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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

VANESSA PODGURNY

Grievor

and

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

Employer

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

In the matter of an individual grievance referred to adjudication

Before: Goretti Fukamusenge, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Paul Raven, labour relations advisor

For the Employer: Soojee Hahn, counsel

Decided on the basis of written submissions, filed February 27 and March 12 and 15, 2024.

I. Individual grievance referred to adjudication

[1] This decision concerns a grievance challenging the employer's refusal to approve an accountable-advance request during an emergency evacuation due to the COVID-19 pandemic. The grievor, Vanessa Podgurny, was employed by the Department of Foreign Affairs, Trade and Development ("the employer"), which is also known as Global Affairs Canada. When the COVID-19 pandemic occurred, the grievor was on a duty assignment at the Canadian embassy to the Hellenic Republic in Athens, Greece, where they resided with three dependants, including two young children. They also resided with their three pets — one dog and two cats.

[2] While a few items in the grievor's request were approved, many were not, because the employer decided that they were deemed non-essential. The question to be decided is whether the employer's decision was reasonable, and I find that it was.

[3] At all relevant times, the grievor occupied a foreign service officer position classified FS-03 and was part of the Foreign Service bargaining unit, which was represented by the Professional Association of Foreign Service Officers ("the bargaining agent"). The employer and the bargaining agent were governed by a collective agreement, which incorporated several directives that the National Joint Council (NJC) developed. Under s. 11 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), the NJC is the forum for consultation and for codeveloping workplace improvements by the Treasury Board as the employer and bargaining agents.

[4] The issue is the application of the NJC's *Foreign Service Directives* ("the FSD" or "the Directive"), in particular, FSD 64 "Emergency Evacuation and Loss", and its section 64.5, "Accountable Advances for Purchase of Essential Household Effects". This provision is designed to provide emergency evacuation of an employee or a dependant from a foreign service post, in the event of hostilities or a natural disaster.

[5] The main provision at issue is defined in section 64.5 of the Directive, which reads as follows:

64.5 Accountable Advances for Purchase of Essential Household Effects	***64.5 Avances comptables pour l'achat des effets mobiliers essentiels***
64.5.1 Upon evacuation of the employee and/or dependants, the deputy head may authorize one or more accountable advances to replace essential items of household effects, clothing or children's toys which have been left at the post and, in the event of evacuation to a third country, essential items which duplicate those in storage at headquarters. Advances may only be used to purchase items which duplicate items listed on the employee's inventories. Subsection 64.10.2 refers to compensation where items which have been replaced are subsequently recovered. The maximum amount of the advance(s) shall not exceed:	*64.5.1 Au moment de l'évacuation du fonctionnaire et/ou de ses personnes à charge, l'administrateur général pourra autoriser une ou plusieurs avances comptables pour le remplacement des effets ménagers essentiels, des vêtements essentiels ou des jouets d'enfants essentiels laissés au poste et, dans le cas d'une évacuation dans un tiers pays, des articles essentiels qui sont les mêmes que ceux qui sont en entreposage à la ville du bureau principal. Ces avances ne peuvent être autorisées que pour l'achat d'articles qui sont les mêmes que ceux qui sont énumérés dans l'inventaire. Le paragraphe 64.10.2 s'applique aux cas où un dédommagement a été accordé pour certains articles qui sont récupérés par la suite. Le montant des avances accordées ne devront pas dépasser :*
(a) $2,500 for an employee; or	*a) 2 500 $ pour un fonctionnaire; ou*
(b) $2,500 for the spouse or common-law partner of an employee, where an employee is not evacuated or the spouse or common-law partner of an employee precedes the employee on emergency evacuation; and	*b) 2 500 $ pour l'époux ou le conjoint de fait d'un fonctionnaire dans les cas où le fonctionnaire n'est pas évacué ou que son époux ou son conjoint de fait le précède à l'occasion d'une évacuation d'urgence; et*
(c) $1,000 for an employee where the employee's spouse or common-law partner has received an advance of $2,500; and	*c) 1 000 $ pour un fonctionnaire, lorsque son époux ou son conjoint de fait a reçu une avance de 2 500 $; et*
(d) $1,000 for each dependant accompanying the employee and/or spouse or common-law partner on emergency evacuation.	*d) 1 000 $ pour chaque personne à charge qui accompagne le fonctionnaire ou l'époux ou le conjoint de fait au moment d'une évacuation d'urgence.*

[6] The parties agree that the provisions of section 64.5 of the Directive provide the employer with the discretion to determine whether and how an accountable advance is authorized. They disagree on whether the employer reasonably exercised its discretion.

II. Background

[7] The factual background is based on an agreed statement of facts and a joint book of documents, which are summarized as follows.

[8] On March 16, 2020, in response to the worldwide outbreak of the COVID-19 virus, the employer issued an emergency evacuation order of all designated vulnerable employees and their dependants residing at posts outside Canada.

[9] Following the employer's emergency evacuation order, the grievor submitted an accountable-advance request for $5500 under section 64.5 of the Directive. The request was denied, and the grievor was asked to provide an itemized list, with an estimated cost for each item. The grievor resubmitted their request for $5500, along with an itemized list that included several items, with a total estimated cost of $12 219.

[10] The grievor's request was denied in part based on the consideration that some of the items claimed were considered non-essential. The employer approved the request to purchase two children's car seats and air filters, with the estimated cost of $500 and $1450 respectively. It decided not to approve the remaining items. It explained that it applied a strict definition of what were being considered "essential items" across the public service during the COVID-19 pandemic, given that employees were informed to pack excess baggage in advance of the evacuation and to start packing as soon as possible.

[11] Between March and September 2020, the grievor received advances and reimbursements for several entitlements, including for travel, a self-contained accommodation at an Airbnb, meals, and incidentals.

[12] The grievor's evacuation occurred in a very short time. On March 16, 2020, the grievor was informed by email of the emergency evacuation. The information included the following:

…

> · *Given that we are not able to predict the duration of the evacuation, **excess baggage** is approved (up to airline limits) in order for CBS and dependants evacuating to pack as many essential items as possible (weather-appropriate clothing (casual and business), items required for young children such as car seats, toys, etc., personal laptops for distance learning, etc.). The purchase of essential items will only be authorized in exceptional circumstances. Employees can request access to their long-term storage to retrieve essential items as required.*
>
> …
>
> · *The Foreign Service Directives may not cover all of the expenses incurred by the employee due to the early departure of the employee and/or dependants….*
>
> …
>
> [Emphasis in the original]

[13] By the next day, March 17, 2020, the grievor was advised that a flight for their family was booked for March 19, 2020. The information included that the employer was facing challenges due to numerous cancellations and oversold limited flights. It also emphasized that the employer was trying to look at other options for the dog to travel on its own because the airline would not accept it.

[14] On March 18, 2020, multiple exchanges ensued about the evacuation arrangements. At 3:09 a.m., the embassy informed the grievor that their family, including the dog and the two cats, were booked on a flight departing on March 21, 2020. However, at the same time, the embassy noted that it was still trying to find flights on earlier dates, as it was concerned about the high incidence of flight cancellations as time passed.

[15] On the same day, at 10:42 a.m., the grievor was informed that they were booked on a flight that was scheduled to leave at 2:40 p.m. and that a taxi would pick them up at 12:00 p.m.

[16] At 10:55 a.m., the grievor was informed that the taxi had been rescheduled and that it would arrive to take them to the airport at 11:30 a.m.

[17] The grievor and their family left Greece on March 18 and transited in Paris, France. On March 19, 2020, after a night in Paris, they left that city and arrived in Montreal, Quebec. They rented a vehicle at the Montreal airport and used it for their travel to their final destination in Ottawa, Ontario.

III. The employer's decision

[18] The employer's decision was explained primarily through an email that was sent to the grievor's representative during discussions with the bargaining agent. It reads as follows:

> …
>
> *The request below pertains to the purchase of essential items.*
>
> *As CBS were provided the opportunity to bring additional luggage, we have not been approving the majority of requests for additional essential items. Exceptions were made for medical devices, large baby items, car seats, etc…*
> *This was discussed at WGB and is in line with what other departments are doing.*
>
> *Regarding Ms. Podguirny: She requested clothing, winter outerwear, kids crafts and games, kitchen items, new bikes and car seats. The car seats were approved for safety reasons.*
>
> *For* [name redacted], *she requested the items below:*
>
> *Duvet X 3, Pillows X 6, sheets and pillow cases (Sets) X 6, Bath towels, hand towels, washclothes (Set) X 6, Dishclothes, mops, brooms, Cleaning supplies Dishrack Garbage Can Diaper Pail Baby Play Mat Child Exercise Mat (gymnastics) Child bike Baby Walking Toy Coffee mugs X 6 Glasses and cups X 6 Plate set Cutlery Utensils (Spatulas, Whisks, Spoon, Can Openers, etc.) Set of Pots and Pans Baking Dishes Shower Curtain X 2 Bath Mats X 2 Baby potty High Chair Play Pen TV Baby toys Child toys Childrens Books (X 2) Clothes and shoes X Baby Clothes and Shoes X 9 year old Clothes and Shoes X Wesley Clothes and Shoes X Eilis Tool box*
>
> *While I am not sure a final answer has been provided to her (will verify), the majority of requested items would normally have been provided by hotel/temporary accommodation. If the employee opted for an unfurnished place, this would have been deemed a personal decision. Some of the essential baby items may be provided.*
>
> …
>
> [*Sic* throughout]

IV. Summary of the arguments

A. For the grievor

[19] The grievor's premise is that all the items in their request should have been approved, since they were allegedly not provided enough time to take advantage of the opportunity to bring additional luggage. The grievor argues that there was conflicting

information concerning travel arrangements and that the time constraint associated with parenting responsibilities made it impossible for them to pack their luggage and bring all their belongings with them when they were evacuated. The grievor explains that as a family with young children, parenting responsibilities were ongoing during the evacuation period, since the children were at home, while they continued to work at the embassy until March 17, 2020.

[20] Particularly, the grievor emphasizes that while the wording of section 64.5 specifically mentions "clothing" as an example of the type of essential items for which an accountable advance could be provided, none of the clothing items in their inventory were approved to be replaced via an authorized accountable advance. The grievor submits that had the parties intended to exclude clothing from section 64.5, the word "clothing" would not have been included in this provision.

[21] The grievor draws my attention to clause 42.02 of the collective agreement and submits that I should give the Directive the same interpretation as the collective agreement. Clause 42.02 reads as follows:

42.02 *Agreements concluded by the National Joint Council of the public service on items which may be included in a collective agreement, and which the parties to this agreement have endorsed after December 6, 1978, and as amended from time to time, will form part of this agreement, subject to the* Federal Public Sector Labour Relations Act *(FPSLRA) and any legislation by Parliament that has been or may be, as the case may be, established pursuant to any act specified* [in] *section 113 of the FPSLRA.*	***42.02*** *Les ententes conclues par le Conseil national mixte de la fonction publique sur les clauses qui peuvent figurer dans une convention collective et que les parties à cette dernière ont ratifiées après le 6 décembre 1978, et telles que modifiées de temps à autre, feront partie de la présente convention collective, sous réserve de la* Loi sur les relations de travail dans le secteur public fédéral *(LRTSPF) et de toute loi du Parlement qui, selon le cas, a été ou peut être établie en application d'une loi stipulée à l'article 113 de la LRTSPF.*

[22] The grievor refers me to the well-known principles of collective agreement interpretation and, citing *Genest v. Treasury Board (Correctional Service of Canada)*, 2021 FPSLREB 31, urges me to read the words of the collective agreement "… in their entire context, in their grammatical and ordinary sense, and harmoniously with the scheme of the agreement, its object, and the parties' intention."

[23] The grievor also referred me to *Daigneault v. Treasury Board (Correctional Service of Canada)*, 2017 PSLREB 38 at paras. 28 and 29, to help me interpret the Directive as it applies in this matter.

[24] Further, the grievor argues that while the Directive confers a discretion on the employer, it was intended that the discretion be exercised fairly or reasonably. To support this argument, the grievor refers to *Union of Canadian Correctional Officers - Syndicat des agents correctionnels - CSN v. Treasury Board (Correctional Service of Canada)*, 2007 PSLRB 120 at paras. 22 and 23.

[25] Finally, the grievor contends that the employer's claim that the grievance is now moot, since they received the household effects that were left behind in Greece, is incorrect. To support their arguments, the grievor relies on section 64.10.2 of the Directive, which reads as follows:

64.10.2 Compensation for loss/damage of personal and household effects which are subsequently recovered following emergency evacuation shall be in accordance with the provisions of FSD 15 - Relocation, related to loss/damage except that the employee shall have the option of:	*64.10.2 Le dédommagement d'effets personnels et mobiliers qui sont récupérés ultérieurement, après une évacuation d'urgence, sera effectué conformément aux dispositions de la DSE 15 - Réinstallation qui ont trait aux effets perdus ou endommagés, sauf que le fonctionnaire aura le choix de :*
(a) retaining recovered articles which have been duplicated under the provisions of section 64.9, in which case compensation shall be limited to one-half of the replacement cost value of the articles recovered; or	*a) conserver les articles récupérés qui ont été remplacés par des articles semblables en vertu des dispositions de l'article 64.9, auquel cas le dédommagement sera limité à la moitié de la valeur de remplacement à neuf des articles récupérés; ou*
(b) refusing acceptance of recovered articles which have been duplicated under the provision of section 64.9 in which case compensation shall be in accordance with the replacement cost value of the articles recovered, and ownership of such articles shall vest in the Crown.	*b) refuser les articles récupérés qui ont été remplacés par des articles semblables en vertu des dispositions de l'article 64.9, auquel cas le dédommagement correspondra à la valeur de remplacement à neuf des articles récupérés et la propriété desdits articles est dévolue à l'État.*

[26] The grievor explains that according to that provision, receiving household effects that were recovered following an emergency evacuation does not render a

grievance moot. According to section 64.10.2, once an employee receives recovered items, the employee is given the option of either accepting or refusing them. The employee's decision will then dictate whether they are entitled to all or only half of the amount advanced to them under section 64.5.

[27] The grievor notes that had they received the full advance requested under section 64.5, then receiving the recovered effects would have simply triggered deciding whether to accept or refuse them and thus being entitled to keep all or half of the advance.

[28] Ultimately, the grievor claims that the employer's denial of her request for $5500 placed an unanticipated financial burden on them and their family.

B. For the employer

[29] The employer puts forward the following arguments. First, it argues that the grievor was afforded enough time to pack their essential items before the March 18, 2020, flight. The employer emphasizes that the grievor should have started to pack their luggage as soon as they were notified of the emergency evacuation on March 16, 2020. The grievor was or should have been aware of the employer's instructions to pack as many essential items as possible and that purchasing essential items would be authorized only in exceptional circumstances.

[30] Further, the employer states that on March 18, 2020, at 3:09 a.m., the grievor was notified by email that a flight scheduled to leave on March 21, 2020, was booked for them, their three dependants, and their three pets. It noted that earlier flight options were being explored, as flights were being cancelled. At that time, the grievor was or should have been aware that the flight could change to an earlier date and time at any given moment.

[31] As for the non-approved items, the employer argues that during the emergency evacuation, the grievor and their family stayed at a furnished Airbnb with kitchen facilities and household items. Kitchen-related items that they requested, such as a French-press coffee maker, an immersion blender, and a frying pan, were not essential. The grievor and their family were paid meal allowances during that time. Household items that they requested, such as a duvet, an electronic bathroom scale, and alarm

clocks, were also not essential. Items such as high heels, makeup products, and children's costumes were not essential.

[32] The grievor and their family arrived in Canada in late March 2020. They had to quarantine for a couple of weeks on arrival, and seasonal winter clothes were not needed at that time.

[33] The grievor should have packed the essential clothing items in their luggage. It was reasonable for the employer to expect the grievor to pack essential clothing items, such as underwear, shirts, pants, socks, and a jacket for each family member.

[34] Particularly, the employer's central argument is framed on what it claims is management discretion when it assesses requests under the Directive. For the most part, it argues, an accountable advance to purchase essential household effects under section 64.5 is subject to significant management discretion.

[35] The employer takes the position that its discretion is not subject to the Board's review except to the extent of ensuring that it was exercised reasonably. The Board should not interfere unless the employer misconducted itself in a procedural sense or made a patently unreasonable decision. To support this argument, the employer refers to *Nova Scotia Civil Service Commission v. Nova Scotia Government Employees Union*, 1993 NSCA 111; and *Borst v. Treasury Board (Department of Foreign Affairs, Trade and Development)*, 2023 FPSLREB 83.

[36] Further, the employer explains that considering the context of the COVID-19 pandemic and the financial hardships that many Canadians faced at that time, its exercise of discretion to apply a strict and consistent definition to what are considered "essential items" was reasonable. Its exercise of discretion was done reasonably by ensuring that any approved item would be a justifiable charge to public funds.

[37] The employer agrees that the FSDs are incorporated into the collective agreement and submits that the modern rules of contract interpretation must apply when examining its provisions. It urges me to interpret the FSDs using those modern principles. Citing *Daigneault*, it argues that the Board has found that if the FSDs' wording is clear, then the Board cannot stray from what the provisions express clearly.

[38] The employer also refers to *Public Service Alliance of Canada v. Treasury Board (Department of Veterans Affairs)*, 2013 PSLRB 165 at para. 67, and submits that the grievor has not proved on the balance of probabilities that their interpretation of section 64.5 of the Directive is appropriate, with sufficiently clear and cogent evidence. As such, it asks the Board to deny the grievance.

[39] In the alternative, the employer urges me to deny the grievance on the grounds that it has become moot and that the grievor has failed to demonstrate financial hardship. According to the employer, accountable advances under section 64.5 may be used only to purchase items that duplicate items already listed in the grievor's inventory. This is subject to section 64.10.2, when replaced items are subsequently recovered.

[40] The employer explains that on August 12, 2020, the grievor's effects in Athens were packed and shipped to Ottawa. On October 14, 2020, their effects were released from customs in Montreal and were transported to their permanent residence in Ottawa. They can no longer request accountable advances under section 64.5.

[41] The corrective action that the grievor requests is that the employer provides them with an accountable advance under section 64.5 and to be made whole. They are no longer in an emergency evacuation under the provisions of section 64. All the items in their inventories were recovered and delivered to them in October 2020.

V. Analysis

[42] First, it should be noted that before the grievance was referred to the Board for adjudication, it was referred to the NJC's Foreign Service Directives Committee and then to its Executive Committee. They reached an impasse.

[43] It is also worth noting that the parties agreed to proceed by way of written submissions. In accordance with s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), the Board has the authority to decide any matter before it without holding an oral hearing. Therefore, I have exercised that authority to decide this grievance based solely on the written submissions.

[44] The logical starting point of this analysis is the mootness issues, because should the employer's arguments regarding mootness be upheld, the analysis ends there.

A. Does the recovery of the items, left in Athens as a result of the evacuation, render the grievance moot?

[45] The answer to this question is negative.

[46] The Supreme Court of Canada established the mootness test in *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342 ("*Borowski*") (see page 353). The test involves two steps: first, determining if a tangible and concrete dispute exists; second, if not, deciding whether it would be appropriate to exercise discretion and still hear the matter.

[47] This matter presents a live dispute between the parties. Therefore, the grievance is not moot.

[48] The employer suggests that the grievance should be dismissed based on mootness because all the items in the grievor's inventories were recovered and delivered to them. The employer argues that the grievor can no longer request accountable advances under section 64.5 since they are no longer under the emergency evacuation. The employer relies on to section 64.10.2 which provides for compensation for damage or loss of personal and household effects.

[49] In my view, this argument misinterprets the purpose of section 64.5, which mandates evaluation of an employee's request for an accountable advance at the time of evacuation, not upon subsequent recovery of items. The employer's interpretation would create an absurd result, delaying essential assistance and undermining the immediate protection intended by section 64.5.

[50] It is undisputed that the recovery of replaced items triggers section 64.10.2. That section, however, only specifies two options when replaced items are recovered: accept the items and receive half replacement cost or refuse them and receive the full replacement cost. None of these options implies an automatic resolution of a matter related to the employer's exercise of discretion under section 64.5.

[51] The recovery of the items did not render the grievance moot. As it was noted in *Borowski*, a dispute does not become moot when there is still a "tangible and concrete controversy" between the parties. The grievance, which was prompted by the employer's discretionary evaluation of the grievor's request under section 64.5, was

active at the commencement of these proceedings. It remained active after the items were recovered, and continued until the Board issued its decision.

[52] Therefore, the employer's arguments regarding mootness are rejected. I will now proceed to consider the substantive questions raised on the merits.

B. The questions to be decided

[53] There is only one basic question, which is whether the employer's exercise of its discretion when it assessed the grievor's accountable-advances request was reasonable.

[54] It was.

[55] For the most part, the parties' arguments focus on the interpretation of the collective agreement. However, there is no ambiguity in section 64.5 of the Directive. There is no dispute that the parties conferred on the employer broad discretion to authorize accountable advances to replace essential items, to help defray expenses during an evacuation period. Most relevant to this matter is how the employer exercised that discretion.

[56] The starting point for determining whether the employer's exercise of discretion was reasonable is section 64.5, which provides that the employer "… **may authorize** … accountable advances to **replace essential items** of household effects, clothing or children's toys which have been left at the post and, in the event of evacuation … [emphasis added]".

[57] Citing *Union of Canadian Correctional Officers - Syndicat des agents correctionnels - CSN*, at paras. 22 and 23, the grievor submits that the employer is obligated to administer the collective agreement fairly and reasonably. The grievor is correct on that point.

[58] For its part, the employer argues that the use of the word "**may**", in the phrase "… may authorize … accountable advances to replace essential items of household effects …" in section 64.5 indicates that it has significant discretion, and as such, accountable advances are subject to management discretion.

[59] The true question in this case is not whether section 64.5 uses the word "may" to confer discretion but whether the discretion was exercised reasonably — that is, not arbitrarily, capriciously, or in bad faith.

[60] It is well accepted in the jurisprudence that the word "may" alone is not determinative (see, for example, *Butler v. Snelgrove*, 2015 NLCA 46 at para. 26); it must be considered in the entire context, along with the provision's spirit and purpose. The word "may" does not allow exercising discretion in a manner that is arbitrary, capricious, or in bad faith. As was rightly noted in *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 140, "… there is no such thing as absolute and untrammelled 'discretion', that is that action can be taken on any ground or for any reason …".

[61] The parties referred me to *Genest*, at paras. 51 to 54, and *Daigneault*, at paras. 28 and 29, to help me interpret section 64.5. Those decisions review the general principles governing collective agreement interpretation. I find that the language in section 64.5 is clear and unambiguous and that it does not require interpretation.

[62] This grievance raises an issue of collective agreement administration or application, which can be addressed from different angles. For the purposes of this analysis, I have decided to use the general organizing principle of good faith governing contractual performance, which the Supreme Court of Canada recognized in *Bhasin v. Hrynew*, 2014 SCC 71. Recently, the Court elaborated on the duty to exercise discretionary powers in good faith in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 ("*Wastech*").

C. The organizing principle of good faith

[63] At paragraph 63 of *Bhasin*, the Court noted that the organizing principle of good faith is simply that generally, parties must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily. Similarly, *Wastech*, at paras. 62 to 64, emphasized that the duty to exercise contractual discretion in good faith "… requires the parties to exercise their discretion in a manner consistent with the purposes for which it was granted in the contract, or, in the terminology of the organizing principle in *Bhasin*, to exercise their discretion reasonably."

[64] When assessing the employer's conduct using the principle of the duty to exercise contractual discretion in good faith, it is helpful to draw inspiration from the guidance that the Supreme Court of Canada provided in *Wastech,* at paras. 62 and 63.

> *[62] One may well ask — as courts and scholars have on occasion — **how the exercise of an apparently unfettered contractual discretion could ever constitute a breach of contract since one***

> ***could argue that a party, in exercising such a discretionary power, even opportunistically, is merely doing what the other party agreed it could do in the contract*** *(D. Stack, "The Two Standards of Good Faith in Canadian Contract Law" (1999), 62* Sask. L. Rev. *201, at p. 208). The answer can best be traced to the "standard" that underpins and is manifested in the specific legal doctrine requiring that where one party exercises a discretionary power, it must be done in good faith.* ***Expressed as an organizing principle, this standard is that parties must perform their contractual duties, and exercise their contractual rights, honestly and reasonably and not capriciously or arbitrarily*** *(*Bhasin*, at paras. 63-64).* ***Accordingly, a discretionary power, even if unfettered, is constrained by good faith****. To exercise it, for example, capriciously or arbitrarily, is wrongful and constitutes a breach of contract****.*** *Even unfettered, the discretionary power will have purposes that reflects the parties' shared interests and expectations, which purposes help identify when an exercise is capricious or arbitrary, to stay with this same example. Like the duty of honest performance considered in* Bhasin *and* Callow*, the duty to exercise discretionary power in good faith places limits on how one can exercise facially unfettered contractual rights. When the good faith duty is violated, the contract has been breached. The question is what constraints this particular duty puts on the exercise of contractual discretion.*
>
> *[63] Stated simply, the duty to exercise contractual discretion in good faith* ***requires the parties to exercise their discretion in a manner consistent with the purposes for which it was granted in the contract, o****r, in the terminology* ***of the organizing principle in*** **Bhasin*****, to exercise their discretion reasonably****.*
>
> [Emphasis added]

[65] According to the comments in paragraph 62 of *Wastech*, "… parties must perform their contractual duties, and exercise their contractual rights, honestly and reasonably and not capriciously or arbitrarily …".

[66] The grievor alleged that the employer exercised its discretion unreasonably. The grievor bore the burden of the proof to demonstrate that its decision was unreasonable, capricious, or arbitrary. However, the agreed statement of facts and the evidence before me do not support a finding that the employer's conduct suffered such defects. As a result, I do not find that the grievor discharged the burden of proof, particularly for the following reasons.

1. The issue of inadequate time for packing luggage

[67] The grievor argues that they were not provided with adequate time to take advantage of the opportunity to bring additional luggage. However, the agreed

statement of facts indicates that the employer began evacuating employees and their dependants from posts in other countries beginning in January 2020. Considering that the grievor identified themselves as a vulnerable person, they could have started then to consider what items they and their three dependants might need to bring with them when their evacuation arrived. It appears that they did not make any plan of packing essentials until March 2020, when they were informed of their evacuation.

[68] A relevant portion of the grievor's request, which was submitted via the employer's FSD Portal, reads as follows: "As per FSD 64 - I would like an accountable advance for myself (employee) and my three dependants. We had less than 2 hours notice to evacuate, and we need to buy items …". However, the grievor was informed about the emergency evacuation order on March 16, 2020. The grievor and their family left Athens on March 18, 2020, meaning that they had at least 24 hours to pack their luggage.

a. The issue of insufficient space for luggage

[69] Similarly, the grievor argues that the ability to bring additional luggage was restrained by what was physically possible to fit in a vehicle, as they travelled with their three dependants, two cats, and a dog. The grievor explains that their luggage, dog crate, cat carriers, and children barely fit in the largest vehicle and that there was no room for any additional luggage. However, it appears from the evidence filed before me that employees who were subject to the emergency evacuation were informed that they could claim the cost to board their pets or ship them as unaccompanied baggage or by air freight, if necessary, to the evacuation point. Even though travelling separately from their pets was not an ideal solution, the grievor had the opportunity to use that option to create space for additional luggage but chose not to.

[70] Undoubtedly, it would have been preferable to ensure the evacuation of the grievor, their three dependants, the dog, and the cats without any constraints. However, an emergency evacuation is inherently imperfect. The agreed statement of facts states that the employer was impacted the most of all federal departments, with over 70% of its employees posted overseas when the COVID-19 pandemic erupted. In a situation like the pandemic, in which the employer had to evacuate hundreds of employees and their dependants, it was not possible to ensure perfection. While the grievor might feel that they were not treated fairly, it is also important to recognize

that the employer dealt with an unpredictable situation and had its own limitations and constraints.

b. The non-essential, non-approved items

[71] The FSD says "Upon evacuation of the employee and/or dependants, the deputy head **may** authorize one or more accountable advances to **replace essential items** …. Advances **may only** be used to purchase items which duplicate **items listed on the employee's inventories.**"

[72] In my view, a reading of section 64.5 establishes that being essential is a precondition to the employer's approval. Not only must the items to be approved be essential; but they must also, be intended to replace essential items listed in the grievor's inventory. To put it another way, the grievor bears the burden of proving that the items for which they seek approval are essential and are listed in their inventory. However, even then, the employer has the discretion to deny the request provided it does so reasonably.

[73] In this way, it appears to me that the approval process could be structured in three steps.

[74] First, the grievor has the responsibility to prove that the requested items are essential and are listed in their inventory. This stage is crucial because the burden of proof is on the grievor to present appropriate information to demonstrate the necessity of the items. The Directive does not define the term "essential", and in my view, what constitutes "essential" largely depends on the context and the perspectives through which the situation is assessed.

[75] However, despite this contextual flexibility, in *British Columbia (Attorney General) v. Lafarge Canada Inc.,* 2007 SCC 23 (CanLII), [2007] 2 S.C.R. 86, at para. 42, the Supreme Court of Canada provided a definition of "essential" that, in my view, aligns with its ordinary meaning. According to the Court's definition "essential is understood as "absolutely indispensable" or "necessary", "extremely important". The relevant excerpt from paragraph 42 is reproduced below.

> *42. In this case, we are dealing with a federal undertaking, the VPA, constituted pursuant to two heads of federal legislative power, the authority in relation to public property (Constitution Act, 1867, s. 91(1A)) and the federal authority in relation to*

> *navigation and shipping (s. 91(10)). In* Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, 1988 CanLII 81 (SCC), [1988] 1 S.C.R. 749 (*"Bell Canada (1988)*"), the Court restricted interjurisdictional immunity to "essential and vital elements" of such undertakings (pp. 839 and 859-60**). In our view,** *as explained* ***in*** **Canadian Western Bank*, Beetz J. chose his words carefully and intended to use "vital" in its ordinary grammatical sense of "[e]ssential to the existence of something; absolutely indispensable or necessary; extremely important, crucial"*** *(*Shorter Oxford English Dictionary on Historical Principles *(5th ed. 2002), at p. 3548).* ***The word "essential" has a similar meaning****, e.g. "[a]bsolutely indispensable or necessary" (p. 860). …*
>
> [Emphasis added]

[76] Once the grievor provides information substantiating that the requested items are essential or indispensable, the second step requires the employer's evaluation. The employer evaluates whether the information submitted, and the individual's circumstances sufficiently support their request. The employer determines whether the request should be approved based on the circumstances, not its personal interpretation of what is "essential". However, even when the items are deemed to be essential, the FSD does not require the employer to approve a request solely on that basis. The employer might consider certain factors or relevant circumstances, which might include the following:

- The relevance of the items being requested, for example, whether they are in the grievor's inventory.
- Whether the items are necessary in the context of the circumstances.
- The availability of alternative options: for example, if there are other, less costly options that would still meet the grievor's needs.
- Budgetary constraints: even if the items are proved to be essential, there might be budgetary limitations or other financial considerations that could prevent approval of a request made under the FSD.
- Whether the request goes beyond the amounts considered under section 64.5 of the FSD).

[77] The third and final step is the approval or rejection of the request. This is where the employer's discretion comes into play. The discretion here is exercised considering all circumstances surrounding the request and ensuring that the decision is consistent with the intended purpose of the FSD. The final decision whether approving or rejecting the request, should be made in a way that is reasonably justifiable in the context of the individual circumstances. If the employer denies the benefit, the reasons

for the denial should be clearly communicated and based on reasonable considerations (for example the grievor did not meet the burden of proving the items were essential).

[78] In the present case, it appears that one reason for denying the grievor's request was that the grievor was instructed to pack excess baggage, with as many essential items as possible and was warned that the purchase of essential items would only be authorized in exceptional circumstances. In addition, certain items that the grievor requested, such as a French-press coffee maker, an immersion blender, and a frying pan, were denied on the ground that they should have been provided by the hotel. It appears from the agreed statement of facts that during the emergency evacuation, the grievor and their family stayed at a furnished Airbnb, with kitchen facilities and household items. The grievor and their family had also been paid meal allowances during that time.

[79] Similarly, household items that the grievor requested, such as a duvet, an electronic bathroom scale, and alarm clocks, and other items such as high heels, makeup products, and children's winter costumes were not approved, because they were deemed non-essential.

[80] As previously indicated, the onus of demonstrating that those items were essential was upon the grievor. For instance, the grievor could have provided reasons explaining why items including a French press, duvet and children's winter outerwear were essential or indispensable. However, no such evidence or information was filed before the Board. Therefore, the employer's decision not to approve those items cannot be said to be unreasonable.

[81] Further, with respect to the issue of not approving clothing, the grievor argues that because the parties specifically included the word "clothing" in section 64.5 of the Directive, it follows that the accountable-advance request for clothing should have been approved.

[82] The grievor's assertion that all clothing items should have been approved merely because they were clothing is in direct conflict with the clear terms of the Directive which provides that such items must be deemed essential. I see no intention or decision on the employer's part to deny reimbursement of all clothing items, but neither is it required to approve all such claims merely because they are clothing. All items requested for reimbursement must, first and foremost, be deemed essential.

[83] Section 64.5 provides that the employer "… **may authorize** one or more accountable advances to replace essential items of household effects, **clothing or** children's toys which have been left at the post … [emphasis added]". In my view, the word "clothing" in section 64.5 is descriptive or exemplative. It is an example, among other things, and must be read in association with all the items that can be included in the provision. In this context, agreeing with the grievor's assertion would have the unfortunate result of putting the employer in an impossible situation of approving all accountable-advance requests for clothing. That would not be the purpose of section 64.5. One must not look solely at the words used in the provision; one must also include the relevant context.

[84] Moreover, considering both the English and French versions of section 64.5, the French version is unequivocally clear by using the terms "des vêtements essentiels", which emphasize that the clothing must be essential.

[85] The employer explained that its exercise of its discretion was guided by the objectives of maximizing efficiency and minimizing costs, given that it was facing an unpredictable situation; it could not predict the evacuation's duration. That is why it informed employees before the evacuation that all expenses may not be approved and why it instructed them to pack excess baggage.

[86] While the grievor was disappointed that their request was not fully approved, it was reasonable for the employer to ensure that expenses were managed effectively and efficiently. It is also important to keep in mind that the purpose of this case is to determine the reasonableness of the employer's decision, not whether its decision was suitable for the grievor. My role is not to reassess the grievor's request or define what is deemed essential or non-essential but rather to determine whether the employer acted in a manner that was unreasonable, arbitrary, or capricious. In the circumstances of this case, I find no basis to conclude that the employer's refusal to approve the grievor's request was unreasonable.

[87] I have no doubt that the issues that the grievor raised caused them significant challenges, and at the same time, one must keep in mind the unique challenges of the COVID-19 pandemic, in which the evacuation orders were being processed. The pandemic and the associated lockdowns created unprecedented challenges, with many

unknowns for everyone, including governments, communities, families, and individuals.

c. Allegation of the failure to assess the grievor's request on its merits

[88] The agreed statement of facts indicates that given the variety and volume of requests to replace essential items under the Directive, the employer wanted to ensure a common approach as to how these requests were handled. The employer asserts that it applied a strict definition of "essential item" across the public service during the COVID-19 pandemic. However, it didn't explain what that strict definition was.

[89] The grievor argues that the employer failed to examine each request and its series of facts individually. Citing paragraph 33 of *Coppin v. Canada Revenue Agency*, 2009 PSLRB 81, the grievor suggests that the employer did not base its decision on the merits of their request.

[90] *Coppin* is distinguishable on the facts and has very limited application to these circumstances. In *Coppin*, the grievors were among the employees who were prevented from reporting to work due to a winter storm. All other employees except the grievors asked for annual leave that day. The grievors presented requests for leave with pay for "other reasons" under their collective agreement. The employer denied their requests and, instead, granted them annual leave. Based on the circumstances of that case, the former Board rightly concluded that the employer's exercise of discretion was unreasonable.

[91] In this case, the argument that the request was not examined on its merit is not supported by the material facts, for the following reasons.

[92] Before the evacuation took place, the grievor was alerted to the possibility that not every expense might be approved under section 64.5. As a result of their request for an accountable advance, they were provided with the reasons that not all items were approved; some of the items in their request were not considered essential, in alignment with the employer's decision to apply a consistent definition of "essential items" to all request for accountable advances under the Directive during the COVID-19 pandemic. It was also noted that "… the majority of requested items would normally have been provided by hotel/temporary accommodation. If the employee opted for an unfurnished place, this would have been deemed a personal decision."

[93] It appears that one of the most important issues that the employer considered when it denied the grievor's request was the financial aspect, for example not approving replacing those items that would have been provided by a hotel or those deemed non-essential, like high heels, makeup products, and children's costumes. Thus, I am unable to agree with the grievor's statement that the employer failed to assess their request on its merits.

[94] Further, I do not find that the employer's exercise of discretion was arbitrary or that it was exercised capriciously. The Directive is silent as to how the discretion must be exercised. It does not use terms like "reasonable", "arbitrary", or "bad faith". If I can borrow some terminology from the reasons in *Grain and General Services Union v. Viterra Inc.*, 2012 CanLII 12423 (CA LA) para. 129, citing *Telus Communications Inc. v. Telecommunications Workers Union*, [2007] C.L.A.D. No. 358 (QL) at para. 50:

> *[129] … The term "arbitrary" is used to define actions and decisions … which are performed in a capricious and unreasonable manner* ***with willful disregard*** *to the facts. "Bad faith" is defined as contemplating a "state of mind affirmatively operating with furtive design or ill will".*
>
> [Emphasis added]

[95] I do not find that the employer acted "with willful disregard to the facts". It provided clear instructions from the outset of the evacuation, and during the process, it explained the rationale behind the assessment of the grievor's request. For instance, it concluded that bathroom scale, alarm clocks, high heels, make-up products and children's costumes were not essential under the circumstances. By doing so, it demonstrated that its decision not to approve certain items was based on thoughtful consideration. Therefore, as the decision was made with consideration, it cannot be considered capricious or arbitrary.

[96] Ultimately, the grievor claims that the employer's denial of her request for $5500 placed an unanticipated financial burden on them and their family. However, I was not provided with evidence establishing how and to what extent the grievor was placed in a financial constraint linked to the employer's decision to not approve the accountable advance. Notably, the Directive does not say that compensation is warranted, even in cases where the employer's denial has been reasonable, if the employee has suffered some kind of overriding financial constraint.

[97] Considering everything discussed to this point, I am satisfied that the employer's decision did not violate the Directive, which forms part of the collective agreement or the implied duty to exercise contractual discretion in good faith and reasonably. I find that they denied the request based on appropriate considerations. It cannot be said that its decision was arbitrary, capriciously, or made in bad faith.

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

(The Order appears on the next page)

VI. Order

[99] The employer's arguments regarding mootness are rejected.

[100] The grievance is denied.

April 3, 2025.

Goretti Fukamusenge,
a panel of the Federal Public Sector
Labour Relations and Employment Board