Date: 20150601

File: 566-02-8057

Citation: 2015 PSLREB 52

Public Service Labour Relations Act

Before an adjudicator

BETWEEN

JEAN CHÊNEVERT

Grievor

and

TREASURY BOARD
(Department of Agriculture and Agri-Food)

Employer

Indexed as
Chênevert v. Treasury Board (Department of Agriculture and Agri-Food)

In the matter of an individual grievance referred to adjudication

Before: Steven B. Katkin, adjudicator

For the Grievor: Sandra Guéric, Professional Institute of the Public Service of Canada

For the Employer: Allison Sephton, counsel

Heard at Montreal, Quebec,
November 19 and 20, 2013,
and at Ottawa, Ontario,
December 11, 2013.
(PSLREB Translation)

I. Individual grievance referred to adjudication

[1] The grievor, Jean Chênevert, held a position as a regional advisor classified at the CO-02 group and level in the Rural and Co-operatives Secretariat of the Department of Agriculture and Agri-Food ("the employer"). On August 13, 2012, he filed a grievance alleging that the employer had violated article 43 ("No Discrimination") of the collective agreement between the Treasury Board and the Professional Institute of the Public Service of Canada ("the Institute") for the Audit, Commerce and Purchasing Group (AV) ("the collective agreement") and Appendix C, about workforce adjustment ("WFAA"), which is part of the collective agreement.

[2] The grievance was referred to adjudication on January 30, 2013, under paragraph 209(1)(*a*) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22. s. 2; *PSLRA*), i.e., for a grievance related to the interpretation or application of a collective agreement provision. Once notified of the referral to adjudication, the Institute indicated that it agreed to represent the grievor in accordance with subsection 209(2) of the *PSLRA*.

[3] On the same date, January 30, 2013, the Institute, in accordance with section 210 of the *PSLRA*, notified the Canadian Human Rights Commission (CHRC) that the grievance raised an issue related to the interpretation or application of the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6; *CHRA*), i.e., discrimination based on age, because the employer apparently refused to grant the grievor an alternation, thus depriving him of remaining in the employer's service. In a letter dated February 11, 2013, the CHRC informed the Public Service Labour Relations Board (PSLRB) that it did not intend to make submissions in this matter.

[4] 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 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 *PSLRA* as that Act read immediately before that day.

II. Summary of the evidence

[5] The parties presented an agreed statement of facts (ASF). It is appropriate to reproduce it in full, and it reads as follows:

> [Translation]
>
> *This agreed statement of facts establishes the facts that the Professional Institute of the Public Service of Canada (PIPSC) and the Treasury Board (Agriculture and Agri-Food Canada) ("the parties") recognize with respect to this grievance, having PSLRB reference number is 566-02-8057.*
>
> *The parties agree to the following statement of facts:*
>
> *1. Mr. Chênevert joined the public service in May 2000. In 2008, he held an indeterminate position as a regional advisor, at the CO-02 group and level, with the Rural and Co-operatives Secretariat in Québec. Beginning in 2010, he held an acting regional manager position.*
>
> *2. On April 11, 2012, Mr. Chênevert received a letter from the employer advising him that his regional advisor position would be eliminated and that he would have 120 days to choose an option under the workforce adjustment appendix to the collective agreement. The letter Mr. Chênevert received is attached as "Appendix A" to this agreed statement of facts, and Appendix "C", "Workforce Adjustment," of the collective agreement is attached as "Appendix B."*
>
> *3. Agriculture and Agri-Food Canada (AAFC) had a list of unaffected employees who volunteered for alternation within the department. That list included Mr. Joseph Cogné, a business development officer (CO-02) with the Market and Industry Services Branch (MISB).*
>
> *4. On June 26, 2012, Mr. Chênevert emailed his resume to Ms. Sandra Gagné, Director, AAFC Quebec Regional Office at the MISB, and indicated his interest in an alternation with Mr. Cogné. His resume (see Appendix "C") indicates, among other things, his academic training, his other training and his work experience.*
>
> *5. On June 27, 2012, Ms. Gagné replied to him, indicating that an interview was anticipated for June 29, 2012. She sent him two documents (job descriptions) to help him prepare his cover letter and prepare for the interview (see Appendix "D").*
>
> *6. On June 28, 2012, Ms. Gagné's assistant confirmed the interview on June 29. Mr. Chênevert sent his cover letter to*

Ms. Gagné (see Appendix "E"). Among other things, his cover letter addressed his experience, knowledge and skills. Ms. Gagné's assistant sent him the statement of merit criteria to help him prepare for the interview (see Appendix "F").

7. On June 29, 2012, Mr. Chênevert met with Ms. Gagné and Mr. Scott Patterson, Assistant Director, MISB. At that meeting, Mr. Chênevert was asked four structured questions.

8. On July 6, 2012, Mr. Patterson, then MSIB Acting Director, advised Mr. Chênevert that his application was not approved. Mr. Chênevert requested a written response.

9. On July 10, 2012, Mr. Patterson emailed Mr. Chênevert, summarizing the July 6, 2012, discussion of the evaluation (see Appendix "G").

10. Ms. Gagné received a call from Ms. Michaela Huard, Acting Executive Director of the Rural and Co-operatives Secretariat, and agreed to meet again with Mr. Chênevert.

11. On July 17, 2012, Mr. Chênevert wrote to Ms. Gagné and indicated that he was available on Thursday or Friday for a second meeting.

12. The second meeting took place on July 19, 2012, in Montreal with Ms. Gagné and Mr. Patterson. Mr. Chênevert gave them a document further explaining his skills and experience (see Appendix "H").

13. Ms. Gagné then wrote to Mr. Chênevert to advise him that a review of the additional information provided at the second meeting did not demonstrate that his experience and education corresponded to that required for the position (see Appendix "I").

14. On August 7, 2012, Ms. Louise Boudreau, Rural and Co-operatives Secretariat Director, received Mr. Chênevert's option choice, i.e., option C (ii). Mr. Chênevert's two years of unpaid education leave began on September 12, 2012, and was to end on September 11, 2014. Mr. Chênevert received the Transition Support Measure payments and the reimbursements for tuition and the required books and equipment to which he was entitled under option C (ii).

15. On August 13, 2012, Mr. Chênevert filed this grievance within the time prescribed in his collective agreement (see Appendix "J").

16. On August 23, 2012, following an agreement with the first and second grievance level representatives, the grievance was sent directly to the final level. The grievance

> *was heard on November 27, 2012, and January 4, 2013. Ms. Johanne Bélisle, Assistant Deputy Minister at the Human Resources Branch, dismissed it (see Appendix "K").*
>
> *17. On January 30, 2013, Mr. Chênevert referred his grievance to adjudication at the Public Service Labour Relations Board (see Appendix "L").*
>
> *The parties reserve the right to present other documentary and oral evidence in support of their respective positions.*

[6] Four witnesses were heard during the hearing, for the grievor, he and Joseph Cogné, and for the employer, Sandra Gagné and Scott Patterson.

A. For the grievor

1. The grievor's testimony

[7] The grievor began his testimony by referring to his resume to demonstrate his educational training and work experience. After obtaining a college diploma in psychology, he began non-degree university studies. During his career, he attended several conventions, symposiums and training sessions in areas such as regional development stakeholder leadership, business management and regional development. As indicated in his resume, he acquired significant experience in rural development. Among other things, he started his own horticulture business, which he managed for six years. According to him, his experience earned him professional status in the eyes of the public service. Since entering the public service in 2000, all his positions were related to rural development.

[8] When preparing for the interview with Ms. Gagné and Mr. Patterson on June 29, 2012, the grievor sent her a cover letter. Since her assistant sent him the statement of merit criteria only on June 28, 2012, after he had sent his cover letter, he was unable to consider it when preparing his cover letter.

[9] The statement of merit criteria was for a CO-02 market development officer position with the employer's Market and Industry Services Branch (MISB).

[10] The June 29, 2012, interview lasted one hour. According to the grievor, the criteria on which he would be evaluated were not addressed at the interview; nor was the fact that he already met certain CO-02 criteria. He stated that Ms. Gagné did not ask him any questions about his resume and that she did not refer to his cover letter.

[11] During the grievor's telephone conversation with Mr. Patterson on July 6, 2012, Mr. Patterson told him that he did not meet the criteria for the position, specifically with respect to international trade and analytical and research abilities. The grievor requested a written response, to analyze how that decision was reached as he had seen Ms. Gagné take many notes on a multi-paged grid during the interview. Although he made the request in an email on July 9, 2012, he never received the handwritten documents.

[12] Mr. Patterson's response in an email dated July 10, 2012 (Appendix G of the ASF), indicated that the grievor's resume, cover letter and interview were considered when his profile was evaluated. The following was noted under the heading "[Translation] Evaluation":

> [Translation]
>
> *Based on the candidate's experience and his interview, it could not be demonstrated that he had the experience in tracking, researching and analyzing market or sector trends and potential, or in international trade or trade policy. Considering as well the candidate's education in human resources and adult education, our final evaluation led us to conclude that the candidate also did not possess an acceptable combination of education and experience.*

[13] Believing that the process had aggrieved him, the grievor contacted Michaela Huard, Executive Director, Rural and Co-operatives Secretariat. After she intervened, Ms. Gagné agreed to meet with the grievor a second time; it took place on July 19, 2012, and Mr. Patterson attended.

[14] The grievor stated that Ms. Gagné immediately showed openness, and she stated that she was transparent and that she had a great sense of ethics. She stated that she saw alternation as a process for accommodating those affected by workforce adjustment. She also stated that because it was not a staffing process, there were no rules for alternations. She stated that she had interviewed several people whom she would not have met with in a normal process because they did not meet the criteria.

[15] Ms. Gagné explained her context to him. She mentioned that if she accepted an alternation, it would cause a problem within her team because it would eliminate the possibility of advancement to the CO-02 position for her team members. She stated that she had held an external competition the year before and that she had been

pleased to fill the positions with perfect fits.

[16] The grievor then asked her that if given her context, she maintained her decision, and she allegedly replied in the affirmative. He wanted to know if he met the requirements for the position other than for sectoral analysis and international trade analysis. Ms. Gagné replied that they had not evaluated the other competencies. He still decided to present his qualifications, which he detailed in a five-page document (Appendix H of the ASF).

[17] The grievor first presented his analysis experience. For each one, Ms. Gagné immediately told him that it was not relevant. He then decided to close his document and give it to her, and he told her that they could make a decision.

[18] The grievor stated that the conversation strayed to personal areas. Ms. Gagné sensed his disappointment and asked him what he would do. He replied that he was admitted to a graduate university program as the university considered him to have the equivalent of a bachelor degree. He stated that that would not be easy at his age. She then asked him how many years he hoped to work in the public service. He stated that he had contributed to his pension fund for only 12 years and that he wanted to work as long as his health would allow. He was surprised and troubled by the question and replied jokingly that he would need to work until he was 80 years old. He said so because he began with the public service at age 45. He testified that in fact, his intention was to work until 65. Following his interview, he went home and wrote up a summary of the meeting the same day.

[19] The day after the meeting, Ms. Gagné advised the grievor by email that a review of the additional information provided at the second meeting did not demonstrate that his experience and education corresponded to the position's requirements.

[20] The grievor testified that he received daily public service staffing announcements and notifications by email. When a position interested him, he asked his contact at Human Resources to send him the advertisement for the position as he no longer had access to the employer's intranet.

[21] In one such email, dated August 30, 2013, one advertisement was for a position as a CO-02 market development officer at the employer's MISB. At the grievor's request, his contact sent him the information about the position on the same day.

[22] As it was the same position for which his application had been rejected, the grievor compared the statements of merit criteria and found differences. In the August 30, 2013, statement of merit criteria, the training requirements for international trade and for environmental or rural development had been eliminated. As for experience, the requirements in international trade and trade policy had also been eliminated in that statement of merit criteria. He indicated that in the August 30, 2013, advertisement, the requirement for experience preparing briefing notes, reports or other documents for managers had been added.

[23] Although the employer objected to the submission of that document, I admitted it subject to an evaluation of its probative value.

[24] In cross-examination, although he acknowledged that he did not provide examples of his experience in his resume, the grievor explained that Ms. Gagné had requested his resume quickly, and thus he had not rewritten it. In his first interview, he did not have any examples for Ms. Gagné and Mr. Patterson, and they did not ask for any.

[25] At the second interview, the grievor provided a document that included examples of his experience (Appendix H of the ASF). He provided some examples at the interview, but on finding that the decision had already been made, he submitted the document.

[26] Counsel for the employer pointed out to the grievor that in his summary of the second interview, he noted that Ms. Gagné had told him that she would read the entire document before making her final evaluation.

[27] As for the part of the grievor's summary in which he noted that Ms. Gagné had said that hiring him would cause conflicts in her team because some desired access to a CO-02 position, counsel for the employer commented to the grievor that that was not how Ms. Gagné remembered it. However, counsel did not go any further and did not ask him any specific questions about his version of the meeting.

[28] As for the discussion at the end of the second interview, the grievor admitted that Ms. Gagné did not ask him his age. When counsel for the employer brought it to his attention that in her July 20, 2012, email rejecting his application, she made no mention of his age, the grievor replied that she "[translation] was smarter than that."

[29] As for the statement of merit criteria for the first interview, the grievor stated that he received it less than 24 hours before the interview. As he had to travel to Montreal from Québec, he did not have much time to revise his resume or write a new cover letter. However, he had that opportunity for the second interview, but he was not asked any questions during that interview.

[30] When asked if he applied for the position advertised on August 30, 2013, the grievor replied that he did not because he had just signed a letter of appointment for another position outside the public service.

2. Joseph Cogné's testimony

[31] Mr. Cogné held a CO-02 market development officer position with the MISB for 12 years. In June 2012, he volunteered for alternation within the department. His immediate supervisor was Mr. Patterson, the acting director. Ms. Gagné was the acting director general. Mr. Cogné was also a union steward.

[32] The grievor contacted Mr. Cogné because he had seen his announcement volunteering for alternation. During their telephone discussion, the grievor asked him questions about the type of work as he wanted to see if he had the experience and skills for the position. Following the discussion, Mr. Cogné went to Ms. Gagné's office to advise her that the grievor was interested in the position. She told him that she was already aware as the grievor's director had already advised her.

[33] Mr. Cogné stated that he expressed considerable enthusiasm to Ms. Gagné about the grievor as he was a good candidate. She replied that it would have to wait until his resume arrived. When he repeated that the grievor was a good candidate, she again told him that it would have to wait until his resume arrived. Mr. Cogné sensed that she did not share his enthusiasm, and when he insisted, he saw that she did not like it. She seemed familiar with the grievor's experience before even receiving his resume.

[34] Between the grievor's first interview on June 29, 2012, and the second interview on July 19, 2012, Mr. Cogné was called to Ms. Gagné's office; Mr. Patterson was present. They told him to be very careful with what he said to candidates because as a volunteer, he had to ensure that applicants had the experience to be candidates before sending their resumes to superiors. He was also told that he had to be careful not to raise potential candidates' expectations. Mr. Cogné replied that he did not do that.

[35] Ms. Gagné stated that she had to again meet with the grievor and that he would receive the same response he received after the first interview. Mr. Cogné replied that he did not understand as the grievor had the desired skills. He noted that she was annoyed, based on her facial expression. He stated that he was stunned.

[36] Ms. Gagné then ordered him to no longer speak to candidates and to tell them to send their resumes to Mr. Patterson. He was to send any resumes he received to Mr. Patterson and to not have any discussion with the applicants.

[37] Mr. Cogné then received applications from other candidates, which he forwarded to Mr. Patterson. When telephoned, he informed candidates to contact Mr. Patterson and so advised him.

[38] Mr. Cogné stated that he contacted Human Resources Services in Moncton as it handled alternations. At one point, Mr. Patterson told him that he was in touch with Moncton, which Mr. Cogné confirmed.

[39] In September 2012, Ms. Gagné called Mr. Cogné to a meeting in a conference room. He stated that she began by telling him the following: "[translation] Joseph, starting now and for the next half-hour, you need to understand everything." He asked her what he needed to understand, and she replied by asking him if she was speaking to a friend or to a union steward. He replied that it did not matter as they were not enemies.

[40] They discussed the grievor and other candidates for the alternation. Ms. Gagné stated that if she were to carry out an alternation, CO-01s on her team desiring a promotion would question her about it. Mr. Cogné told her that according to the Workforce Adjustment Directive in the collective agreement, the important factor is continued employment. He continued by stating that the CO-01s had jobs but that the CO-02s, such as the grievor, were losing their jobs. Ms. Gagné reiterated that she had CO-01s expecting promotions. She then ended the meeting by noting that Mr. Cogné was greedy because he wanted to leave and receive money, to which he replied that he had his job and that alternation was a way to continue employment.

[41] In cross-examination, Mr. Cogné stated that the first screening of candidates was to see if their training and experience met the criteria. He was not involved in decision making with respect to applications. He stated that he did not send the

statement of merit criteria to the grievor.

B. For the employer

1. Ms. Gagné's testimony

[42] At the time in question, Ms. Gagné was AAFC Regional Director for Quebec; her office was at the MISB. Her staffing responsibilities involved planning for needs, seeking authorizations from the management board to fill positions and holding competitions. She had already taken part in five or six staffing processes.

[43] Comparing the role of the MSIB regional office to that of the Rural and Co-operatives Secretariat, Ms. Gagné stated that the regional office's emphasis was on market development and foreign market access. Knowledge was needed of Quebec industries, from farm production to exporting. The work is done with the main industries, i.e., dairy, pork and horticulture. The regional office is also the department's liaison with industry and the provincial government.

[44] The Rural and Co-operatives Secretariat deals with all files related to the rural sector, which can include an agricultural part. It is within the AAFC, and the regional management committee includes all managers from the region, including those from the Rural and Co-operatives Secretariat. Ms. Gagné was never the grievor's director.

[45] As for alternation, Ms. Gagné stated that no prescribed process was in place. Management was advised to work with Human Resources to evaluate candidates. Employees were informed of the opportunity to find individuals who were ready to leave the public service, and to that end, the government created a bank for those who wanted to leave their positions. Management encouraged those who wanted to leave their positions to advise it of those who expressed interest in their positions. Two employees on Ms. Gagné's team expressed a desire to alternate, one of whom was classified EC-07 and the other CO-02.

[46] Ms. Gagné stated that she and Mr. Patterson had received workforce adjustment training. They consulted someone who handled staffing at Human Resources at the office who told them that there was no prescribed process for alternations. They had to figure out the best way to conduct the evaluation. The regional management committee authorized alternations for the two positions in question.

[47] Ms. Gagné stated that as they had completed a competition in March 2012 to hire two CO-02s, it was natural for them to use the same process for the evaluation. Although the alternation was not a competition, it was a means to staff a position. It had to be determined whether the candidates' qualifications met the requirements based on the office's then-current and future needs.

[48] Ms. Gagné stated that she began by examining a candidate's resume. If the education and experience were not perfectly aligned with the statement of merit criteria, the candidate was invited to an interview to explain how he or she could fill the position. She stated that they held three interviews for the CO-02 position. The alternation for the CO-02 position was not granted because none of the candidates met the requirements.

[49] The statement of merit criteria for the CO-02 position evolves to account for the office's current and future needs. It was the same statement used for the 2012 competition.

[50] Ms. Gagné stated that management was not required to grant an alternation and that she decided if one would occur. In that regard, she referred to an excerpt from some frequently asked questions on alternation posted on the department's intranet that reads as follows:

> [Translation]
>
> . . .
>
> *It is important to note that the decision as to whether to proceed with an eventual alternation is up to management. . . Alternations require approval from those responsible in the branches, and the Horizontal Management Committee will confirm them.*
>
> . . .

[51] In the same document, question 6 and its answer read as follows:

> [Translation]
>
> ***Q6. As an eventual alternate, must my position exactly reflect the opting employee's? What are some of the factors considered?***
>
> *No, but the opting employee must demonstrate that he or she has the required qualifications to hold the alternate's*

> *position. The responsible manager must evaluate the employee to ensure that he or she has the necessary qualifications and meets the language requirements.*
>
> [Emphasis in the original]

[52] Before the grievor's June 29, 2012, interview, Ms. Gagné had his cover letter and resume. She and Mr. Patterson decided to invite him to an interview even though they were of the opinion that he did not "[translation] perfectly match" the desired qualifications.

[53] During the interview, they used the same four questions about skills that they had used for the March 2012 competition, although they understood that it was not a competition. They chose that method to facilitate discussion during the interview. The questions were supplied to the candidates before the interviews to give them a chance to think of examples to provide.

[54] During his interview, the grievor provided examples of his experience, including significant coordinations to get stakeholders to work together. According to Ms. Gagné, they were not able to determine that he had the sectoral analysis experience that would allow him to analyze a value chain from production to export.

[55] The fourth interview question asked the candidates to analyze the potential for developing new markets for a specific sector of the Quebec agri-food industry, such as pork, and to provide suggestions in that regard and an analytical approach.

[56] Ms. Gagné stated that the grievor's response to that question demonstrated that he had certain basic knowledge but not of the details about what each step required and how to proceed. According to her, that was inconclusive as the analytical approach was incomplete. She stated that his cover letter and resume did not demonstrate the in-depth approach they sought in their office. She stated that according to those documents, he did not conduct analyses; the people he coordinated did. In addition, his analysis was more socioeconomic, which was not the degree of analytical experience they sought.

[57] As for the evaluation of the grievor's education, Ms. Gagné stated that he had no direct recognition of his education and that after the interview, she determined that the combination of his experience and education was insufficient.

[58] At Ms. Huard's request and with her regional management committee's approval, Ms. Gagné agreed to a second interview with the grievor, which took place on July 19, 2012; Mr. Patterson attended it.

[59] The grievor brought a new document to that interview, which provided more details on his skills and experience. Ms. Gagné stated that they did not read the entire document but that it contained no new facts, based on a quick reading, of which they informed him. She told him that they would read it to determine whether the conclusion from the first interview would change. After the interview, they read it in full and concluded that it did not contain enough new facts to change that decision.

[60] When questioned as to whether she had discussed other things with the grievor, Ms. Gagné replied that although she could not remember the exact words, she asked him about his next steps, to which he replied that he would consider returning to school. She then asked him if he had been working in the public service a long time, to see how education would help him in his career.

[61] According to Ms. Gagné, she asked the grievor that question because she sensed that he was emotional and she wanted to put him at ease to end the interview on a positive note. She stated that that discussion had no effect on the decision not to offer him the alternation.

[62] Ms. Gagné stated that her regional office's business plan began to evolve in 2012 by emphasizing sectoral analysis. In May 2013, regional offices in the department were refocusing on strategic sectoral analysis, which was their essential base function. The regional office is close to industry and is part of several groups of contacts with industry sectoral leaders.

[63] Ms. Gagné stated that they reviewed all regional office activities and noted everything related to analysis. They no longer coordinated foreign market development missions.

[64] As for the statement of merit criteria for the two CO-02 positions from August 30, 2013, Ms. Gagné stated that they were for replacements for two maternity leaves during the period indicated, i.e., from October 2013 to April 2014. She stated that the changes compared to the first statement were due to the transformation that began in May 2013.

[65] Ms. Gagné then spoke about her exchanges with Mr. Cogné. He had put his name in the alternations bank, and she reminded him of the main points of an alternation. She told him that if someone expressed an interest to forward his or her contact information to the managers. She told him not to create expectations by telling the person that he or she would be suitable for the position as that decision was up to the managers.

[66] Ms. Gagné stated that she had discussed with Mr. Cogné that alternations had to meet office needs and that CO-01 positions could not be compared to CO-02 positions in an alternation. She stated that had not been convinced that Mr. Cogné fully understood the process.

[67] As for the part of the grievor's summary of the July 19, 2012, interview in which he noted that Ms. Gagné stated that hiring him would cause conflicts in her team because some of them would have liked access to a CO-02 position, she testified that that did not reflect what she told him, which was that the statement of merit criteria for Mr. Cogné's position was related to staffing that she had carried out in 2012 and that it was important to find someone who met the requirements. She also told him that had they used a statement that had differed from that of the competition, she would have been questioned about it. Her decision to not retain his application was based on the documents.

[68] In cross-examination, Ms. Gagné acknowledged that she had never worked at the Rural and Co-operatives Secretariat. When questioned about how she understood the continuation of employment, she stated that there were directives and rules to follow and that it was a matter of giving employees the maximum support possible to help them find work. According to her, alternations are a means of promoting the continuation of employment. She stated that her role at the Montreal regional office included being up to date on medium- and long-term needs.

[69] As for the June 29, 2012, interview and the grievor's response to the fourth question, Ms. Gagné did not remember if she asked him for clarification. She stated that she did not want to go too far because she wanted to remain neutral and let the candidate provide clarification, as it was not a competition.

[70] As for the grievor's analysis experience, Ms. Gagné did not ask him who had done the analysis but asked him for examples. In one, an economist who was part of

the study had done the analysis. When questioned as to whether she had asked the grievor if he had done analyses in other scenarios, Ms. Gagné replied that it had not been necessary to ask him if the examples consisted of coordinations. Each time the grievor conducted an analysis, it was about rural sector issues, while she was seeking an analysis of the value chain.

[71] Ms. Gagné stated that at the end of the interview, they asked whether the candidate had any questions; the grievor had none.

[72] They did not prepare questions for the second interview with the grievor. They chose to use the statement of merit criteria as the evaluation tool for the alternation.

[73] Ms. Gagné stated that CO-01s could not apply for CO-02 positions in alternations and that managers decided alternations.

2. Mr. Patterson's testimony

[74] At the time in question, Mr. Patterson was Assistant Regional Director of the Quebec Regional Office and had been since March 2009. He stated that the basic mandate of his team was to be the primary interface between industry and the provincial government. That mandate evolved over time and was focused on program development. The office's purpose became sectoral analysis.

[75] CO-01s and CO-02s at the office, including Mr. Cogné, reported to Mr. Patterson. There was no working relationship between their organization and the grievor.

[76] A CO-02's role included responsibility for an industry sector, such as pork, dairy or horticulture. Management wanted them to become experts in those fields.

[77] Mr. Patterson prepared the statement of merit criteria that was used for the staffing in 2012 and for the alternation. He stated that its experience criterion required taking an industry sector and viewing it in terms of a value chain. It also required the ability to identify industry partners and to spot information relevant to the sector in question. It was also necessary to create a sector profile, to understand how it worked and its opportunities and challenges from a market perspective.

[78] Referring to the grievor's evaluation, which Mr. Patterson emailed to him on

July 10, 2012, Mr. Patterson stated that it was based on the grievor's resume, his cover letter and the June 29, 2012, interview. In his opinion, all the merit criteria were essential for the alternation.

[79] Mr. Patterson stated that the grievor's experience was primarily in coordination and promotion in the rural sector and in his past positions. It was also not clear that he had conducted the analyses. Mr. Patterson stated that rural affairs were a different field from an economic industry, such as the AAFC.

[80] Questioned about whether he remembered the grievor's response to the fourth question at the first interview, Mr. Patterson stated that it was about the pork sector and that the grievor articulated a process by which he would have done an analysis to identify partners and primary information. His response was based on his experience.

[81] Mr. Patterson was asked based on the grievor's response how he evaluated the capacity for analysis. He stated that he covered some of the required elements and that a large part of the response was at a high level. The fourth question was to evaluate the knowledge criterion.

[82] When questioned as to his evaluation of the grievor's knowledge, Mr. Patterson first stated that they did not give marks for each criterion in the interview. He stated that he characterized the grievor's knowledge as adequate. Based on the grievor's response, it was not clear that he had analysis experience.

[83] Mr. Patterson stated that the second interview with the grievor was another opportunity to demonstrate that he met the essential criteria. That time, the second cover letter clearly targeted the essential criteria of experience. According to Mr. Patterson, the interview consisted primarily of discussing the criteria and the contents of the second cover letter.

[84] Following the interview, Mr. Patterson and Ms. Gagné reviewed the contents of the second cover letter and integrated it into all the information they already had. They evaluated whether that new information indicated if the experience criteria had been met and concluded that the grievor had not met it.

[85] Referring to the cover letter and the examples that the grievor provided, Mr. Patterson stated that it was not clear that he was involved in research and analysis. It was a coordination role. Several other examples were not related to a sector

or to the industry but instead to rural issues. Mr. Patterson indicated that at one point, the grievor stated that he had led promoters. According to Mr. Patterson, the grievor's role was not clear or direct. As for the fact that the grievor had started a horticulture business, Mr. Patterson stated that that was 20 or 25 years ago, that the description was vague, and that the grievor did not specify the analysis he had done at that time.

[86] The grievor provided an example of coordinating a team of two people to conduct a market study on field vegetable production in the Gaspé region. According to Mr. Patterson, that example did not demonstrate that it was experience that the grievor had acquired personally.

[87] Mr. Patterson stated that the grievor did not provide a single example that demonstrated experience in industry and markets. It consisted of research and analyses to identify job market trends in business sectors where seasonal work was predominant. When they put that example in the context of all the information provided, it was not enough to meet the criteria. Mr. Patterson stated that the CO-02 position was not entry-level.

III. Summary of the arguments

A. For the grievor

[88] The grievor pointed out that the legal framework in this case is defined by the WFAA and the decision in *Public Service Alliance of Canada and Professional Institute of the Public Service of Canada v. Treasury Board of Canada*, 2013 PSLRB 37 ("*Alliance and Institute*"; application for judicial review dismissed in 2014 FC 688). In that decision, the adjudicator determined that, among other things, because the WFAA was an integral part of the collective agreement, the applicable rules of interpretation were those for interpreting collective agreements. The adjudicator explained alternation as follows at paragraph 2 of the decision:

> *. . . 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 [sic] ("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 [sic]. 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.*

[89] The grievor noted that the WFAA's objectives are to optimize employment opportunities as much as possible and that the employer had to assume a proactive role by promoting the continuation of employment. In that regard, he quoted the following sentence from paragraph 33 of *Alliance and Institute*:

> *. . . On a more general level, participation* [by departments] *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. . . .*

[90] Referring to clause 6.2.4 of the WFAA, the grievor argued that the employer's decision as to whether the opting employee meets the requirements of the position must be made within the framework of the WFAA's objectives and must not be unreasonable.

[91] The grievor pointed out that an adjudicator has the authority to evaluate whether the employer's discretionary decision was reasonable as it was a decision arising from applying the provisions of a collective agreement. In that regard, he cited Brown and Beatty, *Canadian Labour Arbitration*, 4th edition, at paragraph 4:2326, and *Prévost v. Office of the Superintendent of Financial Institutions*, 2011 PSLRB 119, at para 111 and 128.

[92] The grievor referred to the employer's role and responsibilities as described in clause 1.1.2 of the WFAA and in that regard cited *Alliance and Institute*, at para 37, as follows:

> *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.*

[93] The grievor then addressed the testimonies and pointed out that their credibility had to be evaluated based on the criteria that the British Columbia Court of Appeal established in *Faryna v. Chorny*, [1952] 2 D.L.R. 354.

[94] The grievor submitted that Ms. Gagné's testimony had lacked coherence and that it had not corresponded to the likely circumstances of the case. While she had stated that alternation had no prescribed process or rules, in cross-examination, she had stated that there were rules to follow for continuing employment. As for the comparison between the roles of the regional office of the MISB and the Rural and Co-operatives Secretariat, she had acknowledged that she had never worked at the Secretariat and that she had no experience in that area.

[95] The grievor claimed that in the first interview, on June 29, 2012, Ms. Gagné did not ask him any questions about his resume or his cover letter. She did not remember if she asked him any questions with respect to the fourth structured question. Mr. Patterson testified that the fourth question was a hypothetical scenario and that they did not discuss the grievor's experience. It was a matter of knowing what the grievor would do in the hypothetical scenario.

[96] The grievor submitted that according to *Alliance and Institute*, the employer's participation cannot be token or perfunctory. However, Mr. Cogné testified that as soon as he received the grievor's expression of interest, he went to see Ms. Gagné and found that she did not share his enthusiasm, even before she received his cover letter and resume.

[97] The grievor pointed out that in her testimony, Ms. Gagné stated that she had read the frequently asked questions document about alternation that the AAFC had prepared and the frequently asked questions about workforce adjustment agreements that the Treasury Board prepared without stating how she applied them to this case.

He submitted that those documents were not relevant as the issue is not what the department wanted but Ms. Gagné's decision.

[98] The grievor submitted that based on the evidence, it is difficult to perceive any real desire to help him and to favour the continuing of employment. According to him, the evidence demonstrated that Ms. Gagné was not open to giving him a second chance.

[99] In that regard, the grievor referred to Mr. Cogné's testimony, who stated that between the two interviews, Ms. Gagné asked him to come to her office and that Mr. Patterson was there. She told Mr. Cogné that she had to meet with the grievor again and that he would receive the same response he received after the first interview.

[100] The grievor pointed out that in the second interview, on July 19, 2012, Ms. Gagné did not ask him any questions. He submitted that she told him that the new document that he had brought to the interview contained more details of his skills and experience but that after giving it a quick read, there were no new facts. She told him that at first glance, she maintained the first evaluation, but that they would read the document to determine whether the conclusion from the first interview would change. The grievor submitted that a document could not both contain more details and not provide anything new.

[101] The grievor pointed out that the conversation then turned personal, when Ms. Gagné asked him what he planned to do. He replied that if he were not working for the AAFC, he would return to school, which was difficult at his age. She then asked him how long he hoped to work in the public service. He was surprised by that question and submitted that it was clear that his age was a relevant factor for her. According to him, his age was not relevant to determining whether he met the position's requirements. He argued that his age was not a determining factor in Ms. Gagné's decision but that it was nonetheless one of the factors considered. He submitted that that must be proven on a balance of probabilities, and in that regard, he cited *Bergeron c. Télébec Ltée*, 2005 CF 879, at para 66.

[102] The grievor then addressed the issue that at the second interview, Ms. Gagné told him that hiring him would cause conflicts within her team as some team members wanted to access a CO-02 position as he described in the fourth paragraph of his summary of the interview. She testified that that did not reflect what she said. She

allegedly stated that had she used a statement of merit criteria that differed from the one she used in the staffing competition for a CO-02 position on her team in March 2012, her team would have questioned her about it. The grievor submitted that on that item of evidence, his version was corroborated by Mr. Cogné's testimony and that Ms. Gagné's version was inconsistent with the evidence.

[103] The grievor continued by addressing the August 30, 2013, statement of merit criteria for two CO-02 positions at the regional office. Ms. Gagné testified that in May 2013, her department's regional offices refocused on strategic sectoral analysis and no longer coordinated foreign market development missions. The August 2013 change to the statement of merit criteria reflected that new orientation.

[104] The grievor submitted that Ms. Gagné told him that she was looking for a candidate with experience in sectoral analysis and in international market analysis. Those elements were removed from the statement of merit criteria in August 2013. He pointed out that it was not very likely that she was unaware that those changes were coming, as she was the AAFC liaison officer in Quebec and testified that she was aware of the organization's current and future needs. In that regard, he referred to clause 1.1.2 of the WFAA, about effective human resources planning, and to the frequently asked questions about alternation, which indicate that management must consider current and future needs. He submitted that his application was rejected for reasons that were no longer part of the statement of merit criteria.

[105] About the evaluation of the grievor's experience, Ms. Gagné stated that he had basic experience but that he did not clearly demonstrate that he could pursue an analysis of a sector's strengths and weaknesses. He pointed out that he provided an overview without clarifying at each stage. Thus, it was not a lack of experience but a lack of details. He submitted that Ms. Gagné should have asked him for clarification but did not.

[106] As for the evaluation of the grievor's education, Ms. Gagné stated that he had no direct recognition of his education, and after the interview, she found the combination of his experience and education insufficient. He referred to the essential qualities section of the statement of merit criteria for the CO-02 position, which listed a university diploma or an acceptable combination of education, training and experience. The grievor submitted that Ms. Gagné's testimony implied that two criteria had to be met, a university diploma and an acceptable combination. However, it is one criterion.

He stated that the public service recognized the combination of his education, training and experience as sufficient to hold a CO-02 position, and he had even held a CO-03 position for two years.

[107] The grievor then addressed Mr. Patterson's testimony. His arguments dealt primarily with the fact that Mr. Patterson did not assign sufficient importance to the grievor's varied experience, as detailed in his resume and in the document that he submitted at the second interview. For example, the grievor referred to his experience in Deux-Rivières, which he claimed specifically satisfied the desired experience. Another example was that of the horticulture business that he started and maintained for six years. Mr. Patterson testified that that experience was not valid because it had occurred too long ago. The grievor pointed out that the statement of merit criteria did not specify a time limit on experience or that he was to list only recent experience.

[108] The grievor submitted that when Mr. Patterson was asked for his evaluation of the grievor's response to the fourth question at the first interview, he first stated that he did not give marks for each criterion at the interview. He stated that he characterized the grievor's knowledge as adequate. Despite that, the grievor was then told that he did not have relevant experience.

[109] The grievor, referring to his cover letter and his examples, submitted that Mr. Patterson stated that it was not clear that the grievor had been involved in research and analysis. The grievor noted that Mr. Patterson or Ms. Gagné could have asked him for clarification.

[110] The grievor argued that the decision to refuse him the alternation was unreasonable, unfounded, made in bad faith, inequitable and contrary to the WFAA. According to him, it was clear that Ms. Gagné did not want him and that she favoured advancing the careers of the CO-01s on her team. He also submitted that the decision was arbitrary because according to the evidence, he objectively demonstrated that he had the necessary experience.

[111] The grievor submitted that he had suffered from discrimination as Ms. Gagné's question as to how long he wanted to work in the public service was not aimed at determining whether he met the position's requirements. Thus, the employer violated article 43 ("No Discrimination") of the collective agreement along with the *CHRA*. The grievor asked that the grievance be allowed and that a supplementary hearing be held

so that he could present evidence of the harm that he suffered.

B. For the employer

[112] The employer submitted that the following two questions are at issue: Was the collective agreement violated? Was the grievor discriminated against?

[113] The employer pointed out that the WFAA's objectives are general introductory articles that do not confer substantive rights on employees and that do not create obligations for the employer. As those provisions explain only the guiding principles, it is not possible to violate the objectives. In support of that argument, the employer cited the following decisions: *Canada (Attorney General) v. Lâm*, 2008 FC 874, at para 28; *Swan and McDowell v. Canada Revenue Agency*, 2009 PSLRB 73, at para 54 and following paragraphs; and *Mackwood v. National Research Council of Canada*, 2011 PSLRB 24, at para 11 and 12.

[114] The employer submitted that the WFAA's objectives and its clauses 1.1.1 and 1.1.2 do not impose a requirement that it offer employees all possibilities of pursing their careers with the public service, only reasonable possibilities. Awarding a position to an unqualified person is not a reasonable opportunity, and clauses 6.2.4 and 6.2.6 of the WFAA indicate that that is not the intent of alternation.

[115] The employer submitted that no evidence supported the grievor's argument that management's actions in this case were inequitable. Ms. Gagné testified that the same process was used for all candidates, i.e., a resume and the statement of merit criteria, and she found that no candidate met the position's requirements.

[116] The employer submitted that it was a matter of determining whether it acted reasonably when it exercised its authority under the WFAA. According to the employer, the Supreme Court of Canada's ruling in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at para 11 and 15, applies to management decisions. In this case, clauses 6.2.4 and 6.2.6 of the WFAA set out management's exclusive authority over alternations.

[117] The employer pointed out that management determined that the grievor did not meet the requirements of the position in question and he, who bore the burden of proof, did not establish that the collective agreement was violated. On the issue of the burden of proof, the employer cited *Canadian Association of Professional Employees v.*

Treasury Board (Department of Human Resources and Skills Development), 2013 PSLRB 100, at para 21.

[118] The employer submitted that the collective agreement does not require it to grant alternations and that employees have no such guarantees. As for the decision with respect to the grievor, the employer was diligent, transparent and reasonable, and its decision was not arbitrary or marked by bad faith.

[119] When addressing the facts, the employer submitted that Ms. Gagné and Mr. Patterson determined the process before beginning their evaluation. Wishing to be transparent and diligent, they used the March 2012 statement of merit criteria, which reflected management's then-current needs. As for Ms. Gagné's testimony that there was no prescribed process for alternations, the employer referred to the statement of merit criteria, the resume and the interview.

[120] Before reaching a decision, Ms. Gagné and Ms. Patterson considered all the information that the grievor had provided. The employer submitted that at the second interview, Ms. Gagné informed him of her decision only at his request. It noted that since she stated that she would carefully read his document to see if her decision following the first interview would change, her decision rendered at the second was not final. Only after the interview did they examine the document and conclude that it did not provide enough new facts to change the decision.

[121] As for the grievor's argument that he could have been asked for clarification about his experience, the employer noted that the documents he provided contained many details that Ms. Gagné and Mr. Patterson considered. As for the fourth question, although Mr. Patterson stated that the grievor's knowledge was adequate, it was not clear that he had the desired experience for the position in question. And the only example acceptable to management in the document that the grievor provided was insufficient for a CO-02 position, which was not an entry-level position.

[122] As for the August 2013 statement of merit criteria, the employer submitted that that information was not available when Ms. Gagné made her decision and that the information the grievor obtained after the fact could not be considered.

[123] As for the grievor's argument that Ms. Gagné favoured the CO-01s on her team, the employer pointed out that according to her, the discussion was not about a conflict

with CO-01s but about the differences between CO-01s and CO-02s. The employer submitted that that was not the reason for not allowing the grievor's application and that there was no evidence that it was a consideration in the decision.

[124] The employer submitted that the March 2012 statement of merit criteria met the current needs at that time and that the grievor could not use changes to it that occurred a year later and testimony about a conflict between CO-01s and CO-02s to reduce the evaluation's scope. He should have applied for the position posted in August 2013 but did not. In that regard, the employer cited *Canadian Association of Professional Employees v. Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 100, at para 21.

[125] The employer then addressed the grievor's allegation that he was a victim of discrimination. It submitted that there was no evidence of discrimination and that he did not provide *prima facie* (at first sight) evidence of discrimination. In support of its argument, the employer cited the following decisions: *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536; *Souaker v. Canadian Nuclear Safety Commission*, 2009 PSLRB 145, at para 131 and 133; and *Rosenthal v. President of the Federal Economic Development Agency for Southern Ontario*, 2011 PSST 22, at para 28 to 31.

[126] The employer noted that Ms. Gagné stated that her discussion with the grievor after the second interview did not affect her decision and that he had to demonstrate that she had considered his age.

[127] The employer submitted that even were I to conclude that the grievor's age was considered in the decision, the fact remains that he did not meet the position's requirements. And he had to prove that the decision was discriminatory or a sham and had to demonstrate that were it not for his age, he would have been entitled to the position.

[128] The employer pointed out that Ms. Gagné stated that the discussion at the end of the second interview was aimed at lightening the mood, given the grievor's disappointment. She explained that he mentioned his age first. According to her, the discussion had been inoffensive, and her decision had been based solely on the statement of merit criteria and his experience.

C. The grievor's reply

[129] The grievor submitted that an adjudicator has jurisdiction to examine the context in which management's decision was made. In this case, the decision was arbitrary, not the criteria.

[130] As for the argument that in the first interview the grievor did not provide examples of his experience, he pointed out that the manager did not request examples, except for the third question, when he was asked to describe "[translation] an occasion."

[131] The grievor submitted that in his testimony, Mr. Patterson attempted to create a hierarchy of experience levels within the CO-02 position, which was not described that way.

[132] As for the discrimination allegation, the grievor pointed out that two contradictory versions existed. Ms. Gagné's version was that, without the grievor recalling her exact words, she asked him how many years of service he had in the public service, to determine how his studies would serve him in his career, which he submitted was illogical. According to him, she asked him how much longer he hoped to work in the public service.

[133] As for the employer's argument that were it not for his age, the grievor would have been granted the alternation, he submitted that that means that age was a factor in the decision. According to him, the jurisprudence requires only that it be a factor.

IV. Reasons

[134] The grievance raises the following questions. Did the employer use its discretionary authority unreasonably when it refused the grievor's request for alternation, thus violating the collective agreement? Was he discriminated against based on age?

A. Discrimination allegation

[135] I will deal first with the grievor's discrimination allegation, which was that his age was a factor that Ms. Gagné considered in her decision to not offer him an alternation.

[136] When issues involve the *CHRA*, an adjudicator has the powers set out in paragraphs 226(2)(*a*) and (*b*) of the *PSLRA*, which read as follows:

> ***226.*** *(2) An adjudicator may, in relation to any matter referred to adjudication,*
>
> *(*a*) interpret and apply the* Canadian Human Rights Act *and any other Act of Parliament relating to employment matters, other than the provisions of the* Canadian Human Rights Act *related to the right to equal pay for work of equal value, whether or not there is a conflict between the Act being interpreted and applied and the collective agreement, if any;*
>
> *(*b*) give relief in accordance with paragraph 53(2)(*e*) or subsection 53(3) of the* Canadian Human Rights Act . . . .

[137] To demonstrate discrimination, a grievor first has to establish a *prima facie* case of discrimination. The Supreme Court described the criterion for such evidence as follows in *Moore v. British Columbia (Education)*, 2012 SCC 61, at para 33:

> *As the Tribunal properly recognized, to demonstrate* prima facie *discrimination, complainants are required to show that they have a characteristic protected from discrimination under the* Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a* prima facie *case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.*

[138] If the grievor is able to establish a *prima facie* case of discrimination, the employer must refute the allegations or provide another reasonable explanation that is not based on discrimination. That explanation cannot come down to a simple pretext aimed at justifying the discriminatory conduct.

[139] Juriansz, J., of the Ontario Court of Appeal, explained the analysis of a *prima facie* case as follows in *Peel Law Association v. Pieters*, 2013 ONCA 396:

> . . .
>
> *[82] . . . A* prima facie *case framework in the discrimination context is no different than that used in many other contexts. Its function is to allocate the legal burden of proof and the*

> *tactical obligation to adduce evidence. It governs the outcome in a case where the respondent declines to call evidence in response to the application.*
>
> *[83] On the other hand, in a case where the respondent calls evidence in response to the application, the* prima facie *case framework no longer serves that function. After a fully contested case, the task of the tribunal is to decide the ultimate issue whether the respondent discriminated against the applicant. After the case is over, whether the applicant has established a* prima facie *case, an interim question, no longer matters. The question to be decided is whether the applicant has satisfied the legal burden of proof of establishing on a balance of probabilities that the discrimination has occurred.*
>
> . . .
>
> *[88] The approach respondents' counsel advocates would make the question whether there is sufficient evidence to support a* prima facie *case indistinguishable from the ultimate question whether, at the end of the day, discrimination has been established. Both analyses would be identical because both would consider all the evidence in the record. Instead of conducting the analysis twice, it would make better sense for the tribunal to proceed directly to the ultimate question whether, on the whole of the evidence, there is discrimination.*
>
> . . .

[140] The employer pointed out that the grievor did not establish a *prima facie* case of discrimination. However, since both parties adduced evidence about his discrimination allegation, it becomes a matter of determining whether he succeeded in demonstrating that, on a balance of probabilities, discrimination occurred.

[141] The grievor's discrimination allegation rested solely on his discussion with Ms. Gagné at the end of the second interview. His testimony and his written summary, as well Ms. Gagné's testimony, agreed on the following points. The discussion took a personal turn because she sensed his disappointment with the decision. She did not ask him his age; he raised that issue when he stated that returning to school at his age would not be easy.

[142] The grievor testified that in response to Ms. Gagné's question about how long he hoped to work in the public service, he stated that he had contributed to his pension fund for only 12 years and jokingly added that he planned to work until he was 80. He testified that Ms. Gagné's question troubled him and that it left him

thinking that she considered his age in her decision. She testified that she did not consider his age in her decision to not grant him the alternation.

[143] Although the grievor's version could raise certain questions about the employer's motivation, I believe that the employer's evidence on the age issue was credible, was consistent with the facts and demonstrated that that issue was not a factor in Ms. Gagné's decision. The issue of his age arose during his discussion with her in a manner consistent with the employer's version. It is not enough for the grievor to think or to have the impression that he suffered an adverse effect and that the protected characteristic, in this case his age, was a factor in the manifestation of the adverse effect, i.e., the refusal of the alternation. He had to prove as much. In the circumstances of this case, and in light of the evidence the two parties adduced, I find that the grievor did not successfully demonstrate that, on a balance of probabilities, he was a victim of discrimination by the employer.

B. <u>The alternation</u>

[144] As indicated in the section entitled "General," the WFAA is part of the collective agreement. According to the definitions the WFAA sets out, the grievor was the opting employee and Mr. Cogné was the alternate. Alternation is defined as follows in the WFAA:

> ***Alternation*** *(*échange de postes*) - 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.*
>
> [Emphasis in the original]

[145] According to the employer, management did not offer the grievor the alternation because he did not meet the requirements of the position in question. Clauses 6.2.4 and 6.2.6 of the WFAA state that the decision as to whether an opting employee meets the position's requirements is the employer's to make. Those clauses read as follows:

> ***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 will result in retaining the skills required to meet the ongoing needs of the position and the Core Public Administration.*
>
> . . .
>
> ***6.2.6*** *The opting employee moving into the unaffected position must be, to the degree determined by the Employer, able to 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.*

[146] According to the employer, the grievor did not demonstrate that management's decision violated the collective agreement. However, although the employer has decision-making authority under the WFAA, its authority cannot be exercised in an unreasonable, arbitrary or discriminatory manner, or in bad faith. The two parties agreed on that point.

[147] The employer pointed out that its decision must be reasonable, and, in that regard, it cited *Newfoundland and Labrador Nurses' Union.* In that case, in the context of an application for judicial review of an arbitrator's decision, who had interpreted a collective agreement, the Supreme Court set out certain criteria that a reviewing court must consider that is examining whether an administrative tribunal's or a specialized decision maker's decision is reasonable given the outcome and reasons.

[148] I do not believe that that the same criteria apply to this case. Unlike a reviewing court, an adjudicator's role is to render an appropriate decision based on the evidence and arguments presented before him or her in a hearing *de novo*.

[149] The adjudicator in *Union of Canadian Correctional Officers - Syndicat des agents correctionnels - CSN v. Treasury Board (Correctional Service of Canada)*, 2007 PSLRB 120, a decision cited in *Alliance and Institute*, summarized as follows the arbitral jurisprudence about reasonable interpretations of collective agreements:

> . . .
>
> *[22**]** Whether an employer is under an obligation to administer the collective agreement in a fair and reasonable manner has been the subject of much discussion in the arbitral jurisprudence (see Mitchnick and Etherington,* Labour Arbitration in Canada *at 16.2 and 16.3* [17.2 and

17.3 in the 2nd edition, 2012]*). The arbitrator in* Blue Line Taxi Co. and R.W.D.S.U., Local 1688 *(1992), 28 L.A.C. (4th) 280, summarized the discussion and conclusions as follows (at pages 287-88):*

. . .

> . . . the employer is under such an obligation *[to administer the collective agreement in a fair or reasonable manner]* in the following situations. First, if a provision of the collective agreement expressly confers a discretion on the employer, an arbitrator could conclude that it was intended that the discretion be exercised fairly or reasonable. Secondly, it has been held that an employer is implicitly precluded from acting unreasonably (in areas not expressly regulated by the collective agreement) if that might lead to specific provisions of the agreement being negated or undermined: see Metropolitan Toronto (Municipality) v. C.U.P.E., Loc. 43 (1990), 69 D.L.R. (4th) 268, 74 O.R. (2d) 239, 39 O.A.C. 82 (Ont. C.A.) [leave to appeal to S.C.C. refused 72 D.L.R. (4th) vii], and Re Westin Harbour Castle and Textile Processors, Service Trades, Health Care, Professional & Technical Employees Int'l Union, Loc. 351 (1991), 23 L.A.C. (4th) 354 (Brown).
>
> As I understand the law, therefore, the employer will only be answerable for the exercise of a management discretion if a link to the collective agreement can be established. Such a link might be found to exist if (a) the collective agreement expressly confers or recognizes a management discretion, or (b) the exercise of the management discretion might lead to specific provisions of the agreement being negated or undermined.

. . .

[23] In Metropolitan Toronto (Municipality) v. CUPE, Local 43 *(1990), 69 D.L.R. (4th) 268, the Ontario Court of Appeal stated:*

. . .

> It is also true that parties intent on reaching a settlement do not always have the time, the incentive, or the resources to consider the full implications of each and every phrase. There is, therefore, a place for some creativity, some recourse to arbitral principles, and some overall notion of reasonableness. . . . The presence of an implied principle or term of reasonable contract administration was also acknowledged by Craig, J. in *[Wardair Canada Inc. v. C.A.L.F.A.A. (1988), 63*

O.R. (2d) 471 (Div. Ct.)] at pp. 476-77.

. . .

[150] As for the WFAA objectives, I agree with the employer's argument that they do not confer substantive rights on the grievor. However, one of the guiding principles of the objectives is to promote continued employment, which is expressed as follows: "This should not be construed as the continuation of a specific position or job but rather as continued employment." Regardless, the grievor's claim was not based solely on the WFAA's objectives but instead on the employer's decision to refuse him an alternation. Since the employer's discretionary decision-making authority is found in the provisions of the collective agreement, i.e., clauses 6.2.4 and 6.2.6 of the WFAA, an adjudicator has jurisdiction to determine whether that authority was exercised reasonably.

[151] When examining the evidence, a first point stands out: Mr. Cogné had the first contact with the grievor when he called to inquire about the position in question. Following his discussion with the grievor, Mr. Cogné went to Ms. Gagné's office to advise her that the grievor was interested in the position, which she already knew. Mr. Cogné expressed great enthusiasm about the grievor's application and on two occasions advised Ms. Gagné that he was a good candidate. Each time, Ms. Gagné replied that it would have to wait until his resume arrived. He sensed that she did not share his enthusiasm. Although the decision of whether to grant an alternation is up to the employer, it is interesting that Mr. Cogné had held the position for 12 years.

[152] Mr. Cogné testified that when he was called to a meeting with Ms. Gagné and Mr. Patterson between the grievor's first and second interviews, Ms. Gagné ordered him to speak to candidates no longer and to tell them to direct their resumes to Mr. Patterson. That direction seems inconsistent with the following part of question 2 of the frequently asked questions prepared by the AAFC:

> [Translation]
>
> *The Human Resources Branch of Agriculture and Agri-Food Canada (AAFC) has implemented an alternation process to facilitate pairing opting employees and alternates within the department. Opting employees will receive the names of possible alternates with whom they may examine alternation opportunities. . . .*

[153] It is true that the frequently asked questions do not have the force of a collective agreement. However, it seems to me that the purpose of that quote is to promote the opportunity for an opting employee to speak directly to an alternate in the position in question to decide quickly whether to apply for the position. Ms. Gagné's instructions would deprive opting employees of the opportunity to speak directly with the person in the position, in this case Mr. Cogné. It seems to me that Ms. Gagné took that step to control the selection process in her own way. Eliminating Mr. Cogné as the first contact with applicants was not necessary because regardless the WFAA states that the decision-making authority rests with the employer.

[154] As for the first interview, on June 29, 2012, the evidence showed that only on June 28, less than 24 hours before the interview, did Ms. Gagné's assistant send the statement of merit criteria for the position in question to the grievor, after he had sent his cover letter to Ms. Gagné. As he had to travel from Québec to Montreal for the interview, he thus did not have the opportunity consider it and to review his resume or cover letter. Ms. Gagné's testimony and Mr. Patterson's July 10, 2012, email to the grievor indicate that the grievor's evaluation was based not only on the interview but also on his cover letter and resume. The grievor's undisputed testimony was that Ms. Gagné did not ask him any questions about his resume and did not refer to his cover letter. And according to the grievor's testimony, Ms. Gagné and Mr. Patterson did not address the evaluation criteria during the interview or whether he met certain criteria for the CO-02 position.

[155] Mr. Patterson testified about the grievor's response to the fourth question in the first interview, which was about his analytical skills. He stated that the grievor covered some of the desired points and that a large part of his response was at a high level. According to Mr. Patterson, the fourth question was to evaluate the knowledge criterion. However, he also stated that he did not give marks for each criterion at the interview and that he characterized the grievor's knowledge as adequate. As Mr. Patterson would have been the grievor's immediate supervisor and knew what he was looking for, a reasonable person would have concluded that that was a positive comment. However, according to Mr. Patterson, it was not clear that the grievor had experience in that kind of analysis. Ms. Gagné testified that the grievor's response to the fourth question demonstrated that he had certain basic knowledge but not of the required details for each step. According to her, the analytical approach was not complete. As for the grievor's response to the fourth question, Ms. Gagné did not

remember if she asked him for clarification. She stated that she did not want to go too far because she wanted to remain neutral and let the candidate provide clarification.

[156] The grievor's application was refused primarily because according to the employer, he did not demonstrate that he had experience in international trade and in research and analysis.

[157] As for the evaluation of the grievor's education, Ms. Gagné found insufficient the combination of his experience and education. That evaluation was included in Mr. Patterson's July 10, 2012, email. That conclusion raises questions because, at the very least, the combination of the grievor's experience and education allowed him to access a CO-02 position in the public service and an acting regional manager positon at the CO-03 level for two years. And according to the grievor's undisputed testimony, when he opted for the education allowance under the WFAA, the university recognized his experience and education as equivalent to a bachelor degree and admitted him to a graduate program.

[158] Following Ms. Huard's intervention, a second interview was held on July 19, 2012, for which the grievor prepared a five-page document detailing his skills and experience. Ms. Gagné testified that they did not prepare questions for that interview.

[159] It seems to me that the employer's role in such a process should not be as a passive observer. Given that the employer knows what it is looking for, it should play an active role at the interview stage to verify whether a candidate has the necessary elements for an alternation. The issues are significant for an opting employee, and the employer simply cannot adopt the approach that the employee must demonstrate that he or she deserves to continue his or her public service employment. Both parties should be involved.

[160] The evidence showed that Ms. Gagné opinion of alternation seemed inconsistent with the WFAA's objectives. In that regard, the adjudicator in *Alliance and Institute* explained the employer's role in alternations as follows at paragraph 33 of his decision:

> *. . . On a more general level, participation* [by departments] *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. . . .*

[161] By maintaining a passive approach and by insisting that it was the grievor's sole responsibility to demonstrate his ability to meet the requirements of the position in question, the employer acted unreasonably.

[162] Due to the evaluation that he received from Mr. Patterson indicating that he did not meet the required experience with respect to sectoral analysis and to international market analysis, the grievor first asked if he met the position's other criteria. He testified that Ms. Gagné's response was that their evaluation had dealt only with two essential qualifications that he had not met and that they had not evaluated the other skills. Still, the grievor presented his qualifications, beginning with his analysis experience. Ms. Gagné told him that his experience for each one was not relevant. He therefore closed his document, gave it to her and asked her if she was maintaining her initial decision, to which she replied in the affirmative. She then stated that she would read the document before making a final decision. In her testimony, she stated that following a quick reading of the grievor's document at the second interview, no new facts arose. The day after the interview, July 20, 2012, Ms. Gagné advised the grievor that she had refused his alternation application.

[163] It seems that Ms. Gagné was seeking the perfect candidate for the alternation. The grievor testified that at the second interview, she told him that she had held a competition, open externally, the year before and that she had been pleased to fill positions with perfect fits. She also testified that before the first interview on June 29, 2012, she and Mr. Patterson had decided to invite the grievor to an interview even though their opinion was that he did not "[translation] perfectly match" the desired qualifications. I do not believe that under the WFAA the employer is entitled to require that a perfect candidate be found to grant an alternation. And question 3 of the frequently asked questions states as follows:

> [Translation]
>
> *. . . However, the manager of the employee volunteering for the alternation must evaluate the opting employee and all opting employees in the AAFC database who expressed interest in the position to ensure that they have the required qualifications, including language requirements, to identify the best candidate. . . .*

[164] In its argument, the employer acknowledged that its decision about an alternation must be reasonable and that it is required to offer employees every

reasonable opportunity to continue their careers in the public service. By insisting that an applicant be the perfect candidate before granting an alternation, the employer, by its own admission, creates an unreasonable requirement.

[165] One fact from the evidence that I find important is Mr. Cogné testimony about his meeting in Ms. Gagné's office between the grievor's first and second interviews. Mr. Patterson was present. During that meeting, Ms. Gagné told Mr. Cogné that she had to again meet with the grievor for another discussion and that he would receive the same response he had received after the first interview. When Mr. Cogné replied that he did not understand because the grievor had the desired skills, it appeared to him that based on her facial expression, Ms. Gagné was annoyed. Mr. Cogné stated that that stunned him. Neither Ms. Gagné nor Mr. Patterson disputed that testimony. I believe that this evidence shows that Ms. Gagné had a closed mind with respect to the grievor's application. Given that attitude, how could she have conducted the second interview in good faith? Thus, it seems clear that the grievor's second interview was destined to fail.

[166] Another indicator of Ms. Gagné's frame of mind is the evidence about her perception of the effect that an alternation would have had on her team. The grievor testified that at the second interview, she stated that hiring him would have caused internal conflicts because members of her team desired access to a CO-02 position. She testified that that did not reflect what she told the grievor. Rather, she told him that the statement of merit criteria for the position in question was related to staffing that she had carried out in 2012 and that it was important to find someone who met the requirements. She stated that had she used a statement other than the one from the staffing competition, she would have been questioned about it.

[167] On the same issue, Mr. Cogné testified that in September 2012, Ms. Gagné called him to a conference room, where she told him the same thing, which was that if she carried out an alternation, the CO-01s on her team desiring a promotion would question her about it. Mr. Cogné replied that under the WFAA, the important thing was continuing employment. According to Ms. Gagné, she discussed with Mr. Cogné that alternation had to meet the office's needs and that CO-01s could not be compared to CO-02s in alternations.

[168] When examining that part of the evidence, it must be noted that the grievor wrote a summary of the July 19, 2012, discussion on the same day and on the next

day, i.e., contemporaneously to the event. According to his testimony, Ms. Gagné addressed the issue of how granting an alternation would affect her team. In addition, Mr. Cogné's undisputed testimony in this regard corroborated the grievor's testimony, and Mr. Cogné also stated that she raised that point at their September 2012 meeting. Under the circumstances, I find that Ms. Gagné's version of this point is inconsistent with the evidence, and I retain Mr. Cogné's testimony and the grievor's. That evidence indicates that Ms. Gagné was more concerned about how her team members would react if she filled the CO-02 position through an alternation than about promoting continued employment for a WFAA-affected candidate.

[169] Although the employer pointed out that the WFAA's objectives do not confer substantive rights on employees, it never disputed the grievor's argument that the WFAA's purpose is to optimize employment opportunities as much as possible and to promote continued employment in the public service. The employer agreed that clauses 6.4 and 6.2.6 of the WFAA confer substantive rights on employees.

[170] Those clauses form the WFAA's objectives, which include continuing employment as much as possible. I note that clauses 6.2.4 and 6.2.6 state that it is up to the employer to decide whether the grievor meets the requirements of the position in question. The evidence showed that in her decision, Ms. Gagné considered, at least in part, how the CO-01 members of her team would react. That factor had no relevance to the decision she had to make and was contrary to the WFAA's spirit and intent.

[171] The grievor noted that in the August 2013 statement of merit criteria, the requirements for experience in sectoral analysis and international market analysis were eliminated. The employer objected to adducing the August 2013 statement of merit criteria in evidence because it had not been aware of it before May 2013. I allowed it subject to its probative value.

[172] The grievor noted that Ms. Gagné stated that her role as a liaison officer for the AAFC in Quebec required her to be aware of medium- and long-term needs. Thus, according to him, it was not very likely that she would not have been aware that those changes were coming.

[173] Ms. Gagné's testimony on that part of the evidence was that her regional office's business plan began to evolve in 2012 by emphasizing sectoral analysis and that only in May 2013 was it determined that the regional office would change, which

led to the international requirements being eliminated. It no longer coordinated foreign market development missions.

[174] The burden of proof was on the grievor. Even had Ms. Gagné been aware of her office's medium- and long-term needs, it was not enough to state that it was not very likely that she was not aware that the international requirements would be eliminated. Proof was required that in July 2012, or at a time close to that date, Ms. Gagné was aware of those upcoming changes. The grievor did not successfully demonstrate that, on a balance of probabilities, Ms. Gagné knew of them.

[175] The employer pointed out that the grievor did not apply for the position advertised in August 2013. However, he testified in cross-examination that he did not apply because he had signed a letter of appointment for a position outside the public service. It must also be noted that the August 2013 position was advertised as a replacement for a maternity leave from October 2013 to April 2014; i.e., it was for a temporary position.

[176] As mentioned earlier in this decision, the authority to grant alternation rests with management, which must evaluate an applicant's qualifications. Ms. Gagné testified that she decided whether an alternation could occur. However, according to the evidence, I find that she did not consider the grievor's application with an open mind; consequently, her decision to refuse him the alternation was unreasonable. Certainly, the employer's position was that he did not meet the requirements of the position, and I do not question the sincerity of that position. However, the grievor was entitled to have management treat him transparently and with an open mind. It is true that following Ms. Huard's intervention, Ms. Gagné granted a second interview. However, I cannot ignore the evidence that she told Mr. Cogné what the result of the second interview would be before it even took place.

[177] Under the circumstances, the grievance is allowed. As for the issue of the appropriate remedy, I am not prepared to declare that the employer should have granted the alternation to the grievor. I have simply concluded that the employer's decision was tainted by an inappropriate consideration (the CO-01s' advancement) and by a lack of WFAA knowledge. Consequently, the parties must attempt to agree on an appropriate remedy, failing which a hearing will be held.

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

(The Order appears on the next page)

V. Order

[179] The grievance is allowed.

[180] I will remain seized of this grievance for a period of 90 days from the date of this decision, during which time the parties shall attempt to agree on an appropriate remedy, failing which they shall advise the Board so that a hearing can be scheduled.

June 1, 2015.

PSLREB Translation

Steven B. Katkin,
adjudicator