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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

BRONSON HAHN BORST

Grievor

and

TREASURY BOARD

(Department of Foreign Affairs, Trade and Development)

Employer

Indexed as

Borst v. Treasury Board (Department of Foreign Affairs, Trade and Development)

In the matter of an individual grievance referred to adjudication

Before: Patricia H. Harewood, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Paul Raven, representative

For the Employer: Philippe Giguère, counsel

Decided on the basis of written submissions,
filed January 13 and 27, February 20, March 2 and May 12 and 17, 2023.

REASONS FOR DECISION

I. Grievance before the Board

[1] This is a grievance about management discretion to approve relocation expenses. The issue is whether the Treasury Board (“the employer”) reasonably exercised its discretion when it refused to cover all the relocation costs of shipping the grievor’s personal motor vehicle (PMV) — a 2014 Ford Edge — from Manila, in the Philippines, to Ottawa, Ontario. Bronson Hahn Borst (“the grievor”) had just completed a posting at the Canadian Embassy in Manila as a management consular officer when he filed his grievance on November 3, 2017.

[2] The employer paid for part of the cost of shipping the grievor’s PMV to Ottawa. However, the grievor was required to pay the difference between shipping his PMV and household effects in two 20-foot containers as opposed to one 40-foot container as well as all the storage costs.

[3] The employer claimed that the grievor’s decision not to consolidate his PMV shipment with his household effects was personal and that the Canadian public should not be responsible for those additional costs.

[4] The grievor alleged that the failure to pay all the costs breached s. 15 of the 2013 National Joint Council’s (NJC) foreign service directive (FSD) *FSD 15 - Relocation* (“the Directive”), which is incorporated into the applicable Foreign Service (FS) group collective agreement between the employer and the Professional Association of Foreign Service Officers (“the bargaining agent”) that expired on June 30, 2014 (“the collective agreement”). The grievor alleged there was nothing in the directive that barred him from shipping his PMV separately from his household effects. Further, it was against the principle of comparability to make him pay for some of the shipping and all of the storage costs since it left him in a less favourable position than he would have been in if he had served in Canada.

[5] The grievor explained the substance of his grievance on the grievance form as follows:

...

I grieve the refusal by Global Affairs Canada (GAC) to approve the shipment of my PMV from Manila, Philippines to Ottawa, Canada

at no cost to me, as well as to ensure that storage costs accrued as a result of department- and mission-induced delays and decisions are not transferred to me.

...

[6] The employer raised a preliminary objection at all levels of the grievance process on the basis that the grievance was untimely. Following the report of the NJC Foreign Service Directive Committee, the NJC's Executive Committee addressed the grievance on the merits and concluded that the grievor had been treated within the intent of the Directive.

[7] This decision deals first with the preliminary objection. Then, it addresses the merits of the grievance. My conclusion is that the grievance is not untimely as the actions that gave rise to it crystallized on October 16, 2017, when the grievor was informed that he would also be responsible for the storage costs.

[8] However, the grievance is denied on the merits since there was no violation of the Directive. Section 15.18.1 of the Directive provides the employer with significant discretion with respect to paying relocation expenses. Paying shipping costs for a PMV is not an automatic entitlement but is subject to management discretion.

[9] In this case, the grievor was indecisive about what he intended to do with his PMV. The employer's decision to cover some, but not all, of the costs of shipping it to Ottawa and to deny covering the storage costs was a reasonable exercise of management discretion and was not a violation of the collective agreement.

[10] The issues in this grievance are as follows:

- 1) Is the grievance untimely?
- 2) Was the employer's refusal to pay the storage costs and part of the cost of shipping the grievor's PMV from Manila to Ottawa a breach of s. 15.18.1 of the Directive?

II. Summary of the evidence

[11] The parties agreed to proceed via written submissions on both the preliminary matter and the merits.

[12] The parties also produced an agreed statement of facts ("ASF") and a joint book of documents. The ASF reads as follows:

1. The grievance before the Federal Public Sector Labour Relations and Employment Board (“the Board”) was filed under Foreign Service Directives (“FSDs”) which forms part of the Agreement Between the Treasury Board and the Professional Association of Foreign Service Officers (“the Collective Agreement”) with the expiry date of June 30, 2014.
2. At the time, the Grievor was substantively employed as a Management/Consular Officer (MCO) at the FS-02 level. He was posted as a Senior Officer, Consular and Emergency at the Embassy of Canada to the Philippines (“the Embassy”). His assignment was scheduled to end on August 31, 2017 but was later changed to August 17, 2017. The Grievor’s last day of work at the Embassy was August 25, 2017.
3. On July 12, 2017, an FSD advisor confirmed with the Grievor that he will be repatriated to Canada from the Philippines. The Grievor was asked to complete his Return to Canada - Authority Message Form, as well as to confirm if he was planning to ship a Personal Motorized Vehicle (PMV) (See TAB A of the Joint Book of Documents “JBD”).
4. On July 13, 2017, the Grievor confirmed that he would sell his PMV locally in the Philippines, and that he had received Head of Mission (“HOM”) approval for its disposal (See TAB A of the JBD).
5. On July 13, 2017, the Grievor also sent back his signed and completed - Return to Canada - Authority Message Form to the Employer indicating that he had a PMV which he intended on selling/disposing in the Philippines (See TAB B of the JBD).
6. On July 27, 2017, the Grievor’s Household Effects (HHE) (Sea Shipment) were packed. The exit clearance for that shipment was received on Aug 14, 2017.
7. On August 1, 2017, the Grievor’s Household Effects (HHE) (Air Shipment) were packed.
8. On August 17, 2017, The Grievor brought his PMV to local body shop in Manilla, Philippines to have two weeks of bodywork performed on it.
9. On August 23, 2017, Brian Nebres, A/Logistics Coordinator at the Embassy informally approached the Grievor in passing and asked what was happening with his PMV. The Grievor responded that he was still trying to sell it, Mr. Nebres responded by asking the Grievor if he would like to ship his vehicle back to Canada to which the Grievor asked if that is still possible and If so yes (See TAB C of the JBD).
10. On August 24 2017, the Grievor sent an email to the FSD advisor where he confirmed his departure on August 27, 2017, his last day of work at the office on August 25, 2017. Moreover, he indicated that he is still trying to sell his PMV locally - however if nothing happens between now and August 28, 2017, he will ask to ship it back to Canada (See TAB 1 of the Grievor’s Book of Documents “GBD”).

- 11. The Grievor acknowledges that he did not verify the accuracy of the information provided in his discussion with Brian Nebres with the FSD advisor assigned to his file.*
- 12. On August 25, 2017, the Grievor gave the go ahead to the local body shop in Manilla, Philippines to perform two weeks of bodywork on his PMV.*
- 13. On August 27, 2017, the Grievor departed Manilla, Philippines for Ottawa, Canada where he arrived the following day.*
- 14. On August 28, 2017, the Grievor's personal household effects were shipped on board the Northern Diamond Vessel in a 20-foot container (See **TAB D of the JBD**).*
- 15. On the same day, first secretary of the Embassy sent a request to the Department of Foreign Affairs, received on August 29, 2017, that sought permission for the re-exportation of the Grievor's PMV to Canada (See **TAB E of the JBD**).*
- 16. On September 14, 2017, the Grievor provided his PMV shipment form to the FSD advisor assigned to his file (See **TAB C of the JBD**).*
- 17. On September 18, 2017, Panilpa INC provided the Employer with a cost comparison for the cost of shipping two 20-foot containers versus one 40-foot container. As per the standing offer, two 20-foot containers would cost 12118\$ versus 7276\$ for one 40-foot container. A difference of 4,842\$ (See **TAB F of the JBD**).*
- 18. On September 19, 2017, the FSD advisor responded to the Grievor indicating that due to his personal decisions the Employer was not able to ship his PMV within the same container as his HHE. Consequently, the Grievor would be held financially responsible for the cost difference of 4842\$ should he wish to continue with the shipment of his PMV. (See **TAB C of the JBD**).*
- 19. On September 29, 2017, the Deputy Director of the FSD Client Service Centre (AES) advised the Grievor that the Employer's decision remained unchanged and that he would be responsible for the additional cost of shipping his PMV back to Canada (See **TAB G of the JBD**).*
- 20. Between October 4 and October 12 2017, the Grievor reached out to the Embassy of Canada to the Philippines, asking for assistance obtaining documents required to sell the PMV (See **Tab 4 of the GBD**).*
- 21. On or around October 6, 2017, the Grievor chose to attempt, anew, to sell the vehicle.*
- 22. On October 16 2017, the Deputy Director of the FSD Client Service Centre (AES) indicates via an email to the Director, Common Services Delivery Point, the Embassy of Canada to the Philippines that the last message from the Grievor was that he was going to sell the car. He also indicated that expenses pertaining to storage should be assigned to the Grievor (See **Tab 5 of the GBD**).*

23. On October 23, 2017, the Grievor stated to the Employer that it is still his preference to ship his PMV but given recent conversations, he was aiming to sell his PMV locally in the Philippines (**See TAB H of the JBD**).

24. On October 25 2017, Mr. Gerunggay received an email from Goetz Moving in the Philippines, stating they require the Grievor's authorization and that storage and operating costs must be settled prior to their releasing the Grievor's PMV (**See Tab 8 of the GBD**).

25. On October 25 2017, the Director, Common Services Delivery Point of the Embassy sent an email to the Grievor within which he identifies Levi Marimat, Logistics Officer of the Embassy as being able to assist him in retrieving his PMV from storage . He also confirmed that their instructions from the Foreign Service Directives Bureau within Global Affairs Canada are to appoint the PMV storage costs to the Grievor. Furthermore, he stated that they require the Grievor to provide them the complete contact information of his local representative. As Nicole Cruz received an email from an individual, but did not reply, as she did not know who that individual was. Moreover, he indicated that the Grievor should be the one interacting with the Embassy about the handing of his PMV and not a third party (**See Tab 9 of the GBD**).

26. On October 31, 2017, the Director of the FSD Policy and Monitoring division (AEF) reconfirmed that the Grievor remained responsible for the cost of the additional shipment of the PMV given that their perspective is that the lateness of his decision and his lack of attempt to consolidate his PMV within the existing HHE shipment led to the additional cost (**See TAB P of the JBD**).

27. On October 31 2017, the Grievor sent an email to Levi Marimat, within which he requests that the Embassy coordinate the transmittal of the required paperwork with his local legal representative Mr. Gerunggay (**See Tab 11 of the GBD**).

28. On November 6, 2017, the Grievor filed a grievance contesting the refusal to approve the shipment of his PMV from Manila, Philippines to Ottawa, Canada at no cost to him. As corrective action, he asked the Employer to authorize the shipment at no cost to him and to be made whole (**See TAB I of the JBD**).

29. On November 23, 2017, the Grievor wrote to the Employer asking that his PMV be released to his local representative so he could sell the vehicle locally in the Philippines. The Employer then informed him on the steps, delays and cost associated with this decision. The Grievor was further informed that the Embassy's position is that he will remain their contact on the unresolved PMV issues, not the representative he has designated (**See TAB J of the JBD**).

30. On November 24 2017, Mr. Gerunggay, was informed by Goetz Moving that the Embassy had requested that they hold and not release the Grievor's vehicle until further instructions and refrain from communicating with him (Mr. Gerunggay) (**See Tab 12 of the GBD**).

31. On November 27, 2017, the Director, Common Services Delivery Point of the Embassy wrote to the Grievor indicating that releasing his vehicle to a third party, that does not enjoy diplomatic immunity was problematic. As, via its contract with Goetz Moving, the Embassy remained the custodian of his vehicle. Moreover, the Embassy had diplomatic status, which is appropriate to be in the custody of a vehicle with diplomatic plates registered under diplomatic privileges. He further stated that he would seek further guidance and sent an email to that effect last Thursday. Moreover, he indicated that releasing his vehicle to a third party that does not enjoy diplomatic immunity would mean that his representative would need to cover custom duties and taxes in the amount of approximately 16,000.00\$ **(See Tab 13 of the GBD)**.

32. On November 29, 2017, the Grievor wrote to the Employer indicating that he wanted to ship his PMV. He understood that he was responsible for the cost over and above what the Employer would have paid if it had been shipped with his HHE. However, the payment was made in protest. **(See TAB K of the JBD)**.

33. On January 16, 2018, the Grievor's PMV was shipped to Canada on board the Northern Diamond Vessel in a 20-foot container **(See TAB L of the JBD)**.

34. On February 12, 2018, the Employer denied the grievance at the second level of the internal grievance process. It noted that the Grievor did not originally intend to ship his PMV as he attempted to sell it prior to his return. However, being unable to sell it, a decision was made to ship it back. This resulted in unforeseen additional costs associated with a second shipping container. The Employer found the transferring these additional costs to the Grievor was appropriate **(See TAB M of the JBD)**.

35. On February 14, 2018, the grievance was referred to the NJC's Executive Committee ("the Executive Committee").

36. On April 10, 2019, the Executive Committee concluded that the Grievor was treated within the intent of the FSD. It noted that his late decision to ship his PMV resulted in the use of two 20-foot containers as opposed to one 40-foot container. The Employer was held to have provided the necessary assistance under the FSD since it only sought reimbursement of the cost difference. Moreover, it held that the costs should be transferred to the Grievor as they resulted from his personal decisions **(See TAB N of the JBD)**.

37. On April 23, 2019, the grievance was referred to the Board for adjudication. The matter is proceeding by written submissions **(See TAB O of the JBD)**.

[Sic throughout]

[Emphasis in the original]

III. Is the grievance untimely?

A. For the grievor

[13] The grievor alleged that the grievance is not untimely. The actions that gave rise to it occurred on October 31, 2017, and the grievance was filed six days later, on November 6, 2017.

[14] On October 31, 2017, the grievor received a response from the director of FSD policy and monitoring, confirming that he would be responsible for part of the cost of shipping his PMV from Manila to Ottawa and all the storage costs.

[15] Furthermore, the grievor contended that the employer's decision on October 31 contained new information and analysis by a higher authority. As in *Bowden v. Treasury Board (Canada Border Services Agency)*, 2021 FPSLREB 93 at para. 49, the Federal Public Sector Labour Relations and Employment Board ("the Board") should deem the timelines as having been reset since the response included a new analysis in response to the grievor's arguments of October 24, 2017.

[16] The grievor submitted that in the alternative, if the grievance is untimely, then an application for an extension of time should be granted on the grounds that there was a clear, cogent, and compelling reason for the delay, the delay was less than two months, and there is no prejudice to the employer in granting the application. He noted that as it does with many issues involving the Directive, the bargaining agent attempted to use the informal dispute resolution route to resolve this matter between October 25, 2017, and October 31, 2017 and those seven days should be excluded from any calculation of the timelines. The grievor submitted that there is a longstanding practice of waiving timelines when the parties are involved in informal discussions. This approach is consistent with the spirit of s. 207 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the Act") and the collective agreement. When attempts at informal resolution failed, the grievor filed the grievance.

[17] The grievor cited *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, to support his request for an extension of time to file the grievance.

B. For the employer

[18] The employer submitted that it raised a timeliness objection at each step of the grievance process, including before the NJC's Foreign Service Directive committee.

[19] The action that gave rise to the grievance occurred on September 19, 2017, when the grievor was first informed by the employer's FSD representative that he would have to pay the difference in shipping costs between one 40-foot and two 20-foot containers. This amounted to \$4842.

[20] Section 15.1.6 of the NJC By-Laws sets a 25-day time limit for the presentation of a grievance.

[21] No verbal or written agreement was reached to extend any prescribed timelines. Further, there was no past practice of agreeing to extend timelines without any verbal or written confirmation. Informal discussions do not absolve grievors of the requirement to file a grievance. The grievor could have requested an extension of time to file his grievance but failed to.

[22] The grievor filed his grievance on November 6, 2017, nine days after the deadline.

[23] The Board lacks jurisdiction to hear the grievance on the merits because it is untimely.

[24] The employer cited several decisions to support its argument that the grievance is untimely (see *Fragomele v. Public Service Alliance of Canada*, 2021 FPSLRB 117; *Pomerleau v. Treasury Board (Canadian International Development Agency)*, 2005 PSLRB 148; and *Vidlak v. Treasury Board (Canadian International Development Agency)*, 2006 PSLRB 96).

C. Analysis

[25] Section 15.1.6 of the NJC By-Laws of June 2008 establishes the deadline for filing a grievance - 25 days after the day on which the employee was informed orally or in writing or on which the employee first becomes aware of the action or circumstances that gave rise to it.

[26] The time limits do not include Saturdays, Sundays, and designated paid holidays (see s. 15.1.19). This means that if the time limit occurs on a Saturday, Sunday, or designated paid holiday, then that day is excluded.

[27] I disagree with the grievor that in this situation, the timelines were reset (see *Bowden*). The comments in *Bowden* about resetting timelines were not germane to the timeliness objection at stake in that grievance. In the case before me, the circumstances did not change and there was no new analysis or review of a previous decision warranting resetting timelines.

[28] The employer's decision on October 31, 2017 was a confirmation of what had been communicated earlier to the grievor: that he would be responsible for the additional cost of shipping his PMV due to the tardiness of his decision-making.

[29] I therefore find that the circumstances that gave rise to the grievance crystallized on October 16, 2017, when the grievor was still making efforts to sell his PMV locally and was informed for the first time that all storage costs would be apportioned to him. Before that point, he had been informed only that he would be responsible for the difference in shipping two 20-foot containers versus one 40-foot container. The employer had been silent about storage costs, which are an integral component of the substantive grievance as filed, including the remedies sought. In light of this finding, the grievance is timely as, according to the grievance form it was received by the Deputy Director on November 3, 2017 — 21 days after that last piece of information was communicated to him.

[30] The grievance contests both the shipping and all storage costs and asks for a remedy that specifically includes "... that storage costs accrued as a result of department- and mission-induced delays and decisions are not transferred to me."

[31] Although the employer claimed that the action that gave rise to the grievance occurred on September 19, 2017, when the employer advised the grievor that he would be responsible for the difference between shipping two separate 20-foot containers and one 40-foot container, no decision or information on storage costs had been communicated to the grievor at that time.

[32] The ASF states the grievance was filed on November 6 (Tab I of JBD). Even if this date had been selected as the date the grievance was filed, it would be timely given that I have found that the actions giving rise to the grievance arose on October 16.

[33] The employer cited a number of decisions that are distinguishable from this case. Each involve situations in which the circumstances that gave rise to the grievance occurred at a distinct moment when all the information on which the grievance was eventually based was communicated to the grievor at issue. They are unlike this case, in which the employer partially communicated some information to the grievor (the shipping costs) and then later communicated the rest of the information (the storage costs).

[34] *Fragomele* is a decision on a complaint concerning the duty of fair representation which involved a grievor who filed a grievance contesting a staffing decision that had occurred two-and-a-half years earlier. The grievor knew of the facts and circumstances that gave rise to the grievance for two-and-a-half years, but he did not feel immediately aggrieved. These are not the facts in the case before me.

[35] In *Mark v. Canadian Food Inspection Agency*, 2007 PSLRB 34, the decision to deny sick leave was communicated at a distinct moment. No further elements that formed the basis of the grievance were communicated later. In *Pomerleau*, the employer provided the grievor in that case with a decision denying the recognition of his foreign service. No further clarification or information that served as the impetus for filing the grievance was provided at a later date, as it was in this case.

[36] Therefore, the timeliness objection is dismissed. There is no need to apply the *Schenkman* analysis. I will now proceed to examine the grievance on the merits.

IV. Was the employer's refusal to pay the storage and shipping costs of the grievor's PMV a breach of the Directive?

[37] The parties agreed to provide written submissions, and I have included an edited version of their arguments in this section.

A. For the grievor

[38] The grievor argued that s. 15.18 of the FSD from 2013 is part of the collective agreement and that it must be interpreted in keeping with modern principles of contract interpretation (see *Daigneault v. Treasury Board (Correctional Service of*

Canada), 2017 PSLREB 38 at paras. 28 and 29; and *Genest v. Treasury Board (Correctional Service of Canada)*, 2021 FPSLREB 31 at paras. 51 to 54). The Board has already interpreted the FSDs that form part of the collective agreement within this framework.

[39] In addition, management rights are fettered by collective agreement clauses (see *Professional Institute of the Public Service of Canada v. Treasury Board*, 2019 FPSLREB 7 (“PIPSC”).

[40] The grievor submitted in particular that “... words of collective agreements be read in their entire context, in their grammatical and ordinary sense, and harmoniously with the scheme of the agreement, its object, and the parties’ intention”.

[41] The grievor underlined that nothing in the Directive requires that PMVs be shipped with household effects. In fact, s. 15.18.3 indicates that PMVs can be shipped from a third-party location and separately from household effects. Therefore, requiring Mr. Borst to pay shipping costs would not align with the intent of the parties.

[42] The “Foreign Service Handbook” also says nothing about employees being responsible for shipping fees if a PMV is not shipped with the household effects. The silence in the 2017 handbook as to whether employees will be responsible for shipping fees if their vehicles are shipped separately suggests that no such policy exists or that it was never communicated to employees. Furthermore, given that there is no such restriction in the Directive, it cannot be implied as it would be fettered by the collective agreement.

[43] The employer should have approved the shipment of the grievor’s PMV from Manila to Ottawa at no cost to him and ensured that no storage costs were transferred to him.

B. For the employer

[44] The employer submitted that the shipment of a PMV is not an entitlement under the Directive. It had the sole discretion to determine the relocation assistance that would be provided to the grievor.

[45] Both the employer and the NJC’s Executive Committee concluded that the grievor was treated within the intent of the Directive.

[46] The grievor made a personal choice to sell his vehicle and then made a last-minute change to ship it, resulting in the use of two 20-foot containers rather than just one 40-foot container. Therefore, he should have borne any additional costs as his decision making prevented the employer from shipping the PMV in the most cost-effective manner.

[47] The employer argued that its interpretation is in line with modern rules of contract interpretation, in which one must look at the plain and ordinary meaning of the words that the parties choose, read in their entire context, and in a way that respects the Directive's overall purpose and intention.

[48] The employer relied on previous decisions by the Board and the Federal Court to support its position that the modern principles of contract interpretation should be applied to resolve contract interpretation issues. (See *Burden v. Canada (Attorney General)*, 2011 FC 251 ("*Burden*"); *Beese v. Treasury Board (Canadian Grain Commission)*, 2012 PSLRB 99 at paras. 23 and 24; *Smolic v. Treasury Board (Department of Industry)*, 2018 FPSLREB 34 at paras. 92 and 93; *Turner v. Treasury Board (Department of Fisheries and Oceans)*, 2018 FPSLREB 81 at para. 48; and *Fehr v. Canada Revenue Agency*, 2017 FPSLREB 17 at paras. 56 and 57 (upheld on judicial review in *Canada (Attorney General) v. Fehr*, 2018 FCA 159.)

[49] Section 15.18 of the Directive cannot be read alone. The Board has recognized the importance of interpreting NJC directives consistently with their purpose, intent, and general clauses (see *Burden v. Parks Canada Agency*, 2011 PSLRB 94; and *Brown v. Treasury Board (Correctional Service of Canada)*, 2021 FPSLREB 50).

[50] The employer cited the Directive's intent as explicitly set out in s. 15.1.2 and s. 15.1.4. Notably, the purpose of the relocation is to relocate an employee in the most efficient fashion, at the lowest possible cost to the Canadian taxpayer, and with a minimum detrimental impact on the employee and their family.

[51] The Board should defer to the employer's sole discretion and should interfere only if the employer misconducted itself in a procedural sense or made a patently unreasonable decision (see *Nova Scotia (Civil Service Commission) v. Nova Scotia Government Employees Union (NSGEU)*, 1987 CanLII 7984 (NS LA) ("*Nova Scotia*").

[52] But for the grievor's personal decision and late change of heart, the employer could have actioned his request in a more efficient fashion at the lowest cost to the public. Instead, he continued to elect to sell his vehicle locally until it was too late and his household effects had already been packed.

[53] The grievor contacted his FSD advisor only on August 24, 2017, to indicate that he was still trying to sell his vehicle locally. He then sent his car to a body shop for two weeks. He provided his PMV shipment form only on September 14, 2017. At that time, it was too late to ship his PMV with his household effects.

[54] The public should not be held accountable for the additional shipping and storage costs incurred as a result of the grievor's personal decisions.

[55] The grievor's interpretation undermines the sole discretion afforded to the employer under s. 15.1.3 of the Directive to determine the relocation assistance to be accorded.

C. Analysis

1. Was the employer's refusal to pay the storage costs and part of the cost of shipping the grievor's PMV from Manila to Ottawa a breach of s. 15.18.1 of the Directive?

[56] The 2013 version of the Directive forms part of the collective agreement that was in effect when the grievance was filed. It is one of several directives that are the products of the NJC, which is a forum for collaboration and consultation between the federal government as the employer and public service bargaining agents.

[57] The following principles included in the Introduction and Forward of the Directives apply to all of the Directives, including FSD 15:

...

***Comparability** - insofar as is possible and practicable employees serving abroad should be placed in neither a more nor a less favourable situation than they would be in serving in Canada.*

***Incentive-inducement** - the employer must provide certain additional incentives both to attract employees to serve an occasional assignment outside Canada and to recruit and retain employees in a career foreign service.*

***Program-related provisions** - to ensure that employees abroad will be provided with the means to carry out the programs assigned to them.*

...

[58] The Directive provides a set of rules on how relocation expenses are to be treated for employees posted to work outside Canada, including the cost of shipping a PMV back to Canada or to a third country. While the Board has examined some aspects of the Foreign Service Directives, this particular provision on shipping PMVs has not been the subject of much arbitral reflection.

[59] There is no dispute that given that the Directive is incorporated by reference into the collective agreement, the modern rules of contract interpretation must apply when examining its provisions.

[60] I agree with the parties that these rules require that the words of collective agreements be read in their entire context, in their grammatical and ordinary sense, and harmoniously with the scheme of the agreement, its object, and the parties' intention (see Brown and Beatty, *Canadian Labour Arbitration*, 4th ed., at paragraph 4:2100; *Burden*, at para. 15; and *Smolic*, at para.92).

[61] Furthermore, the Board has interpreted other provisions of the NJC's directives using the same modern principles of contract interpretation (see *Brown and Genest*), and there is no reason to depart from this approach.

[62] The relevant portions of the Directive are as follows:

...

15.18 Shipment of Private Motor Vehicle (PMV)

15.18.1 Subject to the provisions of this section, the deputy head may authorize shipment of one private motor vehicle (PMV), the primary purpose of which is for family conveyance. For purposes of shipment, private motor vehicle (PMV) means a motorcycle (when not shipped as household effects), sedan, sports car, station wagon, mini van, pick-up [sic] or 4-wheel drive vehicle of three-quarter ton rating or less owned by or registered in the name of an employee or a dependant.

15.18.2 Payment of the actual and reasonable expenses related to the crating if required by the shipping and/or insurance company, insuring and transporting of a private motor vehicle (PMV) to and/or from the employee's post may be authorized when the deputy head is satisfied that the country to which an employee is about to be relocated does not:

(a) impose restrictive limitations on the size or other characteristics of the private motor vehicle (PMV) to be shipped;

(b) have vehicle operating laws or conditions that in the opinion of the deputy head make the operation of the employee's PMV significantly less safe than that experienced in Canada;

(c) have prohibitive import duties or embargoes on the importation of private motor vehicles, or prohibitive disposal restrictions.

15.18.3 Expenses authorized under subsection 15.18.2 shall not exceed the cost of crating, insuring, and transporting an employee's PMV from the old place of duty in Canada to the post, notwithstanding that the PMV may be shipped from a third location to the employee's post.

15.18.4 Expenses authorized under subsection 15.18.2 shall not exceed the cost of crating, insuring and transporting an employee's PMV from the post to the new place of duty in Canada, except that such expenses will only be authorized if the PMV is in the possession of the employee, or a dependant, at the post, prior to shipment.

15.18.5 In cases of cross-posting, the expenses authorized under subsection 15.18.2 shall not exceed the cost of crating, insuring and transporting an employee's PMV from:

(a) the employee's old place of duty to the new place of duty where the vehicle is shipped from the old place of duty, or

(b) the employee's old place of duty in Canada to the new place of duty where the vehicle is shipped from a location other than the employee's former post, except where the deputy head determines, and advises the appropriate foreign service interdepartmental co-ordinating committee, that unusual circumstances warrant the waiver of this limitation.

15.18.6 In determining the transportation entitlement under subsection 15.4.3, the cost for PMV shipment shall be established in accordance with subsections 15.18.3, 15.18.4 and 15.18.5 above, but shall not exceed the estimated cost of shipping the vehicle from its location to the new place of duty.

15.18.7 Payment of duties, taxes or registration for which an employee may be liable at a post or in Canada in respect of a private motor vehicle (PMV), motorcycle, boat or trailer shall not normally be authorized by the deputy head.

15.18.8 Where the vehicle to be shipped exceeds the limits specified above, the deputy head may authorize actual and reasonable shipment expenses for such a vehicle to the limit of the maximum allowable.

15.18.9 The deputy head shall not authorize shipment of a PMV which does not meet carrier specifications.

15.18.10 The provisions of Section 15.18 may be applied to a PMV which is shipped directly from the manufacturer to a local dealer at the employee's post, notwithstanding that it is not owned by or registered in the name of the employee or dependant at time of shipment, in situations where the manufacturer will not ship

directly to the employee. Reimbursement shall be limited to identifiable transportation costs, upon production of evidence satisfactory to the deputy head, for the purchase of a new PMV.

15.18.11 The provisions of subsection 15.18.10 may also be applied where, in the opinion of the deputy head, it is cost effective to purchase a new PMV from a local dealer, rather than pay directly for shipment of a PMV to a post.

...

[63] Additionally, the Directive contains specific requirements. Beginning with the objective of the relocation provisions, the wording of s. 15.1.2 of the Directive is clear. The relocation provisions should provide for legitimate relocation expenses, not for personal gain or extravagances.

[64] Ultimately, the aim is to relocate the employee efficiently — at the most reasonable cost to the public and with minimal inconvenience to the employee and their family, pursuant to s. 15.1.4 of the Directive. It is a delicate balancing act.

[65] In reading the Directive in its entire context and its scheme, I note that throughout the Directive, which was jointly developed by the public service bargaining agents and the federal government, there are checks and balances on what may be reimbursed. Overall, the bargaining agent and the employer's intent is to afford considerable discretion to the deputy head to determine the relocation expenses that will be paid.

[66] I agree with the employer that the Directive provides it with the sole discretion to determine the relocation assistance that will be provided. Section 15.1.3 is clear that since the employer decides on the relocation, it will determine the relocation assistance that will be provided. There is no ambiguity in this language and no need to look elsewhere, including to other directives or the FSD handbooks to understand the parties' intent in according that responsibility to the employer.

[67] With respect to shipping a PMV, the parameters of what a deputy head may authorize can be found at s. 15.18, entitled "Shipment of Private Motor Vehicle (PMV)".

[68] First, the language at s. 15.18.1 of the English and French versions gives the deputy head the discretion to approve shipping one PMV. In the English, the language is that the "deputy head may authorize shipment". In the French version, it is

“l’administrateur général peut autoriser l’expédition”. It is discretionary, not obligatory language.

[69] Second, the vehicle must be primarily for personal family transportation. The provision even specifies the types of permissible vehicles, which are a motorcycle (when not shipped as household effects), sedan, sports car, station wagon, minivan, or a pickup truck or four-wheel-drive vehicle with a three-quarter-ton rating owned or registered in the name of an employee or a dependant. This is an exhaustive list.

[70] Finally, the expenses that may be authorized are subject to the provisions in s. 15.18 as a whole. This includes s. 15.18.4, which establishes that the expenses authorized cannot exceed the cost of crating, insuring, and transporting the PMV from the post to the new place of duty in Canada. The expenses will be authorized only if the employee or a dependant at the post is in possession of the vehicle before shipping it.

[71] There are other restrictions on the deputy head’s discretion. Here are two:

- 1) the duties, taxes, or registration will not normally be authorized (s. 15.18.7); and
- 2) deputy heads shall not authorize a PMV that does not meet carrier specifications (s. 15.18.9).

[72] As in *Daigneault*, in which the Board could not stray from the clear language in the FSD on relocation expenses, I must stick to what is clearly expressed in the Directive at s. 15.1.4, 15.18.1, and 15.18.4.

[73] *PIPSC* is not useful and can be distinguished on its facts. In *PIPSC*, the Board addressed certain provisions of the employer’s Directive on performance management that purported to address culpable behaviour. To the extent that the Directive interfered with the collective agreement rights to bargaining agent representation and due process in cases of culpable discipline, parts of it were struck by the Board.

[74] In the case before me, there is no dissonance between the provisions on shipping a PMV and other collective agreement rights; nor has the grievor pointed me to any specific collective agreement provision that is in conflict with s. 15.18.1.

[75] The ASF establishes that initially, the grievor intended to sell his vehicle locally but that he then changed his mind much later, when he was informed that doing so

would be too costly. As early as July 12, 2017, his FSD advisor asked him whether he intended to ship his PMV so that the “red book value” could be established. He responded the next day by email that his PMV was being sold locally and that he had already obtained approval for its disposal.

[76] On his “Return to Canada Authority” form, in part 1.5, the grievor had the choice of indicating whether he intended to ship or sell his PMV. He checked off the box indicating that he was “Disposing or Selling” it. The form was signed on July 13, 2017, and the grievor acknowledged by his signature that he had read and understood the FSDs and that he would seek clarification with respect to their application or interpretation as needed.

[77] The FSD Handbook has no legal authority, and it states as much on its first page. If the grievor referred to it at the time, this was the checklist that would have been provided with respect to shipping or selling a personal motor vehicle:

...

Personal Motor Vehicle (PMV)

Determine whether you will sell or ship your PMV.

Before departure, arrange for the return of diplomatic plates and the cancellation of insurance and vehicle registration. Keep copies of the vehicle registration with the rest of your documents for insurance purposes when relocating.

*Ask the mission administration to provide you with an official letter indicating that you have surrendered your diplomatic plates at the mission before departure and that you **are returning back to Canada with your PMV as part of your sea shipment.***

Make a copy of your international driver’s license.

Request a letter from the insurance company at the mission confirming continuous insurance coverage and that you were driving while on posting.

Selling a PMV

Make all the necessary arrangements for sale.

Familiarize yourself with local laws and regulations regarding the sale of vehicles, including taxes, safety inspections etc. in consultation with mission administration.

...

[Emphasis added and in the original]

[78] On August 23, 2017, he was told informally by the Acting Logistics Coordinator, that he could still ship his PMV. The grievor admitted in the ASF that he never verified the accuracy of this information with his FSD advisor. This was the person he should have dealt with for any questions he might have had about applying the Directive.

[79] Three days before his household effects were shipped to Ottawa, he sent his car to a body shop for two weeks on August 25, 2017. After he left Manila on August 27, 2017, the grievor continued to express that his preference was to ship his vehicle to Ottawa but that he was still trying to sell it locally.

[80] The grievor only sent in his form to his FSD Advisor to ship his PMV on September 14, 2017, over two weeks after his household effects had been shipped and he had left the mission to return home to Ottawa.

[81] Eventually, by November 29, 2017, the grievor abandoned his efforts to sell his vehicle locally because doing so would have been too expensive. However, by then, it was too late to even consider consolidating his PMV as part of household effects, which had already been shipped to Ottawa on August 28, 2017.

[82] As the ASF notes, releasing a vehicle to his representative without diplomatic immunity would have cost him approximately \$16 000 to cover customs duties and taxes, which the grievor would have been required to pay on his own. In the end, the grievor chose an option that might have been the most reasonable, cost effective, and least inconvenient for him but not for the public purse.

[83] While the grievor blames the employer for in his words “mission-induced delays”, the grievor has failed to establish that the employer stalled or that it was late in its decision making. Furthermore, it is unclear why the grievor did not communicate with his FSD advisor much earlier about the logistics and all potential costs involved in shipping or releasing his vehicle for sale so that he could make a fully informed decision about what to do with his own PMV.

[84] Pursuant to s. 15.18.1 of the Directive, the deputy head reviewed all of the circumstances and exercised discretion by approving the cost of shipping one 40-foot container and requiring the grievor to pay the difference between that expense and the cost of separately shipping two 20-foot containers. It chose to pay the maximum that

the grievor would have received had he used one 40-foot container and to assign him the storage costs incurred due to his decision making.

[85] Therefore, I agree with the employer's submissions that but for the laboured pace of the grievor's decision making and a degree of indecisiveness, his PMV could have been shipped with his household effects in August 2017 in one 40-foot container rather than incurring additional costs for shipping a second 20-foot container. That would have been a more reasonable option for the Canadian public and likely would have been more convenient for him as well since he might have had the use of his PMV sooner when he returned to Ottawa. Ultimately, his meandering decision making resulted in his late final decision in November to ship his PMV to Ottawa.

[86] While there is no provision in the Directive requiring PMVs to be shipped with household effects, the deputy head reviewed all of the circumstances in applying its sole discretion to approve shipping and storage costs.

[87] In these circumstances, it was reasonable for the employer to require him to shoulder some of the relocation costs. The grievor did not discharge his burden in showing that the employer's refusal to pay the storage costs and part of the cost of shipping the grievor's PMV from Manila to Ottawa is a breach of s. 15.18.1 of the Directive. Thus, the employer's refusal is not a violation of the agreement.

[88] The grievor also argued that requiring him to shoulder some shipping and all of the storage costs did not adhere to the principle of comparability which applies to all of the directives. I find that the grievor has failed to establish that he was put in a less favourable position than he would have been in if he had been serving in Canada. The grievor has provided no information to compare his situation to what he would have been entitled to with respect to his PMV if he had been serving in Canada. Moreover, comparability is a principle that is to be applied in so far as it is "possible and practicable". It does not negate the broad discretion afforded to the employer to approve shipping and storage expenses for a PMV.

[89] Although I consider the employer's allegation in its submissions that the grievor never intended to sell his vehicle in the Philippines unsubstantiated and gratuitous, I see no reason to interfere with its ultimate decision, which was reasonable (see *Nova Scotia*, which it cited).

[90] I am sympathetic to the grievor who would have been juggling both work and personal obligations, like any other foreign service officer preparing to return home after a post abroad. However, I must give effect to the applicable provision of s. 15.18.1 as worded.

[91] Given that the Directive is an NJC Directive that applies to unionized employees posted to work outside Canada, it is incumbent upon the NJC to modify or add to its provisions, as needed. My authority is constrained by the negotiated language.

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

(The Order appears on the next page)

V. Order

[93] The preliminary objection on timeliness is denied.

[94] The grievance is denied.

September 11, 2023.

**Patricia H. Harewood,
a panel of the Federal Public Sector
Labour Relations and Employment Board**