

Unexpected Costs Of Employee Relocation



Recently, in *Nowlan v. Canada (Attorney General)* 2022 FCA 83, the Federal Court of Appeal considered an employer's duties towards employees in the event of employee transfers.

In that case, the court reviewed a decision of the Federal Public Service Labour Relations and Employment Board in which the board determined that a government employee who had requested a transfer for personal reasons was owed relocation expenses pursuant to a collective agreement directive. The directive included a compensation provision which read, in part:

12.1.2 An employee-requested transfer that results in an authorized relocation to a position at the appropriate group and level which is vacant on arrival at the new place of duty shall be deemed to be an employer-requested relocation subject to the following:

(a) The relocated employee shall be reimbursed relocation expenses within the limits prescribed in this Directive, unless the deputy head or senior delegated officer provides written certification that, had the vacant position not been filled as a result of an employee-requested transfer, it would have been filled through normal staffing procedures without relocation expenses being incurred.

(b) When a position is so certified, the employee is entitled to:

* the sum of up to five thousand dollars (\$5,000.00) in their Customized Fund;

Board decision

In 2010, the employee requested to move from Ottawa to Toronto and was told by the employer that no relocation expenses would be paid. The employee made this request of the employer, even though the relocation would involve the demotion to a position with a lower rate of pay than the one she held in Ottawa. Costs incurred by the employee for the relocation included \$26,124 in moving expenses and eight days of leave to arrange the move.

Approximately two years later, the employee asked her employer if it would cover her relocation expenses in accordance with the directive. The employer considered the employee's request for two years and rejected the claim on the basis that she did not have written authorization for reimbursement prior to incurring the expenses.

The employee's union grieved the rejection of the employee's claim for reimbursement,

with the matter being heard and determined in 2021. In its decision, the board recognized the principles of collective agreement interpretation that words are to be given their ordinary meaning, finding that when the language of the collective agreement is clear, "it must be applied, even if the result may seem unfair or impose additional costs." In interpreting the compensation provision, however, the board determined that it had to go beyond the technical rules of contract interpretation and apply common sense.

In summary, the board concluded that even if the employee did not follow the directive procedure in seeking preapproval for relocation expenses, she was nonetheless entitled to be reimbursed for the moving expenses incurred. The board awarded the employee \$5,000 in relocation expenses and reimbursement of the eight days of leave she used for the relocation, at the lower rate of pay, subject to required statutory deductions.

Judicial review

The employee applied for judicial review of the board's decision and its interpretation of the directive. The Federal Court of Appeal stated that the reasonableness standard of review applied, noting that "when a decision-maker's reasons reveal that the decision is based on an unreasonable chain of analysis it will not meet the requisite standard of analysis of justification, transparency, and intelligibility."

The court agreed with the board's interpretation of some provisions of the directive. However, the court took issue with the board's interpretation of the compensation provision. The court found that rather than applying the legal principles relied upon earlier in its analysis of the directive, the board had taken a "non-technical common sense approach" in interpreting the compensation provision.

This, concluded the court, resulted in a lack of "logical coherence" to the board's decision. This was especially true given the settled law of collective agreement interpretation, that language must be reviewed in "its ordinary and normal sense, in the entire context of the agreement." It is only in cases of ambiguity that a decision maker should assess extrinsic evidence in interpreting language. The court concluded there was no ambiguity to the compensation provision, thus the board should not have adopted a different approach to its interpretation.

In addition, the court found it was unreasonable for the board to conclude that the employee's failure to obtain written approval prior to incurring relocation expenses was her mistake. The court found this mistake stemmed from the employer's mistaken advice to the employee that no reimbursement expenses would be provided, despite her entitlement to such expenses. On this point, the court concluded, the board's reasoning lacked logic and coherence.

The court was also critical of the board's decision to rely on a decision that was distinguishable from the facts of the case and its failure to explain why it dismissed the reasoning of a different decision interpreting the compensation provision.

The board did not grant its remedy based on the application of the wording of the directive to the facts, but rather based on a hypothetical scenario, rendering the board decision unreasonable.

Lastly, the court found that the employee's compensation for her eight days of leave was calculated incorrectly by the board: the employee was awarded eight days of compensation at the lower rate of pay (due to her demotion), when five of those days

were technically taken whilst she was still entitled to the higher rate of pay due to her higher position.

The court quashed the board decision and remitted the matter back to the board.

Takeaways

The board's reconsideration is pending. However, we note the following takeaways from *Nowlan*:

- The standard of review applicable is one of reasonableness.
- A decision will be unreasonable in the following circumstances:
 - when a decision-maker's reasons reveal that the decision is based on an unreasonable chain of analysis;
 - where the decision-maker's reasoning lacks logic and coherence;
 - where the decision-maker has failed to explain its rejection of precedent that is clearly relevant to the case; and
 - where the decision-maker bases a remedy on a hypothetical situation instead of on the facts of the case.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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