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Public Service Labour Relations Act Before an adjudicator

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Public Service Alliance of Canada v. Treasury Board (Correctional Service of Canada)

In the matter of a policy grievance referred to adjudication

REASONS FOR DECISION

Before: Margaret T.A. Shannon, adjudicator

For the Bargaining Agent: Amarkai Laryea, Public Service Alliance of Canada

For the Employer: Sean Kelly, counsel

Heard at Ottawa, Ontario,
October 15 and 16, 2014.

I. Policy grievance referred to adjudication

[1] The Public Service Alliance of Canada ("the grievor" or "the bargaining agent") alleged that the Correctional Service of Canada ("CSC" or "the employer") has violated the provisions of Appendix I of the collective agreement between the Treasury Board and the grievor for the Operational Services Group (all employees) with an expiry date of August 4, 2014 ("the collective agreement"), in its application of the Workforce Adjustment (WFA) policy and, in particular, by refusing to provide the salary protection provisions to members of the GW-FOS (FOS) category as a result of a modernization of the food services to inmates in federal institutions and, by advising affected employees that in order to be considered for a position at the FOS 03 group and level, the employee would have to resign from their position and apply as an external candidate for positions at the FOS 03 group and level.

[2] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act*, No. 2 (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 396 of the *Economic Action Plan 2013 Act*, No. 2, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) as that *Act* read immediately before that day.

II. Summary of the evidence

[3] In November 2012, the employer announced an undertaking to modernize food services within correctional institutions by creating more efficient food preparations and delivery methods of inmate meals in 29 of 57 institutions. The intent was to create a food production centre in each region where meals would be prepared, chilled and distributed to institutions in the region, where they would be tailored and reheated for service ("the cook-chill" process or "the program"). As a result, members of the FOS category were declared affected as of November 1, 2012. In particular, there were fewer requirements for FOS 06, 07 and 09 positions. New FOS 03 and 05 positions

were created. In essence, 107 FOS 03 positions were created to offset 144 positions being eliminated.

[4] On November 8, 2012, a labour-management meeting was held between representatives of the Union of Solicitor General Employees, a component of the grievor, and representatives of the employer to discuss the implementation of the cook-chill program. The program was to be implemented first in Ontario and British Columbia, then in the Atlantic and Prairie regions, and finally, in Quebec. A selection for employee retention or layoff (SERLO) process was to be held for certain higher-level FOS positions. If an employee was not selected for retention, he or she was to be given the option of a lower-level position, with salary protection, which was to apply only to one salary level below the employee's current group and level. Some employees were to become opting employees and would have been given the choices provided in Part VI of Appendix I of the collective agreement. Employees who chose to accept an FOS 03 position voluntarily would not have been entitled to salary protection. To do so, they would have had to resign their current positions by selecting the severance option and would have had to apply as external candidates.

[5] At a meeting of the National Workforce Consultation Committee on September 25, 2013, the issue of salary protection and the employer's position on it were discussed. The employer confirmed its position that salary protection is only applied at one classification level lower and only in exceptional circumstances, two levels lower. According to the grievor, there is no policy or legislative authority for the employer's approach to salary protection.

[6] David Orfald testified on behalf of the grievor. He has been employed by the grievor for more than 16 years and was Director of its Collective Bargaining Branch for 3 of those years. He has experience with the WFA provisions of the collective agreement and was the point person for the grievor on the interpretation of Appendix I during the period known as the employer's Deficit Reduction Action Plan (DRAP). He wrote the grievor's interpretation guidelines for Appendix I when it was negotiated in 1998. Since then, he has negotiated changes to it, and in 2013 spent one-third of his time working with the grievor's WFA team. He has developed communications to members and has provided advice on the subject. In addition, he was one of two technical advisors to the National Workforce Adjustment Management Committee ("the committee"), which was a committee of representatives of management, the Treasury

Board and the various bargaining agents. He is also a member of a smaller subcommittee of the committee, which focuses on the technical aspects of the WFA.

[7] At a meeting of the committee on September 25, 2013 (see the minutes of the meeting in Exhibit 2, tab 12), Mr. Orfald raised the issue of salary protection and identified three issues: the employer's authority to restrict salary protection to one or two levels lower than an employee's current classification group and level, job offers during the opting period that were at a lower level and for which salary protection was not applied, and an unrelated issue between the Canada Revenue Agency and Service Canada. These issues were initially raised at the technical subcommittee meeting but needed to be addressed by the full committee. The Treasury Board representatives were asked to investigate the proper interpretation and application of salary protection and to report back to the committee.

[8] Approximately three weeks later, Mr. Orfald received a call from a member of the technical subcommittee. Jim Butler, from the Office of the Chief Human Resources Officer, informed him that the CSC's application of salary protection was correct.

[9] According to Mr. Orfald, under the WFA process, the employer decides which positions are to be eliminated and then provides notice to the bargaining agent within a period specified in the collective agreement before notifying the employees. Once employees are notified that their positions are affected by a WFA, they are advised of one of three things: that they can stay in their positions for a specified period, that they will be given a guarantee of a reasonable job offer, or that, if there is no guarantee of a reasonable job offer, they will be entitled to exercise their options under Appendix I. For those employees who choose to stay in their positions, a SERLO process may be conducted to determine who will remain. Employees unsuccessful in the SERLO process either are given a guarantee of a reasonable job offer or are entitled to exercise their options, known as "being made opting." In the case of the cook-chill changes, those employees who were not successful in the SERLO process were made opting employees.

[10] The options available to employees are found in Part VI of Appendix I of the collective agreement in the event that there is no guaranteed reasonable job offer (GRJO). Employees choosing surplus status have a 12-month period during which they have priority status with the Public Service Commission of Canada (PSC) for employment opportunities. If at the end of the 12 months they are unsuccessful in

obtaining alternate employment, they are laid off. They can agree to resign in exchange for transition support measures and severance entitlements. Or, they can accept an education allowance. Following the period of study, they have a right to return to employment with the public service.

[11] Mr. Orfald testified that salary protection is found in Part V of Appendix I of the collective agreement. If surplus or laid-off employees are appointed to lower-level positions, their salaries are protected, and they will receive the salary of the positions they left. For a 12-month period, if a position comes available at the level, the employee is offered it. If no position becomes available or the employee remains in the lower-level position, the employee is entitled to salary protection until he or she retires or resigns. Salary protection is specific to the person and not to the position he or she occupies.

[12] At the time the grievance was filed, the employer was proceeding to roll out the cook-chill program in Ontario and British Columbia. SERLO processes were being run for the FOS 06 and higher positions that were being eliminated. FOS 03 positions were being created in their place. It was the employer's intention to tell employees that if they wanted FOS 03 positions, to choose the second option under Part VI of Appendix I of the collective agreement, resign from the public service and then be rehired at the FOS 03 level, without the benefit of salary protection. The grievor disagreed with this approach and the provision of this information to its members. When the policy grievance was filed, the Treasury Board Secretariat (TBS) refused to intervene. The response received from the TBS and the CSC was that it was a matter of policy to provide salary protection only for positions one level lower than the current level. When asked for a written explanation, the employer was not willing to provide one.

[13] In the grievor's opinion, this approach is a matter of practice and not policy. When the policy grievance was denied, the grievor sent a letter to the PSC president (Exhibit 2, tab 10) on February 12, 2012, seeking a review of the CSC's staffing processes for the FOS 03 positions. The focus of the concerns expressed were the instructions that the CSC provided to employees interested in the FOS 03 positions, which the grievor saw as an end-run around the priority list and an attempt to usurp the PSC's role of administering the priority system. The employer was predetermining the outcome of external recruitment processes by asking people to resign with the promise of being rehired as external candidates.

[14] The PSC acknowledged the letter by phone and agreed to look into the matter. The grievor met with PSC representatives in late March 2014. The purpose of the meeting was to determine the basis of the grievor's concerns and why an investigation was required. The grievor explained that the matter was urgent because the opting period was closing, and it was afraid that its members were being misled.

[15] On June 11, 2014, the PSC responded to the grievor (Exhibit 2, tab 11). The employer had agreed to consider members on the priority list if they self-referred to the FOS 03 processes. The reason for this requirement was that the PSC was required to refer people from the priority list to suitable positions at level or at one level lower. Employees on the list can self-refer at any group or level.

[16] The grievor advised its members not to resign but rather to take option A, the 12-month surplus option, and to go on the priority list. A letter from the Public Service Commission (Exhibit 2, tab 11), confirmed that CSC would consider hiring the members off the priority list if they self-referred to the competitions for FOS 03. However, the PSC's letter did not address the issue of salary protection as that was beyond its scope of authority. There is a distinction between salary protection and the automatic referral process to one level lower. Salary protection was a matter for the Treasury Board and the collective agreement.

[17] Mr. Orfald stated that there was considerable risk for an employee to resign on the promise of obtaining an FOS 03 position. Under Appendix I of the collective agreement, once the employee selects an option, it cannot be rescinded. Once the employee resigns, any right to salary protection is lost. The employer has a responsibility to properly counsel employees on the consequences of the various choices. Rather than counsel the employees to resign, it should have advised them to select option A and then to self-refer to the FOS 03 positions as priority employees. The grievor communicated this to the employer many times, with no success.

[18] There is an obligation, according to Mr. Orfald, on the employer to make reasonable job offers to affected employees. Every effort must be made to find a position at the same level before offering a position at a lower level. However, a reasonable job offer is one at level or lower and may require relocation and training. It also offers salary protection. It is not reasonable to bypass the SERLO and opting processes and make a direct offer at the FOS 03 level. What is reasonable is to make the employees opting, and once an employee has elected to become surplus (option A),

an FOS 03 position could be considered reasonable given the limited number of FOS jobs in the public service. Food service is specialized work, and in the circumstances, it might have been reasonable for one to accept an FOS 03 position in order to stay employed. If the employee elects this option, salary protection should apply.

[19] Gregory Hall is currently Director of Technical Services at the CSC and was involved in the conceptualization of the cook-chill project as an initiative under the DRAP. The decision to proceed with the cook-chill proposal was approved by cabinet in Budget 2012. The result was a reduction from 57 individual food preparation centres to 1 food production centre per region, which produces 60% of the food served in federal penal institutions. In addition, there are 29 finishing kitchens where the food is warmed and other food, such as salads, is prepared. Approximately 264 employees received notices that their positions were affected (Exhibit 2, tab 5). The forecasted savings as a result of the changes was $3.295 million in salaries. In addition to the salary dollars saved, the lowered number of sites cooking from scratch reduced spoilage and waste. The introduction of a food information management system standardized recipes and menus across all institutions.

[20] Before the DRAP, there were approximately 10 full-time equivalents at each of the 57 sites. Positions included one FOS 09 position, one to three FOS 07 positions, four to six FOS 06 positions and one to five FOS 03 positions. Under the new plan, sites would have one FOS 07 position, one FOS 06 (if it was a site with a small group meal plan), two FOS 05 positions and four to six FOS 03 positions (see Exhibit 2, tab 14). In total, 107 new FOS 03 positions were created.

[21] The reason for the changes in level was that the complexity and accountability of the work at finishing kitchens was significantly reduced. Previously, employees were required to be “Red Seal Chefs.” This certification is not required in the kitchens where the meals are reheated. The hierarchy in the kitchens before 2013 required one FOS 09 position, the food service manager, who reported to the institution’s assistant warden, operations. The duties of the FOS 09 position included human resources responsibilities and training inmates who worked in the kitchen. At least one FOS 07 reported to the FOS 09, whose role was to conduct inmate training, supervise the FOS 06 cooks, and ordering, procure and service food.

[22] The FOS 06 was the cook responsible for preparing the food and for the care and control of the inmates working in the kitchen. The FOS 06 interacted with the case

management team concerning the performance and conduct of the inmates working in the kitchen.

[23] The FOS 05 was primarily a regional position located only at Sainte-Anne-des-Plaines in Quebec where food was prepared for shipping to other institutions in the area. In addition, at other sites, an FOS 05 was responsible for preparing special diets. Under the new scheme, FOS 03s take the product and finish it off for service and do non-complex cooking such as short-order type cooking. Inmates are not under the care and control of the FOS 03s; however, the FOS 03s are responsible for training inmates within their roles at retherm kitchens and for shipping and receiving prepared meals.

[24] The primary difference between FOS 03 and FOS 07 or FOS 09 duties is the significant difference in responsibilities and accountabilities. The FOS 09 was responsible for the operation of the kitchen under the *Financial Administration Act* (R.S.C. 1985, c. F-11; *FAA*) and for the delegated responsibilities for human resources management. The FOS 09 was the chief of food services within an institution, was part of the management team and managed inmate training programs. The FOS 07 planned and implemented the FOS 09's directions within delegated authority. The FOS 07 was responsible for purchasing and procurement for the institution's kitchen and was responsible for training and supervising inmates and staff.

[25] The FOS 05s and FOS 06s prepared and cooked food from scratch, were responsible for food safety and cleanliness, and were trained and certified cooks or chefs. They had the actual care and custody of the inmates while they worked in the kitchen and had access to the Offender Management System.

[26] In addition to considering the differences in the responsibilities and accountabilities, the employer considered the wage differences before implementing the changes and determining whether to offer the affected incumbents FOS 03 positions. The overall salary was considered, including the hourly rate, shift differentials, penological factor and other allowances. The base salary of an FOS 09 without allowances was approximately $80 000 per annum (although the parties disputed that amount), an FOS 07 was approximately $70 000 per annum, an FOS 06 was approximately $60 000 per annum, and an FOS 05 was approximately $57 000 per annum. An FOS 03 base salary is approximately $48 000. In addition to a variety of allowances, an FOS 03 earns overtime on a regular basis.

[27] The initial step taken by the employer in implementing the WFA process was to consult existing employees, to determine who was interested in staying, relocating or voluntarily leaving. The employer also canvassed food services employees to determine the level of interest in accepting correctional officers' positions. Following this, a SERLO process was commenced in the Ontario and Pacific regions in the fall of 2013. The remaining regions underwent a SERLO process in 2014. Options were provided to employees not successful in the SERLO process. No FOS 03 positions were offered to opting employees at the FOS 05 level or higher (see Exhibit 2, tab 14).

III. Summary of the arguments

A. For the grievor

[28] The objective of Appendix I of the collective agreement is to maximize employment opportunities for current employees and to ensure continued employment within the public service when possible. In this situation, the employer declared FOS 05, 06, 07 and 09 positions redundant as a result of the implementation of the cook-chill program and the elimination of full kitchens in federal correctional facilities. The majority of those affected were the FOS 06 cooks. In place of the positions eliminated, the employer created 107 FOS 03 positions. A SERLO process was commenced in 2013 for the Ontario and Pacific regions. Options were given to those not selected for retention, in accordance with article 6 of Appendix I. The employer advised those affected who were interested in an FOS 03 position to elect option 3 and to seek appointment to the FOS 03 positions as external candidates rather than appointing the affected employees to these positions and providing them salary protection.

[29] There are three questions to be answered by the new Board: (1) Did the employer violate the collective agreement by stating that a policy existed that precluded offering salary protection when the positions sought were more than one classification level lower than the incumbent's position level? (2) Under Appendix I, can an offer of an FOS 03 position be considered a GRJO to employees in positions two or more levels higher than FOS 03? And (3): Did the employer violate the collective agreement by counselling employees to terminate their employment with the employer in order to secure FOS 03 positions as external candidates, for which there would be no salary protection?

[30] The grievor first raised the salary protection issue on November 8, 2012, at a National Workforce Adjustment Meeting (Exhibit 2, tab 4). The employer explained its position that salary protection was available only for positions one level lower based on the TBS's interpretation of Appendix I of the collective agreement. Mr. Orfald raised that response on September 25, 2013, at the National Workforce Management Consultation Committee (see Exhibit 2, tab 12), where it was restated that the TBS's policy is to apply salary protection only one level lower and only after all other avenues have been exhausted. The employer's representative on the committee also referred to past practice to support this interpretation. Originally, the employer had relied only on TBS policy to support its actions.

[31] The final-level grievance response states that it was never the intent of Appendix I of the collective agreement to salary-protect surplus employees at significantly lower levels from their substantive positions for an extended period (see Exhibit 2, tab 3). According to the employer, part V of the WFA appendix (Appendix I, page 320; "WFAA") provides for salary protection at more than one level only by exception. The employer has provided no evidence as to what would be an appropriate reason to invoke this exception. Clause 1.1 of the WFAA provides no limit on salary protection. If the parties intended to limit salary protection by level, they could have specifically included the limitation there. It does not create an absurdity to interpret clause 1.1 with no limitation, as argued by the bargaining agent. However, to interpret the provisions related to salary protection as argued by the employer requires an amendment to the collective agreement (see *Lessard v. Treasury Board (Department of Transport)*, 2009 PSLRB 34, and *Brisson and Dubeau v. Canadian Food Inspection Agency*, 2005 PSLRB 38). The answer to the first question is that the CSC's policy on salary protection goes against Appendix I, which does not define a limit to salary protection.

[32] From the beginning, the employer ruled out the question of whether FOS 03 positions could be considered as GRJOs for employees at the FOS 05 level or higher. The CSC never truly considered whether FOS 03 positions could be GRJOs for employees at the FOS 05 level, which is a difference of levels within the scope of its policy. Appendix I of the collective agreement defines a reasonable job offer as one that is normally at an equivalent level but that could include positions at a lower level (see Exhibit 2, tab 1, page 305). There are no criteria with respect to job duties or work descriptions being similar. The employer wants the new Board to read these criteria

into the definition of "reasonable." The use of "equivalent level" in Appendix I refers to the rate of pay for the position, not the duties (see *Kreway v. Canada Customs and Revenue Agency*, 2004 PSSRB 172, at para 65, *et seq.* (and following paragraphs). Clause 5.2 of Appendix I refers not to duties but to salary protection until the employee is deployed to a position at a similar rate of pay.

[33] The emphasis is to find employment at an equivalent level of pay. Clause 1.1.16 of Appendix I of the collective agreement states that before an employee is appointed to a position at a lower level, there is a process to follow, which emphasizes a search for employment at the equivalent level. This process was never undertaken, as the employer did not consider the possibility of an FOS 03 position as a GRJO from the very beginning, for several reasons. The first was that there was a policy not to salary-protect an employee at more than one level below, yet there were no FOS 04s at the CSC (see Exhibit 2, tab 8). The real reason was that salary protection at more than two levels has a direct impact on cost savings, something that was never contemplated within Appendix I.

[34] Why would the employer offer FOS 03 positions to affected employees at all if they were not a reasonable option? The employer presented FOS 03 positions as an option to those not wishing to leave the CSC who were not selected for retention. CSC representatives encouraged these people to resign their positions and to apply to the FOS 03 positions as external candidates in order to avoid the employer's liability for salary protection. Therefore, an FOS 03 position was a reasonable GRJO once all the other options had been exhausted. Denying this possibility from the beginning violated clauses 1.1.1 and 1.1.2 of Appendix I of the collective agreement.

[35] Clause 4.3.2 of Part IV of Appendix I of the collective agreement recognizes that positions that constitute GRJOs could include different duties and could be at a lower level. This entitles the employee to the salary protection of Part V of Appendix I. Employees are obligated to consider GRJOs at a lower level (clause 1.4.2(e) of Appendix I), regardless of level. The answer to question 2 is that FOS 03 positions could have been considered as GRJOs but for the fact that the employer chose not to make these offers, to avoid the salary protection provisions of Appendix I.

[36] The part of the grievance related to the nature of the information provided by the employer to affected employees was not addressed in the final-level grievance response; nor was the corrective action sought. There were other options available to

affected employees other than terminating their employment, Option B. Another option was for the employees to elect to be placed on the surplus priority list (Option A) and then to refer themselves as candidates for the FOS 03 positions. They could then have been appointed pursuant to clause 1.1.16 of Appendix I of the collective agreement. By failing to counsel the employees concerning this option, the employer violated clause 1.1.34 of Appendix I. The only option the employer promoted was Option 3, which was to resign and take an FOS 03 position as an external candidate, without the benefit of salary protection. The employer violated the collective agreement by providing inaccurate and incomplete information to the affected employees.

[37] By way of remedy, the grievor seeks a declaration that the employer has violated the collective agreement and that the new Board remit the matter to the parties to determine the appropriate manner in which to make the affected employees whole.

B. <u>For the employer</u>

[38] There are two issues to be decided. The first is the following: Does an adjudicator have jurisdiction to consider a new allegation relating to a violation of clause 1.1.34 of Appendix I of the collective agreement? The second is the following: Was a job offer two levels or more below an employee's current level a reasonable job offer? It is the employer's position that an offer of an FOS 03 level position to someone who was previously at the FOS 05 level or higher was not reasonable and that it did not breach the collective agreement. The answer to both questions is "No."

[39] An adjudicator is without jurisdiction to consider any allegation of a breach of clause 1.1.34 of Appendix I of the collective agreement as this is a new allegation that was never raised before the matter was referred to adjudication. Subsection 209(1) of the *Act* directs that only those grievances presented ". . . up to and including the final level in the grievance process . . ." can be referred to adjudication. Accordingly, when a grievor fails to raise an issue after the conclusion of the grievance process, there is no grievance about the newly raised issue that has been dealt with ". . . up to and including the final level in the grievance process . . ." (see *Boudreau v. Canada (Attorney General)*, 2011 FC 868, at para 5 and 20; *Mutart v. Canada (Attorney General)*, 2014 FC 540, at para 33; and *Shneidman v. Canada (Attorney General)*, 2007 FCA 192, at para 25 to 30).

[40] The pith and substance of this grievance is the employer's predetermination that an offer of an FOS 03 position was unreasonable in the circumstances of this case. It is undisputed that clause 1.1.34 of Appendix I of the collective agreement was never discussed during the entire grievance process. Furthermore, the grievance fails to refer to clause 1.1.34 despite specifically referencing a myriad of other clauses in the body of the grievance. The use of the phrase ". . . several articles of the WFAA including but not limited to . . ." is not sufficient to provide the employer with the required notice and to allow it to understand the nature of the allegations in order to respond to them adequately (see *Grierson-Heffernan v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 30, at para 61).

[41] In the event that the new Board determines that it has jurisdiction to deal with the allegations raised at the hearing concerning clause 1.1.34 of Appendix I of the collective agreement, the employer argued that the bargaining agent did not allege that its members were not actually informed and counselled by the employer but rather that they were incorrectly informed and counselled. The allegation was based on the bargaining agent's opinion that the employer was wrong in declining to consider making job offers at the FOS 03 level with salary protection. The employer did not breach Appendix I given that it was unreasonable in these circumstances to make job offers at the FOS 03 level.

[42] The onus was on the bargaining agent to clearly demonstrate that, on the balance of probabilities, the employer violated a specific provision of Appendix I of the collective agreement by predetermining that an FOS 03 offer was unreasonable given full consideration of the circumstances of this case (see *Canadian Association of Professional Employees v. Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 100, at para 21; "*CAPE*").

[43] Sections 7 and 11.1 of the *FAA* grant the employer a "broad unlimited power" to set general administrative policy for the federal public service, organize the federal public service, and determine and control personnel management within the public service (see *Babcock et al. v. Attorney General (Canada)*, 2005 BCSC 513, at para 12; *Brescia v. Canada (Treasury Board)*, 2005 FCA 236, at para 42 to 45; and *Professional Institute of the Public Service of Canada v. Treasury Board (Department of Human Resources and Skills Development)*, 2014 PSLRB 18, at para 48; "*PIPSC*"). Moreover,

sections 6 and 7 of the *Act* clearly state that nothing in the *Act* must be construed as limiting the right of the employer to manage the federal public service.

[44] In exercising its management rights, the employer may do that which is not specifically or by inference prohibited by the collective agreement (see *P.S.A.C. v. Canada (Canadian Grain Commission)* (1986), 5 F.T.R. 51, at para 15 and 16; *Peck v. Canada (Parks Canada)*, 2009 FC 686, at para 33; and *Public Service Alliance of Canada v. Treasury Board (Department of Veterans Affairs)*, 2013 PSLRB 165, at para 83).

[45] In assessing any limitations prescribed by a collective agreement, an adjudicator must examine the ordinary meaning of the words used by the parties unless doing so would lead to an absurd result or unless the agreement defines them in a special or particular way. An adjudicator must take into account the entire collective agreement and refrain from modifying its terms. A provision must not be considered in isolation (see *Chafe et al. v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112, at para 50 and 51).

[46] A job offer is unreasonable if the terms and conditions being offered significantly differ from those of the previous job (see *Fenwick Automotive Products v. United Steelworkers*, [2010] O.L.A.A. No. 378 (QL), at para 25; and *Citation Industries Ltd. v. British Columbia (Director of Employment Standards)*, [1988] B.C.J. No. 1095 (C.A.) (QL), at 9). In both cases, the level of responsibility and accountability was assessed when determining the reasonableness of the alternate employment.

[47] Clause 1.1.16 of Appendix I of the collective agreement, coupled with the definition of a reasonable job offer, clearly indicate that a reasonable job offer is normally at an equivalent level and that any offer at a lower level is optional. The language of clause 1.1.16 states that departments shall avoid appointments to a lower level except when all other avenues have been exhausted. The use of the word “could” indicates that an appointment at a lower level is discretionary. By including this language, the parties clearly intended that an appointment at a lower level would be optional. These words become redundant, contrary to the rules of interpretation of collective agreements, if one accepts the bargaining agent’s interpretation that a lower level appointment is mandatory (see *Stevens et al. v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 34, at para 21).

[48] To accept the bargaining agent's interpretation would have the effect of amending the collective agreement, contrary to the express provision of section 229 of the *Act*. In particular, allowing the grievance would have the effect of replacing the word "could" in the definition of a reasonable job offer with the word "should." The bargaining agent's interpretation is also contrary to the well-established principle that any limitation to the employer's broad unlimited powers under the *FAA* to set terms and conditions of employment must be expressly set out in the collective agreement.

[49] Agreeing with the bargaining agent's interpretation would have a chilling effect on labour relations between the parties. Such an interpretation would result in requiring opting employees to accept a job offer at a significantly lower level at any stage of the process or risk being disqualified from their other rights under Appendix I of the collective agreement by refusing a reasonable job offer. Second, such a finding would dissuade employers from pursuing similar initiatives and would encourage them to consider other alternatives, such as contracting out (see *CAPE*, at para 24).

[50] The bargaining agent's interpretation must be rejected as it leads to an absurd result. It is absurd for two employees who are doing the same work to be paid at significantly different wage rates or salaries. Offering an FOS 03 position to someone previously employed as a FOS 05 or higher is clearly unreasonable, given the significant gap in wages and responsibilities between the positions.

IV. Reasons

[51] The bargaining agent was correct in its statement that there is no explicit restriction in Appendix I to the effect that job offers are to be at no more than one level lower than the employee's current level. Indeed the wording of Appendix I itself, refers to "levels" in the plural, leading to a conclusion contrary to that arrived at by TBS.

[52] The employer has not convinced me that any legislation or collective agreement language exists that prohibits a difference of more than one level from the employee's current position in order for salary protection to apply. It is not stated in the collective agreement; nor has the employer produced any conclusive evidence of an existing past practice to support its application of Appendix I. The evidence simply indicates that, the employer relied on a TBS interpretation which at best is a rule of thumb, and at worst, someone's opinion in the absence of supporting authority.

[53] In any event, I have difficulty in seeing how a unilateral TB policy or interpretation can prevail when it runs contrary to the express language of the collective agreement. If the collective agreement made no further references to lower levels, the matter would end there, and the bargaining agent would be successful. However, it does not end there. As the parties both agreed, there are at least two questions to be answered in arriving at my decision: Did the employer violate Appendix I by refusing to provide job offers at the FOS 03 level? Did the employer violate the salary protection provisions of Appendix I in so doing?

[54] To determine the true meaning of an article in the collective agreement, the normal meaning must be attributed to each word, unless it results in an absurdity. Clearly, the definition of a reasonable job offer anticipates that the offer may be one of employment normally at the current level but that it could include lower levels. When dealing with alternate service delivery options, there are additional conditions to be met, those being that the maximum attainable salary not be less than the employee's current salary at the time of the transfer and that there be a seamless transfer of benefits.

[55] The parties have not focused on alternate service delivery options, as this case is not that type of situation. I merely note that the parties have clearly addressed the issue of levels and salaries in the situation of alternate service delivery but not in the context of what a reasonable salary difference is in considering whether a job offer at a lower level is reasonable. Such an omission is regrettable as the language regarding alternate service delivery situations provides the parties with some measure of certainty on the issue. However, in the absence of such language in this case, and given my conclusion that a reasonable job offer could, depending on the circumstances, include one two or more levels lower, I am left without direction on how to apply Appendix I in this case.

[56] A collective agreement must be interpreted in its entirety (see *Chafe*, at para 50 and 51). Each word must be given its ordinary meaning unless to do so would result in an absurdity or unless the agreement defines them in a special way or context. The definition of a reasonable job offer cannot be interpreted in isolation of clause 1.1.16 of Appendix I of the collective agreement. Under the definitions section of Appendix I, a reasonable job offer is defined as follows:

> *Reasonable job offer (offre d'emploi raisonnable) – is an offer of indeterminate employment within the Core Public Administration, normally at an equivalent level, but which could include lower levels. . . .*

[57] This definition clearly indicates that lower levels (not just one level) were within the contemplation of the parties when they negotiated the collective agreement. However, the bargaining agent was incorrect in its argument that the employer was obligated to offer the affected employees all positions at lower levels. The parties used the word "could" in the definition, which indicates that there is a possibility that the reasonable job offer may not be one at the employee's current level. The word "could" is used to convey a slight degree of possibility, according to the *Gage Canadian Dictionary*, not discretion, as counsel for the employer argued. It means nothing more than that the parties may be required to consider jobs at lower levels in their search for a reasonable job offer.

[58] Clause 1.1.16 clearly states the following:

> *1.1.16 Appointment of surplus employees to alternative positions with or without retraining shall normally be at a level equivalent to that previously held by the employee but this does not preclude appointment to a lower level.* ***Department or organizations shall avoid appointment to a lower level except where all other avenues have been exhausted.***
>
> [Emphasis added]

[59] The possibility of job offers at lower levels arises only after the employer has exhausted all other avenues; it is intended to be a last resort, not a first option. What is clear from clause 1.1.16 of Appendix I of the collective agreement is that departments and organizations shall avoid making an appointment to a lower level unless there are no other options.

[60] I cannot ignore the difference in the use of the words "shall" and "could" by the parties to the collective agreement, which clearly indicates their intentions that an appointment at a lower level is a possibility. Otherwise, these words become meaningless, and the process outlined in Appendix I becomes redundant, contrary to the rules of collective agreement interpretation (see *Stevens*, at para 21). On the other hand, I am equally convinced that the parties did not intend that employees be offered positions at significantly lower levels under the guise of a GRJO.

[61] The use of the word "shall" is not discretionary, while the use of the word "could" clearly indicates a possibility that a job offer may be at a lower level and that it should not be discarded prematurely. It is trite law to say that the employer cannot act arbitrarily or in bad faith in the exercise of its discretionary authority. While it may be unreasonable on the basis of the facts to offer a FOS 03 position to an employee at a FOS 09 level, it may very well have been reasonable to make such an offer to an employee at a FOS 05 level.

[62] To determine whether or not it would be reasonable for the employer to provide GRJO's at lower levels to employees cannot be a mechanical decision based on the expression of an opinion from TBS nor can it be made solely on the basis of the number of levels between the positions. The evidence disclosed that management simply applied the one level rule and exercised no discretion in coming to the conclusion on what constituted a GRJO. While the employer did try to present evidence on the appropriateness of a FOS-03 job for a former FOS-09 employee, it is clear that at the time that the grievance was filed it was simply following TBS's interpretation and did not engage in any process of comparing jobs to arrive at a reasoned conclusion.

[63] Although the employer maintained that offers at more than one level lower were restricted to exceptional circumstances, it never provided any indication of when those exceptional circumstances might occur. It also refused to provide the union with a written explanation of its interpretation restricting offers to those only one level lower and never provided any evidence that it turned its mind to see if exceptional circumstances existed in this situation. Such determination cannot be made without a case by case evaluation to determine whether in the individual circumstances, a position at more than one level lower is reasonable.

[64] The approach taken by CSC is arbitrary and flies in the face of the clear language of the collective agreement which provides the possibility of GRJO's being offers of positions at more than one level lower. Consistent with the decision of *Fenwick Automotive Products and Citation Industries Ltd.* such analysis should contain an evaluation of the level of responsibilities and accountabilities. If the employer has in fact completed this type of analysis, it has not shared it with the bargaining agent which is rightly concerned with the employer's exercise of its discretion and its application to its members.

[65] Whether or not the employer communicated inappropriately or inaccurately with the affected employees concerning the possibility of obtaining a FOS 03 position is not easily dismissed as a jurisdictional issue. The grievor clearly argued throughout its correspondence with the employer that the advice provided by the employer to the affected employees was of grave concern to the bargaining agent. The second paragraph of the grievance clearly states that the grievor voiced its objections to the salary protection approach which CSC took. The grievance goes on to refer to the employer's approach as ". . . prejudicing decision making . . ." which is a clear reference to the employees being told to resign and compete for the FOS 03 jobs. Furthermore, the employer's jurisdictional argument entirely ignores the corrective action section of the policy grievance which refers to maximizing GRJO's and ". . . ensuring that all employees have access to accurate information . . ." about their choices. The nature of the communications between the employer and employees was raised as part of this grievance up to and including the final level of the grievance process. In the event that I am wrong that I have jurisdiction to consider this part of the grievor's grievance, I find that the grievor's concerns on this issue could also be characterized as remedial over which I have jurisdiction in the event that I allow the grievance.

[66] Plainly stated, given my decision that the employer violated Appendix I by refusing to consider GRJO's that were more than one level lower than the employees' former positions, its advice to employees to resign and apply as external candidates was also wrong and this second wrong was naturally the outcome of the employer's first error.

[67] The parties saw the necessity of negotiating Appendix I and including it in the collective agreement. The parties have clearly turned their minds to how to limit the impact of WFA on employees and the possibility that a reasonable job offer may be at levels lower than the employee's current level. They must have intended its results.

[68] I am unable to go any further however in providing relief that a simple declaration and leave the parties to revisit what occurred to fashion the appropriate remedy.

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

(The Order appears on the next page)

V. Order

[70] The grievance is allowed in part and the matter is referred back to the parties to evaluate on a level by level basis whether or not a FOS 03 level position would constitute a guaranteed reasonable job offer under Appendix I.

[71] I will retain jurisdiction over this matter for a period of 90 days in the event that the parties are unable to come to an agreement pursuant to paragraph 66 hereof, or should other questions arise from the application of this order.

January 26, 2015.

Margaret T.A. Shannon,
adjudicator