



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

**STUART GARY WILSON
AND SHERIDAN J. GARDNER**

Grievors

and

**TREASURY BOARD
(Foreign Affairs and International Trade)**

Employer

Before: Rosemary Vondette Simpson, Board Member

For the Grievors: Michel Paquette, Professional Institute of the Public Service
of Canada

For the Employer: Richard Fader, Counsel

Heard at Ottawa, Ontario,
May 11 and 12, 1998.

DECISION

These grievances concern a claim for meal and incidental allowances for Stuart Gary Wilson and Sheridan J. Gardner while they were stationed in Tokyo in the Fall of 1992. Some parts of the grievors' claims were at one point paid by the employer. Later, the employer decided to seek reimbursement of this money and, in addition, refused to pay any further portion of the claims which it had not previously paid.

Grievor Wilson's grievance reads as follows:

I grieve the application of FSD 15.33 during my period of temporary accommodation (August 21 - Oct 8 incl) on arrival at the Post in Tokyo in 1992. Specifically, I grieve the repayment of allowances which I was required to reimburse - \$7,809.00 - and an additional \$2,614.38 in allowances for which I was not permitted to make a claim.

Grievor Gardner's grievance reads as follows:

Temporary living allowances not paid as provided for in correspondence dated Aug 11/92 FSD 15.33. I grieve the application of FSD 15.33 relating to my stay in temporary accommodation in August - October, 1992 in Tokyo.

Summary of Evidence

The grievors were posted to Tokyo in the Fall of 1992. Grievor Gardner, but not Grievor Wilson, was given briefing sessions prior to her departure for Tokyo. These were described by Ms. Judith Scott-Houlahan, another employee posted to Tokyo in the Fall of 1992 and who attended the briefing sessions with Grievor Gardner, as information sessions which gave a general overview of what employees might expect by way of allowances. When the employees arrived in Tokyo, they were placed in a hotel for a few days. They were all told that the new quarters being built to house them were not quite ready yet. They were then placed in other temporary quarters for a further few weeks until they were able to move into the new quarters. Ms. Scott-Houlahan and her husband, for example, spent time in three different locations between August 6, when they arrived in Tokyo, and October 6, when they moved into the new quarters assigned to them. After their initial few days in a hotel, they were moved to a rental house for two and one-half weeks before being moved to their new quarters. From the beginning they were advised that they would be moved

around a couple of times. They were told not to break into their air shipment of goods containers which contained the basic household goods that they would normally have used right away and which they needed to set up housekeeping, to avoid the expense of paying for re-packing. They were, of course, still awaiting the sea shipment which contained less urgently needed goods and which would arrive sometime later. They were told that they would continue to receive the temporary allowance which allowed them to live out of their suitcases and buy all meals out.

All employees were given the following memorandum to confirm this situation (Exhibit G-1):

The instructions to FSD 15.33(a) state "At a post, when an employee occupies temporary self-contained accommodation or private accommodation and is authorized to claim living expenses beyond the two-day entitlement, post management shall establish a reduced amount for meals for periods beyond two days as an approximation of actual and reasonable food costs based on a fair assessment of local food costs and the facilities available in the temporary or private accommodation for the preparation and storage of food."

I recommend the full meal and incidental allowance for the first two days, 80% of the meal allowance and 15% incidentals, for the employee only, for the next five days, if the employee has moved into a staff quarter, on a temporary basis. Then a meal allowance to cover the cost of dinner only (yen 8,500), which represents about 60% of the total meal range, plus 15% incidentals, for the employee only, for the remaining time the employee occupies the temporary sq.

This should be effective from 10 August 1992. Naturally, if the employee has to stay in the hotel for a longer period because the temporary sq is not ready for occupancy, the above formula would not go into effect until they move into the temporary sq.

This memorandum had typed on it the assent of the administrative head of the Tokyo mission at that time, "J.D.L. Rose". It was not disputed by the employer that Mr. Rose approved Exhibit G-1.

Ms. Scott-Houlahan received an advance to cover her expenses. Her actual expenditures for meals in Tokyo were very high. She gave the example of \$45 for a basic breakfast, \$100 for a restaurant dinner. Even at McDonald's, two people would be required to pay about the equivalent of \$50 for hamburgers and fries.

Ms. Scott-Houlahan first found out there was a problem with her claims in mid-November 1992. There had been a change of staff dealing with finance. When Mr. Paul Gray became involved, he gave the employees the first indication there might be a problem. In all there were six other people besides Ms. Houlahan involved in receiving temporary allowances. Mr. Gray announced on a Friday afternoon that the payments were not authorized and there would have to be an immediate reimbursement because auditors were coming on the next Monday. It was calculated that Ms. Scott-Houlahan owed the equivalent of approximately \$6,000. On February 19, 1993, she paid the money back and filed a grievance on February 24, 1993.

Ms. Scott-Houlahan discussed the contents of the grievance with the grievors. As far as she was aware, nothing happened with her grievance until mid-July 1995 and it was not until December 1995 that she received a cheque equivalent to \$6,200, which constituted reimbursement in full without interest.

In the Summer and Fall of 1992, Ms. Scott-Houlahan did not question the authority of those in management who told her that she was eligible to receive the temporary allowances. She testified: "I had no reason to question these very senior people." Mr. R. Dunseath was a senior manager at the Tokyo mission, and Mr. David Rose, who authorized the memorandum (Exhibit G-1), was the deputy head of the Tokyo mission.

Grievor Wilson, a senior policy analyst, was seconded to Foreign Affairs in 1992. He also received the instructions that Ms. Scott-Houlahan had received (Exhibit G-1). He was not to open any of his air-freight shipment boxes containing those things which would be needed to set up housekeeping prior to the arrival of the later sea shipment. He was also receiving the temporary allowances. He ate out. He bought packaged lunches for his children. He had no access to his computer and household goods. While in temporary accommodation, he submitted his claims every

two weeks. All were signed off by David Rose who approved them all before sending them to Administration. All the claims were approved except for the fourth. This was questioned because a new financial officer, John Turley, had arrived at the mission. Mr. Turley's position was that the payments were unauthorized and would have to be reimbursed. Grievor Wilson discussed filing a grievance but was aware that Ms. Scott-Houlahan was filing a grievance herself. In order to avoid multiple grievances, it was agreed that the grievors would await the outcome of Ms. Scott-Houlahan's grievance and all the affected employees would be paid out in accordance with the outcome of Ms. Scott-Houlahan's grievance. Grievor Wilson returned to Canada in July 1995. It was not until he saw Ms. Scott-Houlahan in April 1996 that he learned that the result of her grievance was the complete reimbursement of the amount she had claimed. He had not been informed of this by management. He then contacted his bargaining agent to pursue his claim of reimbursement relying on management's promise that his claim would be settled in accordance with the outcome of Ms. Scott-Houlahan's grievance. After negotiations failed, he submitted his grievance on October 15, 1996.

Grievor Gardner, an employee of Revenue Canada, was posted to Tokyo as a customs attaché at the Embassy. She received her instructions as did the other employees (Exhibit G-1) and she ran her life accordingly. She was told that she would be paid the allowances to compensate her for the inconvenience and expense of unpacking and packing again her household goods. Then she learned that management was challenging the authority to pay her the allowance. She decided, as did Grievor Wilson, to await the outcome of Ms. Scott-Houlahan's grievance. Management did not want to deal with a variety of grievances.

When she learned of the granting of Ms. Scott-Houlahan's grievance, in the Spring of 1996, she wrote a letter to the employer requesting that her original claim be settled in the same manner as Ms. Scott-Houlahan's. There was a long delay in the reply. She filed her grievance on October 15, 1996.

Paul Gray is a retired foreign service officer. He was, for five years, an area manager of the Asia Pacific Branch in Tokyo. His role was resource management and allocations and advice on these matters to the Assistant Deputy Minister, Foreign

Affairs and International Trade. He arrived in Tokyo on August 8, 1992. He reported to the Head of Chancery, David Rose.

Soon after his arrival in Tokyo, concerns arose about the question of allowances beyond the normal 21-day period to the grievors and other Canadian families who had been posted to Tokyo and were in similar circumstances. Ottawa was advised, which then instructed that the original instruction extending the meal and incidental allowances beyond the 21-day period was rescinded. The decision came down late in the Fall of 1992 and recovery action was taken. Most people were unhappy. Mr. Gray was aware that Ms. Scott-Houlahan was presenting a grievance on the matter. She returned to Canada prior to the grievance outcome and Mr. Gray stopped getting reports on it. He also testified that he was aware that others were awaiting the outcome of her grievance to present their own claims again. The grievors were not abandoning their claims.

Zenobia Pankiw, a Treasury Board employee for over 20 years, deals with foreign travel and relocation policies. Her testimony was that there was no authority in management to extend the meal and incidental allowances in the manner that the employees were informed they would be entitled to.

According to Ms. Pankiw, the employees' entitlements were as follows: from the third to the 21st day, they were entitled to the incidental allowance and up to 80% of the meal allowances. Upon the expiration of a further 14-day period, the employee must begin to assume normal shelter costs. Memorandum G-1 approved by Mr. Rose had no authority to change the entitlements outlined in the policy. She stated that if the memorandum "was ever sanctioned by Ottawa, it is not in our files at Treasury Board."

Argument for the Grievors

The Foreign Service Directives form part of the National Joint Council agreements which are incorporated by reference into the collective agreement. A grievance may be presented up to the 25th day after the employee first becomes aware of the action giving rise to the grievance.

It was not until October 1996 that Grievors Wilson and Gardner were finally told that they were not going to be compensated in accordance with memorandum G-1 of August 1992. Grievors Wilson and Gardner, in discussions with Messrs. Gray and Turley, agreed that if the grievance of Ms. Scott-Houlahan brought about changes to the question of reimbursement, they would be included.

The grievors were specifically instructed not to open the air shipment in order to save costs to the Department. It is management's prerogative under the Foreign Service Directives to determine what the actual and reasonable expenses were.

Argument for the Employer

The employer argued that the grievances were untimely. No application for an extension of time was made.

Neither Mr. Rose nor Mr. Dunseath, the originator of the memorandum G-1, had authority to alter the terms of the Foreign Service Directives. Therefore, the overpayment of the entitlements set out in the policy is in the nature of an administrative error and therefore recoverable.

Reason for Decision

It was agreed by the employer and the employees that one of them would submit a grievance and, depending on the outcome of that grievance, the other employees in the same circumstances would be treated similarly. Ms. Scott-Houlahan submitted her grievance. She was eventually offered a cheque for \$6,200 in settlement of her claim, a sum which did not include interest. She received this in December 1995.

Grievors Gardner and Wilson were not promptly informed of this by their employer. They learned of the award on their own. At that time, three years had elapsed since the expenses were incurred and people were in new postings. They again requested payment and submitted grievances. Considering the unusual nature of the case, the length of time that had elapsed since the expenses were incurred, the payment to Ms. Scott-Houlahan and the grievors' legitimate expectation that the matter would be settled in accordance with the agreement with the employer that they would be paid in accordance with Ms. Scott-Houlahan's settlement, I find that the

filing of the grievances cannot be considered to be untimely. The collective agreement provides that a grievor may present a grievance up to the 25th day after he/she first becomes aware of the action giving rise to the grievance. It was not until October 1996 that the grievors were finally told that they were not going to be compensated. Both the grievors indicated to the employer their intention of presenting their right to pursue their claims and this was acceded to by the employer. The grievors' grievances were filed within 25 days of learning of the settlement of Ms. Scott-Houlahan's grievance and of the fact that the employer had not dealt similarly with their claims.

I cannot agree with the employer's position that Directive 15 of the Foreign Service Directives precludes the payment of the grievors' claims.

Paragraphs 15.01(a), (b), (c) and (d) of the Directive provide:

(a) This directive applies to an employee and/or a dependant on relocation to, from and between posts and on ceasing to be an employee and/or dependant while serving outside Canada.

(b) The relocation provisions should provide for the employee's legitimate relocation expenses, without opening the way for personal gain or for the underwriting of extravagances. Expenses resulting from misinterpretation or mistakes shall not be a basis for reimbursement.

(c) It is the employer who decides whether an employee should be relocated, therefore, it is the sole responsibility of the employer to determine the relocation assistance that should be provided.

(d) In any relocation, the aim should be to relocate the employee in the most efficient fashion - that is, at the most reasonable cost to the public, and with minimal inconvenience to the employee and family.

In accordance with paragraph 15.01(c), it was the employer who decided that these employees should not open their containers of personal possessions which would have enabled them to set up some kind of normal housekeeping while in temporary accommodations. Presumably, the employer was acting in accordance with subparagraphs (c) and (d), i.e. acting in accordance with the proviso that "the aim should be to relocate the employee in the most efficient fashion - that is, at the most

reasonable cost to the public, and with minimal inconvenience to the employee and family."

The provisions regarding entitlements when an employee is in self-contained accommodation do not apply in the circumstances of this case because the employees were specifically directed not to move into their temporary accommodations as one normally would, using the possessions they brought with them by air freight. They were instead ordered to take their meals as in temporary accommodation, opening their air freight only when they moved into the permanent accommodations being prepared for them. Presumably it was felt, at least at the beginning of the arrangement, that this would save money.

Although paragraph 15.33 sets out limitations, I cannot disregard the fact that the grievors not only relied upon the representations of their employer, they also were put in the position of obeying their employer's instructions. Because of their reliance on instructions of management, they incurred prohibitively expensive, by Government standards, meal expenses in Tokyo and important incidental expenses they would normally not have had to bear.

In this case the employer is now estopped from taking the position that it is precluded by the limitations of the regulations from making the reimbursements promised to the grievors.

The grievors relied to their detriment on the representations of their employer that they were entitled to temporary accommodation allowances because they were acceding to their employer's wishes in leaving their boxes of possessions packed until they could be moved into their permanent quarters.

The grievances are therefore allowed.

Rosemary Vondette Simpson
Board Member

OTTAWA, October 20, 1998.