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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

JACQUES DAVID MIMEAULT

Grievor

and

TREASURY BOARD
(Department of Employment and Social Development)

Employer

Indexed as
Mimeault v. Treasury Board (Department of Employment and Social Development)

In the matter of an individual grievance referred to adjudication

Before: Renaud Paquet, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Christine Dutka, Public Service Alliance of Canada

For the Employer: Julie Chung, counsel

Decided on the basis of written submissions, filed February 13 and March 13 and 23, 2020.
(FPSLREB Translation)

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Individual grievance referred to adjudication

[1] On June 16, 2010, Jacques David Mimeault (Mr. Mimeault) filed a grievance against the decision by the Department of Human Resources and Skills Development to claim $2689.19 from him as an overpayment of the vacation travel assistance (VTA) of $2999.48 that had been paid to him. This assistance is provided in the National Joint Council's *Isolated Posts and Government Housing Directive* ("the NJC Directive"), which is part of the collective agreement for the Program and Administrative Services Group bargaining unit that expired on June 20, 2011 ("the collective agreement").

[2] On December 12, 2013, the Department of Human Resources and Skills Development became the Department of Employment and Social Development (the terms "department" and "employer" are used to refer to this portion of the federal public administration both before and after the change).

[3] 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 to replace the Public Service Labour Relations Board and the Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 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 s. 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 continued under and in conformity with the *Public Service Labour Relations Act* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[4] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act* and the *Public Service Labour Relations Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act*.

II. The parties' positions

[5] The employer does not contest that Mr. Mimeault was entitled to receive the VTA when he applied for it while he was working in New Richmond, Quebec, as that location is an isolated post within the meaning of the NJC directive. However, he was transferred to Ste-Anne-des-Monts on May 10, 2010, a city that is not an isolated post within the meaning of the NJC directive. The employer's position is that Mr. Mimeault could receive the VTA for 2010-2011 only for the portion of the year that he worked in an isolated post, namely, from April 1, 2010, to May 9, 2010. Given that the VTA had already been paid to him in full, the employer claimed a refund proportional to the days on which Mr. Mimeault no longer worked in an isolated post. He argues that the employer could not claim a refund for him for the VTA that was already paid. According to him, nothing in the NJC directive allowed the employer to act as it did. Note that Mr. Mimeault has already repaid the amounts claimed by the employer.

III. Summary of the facts agreed to by the parties

[6] Mr. Mimeault began working as a payment officer for the employer in New Richmond on September 24, 2007. That location is a class 2 isolated post, according to the NJC directive. Because of his status as a full-time indeterminate employee, he was thus eligible for the VTA. Mr. Mimeault received the VTA every year from 2007. Note that he received the full VTA for the fiscal year beginning on April 1, 2007, and ending on March 31, 2008.

[7] In April 2009, Mr. Mimeault began taking steps with the employer to pursue his career as a citizen service officer (CSO) in Ste-Anne-des-Monts. At the end of March 2010, the employer confirmed to him that he would be transferred to Ste-Anne-des-Monts. However, he completed his CSO training in New Richmond, so he began working in Ste-Anne-des-Monts on May 10, 2010. According to him, for family reasons, he moved to Ste-Anne-des-Monts only on September 8, 2010; he returned to New Richmond on weekends between May and September 2010.

[8] On April 1, 2010, by filling out the relevant form, Mr. Mimeault asked his supervisor for the payment of the VTA for the 2010-2011 fiscal year. According to him, when he did not receive anything, around April 20, 2010, he asked his supervisor about it, who reportedly replied that he was waiting for a response on whether the VTA would be paid for the full year. Mr. Mimeault was later informed that he would be

paid the full amount. Then, on May 17, 2010, he received a cheque for $2999.48, the full amount he had claimed for the entirety of 2010-2011.

[9] On May 26, 2010, Myriam Pelletier, a compensation officer for the department, informed Mr. Mimeault by email that an employee who was transferred to a "non-isolated" post during the fiscal year was entitled to the VTA, prorated according to the number of days in the year worked in an isolated post. Thus, according to Ms. Pelletier, Mr. Mimeault was entitled to the VTA from April 1, 2010, to May 9, 2010, which meant that an overpayment of $2689.19 had been made that had to be repaid. On June 23, 2010, the employer began deducting $188.48 from each of Mr. Mimeault's biweekly pay deposits until the overpayment was fully repaid.

[10] On June 16, 2010, Mr. Mimeault filed a grievance contesting the employer's decision to pay him the VTA only for the portion of the year in which he worked in New Richmond and then to impose an overpayment on him as a result of that decision. The employer dismissed the grievance at each level of the internal grievance procedure. At the first level, it based its decision on the NJC directive, "[translation] specifically, section 1.16". The NJC also dismissed the grievance and found that Mr. Mimeault had been treated according to the spirit of the directive. The gist of the response was as follows: "[translation] The Executive Committee has already concluded that the full vacation travel assistance benefit is intended for public servants who work in an isolated post for a period of 12 months."

IV. Summary of Mr. Mimeault's arguments

[11] Mr. Mimeault points out that the NJC directive is part of the collective agreement that governs his working conditions. He was assigned to a class 2 isolated post and was a full-time indeterminate employee.

[12] The NJC directive is clear with respect to granting the VTA. It is paid once a year to employees assigned to class 2 isolated posts (section 3.4.1). Mr. Mimeault was still eligible for the VTA on April 1, 2010, when he applied for it. The employer accepted the application and paid him the sum of $2999.48 on May 17, 2010.

[13] The employer could not, as it did, claim a repayment of the VTA from Mr. Mimeault prorated per the months that followed his assignment to a non-isolated post. The NJC directive provides for a repayment or recovery when an employee resigns (the

"Note" in section 3.4.6). However, no repayment is claimed if an employee leaves due to retirement, disability, workforce adjustment, or termination for reasons other than a breach of discipline or misconduct. Yet, Mr. Mimeault did not resign; nor was he terminated for disciplinary reasons or misconduct.

[14] Mr. Mimeault asks that the Board allow the grievance.

V. Summary of the employer's arguments

[15] To determine the true intent of the parties to the collective agreement, the Board must give the words used their ordinary meanings. It must also consider the rest of the collective agreement, since the agreement as a whole makes up the context in which the words used must be interpreted. Therefore, when a provision allows for several interpretations, the one that agrees best with the whole of the agreement should be preferred. Also, a benefit that involves a monetary cost must be clearly and expressly stated in the agreement.

[16] According to the employer, Mr. Mimeault was treated according to the spirit of the NJC directive, which provides allowances to employees working in isolated posts. But Mr. Mimeault no longer worked in an isolated post as of May 10, 2010. Therefore, he could no longer receive the benefits conferred by the NJC directive, since he had been transferred to a non-isolated post.

[17] The employer refers to sections 1.13.1, 1.14.3, 1.18, 1.18.3, 1.20.1, and 3.4.5 of the NJC directive, which require that the employee remain in the isolated post to receive the allowances that the directive provides. Even though those provisions do not specifically address the VTA payment, the NJC directive states that the allowances provided in Part I are granted to employees who continue to occupy a position in an isolated location. The case law has recognized that the same meaning should be given to similar words used in different parts of a collective agreement.

[18] The employer's interpretation was supported by the NJC Executive Committee, which is composed of, in equal parts, representatives of the bargaining agents and the employer. The committee is ultimately responsible for developing NJC directives and rendering decisions on grievances that have been filed. Clearly, the bargaining agents and the employer, which together wrote the directive, understand it best and are the experts at interpreting it. Yet, the Executive Committee dismissed the interpretation

that Mr. Mimeault advanced. It concluded that the entitlement to the full VTA was intended for employees in an isolated post for 12 months.

[19] Once it is established that the VTA should have been paid only for the period during which Mr. Mimeault was in an isolated post, it is clear that the employer was entitled to recover the overpaid amounts. Section 3.6.1 of the NJC directive provides for situations in which the employer is unable to recover a VTA that has already been paid. Yet, those situations are different from that of Mr. Mimeault. Had the parties to the collective agreement wanted section 3.6.1 of the directive to apply to a situation like that of Mr. Mimeault, they would have specified it.

[20] Finally, the *Financial Administration Act* (R.S.C., 1985, c. F-11) gives the employer the power to recover overpayment amounts. In that respect, s. 155(3) of that Act stipulates the following:

> ***155(3)*** *The Receiver General may recover any over-payment made out of the Consolidated Revenue Fund on account of salary, wages, pay or pay and allowances out of any sum of money that may be due or payable by Her Majesty in right of Canada to the person to whom the over-payment was made.*

[21] The employer referred me to NJC decisions 27.4.99 (June 15, 2011), 27.4.66 and 27.4.67 (December 12, 2007), and 27.4.125 (October 11, 2018). It also referred me to the following decisions: *Arsenault v. Parks Canada Agency*, 2008 PSLRB 17; *Cooper v. Canada Revenue Agency*, 2009 PSLRB 160; *Public Service Alliance of Canada v. Parks Canada Agency*, 2020 FPSLREB 13; and *Communications, Energy and Paperworkers Union of Canada v. Irving Pulp & Paper Ltd.*, 2002 NBCA 30. Finally, the employer referred me to two NJC documents and to Palmer and Snyder, *Collective Agreement Arbitration in Canada*, 6th Edition, Part 1, chapters 2 to 2.23.

VI. Reasons

[22] Among other things, clause 7.03 of the collective agreement states that the NJC directive is part of that agreement.

[23] The 2007 version of the NJC directive was in force in 2010 and therefore should be referred to. It is appropriate to review its following sections:

…

1.13.1 Persons at an isolated post who are in travel status pursuant to the NJC Travel Directive and whose headquarters are not isolated posts are not subject to this directive.

…

1.14.3 Employees on maternity/parental leave without pay who remain at the isolated post continue to be entitled to the allowances of this directive and to the benefits of section 3.1.1.

…

1.15.1 The period of eligibility for the payment of allowances shall commence on the later of:

(a) 00:01 hour of the day that the employee arrives at the headquarters;

(b) midnight of the last day in respect of which the employee is paid any transportation or travelling expenses as a result of the assignment to an isolated post; and

(c) 00:01 hour of the day the employee returns to work after a period of leave without pay ends.

1.16 Termination

1.16.1 The period of eligibility for the payment of allowances shall end at midnight on the earlier of the day immediately preceding:

(a) the first day in respect of which employees are paid any transportation or travelling expenses as a result of their relocation from their headquarters, and

(b) the day they cease to be employees.

(c) 00:01 of the first day in respect of which the employee begins a period of leave without pay.

…

1.18.1 Subject to this section, when employees are absent from their headquarters and are paid transportation or travelling expenses in respect of that absence, their allowances shall, on the 31st calendar day of absence,

(a) cease, if they are employees with dependants and none of their dependants remain at their headquarters,

(b) revert to the employee without dependants rate, if they are employees with dependants and one of their dependants remains at their headquarters, or

(c) remain at the employee with dependants rate, if they are employees with dependants and more than one of their dependants remains at their headquarters.

…

1.18.3 Nothing in this section shall be construed to affect the allowances of employees who are granted leave for vacation,

compensatory or lieu time off with pay pursuant to an appropriate governing authority and who:

(a) remain at their headquarters, or

(b) return to their headquarters at the conclusion of the leave or time off.

…

1.20.1 Subject to this section, when employees begin a period in respect of which allowances are payable without any dependants, but they establish to the satisfaction of their deputy head that a dependant intends to reside with them at their headquarters residence during the entire term of their assignment there, the amount of any allowance shall be calculated at the rate for an employee with dependants from the day the period commences, if the dependant arrives at the headquarters within 90 calendar days of that day.

…

3.4 Vacation Travel Assistance (VTA)

3.4.1 The vacation travel assistance payments shall be limited to:

(a) once in each fiscal year for the employee whose headquarters has an EA classification of 1, 2 or 3 ….

…

3.4.5

(a) Employees who have been reimbursed relocation expenses pursuant to Part IV of this Directive and have moved from a non-isolated location to an isolated post must wait three months from the date of their relocation to the post to qualify for VTA.

(b) Local hires initially appointed to a position at the post must also wait three months from the date of their appointment to qualify for the VTA.

3.4.6 Employees who have been reimbursed relocation expenses pursuant to Part IV of this Directive and have moved from one isolated post to another isolated post are not subject to the three-month waiting period.

Note:

Employees who resign from the Public Service in a fiscal year for which they have received any benefits pursuant to Section 3.4 may be subject to recovery action. Refer to Section 3.6 for complete details.

…

3.6 Recovery of Vacation Travel Assistance (VTA)

3.6.1 No recovery will be made when employees cease to be employees by reason of their retirement, disability, a work force adjustment or termination for reasons other than breaches of discipline or misconduct.

> *3.6.2 Subject to this section, when employees, except those referred to in Sections 5.2 and 5.11 resign from the Public Service, having received any benefits pursuant to Section 3.4 within the preceding three months (if the headquarters has an environment classification of 1, 2 or 3) the amount of these benefits shall be:*
>
> *(a) deducted from the amount that would have been paid pursuant to Part V; or*
>
> *(b) be considered a debt owing to the Government when there are insufficient funds payable pursuant to this part or employees are not eligible to any benefits of this part.*
>
> …
>
> [Emphasis in the original]

[24] The dispute that I must decide in this case is relatively simple. Once all the other eligibility conditions are fulfilled, the question is whether the annual VTA provided in the NJC directive is payable in proportion to the number of months worked in an isolated post. Mr. Mimeault argues that proportionality does not apply. The employer's position is rather that Mr. Mimeault could receive the VTA only for the portion of 2010-2011 during which he worked in an isolated post, namely, from April 1, 2010, to May 9, 2010. Given that the VTA had already been paid to him in full, the employer recovered the portion of the year that corresponded to the days on which he no longer worked in an isolated post. He argues that the employer could not demand repayment of the VTA that had already been paid. According to him, nothing in the NJC directive allowed the employer to act as it did.

[25] Sections 3.4 to 3.7 of the NJC directive deal specifically with the VTA. Section 3.4 deals mainly with the terms and conditions, section 3.5 with fixed-rate travel, section 3.6 with VTA recovery by the employer, and section 3.7 with seasonal and part-time employment. The only issue at play is whether Mr. Mimeault was entitled to the entirety of the VTA or only a portion of it, given that he was transferred to a non-isolated post approximately six weeks after the beginning of the year (April 1 to May 10). In section 3.4, the NJC directive states that the VTA is payable only once a year for a post with a classification of 1 to 3. In section 3.4.5, it states that an employee who is reimbursed relocation expenses and arrives in an isolated post must wait three months to qualify for the VTA. Local hires must also wait three months. However, section 3.4.6 states that employees who arrive at another isolated post do not have to wait for three months to qualify for the VTA. Later in the same section, it is stated that when an employee resigns from the public service during a year in which the VTA was paid, the VTA can be recovered. Section 3.6 specifically concerns

recovering the VTA. It is not recovered in cases of retirement, disability, workforce adjustment, or termination for other than disciplinary reasons (section 3.6.1). However, the VTA will be recovered from employees who resign from the public service within five months (in that case, classifications 1 to 3) of receiving it (section 3.6.2). The VTA that was already paid will then be deducted from what would have been paid pursuant to Part V of the NJC directive or will be considered a debt owed to the government. As for section 3.7, it states that seasonal and part-time employees are entitled to the section 3.5 benefits (fixed-rate travel) prorated to the annual hours worked in relation to full-time employees.

[26] Nothing in sections 3.4 to 3.7 explicitly deals with a situation like that of Mr. Mimeault. He was a regular employee who had worked for more than two-and-a-half years in an isolated post at the time of his transfer to a non-isolated post. He did not resign from the public service, was not terminated, and did not retire or leave due to disability. He was simply transferred to a non-isolated post.

[27] The employer referred me to several sections of Part I of the NJC directive. I reviewed those provisions and find that they are not very useful for deciding this dispute. Mr. Mimeault was not in travel status when he worked in New Richmond (section 1.13.1). He was not on unpaid leave and did not apply for the benefits provided in section 3.1.1 (section 1.14.3). Nor was he on paid leave (section 1.18.3). He was not absent from his headquarters and clearly did not receive a transportation or travel allowance for that absence (section 1.18.1). Nothing in what was submitted to me addressed the issue of Mr. Mimeault's dependants (section 1.20.1). In summary, even if some of the sections deal with the proportionality of benefits, they in no way refer to the VTA and its alleged payment in proportion to the period worked over the course of a year. According to the employer, if there is a proportional application of benefits in these sections, it should be the same for the VTA. I do not agree with that conclusion.

[28] The NJC directive provides for repayment of a VTA that was already paid in cases in which regular employees cease to be employees due to resignation from the public service (the "Note" in section 3.4.6) or termination for disciplinary reasons (section 3.6.1). There is no proportionality there. Instead, in section 3.6.1, the NJC directive states that no amount will be recovered after a departure due to retirement, disability, or a workforce adjustment. Finally, in section 3.4.5, the directive states that

a new employee must wait three months to qualify for the VTA. Once again, there is no proportionality there. Therefore, an employee hired, say, in May, must wait until August to qualify for the full VTA and not 7/12 of it. Moreover, even though he had been hired on September 24, 2007, in the middle of the 2007-2008 fiscal year, Mr. Mimeault received the full VTA then. The only case in the NJC directive when VTA proportionality applies is that of seasonal or part-time employees, which is perfectly consistent with the rest of the collective agreement. The concept of VTA proportionality does not exist for full-time regular (indeterminate) employees.

[29] In light of the foregoing, I find that the employer cannot claim a repayment of the VTA that was already paid to an employee who does not leave the public service and who, as in this case, is instead transferred during the year to a non-isolated post. Had the parties to the collective agreement wanted to apply a proportionality rule for the VTA paid to a regular employee, they should have stated so in writing. It seems reasonable to me to conclude that transfers out of isolated posts are normal situations, although perhaps infrequent, and that the bargaining agents and the employer, which together negotiated the directive, were aware of that reality and did not provide for repayments in those cases.

[30] The VTA for a regular New Richmond employee is payable once each year (section 3.4.1), and the employee must apply for it in writing (section 3.4.2). Mr. Mimeault was working in New Richmond, and he submitted his application in writing. The employer decided to accept his application, even though it knew at the time of it that he would leave in the coming weeks for a non-isolated post. Only later did the employer change its mind and amend its position.

[31] I would add that it is appropriate to distinguish allowances payable under the NJC directive (Part I) from the travel costs that are the subject of Part III. It seems completely logical to me to cease paying allowances for environment, cost of living, fuel, or housing provided in Part I as soon as employees stop working in an isolated post. Since they no longer need an allowance because they are no longer there, it ceases to be paid. However, it is not stipulated in Part III that an employee who would have been paid, for example, travel costs for medical treatment or a death in the immediate family would have to partially repay those amounts if the person leaves the isolated post later in the same fiscal year. For the VTA, repayment is required only in

certain cases of employees who leave the public service. Under no circumstances is there a proportional repayment. The employee repays or does not repay.

[32] The employer submitted case law to me to support its argument that it was entitled to reclaim overpayments. Nevertheless, no overpayment existed in Mr. Mimeault's case, since he was entitled to the full VTA for 2010-2011.

[33] The employer's argument is whether, because the NJC develops the directives, its interpretation of them during the examination of grievances is necessarily the correct one. With such an argument, the adjudication of grievances based on interpreting NJC directives becomes an exercise in futility. Yet, the parties to the collective agreement decided otherwise by integrating the directives in that agreement, thus giving the Board jurisdiction to interpret them in the same way as or differently from the NJC.

[34] In any event, the employer submitted to me four NJC decisions to me. Decision 27.4.99 came after Mr. Mimeault's grievance. The NJC dismissed Mr. Mimeault's grievance in a decision that was just over four lines long, with little explanation. In decisions 27.4.66 and 27.4.67, the NJC dealt with a dispute over a proportional payment of the VTA to term employees. As Mr. Mimeault was a regular full-time indeterminate employee, those decisions do not apply in this case. Finally, decision 27.4.125 deals with a situation where over the course of a year, a city changed from a level 4 to a level 3 isolated post, thus reducing employees' entitlement from two annual VTA payments (level 4) to just one (level 3). Even though the change occurred before the beginning of the fiscal year, the employees had applied for two payments, which were given to them. Later, the employer decided to recover the second payment. The employees filed a grievance that the NJC ultimately dismissed. The issue in those grievances is not the same as the one in this case.

[35] For all of the above reasons, the Board allows Mr. Mimeault's grievance and makes the following order:

(The Order appears on the next page)

VII. Order

[36] I order the employer to refund the amount of $2689.19 to the grievor within 30 days.

May 8, 2020.

FPSLREB Translation

Renaud Paquet,
a panel of the Federal Public Sector
Labour Relations and Employment Board