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Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Bargaining Agents

and

TREASURY BOARD OF CANADA

Employer

Indexed as
Public Service Alliance of Canada and Professional Institute of the Public Service of Canada v. Treasury Board of Canada

In the matter of policy grievances referred to adjudication

REASONS FOR DECISION

Before: Michael Bendel, adjudicator

For the Public Service Alliance of Canada: Andrew Raven, counsel

For the Professional Institute of the Public Service of Canada: Karyn Ladurantaye, regional representative

For the Employer: Richard E. Fader, counsel

Heard at Ottawa, Ontario,
January 15, 2013.

The grievances

[1] The Public Service Alliance of Canada (PSAC) and the Professional Institute of the Public Service of Canada (PIPSC) ("the bargaining agents") have presented separate policy grievances challenging the manner in which the Treasury Board ("the employer") has been applying the "Workforce Adjustment Appendix" (in the case of the PSAC) and the "Workforce Adjustment Agreement" (in the case of the PIPSC) as regards the subject of "alternation." The Workforce Adjustment Appendix forms part of the collective agreements between the PSAC and the employer for the PA, SV, TC, EB and FB bargaining units, which, respectively, have expiration dates of June 20, 2014, August 4, 2014, June 21, 2011, June 30, 2014, and June 20, 2011. As for the Workforce Adjustment Agreement, it is incorporated in all the collective agreements between the PIPSC and the employer.

[2] While greater detail on alternation will be given later in this decision, it would perhaps be helpful at this stage to give a brief general explanation of alternation. The Workforce Adjustment Appendix and the Workforce Adjustment Agreement (referred to collectively in this decision as "the WFAA") establish certain procedures the employer must follow, in every workforce adjustment situation, to maximize employment opportunities for employees affected and reduce the impact of workforce adjustment on individual employees. One of the possibilities provided for in the WFAA is alternation, a process by which an employee who has been identified for possible lay-off ("the opting employee") agrees to change places with a similarly qualified employee who has not been so identified ("the alternate"). With this switching of positions, the two employees stand in each other's shoes as regards continuity of employment and as regards measures to cushion the impact of the lay-off. The advantages of alternation to the two employees are obvious: the opting employee continues his or her career in the same way as if he or she had simply been transferred to another position, and the alternate receives a financial incentive for vacating the position. In principle, an alternation imposes no additional costs on the employer, while not detracting from its objective of reducing the size of its workforce.

[3] All the parties agreed that, since the two bargaining agents' versions of the WFAA were essentially identical and since the two grievances raised very similar issues, the grievances should be consolidated for the hearing. They further agreed that, in the interests of facilitating the resolution of the grievances, the adjudicator would be asked, in the first instance, to rule on certain questions having to do with the

interpretation of the WFAA. Specifically, they agreed to put the following questions to the adjudicator:

> 1. *Is the employer required under the WFAA to establish an alternation system or establish systems and processes to facilitate alternation opportunities?* [Referred to in this decision as "Question 1"]
>
> 2. *Is it a violation of the WFAA for a department to indicate to employees that it is not yet ready to consider alternation requests or is there a reasonable period for departments to get their practices and procedures in place? In cases where a department is deemed to be in violation what impact does compliance at a later date have?* ["Question 2"]
>
> 3. *What is the meaning of "participate" in paragraph 6.2.1 of the WFAA?* ["Question 3"]
>
> 4. *Can the Deputy Head deny approval for alternations into a non-affected position which he/she has no intention of filling because of for example:*
>
> > a. *an expected retirement or resignation regardless of whether the employee has made their intention [sic] known or not; or*
> >
> > b. *a future reorganization or downsizing?* ["Question 4"]

As they relate to these four questions, the two versions of the WFAA are identical.

[4] Numerous provisions of the WFAA were referred to in argument. The following provisions, drawn from the Workforce Adjustment Appendix, were the main ones referred to:

> . . .
>
> ***Objectives***
>
> *It is the policy of the Employer to maximize employment opportunities for indeterminate employees affected by workforce 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.*
>
> . . .

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 workforce adjustment situation.*

Alternation *. . . occurs when an opting employee (not a surplus employee) who wishes to remain in the Core Public Administration exchanges positions with a non-affected employee (the alternate) willing to leave the Core Public Administration with a transition support measure or with an education allowance.*

. . .

Laid-off person *. . . is a person who has been laid-off pursuant to subsection 64(1) of the PSEA and who still retains an appointment priority under subsection 41(4) and section 64 of the PSEA.*

. . .

Opting employee *. . . is an indeterminate employee whose services will no longer be required because of a workforce adjustment situation, who has not received a guarantee of a reasonable job offer from the deputy head and who has one hundred and twenty (120) days to consider the options in section 6.3 of this Appendix.*

. . .

Surplus employee *. . . is an indeterminate employee who has been formally declared surplus, in writing, by his or her deputy head.*

. . .

Part I

Roles and Responsibilities

1.1 Departments or organizations

1.1.1 *Since indeterminate employees who are affected by workforce adjustment situations are not themselves responsible for such situations, it is the responsibility of departments or organizations to ensure that they are treated equitably and, whenever possible, given every reasonable*

opportunity to continue their careers as public service employees.

1.1.2 *Departments or organizations shall carry out effective human resource planning to minimize the impact of workforce adjustment situations on indeterminate employees, on the department or organization, and on the public service.*

1.1.3 *Departments or organizations shall establish workforce adjustment committees, where appropriate, to manage the workforce adjustment situations within the department or organization.*

1.1.4 *Departments or organizations shall, as the home department or organization, cooperate with the PSC and appointing departments or organizations in joint efforts to redeploy departmental or organizational surplus employees and laid-off persons.*

1.1.5 *Departments or organizations shall establish systems to facilitate redeployment or retraining of their affected employees, surplus employees, and laid-off persons.*

. . .

1.1.17 *Home departments or organisations shall appoint as many of their own surplus employees or laid-off persons as possible or identify alternative positions (both actual and anticipated) for which individuals can be retrained.*

. . .

1.1.30 *Departments or organizations acting as appointing departments or organizations shall cooperate with the PSC and other departments or organizations in accepting, to the extent possible, affected, surplus and laid-off persons from other departments or organizations for appointment or retraining.*

. . .

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 one hundred and twenty (120) day to consider the three options below before a decision is required of them.*

6.1.3 *The opting employee must choose, in writing, one (1) of the three (3) options of section 6.3 of this Appendix within the one hundred and twenty (120) day window. The employee cannot change options once he or she has made a written choice.*

6.1.4 *If the employee fails to select an option, the employee will be deemed to have selected Option (a), twelve (12) month surplus priority period in which to secure a reasonable job offer, at the end of the 120-day window.*

. . .

6.2 Alternation

6.2.1 *All departments or organizations must participate in the alternation process.*

6.2.2 *An alternation occurs when an opting employee who wishes to remain in the Core Public Administration exchanges positions with a non-affected employee (the alternate) willing to leave the Core Public Administration under the terms of Part VI of this Appendix.*

6.2.3 *Only an opting employee, not a surplus one, may alternate into an indeterminate position that remains in the Core Public Administration.*

6.2.4 *An indeterminate employee wishing to leave the Core Public Administration may express an interest in alternating with an opting employee. Management will decide, however, whether a proposed alternation is likely to result in retention of the skills required to meet the ongoing needs of the position and the Core Public Administration.*

6.2.5 *An alternation must permanently eliminate a function or a position.*

6.2.6 *The opting employee moving into the unaffected position must meet the requirements of the position, including language requirements. The alternate moving into the opting position must meet the requirements of the position except if the alternate will not be performing the duties of the position and the alternate will be struck off strength within five (5) days of the alternation.*

6.2.7 *An alternation should normally occur between employees of the same group and level. When the two (2)*

positions are not in the same group and at the same level, alternation can still occur when the positions can be considered equivalent. They are considered equivalent when the maximum rate of pay for the higher position is no more than six-per-cent (6%) higher than the maximum rate of pay for the lower-paid position.

. . .

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 (12) month surplus priority period in which to secure a reasonable job offer. It is time-limited. Should a reasonable job offer not be made within a period of twelve (12) 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 one hundred and twenty (120) day opting period referred to in 6.1.2 that remains once the employee has selected in writing Option (a).*
>
> *iii. When a surplus employee who has chosen or is deemed to have chosen Option (a) offers to resign before the end of the twelve (12) month surplus priority period, the deputy head may authorize 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 (6) months. The amount of the lump-sum payment for the pay in lieu cannot exceed the maximum of what he or she would have received had he or she chosen Option (b), the transition support measure.*
>
> *iv. Departments or organizations will make every reasonable effort to market a surplus employee within the employee's surplus period within his or her preferred area of mobility.*

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 the purposes of severance pay.*
>
> *or*
>
> *c. Education allowance is a transition support measure (see Option (b) above) plus an amount of not more than ten thousand dollars ($10,000) for reimbursement of receipted expenses of an opting employee for tuition from a learning institution and costs of books and mandatory equipment. . . .*

. . .

Parties' submissions

[5] The bargaining agents maintained, in relation to Question 1, that sections 1.1.5, 1.1.30 and 6.2.1 of the WFAA gave rise to an obligation for the employer to establish an alternation system and to establish systems and processes to facilitate alternation opportunities. According to the bargaining agents, section 1.1.5 should be read as including alternations. Section 1.1.30 should likewise be understood as including an obligation to facilitate alternations. Section 6.2.1 requires all departments or organizations to participate in the alternation process. The primary objective of the WFAA was to attempt to secure continued employment in the federal public service for affected employees, as the former Public Service Staff Relations Board ("the former Board") noted in *Bonia v. Treasury Board (Royal Canadian Mounted Police)*, 2002 PSSRB 88, at para 83.

[6] While the WFAA clearly required departments to establish systems, the Treasury Board, according to the bargaining agents, was obliged to oversee departmental compliance with collective agreements. This obligation, which arose from the role of the Treasury Board under the *Financial Administration Act*, R.S.C. 1985, c. F-11, was recognized in *Panacci v. Attorney General of Canada*, 2010 FC 114. Moreover, the former Board held, in *Public Service Alliance of Canada v. Treasury Board*, PSSRB File Nos. 161-02-791 and 169-02-584 (19960426), that earlier versions of the WFAA envisaged a "partnership role" for the bargaining agents and the Treasury Board as regards alternation. Having signed the collective agreements containing the WFAA, the employer was responsible for ensuring the WFAA was implemented and was answerable for any violations.

[7] On Question 2, the bargaining agents argued that the WFAA would be violated if, after being instructed to implement the WFAA by the employer, a department failed

to do so promptly. It would be for the Public Service Labour Relations Board ("the Board") to determine whether there was a valid explanation for any delay by a department. It would be appropriate for the Board to apply a standard of reasonableness in assessing a department's delay, an approach that would be consistent with *Van der Veen v. Treasury Board (Energy, Mines and Resources)*, PSSRB File No. 166-02-18051 (19890302).

[8] The bargaining agents further argued that there were no provisions in the WFAA that enabled departments to restrict the alternation process to intra-departmental alternations. While the WFAA was silent on the question of alternations between departments, it would be inconsistent with the explicit obligations of departments under the WFAA to read such a restriction into the WFAA. According to the bargaining agents, it should also be held that departments had to act in good faith in assessing whether an opting employee was qualified to alternate into an unaffected employee's position.

[9] The bargaining agents noted that there was a 120-day window under the WFAA for an employee to arrange for an alternation. If a department was not yet ready to consider a requested alternation, according to the bargaining agents, the 120-day period should not start to run until the department was in complete compliance with the WFAA. To hold otherwise would be to reduce an employee's rights under a collective agreement as a result of non-compliance by departments, which could scarcely be justified.

[10] On Question 3, the bargaining agents maintained that the obligation on departments to participate in alternation should be understood as referring to meaningful participation. For example, this required them to ensure that unaffected employees were given an opportunity to make known their desire to alternate, to make information readily available to opting employees, and to respond to alternation requests in good faith, efficiently and reasonably and without regard for factors not explicitly mentioned in the WFAA. This interpretation would be in keeping with the spirit and objectives of the WFAA. It would also be in line with arbitral awards such as *Giant Yellowknife Mines Ltd. v. C.A.S.A.W.* (1990), 15 L.A.C. (4th) 52, which have held that a contractual obligation to consult required meaningful consultation. Moreover, the employer could not avoid its workforce adjustment obligations by showing that it

would be onerous to comply, as was implicit in *Public Service Alliance of Canada v. Canada Customs and Revenue Agency*, 2002 PSSRB 23.

[11] In reply to Question 4, the bargaining agents argued that the adjudicator should hold that the only valid reason for denying an alternation would be where the skills necessary for the position would not be retained. However, the bargaining agents conceded that it might also be legitimate for a department to refuse an alternation request where the alternate had declared an intention to resign or retire at a specified future date, but no other situations would justify the refusal of an alternation request. In particular, a department should not be allowed to refuse a request simply because it had plans for a future reorganization, although it would be reasonable for such a department to alert the opting employee of the risk that the position might be lost in the future.

[12] Counsel for the employer reminded the adjudicator of the basic principles of collective agreement interpretation, as stated for example in Palmer & Snyder, *Collective Agreement Arbitration in Canada*, 4th ed. (2009), at pages 21 to 54. Of particular relevance were the principles (i) that the parties' intent was to be determined by the language of the agreement, (ii) that words were to be given their ordinary meaning, (iii) that collective agreements had to be interpreted as a whole and (iv) that specific provisions took precedence over general ones.

[13] As a general observation, the employer maintained that the alternation process was an "employee-driven" one, not a "top-down" one. Nothing in the WFAA suggested the contrary.

[14] On Question 1, the employer argued that it had no obligation to establish an alternation process. The WFAA created no such obligation. The WFAA specified, in a detailed way, the duties of the different actors, and almost all of the duties were imposed on employees or departments. There was no role for the employer in the alternation process. It was not legitimate to rely on the general objectives of the WFAA to create any obligation in this regard for the employer. As for section 1.1.5, it simply required departments to ". . . establish systems to facilitate redeployment or retraining of their affected employees, surplus employees, and laid-off persons," and it was not legitimate to interpret "redeployment" as being the equivalent of an alternation.

[15] On Question 2, the employer observed that section 6.1.3 of the WFAA gave opting employees a 120-day window to decide between the choices open to them. This was the period within which employees had the opportunity to arrange alternations and have them approved. Management had the responsibility to decide, pursuant to section 6.2.4, whether to approve the alternation. Provided management gave a response within the 120-day window, it was in compliance with the WFAA. It was not required to be in a position to decide on the acceptability of a proposed alternation at the very opening of the window.

[16] The employer further argued in the alternative that, if a department were in violation, the appropriate remedy would be to compensate the employee according to the measure of damages for a breach of contract. This would mean that the adjudicator would order that the employee be put in the situation in which he or she would have been had the contract been faithfully applied. Specifically, the only situation in which a remedy would be available, according to the employer, would be in the case of an employee who opted to remain employed and take the surplus period. If such an employee could demonstrate that a valid alternation request was denied by the department as it did not have practices in place, and if the department did not remedy this failure within the 120-day window, it would be appropriate to give the employee a new 120-day period or until the end of the surplus period (whichever came first) to present an alternation request even though, normally, alternations could not occur during the surplus period.

[17] As regards Question 3, the employer argued that departments' participation in the alternation process simply meant that they had to consider any alternation requests made by opting employees. Their obligation under the WFAA to participate in the alternation process required nothing more of them.

[18] On Question 4, the employer noted that an alternation could occur only between an affected employee and a non-affected employee during the opting period. This reflected the obvious purpose of alternation, which was to provide for continuity of employment for the affected employee and allow for the elimination of a position. A department could therefore not be expected to approve an alternation if it was aware that the position the opting employee was proposing to fill was shortly going to be vacated as a result of an expected retirement or a future downsizing. The objective of the WFAA was to provide for employment continuity, not to allow a "shell game" by

employees. Alternation was conceived as a process to enable departments to retain employees in positions that were expected to continue indefinitely. It would not be effective human resource planning, and would thus be inconsistent with section 1.1.2, to allow an alternation to occur if it would simply lead to a new workforce adjustment situation. Section 1.1.17 of the WFAA required departments to anticipate future conditions. Section 6.2.4 was clearly intended to avoid the absurdity that would result from allowing an opting employee to alternate with an employee whose position would also be eliminated. However, according to the employer, departments could refuse an alternation for this reason only if there were a sufficient degree of certainty about an anticipated resignation or reorganization.

Reasons

[19] I asked the parties, in the course of argument, whether the rules by which the WFAA had to be interpreted were those that applied to collective agreements, to statutes or to something else. I regard the question as important since it is well-established that rules of interpretation differ according to the nature of the document under consideration, even though they will inevitably have much in common with the rules applicable to other categories of documents. As the arbitrator stated in *Sudbury Mine Mill & Smelter Workers, Local 598 v. Falconbridge Nickel Mines* (1955), 6 L.A.C. 56, at 58:

> *. . . [T]here is a fundamental, not to say obvious, distinction between a collective agreement, or any consensual document which purports to embrace the accord of bargaining parties, and a statute which articulates a legislative policy. It may be that similar rules of interpretation or similar kinds of material may be brought to bear on agreements and statutes when one is seeking to expound their meaning, but they have different origins and purposes, and these are weighty factors in assessing meaning.*

In response to my question, the parties all took the position that the WFAA was an integral part of the pertinent collective agreements and that the present dispute had to be treated strictly as an issue of collective agreement interpretation.

[20] In Question 1, as I understand the parties' submissions, they have in effect asked two questions:

(a) What responsibility does the employer, as opposed to departments, have under the WFAA in areas where specific responsibilities are imposed on departments by the WFAA? and

(b) Does the WFAA require the employer (or departments) to establish an alternation system or establish systems and processes to facilitate alternation opportunities?

[21] As regards the relationship between the Treasury Board and departments for the purposes of the *Public Service Labour Relations Act*, I would note that this is a subject that has been examined several times. For example, in an early case before the former Board, *Professional Institute of the Public Service of Canada v. Treasury Board (Economics, Sociology and Statistics Group - Scientific and Professional Category)*, PSSRB File No. 172-02-31 (19710714), the former Board stated the following:

> *One of the problems that legislators have to face in establishing a scheme of collective bargaining for public servants in any jurisdiction is that of identifying the person or body that is to be vested with authority to speak and act on behalf of the employer. Under the* Public Service Staff Relations Act*, the body that has been so identified for those portions of the public service specified in Part I of Schedule A is the Treasury Board. For this purpose, the Treasury Board is the Committee of the Queen's Privy Council for Canada created by section 3 of the* Financial Administration Act*. The relevant subsections of this section read as follows:*
>
> > *(1) There shall be a committee of the Queen's Privy Council for Canada called the Treasury Board over which the President of the Treasury Board appointed by Commission under the Great Seal of Canada shall preside.*
> >
> > *(2) The committee constituting the Treasury Board shall, in addition to the President of the Treasury Board, consist of the Minister of Finance and four other members of the Queen's Privy Council for Canada who may be nominated from time to time by the Governor in Council.*
>
> *It is this Committee that speaks and acts on behalf of - that "represents" - Her Majesty under the* Public Service Staff Relations Act*. But this in no way detracts from the fact that it is Her Majesty who is the employer. . . .*
>
> *. . .*

In keeping with this decision, in my view, the Treasury Board alone is answerable under the legislation for any management violations of collective agreements in the parts of the public service where it is responsible for entering into such agreements on behalf of Her Majesty. It does not escape responsibility to employees or bargaining agents for such violations by delegating functions to departments, whether or not the delegation is referred to in the collective agreement. Responsibility for the performance of obligations cast upon departments in collective agreements is the Treasury Board's. The Treasury Board is the only address for employees or bargaining agents alleging violations of collective agreements. The system established by the *Public Service Labour Relations Act* cannot accommodate the notion that departments have a role under collective agreements that is independent of the Treasury Board's. In my view, it follows that, although the WFAA identifies different tasks and functions for departments, Her Majesty in right of Canada, as represented by the Treasury Board, has sole responsibility under this legislation for management compliance with the WFAA.

[22] Still on Question 1, the bargaining agents claim that the employer is required under the WFAA to establish an alternation system or establish systems and processes to facilitate alternation opportunities. According to the bargaining agents, sections 1.1.5, 1.1.30 and 6.2.1 of the WFAA create this obligation.

[23] The provisions relied on by the bargaining agents were quoted earlier in this decision. I am not persuaded that sections 1.1.30 and 6.2.1 advance the bargaining agents' case. As for section 1.1.30, it does not require the establishment of any systems, but merely requires departments to cooperate with the Public Service Commission and other departments in placing affected employees. While I do not reject the possibility that section 1.1.30 applies to alternations, it certainly does not require departments to establish any systems. Section 6.2.1 likewise does not impose any obligation to establish systems, merely requiring departments to participate in the alternation process. I shall have more to say later, in relation to Question 3, about the quality and extent of the participation required by section 6.2.1, but I cannot read it, either alone or in conjunction with other provisions, as requiring departments to establish any system or process to facilitate alternations.

[24] However, section 1.1.5 requires the establishment of systems that ". . . facilitate redeployment or retraining of … affected employees, surplus employees, and laid-off

persons." The word "redeployment" is not a term used in any pertinent legislation and is not a term of art (although the word "deployment" is defined in subsection 2(1) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13). The ordinary dictionary meaning of "redeployment," in my view, is the assignment (of troops, employees or resources) to a new place or task: see www.oxforddictionaries.com. The question I have to address is whether the word "redeployment" could have been intended to include alternations. I agree with the employer's submission that it would be wrong in principle to interpret the word "redeployment" as a synonym for "alternation." However, in an alternation, several things are happening: the opting employee and the alternate find each other; the proposed alternation is examined by the department; and then the two employees switch positions, the opting employee moving to the position that is intended to continue, and the alternate moving to the position that is slated for elimination. In my view, the word "redeployment," while not a synonym for "alternation," is apt to describe part of an alternation, namely, the process whereby the two employees switch positions. It must be recalled that the whole purpose of the WFAA is to address the issue of lay-offs and potential lay-offs in a workforce adjustment situation, and that this is the context of the parties' use of the word "redeployment." I also note that the systems that departments are required to establish are those that will facilitate the redeployment, among others, of "affected employees," a term that includes opting employees. I am therefore satisfied that section 1.1.5 applies to the alternation process.

[25] The obligation on the employer in section 1.1.5 is to ". . . establish systems to facilitate redeployment … of … affected employees. . . ." Given the limited arguments I received in relation to Question 1, I do not intend to spell out in this interim decision the parameters of this obligation. It is sufficient for me to state that the obligation extends to the facilitation of opting employees switching positions with alternates.

[26] In Question 2, the parties have asked whether it is a violation of the WFAA for a department to indicate to employees that it is not yet ready to consider alternation requests.

[27] The WFAA contains no explicit statement that employees wishing to alternate have a 120-day window within which to do so. However, there is no disagreement between the parties that, since only "opting employees" can alternate (section 6.2.3), and since an employee acquires the status of an opting employee upon being informed

that he or she will not be receiving a guarantee of a reasonable job offer (section 6.1.2), and since the status of opting employee expires after 120 days (section 6.1.4), an alternation can occur only within the 120-day period following the employee becoming an opting employee. Before the close of that period, an employee interested in an alternation not only has to arrange one with an unaffected employee but also has to have it reviewed by management. Obviously, with the clock ticking, employees would be well advised to seek out proposed alternations as soon as possible after being informed they will not be receiving a guarantee of a reasonable job offer.

[28] One could envisage several possible problems arising in relation to the time frame for alternations. The prime situation, it seems to me, would be when a department has insufficient time to examine the request and respond to it, either because the employee did not submit the request for approval until well into the 120-day period or because of the length of time required by the department to reach a decision.

[29] However, in Question 2, the parties have not asked about the situation referred to in the preceding paragraph. Rather, they have asked whether it is a violation of the WFAA for a department to declare that it is not yet ready to consider alternation requests. The bargaining agents have suggested in Question 2 that, perhaps, departments should be allowed a reasonable period, after the declaration of a workforce adjustment situation, to make arrangements for approving alternations.

[30] The WFAA requires all departments to "participate in the alternation process" (section 6.2.1). If a department is not prepared to respond to timely requests for alternations before the close of the 120-day window, it seems to me that it would have failed to comply with this obligation. However, if a department indicates to employees that it is not yet ready to consider such requests, but succeeds nevertheless in responding within the 120-day window, there will have been no violation, in my view.

[31] In their submissions, the parties have addressed the remedies that might be available to employees whose careers are adversely affected by such failures by departments. As a general proposition, I agree with the employer's submission that, even though a department might be tardy in establishing procedures to approve alternations, there is no violation of the WFAA if it is able to give proper consideration to a requested alternation and make a decision before the close of the 120-day window. I also agree with the employer that, where financial compensation is called

for, the measure of damages would be that which applies for a breach of contract. Beyond that, I would simply observe that adjudicators have broad remedial authority. I would be very reluctant, in this interim decision, to attempt to catalogue all the situations within the scope of Question 2 that might arise and the remedies that might be appropriate for each case.

[32] In Question 3, the parties have asked about the quality of the required departmental participation in the alternations process.

[33] In relation to Question 1, I stated earlier that section 1.1.5 of the WFAA requires that systems be established to facilitate opting employees switching positions with alternates. As I stated in response to Question 2, departments must also be ready to receive and respond to alternation requests within the 120-day window. On a more general level, participation cannot be token or perfunctory: there must be a genuine willingness to assist employees seeking to alternate and to consider proposed alternations, but this has to be within the framework of the WFAA. I do not think it would be helpful to the parties for me to provide a more specific opinion on the type of participation required by section 6.2.1: any disputes about employer compliance with section 6.2.1 would have to be carefully examined on a case-by-case basis.

[34] In Question 4, the parties have asked whether it is legitimate for a department to deny a requested alternation into a position it has no intention of filling.

[35] Under section 6.2.4, management decides ". . . whether a proposed alternation is likely to result in retention of the skills required to meet the ongoing needs of the position and the Core Public Administration." The obvious implication of this provision is that, if the proposed alternation is not likely to result in the retention of the requisite skills, management can block the intended alternation. The provision permits, first and foremost, a consideration of the suitability of the opting employee for the position into which he or she is proposing to move. However, it also gives management broad latitude to consider the ". . . ongoing needs of the position and the Core Public Administration."

[36] Apart from section 6.2.4, the WFAA gives management no latitude to turn down a proposed alternation that complies with the alternation provisions. An alternation, according to the WFAA, ". . . occurs when an opting employee who wishes to remain in the Core Public Administration exchanges positions with a non-affected employee (the

alternate) willing to leave the Core Public Administration under the terms of Part VI of this Appendix" (section 6.2.2). Aside from section 6.2.4, there is no requirement for management approval and no discretion expressly vested in management to block the proposed alternation, provided it meets the terms of Part VI of the WFAA.

[37] The employer has argued that section 1.1.2, which requires it to "carry out effective human resource planning," is also pertinent to the employer's evaluation of proposed alternations as it would allow the employer to reject proposed alternations that would run counter to the objective of effective human resource planning. I disagree with that argument since, according to the express language of section 1.1.2, the requirement to carry out effective human resource planning is for the purpose of ". . . [minimizing] the impact of workforce adjustment situations on indeterminate employees, on the department or organization, and on the public service." I am therefore satisfied that the employer cannot invoke the need to carry out effective human resource planning as an independent basis for rejecting proposed alternations.

[38] In Question 4, the parties have envisaged one particular scenario, namely, where the department does not intend to fill the position of the proposed alternate once it is vacated. As I understand the question, the parties are asking whether the WFAA permits a department to deny a proposed alternation into a position that, to the knowledge of the department, is shortly due to become vacant and will not be filled when it is vacated. The examples given by the parties in Question 4 are of situations where the alternate intends to resign or retire, or where a reorganization or downsizing is expected to occur.

[39] In my view, section 6.2.4 has no bearing on the possible denial of the alternation request in this scenario. The provision speaks to the need to ensure that any alternation will ". . . likely . . . result in retention of the skills required to meet the ongoing needs of the position and the Core Public Administration." As I read this section, the parties' concern, through their use of the word "retention," is that the public service not lose skills that are required. Section 6.2.4 authorizes the department to block a proposed alternation only if it is satisfied that the switch between the opting employee and the alternate might result in the loss of required skills. I am unable to interpret it as expressing a concern that, through the proposed alternation, the public service might end up with employees whose skills or services were not needed on an ongoing basis. The discretion given to the department by that section cannot therefore

be used to ensure that the public service does not find itself with employees who are surplus to current or planned requirements, which seems to be the point the parties had in mind in Question 4.

[40] Although the employer, in its submissions, did not ask me, in so many words, to find that the WFAA contained implied terms, that was in essence the theme of its submissions on Question 4, in my view. As I understand its submissions, it tacitly recognized that the answer it wanted me to give to this question was not rooted in the WFAA's express terms, which provided no conceivable basis for the answer it sought. In my view, therefore, I am bound to examine whether such an implied term can properly be found.

[41] I should state that I intend to follow the decision in *Union of Canadian Correctional Officers - Syndicat des agents correctionnels - CSN v. Treasury Board (Correctional Service of Canada),* 2007 PSLRB 120, on the question of the test for finding implied terms in collective agreements. In that decision, the adjudicator cited with approval the award in *McKellar General Hospital v. Ontario Nurses' Assn.* (1986), 24 L.A.C. (3d) 97, where, at page 107, the arbitrator stated that the power to declare the existence of an implied term could be exercised only in a case in which both the following conditions were met:

> *(1) if it is necessary to imply a term in order to give "business or collective agreement efficacy" to the contract, in other words, in order to make the collective agreement work; and*
>
> *(2) if, having been made aware of the omission of the term, both parties to the agreement would have agreed without hesitation to its insertion.*

I recognize that the decision by the Supreme Court of Canada in *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967, has been viewed in some awards as establishing a more permissive approach to implied terms in collective agreements: see, for example, the discussion in Palmer & Snyder, at pages 32 to 36. However, it seems to me difficult to believe that the Supreme Court of Canada intended to give arbitrators and adjudicators completely unfettered authority to find implied terms in collective agreements whenever they felt it was reasonable or desirable to do so. Such latitude could potentially do such disservice to the institution of collective bargaining, by endowing arbitrators and adjudicators with broad discretionary power to add to, or subtract from, the terms of collective agreements negotiated at the bargaining table that it

would take a far clearer direction to that effect from a superior court to persuade me that the traditional, restrictive approach to finding implied terms, as articulated, for example, in *McKellar General Hospital*, should be abandoned.

[42] It should be noted that the bargaining agents acknowledged in their submissions that it would be legitimate for a department to deny a proposed alternation if the intended alternate had already given notice of resignation or retirement to be effective at some specific date and if the department had taken the decision not to fill the position once vacated. Since this criterion is nowhere expressed in the WFAA, I understand the bargaining agents' position to be that they accept that an implied term to that effect would be reasonable.

[43] Apart from what has been conceded by the bargaining agents, is there a proper basis for concluding that there is an implied term giving the employer the authority to block a proposed alternation on the ground that it has no intention of filling the position? I am not satisfied that I am authorized to find any such implied term. As I stated earlier, a party proposing that an implied term be found has to demonstrate that there is some necessity for the term from the point of view of the efficacy of the collective agreement. In the context of the scenario outlined by the parties in Question 4, I can appreciate that such a term might be reasonable, in the sense that, if the parties had made of it an express term, one would have easily understood its place in the agreement and its function in the alternation system. However, the employer's submissions did not indicate that the absence of this implied term would create any significant problems for it. At the most, according to the employer's submissions, the opting employee risked being involuntarily moved out of the position in question in a new workforce adjustment situation, which would scarcely be effective manpower planning or desirable. This concern by the employer, legitimate though it might be, does not persuade me that it is necessary to find an implied term in order to make the collective agreement work.

[44] Therefore, in reply to Question 4, I conclude that the only situation in which a department could block a proposed alternation (other than the situations expressly provided for in the WFAA) would be where the intended alternate had already given notice of resignation or retirement to be effective at some specific date and where the department had taken the decision not to fill the position once vacated.

[45] With the answers given earlier in this decision to the questions submitted to me by the parties, I trust that they will be able to resolve all or most of the conflicts between them about alternation. I remain seized of these two grievances to deal with any disputes within their scope that the parties are unable to resolve themselves. The parties will have a period of 90 days from the date hereof to identify any further matters on which they seek a ruling. If any such issues are identified, directions will be issued.

April 09, 2013.

Michael Bendel,
adjudicator