in Gatineau. I note that the employer did not contest those facts.

[10] The grievor attended both training sessions in Ottawa. When he returned from the second session, he submitted both travel expense claims to his manager and was informed that his claims for private non-commercial accommodation totalling \$450 were no longer being approved and would not be reimbursed. All his other expenses were approved and reimbursed, including \$444.28 for the use of his personal vehicle and \$773 for meals and incidentals.

[11] The grievor was informed by his manager that it was wrong to pocket \$50 per night while staying with his family, in his family residence, despite the fact that he was considered on travel status.

[12] According to the grievor, his manager informed him that, had he chosen to stay in a commercial establishment, such as a hotel, as did his colleagues for the same training sessions, his accommodation expense would have been approved and reimbursed. According to the grievor, the expenses claimed by and reimbursed to his colleagues for staying at a hotel averaged \$150 per night. The grievor was also informed that, had he chosen to stay in any other private non-commercial dwelling,

such as with a friend or a relative, the \$50 per night allowance would have been paid. Again, I note that the employer did not contest those facts.

[13] Although the grievor acknowledged that he had agreed to not submit accommodation claims for two previous trips to Ottawa, he explained that on those occasions, he was not required to participate in the Ottawa conferences but that he wanted to for his own professional development. Although he believed that he was entitled to the accommodation allowance, having stayed in the Gatineau family residence rather than in a hotel, he had agreed to not claim it on those particular occasions.

[14] The grievor eventually transferred to a position with the Department of Transport in Ottawa and returned to the family residence in Gatineau, where he now resides full-time. In total, the grievor resided in Pierrefonds for nine months.

B. For the employer

[15] The grievor's manager was not called as a witness; nor was anyone from the Department of Transport. The employer's sole witness was Suzanne Chalifoux, an acting senior policy and program analyst — Union Engagement and NJC Support — with the Treasury Board Secretariat of Canada. She had been acting in this position since January 2011. Before that, she had been a policy analyst with the same directorate since December 2006. One of her main duties, in both her former and more recent acting position, was to interpret travel directives.

[16] Ms. Chalifoux was not directly involved in the grievor's travel claims; nor was she involved in drafting the applicable NJC directive. As a result, I found much of her testimony of limited value.

[17] In a nutshell, Ms. Chalifoux's testimony proposed that the intent behind section 3.3.1 of the directive was to provide an allowance to employees on government travel who chose to stay with friends or relatives rather than in a commercial establishment. According to Ms. Chalifoux, it was never intended that an employee who chose to stay in his or her own residence and to sleep in his or her own bed would be entitled to the private non-commercial accommodation allowance. The intent, as stated by Ms. Chalifoux, has always been to reimburse legitimate and reasonable travel expenses incurred by employees while on government travel and not to encourage personal gain.

[18] I note that Ms. Chalifoux was not qualified as an expert witness, and that she was not called to give extrinsic evidence. When prompted in cross-examination to point to a single document that could shed some light on what the drafters of the directive intended, she could not.

[19] Ms. Chalifoux acknowledged that situations could arise in which an employee who chose to stay at a property that he or she owned would be entitled to the allowance. She gave the example of an employee who chose to stay at a seasonal cottage, where it would be reasonable to assume that certain costs would be incurred to turn on the water and the electricity. She also stated that it would be reasonable to assume that employees who chose to stay with friends or relatives would provide gifts to their hosts and therefore would incur legitimate expenses.

III. Summary of the arguments

A. For the grievor

[20] The grievor believes that he should be entitled to the private non-commercial accommodation allowance for the following reasons:

- 1) he was required to attend training sessions away from his work headquarters;
- 2) his employer knew that he was residing in Pierrefonds during the week;
- 3) he was required to travel and to stay overnight outside his headquarters area for the courses on weekdays, rather than on weekends;
- 4) he preferred to stay with his family rather than in a hotel or with friends or relatives;
- 5) he was well aware that his preference was more economical for his employer;
- 6) he told his employer about his intention to stay at his family residence in Gatineau before leaving; and
- 7) he sought and obtained approval in advance from his manager for the allowance.

[21] The grievor contended that the concept of personal gain is not defined anywhere in the directive. According to him, there is no difference between staying at a friend's residence, a relative's residence or in a dwelling that he partly owns. There are no ways of monitoring expenses in any of those cases.

[22] The grievor argued that encouraging employees to stay at a hotel when they prefer to stay in their own residence is sending the wrong message and is not consistent with modern accountability principles.

[23] According to the grievor, he did not normally reside in Gatineau during the week. He was required to travel to Ottawa on business on weekdays for the courses. At the relevant time, the grievor normally resided in Pierrefonds five days out of seven, a fact of which his employer was aware.

[24] The grievor's view is that staying in his family residence generated no greater gain than if he had stayed with friends or relatives. In all cases, the allowance is not associated with a specific or tangible expense. Although the grievor recognizes that he was not out-of-pocket when he stayed at his family residence, the same could easily be said had he stayed with friends or relatives, as he would not have been obligated to provide gifts to his hosts.

B. For the employer

[25] According to the employer, the purpose and scope of the directive can be found in its general provisions and read as follows:

Purpose and scope

The purpose of this directive is to ensure fair treatment of employees required to travel on government business consistent with the principles above. The provisions contained in this directive are mandatory and provide for the reimbursement of reasonable expenses necessarily incurred while travelling on government business and to ensure employees are not out of pocket. These provisions do not constitute income or other compensation that would open the way for personal gain.

[26] The employer suggested that no gain occurs if an employee chooses to stay with friends or relatives because he or she would be expected to bring wine or dessert, as suggested by Ms. Chalifoux.

[27] As for the manager's prior approval of the grievor's travel authority and advance forms, the employer referred me to section 1.3.1 of the directive, which states as follows:

1.3 Overpayments

1.3.1 Overpayments, namely amounts reimbursed or paid to travellers, which are not in accordance with the terms of this directive, shall be recovered from the traveller as a debt owing to the Crown.

[28] The employer suggested that the manager's prior approval of the accommodation allowance was not determinative of the issue, since the determination of whether the grievor was entitled to the allowance could be made only in accordance with the terms of the directive, failing which an overpayment would be created. The employer argued that, since the grievor normally resided in the Gatineau dwelling, he could not claim the private non-commercial accommodation allowance while staying there.

[29] In support of that proposition, the employer relied on *Robichaud v. Canadian Food Inspection Agency*, 2009 PSLRB 149, and *Clarke v. Treasury Board (Department of Indian Affairs and Northern Development)*, PSSRB File No. 166-02-13543 (19830518).

[30] The employer referred specifically to paragraph 38 of *Robichaud*, in which the adjudicator wrote the following:

[38] The definition of private non-commercial accommodation includes a private dwelling where the traveller does not normally reside. Starting in 1982, Mr. Robichaud always identified his dwelling in Shippagan as his residence and thus as the location where he normally resided, which was still the case when he was assigned in 2004. That fact combined with the Directive's stated purpose that its provisions not open the way for personal gain lead me to conclude that he is not entitled to reimbursement for staying in non-commercial accommodation. In Clarke v. Treasury Board (Department of Indian Affairs and Northern Development), PSSRB File No. 166-02-13543 (19830518), the adjudicator reached the same conclusion, as follows:

. . .

. . . Further, the argument on his behalf at the hearing was that so long as the grievor was away from Fredericton he would have been on travel status. Such a finding would permit him to stay anywhere in the Moncton area, including his own home and be able to validly claim reimbursement at the non-commercial rate. I cannot accept such a notion. . .

. . .

[31] The employer argued that the same scenario that arose in *Robichaud* applies in this case.

[32] The employer argued as follows that the grievor normally resided in his Gatineau residence:

- 1) he owned that residence;
- 2) it was the family residence, where his wife and children resided;
- 3) he had lived there full-time before taking the position in Dorval;
- 4) he moved back there after he was transferred to Ottawa and still lives there to this day;
- 5) he returned to that residence on weekends as often as possible; and
- 6) when he requested once to work from home, he worked from this Gatineau residence.

[33] The employer argued that the grievor's claim is not for a reasonable expense, that he was never out-of-pocket and that allowing his claim would result in personal gain, contrary to the directive's intended purpose.

III. Reasons

[34] The employer's personal gain argument is based on nothing more than an assumption that employees claiming the private non-commercial accommodation allowance will provide their hosts with gifts equivalent to the full allowance claimed; otherwise, some personal gain would be derived. That is not a convincing argument.

[35] Suggesting that staying with friends or relatives negates the possibility of benefiting from a personal gain is completely unrealistic. Should I assume that an employee would be expected to provide his or her hosts with \$450 worth of wine and dessert when staying for three nights on one occasion and six nights on a later occasion? I doubt that this is the norm or a legitimate expectation. In any event, I was pointed to no data or documentation in support of such a proposition nor provided with any evidence regarding the intention of the drafters of the directive. There are no means to monitor with whom an employee stays when a private non-commercial accommodation is claimed or what, if any, gifts were provided. I was pointed to no obligation by employees to disclose where they resided when claiming the private non-commercial accommodation allowance or to provide receipts of their gift purchases. All that such a random distinction can accomplish is to encourage

employees to lie about where they are staying in such circumstances, something that the grievor was not prepared to do.

[36] I am not suggesting that employees claiming the private non-commercial accommodation allowance while staying in a dwelling that they own should automatically be entitled to the allowance. Such a determination must be made on a case-by-case basis and in accordance with the terms of the applicable directive. However, the stand-out fact in this case is that the grievor was not normally residing in the Gatineau dwelling when he made his claims.

[37] A private non-commercial accommodation is defined in the directive as follows:

Private non-commercial accommodation (logement particulier non commercial) - private dwelling or non-commercial facilities where the traveller does not normally reside.

[38] When the grievor was required to travel on government business to Ottawa, he resided regularly in Pierrefonds from Monday to Friday, five days out of seven. For the courses, he had to travel and stay overnight on weekdays, rather than on weekends. In addition, the employer knew of that arrangement, had reimbursed the grievor for his moving expenses to Pierrefonds and approved travel authority forms that identified the Pierrefonds dwelling as the grievor's residential address. My view is that the grievor normally resided in Pierrefonds when he was required to travel on government business in October 2008 and that he was entitled to be paid the private non-commercial accommodation allowance he claimed, totalling \$450. The employer introduced no compelling evidence suggesting otherwise.

[39] With respect to the employer's submitted jurisprudence, this case is easily distinguishable from the *Robichaud* and *Clarke* decisions in many significant ways. The *Clarke* decision was rendered in 1983 and dealt with a differently worded Treasury Board travel policy. The policy also dealt with differences between primary and secondary residences, a distinction that is no longer relevant under the applicable policy. But, more importantly, in *Clarke*, the employer introduced evidence suggesting that Mr. Clarke had always proclaimed that his principal residence was in Moncton (the dwelling where he had stayed overnight and claimed the private non-commercial accommodation allowance), his driver's licence had his Moncton address and his

income tax form also had his Moncton address. The employer in this case introduced no such evidence.

[40] In *Robichaud*, the grievor had kept his Shippagan address (the dwelling where he had stayed overnight and for which he had claimed the private non-commercial accommodation allowance) as his mailing address and as his personnel file address with the employer. In this case, the grievor's address on the applicable travel authority and advance forms referred to his Pierrefonds address and not to the Gatineau address. In addition, in *Robichaud*, the grievor was approached to work on a joint project with the Department of Fisheries and Oceans that had him working in Shippagan for an extended period of seven months, at a time when the grievor in that case was known to reside in Shediac in a trailer during the summer and in a rented furnished cottage in the winter. In this case, the grievor attended training sessions of short duration and was renting an unfurnished apartment in Pierrefonds, to which he had moved his personal belongings, an expense that the employer had reimbursed. Contrary to the situation in *Robichaud*, the grievor in this case was not in a situation in which he could simply have foregone renting his Pierrefonds apartment and moved back to his own home for an extended period of seven months.

[41] Another interesting distinction is the fact that, unlike in the *Robichaud* scenario, the grievor was reimbursed for all his meals, including breakfasts and dinners, which he consumed at the Gatineau dwelling. Were I to accept the employer's logic, that would amount to a significant personal gain. Yet, the employer had no problem reimbursing those expenses. If the employer truly believed that the grievor normally resided in the Gatineau dwelling, it would not have reimbursed meals consumed there.

[42] And, more importantly, at paragraph 38 of *Robichaud*, the adjudicator concluded that Mr. Robichaud had "... always identified his dwelling in Shippagan as his residence and thus as the location where he normally resided ...," which was not so in this case, as evidenced by the applicable travel authority and advance forms that each refer to the grievor's Pierrefonds address and by the fact that the grievor resided in Pierrefonds from Monday to Friday during the relevant period.

[43] I find that, at the time of his travel claims, the grievor normally resided in Pierrefonds.

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

(The Order appears on the next page)

IV. Order

[45] The grievance is allowed.

[46] I order the employer to reimburse the grievor's claim of \$450, representing nine overnight stays in a private non-commercial accommodation at the rate specified in Appendix C of the directive.

October 12, 2011.

**Stephan J. Bertrand,
adjudicator**