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Citation: 2015 PSLREB 99

Public Service Labour Relations and Employment Board Act and *Public Service Labour Relations Act*

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

MICHAEL BANGLOY

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Bangloy v. Treasury Board (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

Before: Margaret T.A. Shannon, a panel of the Public Service Labour Relations and Employment Board

For the Grievor: Rebecca Thompson, Public Service Alliance of Canada

For the Employer: Josh Alcock, counsel

Heard at Ottawa, Ontario,
September 28, 2015.

I. Individual grievance referred to adjudication

[1] The grievor, Michael Bangloy, seeks reimbursement for expenses incurred as a result of being on travel status when his assignment ended early. When his one-year assignment to the Ottawa, Ontario, area ended early, he was required to terminate his apartment lease early. He incurred a penalty of three months' rent plus parking for the early termination of his lease. He seeks to recoup that penalty.

[2] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) before November 1, 2014, is to be taken up and continue under and in conformity with the *Public Service Labour Relations Act* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

II. Summary of the evidence

[3] The grievor is a border services officer assigned to the Vancouver Marine Operations in Vancouver, British Columbia. He accepted a one-year assignment to the National Risk Assessment Centre in Ottawa in 2009. He chose an assignment rather than permanently relocating to Ottawa from Vancouver.

[4] When he came to Ottawa in 2009, the Canada Border Services Agency, (the "employer") provided him with limited support for the move and for finding appropriate lodgings. Most of the information he received was from colleagues who had been on assignment. A week before he left Vancouver, the employer directed him to the National Joint Council (NJC) Travel Directive ("the travel directive"). He was told that he could live anywhere provided it was within the cost limit set out in the travel directive (see the email at Exhibit 1, tab 8). The employer did not give him any specific directions, but his colleagues did, adding specific guidance too.

[5] The grievor initially stayed at a suite hotel near the ByWard Market. He decided

to look for longer-term accommodation and sought to rent an apartment in that area. He found one that met the budget set out in the travel directive. He paid a deposit on the apartment to the landlord (one month's rent) and eventually signed a one-year lease (Exhibit 1, tab 10) for a term from February 1, 2009, to January 31, 2010. He moved in at the end of February 2009.

[6] After he had paid the rental deposit and before signing the lease, the grievor met with and had a discussion with his manager, Louise Worth, who recommended that he not sign a lease. He also discussed the reimbursement of his deposit. She told him that it was ill-advised to sign a lease and that she would not authorize the reimbursement of the deposit as it constituted the last month's rent. The grievor could submit a claim for reimbursement at that point. At the end of the discussion, according to the grievor, Ms. Worth again advised him not to sign the lease. At that point, he had already given the landlord his deposit. He stood to lose it unless he followed through with the lease.

[7] At the meeting, they did not discuss any early termination of the assignment. Nothing on this subject was raised until August 2009. When he was advised of the early termination of his assignment, the grievor discussed the lease situation with Ms. Worth, who reminded him of the previous discussion in which she had advised him not to sign a lease.

[8] After he was advised that his assignment would end early, the grievor spoke to his building manager, who told him that the lease could not be broken. The vice-president of the landlord's company confirmed as much when the request to break the lease was escalated to him. The grievor then tried to find someone to sublet the apartment or to assume the lease. His advertisements on Kijiji, Craigslist, and other websites were unsuccessful in finding anyone interested in either subletting or assuming the lease. Consequently, he requested that the employer pay out the balance of his lease, which it denied (see the email at Exhibit 1, tab 13).

[9] The grievor testified that he entered into the lease in compliance with section 3.3.1 of the travel directive. He did not remember being advised in his letter of offer for the assignment that leases should not be signed. He knew his assignment was for one year, and he was unaware of a provision that it could have been terminated earlier even though he admitted on cross-examination that he was at least superficially

aware that the assignment could be terminated with two weeks' advance notice. He did not consider the possibility that his assignment would end early when he entered into the lease. To the best of his knowledge and experience, it is not common for the employer to terminate an assignment early. His ended on October 31, 2009.

[10] The grievor admitted to reading the travel directive; however, his colleagues were his primary source of information about accommodations. He never asked anyone from management about signing a lease until after he had paid the deposit on his apartment. While the employer provided him with a list of recommended suite hotels, he preferred the apartment for which he had signed the lease. It was one of the nicest apartments he had seen and was in a desirable building and location.

[11] The grievor was aware that he was signing a one-year lease and understood the consequences. Rather than forfeit his deposit of one month's rent after he spoke to Ms. Worth, he asked his landlord if a shorter term were possible. After learning that one was not possible, he felt that it was worth taking the risk that his assignment would not end early rather than losing his deposit. He was never told that the employer would assume his lease if his assignment ended early, but based on his reading of the travel directive, it was reasonable to assume that it would. However, that was never validated with the employer before signing the lease.

[12] His request for reimbursement was denied, and the grievor filed this grievance, which was denied at all levels of the grievance process.

III. Summary of the arguments

A. For the grievor

[13] This grievance arose out of the unprecedented early termination of an assignment. The grievor has never heard of this happening before, and when he accepted his assignment, he signed a lease for one year, in keeping with the tenets of the travel directive. The purpose and scope of the travel directive is to ensure that mandatory reasonable expenses are reimbursed and that an employee is not out of pocket for travel-related expenses.

[14] The reality of apartment rentals is that a lease is required. Leases are common practice and are within the intent of the travel directive, which does not state that leases are not to be signed. It merely stipulates that expenses incurred must be

reasonable and that hotel stays over 30 days are not recommended. The cost of the suite hotel where the grievor first stayed exceeded the monthly allowance available to him. It is true that he could have avoided a lease, but he would have then incurred expenses that would have exceeded the monthly allowance. The welcome package he received from the employer (Exhibit 1, tab 7) merely recommended against entering into a lease; it did not speak to employee liability for the cost of ending a lease early.

[15] If there was a list of approved landlords from whom the grievor was to rent, it should have been communicated to him. The only real direction he received on accommodations was that he could stay anywhere as long as it was within the monthly allowance set out in the travel directive.

[16] Based on past practice, it was not foreseeable that the grievor's assignment would end early. He took a gamble and entered into a lease for the period of his assignment, consistent with the travel directive, which encourages an employee on travel status for more than 30 days in one location to use apartments or corporate residences. Renting an apartment is a preferred method of accommodation in longer-term assignments.

[17] The grievor took reasonable steps to mitigate his losses and should not have been penalized for the employer's unilateral decision to prematurely end the assignment. The travel directive requires that the employee be provided 30 days' notice of the termination of an assignment, and the agreement that the grievor signed was for two weeks' notice (Exhibit 1, tab 4, paragraph 1.9.2).

[18] When he was unable to assign the lease or find someone to sublet the apartment, the grievor was required to pay for three months' additional rent and parking after his assignment ended. The employer should reimburse him. It is unfair for the employer to expect him to bear those costs.

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

[19] This is an interpretation case, and the adjudicator's role is to determine the travel directive's true intent, based on ordinary language. An interpretation is limited to the express terms of the agreement and cannot create new terms or conditions or modify the terms that are clear (*Chafe et al. v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112 at paras. 50 and 51; *Cooper and Wamboldt v. Canada*

Revenue Agency, 2009 PSLRB 160 at paras. 32 to 34; and *Wamboldt v. Canada Revenue Agency*, 2013 PSLRB 55 at paras. 25 to 28).

[20] Just because something in a document appears unfair is no reason to ignore it if it is otherwise clear. When interpreting a document, an adjudicator must take into account its entirety as it sets out the context for interpretation. A benefit that has a monetary cost to the employer must be specifically stated in the collective agreement (*Wamboldt* at para. 27).

[21] For the travel directive to have applied, the grievor had to have been on travel status as of November 1, 2009. He was not as he had returned to his home in Vancouver. Therefore, he was not entitled to claim expenses incurred from that date forward (*Hawkins v. Treasury Board (Department of Fisheries and Oceans)*, 2013 PSLRB 146 at paras. 23 and 24).

[22] The grievor argued that equity and the employer's interpretation are inconsistent. As early as December 3, 2008, he was aware that signing a lease was not recommended (Exhibit 1, tab 7, page 4). When he signed the offer for the temporary assignment, he was clearly informed that it could be terminated on two weeks' notice. The fact that he had never heard of an assignment ending early did not create a past practice.

[23] The employer made it clear in the welcome package of December 3, 2008, and the assignment agreement that leases were not recommended and that an assignment might end early, which should have led the grievor to conclude that it was not wise to sign a lease he could not get out of early. He went ahead and signed the lease despite the clear warnings and without discussing it with management before he paid the deposit. He did so because he preferred the Byward Market location.

[24] Other buildings were available but did not suit the grievor's preferred location. There is no evidence that suite hotels that charged within the monthly allowance were not available. He entered into a contractual arrangement with the landlord of his building without consulting the employer on the advisability of that arrangement. When he was advised that it was not recommended, he took the risk of signing the lease rather than lose his deposit.

[25] The grievor did not claim reasonable expenses that were necessarily incurred. It

was not reasonable or necessary to enter into a lease that was specifically warned against. It was a poor idea just to avoid losing a deposit.

[26] This grievance went through the NJC grievance committee and was examined by representatives of the employer and the bargaining agents. The decision was made to deny the grievance as his claim was for the reimbursement of ineligible expenses (Exhibit 1, tab 3). He did not point to any part of the travel directive to support that the employer's interpretation was incorrect. There is no conflict in the language of the assignment agreement, and the travel directive, as per the section the grievor cited, applies only to workplace changes within the headquarters area and not to terminating a temporary assignment.

[27] There can be no dispute that the grievor was provided proper notice of the end of his assignment. He was treated fairly and equitably within the intent of the travel directive up to the point at which he was no longer on travel status. There is no evidence of the extent of any loss or of any mitigation.

[28] Like in *Craig et al. v. Treasury Board (Correctional Service of Canada)*, 2010 PSLRB 113, the issue in this case is whether the travel directive applies. It does not, as the grievor was not on travel status. In *Outingdyke v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2003 PSSRB 51 at paras. 45 to 52, the adjudicator determined that he could not expand the categories of reimbursable expenses. In this case, it was the grievor's choice not to follow the employer's advice, and he willingly incurred the expenses; this matter is of his own making and not something that created an entitlement to reimbursement (*Warwick v. Treasury Board (Environment Canada)*, PSSRB File No. 166-02-28334 (19980602) at 3 and 4).

IV. Reasons

[29] There is no doubt that the travel directive specifically sets out what will and will not be reimbursed when an employee is on travel status. Section 3.3.1 of the travel directive states as follows:

…

> *For periods of travel status of more than 30 consecutive calendar days at the same location, accommodation at corporate residences, apartments, private non-commercial accommodation or government and institutional accommodation is encouraged. Travellers who choose to stay*

> *in a hotel after the 30th day when apartments or corporate residences are available in the area surrounding the workplace shall be reimbursed up to the cost of the average apartment or corporate residence available.*

[30] According to the travel directive, travel status occurs when "… an employee or traveller is on authorized government travel." Clearly, when the grievor was now located at his Vancouver home, he is ineligible to receive reimbursement for expenses because he is not on travel status.

[31] It is also incontrovertible that in its welcome letter of December 3, 2008 (Exhibit 1, tab 7, page 4), the employer advised the grievor that "[i]t is recommended that leases not be signed. Ensuring you have the ability to provide 30 days (or less) notice to move is strongly recommended."

[32] The grievor sought to live in a very desirable building in a very desirable location in Ottawa. He was not obligated to; he wanted to and entered into a personal legal obligation to do so. He provided no evidence that other properties, both rentals and corporate suite hotels in the same general vicinity, were unavailable to him, which would have allowed him to move with 30 days' notice as the employer recommended in its welcome letter. However, according to his testimony, they did not suit his tastes. Furthermore, he chose to "take the gamble" that his assignment would not end early and that he would not be required to terminate his lease prematurely. He did so rather than lose his deposit. He could have walked away from the apartment rental with merely the loss of one month's rent after he spoke to Ms. Worth, but instead, he proceeded with executing the lease and with obligating himself to pay three months' rent plus the cost of parking to extricate himself from the arrangement early.

[33] He assumed this risk with the full knowledge of the possibility that the employer could have terminated his assignment at any time, with two weeks' notice. It is clearly stated in his offer of the assignment (Exhibit 1, tab 5, page 2) that "the assignment/secondment/secondment may be terminated at any time with mutual consent of host and home organizations or two weeks notice [*sic* throughout]."

[34] The fact that the grievor had never heard of an assignment ending early is irrelevant. He accepted the terms as set out in the assignment agreement as is witnessed by his signature. Just because he was unaware of other assignments ending early, it did not create a past practice. As explained in Brown and Beatty, *Canadian*

Labour Arbitration, 4th edition at 3:4430, a past practice requires that there be conduct by one party that explicitly involves the interpretation of an agreement according to one meaning, and that this conduct be acquiesced in by the other party. A past practice typically requires that it occurred over a number of years and not just once or twice.

[35] There is no evidence before me that establishes a past practice. Nor is there any evidence that the employer treated the grievor unfairly or that it misrepresented any of the terms and conditions of the assignment. The travel directive clearly states what will be reimbursed when an employee is on travel status, which the grievor was not on as of November 1, 2009. Nowhere does it state that the employer will reimburse the employee for the costs of terminating a lease early, and it is not my role to add it to the travel directive.

[36] The employer is not responsible to make the grievor whole because he gambled and lost.

[37] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[38] The grievance is denied.

December 30, 2015.

Margaret T.A. Shannon,
a panel of the Public Service Labour Relations and Employment Board