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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

JEFFREY BROWN

Grievor

and

**TREASURY BOARD
(Correctional Service of Canada)**

Employer

Indexed as

Brown v. Treasury Board (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

Before: Ian R. Mackenzie, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Michael Fisher and Ann Lichty, counsels

For the Employer: Phillipe Giguère, counsel

Decided on the basis of written submissions,
filed November 6 and 30, 2020; January 11 and 18, 2021.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Jeffrey Brown relocated from Windsor, Ontario to Kingston, Ontario for work in 2009. At the time, he worked as a Parole Officer (WP-4) for the Correctional Service of Canada ("CSC" or "the employer"). In 2010, Mr. Brown grieved the denial by the employer of his request for an extension of the time limit for the purchase of a new house under the National Joint Council (NJC) Relocation Directive. The grievor also alleged that he was improperly denied Interim Accommodation, Meals and Miscellaneous Relocation benefits ("Interim benefits"). The NJC Executive Committee dismissed the grievance. The grievance was referred to the Board in February 2013.

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

[3] 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*, the *Public Service Labour Relations Act*, and the *Public Service Labour Relations Regulations* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, the *Federal Public Sector Labour Relations Act* ("the Act"), and the *Federal Public Sector Labour Relations Regulations* ("the Regulations").

II. NJC Relocation Directive provisions

[4] The NJC Relocation Directive (the “directive”) establishes the benefits provided to employees in the federal public service who fall within the definition of a relocation. The directive forms part of the collective agreement between the parties. The purpose of the directive is set out in paragraph 1.2.1:

1.2.1 It is the policy of the government that in any relocation, the aim shall be to relocate an employee in the most efficient fashion, at the most reasonable cost to the public while having a minimum detrimental effect on the employee and his/her family and on departmental operations.

[5] The “Principles of the Directive” are set out in the directive:

...These principles are the cornerstone of managing government relocations and shall guide all employees and managers in achieving fair, reasonable and modern relocation practices across the public service.

Trust - increase the amount of discretion and latitude for employees and managers to act in a fair and reasonable manner.

Flexibility - create an environment where management decisions respect the duty to accommodate, best respond to employees’ needs and interests, and consider operational requirements in the determination of relocation arrangements.

Respect - create a sensitive, supportive relocation environment and processes which respect employees’ needs.

Valuing people - recognize employees in a professional manner while supporting employees, their families, their health and safety in the relocation context.

Transparency - ensure consistent, fair and equitable application of the Directive and its practices.

Modern relocation practices - introduce relocation management practices that support the principles and are in keeping with relocation industry trends and realities; develop and implement an appropriate relocation accountability framework and structure.

[Emphasis in the original]

[6] There is a one-year time limit for receiving reimbursement under the directive (paragraph 2.13.1). A request for an extension of that time limit can be requested by an employee, “based on exceptional circumstances”. Approval for such requests “shall not be unreasonably denied”.

[7] Paragraph 9.2 provides that an employee can request an extension to the time limit for the purchase of a home, “in situations where the purchase of the home is delayed due to exceptional circumstances”. The paragraph also provides that requests for extension shall not be unreasonably denied, “in accordance with the Principles outlined in this Directive”. The directive sets out a non-exhaustive list of exceptional circumstances, including “depressed housing market conditions”.

[8] To obtain an extension, the employee must submit a business case to the Departmental National Coordinator (DNC) who shall forward the submission with his or her recommendation to the Program Authority at Treasury Board Secretariat for approval. The Program Authority is then required to provide a written response to the employee’s request as early as possible, but no later than ten working days after receipt of the business case.

III. Summary of the evidence

[9] The parties prepared an agreed statement of facts and I have used that statement, as well as the documents provided by the parties, in preparing the summary of the evidence.

[10] On September 21, 2009, the grievor accepted an offer to relocate from the Windsor Area Parole Office to the Portsmouth Centre located in Kingston. The letter of offer was signed on November 10, 2009.

[11] Initially the relocation was scheduled to take place on November 1, 2009, but due to budgetary constraints, the employer rescheduled the relocation to April 1, 2010. The grievor’s relocation file was registered with relocation services on December 15, 2009. At the grievor’s request, the relocation date was subsequently changed to April 15, 2010.

[12] In the Fall of 2009, the grievor began a preliminary exploration of the real estate market. His intention was to sell his property in Windsor and purchase a home in Kingston. He learned in these preliminary discussions with several real estate agents that Windsor had a depressed housing market and that it would be very difficult to sell his home. As a result, he elected to simultaneously list his property for sale and for lease. Two open houses were held. The grievor received no purchase offers and received five lease offers. By April 16, 2010, he accepted a leasing arrangement for his

Windsor property starting June 1, 2010. He elected to receive real estate commission fees under the directive that would have been payable had he sold his home.

[13] From March 6 to 14, 2010, the grievor was in Kingston for an approved house hunting trip, for which he was reimbursed. Sometime in or around March 18, 2020, the grievor made a conditional offer to purchase a property in Kingston. The sale was scheduled to close on April 1, 2010. The sale fell through and the grievor lost his \$1000 deposit. In an email to the employer on April 5th, 2010, he stated that the financing for the purchase fell through because having a second mortgage increased his down payment requirement. He checked into a hotel on April 1, 2020 and stayed there until June 2, 2010.

[14] In April 2010, the grievor signed a one-year lease on a local townhouse with a move in date of June 2, 2010. He remained at this residence for several years.

[15] On April 26, 2010, the grievor submitted a formal request in writing for an extension of relocation benefits, including a business case for the extension. He advised the employer that in his preliminary talks with real estate agents in Windsor, he was told that it would be very difficult to sell his house as Windsor was a depressed housing market, especially at the price value of his home (approximately \$300,000). He wrote that once he received the “green light” from the Department, he listed his Windsor home:

...The property was aggressively marketed for both sale and lease. As predicted by several real estate agents despite several open houses I did not receive a single offer [of] a purchase but did receive several offers for lease. Faced with these realities I made a decision to accept the lease arrangement and the “elect not to sell option” offered me in the NJC Directive...

Although I acknowledge that things did not turn out as smoothly as I would have hoped for with regards to my attempt to purchase a home at the new location. As this deal disintegrated from the change in financial requirements. It is important to point out that I have also lost significantly in the circumstance. Both in the most obvious ways like my deposit on the property and my continuing cost with regards to temporary accommodations (motel) while I continue to scramble to find a place to live for me and my children. I have cut deeply into my savings just to have a temporary place to live while trying to adapt to my new work responsibilities... I am faced with renting a property at the new location for a series of reasons. But it is my goal to purchase here

at the new location granting me an extension of one year would assist a great deal in making that a reality.

[Sic throughout]

[16] On June 8, 2010, Mr. Luc Lemieux, the DNC, denied the grievor's request:

The election not to sale was made in the very early stage of this relocation. From information provided in an email from Mr. Brown dated April 5th, 2010, ... it clearly indicates that the problem with securing this mortgage came from the decision of the member to elect not to sale which is a personal decision that created the double mortgage issue and the requirement for the larger down payment that prevented Mr. Brown from purchasing a house at the new location.

As circumstances are not deemed exceptional and as Mr. Brown still has six month left of the initial one year time limit to proceed with the purchase of a house at destination, the request for the one year extension is not supported by the DNC.

[Sic throughout]

[17] On June 9, 2010, the grievor requested a second review of his request for an extension of his relocation expenses and provided further explanations:

...

I noted in the response that part of that decision was based on my 6 month's left on my current Relocation file. However because I had to move into semi-permanent accommodations I was required to sign a 1 year lease as of June 1/2010. This would mean that even if I was able to make another offer on a property in the next 6 months before this relocation expires I would be looking at breaking this lease and the consequences/penalties for that.

...the housing sales in Windsor are documented to be some of the worst in the Country, (no doubt effected by the greater than 12% unemployment rate). As well this condition for extensions according to policy "Is not to be unreasonably withheld".

...

If I would have passed by the opportunity to obtain a good party to lease my property at the old location for June 1st (signing a 15 month contract). I very likely would have been saddled with a empty house in Windsor still not sold and a mortgage I was responsible for + the cost of accommodations for life in Kingston.

I have paid for two places for All of April and All of May and this has been a very substantial financial drain on me and my family (hence my request for IAM &MA from the report date of April 1st to the move in date of June 2) . There is no way I could have done this indefinitely, and the department only accommodates for 6

months. Besides as I stated before 6 months of TDRA, would have been substantially higher amount of cost to the CSC then the monies they have to dale paid out.

...

[Sic throughout]

[18] The responsible manager forwarded the second request to the DNC with the following observation:

...

I am in agreement with him that under the circumstances he meets the criteria as "exceptional circumstances" and am certainly recommending the extension be submitted to TB. If the answer is still no I would ask that you please outline what might be considered "exceptional circumstances" that would warrant submission to TB for their review. Thanks for your time and consideration of this important request.

[19] The DNC denied the grievor's request on July 8, 2010:

The extension request was reviewed and it is still not supported by the DNC as the situation arose from a series of personal decisions and as such, does not meet the definition of "exceptional circumstances".

The argument that the housing market in Windsor is bad can not be evoked as being an exceptional circumstances as Mr. Brown has elected not to sale which is a personal decision. This decision impacted his ability to obtain a mortgage on a house in Kingston which again, was a result of a personal decision. Mr. Brown has decided to lease accommodation in Kingston and sign a one year lease agreement. This is again a personal decision that does not prevent Mr. Brown from purchasing a house in the next 6 months. Finally, the decision to wait until the end of the lease to purchase at destination is again from personal choice.

Similar cases, where situations arose from personal decisions, were discussed and submitted in the pass to TBS for approval and none were approved. In this particular case, the arguments presented by Mr. Brown do not meet the "exceptional circumstances" condition stated in Section 9.2 ...

[Sic throughout]

[20] The grievor filed a grievance of the DNC's response. He also grieved the denial of Interim benefits after April 1, 2010. He requested an extension of one year to purchase a home. On November 22, 2012, the grievance was denied at the final level by the NJC Executive Committee. The NJC Executive Committee agreed that the DNC had

not referred the business case to the Program Authority at TBS, as required by the directive. However, it also concluded that the grievor had been treated within the intent of the directive regarding his request for an extension of the relocation period.

[21] The NJC Executive Committee determined that a depressed housing market did not explain the grievor's failure to purchase a home in Kingston:

...

The Committee recognizes that a depressed housing market, whether with respect to the sale or purchase of a home, qualifies as a valid exceptional circumstance under section 9.2 of the Directive for the extension of the relocation period per section 2.13.1. However, in this instance, once the grievor made the decision not to sell his home at origin, the depressed housing market was no longer a factor in his relocation under the Directive.

...

[22] The Executive Committee determined that the grievor had been provided with the maximum Interim benefits allowable under the directive. The Executive Committee did note that whether the grievor was on travel or relocation status from April 1 to 14, 2010 was unclear. It recommended that the employer review his status and provide reimbursement if applicable.

IV. Summary of the arguments

[23] The parties provided written submissions. What follows is an edited version of those submissions.

A. For the grievor

[24] The grievor was entitled to an extension to relocation entitlements under sections 2.13.1 and 9.2 of the directives. On its face, the directive aims to relocate an employee in the most efficient fashion, while having a minimum detrimental effect on the employee and his family. It includes a framework for determining whether to grant an extension in circumstances where the employee's purchase of a home is delayed due to exceptional circumstances. It explicitly states that an exceptional circumstance includes a depressed housing market. In denying his request, the CSC failed to consider the clear connection between the depressed housing market in Windsor and the grievor's inability to buy a house in Kingston, as well as the principles outlined in the directive.

[25] In interpreting the directive, the Board must consider the words chosen by the parties themselves. The cardinal presumption of interpretation, as this Board has affirmed, “is that the parties are assumed to have intended what they have said, and that the meaning of the collective agreement is sought in its express provisions” (*Porlier v. Treasury Board (Department of Natural Resources)*, 2018 FPSLRB 77). The provisions must be given their normal and ordinary meaning, unless to do so would be inconsistent with the agreement as a whole or lead to an absurd result.

[26] To avoid undue hardship and adverse impacts on employees who are relocating, the parties developed principles which anchor the interpretation of the directive. These principles recognize the significant disruption of a relocation in the lives of employees and their families. They seek to “create a sensitive, supportive relocation environment and processes which respect employees’ needs,” by “[recognizing] employees in a professional manner while supporting employees, their families, their health and safety in the relocation context.”

[27] The parties intended to set up a relocation process with flexibility and trust to “increase the amount of discretion and latitude for employees and managers to act in a fair and reasonable manner.” This would “create an environment where management decisions respect the duty to accommodate, best respond to employees’ needs and interests, and consider operational requirements in the determination of relocation arrangements.” The parties have adopted a liberal and generous framework for determining whether to grant an extension where the purchase of a home is delayed due to exceptional circumstances.

[28] Notably, the prior version of the directive provided a more restrictive approach to approving extensions to relocation benefits. In *Hicks v. Treasury Board (Department of Human Resources and Skills Development)*, 2006 PSLRB 60, the adjudicator considered the context of the 1993 Relocation directive, which contained the following provision relating to the extension of the relocation entitlements:

...

... This limitation may be waived with the approval of the deputy head or a delegated officer. Extensions to the two-year period should be based on the demonstrated inability of the employee to sell the home because of reasons outside the employee's control, for example, a limited housing market, or a market which has experienced a significant slow-down.

[29] The Board in *Hicks* denied the grievance stating that the extension must “relate to external factors unrelated to the employee’s personal situation” and should be “based on the demonstrated inability of the employee to sell his home or purchase a new one.” The adjudicator ultimately denied the grievance because the circumstances invoked by the grievor pertained to his mother-in-law’s illness and the care and attendance provided to her by his wife.

[30] Since the decision in *Hicks*, the parties have significantly amended the entitlements under the directive to increase employee protections. First, they added guiding principles. Second, the parties included section 9.2, which provides that requests for extension shall not be unreasonably denied, in accordance with those principles. They removed the “demonstrated inability” test. In addition, the principles presume that the employees are advancing their claims in good faith.

[31] The changes to the directive since the decision in *Hicks* demonstrate that the employer should approve reasonable requests for extensions in “situations where the purchase of the home is delayed due to exceptional circumstances,” and that these requests should be considered in accordance with the liberal and flexible approach outlined in the principles of the directive. This is a sensible approach given the potential for significant disruption in the lives of employees undertaking relocation for work, and the desire of both the parties to protect against this outcome.

[32] The directive is clear: an employee may request an extension where the purchase of a home is delayed due to exceptional circumstances. Exceptional circumstances expressly include a depressed housing market. Furthermore, the directive provides that the employer must act in a “fair and reasonable manner.” The employer’s failure to extend the relocation benefits in the present circumstances, where depressed housing conditions prevented the grievor from selling and buying a home, constitutes a breach of section 9.2 of the directive.

[33] The employer must provide a compelling reason to deny the request for an extension or a reasonable explanation for such a denial. In *Cianciarelli v. Treasury Board (Department of the Environment)*, 2017 PSLREB 32, the employer had denied a request under the collective agreement to provide transition support measure funds to reduce the grievor’s tax liability in a workforce adjustment context. The Board determined that the employer failed to exercise its discretion fairly and reasonably:

...

[34] ... it seems to me that a principle of fairness has been ignored. The employer has agreed, in the collective agreement proper and in the WFA, to treat employees fairly.

...

[40] ... I can find no reasonable explanation from the employer of any impediment to the two-payment option, especially when it clearly had been in place for some time

[34] In the present case, the employer similarly failed to provide a reasonable explanation for denying the request, given the clear direction in the directive that a depressed housing market is an identified exceptional circumstance that justifies extending employee benefits. The employer has provided no explanation for its conclusion that, notwithstanding the express wording of the directive, the grievor's inability to sell his home was a personal decision. This is particularly the case since the employer has never questioned that his request was made in good faith.

[35] As confirmed by the NJC Executive Committee, the grievor's inability to sell his home was a direct result of the depressed housing market. By their decision, the NJC Executive Committee disagreed with the employer's rationale that the circumstances were not deemed exceptional but rather a personal decision. Specifically, the NJC Executive determined that a depressed housing market whether with respect to the sale or purchase of a home qualifies as a valid exceptional circumstance under the directive.

[36] However, the NJC Executive Committee erred in deciding that the depressed housing market was no longer a factor in his relocation, once the grievor decided not to sell his home. This reasoning is circular, as the grievor had little choice but to lease, rather than sell his home, when he received no offers of purchase. It would have been unreasonable to expect him to sell his home at a significant loss, which would have been his only option at the time. Given the reality of the real estate market in Windsor, his decision not to sell his own was the only reasonable option available to him. There is, therefore, no reasonable basis upon which the employer could consider his inability to sell his home in a depressed housing market "a personal decision."

[37] The depressed housing market in Windsor is also the reason that the grievor was unable to purchase a home in Kingston. Practically speaking, he was forced to lease his home in Windsor. There was no market for his home at the time and selling at

a significant loss is hardly a choice in these circumstances. As he was required to maintain his mortgage on his Windsor property, he was unable to obtain a mortgage to purchase a home in Kingston. Notably, the DNC agreed that his decision not to sell his home impacted his ability to obtain a mortgage on a house in Kingston, but erroneously concluded that this was a personal decision.

[38] The decision not to sell, which was predicated on the depressed housing market, is the direct consequence of the grievor's inability to secure a mortgage to purchase a home in Kingston. His request for an extension on relocation benefits to purchase a home was, thus, directly linked to the depressed housing market in Windsor. Indeed, the responsible manager, agreed that the grievor met the criteria of "exceptional circumstances" under the directive and recommended the extension for relocation entitlements. For unexplained reasons, the employer did not heed this advice and denied the grievor's request.

[39] The employer's decision to deny the grievor's request was contrary to both the express terms of the directive and its underlying principles. The employer unreasonably denied his request, and therefore the grievance should be allowed.

B. For the employer

[40] The employer noted that the grievor made no submissions on the issue of the denial of Interim benefits. It submitted that the grievor had the burden of proving this allegation and should not be permitted to split his case by raising arguments on this issue in reply.

[41] Like any collective agreement interpretation case, the onus falls on the grievor to demonstrate that the employer violated the terms of the agreement, in this case the directive (*Denboer v. Treasury Board (Correctional Service of Canada)*, 2016 PSLREB 58). The Board must ascertain and give effect to the intention of the parties to the directive on the issues in dispute (*Chafe et al. v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112). The Board is limited in its interpretation by the express terms and conditions of the directive. It is not open for it to modify terms or conditions set out in the directive (*Outingdyke v. Canada (Treasury Board)*, 2003 PSSRB 51 and *Chafe*) nor to use the more general purpose provisions of the directive to modify the meaning of specific provisions of the directive which are otherwise clear (*Hicks*).

[42] The grievor's onus is twofold. First, he must establish on a balance of probabilities that the request for an extension of benefits was based on exceptional circumstances that are unrelated to his personal decision-making or situation. After that, he must demonstrate that the employer was unreasonable in its exercise of discretion in denying the request.

[43] The foremost requirement for an extension of relocation benefits is that there must be exceptional circumstances related to external factors unrelated to the employee's personal situation and beyond their control. However, even where such exceptional circumstances are present, entitlement to an extension of relocation benefits is not absolute and the granting of such a request remains at the employer's discretion. The employer's discretion is not subject to review by the Board except to the extent of ensuring that it has been exercised reasonably (*Dollar and Treasury Board (Canada Employment and Immigration Commission)*, [1979] C.P.S.S.R.B. No. 18). The consequence must be that that the Board must not interfere with the employer's exercise of discretion if it was reasonable, even though the Board might well have reached a different decision and granted the extension. The Board should be reluctant to step into the shoes of management and usurp the discretion that has so clearly been given to the employer under the directive. In any case, an ungenerous decision is not necessarily an unreasonable one, and the fact that other persons might grant the request does not amount to a breach of the collective agreement. To the contrary, it may well be that both decisions were equally reasonable, as there could very well be good faith difference of opinion (see *Dollar*).

[44] In this case, the grievor does not meet the first criteria for an extension of time under the directive. First, he failed to establish that exceptional circumstances existed when he submitted his request for an extension of time. Conversely, the grievor's situation resulted from a series of personal and strategic decisions he made as well as some poor planning. Early in the relocation process, he made a personal decision to lease his home instead of continuing to list it for sale. He also made another strategic decision early on when he opted for the non-sale incentive under the directive. He also successfully leased his house in Windsor for a two-year term effective June 2010 at a rate that he indicated was more than enough to cover all his carrying cost and expenses. The grievor thus transformed his Windsor property into an income-generating property. Moreover, he chose to lease his property effective June 2010, even though he knew he was to report to duty in Kingston in April 2010. As a result of these

decisions, the grievor accepted to continue to assume all the cost and risk associated with carrying a mortgage on his property in Windsor, Ontario.

[45] Although his decisions were made early in the relocation process, to his own detriment, the grievor was quite tardy in searching for a suitable residence in Kingston. There was no good reason for him to wait so long. His relocation file was opened in December 2009 and early on he elected not to sell his property in Windsor. In choosing to commence his search so late in the process, he did not allow for any margin of error to deal with any of the standard problems that accompany purchasing and financing a home and in finding suitable accommodations. In the end, issues did arise that could have been avoided had the he been more diligent. At the conclusion of his house hunting trip, he made a conditional offer to purchase a property which fell through because he was unable to secure appropriate financing. To his own detriment, the grievor presumed that being pre-approved for a mortgage guaranteed him approval of a mortgage at those same terms. Had the grievor been more diligent he would have learned that pre-approval of a mortgage does not guarantee approval for a mortgage at those same terms or that already carrying a mortgage may impact his chances of obtaining a second mortgage on favourable terms. Moreover, in any case, it was his personal responsibility to secure appropriate financing and to arrange his personal finances in a way that would have allowed him to purchase a second property in Kingston.

[46] Perhaps, if the grievor had began his house hunting search at an earlier juncture, he would have had enough time to deal with the issues that he faced. For example, he would have realized at an earlier juncture that he needed a larger deposit. He would have had more time to secure proper or alternative financing or could have readjusted his budget to purchase a home which was within his means. He may have realized that he was better off to lease accommodations in Kingston instead of proceeding to purchase a property and in turn allowing for more time to find suitable or flexible leasing arrangements. Unfortunately, his poor planning left him with no room to deal with any of the standard problems that accompany purchasing and financing a home or finding suitable accommodations.

[47] Later, the grievor also made other personal decisions that affected his circumstances. He signed a one-year lease on a property in Kingston, even though the property was only available months later and his report to duty date in Kingston was

scheduled for April 15, 2010. The grievor's decision to bind himself to a one-year lease arrangement as opposed to renting a property with more flexible arrangements was a personal choice. Moreover, it did not prevent him from purchasing a property during that same time period or the remaining six months left on his relocation file.

[48] In summary, the grievor's circumstances were directly attributable to his poor planning and a series of personal and calculated decisions, some of which were made to his own detriment. There is nothing exceptional about these circumstances. The grievor failed to establish that his circumstances fell within the provisions of the directive. The grievance should therefore be dismissed on that basis alone.

[49] In the alternative, the employer exercised its discretion in a reasonable manner that was neither arbitrary, discriminatory nor in bad faith. The employer fairly and fully considered the merits of the grievor's request for an extension of relocation benefits, as well as his individual circumstances. It provided the grievor the opportunity to provide additional information and justifications for "exceptional circumstances." The employer demonstrated flexibility and an open mind as it considered the grievor's situation and request on multiple occasions. It fairly considered his request, but ultimately disagreed with him that his circumstances fell with the parameters of "exceptional." That disagreement does not mean that the exercise of discretion was unreasonable or constitute a breach of the directive. At best, it shows that there may well be a good faith difference of opinion. In any case, an ungenerous decision is not necessarily an unreasonable one, and the fact that other person might defer does not amount to a breach of the collective agreement.

[50] On this basis the grievance should be dismissed.

C. Grievor's reply

[51] The employer's main submission, that the grievor's circumstances were the result of his personal or strategic decisions, fails to consider the uncontested fact that he had no control over the real estate market in Windsor. It could hardly be expected that the grievor would sell his house at below market value and at a significant loss.

[52] The employer's argument that the grievor must establish that his request for an extension of benefits was based on exceptional circumstances unrelated to his personal decision-making or situation is erroneous because it is based on the decision

in *Hicks*. The decision in *Hicks* is no longer relevant, given the subsequent changes to the directive. Specifically, the directive no longer contains the requirement that an extension relate to external factors unrelated to the employee's personal situation. This change in wording signifies a change in meaning that affects the employer's exercise of its discretion.

[53] It is not open to the employer to ignore the principles of the directive when exercising its discretion under the directive, since section 9.2 expressly requires that those principles be considered when exercising its discretion.

[54] The employer has asserted facts in its submission that are inconsistent with the agreed statement of facts:

- The grievor's decision to lease his home in Windsor could not have been a strategic and personal decision, because the agreed statement of facts confirm that it was always his intention to sell his property in Windsor and purchase a home in Kingston
- The employer's claim that the grievor made the decision not to sell his house early in the relocation process is inaccurate. He made the decision on or around April 16, 2010 and had been exploring the real estate market since the fall of 2009.
- There is no evidence to support the employer's claim that the grievor created an income-generating property and that this was his plan all along.

[55] If the employer wanted to challenge the grievor's motives or impugn his credibility, it had the opportunity to request an oral hearing. The employer is bound by the agreed statement of facts and the Board must render its decision based on those facts, not the employer's conjecture.

[56] It is unclear why the employer has made submissions on a second interpretation issue of its own making. If the Board allows the grievance, the grievor is merely seeking the entitlements to which he would have been entitled had the employer properly exercised its discretion in the first place. The issue of any reimbursements need only be answered after the Board's decision on the merits.

V. Reasons

[57] There are two issues in this grievance: the denial of an extension of relocation benefits under the NJC directive, and the denial of Interim benefits. Prior to addressing

these issues, I will make an observation about the appropriate use of an agreed statement of facts.

[58] The grievor has objected to some of the statements in the employer's submissions that, in his view, add to the agreed statement of facts. I have only considered the facts as set out in the agreed statement of facts and the associated documents provided by the parties. The employer has some opinions on those facts relating to the grievor's motivations for his actions. When arguing a case based on an agreed statement of facts, each party is entitled to their own opinions - but not their own facts. I have not accepted the opinions of the employer on the grievor's motivations as facts. I have treated those opinions as I would normally do - as argument.

A. Extension of relocation benefits

[59] The directive contains a general one-year time limit for reimbursement under the directive (paragraph 2.13.1). There is a general provision for an extension of this time limit in this paragraph. A request for an extension of that time limit can be requested by an employee, "based on exceptional circumstances". Approval for such requests "shall not be unreasonably denied". Paragraph 9.2 of the directive relates specifically to an extension of time limits for the purchase of a home. It provides that an employee can request an extension to the time limit for the purchase of a home, "in situations where the purchase of the home is delayed due to exceptional circumstances". The paragraph also provides that requests for extension shall not be unreasonably denied, "in accordance with the Principles outlined in this Directive". The directive sets out a non-exhaustive list of exceptional circumstances, including "depressed housing market conditions". Paragraph 9.2 is the paragraph that is most directly engaged in this grievance.

[60] I accept the general principles of contract interpretation as set out by the parties in their submissions.

[61] The employer relied on *Hicks*, a decision of a predecessor Board involving the time limits under a previous version of the directive. The relevant provision at issue in *Hicks* referred to a demonstrated inability to sell a home "because of reasons outside the employee's control". The adjudicator in *Hicks*, relying on the language in the

directive, concluded that the circumstances contemplated by the parties must relate to external factors “unrelated to the employee’s personal situation”.

[62] The version of the directive that applies to this grievance is different than the version applicable in *Hicks*. Specifically, the directive before me does not refer to “reasons outside of the employee’s control”, or as paraphrased by the adjudicator in *Hicks* “external factors unrelated to the employee’s personal situation”. For this reason, I cannot accept the employer’s position that the exceptional circumstances referred to in the directive before me must be “related to external factors unrelated to the employee’s personal situation and beyond their control”. However, the exceptional circumstance relied on by the grievor for his extension request is a depressed housing market condition – a circumstance that is clearly not related to an employee’s personal situation or within his or her control.

[63] I must therefore first determine if the grievor has shown that the reason for the requested extension of time was because of the depressed housing market conditions in Windsor, Ontario, in 2010. I find, on a balance of probabilities, that he has established this exceptional circumstance.

[64] It is accepted by the parties that there was a depressed housing market in Windsor in 2010. The grievor consulted real estate agents and was advised of the poor real estate market. The NJC Executive Committee recognized this in its response when it stated that once the grievor made the decision not to sell his home, the depressed housing market was no longer a factor in his relocation.

[65] The issue, then, is whether the depressed housing market was the real reason for the grievor’s extension request. The employer’s position is that he decided to lease his property rather than sell it, and that this was a personal decision. In the absence of a depressed housing market, I agree that a decision to lease a property rather than sell it is a personal decision. However, the grievor’s decision to lease in this case was based on receiving no offers to purchase. I find that the absence of any offers to purchase when his home was put on the market, coupled with the advice he received from real estate agents, constitutes an exceptional circumstance related to depressed housing conditions, as set out in the directive.

[66] There is no evidence to support the employer’s contention that the grievor transformed his Windsor home into an income generating property. The lease covered

his mortgage payments and costs associated with the property – a prudent move in the absence of any offers to purchase.

[67] I accept that as a result of his inability to sell his Windsor home due to the depressed housing market, the grievor was unable to purchase a home in Kingston. The financing of a purchase fell through due in large part to the fact that he had a mortgage on his Windsor home. The drafters of the directive must have contemplated such a scenario – since the depressed housing market exception refers to the housing market in the location that the grievor is leaving, not the destination housing market.

[68] The employer also submitted that the grievor could have rented a property in Kingston for less than a year. However, the employer provided no evidence to support the availability of such flexible rental arrangements in Kingston. It was reasonable for the grievor to rent a home for a year, in the exceptional circumstance of not being able to sell his Windsor home due to a depressed housing market.

[69] I therefore conclude that the grievor has met his burden of establishing that his request for an extension was based on the exceptional circumstance of a depressed housing market.

[70] I now turn to the employer's exercise of its discretion. The directive requires that requests for an extension shall not be unreasonably denied. The words "unreasonably denied" in the context of discretionary benefits have been interpreted by this Board and predecessor Boards for decades. As stated in *Close and Stevens v. Treasury Board (Department of Citizenship and Immigration)* 2016 PSLREB 18, quoting the decision in *Barrett v. Treasury Board (Department of Transport)*, PSSRB File No. 166-02-7738 (19800123), "as noted in *Barrett*, the employer cannot establish such a rigid and impenetrable standard that employees must meet to qualify for leave that it renders the provision meaningless".

[71] The process an employer must follow in exercising its discretion was set out in *Coppin v. Canada Revenue Agency*, 2009 PSLRB 81, a case involving discretionary leave due to winter storms. In exercising its discretion, the employer must examine each request and its series of facts individually, and its decision must be based on the merits of each request.

[72] In addition to the general principles that apply to the exercise of discretion, the directive contains an additional requirement: that this discretion is to be exercised in accordance with the principles set out in the directive. The principles are set out in paragraph 5 of this decision. The principles are to guide employees and managers in achieving “fair, reasonable and modern relocation practices”. The principles include flexibility, where management decisions “best respond to employees’ needs and interests”. In addition, the principles are to “increase the amount of discretion and latitude for employees and managers to act in a fair and reasonable manner”. The principles also include transparency to ensure “consistent, fair and equitable application” of the directive. These principles must be considered by the employer when exercising its discretion to extend the deadline for the purchase of a home.

[73] In this case, I find that the employer did not exercise its discretion reasonably. Its refusal to exercise its discretion was not fair, reasonable, equitable or responsive to the needs of the grievor.

[74] The request for an extension was not properly evaluated by the employer. The NJC Executive Committee agreed that the grievor had not been treated “within the intent” of the directive when the DNC failed to forward the grievor’s request to the Program Authority at TBS. Presumably, the requirement to forward the request to the Program Authority is to ensure consistency in the granting of extensions. Although the Program Authority’s decision would be based on the recommendation of the DNC, the role of the Program Authority was considered by the drafters of the directive to be an important step in the process. In this case, the DNC determined that the Program Authority would not approve the request based on past cases. However, the Program Authority is not bound by the recommendation of the DNC. In addition, the exercise of discretion must be based on an individual assessment of each request, on its own merits. The failure of the DNC to refer the grievor’s request (along with the DNC’s recommendation) was therefore an inappropriate exercise of the employer’s discretion as set out in the directive. Nevertheless, the NJC Executive Committee determined at the final level of the grievance process that the grievor was treated within the intent of the directive.

[75] The employer denied the grievor’s request on the basis that he made a personal choice not to sell his property. The employer did not consider the fact that the grievor had put his house on the market and had not received any offers to purchase. It is

neither fair nor reasonable to assume an employee can sell a house if there are no purchasers. The DNC created a rigid and impenetrable standard in this case that rendered the exceptional circumstances exception meaningless. It is hard to imagine a situation where the exception of a depressed housing market would be allowed by the employer, if the request is denied when an employee provides evidence that he or she received no offers of purchase for their home in a depressed housing market.

[76] I therefore find that the employer did not exercise its discretion properly. I find that in looking at the individual circumstances of this case, weighing the facts established, that the employer should have granted the requested one-year extension.

B. Interim benefits from April 1 to 14, 2010

[77] The grievor requested payment of Interim benefits after April 1, 2010. This part of his grievance was also denied at the final level by the NJC Executive Committee. It also determined that the worker had received the maximum allowance available under the directive.

[78] The grievor made no submissions on the issue of Interim benefits. The grievor stated that the benefits flowing from a determination on the requested one-year extension should be determined after the decision on the extension. I agree - the benefits under the directive that flow from my decision on the extension will be returned to the parties for determination. The Board will retain jurisdiction to address any issues arising out of the order, if the parties are not able to come to a mutual agreement on the benefits arising from the extension.

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

(The Order appears on the next page)

VI. Order

[80] The grievance on the denial of the extension of the time limit under paragraph 9.2 of the NJC Relocation Directive of one year is allowed.

[81] The Board retains jurisdiction for a period of 60 days to determine the benefits arising under the NJC Relocation Directive as a result of this extension of the time limit, if the parties are unable to come to an agreement.

May 4, 2021.

**Ian R. Mackenzie,
a panel of the Federal Public Sector
Labour Relations and Employment Board**