Date: 20210331

File: 566-02-12654

Citation: 2021 FPSLREB 34

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

LEE NOWLAN

Grievor

and

TREASURY BOARD
(Department of Foreign Affairs, Trade and Development)

Employer

Indexed as
Nowlan v. Treasury Board (Department of Foreign Affairs, Trade and Development)

In the matter of an individual grievance referred to adjudication

Before: David Orfald, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Tony Micallef-Jones, Professional Institute of the Public Service of Canada

For the Employer: Philippe Giguère, counsel

Heard via videoconference,
January 12 and 13, 2021.

REASONS FOR DECISION

I. Introduction

[1] This case concerns the application of the National Joint Council (NJC) *Relocation Directive* ("the *Directive*"), which forms a part of the collective agreement between the Treasury Board ("the employer") and the Professional Institute of the Public Service of Canada ("PIPSC") for the Audit, Commerce and Purchasing (AV) bargaining unit (expiry date: June 21, 2014).

[2] The issue concerns an employee who relocated from Ottawa to Toronto in Ontario in 2010 on the understanding that no relocation expenses would be paid. About a year-and-a-half later, she made a claim for relocation expenses under the *Directive*. The questions to be answered are: (1) Should the employee be entitled to relocation expenses under the *Directive*? (2) If so, what amount is she entitled to?

[3] In the summer of 2010, Lee Nowlan ("the grievor") was working for the Department of Foreign Affairs, Trade and Development, now commonly known as Global Affairs Canada ("GAC" or "the department.") She applied to take a job at the CO-02 level, which is part of the AV bargaining unit, even though the position represented a demotion. The new job was in Toronto, which would allow her to live and work closer to family. She was informed at the time that no relocation expenses would be paid, and she agreed to take the position on that basis.

[4] In 2011, the grievor filed her 2010 income tax return and claimed her relocation expenses as a self-funded employment deduction. Ultimately, the Canada Revenue Agency ("the CRA") denied that claim.

[5] In 2012, after the CRA denied her deduction, the grievor asked GAC if it would cover her relocation expenses. It considered the request but took more than two years to give her a final answer. In rejecting her claim, the department said that it did not have the authority to cover her relocation expenses as she had not been given written authorization before incurring them.

[6] On June 13, 2014, the grievor filed a grievance to contest GAC's decision. After following the NJC's grievance process, it was referred to adjudication on May 27, 2016.

[7] There is no doubt that the grievor did not carry out the steps required of an employee in the *Directive*, namely, seeking approval for all expenses before incurring them. However, I find that her failures started from a mistaken decision by the employer that it could approve a relocation without approving the relocation expenses. I find that the grievor should have been reimbursed the maximum amount allowable under the "Employee-requested Relocation" provision of the *Directive*. I also find that she should have been given eight days leave with pay under the provisions of the *Directive*.

II. Summary of the evidence

[8] I will start with a short chronology of events based primarily on the agreed statement of facts and the joint book of documents provided by the parties. Three witnesses also provided evidence. The grievor testified for herself. The employer called Katharine Funtek and Marcel Lebleu. At the time of the events in question, Ms. Funtek was a director in the Trade Import Controls Policy Division ("TIC"), the division of GAC into which Ms. Nowlan was hired in 2010. Mr. Lebleu, currently Ambassador to Columbia, was Director General of Regional Operations at GAC at the time the grievor's claim was denied in 2014.

[9] Before moving to Toronto, Ms. Nowlan occupied an indeterminate EC-07 position as a deputy director of strategic policy and planning at GAC, based in Ottawa. She had been seeking positions in Toronto or southwestern Ontario — either within or outside the federal government — to better accommodate her family responsibilities in London, Ontario.

[10] In early July 2010, the grievor met with a deputy director to discuss her interest in one of two senior trade officer positions GAC had newly created in Toronto. The positions were classified in the Commerce group at the CO-02 level. As such, they were at a lower maximum rate of pay than the EC-07 level.

[11] The deputy director advised the grievor that the Treasury Board prohibited paying relocation assistance for the positions, which were part of a strategic review called "SR32". He also told her that if the department did run an appointment process, the Treasury Board would require running a closed-area process.

[12] Ms. Funtek testified that SR32 was an initiative to change the location of 32 positions from headquarters locations to the regions. At the same time, a separate strategic review called "SR400" required GAC to move 400 positions to locations outside Canada. She said the purpose of SR32 was to locate positions in the regions, where they would be closer to clients. She testified that GAC had intended to fill the SR32 positions locally and that the department did not have money for relocations.

[13] On July 30, 2010, the grievor was provided with and signed a letter of offer for the CO-02 position, with a start date of September 7, 2010. The letter referred to the position being in Ottawa. However, Ms. Funtek testified that this was because GAC had not yet formally created a "box" for the position in the regions. At the time, it had a vacant box only in Ottawa, but it wanted the position located in the region.

[14] Ms. Funtek testified that six CO-02 positions were created within the TIC, two in each of Toronto, Montreal, and Vancouver. Of the six, three were filled with employees who relocated from Ottawa: the grievor's position, plus the two in Montreal. No relocation costs were paid for any of these moves.

[15] After a short period of orientation in Ottawa, in September of 2010, the grievor moved to Toronto to work in the GAC office there. She took five days of her own leave to engage in a house-hunting trip before her move and three more days of leave after starting in the new position to facilitate the closing of her house sale and other tasks related to the move.

[16] The grievor testified that she took the position, even though it constituted a demotion, because of her family situation. She acknowledged that she had been told that GAC would cover no relocation expenses and that she had accepted the position on that basis. She acknowledged that the letter of offer did not mention relocation expenses. She said that she struggled with the financial implications of her decision but that she met with her accountant, who said that she could claim some expenses as income tax deductions.

[17] In 2011, the grievor filed her 2010 income tax return and claimed her relocation expenses as a self-funded employment deduction. On November 8, 2011, the CRA wrote her and declined her deduction for this reason: "You did not provide a letter from your employer confirming whether or not you were reimbursed for all or any part of your moving expenses."

[18] The grievor asked her employer for such a letter, and it provided one, on November 22, 2011. The letter said that "[i]n light of the fact that Ms. Nowlan was moving into a permanent position based in the Toronto Regional Office [of GAC], Ms. Nowlan did not receive any financial assistance from the government for relocation expenses."

[19] The grievor testified that after providing the CRA with the letter, she spoke to one of its auditors. She was asked questions about the departmental justification for not reimbursing her that she could not answer. Ultimately, the CRA did not accept her moving expense deductions.

[20] In February 2012, the grievor asked if the department would cover her relocation expenses. It asked her to itemize her costs and provide receipts, which she did. The total was $26 124, of which the largest amount was for a real estate commission on the sale of her home in Ottawa.

[21] At around the same time, GAC was formalizing the arrangements for the TIC positions in the regions. An intra-departmental memorandum of understanding (MOU) was signed in December 2011 between the branch responsible for the TIC program and the branch responsible for regional operations. One of the costs to be covered by the regional office branch was "[f]unding domestic relocation costs, as applicable". On February 13, 2012, GAC provided the grievor with a second letter of offer for her position. There were no changes to the reporting structure or to the duties of the position or its group and level, but the second offer letter listed the location as Toronto. It said that the appointment was being made retroactive to August 19, 2011. During her testimony, Ms. Funtek could not recall why the second letter was made retroactive to that date.

[22] The grievor testified that she asked the department to consider reimbursing her relocation costs after she heard from the CRA that it would not allow her to claim them on her tax return and after seeing relocation costs being referred to in the MOU.

[23] Over the course of more than two years, the department and the grievor corresponded about her reimbursement request. Eventually, on May 21, 2014, Mr. Lebleu provided her with GAC's final answer, denying her claim. The core reason provided was that her request did not fall within the limits of the *Directive*, as "… all

employees were required to obtain a written authorization within the proper delegation framework prior to incurring any relocation expenses."

[24] The grievor filed her grievance on June 13, 2014. Mr. Lebleu heard it at the first level and denied it for essentially the same reasons provided in his earlier email. He added that at the time she took the position in 2010, she had been informed that the department was prohibited from paying relocation costs.

[25] The grievance was heard at the second level by Claude Houde, GAC's departmental liaison officer for the NJC. He issued his decision on February 26, 2015. He agreed with the first-level decision, which stated that the grievor had not obtained written authorization in advance of incurring expenses, as required by the *Directive*. However, noting that administrative errors had occurred when the grievor was offered the position in Toronto, he consented to reimburse her the maximum allowance ($5000) under Part XII of the *Directive*, which covers employee-requested relocations.

[26] The grievor was not satisfied with this result. In accordance with the NJC's By-Laws, the final level of the grievance process is the NJC Executive Committee. She referred her grievance to that committee. Acting on the recommendation of the NJC Relocation Committee, the NJC Executive Committee concluded that the grievor was treated within the intent of the *Directive*. The May 6, 2014, letter denying her grievance further noted that "… although the Department did not follow the approved staffing measures, the employee was not authorized to relocate."

[27] The grievor referred her grievance to adjudication on May 27, 2016. It was originally scheduled to be heard in January 2020. The initial hearing dates were postponed and rescheduled for July 2020. Those dates were postponed due to the COVID-19 pandemic, and the matter was rescheduled and heard by videoconference in January 2021.

[28] By the time of the hearing, the grievor no longer worked for the federal government.

[29] Mr. Houde's decision at the second level of the grievance process to reimburse the grievor under the employee-requested provisions of the *Directive* was never implemented, as her grievance was transmitted to the NJC and then referred to a

predecessor of the Federal Public Sector Labour Relations and Employment Board ("the Board").

III. Summary of the arguments

[30] I will very briefly summarize the parties' arguments in this section. The more detailed analysis of their arguments is found in the reasons that follow.

[31] For the grievor, PIPSC argued that there should be no dispute about whether the *Directive* applies. The department granted the grievance in part at the second level when it said that she should be reimbursed the maximum allowance under the employee-requested relocation provisions at Part XII of the *Directive*. Under those provisions, the employer must take certain steps to declare the relocation that the employee requested. Because it did not take those steps, the grievor's relocation must fall under the employer-requested category, PIPSC argued.

[32] The grievor acknowledged that she did not seek approval in advance for the relocation expenses she incurred, as required by the *Directive*. However, GAC misinformed her from the start by telling her that she was not eligible to receive any relocation expenses, PIPSC argued. Under the *Directive*, the employer has a series of obligations it must fulfil, which precede the employee's obligations. The grievor cannot be faulted for not following the steps in the *Directive* because the employer never took the steps it was required to first.

[33] While acknowledging that the grievor accepted the position in Toronto on the understanding that she would not be paid relocation expenses, PIPSC argued that the Board must interpret the collective agreement. The grievor cannot be bound by a side deal between herself and Ms. Funtek that is not consistent with the collective agreement (see *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board*, 2016 PSLREB 47 at paras. 205 to 210).

[34] The grievor requested reimbursement for her relocation expenses in the amount of $26 124.37 as well as the reimbursement of the eight days of leave she took in August and September of 2010 to arrange her move.

[35] The employer argued that this is a hearing *de novo* (to be heard from the beginning) and that neither it nor the Board should be bound by the departmental

liaison officer's decision at the second level of the grievance process. The facts of this case are clear. The grievor agreed to move to Toronto and understood that the department would not pay for her relocation expenses. The grievor slept on her rights, it argued, and never asked about reimbursement until nearly a year-and-a-half after her move. The *Directive* allows reimbursement only when relocation expenses are approved in advance. It requires employees to work with the contractor hired to manage the relocation process and to receive approval for their expenses before they are incurred. The grievor did not follow that process. The *Directive* does not allow the employer to reimburse her after the fact. The Board must apply the *Directive* as written (see *Chafe v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112 at paras. 50 and 51, and *Delios v. Canada (Attorney General)*, 2015 FCA 117 at paras. 36 and 37).

[36] Additionally, the employer argued that the grievance should be denied based on promissory estoppel. The grievor made an assurance to the employer that she would absorb the costs of moving. The employer relied on that assurance when it made the decision to offer her the position in Toronto. Had she not made that promise, it might have acted differently to fill the position. The employer has already suffered detriment for the costs of this hearing. The grievor should be estopped from bringing her reimbursement claim before the Board.

[37] The employer requested that the Board dismiss the grievance.

IV. Reasons

[38] I will examine the parties' arguments in more detail, and provide my reasons for decision, under the following headings:

a) Should the *Directive* apply to the grievor's relocation?
b) Should the relocation be considered employee-requested or employer-requested?
c) Should the grievance be denied on the basis of promissory estoppel?
d) What order should be made?

A. Should the *Directive* apply to the grievor's relocation?

1. The distinct nature of the *Directive*

[39] The portion of the AV collective agreement at issue in this grievance is the *Directive*, which is incorporated into the agreement through article 35. That article

states that NJC directives, as amended from time to time, form part of the collective agreement.

[40] The *Directive* at issue in all relevant times to this grievance is the one that went into effect on April 1, 2009. All citations to and quotes from the *Directive* are in reference to that version. I take notice that a new version of the *Directive* went into effect on January 1, 2021. However, that is not the version I must interpret.

[41] The NJC is a forum for the "co-development of workplace improvements" in the federal public service (see s. 9 and 11 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2, "the *Act*")). The *Relocation Directive* is one many directives co-developed between participating employers and bargaining agents, incorporated into many collective agreements under the *Act*. The NJC's Relocation Committee is the forum through which the provisions to the *Directive* are co-developed.

[42] As per the collective agreement and the *Directive*, all grievances related to the *Directive* follow a process laid out in section 15 of the NJC's by-laws. The grievor's grievance followed that process. The first step is the representative of the employer authorized to deal with first level grievances, in this case Mr. Lebleu. The second step is the departmental liaison officer, in this case Mr. Houde. The final step in the grievance process is the Executive Committee of the NJC, which in this case made its decision based on a recommendation of its Relocation Committee. If an individual grievor is not satisfied with the decision of the NJC Executive Committee, they may refer it to adjudication under s. 209(1)(a) of the *Act*, which is what the grievor did in this case.

[43] I believe the Board must be attentive to the unique process of co-development used to develop the *Directive*, and the unique grievance process followed prior to the referral to adjudication. Here, the same joint body that co-developed the *Directive* (the NJC Relocation Committee) is also the body that recommended to the NJC Executive Committee that the grievance be denied, on the basis that the grievor had been treated within the intent of the *Directive*.

[44] However, the NJC's response is complicated by the fact the grievance was partially upheld at the second level of the grievance process. As described earlier, the departmental liaison officer recognized that there had been "some administrative errors" when the grievor was appointed and gave his "consent" to reimburse her some

expenses under employee-requested relocation provisions of the *Directive*. The NJC Executive Committee's response did not directly address Mr. Houde's decision.

[45] PIPSC argued that Mr. Houde's reply was an admission that the grievor was entitled to benefits under the *Directive* and that the Board's analysis should start from that assumption. The only aspect of the grievance she moved forward to the NJC and now to the Board is whether she should have been entitled to the full reimbursement of her expenses; i.e., her move should have been treated as an employer-requested relocation.

[46] The employer argued that the Board is not bound by Mr. Houde's response and that it must hear the case *de novo*.

[47] While I believe that the Board must carefully consider the decisions made at each level of the grievance process, I agree with the employer that the Board must hear the case *de novo* and make its ruling, given the wording of the *Directive* and the facts of the situation.

2. Interpreting the *Directive*

[48] It is important to note that the *Directive* is nearly 100 pages long, thus almost comprising a collective agreement unto itself. It is governed by overarching principles of trust, flexibility, respect, valuing people, and transparency that are all aimed at "… achieving fair, reasonable and modern relocation practices across the public service." In broad strokes, some of its essential features are the following:

1) the employer must authorize a relocation in advance and in writing (section 2.1.1);
2) the relocation process is administrated by a "Contracted Relocation Service Provider" or CRSP (currently, a company named Brookfield);
3) the employer shall refer employees to the CRSP and advise them not to proceed with any relocation activities before consulting the CRSP (section 2.2.1);
4) the employee must obtain written authorization before incurring any relocation expenses (section 2.2.2) and follow the CRSP's instructions on the relocation process (section 2.2.2); and
5) a considerable portion of the *Directive* is devoted to enumerating the expenses that are eligible for reimbursement, ranging from moving costs and travel expenses to the costs related to the sale and purchase of a home (parts IV-XI).

[49] The employer argued that relocation is a tripartite process involving it, the CRSP (Brookfield), and the employee. I agree that the *Directive* places significant responsibilities on each of these three, and normally does so in clear and unequivocal language.

[50] At section 1.2.3, the *Directive* also clearly limits the ability of an employee or manager to deviate from it:

> *1.2.3 This Directive and any limitations thereto are published as policy and not as permissive guidelines. Discretion, be it at the employee, managerial or departmental level, shall be confined to those provisions where discretion is specifically authorized.*

[51] Like any other collective agreement grievance, the Board must apply the well-established principles of contract interpretation that the words are to be given their ordinary meanings, the provisions within an agreement or contract are to be read as a whole, effect must be given to every word, and specific provisions are to take precedence over general provisions (see Palmer and Snyder, *Collective Agreement Arbitration in Canada*, 5th edition, at pages 21 to 55, or Brown and Beatty, *Canadian Labour Arbitration*, 4th edition, at 4:2000). When the language of the agreement is clear, it must be applied, even if the result may seem unfair or impose additional costs (see *Chafe* and *Delios*).

3. The grievor did not follow the *Directive*

[52] The core of the employer's case is that the grievor was not authorized to relocate under the *Directive* and that she did not follow the obligations it placed on her. For example, section 2.2.2 provides as follows:

> …
>
> *The employee shall:*
>
> *2.2.2.1 Read this document and consult with the CRSP prior to engaging in any relocation-related activities.*
>
> *2.2.2.2 Obtain written authorization within the proper delegation framework prior to incurring any relocation expenses; employees proceeding with relocation related transactions prior to authorization or incurring expenses beyond those allowable under this Directive will be personally financially responsible for such expenses and could be disqualified from participating in this Directive.*
>
> *2.2.2.3 Be aware that an employee may forfeit eligibility for some or all the provisions of this Directive if he/she signs contracts*

> *(realtor, lawyer, appraisers, pre-sale, etc.), or has been reimbursed directly by the employer for relocation related expenses.*
>
> …
>
> *2.2.2.10 Submit within 90 days after the date of the employee's arrival at the new place of duty, or the date the dependant(s) arrive, whichever is later, a complete relocation expense claim with necessary supporting documentation as required by this Directive.*
>
> …

[53] The grievor did not meet any of these obligations, the employer argued. She agreed to take the position in Toronto on the understanding that no relocation expenses would be paid. She asked the employer about reimbursing her expenses only nearly 1.5 years after she incurred them. She never asked about the application of the *Directive* before accepting the job, never contracted Brookfield to engage its assistance, and incurred all her expenses completely on her own, without prior approval by the employer or Brookfield.

[54] The employer argued that the employee's responsibilities are not guidelines; they are obligations that have been set out by agreement of the parties, and they have to be given meaning, which relates to the fact that relocation expenses are paid out of the public purse. Employees cannot simply spend money without authorization and come to the employer for them afterward. They must seek prior approval. The *Directive* provides a very limited scope for the retroactive approval of expenses when it states at section 2.1.1 as follows:

> *2.1.1 … In exceptional circumstances, the Departmental National Coordinator may post authorize relocation expenses incurred up to 30 days prior to the date of registration with the CRSP. In post authorization cases of more than 30 days, the approval of the Program Authority at TBS is required.*

[55] The *Directive* also makes it clear as to what happens if the rules are not followed, at section 1.2.6: "Expenses incurred because of misinterpretation or mistakes may not necessarily be reimbursed."

[56] Given all those clear provisions, the department's rejection of the grievor's claim for the payment of her 2010 move, made in early 2012, would appear to be on solid ground. Mr. Lebleu testified that the department required a legal basis to make a reimbursement. He testified that he found none within the *Directive*. His denial of her claim, his denial of her grievance at the first level, and in fact the NJC Executive

Committee's denial of her grievance at the final level all focused on this core failing, which is undisputed.

4. The employer also did not follow the *Directive*

[57] However, I also have to consider PIPSC's argument that the grievor's responsibilities under the *Directive* flow from the employer's responsibilities. It has the responsibility of authorizing that relocation expenses will be paid (section 2.2.1) in accordance with the provisions of the *Directive*. It shall refer each employee to the CRSP (section 2.2.1.3), and it must advise the employee not to proceed with activities before consulting with the CRSP (section 2.2.1.2). Ms. Funtek did none of these things, PIPSC argued. Instead, she simply told the grievor that no relocation expenses would be paid. The grievor cannot be faulted for not following the provisions of the *Directive* that the employer said would not apply.

[58] PIPSC did not argue that Ms. Funtek deliberately misled the grievor, but it argued that nevertheless, she was wrong when she decided to offer Ms. Nowlan the job in Toronto on the understanding that no relocation expenses would be paid.

[59] PIPSC argued that Ms. Funtek did not have the discretion to opt out of the *Directive*, which defines a relocation as follows:

> *Relocation (*reinstallation*) - the authorized move of an employee from one place of duty to another or the authorized move of an employee from the employee's place of residence to the employee's first place of duty upon appointment to a position in the public service.*

[60] Section 1.4.2 of the *Directive* says that "[p]ayment of relocation expenses **shall be** authorized for employees who are full-time and part-time indeterminate employees …" (emphasis added). This is not a discretionary provision, PIPSC argued, citing *Gagnon v. Treasury Board (Correctional Service of Canada)*, 2017 FPSLREB 48 at paras. 36 to 38. In *Gagnon*, the grievor had been denied relocation expenses on being appointed from a term to an indeterminate position. The Board found that section 1.4.2 required the employer to authorize the relocation, as the grievor was captured by the definition of a relocation.

[61] At this stage, it is appropriate to review the undisputed facts of this case. In 2010, Ms. Nowlan was working in Ottawa but wanted to move to Toronto or southwestern Ontario. She heard that the department intended to fill newly created

CO-02 TIC jobs in Toronto. She held an initial discussion with the deputy director, followed by a meeting with Ms. Funtek, the director. In both discussions, she was told that no relocation expenses would be paid. She accepted those conditions. The employer made her a job offer, and although the initial letter of appointment stated that the position was based in Ottawa, it is not disputed that the job was based in Toronto. The grievor had to move to Toronto to take the job and did so in September 2010.

[62] I asked the parties to provide me with their comments about the scope of the employer's discretion when it comes to authorizing a relocation. The employer noted that it has a number of options for staffing positions under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "the *PSEA*"). It can advertise positions nationally, it can advertise them to be filled locally, it can use a non-advertised process, or it can deploy people. These options are set out in the *PSEA*. The *Directive* makes no mention of these options. The employer argued that it must still authorize a relocation under the *Directive* and that it did not do so in this case.

[63] I find that the employer is wrong on this critical point. The July 30, 2010, letter of offer to the grievor states that she is being offered a deployment, which is one of the employer's options for staffing a position. The employer clearly understood that the grievor would have to relocate to Toronto for the position. The impact of the letter was clear: it authorized the grievor to stop working in Ottawa as an EC-07 and to start working in Toronto as a CO-02, effective September 7, 2010.

[64] I find no provision in the *Directive* that allows the employer the discretion, after authorizing an employee to start in a position in another location, **not** to authorize that move as a relocation. The grievor's move met the definition of "relocation" in the *Directive* — an authorized move from one place to another. And in accordance with the Board's reasoning in *Gagnon*, I find section 1.4.2 prescriptive, not permissive. When the employer makes an employment offer that involves a relocation, section 1.4.2 says that it **shall** authorize relocation for full-time indeterminate employees.

[65] In short, I find that Ms. Funtek was wrong when she told the grievor that no relocation expenses would be covered if the grievor accepted the position in Toronto. The *Directive* does not provide the employer with the discretion to decide whether to reimburse expenses.

[66] I find no basis to conclude that Ms. Funtek deliberately misled the grievor. The evidence shows that she acted on the Treasury Board's instructions for the SR32 initiative. Clearly, the department was under pressure to fill the positions quickly; staff were hired into the new roles in September 2010, but it took more than a year for GAC to formalize it in the form of the MOU and the revised offer of employment with the correct location.

[67] But Ms. Funtek testified that GAC "did not have the money" to pay for relocation and that it had to fill the SR32 positions on that basis. That excuse did not allow it to both offer the job in Toronto to the grievor and deny her rights under the *Directive*.

[68] It really does not matter whether the employer's obligations in the *Directive* precede those of the employee, as PIPSC argued, or whether the *Directive* requires a tripartite partnership, as the employer argued. Either way, without the employer's initial authorization no responsibilities under the *Directive* can be triggered. In this matter, the grievor never had a chance to fulfil her obligations under the *Directive.* It would not be correct to deny her grievance solely on that basis.

[69] I find that Ms. Nowlan should have been authorized to receive expenses under the *Directive* when she was offered the CO-02 position starting in September 2010 given that she was authorized to relocate.

B. Should the grievor's relocation be considered employee-requested or employer-requested?

[70] The issue then is whether her relocation should be considered employee-requested or employer-requested.

[71] The key provision at issue is found in section 12.1.2, which reads as follows:

> *12.1.2 An employee-requested transfer that results in an authorized relocation to a position at the appropriate group and level which is vacant on arrival at the new place of duty shall be deemed to be an employer-requested relocation subject to the following:*
>
> *(a) The relocated employee shall be reimbursed relocation expenses within the limits prescribed in this Directive, unless the deputy head or senior delegated officer provides written certification that, had the vacant position not been filled as a result of an employee-requested transfer, it would have been filled through normal staffing procedures without relocation expenses being incurred.*

> *(b) When a position is so certified, the employee is entitled to:*
>
> - *the sum of up to five thousand dollars ($5,000.00) in their Customized Fund;*
> - *the Core and Personalized Funds do not apply;*
> - *unused or remaining monies shall be returned to the Receiver General of Canada/department and are not payable to the employee as a cash-payout;*
>
> *and*
>
> - *a contract with a relocation services supplier who will provide the employee with professional assistance such as counselling on the relocation benefits available, guidance on accommodation at the new location and expense management.*

[72] PIPSC argued that paragraph (a) of section 12.1.2 places an obligation on the employer that GAC did not follow. The deputy head provided no written certification stating that the grievor's position "… would have been filled through normal staffing procedures without relocation expenses being incurred." Because no such written certification was provided, her relocation cannot be considered employee-requested, it said. As such, the grievor should be reimbursed her entire expenses, not just the $5 000 limit found at section 12.1.2(b).

[73] PIPSC argued that the Board upheld the importance of this section of the *Directive* in *Gresley-Jones v. Treasury Board (Canada Border Services Agency)*, 2020 FPSLREB 65. In that case, the employer had authorized two employees to use the employee-requested allowance of $5000 to relocate within British Columbia. The Canada Border Services Agency (CBSA) had provided the written certification that section 12.1.2 requires, but the Board found that its certification was "without factual underpinning" (at paragraph 80). It declared that the grievors' relocations should be treated as employer-requested relocations.

[74] The employer argued that the Board's analysis in *Gresley-Jones* started from the basis that the relocation was authorized in advance by the employer, that the grievors made their complaints as soon as they were told that the CBSA considered their relocations employee-requested, and that they met all their obligations under the *Directive*. None of these conditions apply to the grievor's situation, it said.

[75] I do not find *Gresley-Jones* helpful to deciding this case because in this case, neither the employer nor the grievor paid attention to the *Directive*.

[76] PIPSC is correct on a very technical argument: GAC did not provide the required written certification outlined in 12.1.2. However, if I relied entirely on a technical approach to determining this grievance, I could have denied the grievance on the basis asked for by the employer, which was that the grievor failed to obtain permission in advance for any of the expenses she incurred.

[77] I have found that the grievor's failures under the *Directive* are forgiven because she was told that no expenses would be paid. Similarly, I think it is correct to forgive Ms. Funtek's failure to provide the written certification required by section 12.1.2. She was operating under the same misunderstanding as the grievor that the *Directive* had no application.

[78] Although the employer did not provide the written certification it should have, its intention was made clear in both the agreed statement of facts and Ms. Funtek's testimony: had the grievor not taken the job, its intention was to run a closed-area competition that would not incur relocation costs. Furthermore, there is no evidence that this belief was a fiction, as the Board concluded in *Gresley-Jones*. Although Ms. Funtek testified that three of the six positions were initially filled via relocations, the other three were filled through local hires. She also testified that subsequent hiring for these positions was done through local hires. PIPSC provided no evidence to counter this testimony.

[79] Sometimes, the Board has to go beyond the purely technical rules of contract interpretation and apply common sense (see *Carroll v. Treasury Board (Department of Public Works and Government Services and Department of Industry)*, 2019 FPSLREB 23 at paras. 74 and 85). In this case, the grievor clearly made the move request. She was prepared to take the position even though it involved a demotion, and she understood that the department would not reimburse her relocation costs. She had an interview with Ms. Funtek. According to both of their testimonies, they discussed the challenges of balancing work and family responsibilities. They were the reason that the grievor wanted the position in Toronto.

[80] The parties who co-developed the *Directive* included the provisions for employee-requested relocations in Part XII for a reason. It allows employees to request a relocation for personal reasons, even in a situation that would not otherwise attract relocation costs. As a trade-off, expenses are capped at $5 000.

[81] This principle is reflected in the following definition of "employee-requested relocation" in the *Directive*:

> *Employee-requested relocation (*réinstallation à la demande du fonctionnaire*) - a relocation resulting from a formal request made by an employee for compassionate or other personal reasons and for which the costs involved are to be reimbursed in accordance with Part XII.*

[82] The grievor's request to move to Toronto was clearly made for personal reasons. I find it reasonable to conclude that had her relocation been processed correctly from the start, the department would have been able to establish that it met the requirements of section 12.1.2. I am in agreement with Mr. Houde's decision at step 2 of the grievance process, which he made after acknowledging that the employer had made errors in its staffing process.

[83] I note that in the revised version of the *Directive*, effective January 1, 2021, section 12.1 has been revised. The new language states that the intent behind the provisions is to allow employees to request a relocation on personal or compassionate grounds. It sets out the conditions under which employers may approve an employee-requested relocation. The question of how the grievor's situation would be handled under this new version of the *Directive* is not before me.

C. Should the grievance be denied on the basis of promissory estoppel?

[84] The employer also argued that the Board should deny the grievance based on the principle of promissory estoppel. It provided me with one recent authority on this subject, *Weston v. Treasury Board (Immigration and Refugee Board)*, 2020 FPSLREB 88 at paras. 42 and 43. Briefly, the party claiming estoppel must demonstrate that it has suffered detrimental reliance by acting on a promise made to it by another party in a legal relationship. It requires that a clear and unequivocal promise was made. If that is established, the party claiming estoppel must first demonstrate that it relied or acted on that promise and secondly demonstrate that it will suffer if that promise is altered.

[85] In *Weston*, the grievor had decided to resign from the public service following a workforce adjustment situation, based on assurances made to her by compensation and human resources staff that she would receive a transition support measure (TSM) payment of 52 weeks. After making the selection, she was told that her TSM would be of only 28 weeks. Although the Board found the 28-week TSM accurate under the

collective agreement, it then applied the promissory estoppel principle. It found that the 52-week calculation had been a clear and unequivocal promise. It determined that the grievor had relied on that promise when making the decision to retire and that she suffered a loss of 24 weeks of pay as a result. The Board ordered the employer to pay the grievor the 24 weeks' difference between the 52 and 28 weeks of TSM.

[86] In this case, the employer argued that the grievor made a clear and unequivocal agreement to take the position in Toronto without any relocation allowance. The employer relied on that promise. It offered her the job on that basis. Without that promise, it might have filled the position locally. It has suffered detriment by bearing the costs associated with her grievance going to adjudication. It will suffer financially if the Board awards her the relocation costs. Therefore, she should be estopped from making a claim for her relocation costs, it argued.

[87] PIPSC argued that the principle of estoppel requires a promise made by parties to the contract, which in this case are the Treasury Board and PIPSC. The grievor is not a party to the contract. The employer is sophisticated and ought to know that no promise she made can be relied on in such a way that it violates the collective agreement. The Board has applied estoppel in cases in which employers have made a promise, which bound them because they were a party. It cannot claim estoppel when the source of the problem was its error, made 11 years ago, of offering the grievor a relocation without access to relocation costs.

[88] The employer's claim of promissory estoppel appears to be a novel argument. The parties did not provide me with any case law in which an employer claimed estoppel because of a promise that an employee made to it.

[89] I find the first aspect of PIPSC's argument too narrow. The argument that estoppel applies only to promises made between "parties to the contract" would significantly limit the application of the principle. After all, the Board applied the principle in *Weston* by considering the promises made by compensation and human resources staff to the grievor in that case. While that staff made interpretations on behalf of the employer, the promise they made to the grievor would not represent an agreement between "parties to the contract" in the way argued by PIPSC. Nevertheless, the Board found that the assurances that the compensation staff made bound the

employer to pay a TSM of 52 weeks, even though the collective agreement did not provide for that result.

[90] On every other aspect of its argument, I find that PIPSC is correct. The principle of promissory estoppel cannot apply to the grievor's promise to relocate without reimbursement. This employer knows that its decisions are subject to the grievance process, and the cost of going to adjudication is part of the cost of doing business in a unionized environment. Even more importantly, a promise made by an employee at hiring cannot be relied upon as a reason for the Board to allow an employer to violate a collective agreement. Taken to its extreme, this argument would bind an employee to a promise to take a position with a lower rate of pay than the negotiated wage rates.

[91] The grievor did agree to relocate to Toronto on the understanding that no relocation costs would be paid by her employer (although she did expect to receive a moving expense deduction on her taxes). However, her agreement was predicated on the employer's assertion that the *Directive* did not apply to her situation because it did not have the required money. She did not have the authority to negotiate a lower benefit than provided for in the parties' collective agreement.

[92] Furthermore, the grievor's promise cannot be considered clear and unequivocal. Yes, she accepted the employer's assertion that she would have to absorb the cost of the relocation. Yes, she accepted a letter of offer that made no mention of relocation costs. However, this is not a clear and unequivocal promise to never claim that the employer failed to abide by her collective agreement.

[93] Finally, the employer has not demonstrated that it relied on the grievor's promise. It argued that it **might** have made a different decision had it known that the relocation costs might have been an issue; i.e., it could have led to posting the position with a geographical restriction. That strategy might or might not have succeeded (recall that three of the six regional CO-02 positions were filled with employees who transferred from Ottawa). This falls short of the reliance portion of detrimental reliance, i.e. the employer did not demonstrate that it changed its course or conduct by acting in reliance upon the assumption.

[94] Given that the employer did not demonstrate that it did change its course, I do not need to consider whether the employer suffered additional costs. In any case, at the second step of the grievance process, it was prepared to uphold the grievance and

pay the grievor the $5 000 maximum allowance under Part XII of the *Directive*, which is the award I make in this decision.

[95] In short, I cannot find a single basis on which to accept the employer's argument that the grievor is estopped from making her expense claim.

[96] My decision in this case is consistent with this example I found of the Board or its predecessors considering a claim of promissory estoppel made by an employer, in *Trempe v. Treasury Board (Public Service Commission of Canada)*, PSSRB File No. 166-02-14978 (19860117), [1986] C.P.S.S.R.B. No. 2 (QL). After reviewing several arbitration decisions on the subject, the former Public Service Staff Relations Board dismissed the employer's claim as follows:

> …
>
> *… The principle which underlies the latter cases is that an employer cannot, as a matter of private contract with its individual employees, effectively deprive them of the rights secured to them under a collective agreement. But for the operation of this principle, so it is reasoned, the integrity of the collective bargaining relationship would be threatened by the enormous potential for abuse on the part of erstwhile employers, particularly at the hiring stage.*
>
> *I find myself in agreement with the more modern authorities. Although there is certainly nothing in the evidence before me to suggest that the employer here was motivated otherwise than by a genuine concern for the best interests of its employees as a whole, it would set a dangerous precedent to hold that the employer could, by private arrangement, deprive individual employees of rights guaranteed to them under the collective agreement. To so hold would be to set at naught the exclusive bargaining agency of the union, an agency which in this case has both statutory and contractual recognition.…*
>
> …

D. What order should be made?

[97] I have found that the grievor should be reimbursed the maximum amount allowed under Part XII of the *Directive* for an employee-requested relocation. There was no dispute that her relocation expenses totalled $26 124.37 and therefore no dispute that she incurred at least $5000 in eligible expenses. Therefore, I award that she be paid $5000 as reimbursement for moving expenses.

[98] There is also no dispute that the grievor used eight days of her own leave to engage in a house-hunting trip to Toronto and to return to Ottawa to see to the closing of her house sale.

[99] Section 2.2.1.10 of the *Directive* requires the employer to provide an employee with the leave necessary to carry out activities related to the relocation, as follows: "The employer shall provide the relocating employee and spouse or common-law partner, if applicable, with the necessary leave to carry out all activities related to the relocation."

[100] I find that the employer should have offered her leave under the provisions of the *Directive* and that she would not have used her own leave. I seek to remedy that, keeping in mind that she is no longer an employee of the federal public service.

[101] Had she not used her own leave it would have still been available to her at the CO-02 level. Given all the circumstances of the case, I consider it fair and reasonable to award her eight days of pay at the maximum level of the CO-02 group and level pay scale that was in effect in the year she relocated. That would be the rate of pay that went into effect on June 22, 2010.

[102] As this represents employment income, this amount is to be paid subject to any deductions the employer is required to make.

[103] PIPSC requested that the employer be given 90 days to make any payments that the Board awards, and the employer had no submissions on that issue.

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

(The Order appears on the next page)

V. Order

[105] The grievance is allowed in part.

[106] The employer is to pay the grievor $5 000 in relocation expenses, which is the maximum amount allowable under the Employee-requested Relocation provision at Part XII of the *Directive*.

[107] The employer is also to reimburse the grievor for the eight days of leave she took for her relocation, which is to be paid at the maximum step of the CO-02 pay scale effective June 22, 2010, subject to any deductions it is obliged to make.

[108] The employer has 90 days to make these payments.

March 31, 2021.

David Orfald,
a panel of the Federal Public Sector
Labour Relations and Employment Board