Date: 20060321

File: 166-02-32542

Citation: 2006 PSLRB 31

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

KATHLEEN DAWN MOORE

Grievor

and

TREASURY BOARD
(Canadian Grain Commission)

Employer

Indexed as
Moore v. Treasury Board (Canadian Grain Commission)

In the matter of a grievance referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Dan Butler, adjudicator

For the Grievor: Debra Seaboyer, Public Service Alliance of Canada

For the Employer: Neil McGraw, counsel

Heard at Thunder Bay, Ontario,
January 31 and February 1, 2006.

Grievance referred to adjudication

[1] At the time that she initiated her grievance, Kathleen Moore was an indeterminate seasonal employee at the Canadian Grain Commission (CGC), assigned to perform the duties of an Assistant Grain Inspector in a position classified at the PI-01 level located in Thunder Bay, Ontario.

[2] Ms. Moore grieves the alleged failure of the employer to apply correctly the provisions of *APPENDIX "T" – Work Force Adjustment* (the "Appendix T") of the Technical Services Group collective agreement between the Treasury Board and the Public Service Alliance of Canada, which expired June 21, 2003. The circumstances giving rise to the grievance turn on the employer's decision not to recall Ms. Moore to work at the outset of the 2002-2003 shipping season, on or about April 1, 2002. As corrective action, Ms. Moore asks in her grievance that the provisions of Appendix T be applied and that she ". . . be made whole."

[3] Ms. Moore's grievance was filed at the first level of the grievance process on June 5, 2002. Following the employer's final-level reply of April 17, 2003, denying the grievance, the matter was referred to adjudication on July 10, 2003.

[4] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35.

[5] Because of the grievor's unavailability, this reference to adjudication could not be heard prior to January 31, 2006.

[6] At the outset of the hearing, the grievor drew my attention to a Final Investigation Report of the Public Service Commission (PSC), dated August 1, 2003, respecting a complaint that she had filed with the Recourse Branch of the PSC (Exhibit G-4). The subject matter of her complaint to the PSC was a reverse order of merit process conducted by the employer in May of 2002. Some details of this process, as well as the PSC's Final Investigation Report, were entered in evidence during the hearing, as will be reflected below. I understand that the PSC's Final Investigation Report was proffered primarily as an aide to understanding the context for certain events in the 2002-2003 shipping season. Determinations made under the authority of

the PSC relate to matters of interpretation of the *Public Service Employment Act (PSEA).* The complaint issues covered by the PSC's Final Investigation Report are properly not before me for decision in this proceeding.

Summary of the evidence

[7] To a substantial extent, the facts in this case are not in dispute, although the parties may differ on the significance of some facts. Evidence was led through three witnesses; the grievor, on her own behalf, and two senior managers of the CGC on behalf of the employer. The parties presented twenty-four exhibits at the hearing.

[8] The *Canada Grain Act* mandates the CGC to assure the quality and quantity of grain shipments. Through its operational arm, the Division of Industry Services, the CGC carries out this mandate by providing grain inspection, weighing and related administrative services in Thunder Bay and four other regions.

[9] Rick Bevilacqua was Acting Regional Director in the Thunder Bay region at the time of Ms. Moore's grievance (and was subsequently appointed on a permanent basis to this position in 2003). He reported to Jim Stuart, Director of Industry Services, located at the Winnipeg Headquarters, who, in turn, reported to the Chief Operating Officer.

[10] Operations at Thunder Bay are affected by the volume of grain shipments and the length of the shipping season. As navigation opens in the Great Lakes and the St. Lawrence Seaway each March or April, grain stocks in Thunder Bay build up, having been delivered by rail from the Canadian prairies. Ocean and lake freighters take on cargoes at Thunder Bay's nine grain elevators beginning in early spring. The shipping season normally extends through to December or to early January of the following year. Shipments may slow down in the summer but normally increase again in the fall when new grain harvests come on line. Historically, some rail-to-rail transhipments of grain continue at Thunder Bay during the January-March off-season, but the general level of activity declines very sharply. The January-March slow period is used to reconcile records with actual physical stocks and provides an opportunity for employee training.

[11] Recent history has been difficult for the Thunder Bay region. After a peak in 1984, grain shipments have been in decline (Exhibit E-9). Overseas markets are shifting towards Asia-Pacific customers, who are served through terminal elevators on

Canada's West Coast. With declining volumes through Thunder Bay, the challenges of managing operations in the Thunder Bay region have increased. In the last five or six years, the trend in the industry has been to close Thunder Bay terminal elevators completely during the January-March period. A Canadian Wheat Board (CWB) decision to re-direct prairie rail grain traffic to transfer elevators on the St. Lawrence (unaffected by the length of the shipping season) has also contributed to the secular decline in shipment volumes.

[12] Prior to 2002, variable work volumes at Thunder Bay were managed under a staffing strategy that featured a core of full-time indeterminate employees supplemented with seasonal and term employees. As Mr. Stuart described, indeterminate seasonal employees were normally called back to work in late March or early April each year as the shipping season opened. At the end of the shipping season, these employees received lay-off notices. Operations during the January-March off-season were conducted by core indeterminate staff who remained on duty.

[13] Ms. Moore worked for the CGC in Thunder Bay for approximately 18 years as an Assistant Grain Inspector at the PI-01 group and level. In this position, Ms. Moore was responsible for preparing grain samples for inspection and ensuring that sampling equipment functioned properly. Until late in 1990, she was a term employee. She competed each winter for term status for the coming shipping season and was subsequently selected from an eligibility list to perform work each shipping season. On November 1, 1990, Ms. Moore's status changed when she was offered and accepted an Assistant Grain Inspector position on a seasonal indeterminate basis (Exhibit E-1). Her conversion was a result of the employer's decision in 1990 to introduce the "seasonal indeterminate" concept, apparently a response to grievances that had contested the earlier practice of laying-off full-time indeterminate employees on an annual basis. The "seasonal indeterminate" option allowed flexibility in staffing levels. It also provided the new indeterminate seasonal employees with benefits not previously available to term employees.

[14] Ms. Moore understood her new "seasonal indeterminate" status to mean that she could now expect to be employed each year during the shipping season without a competitive process. Service data (Exhibit G-7) show that her expectation for substantial yearly employment was realized. The total number of days that she worked each year between 1991 and 2001 varied, but was considerable throughout.

Ms. Moore's seasonal employment typically began in late March or early April, after she received a recall contact from the employer. It ended in January or February of the following year, after receipt of a two-week written "seasonal lay-off" notice (Exhibit G-6). On several occasions, Ms. Moore was not laid off in the winter months when the shipping season closed.

[15] The situation in Thunder Bay changed for the worse leading into the 2002-2003 shipping season, according to Mr. Stuart. After two consecutive years of drought on the prairies, the CGC received reports from the CWB and major grain companies in January and early February that predicted a dramatic decrease in grain volumes at the opening of the 2002-2003 shipping season. Mr. Stuart stated that indications at the time suggested that the problem might be temporary. A normal grain harvest from the 2002 growing season could bring shipping volumes back to near-normal levels. The CGC was to receive week-to-week updates that would enable managers to better assess operational requirements and determine appropriate staffing levels.

[16] Going into 2002, the Thunder Bay region workforce comprised approximately 130 employees across all occupational groups, of whom 95 enjoyed full-time indeterminate status, 26 or 27 were indeterminate seasonal employees, and six or seven were term employees. The number of indeterminate seasonal employees had increased in late 2001. Ten new seasonal indeterminate positions had been staffed with individuals previously engaged on a term basis. Ms. Moore testified that the employer had decided to conduct this staffing conversion in order to enable individuals previously employed as term employees to acquire benefits available to indeterminate employees.

[17] In February 2002, Mr. Stuart began discussions with Mr. Bevilacqua to address the anticipated volume problem for the shipping season ahead. They concluded that not all indeterminate seasonal and term employees would be required at the beginning of the shipping season and that a process would be needed to recall staff in order to meet operational requirements once volumes returned as the shipping season proceeded. Although predictions were difficult, Mr. Stuart expected that most, if not all of the indeterminate seasonal employees, would be back at work in the course of the shipping season, particularly if the 2002 crop proved promising. Responsibility to develop and manage the required staffing recall process in the region fell to Mr. Bevilacqua, supported by Human Resources.

[18] Ms. Moore soon felt the impact. By late March or early April 2002, when the seasonal recall contact from the employer normally occurred, she had heard nothing. She went to the office to talk with Mr. Bevilacqua about the situation and was told that the employer was not sure when indeterminate seasonal employees could be recalled, that grain volumes were down, but that work might resume "any week". Ms. Moore heard nothing more from the employer until late April or early May. To her knowledge, none of the 16 indeterminate seasonal employees in the region were recalled in April.

[19] Apart from the immediate question of how and when to recall indeterminate seasonal employees, Mr. Stuart had reached the conclusion in February 2002 that a more permanent readjustment or rebalancing of the staff complement was required in view of the secular decline in Thunder Bay grain volumes, and particularly the closing of terminal elevators during the January-March period. The objective would be to reduce the core of full-time indeterminate employees based on average work volumes over the previous five to six years and to continue to supplement the core, as required, with indeterminate seasonal and term employees. In Mr. Stuart's words, full-time indeterminate employees levels needed to be adjusted to "average levels rather than peak levels" as the long-term goal.

[20] The employer turned, as a result, to consider a work force adjustment (WFA). In keeping with commitments Mr. Stuart said had been made to her bargaining agent in national consultations, the employer wished to accomplish any required reductions on a voluntary basis. Mr. Bevilacqua was tasked to develop an approach and put Appendix T into motion. After further analysis of operational requirements and consultations with Human Resources, a strategy was determined, with an anticipated staff reduction target of eight positions.

[21] The employer's WFA objectives were communicated to Thunder Bay staff by the Chief Operating Officer, Gordon Miles, and Mr. Stuart at a meeting off-site on May 2, 2002. On May 17, 2002, Mr. Bevilacqua sent a letter to the Thunder Bay staff asking for WFA volunteers, with a response requested by May 24, 2002 (Exhibit G-9). Expressions of interest were initially received from 30 to 34 employees, including Ms. Moore (Exhibit E-2).

[22] Events were proceeding at the same time on the seasonal recall front. Mr. Bevilacqua and his management team, assisted by Human Resources, designed a

merit-based competition with the objective of ranking indeterminate seasonal employees on a list to be used to determine the order of recalls as work became available, as well as seasonal lay-offs later in the year. When informed of the intended competition process, four indeterminate seasonal employees, including Ms. Moore, wrote to Mr. Stuart to pose questions about the intended approach. They received answers on May 1, 2002 (Exhibit G-8).

[23] Ms. Moore reports that indeterminate seasonal employees felt that the intended process was unfair and unreasonable. They had already successfully competed for their positions and had been ranked and they were very concerned about any new requirement to compete. In previous years, seasonal employees had been recalled and later laid off as a group. With the addition of 10 new indeterminate seasonal employees in 2002, and given the anticipated volume shortage for the outset of the 2002-2003 shipping season, the employer had apparently felt that the usual approach was no longer viable. When asked, in cross-examination, about the impact and fairness of having added 10 new seasonal indeterminate positions when the reverse order of merit exercise was conducted, Ms. Moore countered that there were other options and that the reverse order of merit competition for recalling and laying-off indeterminate seasonal employees should never have been conducted at all.

[24] Sixteen indeterminate seasonal employees in the PI group were advised of their ranking following the competition. The PSC's Final Investigation Report indicates that Ms. Moore was ranked 16th. Starting in June, some employees were recalled as work became available. Mr. Bevilacqua testified that his managers reviewed requirements on a weekly basis as the shipping season continued and determined when additional indeterminate seasonal employees should be recalled. Later in the year, the lay-off of those indeterminate seasonal employees who had been recalled was managed using the same reverse order of merit list. The last of the recalled indeterminate seasonal employees received seasonal lay-off notices in December 2002.

[25] For her part, Ms. Moore was not recalled to work during the 2002-2003 shipping season.

[26] Ms. Moore's complaint to the PSC alleged that ". . . her qualifications were improperly assessed in a merit process. . . ." and that she had effectively been laid off as a result of the exercise in violation of section 29(1) of the *PSEA* and section 32 of the *PSEA Regulations*.

[27] The PSC investigator eventually sustained Ms. Moore's complaint. The investigator found that the merit process conducted by the employer in Thunder Bay was ". . . a *de facto* reverse order of merit (ROM). . . ." determination for purposes of the *PSEA*, and thus within the redress authority of the *PSEA*. The investigator concluded ". . . that the actions of the department with regard to the affected employees during the 2002-2003 shipping season is akin to a lay-off within the meaning of sections 29(1) of the *Public Service Employment Act* . . . and 32 of the *Public Service Employment Regulations*. . . ." Examining how the competition was actually conducted and how rated factors were evaluated, the investigator determined that ". . . the instant merit listing was not conducted in accordance with merit or staffing values. . . ." (Exhibit G-4).

[28] The details of the corrective recommendations offered by the investigator for the subsequent conciliation phase are not germane to these proceedings. I was asked to note, nonetheless, the cover letter for the PSC's Final Investigation Report, which acknowledges that ". . . the issue of pay during the 120-day opting period may not be addressed in the context of this conciliation process and is a matter for which recourse is provided through the grievance process respecting the application of [Appendix T]".

[29] The "longer-term" WFA process continued through the summer and into the fall of 2002. Ms. Moore had volunteered for this process in May 2002, without prejudice to her contention that she should have received an "affected letter" triggering Appendix T as of April 1, 2002, when the employer failed to recall her at the beginning of the shipping season. Had this occurred and had she received a reasonable job offer at that time, she testified that she would have accepted it and moved to another department. Had an April 1, 2002, letter indicated that no reasonable job offer was available, she testified that "I would have done what I subsequently did" (select Appendix T option 6.3.1(c)(ii), which provided an education allowance, a two-year period of leave without pay and other benefits) (Exhibit G-1).

[30] The exhibits tabled by Ms. Moore, and others by the employer, trace the progress of the voluntary WFA process as experienced by Ms. Moore: the information made available, the process updates given, the clarifications sought and provided, Ms. Moore's final decision and the resulting WFA package (see Exhibits G-10 through G-15, and E-3 through E-8). For purposes of this summary of evidence, the essential points are that Ms. Moore's voluntary request to leave her position was ultimately

accepted by the employer in a letter dated January 10, 2003 (Exhibit G-15). The provisions of Appendix T option 6.3.1(c)(ii) were implemented. To correct a failure by the employer to provide the PSC with certain information at that time, the date on which Ms. Moore's one-year priority status began was later revised by approximately three months to April 2005 (after two years' of unpaid education leave).

[31] At no time following receipt of her January 10, 2003, letter was Ms. Moore advised by the employer that any vacant position had become available. She was under the impression that she now could not go to another department, even though she did learn that there were positions posted on the PSC's web site. She has also recently learned that the CGC conducted a PI-02 competition during the time that she was benefiting from Appendix T. As of the date of this hearing, Ms. Moore has not been reappointed to a position in the public service, and her priority status period ends in April 2006.

[32] Mr. Stuart testified that a total of 19 employees in the Thunder Bay region ultimately were offered and accepted WFA packages. More employees had responded to Mr. Bevilacqua's original call for expressions of interest than had been anticipated, well in excess of the eight positions first contemplated by the employer. The employer reviewed the unexpectedly large response and came to the conclusion, after several months, that it could accommodate more. Mr. Stuart confirmed that no reasonable job offers were made during the course of the WFA exercise in accordance with a decision taken by Chris Hamblin, the Chief Commissioner of the CGC.

[33] In cross-examination, Mr. Stuart stated that the employer had examined the possibility of reasonable job offers for positions in other departments in the Thunder Bay area. Based on discussions conducted by Mr. Bevilacqua and Human Resources, the employer had concluded that there were not enough positions available to accommodate the affected employees.

[34] In cross-examination, Mr. Bevilacqua was pressed for further details about the consultations with other departments and the PSC regarding the possibility of reasonable job offers, how the voluntary WFA process was then conducted and whether the process was authorized by the collective agreement. He confirmed that he had been personally involved in the consultations and found that job offers could not be provided. He stated his view that the employer did have the delegated authority to act in the way that it did, using a voluntary process. As to the results of the process,

he recalled that three indeterminate seasonal employees had responded to his May 17, 2002, call for volunteers, that all three had taken WFA packages, including two employees in the PI group (one of whom was Ms. Moore). Asked if either of these PI indeterminate seasonal employees was recalled to work during the 2002-2003 shipping season before the WFA packages took effect, Mr. Bevilacqua noted that Ms. Moore had not been recalled but was unsure about the other. A total of five indeterminate seasonal employees (volunteers and non-volunteers) were not recalled by the end of the 2002-2003 shipping season.

[35] Mr. Bevilacqua's cross-examination also offered further details about the implementation of the recall/lay-off process. Functional authority for determining the actual number of employees involved and the timing of recalls and lay-off fell to his two principal managers; one for inspection services and one for weighing services. Their determinations were made within the established process and reverse order of merit list. According to Mr. Bevilacqua, the overall approach to all classes of employees was, first, to find available work for all full-time indeterminate employees, to supplement these employees with indeterminate seasonal employees as the volume dictated and then draw term employees from the standing eligibility list if further resources were needed. The same approach applied to the lay-off order, and he noted that the actual process occurred within separate ranked lists for PI and GL employees.

Summary of the arguments

For the grievor

[36] Ms. Moore submits that the facts in this case are largely not in dispute. No issue of credibility of testimony arises, and there is general agreement on the issues to be determined.

[37] First, two questions must be answered. Did the employer's failure to recall the grievor to work at the start of the 2002-2003 shipping season trigger a WFA situation within the meaning of Appendix T? In the affirmative, did the employer comply with the requirements of Appendix T in respect of that situation? If the answer to this second question is in the negative, Ms. Moore submits that I must uphold her grievance and the issue then turns to fashioning an appropriate remedy. Ms. Moore suggests that a number of questions will assist consideration of a remedy: when should the employer have provided Ms. Moore with a notice indicating that she was an "affected employee"?; should the notice letter have included a reasonable job offer?; did the

employer's actions in asking employees for expressions of interest in a voluntary work reduction remedy the violation of the collective agreement, or did it simply compound the original violation?; did Ms. Moore receive her full entitlement to benefits under Appendix T once she volunteered for work force reduction?; if not, what entitlement is still outstanding?

[38] Ms. Moore reviewed many of the provisions of Appendix T, some in detail. Given the length of Appendix T, it is not reproduced here. I cite here only the clauses examined by Ms. Moore that I believe are most central to her depiction of the WFA and her argument.

[39] Appendix T applies to all employees covered by the collective agreement. Indeterminate seasonal employees are not excluded from its application:

. . .

General

Application

This appendix applies to all employees. Unless explicitly specified, the provisions contained in Parts I to VI do not apply to alternative delivery initiatives.

. . .

Indeterminate seasonal employees represent a very small proportion of the public service employee population. Clearly, however, any decision that indeterminate seasonal employees cannot access Appendix T protections and benefits would not reflect the intent of the collective agreement.

[40] A WFA situation is triggered when a deputy head decides that the services of an indeterminate employee ". . . will no longer be required beyond a specified date. . . .":

. . .

General

. . .

Definitions

. . .

> ***Work force adjustment*** *. . . - is a situation that occurs when a deputy head decides that the services of one or more indeterminate employees will no longer be required beyond a specified date because of a lack of work, the discontinuance of a function, a relocation in which the employee does not wish to relocate or an alternative delivery initiative.*

. . .

[41] For indeterminate seasonal employees on seasonal lay-off status, how and when do we know that a deputy head has made a determination that their services ". . . will no longer be required beyond a specified date. . . ."? It cannot have been the intent of the collective agreement that leaving employees on seasonal lay-off status, perhaps indefinitely, does not trigger a WFA situation. The employer is obligated to take action. "No action" is not an option. In the case at hand, it is clear that the deputy head made a determination that the services of an indeterminate seasonal employee ". . . will no longer be required. . . ." when the employer failed to recall that employee at the start of the shipping season as per historical practice. In this sense, and for the unique circumstances of indeterminate seasonal employees in this case, the failure to take action triggers Appendix T.

[42] It is important to emphasize that the Appendix T's definition of a WFA does not require that the ". . . lack of work. . . ." be, or must be, permanent.

[43] The fundamental concept of Appendix T is that, ". . . wherever possible. . . .", continued employment shall be found in the public service for affected employees. To this end, Appendix T imposes a critical obligation on the employer to provide an affected employee with a reasonable job offer:

. . .

General

. . .

> ***Objectives***
>
> *It is the policy of the Employer to maximise employment opportunities for indeterminate employees affected by work force adjustment situations, primarily through ensuring that, wherever possible, alternative employment opportunities are provided to them. This should not be construed as the*

> *continuation of a specific position or job but rather as continued employment.*
>
> *To this end, every indeterminate employee whose services will no longer be required because of a work force adjustment situation and for whom the deputy head knows or can predict employment availability will receive a guarantee of a reasonable job offer within the Public Service. Those employees for whom the deputy head cannot provide the guarantee will have access to transitional employment arrangements (as per Part VI and VII).*
>
> . . .

[44] The imperatives of continued employment and of providing a reasonable job offer are reinforced repeatedly throughout Appendix T. For example:

> . . .
>
> ***General***
>
> . . .
>
> ***Definitions***
>
> . . .
>
> ***Guarantee of a reasonable job offer*** *. . . - is a guarantee of an offer of indeterminate employment within the Public Service provided by the deputy head to an indeterminate employee who is affected by work force adjustment. Deputy heads will be expected to provide a guarantee of a reasonable job offer to those affected employees for whom they know or can predict employment availability in the Public Service. Surplus employees in receipt of this guarantee will not have access to the Options available in Part VI of this appendix.*
>
> . . .
>
> ***Reasonable job offer*** *. . . - is an offer of indeterminate employment within the Public Service, normally at an equivalent level but could include lower levels. Surplus employees must be both trainable and mobile. Where practicable, a reasonable job offer shall be within the employee's headquarters as defined in the Travel Directive. In Alternative Delivery situations, a reasonable offer is one that meets the criteria set out in Type 1 and Type 2 of Part VII of this Appendix.*
>
> . . .

> ***Part I***
>
> ***Roles and Responsibilities***
>
> ***1.1 Departments***
>
> ***1.1.1*** *Since indeterminate employees who are affected by work force adjustment situations are not themselves responsible for such situations, it is the responsibility of departments to ensure that they are treated equitably and, whenever possible, given every reasonable opportunity to continue their careers as Public Service employees.*
>
> *. . .*
>
> ***1.1.7*** *Deputy heads will be expected to provide a guarantee of a reasonable job offer for those employees subject to work force adjustment for whom they know or can predict employment availability in the Public Service.*
>
> *. . .*
>
> ***1.1.15*** *Deputy heads shall apply this appendix so as to keep actual involuntary lay-offs to a minimum, and lay-offs shall normally only occur where an individual has refused a reasonable job offer, or is not mobile, or cannot be retrained within two years, or is laid-off at his or her own request.*
>
> *. . .*
>
> ***Part VI***
>
> ***Option for employees***
>
> ***6.1 General***
>
> ***6.1.1*** *Deputy heads will be expected to provide a guarantee of a reasonable job offer for those affected employees for whom they know or can predict employment availability. A Deputy Head who cannot provide such a guarantee shall provide his or her reasons in writing, if requested by the employee. Employees in receipt of this guarantee would not have access to the choice of Options below.*
>
> *. . .*

[45] Appendix T demands actions by the employer and imposes strict and short timelines to implement the requirements of Appendix T. Among these, it is fundamental that an "affected employee" be informed at the earliest possible point that his/her position is implicated in a WFA situation:

. . .

General

. . .

Definitions

. . .

***Affected employee** . . .- is an indeterminate employee who has been informed in writing that his or her services may no longer be required because of a work force adjustment situation.*

. . .

Part I

Roles and responsibilities

1.1 Departments

. . .

***1.1.35** Departments shall inform and counsel affected and surplus employees as early and as completely as possible and shall, in addition, assign a counsellor to each opting and surplus employee and laid-off person to work with them throughout the process. . . .*

. . .

[46] Where a reasonable job offer cannot be provided, affected employees are entitled to a period of 120 days to consider the options available to them under Part VI of Appendix T:

. . .

Part I

Roles and responsibilities

1.1 Departments

. . .

***1.1.8** Where a deputy head cannot provide a guarantee of a reasonable job offer, the deputy head will provide 120 days to consider the three Options outlined in Part VI of this appendix to all opting employees before a decision is required of them. If the employee fails to select an option, the*

employee will be deemed to have selected Option (a), Twelve-month surplus priority period in which to secure a reasonable job offer.

. . .

Part VI

Options for employees

6.1 General

. . .

6.1.2 *Employees who are not in receipt of a guarantee of a reasonable job offer from their deputy head have 120 days to consider the three Options below before a decision is required of them.*

. . .

6.3 Options

6.3.1 *Only opting employees who are not in receipt of the guarantee of a reasonable job offer from the deputy head will have access to the choice of Options below:*

(a)

(i) *Twelve-month surplus priority period in which to secure a reasonable job offer is time-limited. Should a reasonable job offer not be made within a period of twelve months, the employee will be laid off in accordance with the* Public Service Employment Act. *Employees who choose or are deemed to have chosen this Option are surplus employees.*

(ii) *At the request of the employee, this twelve (12) month surplus priority period shall be extended by the unused portion of the 120-day opting period referred to in 6.1.2 which remains once the employee has selected in writing option (a).*

(iii) *When a surplus employee who has chosen, or who is deemed to have chosen, Option (a) offers to resign before the end of the twelve-month surplus priority period, the deputy head may authorise a lump-sum payment equal to the surplus employee's regular pay for the balance of the surplus period, up to a maximum of six months. The amount of the lump sum payment for the pay in lieu cannot exceed the maximum*

of that which he or she would have received had they chosen Option (b), the Transition Support Measure.

(iv) Departments will make every reasonable effort to market a surplus employee and the Employer will ask the Public Service Commission to make every reasonable effort to market a surplus employee within the employee's surplus period within his or her preferred area of mobility.

or

(b) Transition Support Measure (TSM) is a cash payment, based on the employee's years of service in the Public Service (see Annex B) made to an opting employee. Employees choosing this Option must resign but will be considered to be laid-off for purposes of severance pay.

or

(c) Education allowance is a Transitional Support Measure (see Option (b) above) plus an amount of not more than $8000 for reimbursement of receipted expenses of an opting employee for tuition from a learning institution and costs of books and mandatory equipment. Employees choosing Option (c) could either:

(i) resign from the Public Service but be considered to be laid-off for severance pay purposes on the date of their departure;

or

(ii) delay their departure date and go on leave without pay for a maximum period of two years, while attending the learning institution. The TSM shall be paid in one or two lump-sum amounts over a maximum two-year period. During this period, employees could continue to be Public Service benefit plan members and contribute both employer and employee share to the benefits plans and the Public Service Superannuation Plan*. At the end of the two-year leave without pay period, unless the employee has found alternate employment in the Public Service, the employee will be laid off in accordance with the* Public Service Employment Act.

. . .

[47] How, then, should the provisions of Appendix T have applied in the circumstances faced by Ms. Moore? The collective agreement requires that the employer take certain actions as events unfold. The employer cannot simply "drag its heels" and hope that a problem improves. In this case, Ms. Moore submits that, as soon as the employer became aware that there was a lack of work, which would affect the number of indeterminate seasonal employees recalled or the date of their recall, it "needed", was obligated, to implement Appendix T. The employer cannot wait around to see what happens.

[48] Evidence given by the employer's witnesses shows that the employer was aware in January 2002 or, at the latest, by early February 2002, that there would be a lack of work. At this point, the employer should have determined how many and which indeterminate seasonal employees would be affected. Required notices under Appendix T should have been immediately given within the timeframes stipulated by the collective agreement.

[49] The failure to recall Ms. Moore at the beginning of the shipping season on April 1, 2002, was the very latest date on which Appendix T should have been triggered, and Ms. Moore should have received an "affected letter" as required by clause 1.1.35 (*supra*) at that time. The "affected letter" should have included a reasonable job offer. A reasonable job offer is the rule, not the exception, in a WFA situation (clause 1.1.7, *supra*).

[50] Once an "affected letter" was issued, the employer was free to call for volunteers for work force reduction in the context of the alternation process described in section 6.2 of Appendix T.

[51] Ms. Moore should have been given 120 calendar days to decide on her preferred WFA option, as per clause 6.1.2 of Appendix T (*supra*). She should have been paid for the 120-day period. Ms. Moore and other indeterminate seasonal employees had a reasonable expectation of working for a shipping season each year. They are to be distinguished from casual or term employees, who have no legal expectation of employment. Ms. Moore had received an offer of employment for one shipping season on an ongoing basis and expected to be paid for a shipping season. The shipping

season had consistently been approximately nine months in duration, typically beginning in April and ending in December.

[52] Appendix T does not specifically address the issue of pay during the 120-day period. Its provisions primarily reflect the circumstances of full-time indeterminate employees who, unlike their seasonal counterparts, are paid at all times until their services are terminated. Given that the entire Appendix T is dedicated to the securing of public service jobs for affected employees and given that employees are not themselves responsible for a WFA, it would be unreasonable to assume that indeterminate seasonal employees are not entitled to pay for 120 days just because they were on seasonal lay-off at the time that the WFA arose. The approach in Appendix T is to provide to affected employees a safe period of time to make a critical decision. If indeterminate seasonal employees in seasonal lay-off status are not paid for the 120-day period, this "safe" period instead becomes a detriment. Four months without income "is hardly a safe period of time".

[53] Appendix T applies not only where there is a permanent reduction of work, contrary to what is alleged in the employer's reply to Ms. Moore's grievance (on file). The language of the collective agreement does not say this. The lack or shortage of work subject to Appendix T provisions can be temporary. If this were not the case, we would be left to decide exactly when any temporary shortage becomes a permanent shortage triggering a WFA situation.

[54] As was the practice in previous years, the six indeterminate seasonal employees on strength in 2001 were recalled and laid off as a group. The competition held in late 2001 converted term employees to seasonal indeterminate status, tripling the number of indeterminate seasonal employees immediately prior to a downturn in grain volume. This number bears upon what was to happen the next shipping season. Each of the 17 indeterminate seasonal employees now became affected by the emerging WFA situation in 2002. The 2001 conversion of term employees to seasonal indeterminate status was not in itself an unfair or arbitrary exercise. The subsequent determination by the employer in 2002 that indeterminate seasonal employees would not be recalled and laid off as a group and that a reverse order of merit competition would instead be held was unfair and arbitrary.

[55] In his testimony, Mr. Stuart stated at least four times that the employer was aware as early as January 2002 that the volume of grain shipments would be

substantially lower and that there would be an impact on the recall of indeterminate seasonal employees. It was evident at this point that the slowdown was not going to be short. It is safe to say that the employer knew that the period would be significant and potentially permanent. The evidence in the employer's hands of the previous five or six years reinforced its appreciation of the downward trend, and the employer in fact came to a decision in this period to reduce the workforce, eventually targeting eight positions in its May 17, 2002, call for volunteers.

[56] It is undisputed that Ms. Moore was never recalled to work. Those who, like Ms. Moore, "were not recalled at all" in 2002, experienced a situation which the PSC's Final Investigation Report later qualified as being ". . . akin to a lay-off. . . ." (Exhibit G-4). Ms. Moore's last day of work during the 2001-2002 shipping season turned out to be her last day of employment with the CGC. When the shipping season opened in 2002 with no recall, Ms. Moore actively tried to find out from the employer when she could return. Mr. Bevilacqua's indication that this might happen "in a week or so" was wishful thinking.

[57] Before turning to the appropriate remedy, Ms. Moore submitted several previous adjudication decisions. Concerning the scope of corrective action, the preliminary decision *Kreway v. Canada Customs and Revenue Agency*, 2004 PSSRB 33, was cited as indicating that an adjudicator, hearing a WFA case, has authority to fashion an appropriate remedy and is not bound by the corrective action specified in the initiating grievance:

. . .

> *[25] . . . I am not bound by the requested corrective action as stated in the grievance. Rather, I can fashion a remedy I believe appropriate if I should find a violation of the collective agreement. In doing so, I would have to be mindful of whatever prohibitions exist in the PSSRA or elsewhere.*

. . .

[58] In his final decision *Kreway v. Canada Customs and Revenue Agency*, 2004 PSSRB 172, the adjudicator emphasizes the critical obligation of the employer to provide notice of affected status as soon as possible. In that decision, there had been a six-month delay between the time at which the WFA situation took effect and the receipt by the grievor of a written notice:

. . .

> *[61] The provisions of the WFA Appendix entitle affected employees to receive a letter advising them that their services are no longer required (section 1.1.6). This letter creates certain options for the employee and, on November 1, 2001, Mr. Kreway did not receive such a letter. He was entitled to receive one and, therefore, the employer violated the provisions of the collective agreement.*
>
> . . .
>
> *[63] Had the employer adhered to the collective agreement, this letter would have been written in November 2001. The review the employer made of vacant equivalent positions was done in May 2002. What it should have done, in my view, was review the vacancies as they existed in November 2001, then write Mr. Kreway the letter pursuant to the WFA provisions.*
>
> . . .
>
> [Emphasis in the original]

[59] *Chevrette v. Treasury Board* (*Canadian Grain Commission*), PSSRB File No. 166-02-25375 (1995) (QL), is a case involving grain inspectors at the CGC and a WFA situation generated by a decline in grain shipment volumes. In that case, full-time indeterminate employees were designated "off-duty" by a notice in writing, posing the question of whether the WFA Directive applied. The adjudicator did not challenge the employer's right to invoke off-duty status but held that the employer's notice to the grievor of this status did nonetheless trigger the application of provisions of the WFA Directive:

. . .

> *From the moment the employer decides to adjust the work force and declare an employee affected due to a lack of work, the Directive has one universal application. In Mr. Chevrette's case, the CGC experienced a lack of work and Mr. Chevrette was affected. Furthermore, the employer informed him that he was without work from February 1, 1993 onwards. Thus, under the terms of the Directive, Mr. Chevrette was declared affected and surplus by letter on January 15, 1993 (Exhibit 3). Under the terms of this same Directive, the CGC could rescind this declaration (see the definition of surplus employee). Thus, the employer had to provide him with official notice and respect all the time limits provided for in the Directive. Moreover, Mr. Chevrette was*

> *entitled to the reasonable job offer and all the other advantages provided for in this Directive. In conclusion, the employer was required to respect the provisions of the Directive and continue providing Mr. Chevrette with the salary and benefits that are provided for in the relevant collective agreement.*
>
> . . .

[60] In *Simmons v. Treasury Board* (*Forestry Canada*), PSSRB File No. 166-02-23843 (1994) (QL), the adjudicator found that an employee who had not been provided retraining in a WFA situation, contrary to the provisions of the collective agreement, had suffered as a result of the employer's decision and was entitled to a remedy. The grievance was upheld in part and the employer was ordered to pay an amount equal to 24 months' salary.

[61] Concerning remedy, Ms. Moore's grievance asks that the employer apply Appendix T and that she ". . . be made whole." To achieve this end, Ms. Moore should be awarded all salary and benefits required by the collective agreement for each shipping season, starting April 1, 2002, and continuing to date, less any monies already received as part of the voluntary WFA package. This position assumes that, had Ms. Moore received an "affected letter" on April 1, 2002, as required, she would have been provided with a reasonable job offer and would today continue to be employed in the public service as per the fundamental objective of Appendix T. For purposes of fashioning the precise remedy, I am asked to remain seized of the matter.

[62] In the event that I do not agree to this award, other options are available, including a two-year paid training period.

[63] With respect to Ms. Moore's later decision to volunteer for WFA, this must be interpreted as a good-faith action on her part to do what she could to change her circumstances and protect her rights. Her actions cannot be held to prejudice what should have happened on April 1, 2002.

<u>For the employer</u>

[64] The employer characterizes the case as a relatively straightforward matter, solely involving the interpretation of the collective agreement. The employer accepts Ms. Moore's identification of the most basic issue: does the employer's failure to

provide notice to Ms. Moore of her affected status by no later than April 1, 2002, constitute a violation of Appendix T?

[65] First and foremost, the employer submits that it is crucial to determine whether or not the WFA provisions of the collective agreement were in fact triggered in this case. In its submission, nothing supports this contention.

[66] I was referred to a recent decision of the Federal Court of Appeal in *Public Service Alliance of Canada v. Canada* (*Canadian Food Inspection Agency*), 2005 FCA 366, which, the employer argues, supports the requirement to examine the conditions precedent as the initial step in determining whether the provisions of Appendix T apply. Was a WFA situation triggered in the first place?

[67] Ms. Moore contends that the employer's failure to recall her is equivalent to a decision that her services were no longer required. Is this so? While the definition of a WFA in Appendix T (*supra*) does not use the term "permanent" as a qualifier, it is clear that the parties did not intend that definition to apply to a temporary situation. The reference in the definition to a determination that services ". . . will no longer be required beyond a specified date. . . ." can only contemplate a permanent termination. While acknowledging that it may never be possible to decide that services ". . . will no longer be required. . . ." on an absolutely permanent basis (i.e., over a 20-year period), it is surely not possible to interpret a temporary situation as meaning that services ". . . will no longer be required beyond a specified date. . . ." in the same permanent sense.

[68] The evidence shows that the employer never in fact made a decision that the services of the grievor ". . . will no longer be required. . . ." Rather, the employer early in 2002 came to the opposite conclusion. The fact, as indicated by Mr. Stuart, that the employer decided that it was necessary to monitor the volume situation on a week-to-week basis after receiving warnings in January and February 2002 that grain volumes might be very low at the outset of the shipping season demonstrates that the employer was not in a position at that time to conclude that Ms. Moore's services ". . . will no longer be required beyond a specific date. . . ."

[69] The evidence indicates that, prior to 2002, the grievor had not been called back to work from seasonal lay-off until mid- or late April on three occasions (Exhibit G-7). Taking to its logical conclusion Ms. Moore's position that an "affected letter" should have been issued to her in 2002, by no later than April 1, 2002, she should have been

subject to a WFA on each of these previous occasions. Indeed, if Ms. Moore's position is correct, it sets the dangerous precedent that, whenever an indeterminate seasonal employee is not recalled to work on the day on which she expects to return, the employer should provide to that employee an "affected notice" and indicate that she will be declared surplus. In the case at hand, application of this approach would mean that all 16 indeterminate seasonal employees in the Thunder Bay region affected by the recall problem should have been declared surplus by April 1, 2002, their positions eliminated, and each provided with a reasonable job offer, if possible, or offered a choice of the remaining three WFA options.

[70] Evidence shows that most, although not all, indeterminate seasonal employees at Thunder Bay were eventually called back during the course of the 2002-2003 shipping season. The testimony of the employer's two witnesses confirms that the employer expected that these employees would in fact be recalled.

[71] Noting the argument that Ms. Moore reasonably expected to be recalled in April 2002 for a full shipping season, the employer challenged the definition of "season" underlying this expectation. In Ms. Moore's original letter of offer of a full-time indeterminate seasonal position, the "season" is not set. Nothing in this letter guarantees a certain number of hours or days of work each shipping season. To the contrary, the letter states that "[y]our period of employment this season . . . may be for a shorter or longer period depending on the availability of work. . . ." (Exhibit E-1).

[72] Appendix M of the collective agreement establishes specific hours of work. Clause 25.01 of that appendix provides further indication that the collective agreement did contemplate the possibility that employees may not have set hours by indicating that there is no guarantee of minimum or maximum hours:

> *APPENDIX "M"*
>
> *HOURS OF WORK FOR EMPLOYEES IN THE PRIMARY PRODUCTS INSPECTION (PI) GROUP*
>
> ***25.01*** *An employee's scheduled hours of work shall not be construed as guaranteeing the employee minimum or maximum hours of work.*
>
> . . .

[73] Concerning the competition process used in the spring of 2002 to determine the subsequent order of indeterminate seasonal employee recalls and lay-offs, the employer contends that nothing in the PSC's Final Investigation Report evaluating this process suggests that the employer could not proceed with a reverse order of merit determination in such circumstances. The PSC's Final Investigation Report only finds that the specific approach used by the employer to determine the reverse order of merit was flawed. In this regard, *Brescia v. Canada (Treasury Board)*, 2005 FCA 236, a case also involving the CGC, confirmed the power conferred on the employer to place employees on off-duty status without pay. Further, the decision found no statutory reason to challenge a protocol for the subsequent recall of employees based on alphabetical order of last names. The employer suggests that this indicates that it does have latitude to find a way of making the hard decision about which employees are to be recalled and when.

[74] An apparent central concern underlying Ms. Moore's grievance is to know what benefits or protections apply in a situation where indeterminate seasonal employees on seasonal lay-off are not recalled to work when they normally expect to return to work or when they have been called back in previous years. The employer suggests that this is a matter for collective bargaining and not for grievance adjudication. The parties to the collective agreement are free to negotiate benefits or protections for seasonal employees in such circumstances, if the need is accepted.

[75] The employer does not suggest that the provisions of Appendix T cannot by definition apply to indeterminate seasonal employees, only that the situation in this case does not trigger a WFA situation. The requirement for indeterminate seasonal employees to be covered by the provisions of Appendix T is the same as for full-time indeterminate employees: there must be a determination that services ". . . will no longer be required beyond a specific date. . . ." If the employer reasonably expects that services will be required, as is the case here, then the provisions of Appendix T are not triggered.

[76] The employer cautions against the temptation to look retrospectively at all of what subsequently happened over the course of the 2002-2003 shipping season to decide the issue. The logic of the grievance and Ms. Moore's argument means that the adjudicator must look at the situation as it existed on April 1, 2002. The adjudicator must place himself in the position of the employer on April 1, 2002, and then

determine whether the employer, at that moment, should have declared that it no longer required the services of the grievor.

[77] The adjudicator must also distinguish between the two separate situations described in the evidence. First, the particular circumstances affecting the recall of indeterminate seasonal employees in the spring of 2002 and what managers expected to be a temporary slowdown of work. Second, the "overall situation" where the employer was compelled to undertake a permanent staff reduction in view of work volume trends. One is a short-term matter not involving Appendix T, the other is very much a long-term matter and triggers Appendix T.

[78] In sum, examining all of the evidence as well as the language of the collective agreement, the employer argues that I must dismiss the grievance on the grounds that the provisions of Appendix T were not triggered in the case at hand. There was no determination that the services of Ms. Moore ". . . will no longer be required beyond a specific date. . . ."

[79] Should I disagree, the employer argues that the issue of a remedy is moot. There is no evidence to show that Ms. Moore would have received anything different than what she did receive by opting for the voluntary work force reduction in May 2002, had an affected notice letter been sent to her on April 1, 2002, or had her position ultimately been declared surplus in January 2003. The result, for her, would have been the same benefits.

[80] The employer submits that the burden of proof to justify a remedy rests with the grievor. Given Ms. Moore's contention that a reasonable job offer should have been made to her on April 1, 2002, she must lead evidence to show that a reasonable job offer could have been made on or about April 1, 2002. Under the collective agreement, the employer is not obligated to make a reasonable job offer. The deputy head must know or be able to predict, as demonstrated through evidence of the decisions taken at the time, that work is available for which a reasonable job offer can be made. In this case, if the adjudicator is to grant the remedy sought by the grievor, he must have heard evidence to this effect. No evidence was submitted of this kind, and it cannot simply be assumed that a reasonable job offer should have been possible in the circumstances. The argument that it can be inferred that some jobs were in fact available from Mr. Bevilacqua's statement to the effect that there were "not sufficient positions to make reasonable job offers to all employees" does not automatically lead

to the conclusion that the employer could have or should have made an offer to Ms. Moore.

[81] Given that no reasonable job offer could have been made to Ms. Moore on April 1, 2002, because of the lack of sufficient opportunities in view of the number of indeterminate seasonal employees affected, she would still at that time have been faced with the same remaining WFA options that she later considered in the context of the voluntary reduction exercise. The employer suggests that Ms. Moore can be reasonably expected to have preferred the same option reacting to an April 1, 2002, notice as she later selected in the voluntary scenario. She would have received no additional benefits. There is, moreover, no submission before the adjudicator that Ms. Moore did not receive all of the appropriate benefits once she had chosen the option set out in paragraph 6.3.1(c)(ii) of Appendix T. In short, the grievor has not demonstrated that, had a work force reduction been initiated on April 1, 2002, she would have received anything more under Appendix T than what she actually received. In this sense, the issue of remedy is moot.

[82] Turning to the question of the 120-day notice period, the employer argues that the collective agreement does not require that the employee be paid for these days. This period only represents the length of time that an employee must be given to consider the available options under Appendix T. Whether or not the employee should be paid for any or all of these days depends on whether the employee actually worked or not. The basic principle that employees are paid for time worked applies. Neither Ms. Moore's letter of offer nor the collective agreement specifies that seasonally laid-off employees are entitled to receive pay for the 120-day period in question. We cannot assume that the parties to the collective agreement envisioned the situation in this case when they constructed Appendix T. The issue of pay during a notice period for seasonally laid-off employees, then, must be a matter for future collective bargaining.

[83] The employer closed its argument by distinguishing the case law cited by Ms. Moore. Significantly, most of those cases involve situations where the employer agrees that a WFA has been triggered. The opposite is true in Ms. Moore's case. The employer also cautioned that *Chevrette* (*supra*) must be read in conjunction with the much more recent Federal Court of Appeal's ruling in *Brescia* (*supra*), and that leave to

appeal the latter to the Supreme Court has just been denied ([2005] S.C.C.A. No. 401 (QL)).

[84] In summary, the employer concludes that no WFA situation was triggered in respect of Ms. Moore on or about April 1, 2002. If this is not the case, the issue of remedy is moot as there would not have been a reasonable job offer on that date and Ms. Moore subsequently did receive the same benefits under Appendix T to which she would have been entitled on April 1, 2002, given that no reasonable job offer could be made.

Reasons

[85] Ms. Moore alleges in her grievance that the employer violated the provisions of Appendix T of her collective agreement by not recalling her to duty from seasonal lay-off status on April 1, 2002. As corrective action, her grievance asks that the provisions of Appendix T be applied and that she ". . . be made whole."

[86] The parties agree on the basic issue that I must determine in this matter: did the employer's failure to recall the grievor to work at the start of the 2002-2003 shipping season trigger a WFA situation within the meaning of Appendix T?

[87] In order to answer this question, the employer contends that I must determine from the evidence whether the conditions precedent existed for a WFA situation: does the evidence establish that the situation on April 1, 2002, is a WFA, as defined in Appendix T? If there was no WFA situation on or by this date, then the provisions of Appendix T are not triggered and no violation of the collective agreement can have occurred as alleged.

[88] In this regard, the employer submits that Ms. Moore has the onus of showing, on a balance of probabilities, that the evidence establishes the existence of a WFA situation on April 1, 2002, as defined in Appendix T. If Ms. Moore meets this onus, then attention can turn to whether and how the employer violated Appendix T and how these violations should be remedied. On the general principle of she "who alleges must prove", I concur that Ms. Moore has the onus of proof in this case.

[89] I note that the recent Federal Court of Appeal's decision in *Public Service Alliance of Canada* (*supra*) supports the approach advocated by the employer. In that decision, the Federal Court of Appeal evaluates whether there is a violation of the WFA

provisions of the collective agreement at issue by first determining whether the conditions precedent for a WFA, as defined by the collective agreement, exist. Upholding an original determination by the Public Service Staff Relations Board, the Court finds at paragraph 24 that a block transfer of positions from the Canadian Food Inspection Agency (CFIA) to the Treasury Board did not trigger the WFA protections in the collective agreement because the president of the CFIA had not made a decision ". . . that the services of one or more indeterminate employees will no longer be required beyond a specified date. . . ." as required under the collective agreement definition of an "employment transition". In other words, the defined conditions precedent for a WFA did not exist.

[90] The facts examined in *Public Service Alliance of Canada* (*supra*) are different than those before me, but I believe that the approach adopted by the Federal Court of Appeal applies here as well. Does the evidence in this case show that a WFA situation was triggered, within the meaning of the applicable definition in Appendix T?

[91] Appendix T defines a WFA as follows:

> . . .
>
> ***General***
>
> . . .
>
> ***Definitions***
>
> . . .
>
> ***Work force adjustment*** *. . . - is a situation that occurs when a deputy head decides that the services of one or more indeterminate employees will no longer be required beyond a specified date because of a lack of work, the discontinuance of a function, a relocation in which the employee does not wish to relocate or an alternative delivery initiative.*
>
> . . .

[92] The novel element of this case, which poses a challenge in interpreting the collective agreement, is the fact that Ms. Moore works on a seasonal basis and was on seasonal lay-off status when a WFA situation was allegedly triggered. Previous adjudication decisions submitted in argument typically address situations where the employees affected by the WFA have full-time indeterminate status. It is, as a result,

difficult to draw from these decisions findings that apply easily to indeterminate seasonal employees.

[93] The provisions of Appendix T do seem better fashioned to address the situation of full-time indeterminate employees. When the protections and benefits of Appendix T are triggered, full-time indeterminate employees are normally working and receiving pay. Indeterminate seasonal employees could also find themselves facing a WFA situation when they are at work and being paid during the "season", but what happens if a WFA situation occurs outside their season of work? How, for example, does the deputy head know precisely when their services are no longer required? How does the employer administer the 120-day notice period given to employees to decide among WFA options? When does it begin? Is this period paid or not?

[94] Relative to the public service population as a whole, the size of the indeterminate seasonal employee work force is not large. It is conceivable that the parties to the collective agreement may not have put their minds explicitly to WFA situations involving indeterminate seasonal employees in seasonal lay-off status. This is not to be taken, however, as suggesting that Appendix T does not or cannot apply to indeterminate seasonal employees, whether during their "season" of work or during an "off-season". On this point, there appears to be no issue between the parties.

[95] What is in contention is whether the evidence in this case reveals that a WFA was triggered on April 1, 2002. The grievor was very precise on the issue of timing. She argued that the employer knew in January 2002, or by early February 2002, that grain shipment volumes for the upcoming shipping season were problematic and would have a serious impact on the employment of indeterminate seasonal employees. She contended that the employer should, as a result, have notified her by April 1, 2002, at the very latest, that she was affected by a WFA situation. She goes on to construct her approach to defining the required remedy by outlining what should have occurred, beginning on April 1, 2002. The logic of Ms. Moore's argument thus requires that I determine whether there was a violation of the collective agreement on April 1, 2002, or perhaps by April 1, 2002. The employer also argues that this is exactly what I must do; that I must examine the situation faced by the employer on April 1, 2002, and decide whether, at that time, the employer failed to act in compliance with Appendix T.

[96] A substantial portion of the testimony led in this case involves events which occurred after April 1, 2002. Two lines of subsequent fact evidence, in particular, were the focus of considerable testimony both by the grievor and by the employer's witnesses: the process by which the employer later designed and implemented a reverse order of merit competition to determine the order of recall and lay-off of indeterminate seasonal employees for the 2002-2003 shipping season, and the WFA adjustment process announced by the employer on May 2, 2002, for which Ms. Moore subsequently volunteered. Regarding the former, Ms. Moore also placed before me the PSC's Final Investigation Report, which examined the conduct of the reverse order of merit exercise in the spring of 2002 and its impact.

[97] The parties suggest that this evidence provides context for understanding the situation faced by the employer and Ms. Moore in the 2002-2003 shipping season. I accept this suggestion but, at the same time, believe that I must be careful that knowledge of what happened after April 1, 2002, does not cloud my understanding of the situation as it existed on or about April 1, 2002. Unless the evidence about subsequent events is essential or decisive for establishing that a violation of the collective agreement occurred on or about April 1, 2002, it does remain contextual and of limited value.

[98] I have carefully examined all of the evidence adduced by both parties as well as their arguments, all ably presented. For the reasons outlined below, I do not believe that Ms. Moore has demonstrated, on a balance of probabilities, that a WFA occurred on or by April 1, 2002, within the definition of a WFA in the Appendix T.

[99] For the purposes of this case, the contractual definition of WFA contains two key elements: a decision by the deputy head that ". . . the services of one or more indeterminate employees will no longer be required beyond a specified date. . . .", and the existence of ". . . a lack of work. . . ." or ". . . the discontinuance of a function. . . ." to which the deputy head's decision is a reaction.

[100] There is undisputed evidence in this case that the deputy head did make at least one decision during the 2002-2003 shipping season that ". . . the services of one or more indeterminate employees will no longer be required beyond a specified date. . . ." This was the decision announced on May 2, 2002, to effect a permanent reduction in Thunder Bay staff levels, a decision that led to a call for volunteers by Mr. Bevilacqua on May 17, 2002, to which Ms. Moore responded positively. There is no compelling

basis in the evidence, however, to find that this decision is why Ms. Moore was not recalled from seasonal lay-off on April 1, 2002. Indeed, in describing the reasons that led eventually to the May 2, 2002, WFA announcement, Mr. Stuart testified that the objective was, at least initially, to have fewer full-time indeterminate employees. With analysis, a target of eight reductions was established by the employer.

[101] The logic of the evidence suggests, in this regard, that having indeterminate seasonal employees was not the underlying problem that triggered the May 2, 2002, WFA announcement. The recent annual practice of closing terminal elevators from January through March had combined with the secular decline in grain volumes over the years to call into question, instead, the number of full-time indeterminate employees required by the CGC in the Thunder Bay region. As for indeterminate seasonal employees, the evidence suggests that they continued to form part of the employer's preferred flexible staffing model in early 2002. The longer-term problem confronting the employer was to be addressed primarily by reducing numbers elsewhere (among full-time indeterminate employees). That there were indeterminate seasonal employee volunteers in the eventual, expanded WFA exercise does not alter the evidence that the initial WFA objective was to make reductions in full-time indeterminate employees.

[102] It is difficult to treat as completely distinct the staffing issue addressed by the May 2, 2002, WFA announcement and the decision not to recall indeterminate seasonal employees at the beginning of the shipping season on April 1, 2002. To some extent, both reflect dimensions of an overall volume shortage situation with related short-term and longer-term elements. Nonetheless, there is in the testimony of Mr. Stuart and Mr. Bevilacqua an indication that the processes were conceived of and did operate separately. Regarding the latter process of indeterminate seasonal employee recall and lay-off, the evidence suggests that the employer probably did hold a belief, in the early months of 2002, that the problem of recalling employees from seasonal lay-off was expected to be temporary. This may have been wishful thinking, but that is not the point. The employer proceeded with a reverse order of merit competition in the apparent belief that some or all indeterminate seasonal employees would be recalled during the shipping season. It is hard to explain why the employer would devote the time and energy required to conduct such a difficult exercise were there not such a pre-existing belief. When exactly recalls would occur was not known

with any precision in the first part of the year. It depended on grain shipment volumes, the evidence of which was being monitored on a week-to-week basis.

[103] To accept the grievor's argument to the contrary, there should be evidence to establish, on a balance of probabilities, that the employer did know on or about April 1, 2002, that Ms. Moore would not be recalled, that the situation as it affected her was not temporary and that, in reality, her services ". . . will no longer be required beyond a specified date. . . ." I have concluded that I do not have convincing evidence before me to this effect.

[104] Ms. Moore contends that the employer's inaction in not recalling her on April 1, 2002, from seasonal lay-off should be construed as equivalent to a decision that her services were no longer required. I do not dismiss as unreasonable the underlying proposition that an employer's inaction could potentially be interpreted in some specific circumstances as equivalent to a decision triggering a WFA situation. Ms. Moore's argument points to an obvious, though in this case, hypothetical question: how long could the employer continue with its decision not to recall an indeterminate seasonal employee such as Ms. Moore before what it calls a "temporary situation" in fact becomes a more permanent situation that could qualify as a WFA? If, for example, I was asked to determine the matter at a point in time where Ms. Moore had not been recalled for the whole shipping season of 2002-2003, or not after three or four months of the shipping season, might my decision be different? Perhaps so, but I am not called upon to assess a hypothetical question. My task is to determine the real situation on or about April 1, 2002. At this point, the evidence shows, on a balance of probabilities, that the recall situation might be temporary, or at least was plausibly thought by the employer to be temporary.

[105] The employer has pointed out that there were three previous years where Ms. Moore was not recalled to work by April 1, 2002 (see Exhibit G-7). In each of these cases, Ms. Moore was subsequently recalled. In considering what the grievor could have reasonably expected at the outset of the 2002-2003 shipping season, this past record should at least be seen as raising the possibility that there might be some recall delay beyond April 1, 2002, without necessarily triggering a WFA situation. There is, furthermore, no evidence that Ms. Moore ever received a guarantee from the employer that her work would invariably commence on the first day of April. Her letter of offer

indicates to the contrary that her period of employment ". . . may be for a shorter or longer period depending on the availability of work. . . ." (Exhibit E-1).

[106] Still, the grievor's expectation concerning the date on which a seasonal recall would take effect does not determines whether the definition of a WFA in Appendix T has been met; what does is what the employer understood the situation to be on April 1, 2002, and did or did not do in response.

[107] As discussed above, the evidence does not, in my view, reveal a decision by the deputy head by April 1, 2002, that Ms. Moore's services ". . . will no longer be required beyond a specified date. . . ." The words "beyond a specified date" in this definition must be given meaning. They add force to the argument that the "lack of work", which legitimately triggers protections and benefits under the WFA definition in Appendix T, was not intended by the parties to the collective agreement to be temporary. The principal theme and purpose of Appendix T, as argued by Ms. Moore, is to find an affected employee continuing employment elsewhere in the public service. It seems to me that this involves a presumption that, in a WFA situation, the employee's existing position is in fact disappearing, is likely to disappear or is at some significant risk of disappearing. The determination made by the employer to trigger a WFA situation is, after all, one which can eventually result in an action to sever the employment relationship permanently. Ms. Moore has not shown that the employer was contemplating scenarios on April 1, 2002, that would permanently eliminate Ms. Moore's position or permanently lay Ms. Moore off.

[108] *Brescia* (*supra*) is of some relevance here. The primary issue in that case is the legality of a decision by the employer, the CGC in that case as well, to place a group of 69 full-time indeterminate employees located at Thunder Bay on "off-duty status" starting January 10, 2000, ". . . with an estimated return date of on or before April 3, 2000." The employer's action was taken in response to a CWB decision not to ship grain by rail through Thunder Bay in the winter of 2000. While no issue concerning the interpretation of the collective agreement and the provisions of Appendix T is canvassed by the Federal Court of Appeal, the decision of the majority does focus on the temporary nature of the employer's action and holds that the "lay-off" features of the *PSEA* did not apply, in part, because the employer's action was not permanent and there was no resulting termination of employment. The decision of the majority of the Court goes on to affirm the authority of the employer to take the

temporary action of placing full-time indeterminate employees on "off-duty status". That decision does appear to pose questions about the value of *Chevrette* (*supra*).

[109] It is hard not to be struck by some of the similarities in the situation examined in *Brescia* (*supra*) and the circumstances at play in this case. In *Brescia (supra*), the temporary quality of the employer's decision to place full-time indeterminate employees on "off-duty status" is significant in determining that a "lay-off" has not occurred within the meaning of the *PSEA.* Is it unreasonable to propose by analogy in this case that the decision not to recall indeterminate seasonal employees on April 1, 2002, must be shown to be more than just temporary before it is found that a WFA has been triggered? I think not, though I understand clearly that the legal issue in *Brescia* (*supra*) is different.

[110] I draw reassurance that the situation on April 1, 2002, was temporary from the evidence of what subsequently occurred, although this testimony does not determine the matter. Ms. Moore was evaluated by the employer in May of 2002 in the context of the reverse order of merit competition undertaken to establish the order of recall and lay-off of indeterminate seasonal employees. The evidence indicates that most employees on the resulting list were recalled to work, some starting in June. Had Ms. Moore placed higher in the reverse order of merit exercise, it is at least possible, if not probable, that she too would subsequently have been recalled in the course of the 2002-2003 shipping season.

[111] Continued permanent employment for Ms. Moore ceased to be a possibility once Ms. Moore volunteered for WFA and was accepted as a volunteer by the employer. In the PSC's Final Investigation Report, there is a finding that what happened to Ms. Moore over the course of the 2002-2003 shipping season was ". . . akin to a lay-off. . . ." I do not have any reason nor any jurisdiction to question this finding, although I am not sure exactly what ". . . <u>akin to</u> a lay-off. . . . [emphasis added]" actually means. The evidence is clearly not determinative, however, that the situation on April 1, 2002, was a lay-off or that the employer had by then decided that the services of Ms. Moore ". . . will no longer be required beyond a specified date. . . ."

[112] Having determined that the employer had not decided on April 1, 2002, that the services of Ms. Moore ". . . will no longer be required beyond a specified date. . . .", I must find that the situation described in this grievance does not meet the definition of a WFA in Appendix T, and that no WFA was triggered on April 1, 2002. The grievance,

therefore, fails. As a result, there is no need to consider the issues raised in argument concerning the application of the other features of Appendix T or the fashioning of a remedy.

[113] For all of the above reasons, I make the following order:

(The Order appears on the next page)

Order

[114] The grievance is denied.

March 21, 2006

Dan Butler,
adjudicator