Date: 20150513

Files: 566-33-7982 to 7986

Citation: 2015 PSLREB 43

Public Service Labour Relations Act Before an adjudicator

BETWEEN

MONIQUE CHARETTE, DENISA GEORGESCU, STEPHEN LOHNES, ELIZABETH ANN MACDONALD AND LAURIE MCDOUGALL

Grievors

and

PARKS CANADA AGENCY

Employer

Indexed as
Charette et al. v. Parks Canada Agency

In the matter of individual grievances referred to adjudication

Before: John G. Jaworski, adjudicator

For the Grievors: Amarkai Laryea, Public Service Alliance of Canada

For the Employer: Allison Sephton, counsel

Decided on the basis of written submissions,
filed October 7 and 21 and November 4, 2013.

I. Individual grievances referred to adjudication

[1] Between June 8 and 18, 2012, the individual grievors, Monique Charette, Denisa Georgescu, Stephen Lohnes, Elizabeth Ann MacDonald and Laurie McDougall ("the grievors") filed grievances against the Parks Canada Agency ("Parks" or "the employer"), all of which were similarly worded.

[2] The grievance of Ms. Charette was as follows:

> *I grieve that Statement of Assessment for a SERLO Process (Selection of Employees for Retention and Lay-off) Employee Statement of Assessment SERLO ID* ***VEB-PMS-VEPA-001*** *(Position number 10460) dated April 13, 2012. The individual ratings and the total rating under the Assessment Criteria in my case are not an accurate assessment as is required under the SERLO Process. I also grieve that this assessment is a violation of Appendix "K" and any related articles of my collective agreement between the Agency and the Public Service Alliance of Canada (PSAC).*
>
> *Consultation is requested on this grievance at level 2, the final level of the Grievance Procedure in the Parks Canada Agency, with Denis J. McCarthy, Special Advisor, Union of National Employees, Ottawa, Ontario my union representative.*

[3] As corrective action, the grievors are all asking that:

1. Their SERLO assessments be withdrawn;
2. Each of them be given a new "Selection of Employees for Retention and Lay-off" ("SERLO") assessment to fully assess their qualifications;
3. That they not suffer any prejudice as a result of having filed the grievances;
4. That they be made whole.

[4] The grievances of the other grievors only differed from that of Ms. Charette in regards to the specific SERLO assessments, which would have different identification codes for different position numbers and different ratings.

[5] On February 1, 2013, the employer objected to the jurisdiction of the Public Service Labour Relations Board ("PSLRB") to hear the grievances. On February 15, 2013, the grievor's representative responded to the employer's objection to jurisdiction. The

parties requested that the objection to jurisdiction be dealt with in writing prior to hearing the merits of the grievance, and the PSLRB granted that request.

[6] 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 Board") to replace the former PSLRB 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) ("the *Act*") as that *Act* read immediately before that day.

II. Summary of the evidence

[7] The parties were bound by a collective agreement in force at the time between the employer and the Public Service Alliance of Canada, signed March 17, 2009, and expiring August 4, 2011 ("the collective agreement").

[8] All of the grievances were referred to adjudication to the Board utilizing Form 20 under subparagraph 89(1)(*a*)(i) of the *Public Service Labour Relations Board Regulations* (SOR/2005-79). At paragraph 14 of Form 20, under the section entitled "Provisions of the collective agreement or arbitral award that is the subject of the individual grievance," all of the grievors stated "APPENDIX K – WORK FORCE ADJUSTMENT OF THE PSAC AND PARKS CANADA AGENCY COLLECTIVE AGREEMENT."

[9] Appendix K of the collective agreement ("Appendix K") is entitled "Work Force Adjustment" ("WFA") and was submitted as Exhibit A to the employer's written submissions dated October 7, 2013, and is appended herein as Annex "A" to this decision.

[10] Appendix K is 32 pages and contains seven parts and two annexes. The grievors are relying on portions of Parts 1 and 4 of Appendix K, which state as follows:

. . .

> ***1.1.1.*** *Since indeterminate employees who are affected by work force adjustment situations are not themselves*

responsible for such situations, it is the responsibility of the Chief Executive Officer to ensure that they are treated equitably and, whenever possible, given every reasonable opportunity to continue their careers as Agency employees.

. . .

1.1.13 *The Agency is responsible to counsel and advise the affected employees on their opportunities of finding continuing employment in the Agency.*

. . .

1.1.29 *The Agency shall inform and counsel affected and surplus employees as early and as completely as possible and shall, in addition, assign a counsellor to each opting and surplus employee and laid-off person to work with them throughout the process. Such counselling is to include explanations and assistance concerning:*

(a) the work force adjustment situation and its effect on that individual;

(b) the work force adjustment appendix;

(c) the Agency's Priority Administration System and how it works from the employee's perspective (referrals, interview or "boards", feedback to the employee, follow-up by the Agency, how the employee can obtain job information and prepare for an interview, etc.);

(d) preparation of a curriculum vitae or resume;

(e) the employee's rights and obligations;

(f) the employee's current situation (e.g. pay, benefits such as severance pay and superannuation, classification, language rights, years of service);

(g) alternative that might be available to the employee (alternation, appointment, relocation, retraining, lower-level employment, term employment, retirement including possibility of waiver of penalty if entitled to an annual allowance, Transition Support Measure, Education Allowance, pay in lieu of unfulfilled surplus period, resignation, accelerated lay-off);

(h) the likelihood that the employee will be successfully appointed;

(i) the meaning of a guarantee of reasonable job offer, a twelve-month surplus priority period in which to secure a

reasonable job offer, a Transition Support Measure and an Education Allowance;

(j) preparation for interview with prospective employers;

(k) feedback when an employee is not offered a position for which he or she was referred;

(l) repeat counselling as long as the individual is entitled to a staffing priority and has not been appointed; and

(m) advising the employee that refusal of a reasonable job offer will jeopardize both chances for retraining and overall employment continuity;

(n) the assistance to be provided in finding alternative employment in the Public Service (Schedules I, IV, or V of the FAA) to a surplus employee for whom the Chief Executive Officer cannot provide a guarantee of a reasonable job offer within the Agency.

. . .

1.1.36 *The Agency will review the status of each affected employee annually, or earlier, from the date of initial notification of affected status and determine whether the employee will remain on affected status or not.*

1.1.37 *The Agency will notify the affected employee in writing, within five (5) working days of the decision pursuant to subsection 1.1.36.*

. . .

2.1 *In any work force adjustment situation involving indeterminate employees covered by this Appendix, the Chief Executive Officer shall notify the Chief Executive Officer of the Alliance. Such notification is to be in writing, in confidence and at the earliest possible date and under no circumstances two (2) working days before any employee is notified of the workforce adjustment situation.*

2.2 *Such notification will include the identity and location of the work unit(s) involved, the expected date of the announcement, the anticipated timing of the workforce adjustment situation and the number, group and level of the employees who are likely to be affected by the decision.*

. . .

> ***4.1.1*** *To facilitate the redeployment of affected employees, surplus employees, and laid-off persons, the Agency shall make every reasonable effort to retrain such persons for:*
>
> *(a) existing vacancies, or*
>
> *(b) anticipated vacancies identified by management.*

[11] "Affected employee" is defined at Appendix K as follows:

> *Affected employee is an indeterminate employee who has been informed in writing that his/her services may no longer be required because of a work force adjustment situation. (Employé touché)*

[12] "Lay-off notice" is defined at Appendix K as follows:

> *Lay-off notice is a written notice of lay-off to be given to a surplus employee at least one month before the scheduled lay-off date. This period is included in the surplus period. (Avis de mise en disponibilité)*

[13] "Lay-off priority" is defined at Appendix K as follows:

> *Lay-off priority a person who has been laid off is entitled to a priority for appointment on the basis of individual merit without recourse to a position in the Agency for which, in the opinion of the Chief Executive Officer, they are qualified. This priority is accorded for one year following the lay-off date pursuant to the Parks Canada's Staffing Policy, Section 4.1 or following the termination date pursuant to the* Parks Canada Agency Act, *Section 13. (Priorité de mise en disponibilité)*

[14] "Opting employee" is defined at Appendix K as follows:

> *Opting employee is an indeterminate employee whose services will no longer be required because of a work force adjustment situation and who has not received a guarantee of a reasonable job offer from the Chief Executive Officer and who has 120 days to consider the Options of Part 6.3 of this appendix. (Employé optant)*

[15] "Surplus employee" is defined at Appendix K as follows:

> *Surplus employee is an indeterminate employee who has been formally declared surplus, in writing, by the Chief Executive Officer. (Employé excédentaire)*

[16] WFA is defined at Appendix K as follows:

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

[17] At Exhibit C of the employer's written submissions dated October 7, 2013, is the employer's SERLO policy. The relevant portions of the policy state as follows:

> . . .
>
> ***Policy Statement***
>
> *This policy provides the foundation for how employees affected by workforce adjustment situations are selected and retained or identified for lay off. The intention is to retain the employees who best meet the current and future requirements of the Agency.*
>
> *The use of merit governs the process. The selection of an employee for retention does not constitute an appointment as defined by the Appointment Policy.*
>
> ***Application***
>
> *This policy applies to all Work Force Adjustment situations where delegated managers must assess and select from among affected employees for retention and lay off. This policy is intended to provide direction to human resources and delegated managers who must administer such situations.*
>
> *In workforce adjustment situations, this policy takes precedence over any other staffing policy.*
>
> . . .

[18] At Exhibit D of the employer's written submissions dated October 7, 2013, is the employer's "Guidelines for SERLO" ("the guidelines"). The guidelines state, in part, as follows:

> *These guidelines are intended to support delegated managers and Human Resources Managers (HRMs) through the process for selecting employees who are to be retained and laid-off in Work Force Adjustment (WFA) situations, as described in the SERLO policy. An employee selected for retention remains in the same position and at the same group and level.*

. . .

> *WFA gives rise to various situations in which the assessment of employees may be required.*

. . .

[19] Article 5 of the collective agreement is entitled "Management Rights," and clause 5.01 states as follows:

> ***5.01*** *Except to the extent provided herein, this agreement in no way restricts the authority of those charged with managerial responsibilities in the Agency.*

[20] Article 6 of the collective agreement is entitled "Agency Policies," and the relevant portions state as follows:

> ***6.01*** *(a) The following Agency policies, as existing on the date of signing of the agreement and as amended from time to time in accordance with this article, shall form part of this agreement:*
>
> *(i) Travel*
>
> *(ii) Isolated Posts*
>
> *(iii) First Aid To The Public*
>
> *(iv) Bilingualism Bonus*
>
> *(v) Uniforms*
>
> *(b) The Agency agrees to amend the above policies to match changes in rates and entitlements as may be made from time to time in respect of the similar National Joint Council (NJC) Directives.*
>
> . . .
>
> ***6.03*** *The Agency further agrees that it shall maintain the current Agency policies in effect at the date of signing:*
>
> *(i) Living Accommodation Allowances*
>
> *(ii) Commuting Assistance*
>
> ***6.04*** *Any disagreement regarding the interpretation and administration of the aforementioned policies may be addressed through the grievance procedure contained in this collective agreement. In the event that an employee is dissatisfied with the decision of the Agency, the matter may*

> *be referred for resolution in accordance with the Agency's Independent Third Party Review Process (ITPR).*
>
> . . .

[21] Neither the SERLO policy nor the guidelines form part of the collective agreement.

III. Summary of the arguments

A. For the employer

[22] The grievors are taking issue with how the assessments were conducted and the results they received as part of the SERLO processes undertaken by the employer. The SERLO policy and guidelines are not incorporated into Appendix K or any other part of the collective agreement. Appendix K contains no provisions relating to SERLO processes.

[23] The employer's argument that the grievances must be dismissed for want of jurisdiction is based on three arguments:

i. The *Parks Canada Agency Act* (S.C., 1998, c. 31) is a complete bar;

ii. The grievances do not relate to a breach of a provision of the collective agreement within the meaning of paragraph 209(1)(*a*) of the *Act*; and

iii. SERLO grievances are akin to staffing grievances, over which the Board has no jurisdiction.

1. *Parks Canada Agency Act* is a complete bar

[24] Parks is a separate employer under subsection 11(1) of the *Financial Administration Act* (R.S.C., 1985, c. F-11) and is therefore a separate agency under subsection 2(1) of the *Act*. Parks is not subject to the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "the *PSEA*") and is governed under the *Parks Canada Agency Act* ("the *PCAA*"). Section 13 of the *PCAA* states as follows:

> ***13.*** *(1) The Chief Executive Officer has exclusive authority to*
>
> *(*a*) appoint, lay-off or terminate the employment of the employees of the Agency; and*

> *(*b*) establish standards, procedures and processes governing staffing, including the appointment, lay-off or termination of employment otherwise than for cause, of employees.*
>
> *(2) Nothing in the* Public Service Labour Relations Act *shall be construed to affect the right or authority of the Chief Executive Officer to deal with the matters referred to in paragraph (1)(*b*).*

. . .

[25] Under subsection 13(1) of the *PCAA*, Parks has unrestricted authority to select employees for retention or layoff, and under subsection 13(2) of the *PCAA,* an adjudicator under the *Act* is effectively barred from hearing a grievance stemming from the application of the authority set out in subsection 13(1) of the *PCAA*.

[26] In support of this argument, the employer relies on *Peck v. Parks Canada,* 2009 FC 686; *Boutziouvis v. Financial Transactions and Reports Analysis Centre of Canada*, 2013 FCA 118; *Monette v. Parks Canada Agency*, 2010 PSLRB 89; *Goodyear Tire and Rubber Co. of Canada Ltd. et al. v. T. Eaton Co. Ltd. et al.*, [1956] S.C.R. 610; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42; and *Melnichouk v. Canadian Food Inspection Agency*, 2004 PSSRB 181.

2. The grievances do not relate to a breach of a provision of the collective agreement within the meaning of paragraph 209(1)(*a*) of the *Act*

[27] The grievances have been referred to adjudication under paragraph 209(1)(*a*) of the *Act,* alleging a breach of the collective agreement, the portion of the collective agreement allegedly breached being Appendix K. The grievances do not identify what provisions of Appendix K have been violated, and it is the employer's position that the pith and substance of the grievances is an allegation that Parks has not conducted the SERLO process fairly. While the grievors allege a breach of Appendix K, what is really being disputed is the SERLO process, which is not contained anywhere in the collective agreement nor incorporated by reference into the collective agreement.

[28] The SERLO process is governed by a policy and guidelines that are not incorporated into Appendix K of the collective agreement or anywhere else in the collective agreement and fall within the purview of the employer under subsection 13(1) of the *PCAA*. The SERLO policy and guidelines did not arise out of collective bargaining; they were created by the employer. Subsection 13(1) specifically

grants exclusive jurisdiction to the Chief Executive of Parks over such matters such as staffing and layoff, and subsection 13(2) specifically prohibits the Board from interfering.

[29] The employer states that nowhere in Appendix K are there any references to the SERLO process or any reference whatsoever as to how employees will be selected for layoff or retention. Appendix K aims to address affected employees only after they have been identified for layoff. The clear wording of Appendix K indicates that it only becomes engaged after the specific employees have been identified and are affected under a workforce adjustment situation.

[30] What the grievors are really taking issue with is the assessment they were subjected to during the SERLO process prior to the determination of who would be an affected employee. The SERLO process, though, is something that by virtue of subsection 13(1) of the *PCAA* is within the exclusive authority of the employer.

3. SERLO grievances are akin to staffing grievances, over which the Board has no jurisdiction

[31] Parks is not subject to the *PSEA* and as such, employees cannot file complaints with the Public Service Staffing Tribunal ("the PSST") as can employees from other federal departments. This, though, does not give the Board jurisdiction. As set out in *Amos v. Canada (Attorney General)*, 2011 FCA 38, "the factual matrix of a case is a determinative factor in assessing a decision-maker's jurisdiction." As set out in *Canada (House of Commons) v. Vaid*, 2005 SCC 30, "one must look not to the legal characterization of the wrong, but to the facts giving rise to the dispute." If one looks at the facts giving rise to this dispute, it is clear that what is at issue is the SERLO process undertaken by the employer with respect to each of the grievors. The grievors specifically state in their grievances that they are grieving the ratings that they received during their assessment, and the relief they are requesting is that the SERLO process be set aside and redone.

[32] SERLO and staffing are separate and distinct from labour relations. The Board has recognized Parliament's intent to keep the spheres of staffing and labour relations separate. In support of this, the employer has referred to *Pelletier et al. v. Treasury Board (Department of Human Resources and Skills Development)*, 2011 PSLRB 117,

Swan and McDowell v. Canada Revenue Agency, 2009 PSLRB 73, and *Hureau v. Treasury Board (Department of the Environment)*, 2008 PSLRB 47.

[33] The employer states that the fact that the employees of Parks cannot avail themselves of redress before the PSST does not give the Board jurisdiction by default. The Board held in *Spencer v. Deputy Head (Department of the Environment)*, 2007 PSLRB 123, that a gap in another administrative mechanism for redress cannot provide the basis for expanding the jurisdiction of an adjudicator as set out in section 209 of the *Act*.

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

[34] Paragraph 209(1)(*a*) of the *Act* gives the Board jurisdiction to hear matters relating to the interpretation of the collective agreement. Appendix K is incorporated into the collective agreement and deals with work force adjustment matters.

[35] Article 1.1.1 of Appendix K states as follows:

> ***1.1.1.*** *Since indeterminate employees who are affected by work force adjustment situations are not themselves responsible for such situations,* ***<u>it is the responsibility of the Chief Executive Officer to ensure that they are treated equitably</u>*** *and, whenever possible, given every reasonable opportunity to continue their careers as Agency employees.*
>
> [Emphasis added]

[36] Article 1.1.1 of Appendix K is not part of the preamble of objectives of the appendix but an integral part of it that the grievors can rely on to ensure that the employer will treat them equitably through all work force adjustment processes, especially given the potential severe consequence of non-compliance, that being the loss of employment. Article 1.1.1 of Appendix K creates rights for the employees and obligations for the employer.

[37] The fact that the grievances do not set out specific collective agreement articles upon which they rely is not relevant to the Board's jurisdiction. In *Perron v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 109, the Board rejected the contention that the grievor did not properly fill out the grievance form simply because she did not specifically refer to an article in the collective agreement.

[38] "Affected employee" is defined in Appendix K as "an indeterminate employee who has been informed in writing that his/her services may no longer be required because of a work force adjustment situation (Employé touché)" [emphasis added]. Appendix K provides rights to "affected" employees although they have not yet been selected for layoff. Article 1.1.13 states that Parks "is responsible to counsel and advise the affected employees on their opportunities of finding continuing employment in the Agency." Article 1.1.29 states as follows that:

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

[39] The grievors also refer to Articles 1.1.36, 1.1.37 and 4.1.1, in which each of these articles refer to what the employer shall do for the affected employee(s).

[40] According to the grievors, the workforce adjustment processes are engaged once an employee is affected. The SERLO processes are supposed to start after the positions are affected and before the decision to layoff is made. It is paramount that all employees who are involved in a workforce adjustment process are treated equally throughout the process given that their continued employment is at stake.

[41] The pith and substance of the grievances is whether or not the grievors were treated equitably during the workforce adjustment process and in particular the SERLO process. These are not grievances about the SERLO policy or guidelines.

[42] Even if these are grievances about staffing, the Board, under subsection 208(2) of the *Act*, can determine that there is another avenue for redress. Subsection 208(2) of the *Act* states as follows:

> ***208.*** *(2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the* Canadian Human Rights Act.

[43] Although the employer submits that the pith and substance is a grievance about staffing, even though the grievors state this is not the case, this is not a case where under subsection 208(2) of the *Act*, there is another administrative procedure for redress under any Act of Parliament. In *Pelletier et al.*, the objection to the Board's jurisdiction was upheld because the Board found that there was another administrative

procedure available for redress. In this case, there is no other administrative procedure available for the grievors.

C. Reply of the employer

[44] Article 1.1.1 of Appendix K is an overview of the objectives of the appendix itself and does not provide any substantive rights to employees and as such cannot be the subject of a reference to adjudication under paragraph 209(1)(*a*) of the *Act*.

[45] General-purpose clauses and preambles have no independent validity as a source of rights or obligations and can only assist in interpreting the substantive provisions of a collective agreement. The employer cites as support for this proposition Brown and Beatty, *Canadian Labour Arbitration,* 4th edition, 4:2130, *Re United Electrical Workers, Local 527 v. Sargent Hardware of Canada Ltd.* (1966), 17 L.A.C. 23; *Canada (Attorney General) v. Lâm*, 2008 FC 874, and *Mackwood v. National Research Council of Canada*, 2011 PSLRB 24.

[46] The grievors have attempted to introduce for the first time in their submissions the issue of equitability. They have argued that they must be treated equally. Nowhere in the grievances did the grievors ever mention that they were treated unequally or unfairly as compared with other employees in the SERLO process. A review of the grievances and the grievance presentations reveal that what are in issue are the assessment and the scores received by the individual grievors in the assessment. Nowhere was it alleged that the grievors were treated unfairly or unequally in comparison with other employees in the process. The grievors are attempting at this late stage to try and change the fundamental basis for the grievance, which is prohibited under the well-established principle in *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.). This attempt to change the nature of the grievance is in order to make it fit within Appendix K such that it may be referred to adjudication.

[47] The employer argued that simply because there is no other administrative mechanism for redress does not give the Board jurisdiction where there is none. Just because there may be no administrative mechanism for redress does not result in a violation of the collective agreement. This also does not result in inequitable treatment as all employees are subject to the same treatment. Indeed, while there may not be access to independent third-party adjudication, employees still have access to the internal grievance process.

[48] The employer referred to *Boudreau v. Treasury Board (Department of National Defence)*, 2010 PSLRB 100 (aff'd in 2011 FC 868), *Canada (Attorney General) v. Assh*, 2005 FC 734, and *Vaughan v. Canada*, 2003 FCA 76.

IV. Reasons

[49] While section 208 of the *Act* permits an employee to file a grievance with respect to a very large variety of employment-related issues, the jurisdiction of the Board is limited by section 209 of the *Act*. Subsection 209(1) of the *Act* states as follows:

> ***209.*** *(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> *(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*
>
> *(*b*) a disciplinary action resulting in termination, demotion, suspension or financial penalty;*
>
> *(*c*) in the case of an employee in the core public administration,*
>
> *(i) demotion or termination under paragraph 12 (1)(*d*) of the* Financial Administration Act *for unsatisfactory performance or under paragraph 12(1)(*e*) of that* Act *for any other reason that does not relate to a breach of discipline or misconduct, or*
>
> *(ii) deployment under the* Public Service Employment Act *without the employee's consent where consent is required; or*
>
> *(*d*) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.*

[50] The employer has argued that the *PCAA* is a complete bar as Parks is a separate employer and is not subject to the *PSEA*. While Parks may not be subject to the *PSEA*, it is bound by any collective agreement it has entered into and is bound by the *Act*. As the grievors have referred their grievances to adjudication under paragraph 209(1)(*a*)

of the *Act*, the Board may have jurisdiction if the grievance is shown to be a breach of the collective agreement.

[51] The grievors have alleged a violation of Appendix "K" of the collective agreement. Appendix "K" is entitled WFA and is 32 pages long. WFA is defined within the appendix as:

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

[52] The first section of Appendix "K" is entitled "General," and the third subsection within that section is entitled "Objectives" and states as follows:

> ***Objectives***
>
> *It is the policy of the Agency to maximize employment opportunities for indeterminate employees affected by work force adjustment situations, primarily through ensuring that, wherever possible, alternate employment opportunities are provided to them. This should not be construed as the continuation of a specific position or job but rather as continued employment.*
>
> *To this end, every indeterminate employee whose services will no longer be required because of a workforce adjustment situation and for whom the Chief Executive Officer knows or can predict employment availability will receive a guarantee of a reasonable job offer within the Agency. Those employees for whom the Chief Executive Officer cannot provide the guarantee will have access to transitional employment arrangements (as per Part VI and VII).*
>
> *In the case of surplus employees for whom the Chief Executive Officer cannot provide the guarantee of a reasonable job offer within the Agency, the Agency is committed to assist these employees in finding alternate employment in the Public Service (Schedules I, IV or V of the* Financial Administration Act *(FAA).*

[53] The second section of Appendix "K" is entitled "Part 1 Roles and Responsibilities." The first subsection of Part 1, Part 1.1, is entitled "Agency" and sets out the role and the responsibilities of the employer with respect to work force adjustment situations. Subsection 1.1.1 states as follows:

. . .

> ***1.1 Agency***
>
> ***1.1.1*** *Since indeterminate employees who are affected by work force adjustment situations are not themselves responsible for such situations, it is the responsibility of the Chief Executive Officer to ensure that they are treated equitably and, whenever possible, given every reasonable opportunity to continue their careers as Agency employees.*

[54] It is the argument of the grievors that because subsection 1.1.1 of Appendix K states that ". . . it is the responsibility of the Chief Executive Officer to ensure that they are treated equitably . . ." that their grievances, which are as against their specific assessments carried out under the SERLO process, are potentially breaches of the collective agreement. I disagree with this position.

[55] Appendix "K" is silent on how the determination with respect to a lack of work or discontinuance of a function is made, or which employees shall be retained or subject to a layoff.

[56] The determination of which employees shall be retained and those who will be subject to layoff was carried out by a process known as SERLO. Employees were assessed, results were determined from the assessments, and, after the assessment results were determined, certain employees were selected for layoff while others were retained.

[57] There is no reference in either Appendix K or any other part of the collective agreement that incorporates the employer's SERLO policy or guidelines or anything else about SERLO. If the parties to the collective agreement wished that the SERLO policy or guidelines form part of the collective agreement, they would have specifically stated so in Article 6 of the agreement, which is entitled "Agency Policies" and is where they have identified seven particular policies that form part of the collective agreement.

[58] In addition, clause 6.04 of the collective agreement states that any disagreement with respect to the interpretation and administration of the policies included may be addressed through the grievance procedure as set out in the collective agreement.

[59] The grievors have all grieved their specific SERLO assessments and as corrective action have requested that their assessments be withdrawn and they be given a new SERLO assessment. It is clear that the pith and substance of their grievances is the actual assessment that was given to them under the SERLO policy and guidelines. This is what is set out in the grievances.

[60] Appendix K does make a number of references with respect to actions the employer will take as part of the WFA process; however, these actions all deal with the steps after the determination of layoffs is made. There is nothing in Appendix K that diminishes the management right to determine who is to be identified for WFA and layoff. It is trite to state that this management right is set out in Article 5 of the collective agreement.

[61] I interpret the reference as set out in subsection 1.1.1 of Appendix K as referring to employees being treated equitably with respect to the provisions as set out in Appendix K relating to actions to be taken by the employer vis-à-vis all of the employees who find themselves subject to a layoff.

[62] In the alternative, and if I am incorrect in this interpretation, I find that the submission that the bargaining agent is advancing now, that the grievors are entitled to be treated equitably, is different in nature than what is set out in the grievances and as such violates the rule as established in *Burchill*.

[63] I agree with the submissions of the employer, submitted in reply, that the grievors, although they allege a violation of the collective agreement and Appendix "K", nowhere do they allege inequity, inequality or unfair treatment as compared with other employees in the SERLO process. This is significantly different than the allegation contained in the grievance which at its heart is about the accuracy of the assessment scores each grievor received.

[64] The grievors argued that even if these are grievances about staffing, there is no other avenue for redress, and as such, there is jurisdiction under subsection 208(2) of the *Act*. While this is correct, this does not give the Board jurisdiction under section 209 of the *Act*; it only permits the grievors to file a grievance, and it does not enlarge the Board's jurisdiction.

[65] As I have found that this matter is not a breach of the collective agreement, it therefore cannot be referred to adjudication under paragraph 209(1)(*a*) of the *Act*. As the grievance was not referred to adjudication under any other provision of section 209 of the *Act*, and none of the facts alleged fall under any other provision of section 209 of the *Act*, I am without jurisdiction to hear the grievances.

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

(The Order appears on the next page)

V. Order

[67] I am without jurisdiction to hear these matters.

[68] The grievances are dismissed.

May 13, 2015.

John G. Jaworski,
adjudicator