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File: 566-02-6774

Citation: 2013 PSLRB 62

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

STEVE STOCKLESS

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Stockless v. Treasury Board (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievor: Marie-Pier Dupuis-Langis, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

For the Employer: Léa Bou Karam, counsel

Heard at Montreal, Quebec,
April 17 and 18, 2013.
Written submissions filed April 19, 2013.
(PSLRB Translation)

I. Individual grievance referred to adjudication

[1] On August 10, 2011, the grievor, Steve Stockless, filed a grievance against a decision by the Correctional Service of Canada ("the employer" or CSC) to not pay him the allowances provided under National Joint Council (NJC) Foreign Service Directives 55 and 58 (FSDs 55 and 58) while he took part in a United Nations (UN) mission in Haiti. Mr. Stockless works as a correctional officer at the Leclerc Institution in Laval. He participated in the Haiti mission from September 23, 2010 to March 22, 2012.

[2] The applicable collective agreement ("the collective agreement") was signed on June 26, 2006 for the Correctional Services Group by the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the union"), of which the FSDs are part, as stipulated by clause 41.03.

[3] Given that the grievance involves an NJC directive, it was dealt with according to the specified procedure for such a grievance. At the two departmental levels of the grievance procedure, the employer denied the grievance on the basis that it was not filed in time. The employer also denied it on grounds that the UN was paying Mr. Stockless a mission subsistence allowance (MSA) to cover the costs incurred from his temporary deployment to a special mission. Therefore, the employer took the position that, when several allowances have the same purpose, it must ensure that employees do not receive double benefits. The NJC denied the grievance on the grounds that FSD 3.01 states that an employee cannot "receive double benefits." The NJC acknowledged that Mr. Stockless did not receive benefits payable under FSDs 55 and 58, but it noted that he received the MSA from the UN, which was more than the total of the allowances provided in FSDs 55 and 58.

[4] Neither at the referral to adjudication nor during the hearing did the employer raise an objection that the grievance was filed after the deadline. However, it asked me to limit the remedy to the 25 days before the grievance was filed. According to clause 20.10 of the collective agreement, an employee can file a grievance within 25 days of becoming aware of the facts or of the decision being challenged.

II. Summary of the evidence

[5] Mr. Stockless testified. He called Pierre Dumont as a witness. Mr. Dumont is a correctional officer at the Donnacona Institution and is the union's regional president for the Quebec Region. The employer called Kimberley Gowing and Martin Maltby as

witnesses. Ms. Gowing is the director of pension plan management and regulatory policy at the Treasury Board Secretariat. From 2006 to 2009, she was a senior analyst specializing in the FSDs, and in that position, she regularly provided FSD advice to the Department of Foreign Affairs and International Trade (DFAIT). Mr. Maltby is a senior policy analyst for the employer. He was involved several times and handled questions about assignments abroad and about applying the FSDs for CSC employees.

[6] Following an offer by the employer, Mr. Stockless agreed to be deployed or assigned to Haiti to work on the United Nations Stabilization Mission in Haiti (MINUSTAH). His assignment began on September 23, 2010 and was scheduled to end on September 22, 2011. It was extended to March 22, 2012.

[7] The written assignment agreement was signed by Mr. Stockless, Mr. Maltby and a Treasury Board Secretariat representative, whose signature is illegible. Mr. Stockless signed the agreement on September 1, 2010. Among other things, it stated that Mr. Stockless would work continuously, seven days a week, "[translation] in Haitian prisons that were in a state of disrepair." The agreement also stated that the UN would determine the duties, which could include training Haitian correctional officers, promoting respect for offenders' rights, developing training programs, conducting investigations, managing emergencies and establishing monitoring mechanisms. The agreement stated that Mr. Stockless would remain a CSC employee during his assignment and that he would continue to receive his salary and benefits. However, he would not be able to take leave during his assignment, apart from accumulated compensatory leave, because of the continuous seven-days-a-week schedule. The agreement also stated that Mr. Stockless would receive a daily living allowance. Finally, the agreement stated that the FSD benefits and allowances to which Mr. Stockless was entitled were listed in Appendix B of the agreement, which reads as follows:

> [Translation]
>
> ***APPENDIX B***
>
> ***Foreign Service Directives (FSDs) of the Government of Canada***
>
> *You are entitled to the following benefits and allowances:*
>
> *FSD 50 - Vacation Travel Assistance*
>
> *FSD 51 - Family Reunion (if applicable)*

FSD 56 - Foreign Service Incentive Allowances

FSD 56.10 - Post Specific Allowance

FSD 70 - Reporting Requirements and Verification of Allowances

[8] As were his fellow correctional officers at the post, Mr. Stockless was a member of the UNPOL, the UN "police" group in Haiti at the time of the post. The group included, among others, correctional officers and members of the RCMP and municipal police forces.

[9] As stipulated in the assignment agreement, Mr. Stockless worked seven days a week and received no overtime. He accumulated leave and was given approximately two weeks of leave every second month. That leave compensated him for the extra days he worked. Furthermore, Mr. Stockless, voluntarily and on his own initiative, worked one or one and one-half hours longer than his usual workday to complete work documents and reports. He was not paid for those hours.

[10] Like his co-workers, Mr. Stockless lived in a controlled area separated from the population in a fenced house with an armed guard present at all times. He had no hot water, and the electricity was intermittent. Electricity was available, but it would fail without warning and would shortly return. It was very hot in the apartment because the air conditioning worked only when electricity was available. On average, electricity was available for 10 to 12 hours per day. Mr. Stockless had to pay a woman to do his laundry because he was not equipped for it in his very modest apartment, which he shared with a co-worker for US$1500 per month. He could buy food from only a few secure locations, and it was very expensive. It cost him and his co-worker US$350 per week in groceries just for supper. For example, a box of chicken wings cost US$50. Recreational activities were rare. Mr. Stockless's housing complex had a pool. However, for security reasons, it was very difficult to leave the complex.

[11] The prison where Mr. Stockless and his colleagues worked was located in the red zone, the most dangerous part of the city. They travelled there in a utility vehicle provided by the UN. To get to work, they first had to go to the UN base (which took about 15 minutes) and from there travel to the prison, which took an additional 75 to 90 minutes (when everything went well). It was a challenge to get to work because violent outbreaks occurred frequently. Sometimes, the commute took much longer if incidents occurred along the way or in the middle of the road. As an example, soldiers

had to escort Mr. Stockless and his co-workers to work during elections. Sometimes there were demonstrations, so it would take longer to commute to and from work. One time, on their route, they saw a woman's head being cut off, and their vehicle was attacked with sticks and large stones as they returned from work. The vehicle's windows were smashed. On average, Mr. Stockless's two-way commute was three hours in sometimes unsafe conditions, while at home he can make the two-way trip between his home and the Leclerc Institution in one hour.

[12] The prison conditions were extremely difficult. It was often around 40˚C, and there was no air conditioning. A large part of the prison had been burned and was unusable, resulting in 30 to 150 inmates per cell. The cells had no toilets. Given no other choice, the inmates relieved themselves in bags that they later tossed out the window into an indoor hallway that led to another area of the prison. The prison had about 15 septic tanks, but they were almost always full. The smell was foul; it was very hot, and sanitary conditions were below accepted standards. The inmates were washed with fire hoses, and soap was virtually non-existent. The food served to inmates was inadequate. Anemia and cholera outbreaks were very common among inmates. Mr. Stockless remembers two to three deaths happening each day in the prison. Tuberculosis was common, and medical care for the prisoners was rare.

[13] Working in the prison was dangerous. One inmate in each cell was called the cell "major," and he held the key to the cell. That inmate was essentially in charge of his cellmates. Correctional officers had to be alert at all times. Mr. Stockless and his co-workers were not armed and had no tools to defend themselves with. They simply relied on a portable radio and the occasional security messages that they received. A few months before Mr. Stockless arrived, a hostage taking had taken place, involving MINUSTAH personnel. The hostages were released unharmed, but one inmate died.

[14] Mr. Stockless attended a training session in August 2010 before leaving for Haiti. He remembered the employer and a DFAIT representative briefly explaining to him that the FSDs applied to the post and that he would receive several sums, in accordance with the directives. However, the employer did not give him a copy of the FSD in question. Mr. Stockless confirmed that, during his assignment, he received the following amounts from the employer under the FSDs: $1000 for travel assistance under FSD 50, $1773 for a family reunion under FSD 56, $9524 as a foreign service

premium under FSD 56, and a post-specific allowance of $2583 under FSD 56.10. He also received his regular annual salary of $70 131.

[15] During his 18-month assignment in Haiti, Mr. Stockless received a daily subsistence allowance of US$216 from the UN for each of the first 30 days of his assignment and US$150 for the 516 remaining days. Although the UN considers Haiti as having harsh living and working conditions, Mr. Stockless testified that it paid him no premium as compensation for those conditions or the risk that he incurred.

[16] Mr. Stockless adduced into evidence several documents about benefits received by RCMP officers posted in Haiti and by correctional officers posted in Afghanistan as part of a mission sponsored by the Canadian Forces. He believes that he was entitled to receive the same benefits that they did. He added that his situation could not be compared to that of embassy employees who live and work in clearly more favourable conditions than those he was subject to.

[17] Mr. Dumont testified that several union members were deployed to Haiti and were dissatisfied with the benefits that they received from the employer at that time. That was discussed at national union-management meetings in February, April and September 2012. Special meetings were also supposed to have taken place between the union, the employer, the DFAIT and the Treasury Board Secretariat to discuss the application of FSDs 55 and 58 during the Haiti post. The meetings never took place because the employer cancelled them.

[18] Ms. Gowing testified that the FSDs provide for the payment of a variety of allowances to ensure that posted employees have a standard of living comparable to theirs in Canada and to encourage them to take foreign assignments. Ms. Gowing stated that the UN pays an MSA to employees deployed to its missions to cover their housing, food, telephone and other expenses and to compensate them for the general conditions in the regions they are deployed to. The CSC consulted Ms. Gowing about the simultaneous application of FSDs 55 and 58 and the MSA. Ms. Gowing prepared a letter sent by her director at the CSC, explaining that the amounts provided in FSDs 55 and 58 could not be paid to the employees because they were already receiving the MSA, which was based on criteria similar to those in the two FSDs and had the same goals. During Ms. Gowing's testimony, the letter in question was entered into evidence, along with some UN documents explaining the reason for the MSA.

[19] All applicable FSDs were adduced in evidence. Several other documents were also adduced that showed that the allowances provided in FSD 58 had been paid to CSC employees posted abroad, even though food and housing had also been provided. With no further clarification, Mr. Maltby replied that those arrangements differed from those of the Haiti post.

III. Summary of the arguments

A. For Mr. Stockless

[20] Mr. Stockless argued that the employer violated the collective agreement by not providing him with the compensation set out in FSDs 55 and 58. The evidence showed that the cost of living at the post was higher than in Canada. Therefore, FSD 55 applied. The evidence also demonstrated that FSD 58 should have been applied, given the dangers and harsh conditions at the post.

[21] The MSA and FSDs 55 and 58 are intended for different purposes and can be paid at the same time. The MSA is a daily allowance for housing and food living expenses. FSD 55 provides the payment of a living allowance solely for posts where the post index is greater than 100. That index is calculated by comparing the cost of living at the post to that in Canada. FSD 58 is a post differential allowance that applies only to posts designated as difficult. The least difficult posts are classified Level I, while the most difficult posts are classified Level V. The Haiti post is classified Level V in the appendix to FSD 58.

[22] The UN acknowledged in its documents that some employees on postings are eligible to simultaneously receive the MSA, a risk or danger premium for more difficult posts, and a cost-of-living allowance. Therefore, those different allowances and premiums cover different things.

[23] Mr. Stockless referred me to the FSD sections that apply in this case and highlighted the evidence justifying the payment of the requested allowances. On the question of applying my decision to a date more than 25 days before the grievance was filed, he referred me to *Kullar v. Treasury Board (Correctional Service of Canada)*, 2011 PSLRB 3.

[24] Mr. Stockless asked that I allow the grievance and that I leave it to the parties to calculate the amounts that the employer should have paid him under FSDs 55 and 58.

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

[25] Mr. Stockless had the burden of proving that the employer violated the collective agreement by refusing to pay the allowances payable under FSDs 55 and 58. He did not discharge that burden.

[26] The employer claimed that the FSDs did not apply to Mr. Stockless's situation or to his grievance because the UN post in Haiti was not a foreign assignment within the meaning of FSD 3. According to FSD 3, the FSDs apply only in situations stipulated in FSD 3. However, none of those situations corresponds to the UN post in Haiti or to similar posts. Certainly, the employer agreed to pay some allowances provided in the FSDs, but it did so with its discretionary powers under the *Financial Administration Act*. Therefore, the employer did not violate the collective agreement because nothing required it to apply any of the FSDs, including 55 and 58.

[27] If the adjudicator were to conclude that the FSDs applied, the employer claimed that it did not violate the collective agreement by not paying the allowances under FSDs 55 and 58 because those allowances are intended for expenditures already reimbursed or accounted for in the MSA paid by the UN. An employee cannot receive the same benefit twice, which would happen were the grievance allowed.

[28] Mr. Stockless received the allowances to which he was entitled. On its own, the amount of the MSA paid by the UN was much higher than the sum of the allowances payable under FSDs 55 and 58. In addition, the FSDs' purpose is not that employees receive more abroad than in Canada but instead that they are compensated for any additional incurred costs.

[29] Were I to allow this grievance, the employer requested that I limit the remedy to the 25 days before it was filed. On that point, the employer referred me to *Canada (National Film Board) v. Coallier,* [1983] F.C.J. No. 813 (C.A.) (QL).

[30] The employer also referred me to the following: *Gill and Bourque v. Treasury Board (Department of National Defence),* 2013 PSLRB 12; *Irving Pulp & Paper Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 30,* 2002 NBCA 30; *Greater Essex County District School Board v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552*, 2011 ONSC 5554; *Canada (Procureur général) c.*

Lamothe, 2009 CAF 2; *Canada (Attorney General) v. McKindsey*, 2008 FC 73; *Stevens et al. v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 34; and *Roy v. Treasury Board (Department of Foreign Affairs and International Trade),* 2012 PSLRB 43.

IV. Reasons

[31] Clause 41.03 stipulates that the FSDs are part of the collective agreement. That point is not at issue in this grievance. Instead, the matter in dispute is, first, the applicability of the FSDs to the Haiti post, and if applicable, the employer's obligation to pay the allowances under FSDs 55 and 58, given that the UN paid an MSA.

A. The applicability of the FSDs to the MINUSTAH in Haiti

[32] The employer claimed that the FSDs did not apply to Mr. Stockless because the Haiti post was not a foreign assignment within the meaning of FSD 3. According to FSD 3, the FSDs apply only in the stipulated situations. However, the employer deemed that none of those situations correspond to the UN post in Haiti or to similar posts.

[33] The following provisions in the version of FSD 3 in force when Mr. Stockless was assigned to Haiti, taking into account the facts and evidence presented, must be considered to determine whether the different FSDs apply in this case:

> ***Directive 3***
>
> *3.01 Unless otherwise indicated, and subject to the provisions of FSD 8 - Short-term assignments outside Canada, these directives apply to career foreign service employees and to foreign assignment employees on assignment outside Canada, where:*
>
> *(a) an assignment is normally for a period of 12 months or more;*
>
> *(b) career foreign service employees are employees who, as a condition of employment, serve abroad pursuant to a rotational pattern throughout the span of their careers. This rotational service normally involves assignments to a number of posts but occasionally, due to operational requirements, assignments may be limited to one or a few posts;*
>
> *(c) foreign assignment employees are employees who have made no commitment to serve abroad throughout the span of their careers pursuant to a rotational pattern, but who serve an occasional assignment at a post;*

(d) an assignment means an assignment to an office of the Government of Canada at a post or:

(e) where leave with pay is authorized and no financial assistance or related benefits are provided to the employee by the host organization, an assignment means an assignment to:

> *(i) an international organization outside Canada;*
>
> *(ii) a project outside Canada which is funded directly or indirectly by the Canadian International Development Agency;*
>
> *(iii) a foreign government or private firm or organization outside Canada under a formal agreement between the employing department and the host organization;*
>
> *(iv) a research establishment or university outside Canada, where employees have been directed to continue working in their field on a full-time basis;*

except that

(f) notwithstanding Section 3.01(g), FSD 15 - Relocation, may be applied, in part, to training and/or developmental assignments to a recognized educational institution, as follows:

> *(i) Relocation Travel (FSD 15.03 - FSD 15.12)*
>
> *(ii) Relocation of Household Effects (FSD 15.13, FSD 15.14 and FSD 15.15)*
>
> *(iii) Compensation for Damage or Loss of Household Effects (FSD 15.18 - FSD 15.26)*
>
> *(iv) Living Expenses in Temporary Accommodation (FSD 15.33) - Expenses shall be limited to two days at the old place of duty, a maximum of five days outside Canada and two days on return to Canada, and*

(g) with the agreement of the employee's bargaining agent and subject to consultation with Treasury Board Secretariat staff, in order to meet operational requirements:

> *(i) these directives may be applied in whole or in part to assignments for which the employee has been granted leave without pay, including educational leave without pay;*

> *(ii) these directives may be applied in whole or in part to other assignments, including training and/or developmental assignments where professional development leave has been granted under the terms of a collective agreement;*
>
> *(iii) these directives may be applied in part to assignments in which an employee receives financial assistance or benefits from the host organization; or*
>
> *(iv) where an employee has requested and/or arranged for an assignment, other than an assignment to an office of the Government of Canada at a post, the deputy head may direct that an employee be exempt from all or some of the provisions of the Foreign Service Directives during an assignment outside Canada.*

> ***Instructions***
>
> *1. The Foreign Service Directives apply to non-public servants on assignment with a department or agency at a Post, under the Interchange Canada Program or the Business/Government Executive Exchange Program, as specified in the Assignment Agreement.*
>
> *2. In applying Section 3.01(g), care should be taken to ensure that employees:*
>
> *(a) do not receive double benefits, and*
>
> *(b) are not treated more favourably than employees serving outside Canada under the provisions of the Foreign Service Directives, and*
>
> *(c) are fully briefed on the specific application of the Foreign Service Directives.*

. . .

[34] Under those provisions, the FSDs apply to career foreign service employees, of whom Mr. Stockless is not one. They also apply to employees assigned abroad for at least 12 months (section 3.01(a)). *A priori*, Mr. Stockless's situation meets that requirement. Sections 3.01(b) and (c) clarify the distinction between those two types of employees. Sections 3.01(d) and (e) specify the meaning of the term "assignment." According to section 3.01(d), an assignment means working in an office of the Government of Canada at a post. According to section 3.01(e), an assignment can also mean an assignment to an international organization, to a project of the Canadian International Development Agency, to a foreign government or firm working outside

Canada, or to a research establishment or university outside Canada. At its start, section 3.01(e) specifies that the assigned employee is on authorized leave with pay. Based on the submitted documents, Mr. Stockless was not on leave with pay. Instead, he was deployed or assigned to a job outside Canada to serve in a UN mission. Therefore, he was relieved of his responsibilities at the Leclerc Institution, but he received his usual salary from the employer, as set out in the collective agreement.

[35] The assignment agreement states that Mr. Stockless was to work continuously, and it provides an overview of his tasks. It also states that Mr. Stockless was to remain a CSC employee during his assignment and that he would be unable to take leave during his assignment, apart from the compensatory leave earned from working continuously. It is clear that Mr. Stockless was not on leave with or without pay but instead was at work on an assignment other than his usual one. On the other hand, the assignment agreement also stipulates that Mr. Stockless was to receive the MSA along with the benefits and allowances under certain FSDs, namely, FSD 50, 51, 56 and 70.

[36] The out-of-context analysis of the wording of FSD 3.01 would lead me to accept the employer's argument that Mr. Stockless's assignment to Haiti was not an assignment for the application of the FSDs. However, I reject that argument on the basis that the employer was estopped from raising it after stating on several occasions verbally and in writing that the FSDs applied to the Haiti post. The employer could not now refer to the strict wording of FSD 3.01.

[37] Promissory estoppel applies to this grievance. Lord Denning described that doctrine as follows in *Amalgamated Investment and Property Co. Ltd. v. Texas Commerce International Bank Ltd.,* [1981] 3 All E.R. 577:

. . .

> *The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. . . At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption (either of fact or of law, and whether due to misrepresentation or mistake makes no difference) on which they have conducted the dealings between them, neither of them will be allowed to go back on that*

> *assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.*

. . .

[38] In *Canada (Attorney General) v. Molback,* [1996] F.C.J. No. 892 (T.D.) (QL), the Federal Court ruled that an adjudicator under the *Public Service Staff Relations Act* had jurisdiction to apply the doctrine of estoppel. Nothing leads me to believe that that changed with the new *Act.* In *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, the Supreme Court of Canada reiterated that doctrine and wrote the following about the roles and powers of adjudicators:

. . .

> *[44] Common law and equitable doctrines emanate from the courts. But it hardly follows that arbitrators lack either the legal authority or the expertise required to adapt and apply them in a manner more appropriate to the arbitration of disputes and grievances in a labour relations context.*
>
> *[45] On the contrary, labour arbitrators are authorized by their broad statutory and contractual mandates — and well equipped by their expertise — to adapt the legal and equitable doctrines they find relevant within the contained sphere of arbitral creativity. To this end, they may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized.*
>
> *[46] This flows from the broad grant of authority vested in labour arbitrators by collective agreements and by statutes such as the* LRA, *which governs here. Pursuant to s. 121 of the* LRA, *for example, arbitrators and arbitration boards must consider not only the collective agreement but also "the real substance of the matter in dispute between the parties". They are* "not bound by a strict legal interpretation of the matter in dispute"*. And their awards "provide a final and conclusive settlement of the matter submitted to arbitration".*
>
> *[47] The broad mandate of arbitrators flows as well from their distinctive role in fostering peace in industrial relations (*Toronto (City) Board of Education v. O.S.S.T.F., District 15, *[1997] 1 S.C.R. 487 ("*O.S.S.T.F., District 15*"), at para. 36;*

> Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, at para. 17).*

. . .

[39] The facts leading me to find promissory estoppel for the employer invoking that FSD 3 did not apply can be summarized as follows. On September 1, 2010, the employer signed an assignment agreement with Mr. Stockless that stated explicitly that FSDs 50, 51, 56 and 70 applied. In so doing, it indicated to Mr. Stockless that the FSDs applied to the Haiti mission and to his assignment. Earlier, in August 2010, during a training session, the employer had explained to the employees, including Mr. Stockless, leaving on the mission that the FSDs applied to the mission. In August 2011, Mr. Stockless filed a grievance, claiming the payment of the allowances payable under FSDs 55 and 58. The grievance involved an NJC directive and was dealt with according to the procedure specific to such a grievance. At the departmental level, the employer denied it on the grounds that the UN was paying an MSA to cover the costs incurred and that Mr. Stockless could not receive a double benefit. The NJC dismissed the grievance on the grounds that FSD 3.01 stipulates that he could not benefit twice from the same benefits and that the MSA received from the UN was more than the combined total of the allowances provided in FSDs 55 and 58. During some union-management meetings in 2012, evidence revealed that the issue was the applicability of FSDs 55 and 58 and not the applicability of the FSDs as a whole to the Haiti post. Finally, Ms. Gowing testified that the CSC had consulted her on the issue of applying FSDs 55 and 58 and the MSA and that she had prepared a letter explaining that the amounts provided in FSDs 55 and 58 could not be paid because the employees were already receiving the MSA, which was based on similar criteria to those in the two FSDs. All that evidence eloquently explains that the employer's position, repeated many times, was that the FSDs applied.

[40] Agreeing with the employer's new position would be the equivalent of agreeing that the employer misled Mr. Stockless when it posted him to Haiti by leading him to believe that, through the assignment agreement, he had rights that he actually did not have and that the employer was doing him a "favour" by giving him more benefits than those set out in the collective agreement, and by misleading him and his union by giving them incorrect reasons for denying the grievance while continuing discussions with the union after the grievance, clearly suggesting that the FSDs applied. Obviously,

I do not agree with that argument, and I conclude that the employer is estopped from relying on a strict interpretation of FSD 3, given that it adopted a broader interpretation for close to three years. It explicitly "promised" that the FSDs applied to the Haiti post, and it must keep that "promise."

B. <u>The applicability of FSDs 55 and 58</u>

[41] Apart from the argument dismissed above and presented at the hearing, the employer refused to pay the allowances under FSDs 55 and 58 because Mr. Stockless received the MSA, which, according to the employer, covered the same things as the two FSDs. Therefore, to determine whether FSDs 55 and 58 apply to Mr. Stockless's situation, I must consider the objectives of those FSDs and of the MSA and the items included in them. The following provisions of FSDs 55 and 58 capture the essence:

> ***FSD 55 - Post Living Allowance***
>
> ***Introduction***
>
> *To assist employees at missions where the cost of living is higher than in Ottawa/Gatineau, the employer provides a non-accountable allowance to compensate for the higher costs of purchasing goods and services at post.*
>
> ***Directive 55***
>
> *55.01 The deputy head shall authorize a Post Living Allowance (PLA) for each employee serving at a post for which the Post Index is greater than 100, in accordance with the appendix to this directive, where:*
>
> *(a) employees shall be compensated for the actual % of salary spent at post, calculated on the basis of their nominal salary, and reflecting the Post Index adjustment;*
>
> *(b) nominal salary is the mid-point of an employee's salary band, as shown in the appendix to this directive; and*
>
> *(c) the Post Index expresses the price differential between the post and Ottawa, as reported to the deputy head on a monthly basis by Statistics Canada.*
>
> . . .
>
> ***FSD 58 - Post differential allowance***
>
> ***Introduction***

> *This allowance is payable in accordance with the appendix to this directive in recognition of undesirable conditions existing at certain posts. The Deputy Minister of Foreign Affairs has been delegated authority to amend post rating levels, on the recommendation of the appropriate foreign service interdepartmental co-ordinating committee, as and when required.*
>
> ***Directive 58***
>
> *58.01 The deputy head shall authorize payment of a post differential allowance at the applicable rate having regard for the post rating level and the employee's family size, as shown in the appendix to this directive, where:*
>
> *(a) the amounts of post differential allowance shall be revised on the first of April each year in accordance with the methodology agreed to in the National Joint Council Committee on Foreign Service Directives, and published on the Department of Foreign Affairs and International Trade's website; and*
>
> *(b) the post rating levels shall be established and/or amended by the Deputy Minister of Foreign Affairs, on the recommendation of the appropriate foreign service interdepartmental co-ordinating committee, as and when required, and published on the Department of Foreign Affairs and International Trade's website . . . .*

. . .

[42] The parties have agreed that Haiti and Port-au-Prince are geographic areas where the cost of living is higher than in Ottawa/Gatineau for the application of FSD 55. The parties have also agreed that the Port-au-Prince post qualifies for the post differential allowance (FSD 58) at Level V, which is the highest level of undesirable conditions at a post. Therefore, taken alone, the cost of living and undesirable conditions that characterize assignments to Port-au-Prince would justify paying the allowances under FSDs 55 and 58. It seems to me that that point is not at issue. Instead, the question is about the simultaneous payment of those allowances and the MSA. If the MSA serves some goal other than the allowances payable under FSDs 55 and 58, the allowances in question could be paid at the same time as the MSA. To find out, it is necessary to examine the nature of the MSA and the elements on which it is based.

[43] Ms. Gowing explained that, in her view, the MSA already covers the elements taken into account for paying allowances under FSDs 55 and 58. She was not qualified

as an expert witness. Furthermore, she did not testify in the context of extrinsic evidence intended to clarify an unclear text. Instead, Ms. Gowing testified as the employer's specialist on the FSD question, and her testimony has the same limited probative value as I would give to the testimony before me of a union representative knowledgeable about a given issue. Such testimony is much more like part of an argument presented by one party than evidence in support of the argument in question.

[44] The parties provided me with two UN documents about the MSA. The first was not dated. Mr. Stockless adduced it into evidence. It briefly describes an MSA and provides a brief summary of how the allowances are established. Its appendix lists the different posts and their applicable allowances. The most recent review of the allowance rates dates from 2009. The document defines an MSA as a daily allowance payable by the UN to employees at post for their living expenses. It specifies that the MSA rate is established for each post by taking into account the costs of long-term housing, food and several on-site expenditures. The rates may be reduced if the UN provides food and housing. For example, in cases in which housing is provided, the MSA is reduced by 50%.

[45] The employer submitted the second document into evidence during its re-examination of Ms. Gowing's testimony. It is a 39-page report, dated December 1, 1995, listing UN decisions. It is titled, "[translation] Allowances Granted to Staff Serving in the Field, Including the Mission Subsistance Allowance." I carefully read the document to understand the nature of the MSA and the factors considered when establishing it. The following excerpts from the document are useful for understanding the MSA:

. . .

> [Translation]
>
> *19. a) All employees assigned to the same area under the same conditions receive the same emoluments. In other words, all employees entitled to a mission subsistence allowance — regardless of whether they are United Nations employees, persons specifically recruited for the mission, civilians, military observers or civilian police monitors — receive the same <u>subsistence allowance to cover their expenses in the mission area</u>;*

. . .

> *22. The mission subsistence allowance is intended to cover field expenses. It is not based on difficult living and working conditions and does not include an incentive bonus. . . .*
>
> . . .
>
> *24. When a special mission is established, usually through a Security Council decision, a compensation specialist from the Common System and Compensation Service (Office of Human Resources Management) conducts a field survey in cooperation with the Field Administration and Logistics Division (Department of Peacekeeping Operations) to gather cost-of-living data, which is used to determine the initial MSA rates applicable to mission personnel. A detailed assessment is established of the costs of accommodation, meals and related expenses (included later if the United Nations provides housing). Taken into account is that some basic products, goods and services, even infrastructure, could be lacking in the assignment location, for example, when common equipment has been destroyed or abandoned. International communication costs are also considered, as well as local living and working conditions (altitude, medical services, harsh climate, and the availability of newspapers and periodicals).*
>
> . . .
>
> *27. Later on, the MSA rates are regularly reviewed, to verify that the different factors and costs taken into account when setting the initial rates are still valid. If needed, the Common System and Compensation Service carries out a new field survey. Between two field surveys, MSA rates may be adjusted periodically based on information about cost-of-living changes in the mission area, communicated by the head of administration and the mission's administrative services.*
>
> *28. As indicated earlier, the MSA rates calculation accounts for the mission's operational needs. In certain cases, the mission may subcontract, as a whole, accommodation, food and other services for all personnel. Then, the MSA is reduced accordingly, by an amount that varies based on the formula, "accommodation only" or "full room and board." That option is more economical than paying the full MSA.*
>
> *29. In some mission areas, goods and services are sorely lacking or are completely non-existent. Then, the MSA rate must reflect the necessary expenditures for employees to obtain them in the mission area. For example, drinking water may be provided free of charge (subsistence allowance is lower) or may have to be purchased (allowance rate is higher).*

. . .

> *36. Therefore, the daily subsistence allowance is basically intended to cover employees' costs for short trips under normal conditions. The MSA is designed to cover subsistence costs during long-term missions under variable conditions. The daily subsistence allowance is only for travel expenses, while the MSA is based on a wider range of parameters related to the assignment and living and working conditions.*
>
> . . .
>
> *88. . . . The MSA, which is the primary allowance, responds to the operational needs of missions; it is an effective, administratively simple way of covering employees' living expenses in the field. MSA rates established by the ICSC are lower than those for the daily subsistence allowances paid to employees during short trips; they are also lower than the reference public service equivalent, whether for short or long stays. The MSAs, as currently established and allocated, correspond substantially to the expenses that result from being assigned to a mission.*
>
> [Emphasis added]

[46] In its very name, the MSA indicates that it is intended for subsistence, meaning material existence or the satisfaction of needs. It allows recipients to "[translation] cover their expenses in the mission area" (paragraph 19(a)) or "[translation] cover field expenses" (paragraph 22). The very essence of the MSA is to reimburse expenses and not to compensate for the discomforts endured in harsh conditions. Paragraph 22 also expressly states that the MSA "[translation] . . . is not based on difficult living and working conditions and does not include an incentive bonus."

[47] To establish the MSA rate, the UN gathers "[translation] . . . cost-of-living data, which is to be used to determine the initial MSA rates . . ." (paragraph 24). The UN then assesses the costs of accommodation, meals and related expenses. The possible lack of some basic goods and equipment is accounted for (paragraph 24). Finally, paragraph 24 specifies that international communication costs, as well as living and working conditions (altitude, medical services, climate, and the availability of newspapers and periodicals), are considered.

[48] Paragraph 27 indicates that the MSA is adjusted regularly based on the cost of living in the mission area. Paragraph 29 clarifies the components of the MSA, which accounts for additional expenditures that could result from the lack of goods and

services in the assignment area. The lack of drinking water is given as an example. Finally, in paragraph 88, the MSA is described as an "[translation] . . . effective, administratively simple way of covering employees' living expenses in the field." Further on, the same paragraph states that "[translation] [t]he MSAs, as currently established and allocated, correspond substantially to the expenses that result from being assigned to a mission."

[49] FSD 55 provides the payment of a post living allowance to compensate for buying goods and services at the post location that are more expensive than in the Ottawa/Gatineau region. It is calculated based on the cost-of-living index of the country in which the mission is operating. The MSA is also a subsistence allowance, also established based on the cost of living of the country in which the mission is operating. Accepting the simultaneous payment of the MSA and the allowance under FSD 55 would mean accepting the principle of a double payment to compensate for just one thing, the cost of living. Double benefits are explicitly prohibited in section 2 of the instructions in FSD 3. Double benefits would also be contrary to one of the principles underlying the FSDs, which is that employees serving abroad ". . . should be placed in neither a more nor a less favourable situation than they would be in serving in Canada." Therefore, that part of the grievance is dismissed. The employer had the right to refuse to pay Mr. Stockless the allowances under FSD 55.

[50] The MSA reimburses living expenses. According to the UN (see paragraph 88, cited earlier), the subsistence allowance corresponds substantially to the expenses incurred by assigned employees. FSD 58 does not reimburse expenses. It does not mention expenditures but instead financial compensation for "undesirable conditions existing at certain posts." The instructions to FSD 58 specify that posts are rated on a scale of I to V based on the ". . . relative degrees of hardship at posts. . . The form measures physical environment, local conditions and personal safety . . . ." The greater the relative degree of hardship at a post, the greater the allowances will be. It is not a question of compensating for the expenses incurred but instead the discomforts and hardships that the mission entails. A mission to Haiti is considered a Level V mission, which means a mission entailing a very high level of difficulty. Given that the MSA and FSD 58 do not have the same objective and are not based on the same elements, I conclude that the employer violated the collective agreement by refusing to pay Mr. Stockless the allowances under FSD 58.

[51] Although the MSA is for reimbursing living expenses, the UN document cited earlier specifies at paragraph 24 that the MSA calculation includes data about the costs of accommodation, meals and related expenses. That same paragraph also states that living and working conditions in the area are taken into account when the MSA is determined. However, at paragraph 22, the same document specifies that the MSA is intended to cover field expenses and that it does not take living and working conditions into account or include an incentive bonus. I conclude that the reference to living and working conditions at paragraph 24 is to expenditures or additional costs that could result from those conditions and that it is not to serve as a premium for "discomfort," "hardship" or "risk" due to difficult conditions.

[52] FSD 58 provides a monthly allowance of approximately $1000 to compensate for the unpleasant conditions characterizing the Haiti post. Nothing in the evidence adduced leads me to believe that paying that allowance would mean that Mr. Stockless would receive an overall salary higher than he would have received had he been in Canada. Approximately $30 per day is certainly not a disproportionate allowance for the difficult conditions of his post. Additionally, that is an entirely different question than whether he is eligible to receive the allowance payable under FSD 58.

[53] I reviewed the decisions cited by the parties. They are not directly related to the issues before me, apart from recalling some principles of interpretation. Therefore, I will not refer to them.

[54] Mr. Stockless submitted into evidence several documents that could suggest that the RCMP employees received higher benefits than those he received while serving in Haiti. The employer has no obligation to pay an employee what other employers pay in comparable circumstances. Mr. Stockless also submitted into evidence documents showing that certain CSC employees received higher benefits than he did when they were posted to Afghanistan. I agree with the employer that the applicable rules are not the same because the assignments in question were part of a Canadian mission and not a UN mission.

[55] The employer dismissed the grievances at the first and second levels of the grievance procedure on the basis that they were submitted after the deadline. It appears that the employer did not raise that point with the NJC and that it did not do so after the referral to adjudication. However, the employer requested that the

corrective measure be applied beginning only 25 days before the grievance was filed. On that point, the employer referred me to *Coallier*. Mr. Stockless did not agree with the employer and argued instead that my decision should apply from the beginning of his assignment in Haiti. To support his argument, he referred me to *Kullar*.

[56] I agree with the employer. Mr. Stockless started his assignment in Haiti on September 23, 2010. Before the assignment began, he signed an assignment agreement that listed the applicable FSDs. That agreement did not include FSD 55 or 58, and Mr. Stockless has known of that since September 2010. He did not file a grievance until August 10, 2011, 11 months later. According to the principle established by the Federal Court in *Coallier*, Mr. Stockless's grievance can only involve allowances that the employer should have paid him in the 25 days before the grievance was filed. The facts of Mr. Stockless's grievance differ from those in *Kullar*, in which the adjudicator agreed to apply the corrective measures to more than 25 days before the grievance was filed. In *Kullar*, several discussions took place between the union and the employer before the grievance was filed in an attempt to resolve the dispute, which suggests that the claims of all employees involved were resolved, including that of the grievor. In this grievance, the union and the employer held discussions, but only after the grievance was filed. Obviously, those discussions cannot justify the grievance being filed late, as in *Kullar*, or confer entitlement to a corrective measure retroactive to 11 months before the grievance was filed.

[57] Therefore, I conclude that the employer violated clause 41.03 of the collective agreement by failing to pay Mr. Stockless the allowance under FSD 58. It must pay Mr. Stockless that allowance retroactive to 25 days before he filed his grievance.

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

(The Order appears on the next page)

V. Order

[59] Mr. Stockless's grievance is allowed in part. I order the employer to pay him the allowance under FSD 58, effective 25 days before he filed his grievance until the end of his assignment.

[60] I will leave it up to the parties to agree on how to calculate the amounts that the employer must pay Mr. Stockless.

[61] The employer must pay the amounts due Mr. Stockless within 60 days of my decision.

[62] I will remain seized of Mr. Stockless's grievance for 90 days from the date of my decision to resolve any disputes about the calculation of the amount payable to Mr. Stockless.

May 29, 2013.

PSLRB Translation

Renaud Paquet,
adjudicator