

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

JOHN JONK

Grievor

and

TREASURY BOARD
(Foreign Affairs and International Trade)

Employer

Before: [J. Barry Turner, Board Member](#)

For the Grievor: James Shields, Counsel

For the Employer: Richard Fader, Articling Student

Heard at Ottawa, Ontario,
May 22, 1998.

DECISION

John Jonk, while on a Foreign Service posting in Los Angeles in 1991 as a Program Specialist (Student Policy), FS-01 classification level, Economic Policy and Programs Division Selection Branch, Citizenship and Immigration Canada, Ottawa, Ontario, is grieving a decision by the Department of Foreign Affairs and International Trade (DFAIT) to limit a claim for compensation under Foreign Service Directive 64 (FSD 64).

His grievance reads:

I grieve the Department's decision to limit my claim for compensation for loss of personal and household effects in accordance with FSD64.07 of Directive 64 - Emergency Evacuation and Loss of the 1993 Foreign Service Directives, to Canadian \$2,900.

The parties entered the following Agreed Statement of Facts:

- 1. Mr. Jonk is employed as an FS-2 with Citizenship and Immigration Canada. He was posted to Los Angeles, California in August of 1991. While on posting in L.A., the terms and conditions of employment, including the Foreign Service Directives, were administered by the Department of Foreign Affairs and International Trade.*
- 2. Following his arrival in Los Angeles, Mr. Jonk obtained a householder's insurance policy in the amount of \$50,000.00 U.S., with earthquake insurance on the full amount of the policy. There was a 10% deductible on the policy, the lowest available deductible was 5%.*
- 3. As a result of the Los Angeles earthquake on January 17, 1994, Mr. Jonk suffered loss and damage to his personal effects, and was forced to vacate his privately leased accommodation for five (5) days due to the loss of utilities. His insurance claim was approved and paid out by State Farm Insurance Co., in the amount of \$10,435.00 U.S. This amount was determined on the basis of a total loss of \$15,435.00 U.S., reduced by the amount of \$5,000.00 U.S. for the applicable deductible.*
- 4. Following payment of his insurance claim by State Farm Insurance, Mr. Jonk submitted a claim to DFAIT in April of 1994, for \$5,000.00 U.S. for loss of material possessions in accordance with FSD 64.07 of Directive 64-Emergency Evacuation and Loss of the Foreign Service Directives.*

5. *Mr. Jonk's claim was initially denied by DFAIT on the basis that there had not been an emergency evacuation, nor had other FSD 64 measures been put in place and, consequently, in the view of DFAIT, FSD 64.07 did not apply.*
6. *Despite DFAIT's position that it was under no obligation to pay under FSD 64.07, DFAIT offered a partial payment of \$2,900.00 C.A., according to a formula, taking into account available coverage in Los Angeles (i.e., the lowest possible deductible (5%)) as well as a deductible that would apply in Ottawa.*
7. *Following discussions with [the Professional Association of Foreign Service Officers], DFAIT issued a cheque for \$2,900.00 C.A. to Mr. Jonk.*
8. *Mr. Jonk filed a grievance requesting he be reimbursed for the full amount of his insurance deductible, that is US \$5,000.00.*

The above facts are agreed without limiting the right of either party from presenting additional evidence or facts.

Agreed to this 22 day of May, 1998.

Mr. Jonk is requesting the following corrective action:

That the Department approve my claim in the amount of US\$5,000 as requested.

No witnesses were called to testify. The parties entered the following exhibits on consent: a letter dated July 3, 1996 signed by Diane Buenger from the Professional Association of Foreign Service Officers to Normand Villeneuve, Director, FSD Policy and Relocation Division, DFAIT (Exhibit G-1); a response from Mr. Villeneuve to Ms. Buenger dated August 20, 1996 (Exhibit G-2); an extract from FSD 64 (Emergency evacuation and loss). The parties also referred me to the second-level grievance reply from J. McCann, National Joint Council, Department Liaison Officer, DFAIT, dated January 29, 1997 (on file).

Argument for the Grievor

Mr. Shields argued the two issues before me are: the applicability of FSD 64 to Mr. Jonk's situation in Los Angeles and the exercise of the employer's discretion under the Foreign Service Directives.

He argued it is uncontested that there was an earthquake in Los Angeles on January 17, 1994 that affected his client, Mr. Jonk. He added that the employer exercised its discretion under the Foreign Service Directives to pay Mr. Jonk CAN\$2 900 towards the loss and damage of some of his personal effects. What Mr. Shields could not understand is why the employer distinguished between a 5%-deductible policy in the case of a Mr. Poole, another employee affected by the Los Angeles earthquake, and paid him accordingly, and that of Mr. Jonk, who purchased a 10%-deductible policy, but was only compensated at the 5% deductible level, as described in the employer's response from Mr. Villeneuve in Exhibit G-2 that reads in part:

... The fact that a personal decision was made to assume a larger risk (10%) by the employee who had the choice of insuring at the lower deductible does not, in my view, justify rolling this risk over to the Crown.

Mr. Shields agreed that when "reasonable precautions" as described in FSD 64.07 are not taken, compensation is excepted. He argued however that Mr. Jonk took reasonable precautions by obtaining earthquake insurance albeit at a 10% deductible. Section FSD 64.07 reads:

64.07 Where the employee has suffered a loss of material possessions because the events described in Section 64.01 have occurred, the deputy head may authorize compensation for such loss up to a maximum amount established in FSD 15.19 for loss of household effects while in transit outside Canada and the United States and for monetary loss only in the form of bank deposits, up to an amount equal to six months' salary, except that where the deputy head considers that the employee has not taken reasonable precautions against such loss, the assistance of the appropriate foreign service interdepartmental co-ordinating committee shall be requested to determine the amount of compensation, if any, to be paid. [underlining mine]

He argued there is no employer direction or policy with respect to a specific deductible minimum for earthquake insurance.

Mr. Shields referred me to an extract of the Introduction to the Foreign Service Directives that reads:

...

The Foreign Service Directives reflect the following principles:

(a) The principle of comparability recognizes that insofar as is possible and practicable employees serving abroad should be placed in neither a more nor a less favourable situation than they would be in serving in Canada.

...

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

...

Mr. Shields argued that while the Foreign Service Directives give no instructions to staff at the foreign post in Los Angeles, the effect of Mr. Villeneuve's letter would be that Mr. Jonk had an obligation to take the lowest deductible in order to limit the Crown's contingencies. He submitted that such a suggestion is simply ridiculous.

He argued further that FSD 64.01 does not say an entire post has to be evacuated, only an employee. FSD 64.01 reads:

64.01 The deputy head, or where insufficient time or inadequate communications exist, the senior officer at the post, may authorize the emergency evacuation of an employee and/or a dependant from a post to a suitable location convenient to the post and, if subsequent conditions warrant, their return to the post where:

(a) hostilities, natural disaster or other threatening circumstances necessitate such evacuation in order to ensure the safety of the person concerned;

(b) no overriding or effective purpose, in particular the protection and emergency evacuation of other Canadian nationals, would be served by having the employee remain on duty at the post; and

(c) such evacuation is more reasonable and expedient than direct transfer to another post or to Canada in accordance with Directive 15. [underlining mine]

Mr. Shields further argued that the reference to “the events” in FSD 64.07 are not evacuation events but the natural disaster that took place, that is, the earthquake. He concluded therefore that FSD 64 does apply to Mr. Jonk’s situation and there is therefore no need for the employer to have officially declared an evacuation for FSD 64 to apply in this instance. Mr. Shields argued if this had been the intent of FSD 64.07, the wording would have been different to make the event the evacuation and not the disaster. He asked me therefore to interpret the Foreign Service Directives literally and to give a “fair reading” to FSD 64.01 and FSD 64.07 since Mr. Jonk suffered a loss in Los Angeles as a result of the earthquake.

Mr. Shields also argued that if I conclude FSD 64.01 and FSD 64.07 do not apply, there is still an obligation to compensate Mr. Jonk under the introduction to FSD 64. The introduction reads:

This directive is designed to provide for the emergency evacuation of an employee and/or a dependant from a post in the event of hostilities, natural disaster or other threatening circumstances; to safeguard an employee's material possessions during such absence; and to provide compensation for any loss resulting from the event which causes the evacuation.

Mr. Shields argued that the employer’s discretion must also be exercised in concert with the principle of comparability referred to earlier in principle (a) of the introduction to the Foreign Service Directives.

Counsel concluded that Mr. Jonk was also discriminated against since Mr. Poole’s request for compensation was fully paid at 5% deductibility. Mr. Jonk’s should also be fully paid at 10% deductibility since there is no directive or policy that says a deductible must be at the 5% level.

He therefore asked me to find that FSD 64 applies to Mr. Jonk, and that if it does not, he argued the employer’s discretion was applied discriminatorily with no basis whatsoever.

Argument for the Employer

Mr. Fader argued that the wording of the grievance improperly targets a decision not made by the employer, since the employer felt FSD 64 did not apply in the first

place. He argued the introduction to FSD 64 reads an evacuation from a post with a small “p” that means “a city, community or other geographic locality in which a “Post” is situated”. Post capital “P” means “an office of a department outside Canada and is used interchangeably with Mission throughout these directives”. Mr. Fader concluded in this case, the small-“p” post is Los Angeles, and argued there was no evacuation from Los Angeles and therefore no need to apply the emergency evacuation and loss provisions of FSD 64 to Mr. Jonk. He also argued “the events” referred to in FSD 64.07 refer to an evacuation, and the reference to “post” in FSD 64.01 must be read in conjunction with the overall meaning of FSD 64, and be read in their literal, ordinary meaning.

Mr. Fader referred me to *Lavoie* (Board file 166-2-18177) to assist me in interpreting the intent of the FSD 64 as it applies in this matter.

Mr. Fader concluded there never was an evacuation of the small-“p” post in Los Angeles, that Mr. Jonk remained in Los Angeles, and was never authorized to move out.

He argued the employer exercised its discretion under FSD 15.42(a), and applied the comparability provision referred to under principle (a) of the introduction to the Foreign Service Directives referred to earlier. FSD 15.42(a) reads:

Managerial discretion

15.42

(a) Subject to specific financial limitations prescribed in this directive, when the deputy head is of the opinion that the assistance provided under any section is clearly inadequate for an employee (because of special circumstances not taken into account by this directive), such additional assistance may be authorized as is considered necessary to facilitate a departmental program or to rectify what would otherwise be an obvious injustice to the employee. Such additional assistance shall not be granted where it is explicitly prohibited under any section of this directive. [underlining mine]

Mr. Fader argued the grievor took a risk in Los Angeles, by not purchasing the lowest possible insurance risk at 5% deductibility as Mr. Poole did, and therefore cannot now expect to roll over the difference of 5% to the Crown. He argued that if

there had been a fire or a theft in Los Angeles, or something similar to the January 1998 Eastern Ontario ice storm, the employer would not be liable either.

Mr. Fader also argued that I cannot alter the wording of the grievance that refers to a decision under FSD 64, since there was no decision made under that provision. He added the words of the grievance cannot be changed now or read differently to mean something else. He added, that even if I do find that FSD 64 applies, the discretionary element of FSD 15.42 cannot be ignored. He said Mr. Jonk simply did not take the proper precautions, and the Foreign Service Directives are not meant to replace private insurance.

Mr. Fader concluded that the employer drew a discretionary line at 5% for reimbursement and asked me to deny the grievance.

Rebuttal Argument for the Grievor

In rebuttal, Mr. Shields commented that there is no suggestion as Mr. Fader argued that Mr. Jonk wants to change the wording or intent of his grievance. When he filed his grievance on November 28, 1996, Mr. Jonk had no idea what the position of the employer would be regarding the interpretation of Mr. Jonk's rights under the Foreign Service Directives. Secondly, Mr. Shields argued Mr. Jonk could not have been taking a risk in the event he had to make a claim at the 10%-deductibility level, since he was never told by his employer what level his deductible should have been. He concluded Mr. Jonk at least took out earthquake insurance at a reasonable deductible level.

Decision

Mr. Jonk accepted a posting to Los Angeles and took out earthquake insurance with a 10% deductible. An earthquake occurred, his home received damages, he evacuated his home and is seeking reimbursement of his 10% deductible. It is clear to me the event which caused the evacuation was the January 17, 1994 earthquake, a natural disaster.

FSD 64 does not apply to Mr. Jonk's circumstances because no emergency evacuation had been authorized.

However, the introduction of the Foreign Service Directives states that “to achieve the objectives of the Directives, consideration will continue to be given to situations which may arise which are not specifically dealt with in the Directives”. I believe the issue before me is one of these situations.

The grievor’s colleague, Mr. Poole, also suffered earthquake damage and was fully compensated for the 5% deductibility level of his earthquake insurance policy. Mr. Jonk’s policy was at the 10% deductible level but has been compensated only up to 5%. Mr. Jonk is now seeking the difference of 5% calculated on the principle of comparability enunciated in principle (a) of the introduction to the Foreign Service Directives.

Mr. Villeneuve’s letter to Mrs. Buenger (Exhibit G-2), refers to a personal decision by Mr. Jonk to assume a larger risk by not choosing a lower deductible. In Mr. Villeneuve’s view this was not justified. In my view, Mr. Jonk’s decision was reasonable and justified since there was no directive, policy, memorandum or instruction to Mr. Jonk saying he must, should, or ought to have chosen a 5% deductible for earthquake insurance. The Foreign Service Directives merely talk about the need to take reasonable precautions. Mr. Jonk did this, albeit at a different deductible level than Mr. Poole.

Mr. Fader argued the employer exercised its discretion pursuant to FSD 15.42(a) and drew a line at 5% for reimbursement. Why not 4.9% or 5.1%? I believe the employer’s discretion was exercised in an arbitrary fashion that unjustly discriminated against Mr. Jonk and that his claim was justified and within reason.

I therefore order the employer to fully compensate Mr. Jonk at the 10% deductible level.

This grievance is therefore allowed.

**J. Barry Turner,
Board Member.**

OTTAWA, June 19, 1998.