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Citation: 2011 PSLRB 94

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

SCOTT BURDEN AND MARTIN CYR

Grievors

and

PARKS CANADA AGENCY

Employer

Indexed as
Burden and Cyr v. Parks Canada Agency

In the matter of grievances referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievor: David Yazbeck, counsel

For the Employer: Anne-Marie Duquette, counsel

Decided on the basis of written submissions
filed June 7, 23 and 30, 2011.

I. Grievances referred to adjudication

[1] Scott Burden and Martin Cyr were indeterminate seasonal employees ("the grievors") with the Parks Canada Agency ("the employer"). They filed grievances against the employer's interpretation of the Isolated Post Policy (IPP). It refused to reimburse them for expenses incurred while they were on seasonal lay-off. The grievors alleged that the employer violated the IPP, which is incorporated into the collective agreement between the Public Service Alliance of Canada ("the bargaining agent") and the employer, effective April 1, 2003 ("the collective agreement"). Mr. Cyr filed his grievance on December 15, 2002 and Mr. Burden on April 6, 2004. The employer denied both grievances at every level of the grievance procedure. The bargaining agent referred both grievances to adjudication on April 2, 2007.

[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*, these references to adjudication were dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 ("the former *Act*").

[3] The grievances were heard at adjudication, and on April 21, 2010, an adjudicator dismissed them (see: *Burden and Cyr v. Parks Canada* Agency, 2010 PSLRB 55) on the grounds that the employer had correctly applied the IPP. The grievors applied to the Federal Court for a judicial review of the adjudicator's decision. On March 2, 2011, the Federal Court (see: *Burden and Cyr v. Parks Canada* Agency, 2011 FC 251) granted the grievors' application and ordered that the matter be referred to another adjudicator to be decided in accordance with the reasons it outlined in its decision.

[4] Because there were no facts at issue and no evidence was needed from the parties, I decided, after discussing it with the parties, to proceed on the basis of written submissions. I will first summarize the grievances, the adjudicator's decision, and the decision of the Federal Court.

A. The facts relevant to the grievances

[5] At the hearing in 2009 and 2010, the parties had submitted a joint statement of facts. It was reproduced entirely in the adjudicator's decision. I will simply summarize that statement or use the parts that are essential to my decision.

[6] Mr. Burden and Mr. Cyr worked in remote areas of Canada during the summer season. They were both members of the bargaining agent and covered by the IPP and the collective agreement. Subject to certain conditions being met, subsection 2.1.2 of the IPP grants employees or their dependents travel expenses for medical treatment. Subsection 2.1.2 of the IPP reads as follows:

> *2.1.2 Subject to this section, when employees or their dependents obtain medical or dental treatment at the nearest location in Canada where adequate medical or dental treatment is available, as determined by the attending medical or dental practitioner, and they satisfy their FUS by means of a certificate of the attending medical or dental practitioner that the treatment*
>
> *a) was not elective,*
>
> *b) was not available at their headquarters, and*
>
> *c) was required without delay,*
>
> *the FUS shall authorize reimbursement of the transportation and traveling expenses in respect of that treatment.*

[7] Mr. Burden was a seasonal employee at L'Anse Aux Meadows National Historic Site in Newfoundland. This location qualified as an isolated post under the IPP. In July 2003, his daughter became acutely ill, required hospitalization, and was referred to a specialist in St. John's. The earliest possible appointment with the specialist was October 27, 2003, two weeks after Mr. Burden's seasonal employment had ended for the year. Mr. Burden was therefore on seasonal lay-off at the time of his daughter's medical appointment. He travelled with his daughter to St. John's on October 26, 2003 and again on November 27, 2003 for re-evaluation by the specialist.

[8] Mr. Burden initially spoke to the site supervisor, who advised him verbally and in writing that he would be entitled to travel benefits under the policy even though he was "off strength" (on seasonal lay-off) at the time. Subsequently, the site supervisor received an email from the Manager of Administrative Services, who informed her that the benefits were not in fact available to employees on seasonal lay-off status. As a result, Mr. Burden was not reimbursed under the policy.

[9] Mr. Cyr is a seasonal employee at the Mingan Archipelago National Park Reserve. This location also qualifies as an isolated post under the policy. In Mr. Cyr's Field Unit, some travel expenses relating to non-elective medical or dental treatment had been

reimbursed in the past to employees on seasonal lay-off. However, every employee in his unit, including Mr. Cyr, was informed by Memorandum on June 17, 2002 that they were not entitled to reimbursement of treatment-related travel expenses while on seasonal lay-off.

[10] On November 29, 2002, Mr. Cyr travelled with his child to Sept-Iles, Quebec, to attend an orthodontic appointment. His seasonal lay-off had begun some weeks earlier on October 5, 2002. He satisfied the requirements of the IPP by establishing that the treatment was not elective, was not available at his headquarters, and was required without delay. His travel expense claim was denied on the grounds that his travel occurred while he was on seasonal lay-off.

[11] The parties agreed that both grievors met the conditions set out in subsection 2.1.2 of the policy – that is, that the treatments in question were non-elective, were not available at their headquarters, and were required without delay. However, the employer denied their claims on the grounds that both of them were on seasonal lay-off when the medical treatments took place.

B. The adjudicator's decision in 2010 PSLRB 55

[12] The adjudicator denied the grievances. In her analysis of the collective agreement, she concluded that the situation of seasonal employees on seasonal lay-off is not comparable to the situation of employees on leave without pay to whom the benefit applies. The following two sections of the IPP refer directly to those two categories of employees:

> *2.1.1 Employees who are granted leave without pay for the following reasons are also entitled to the benefits of this section: illness, injury-on-duty, or maternity/parental leave.*
>
> . . .
>
> *2.7.3 When, because of operational requirements, an indeterminate seasonal employee who resides at the headquarters cannot be granted the benefits of this section during the operational season, the employer shall, at the employee's request, grant the benefits of this section during the off-season.*

[13] For the adjudicator, the benefits of the IPP are available only during seasonal employment, except when the employer cannot grant the employee's request during the latter's employment because of operational requirements. There was no evidence presented to the adjudicator that the grievor's requests were made for the off-season period because of operational reasons. Mr. Burden's appointment was scheduled during the off-season period because he could not obtain a medical appointment during his seasonal employment. Mr. Cyr relied on the employer's previous interpretation of paying this benefit during the off-season period.

C. <u>The Federal Court decision</u>

[14] The Court stated that the adjudicator erred in placing too much reliance on subsection 2.7.3 of the IPP, which is not, according to the Court, applicable to the medical and dental-related expenses at issue in these grievances. The Court listed the titles of the ten sections of Part II of the IPP and the entire wording of section 2.7. Those read as follows (including section 2.7.3 already quoted):

> ***Part II – Expenses and leave***
>
> ***Travelling and Transportation Expenses***
>
> *2.1 Non-Elective Medical or Dental Treatment*
>
> *2.2 Compassionate Travel and Expenses*
>
> *2.3 Bereavement Travel Expenses*
>
> *2.4 Vacation Travel Assistance*
>
> *2.5 100% Accountable Vacation Travel Assistance*
>
> *2.6 80% Non-accountable Vacation Travel Assistance*
>
> *2.7 Part-time and Seasonal Employment*
>
> *2.8 Carry-over of Expenses*
>
> *2.9 Post-Secondary Educational Travel*
>
> *2.10 Adoption of a Child*
>
> . . .
>
> ***2.7 Part-time and Seasonal Employment***
>
> *2.7.1 Subject to the Application section of this Policy, part-time and seasonal employees shall be entitled to the benefits*

> *of Appendix I or J, in the same proportion as their total annual hours of work compare to the total annual hours of work of a full-time employee occupying a position at the same occupational group and level (prorating).*
>
> *2.7.2 Employees will be eligible to be reimbursed the lesser of:*
>
> *a) the prorated maximum entitlement (Appendix I); or*
>
> *b) the actual expenses incurred (Appendix J).*
>
> *2.7.3 When, because of operational requirements, an indeterminate seasonal employee who resides at the headquarters cannot be granted the benefits of this section during the operational season, the employer shall, at the employee's request, grant the benefits of this section during the off-season.*
>
> *2.7.4 Part-time and seasonal employees may choose the 80% non-accountable Vacation Travel Assistance which will then be prorated.*

[15] The Court did not agree with the adjudicator's interpretation of section 2.7.3 of the IPP. It stated its reasons as follows:

> *[22] . . . section 2.7 does not appear to differentiate between the benefits available to seasonal and full time employees with respect to* all *of the sections of Part II including the section 2.1 benefits at issue here. If section 2.7 were meant to distinguish seasonal employees from full-time employees with regards to all the Part II benefits, it would logically have been inserted at the very beginning of Part II.*
>
> *[23] Section 2.7 could obviously have been drafted more clearly. However, on the face of it, it is possible to determine that this section is meant to apply to vacation benefits specifically, and not to all of the benefits set out in Part II. This is apparent for several reasons: First, section 2.7 mentions Appendix I (Calculation of Maximum Entitlement) and J (Reimbursable Expenses), both of which clearly relate to vacation travel benefits. Second, the preceding and following sections all deal with vacation benefits: 2.4 (vacation travel assistance), 2.5 (100% accountable vacation travel assistance), 2.6 (80% Non-accountable vacation travel assistance), and 2.8 (carry-over of expenses). Third, one of the subsections within section 2.7 (i.e., ss. 2.7.4) explicitly refers to vacation travel assistance.*
>
> *[24] Indeed, this understanding of the provision is a logical one, for there is a clear rationale for including subsection*

> *2.7.3 in order to differentiate the vacation travel-related benefits available to year-round employees from those available to seasonal employees (even if seasonal employees are entitled to the other benefits allocated by the IPP). Because seasonal employees do not work the same annual hours as do full-time employees, section 2.7 provides that they will receive vacation benefits on a pro-rated basis. However, because of the nature of seasonal work, which occurs only in the very season that employees are most needed, some individuals may not be able to take allotted vacations during their seasonal employment. Accordingly, subsection 2.7.3 was designed to allow seasonal employees to obtain certain monetary benefits during the off-season in the event that they are not able to complete a vacation during the season.*
>
> *[25] Therefore, the Applicants are correct in arguing that it was unreasonable of the Adjudicator to rely on a ss. 2.7.3, a section separate and apart from the provisions governing travel expenses for non-elective medical or dental treatment, to conclude that indeterminate seasonal workers were not entitled to those benefits.*

[16] The Court also blamed the adjudicator for failing to consider the "Application" section of the IPP, and for failing to explore the question of whether as "employees" the grievors were entitled to be reimbursed the claimed expenses. The relevant parts of the "Application" and "Definitions" sections of the IPP read as follows:

> ***General***
>
> . . .
>
> ***Application:***
>
> *This Policy applies to all eligible employees of Parks Canada; the Agency is listed in Part II of Schedule I of the Public Service Staff Relations Act, and has opted to follow this policy.*
>
> *Persons employed:*
>
> *a) for a specified term of less than three (3) months or*
>
> *b) working less than one-third of the normal working hours of a full-time indeterminate employee of the same occupational group and level*
>
> *are not eligible for any of the benefits provided in Part II (Expenses and Leave) or those provided in Sub-section 3.2.2 or Section 3.6 of Part III (Relocation to an Isolated Post) of this policy.*

. . .

Definitions

. . .

Employee *(fonctionnaire) – means, subject to the Application section, a person*

a) to whom this policies applies,

b) whose salary is paid out of the Consolidated Revenue Fund.

[17] According to the Court, it would seem that seasonal employees are employees for the purpose of the IPP. As to whether seasonal employees are employees for the purpose of the IPP when on seasonal lay-off, the Court stated that the objective of the IPP militates in favour of treating seasonal employees as "employees" year-round. The IPP section entitled "Purpose and Scope" reads as follows: *The purpose of this Policy is to facilitate the recruitment and retention of staff delivering government programs in isolated locations.*

II. Summary of the arguments

A. For the grievors

[18] The grievors argued that the structure of the IPP confers benefits, in the form of allowances, expenses and entitlements, to eligible employees. There is no doubt that the term "eligible employees" includes seasonal employees. Needless to say, concerns regarding recruitment and retention would apply to indeterminate seasonal employees as much as they would to other employees. By conferring these benefits on eligible employees, the employer furthers the purpose of the IPP to recruit and retain employees by assuming some of the costs associated with living and working in isolated locations. Any exception to the granting of these benefits should be clearly stated in the IPP.

[19] The "Application" section establishes that the IPP applies to all eligible employees. Only two categories of employees are excluded from the benefits set out in part 2 of the IPP: terms of less than three months, and employees who work less than one-third of their normal working hours. It is well established that, by expressly excluding two categories of employees, it must follow that all other categories of

employees are included and therefore are entitled to the benefits provided in part 2 of the IPP.

[20] As stated by the Court, there is a clear rationale for including subsection 2.7.3 in the IPP. It is possible that, because of operational requirements, the employer may deny vacation leave, in which case a seasonal employee would not be entitled to vacation at all. This is because it would not make sense for a seasonal employee to take vacation after the season ends since the employee would not be working anyhow.

[21] The grievors argued that these grievances ought to be allowed. First, the vast majority of arguments that could possibly be advanced by the employer have been rejected by the Federal Court. Furthermore, the Federal Court has confirmed that the grievors are subject to the application clause of the IPP. The only way in which the grievors could therefore be excluded from the IPP would be if the specific language so stated. The employer has failed to point to any such language.

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

[22] The grievors argued that the Court has confirmed that the IPP applies to seasonal employees while on seasonal lay-off unless clearly expressed otherwise. This is not what the Court wrote. It simply stated that, in and of itself, the "Application" section of the IPP did not seem to exclude the grievors from the application of the IPP.

[23] The position of the employer is that the intent of the parties is clear: the IPP confers benefits on employees who are on strength only, unless clearly stated otherwise. The purpose of the IPP is to facilitate the recruitment and retention of employees when delivering programs in isolated locations. The fact that indeterminate seasonal employees do not benefit from the IPP all year-round, as opposed to indeterminate employees who work year-round, does not contradict the purpose of the IPP, quite the contrary. When employees are not on strength, they are not delivering programs in isolated locations. Moreover, seasonal employees are not required by the employer to stay at the isolated location during the off-season, as opposed to year-round indeterminate employees.

[24] A clear indication that the parties meant to apply the IPP to seasonal employees only during the seasonal employment is found in the definition of the term "employee". According to that definition, an employee is a person whose salary is paid

out of the Consolidated Revenue Fund. In the French version, an employee is a person "touchant un traitement tiré à même le Trésor". All employees working for the employer receive a salary that ultimately comes from the Consolidated Revenue Fund.

[25] The parties chose a different definition for the word "employee" in the IPP than the one included in the collective agreement. The parties could have easily decided to use the same definition in the IPP as the one found in the collective agreement. They chose not to do so. The parties chose to include in the definition that an "employee" is someone "to whom this policy applies" and "whose salary is paid out of the Consolidated Revenue Fund". In French, the definition states "touchant un salaire". Every word in the Policy has a purpose. The employer submits that the words chosen by the parties indicate that an "employee" is someone who is on strength, and not simply who retains his "employee status" during the off-season.

[26] In a labour relations context, it is quite unusual when defining the word "employee" to expressly state that the individual has to be paid. Indeed, the parties chose not to use this wording in the collective agreement. In the context of the IPP, however, the presence of these words ("paid", "touchant un salaire") is justified and meaningful: it is consistent with the purpose of the IPP. Again, a seasonal employee during the off-season is not delivering government programs and is not required to stay at the isolated post. In addition, one has to recognize that the parties usually refer to the operational season as the period of "employment". It is therefore not surprising to see the term "employee" in the IPP mean someone who is on strength and not someone who simply maintains his "employee" status under the collective agreement.

[27] The employer submits that the grievors failed to prove that the employer breached the IPP. The grievors were not entitled to the benefits set out in section 2.1 of the IPP because, at the material time, they were on seasonal lay-off. This interpretation of the IPP is consistent with its purpose. Indeterminate employees who are asked to work all year-round can benefit from the policy 12 months a year. Those who are seasonal employees, and who are free to go wherever they want during the off-season can benefit from it only during their seasonal employment.

Reasons

[28] The employer admitted that the grievors met the condition outlined in subsection 2.1.2 of the IPP. The employer also admitted that the only reason to refuse

reimbursing the grievors or their dependents' transportation and travel expenses in respect of medical or dental treatment was that the grievors were on seasonal lay-offs. Thus, the only issue is whether an indeterminate seasonal employee is entitled to that benefit under the IPP while on seasonal lay-off.

[29] The adjudicator in 2010 PSLRB 55 decided that the grievors were not entitled to that benefit under the IPP while on seasonal lay-off. The Federal Court in 2011 FC 251 quashed the adjudicator's decision. In a nutshell, the Court stated that subsection 2.7.3 applies to vacation travel-related benefits, but not to the non-elective medical or dental treatment. In other words, subsection 2.7.3 is irrelevant to decide these grievances. The Court also blamed the adjudicator for failing to consider the "Application" section of the IPP, and for failing to explore whether the grievors were employees according to the "Definitions" section of the IPP when they claimed the reimbursement of expenses.

[30] Considering the decision of the Court, the question before me has been narrowed down to whether the grievors were employees for the purpose under subsection 2.1.2 of the IPP while they were on seasonal lay-off. If they were employees while on seasonal lay-off, the benefits of subsection 2.1.2 applied to them, and their grievances should be allowed. If they were not employees, their grievances should be denied.

[31] I do not agree with the employer's argument that seasonal employees while on seasonal lay-off are not employees for the purpose of the application of the IPP. If the parties' intention was to exclude them from the application of the IPP, they should have mentioned it in the "general" clauses which introduce the IPP, or specified it in the appropriate sections or subsections of the IPP.

[32] There is no doubt in my mind that the "Application" section and the "Definitions" section apply to the whole policy. The specific sections or subsections of the IPP do not exclude the grievors while on seasonal lay-off from receiving the benefits of subsection 2.1.2. For the employer to refuse them those benefits there must be something in the general sections that exclude them.

[33] The "Application" section specifies that the IPP does not apply to employees hired for terms under three months and to employees working less than one-third of the normal working hours of a full-time employee. It does not exclude seasonal employees on seasonal lay-off.

[34] The IPP defines an employee as a person to whom the policy applies and whose salary is paid out of the Consolidated Revenue Fund. The first part of that definition is tautological, and does not shed any light on the issue of whether seasonal employees are employees for the purpose if the IPP while on seasonal lay-off.

[35] It was argued by the employer that the second part of the definition could mean that an employee on seasonal lay-off does not receive a paycheque and, consequently, is not paid out of the Consolidated Revenue Fund. The employer added that the French version makes its point even more clearly by using the words "touchant un traitement". I do not agree with the employer's interpretation that when an employee is off-season, he or she is not an employee for the purpose of the IPP.

[36] The employer did not argue that the grievors were not its employees. Rather, it claimed that, for the purpose of the IPP, they lose their employee status while on seasonal lay-off. This is not my understanding of the terms "paid out of the Consolidated Revenue Fund". Those terms refer to the source of payment rather than to being paid or not being paid. They are used to differentiate persons whose employer is the Parks Canada Agency from persons who work for a contractor or another employer who might be closely associated by its activities to the Parks Canada Agency. During the working season, the grievors are paid out of the Consolidated Revenue Fund. When they are not working, they are not paid, just like employees on leave without pay are not paid.

[37] In my opinion, the French version of the IPP does not shed a different light on the interpretation of the English version. The words "touchant un traitement" simply equate the words "being paid".

[38] This conclusion that seasonal employees on seasonal lay-off are employees for the purpose of the IPP is consistent with the fact that the parties did not exclude those employees as they did in the "Application" section for other categories of employees. If the intention was to exclude those employees while they are on seasonal lay-off, I believe that the parties would have clearly mentioned of it.

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

(The Order appears on the next page)

Order

[40] The grievances are allowed.

July 21, 2011.

Renaud Paquet,
adjudicator