Date: 20160222

File: 566-02-10114

Citation: 2016 PSLREB 15

Public Service Labour Relations and Employment Board Act and *Public Service Labour Relations Act*

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

DHIMUTH ABEYSURIYA

Grievor

and

TREASURY BOARD
(Department of Public Works and Government Services)

Employer

Indexed as
Abeysuriya v. Treasury Board (Department of Public Works and Government Services)

In the matter of an individual grievance referred to adjudication

Before: John G. Jaworski, a panel of the Public Service Labour Relations and Employment Board

For the Grievor: Matthew Way, Professional Institute of the Public Service of Canada

For the Employer: Richard Fader, counsel

Heard at Halifax, Nova Scotia,
August 11 and 12, 2015.

I. Individual grievance referred to adjudication

[1] Dhimuth Abeysuriya ("the grievor") is employed with the Department of Public Works and Government Services (PWGSC or "the employer") as a supply officer trainee at the Purchasing Agent-01 (PG) group and level in Halifax, Nova Scotia.

[2] On or about April 30 or May 1, 2013, the grievor entered into a "Memorandum of Settlement" ("MOS") with the employer with respect to two complaints he had filed with the Public Service Staffing Tribunal (PSST). On August 8, 2014, the grievor filed a grievance, alleging that the employer failed to implement the terms of the MOS and that it breached the collective agreement between the Treasury Board and the Professional Institute of the Public Service of Canada (PIPSC) for all employees of the Audit, Commerce, and Purchasing Group that expired on June 21, 2014 ("the collective agreement"). The grievance stated as follows:

> *I grieve management's failure to implement the settlement agreement dated April 30, 2013, in particular, management's refusal to appoint me to a PG-02 position until after retraining has been completed violates both the settlement agreement and the AV Group Collective Agreement including the Workforce Adjustment provisions at Appendix C.*

[3] As corrective relief, the grievor requested full redress, including but not limited to the implementation of the MOS and pay at the PG-02 group and level, retroactive to May 21, 2013, as well as any other remedy deemed necessary and appropriate.

[4] The employer denied the grievance and on October 27, 2014, the grievor referred it to adjudication. The employer objected to the jurisdiction of an adjudicator to hear this matter.

[5] 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 Public Service Labour Relations Board (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 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") before November 1, 2014, is to be taken

up and continue under and in conformity with the *Act* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[6] At the hearing, the grievor advised that the only relief he was requesting is the difference in salary between what he was paid as a PG-01 and the PG-02 group and level from April 8, 2013, until August 10, 2015.

II. Summary of the evidence

A. Relevant Collective Agreement Provisions

[7] Appendix "C" of the collective agreement ("Appendix C") is entitled "Workforce Adjustment".

[8] "Workforce adjustment" is defined in the general provisions of Appendix C as a situation that occurs when a deputy head decides that the services of one or more indeterminate employees will no longer be required beyond a specified date because of a lack of work, the discontinuance of a function, a relocation in which the employee does not wish to relocate, or an alternative delivery initiative.

[9] "Appointing department" or "organization" ("appointing department") is defined in the general provisions of Appendix C as a department or organization or agency that has agreed to appoint or consider for appointment (either immediately or after retraining) a surplus or laid-off person.

[10] "Home department" or "organization" ("home department") is defined in the general provisions of Appendix C as a department or organization or agency declaring an individual employee surplus.

[11] "Laid-off person" is defined in the general provisions of Appendix C as a person who has been laid off pursuant to s. 64(1) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "the *PSEA*") who still retains a reappointment priority under s. 41(4) and section 64 of the *PSEA*. Subsection 64(4) of the *PSEA* states that an employee ceases to be an employee when he or she is laid off. Subsection 41(4) of the *PSEA* states that priority for appointment shall be given to persons who are laid off pursuant to s. 64(1) of the *PSEA*.

[12] "Surplus employee" is defined in the general provisions of Appendix C as an indeterminate employee who has been formally declared surplus, in writing, by his or

her deputy head.

[13] "Surplus status" is defined in the general provisions of Appendix C as the time frame defined from the date an indeterminate employee is declared surplus until either the date of layoff, the date he or she is indeterminately appointed to another position, the date his or her surplus status is rescinded, or the date the employee resigns.

[14] "Surplus priority" is defined in the general provisions of Appendix C as an entitlement for a priority in appointment in accordance with section 5 of the *Public Service Employment Regulations* (SOR/2005-334) and pursuant to section 40 of the *PSEA*; this entitlement is provided to surplus employees to be appointed in priority to another position in the federal public administration for which they meet the essential requirements.

[15] "Retraining" is defined in the general provisions of Appendix C as on-the-job training or other training intended to enable affected employees, surplus employees, and laid-off persons to qualify for known or anticipated vacancies with the core public administration.

[16] Part IV of Appendix C is titled "Retraining". Its purpose is to facilitate the redeployment of affected employees, surplus employees, and laid-off persons by retraining them to fill either existing vacancies or anticipated vacancies.

[17] Clause 4.2 of Appendix C is entitled "Surplus employees". Clause 4.2.1 states:

> ***4.2.1*** *A surplus employee is eligible for retraining providing:*
>
> *(a) retraining is needed to facilitate the appointment of the individual to a specific vacant position or will enable the individual to qualify for anticipated vacancies in occupations or locations where there is a shortage of qualified candidates;*
>
> *and*
>
> *(b) there are no other available priority persons who qualify for a specific vacant position as referenced in (a) above.*

[18] Clause 4.2.2 of Appendix C states that the home department is responsible for ensuring that an appropriate retraining plan is prepared and is agreed to in writing by

the employee and the delegated officers of the home and appointing departments.

[19] Clause 4.2.3 of Appendix C states that once a retraining plan has been initiated, its continuation and completion are subject to satisfactory performance by the employee.

[20] Clause 4.2.4 of Appendix C states:

> *While on retraining, a surplus employee continues to be employed by the home department or organization and is entitled to be paid in accordance with his or her current appointment, unless the appointing department or organization is willing to appoint the employee indeterminately, conditional on successful completion of retraining, in which case the retraining plan shall be included in the letter of offer.*

[21] Clause 4.2.5 of Appendix C states:

> *When a retraining plan has been approved and the surplus employee continues to be employed by the home department or organization, the proposed lay-off [sic] date shall be extended to the end of the retraining period, subject to 4.2.3.*

[22] Clause 4.3 of Appendix C is entitled "Laid-off persons".

[23] Clause 4.3.2 of Appendix C states:

> *When an individual is offered an appointment conditional on successful completion of retraining, a retraining plan shall be included in the letter of offer. If the individual accepts the conditional offer, he or she will be appointed on an indeterminate basis to the full level of the position after having successfully completed training and being assessed as qualified for the position. When an individual accepts an appointment to a position with a lower maximum rate of pay than the position from which he or she was laid-off [sic], the employee will be salary protected in accordance with Part V.*

B. <u>The Facts</u>

[24] The grievor testified, and the employer called one witness, Veronique Geoffroy, a senior staffing advisor with PWGSC. Ms. Geoffroy was the employer representative who negotiated the MOS.

[25] The grievor has a Bachelor of Science degree from the University of Southern Alabama and two Master of Science degrees from Dalhousie University in Halifax, one

in computer science and one in applied computer science. On April 20, 2009, the grievor was hired by the employer as an indeterminate supply officer trainee at the PG-01 group and level in Halifax.

[26] On April 11, 2012, the grievor was identified as an employee whose services might no longer be required and as such was advised by letter on that date that he was likely to be part of a process run under the Work Force Adjustment ("WFA") Directive to determine which employees would be retained and which would not. This process is commonly known as the "Selection of Employees for Retention and Lay-off" ("SERLO") process.

[27] On June 27, 2012, the grievor was advised that as a result of the SERLO process, he was not selected for retention, and as such, he would be laid off. As part of the process, the grievor was advised that he would not be provided with a guarantee of a reasonable job offer and as such had 120 days to consider and decide on one of three options, which are provided for in the WFA Directive. Pursuant to the WFA Directive, if no option is selected within the 120-day period, Option "A" is the default option. Option "A" is commonly referred to as the "twelve month surplus priority period" and states as follows:

> *Over a period of 12 months, Public Works and Government Services Canada and the Public Service Commission will work with you to identify indeterminate employment in the core public administration. At your request, this 12-month period may be extended by the unused portion of the 120-day period within which you must choose among the three options. If you have not been appointed or deployed by the end of the 12-month period, you will be laid off in accordance with section 64 of the Public Service Employment Act.*

[28] The grievor did not choose an option within the 120-day option period and as such became subject to the twelve month surplus priority period.

[29] The grievor filed two complaints with the former PSST pursuant to s. 65 of the *PSEA* in relation to these notices, in which he alleged that his selection for layoff constituted an abuse of authority; the hearing into the complaints was scheduled to be heard on May 2-3, 2013, in Halifax.

[30] After June 27, 2012 and before May 2, 2013, the grievor applied for a number of

different positions, both with PWGSC and with other departments. These positions were not all at the PG-01 group and level or equivalent.

[31] In April of 2013, a potential position with PWGSC was identified for the grievor in Downsview, Ontario, as a supply officer; however, it was at the PG-02 group and level and not the PG-01 group and level. The identification of this position in Downsview led to the creation of a PG-02 position in Dartmouth, Nova Scotia, which became part of the settlement discussions with respect to the grievor's two PSST complaints.

[32] Ms. Geoffroy testified that a request was made of the PSST by the grievor's PIPSC representative to postpone the scheduled hearing of his PSST complaints, which was not objected to by the employer. This request was denied by the PSST.

[33] Both the grievor and Ms. Geoffroy testified about the settlement discussions that took place relating to his two PSST complaints, after the hearing postponement request was denied. The grievor testified that he was represented in his two PSST complaints by a representative from the PIPSC who would advise him and with whom he would confer and instruct. Ms. Geoffroy testified that she was the one negotiating the settlement from the employer's side, and she was having discussions with the grievor's PIPSC representative.

[34] On April 30, 2013, Ms. Geoffroy forwarded a draft MOS to the grievor's PIPSC representative. This initial draft MOS was not in any of the materials submitted into evidence. The grievor's PIPSC representative emailed Ms. Geoffroy back that same day at 3:08 p.m., stating as follows:

> *Further to our conversation of a couple of moments ago, I've had the chance to speak with Mr. Abeysuriya about the proposed settlement. If I understand correctly:*
>
> *a) The conditional letter of offer and retraining plan would be made pursuant to Part IV of the WFA provisions of the AV Group Collective Agreement, and would last for 2 years;*
>
> *b) The final details of the letter of offer and retraining plan are currently being finalized, and will be completed on or by May 2, 2013.*
>
> *As discussed this morning, as the proposed settlement does not involve an unconditional appointment, the complainant*

> *and I will need to review a copy of the letter of offer and its retraining plan prior to signing the settlement. If an electronic copy of the letter of offer can be sent on/by May 2, 2013, I can arrange a meeting with the complainant to review the letter of offer and retraining plan.*
>
> *I will send an email to the PSST immediately, requesting postponement in order to conclude our productive and expeditious settlement discussion; I understand that you will forward the Department's concurrence with the request to the PSST promptly thereafter.*
>
> . . .
>
> *N.B. In terms of changes to the settlement language itself, all that I'd suggest is changing paragraph 1 from 'letter of offer will be issued" to "attached letter of offer" and possibly changing the date to May 3, 2013. I've attached a draft.doc incorporating these changes; alternatively, we could simply strike through the last sentence of paragraph 1, add "attached", and initial the changes.*

[35] The operative portions of the draft MOS sent back to Ms. Geoffroy on April 30, 2013, at 3:08 p.m. by the grievor's PIPSC representative stated as follows:

> . . .
>
> *The parties acknowledge that all aspects of this matter have been resolved to their satisfaction as per the terms below.*
>
> *The parties agree to the following terms of settlement:*
>
> ***The Deputy Head,** without prejudice to any position he may wish to take in future cases involving similar matters or circumstances, hereby agrees:*
>
> 1. *to appoint the Complainant, conditionally to successful completion of the required training as specified in the attached letter of offer, to a PG-02 indeterminate position in Dartmouth.*
>
> ***The Complainant hereby agrees:***
>
> 2. *to withdraw his complaints filed on June 15, 2012 and July 8, 2012 on the date of the signature of this agreement;*
>
> [Emphasis in the original]

[36] Further email correspondence was exchanged between the grievor's PIPSC representative and Ms. Geoffroy on May 1, 2013. At 2:52 p.m., Ms. Geoffroy sent the

grievor's PIPSC representative an email that set out the training plan for the grievor, which email stated as follows:

> *Please find a training plan, slightly modified, in order to be easily able to make the link between the merit criteria that Ms. Abeysuriya had not met in the context of the PG-02 process. We also took out the reference to the three months.*
>
> *And yes, the training plan in [sic] for two years, and made pursuant to Part IV of the WFA Directive.*

[37] At 3:08 p.m. on May 1, 2013, the grievor's PIPSC representative wrote back to Ms. Geoffroy, accepting the training plan but requesting a change to the draft MOS. The change suggested was as follows:

> *In terms of the settlement document itself, the one change I would request is that "the required training as specified in the letter of offer" be changed to "the required training as specified in the attached", with a copy of the below email attached. We could cross through the "letter of offer", write "attached", and initial the change, if that would be acceptable to you? (We could, alternatively, print out a new copy with that change and send you a signed copy, for Mr. Flemming to sign)?*
>
> . . .

[38] The settlement of the grievor's two PSST complaints was finalized on the eve of the hearing of his complaints, and the MOS was executed on May 1, 2013 (despite being dated April 30, 2013). The MOS is found at Exhibit G-1, Tab 3, as well as at Exhibit E-1, Tab 9, and the operative portions state as follows:

> . . .
>
> *The parties acknowledge that all aspects of this matter have been resolved to their satisfaction as per the terms below.*
>
> *The parties agree to the following terms of settlement:*
>
> ***The Deputy Head,*** *without prejudice to any position he may wish to take in future cases involving similar matters or circumstances, hereby agrees:*
>
> 1. *to; appoint the Complainant, conditionally to successful completion of the required training as specified in the attached, to a PG-02 indeterminate position in Dartmouth. The letter of offer will be issued in the next few days.*

> ***The Complainant hereby agrees:***
>
> *2. to withdraw his complaints filed on June 15, 2013 and July 8, 2012, on the date of the signature of this agreement.*
>
> . . .
>
> [Emphasis in the original]

[39] The training plan for the grievor was attached to the MOS as a third page. The training plan itself is not in issue before me; however, it was cut-and-pasted from Ms. Geoffroy's email sent to the grievor's PIPSC representative on May 1, 2013, at 2:52 p.m., which email discussed the training plan. The relevant portion of that email (which is part of page 3 of the MOS document) states as follows:

> . . .
>
> *Please find a training plan, slightly modified, in order to be easily able to make the link between the merit criteria that Mr. Abeysuriya has not met in the context of the PG-02 process. We also took off the reference to the three months.*
>
> *And yes, the training plan in [sic] for two years, and made pursuant to Part IV of the WFA Directive.*
>
> . . .

[40] The difference between the draft MOS suggested by the grievor and the MOS as executed is that the grievor was originally suggesting that the letter of offer be attached to the MOS, which did not occur. The final wording in the MOS referred to the letter of offer being sent within a few days.

[41] Pursuant to the MOS, the grievor immediately withdrew his two PSST complaints.

[42] The letter of offer, as referenced in paragraph 1 of the MOS, was not issued within a few days but on July 31, 2013, three months after the MOS was signed.

[43] A "Public Service Staffing Advertisement and Notification" was posted with respect to the PG-02 supply officer position in Dartmouth, Nova Scotia, which the parties agreed was the position that was the subject matter of the MOS and to which the letter of offer dated July 31, 2013, referred. Ms. Geoffroy testified that this notification was posted in error and that it was taken down within a couple of days of

its posting. She further testified that a "Notification of Consideration" was not required because the grievor was being appointed pursuant to a priority.

[44] Between May 1, 2013, and July 31, 2013, the grievor remained on the priority list, and the staffing officer responsible for the grievor (Yvan Fortier) received requests from six different departments to set up interviews and tests for the grievor. On June 4, 2013, Mr. Fortier received a call from a Health Canada (HC) advisor advising that HC was prepared to issue the grievor a letter of offer for an indeterminate position at the PG-01 group and level in Winnipeg, Manitoba. Mr. Fortier emailed the grievor on June 4, 2013, as follows:

> *I received a call from a Health Canada advisor advising that they are willing to issue you a letter of offer at the PG-01 level in Winnipeg.*
>
> *Just wanted to meet with you to make sure you understand the repercussions of receiving a [sic] offer and what happens if you reject-accepts [sic] it.*
>
> *Let me know when you can meet.*

[45] The grievor emailed Mr. Fortier back immediately, stating that he could meet right away, and according to the grievor, they did (on the morning of June 4, 2013) in Mr. Fortier's office. The grievor stated that Mr. Fortier told him that he would be offered an indeterminate position at the PG-01 group and level in Winnipeg. The grievor stated that he asked Mr. Fortier why would he need this PG-01 position if he was going to get a PG-02 letter of offer from PWGSC. The grievor testified that he asked Mr. Fortier to give him a letter in writing that he (the grievor) would be getting the PG-02 letter of offer.

[46] Mr. Fortier emailed the grievor on June 4, 2013, at 11:40 a.m. as follows:

> *We (PWGSC ATL region) are offering a PG-02 letter of offer (with re-training) but are simply waiting for the LofO to be released from HQ.*
>
> *If this is your preferred employment option, due to the fact that it is here in Dartmouth/Halifax and you don't have to move, you should advise Health Canada of this as they have been in contact with me and are interested in offering a position to you in Winipeg.*
>
> *The HC contact person is Amy Kirby and her contact information is below*

Good day

Yvan

[*Sic* throughout]

[47] The email of Mr. Fortier of June 4, 2013, at 11:40 a.m. was part of a longer email chain, other parts of which shall be further set out later in this decision.

[48] On June 4, 2013, at 11:54 a.m., the grievor emailed Amy Kirby at HC and stated as follows: "I am going to receive a Letter of Offer for a PG-02 position in Halifax for a competition, which I did and now I do not have to relocate to Winnipeg."

[49] On August 2, 2013, the grievor received the letter of offer (referred to in the MOS) dated July 31, 2013. The relevant portions state as follows:

. . .

Subject: Selection process number: 2013-SVC-PRI-HQ-93874

Position title:	*Supply Officer*
Position number:	*144652*
Group, sub-group and level:	*PG-02*

On behalf of Public Works and Government Services Canada, I am pleased to offer you a conditional full-time indeterminate appointment to the above-mentioned position effective upon fulfilment of the attached retraining plan (Appendix A).

This offer of appointment is conditional upon successful completion of the required training as described in the attached retraining plan (Appendix A). This condition must be met ***prior to your appointment****. The Retraining Plan outlines the conditions that needs [sic] to be met and has defined your training period to remain valid until August 12, 2015. Once the conditions have been met, you will receive a formal letter of offer which will terminate your surplus priority and will set the effective date of your appointment. If you fail to meet any of these conditions by the end of the retraining period, you may be laid off.*

Until such a time as you meet the conditions stipulated in the retraining plan, you will continue to be paid in accordance with your current position at the PG-01 group and level. As a result, you will be assigned to the host organization with a starting date of August 12, 2013.

. . .

> *Please note that as this letter constitutes a reasonable job offer, you could be laid off if you refuse it, unless you accept another offer before your actual lay off date.*
>
> [Emphasis in the original]

[50] The retraining plan attached as Appendix A to the July 31, 2013, letter of offer ("the July 31, 2013, letter"), is identical to the retraining plan attached as page 3 to the MOS.

[51] Included with the July 31, 2013, letter was an "Assignment/Secondment" agreement, which listed the grievor's group and level as PG-01; the duration of the assignment, being two years, from August 12, 2013, to August 12, 2015; and his manager as Paul Pleau. Attached to the Assignment/Secondment agreement was the identical retraining plan that was attached to the MOS and the July 31, 2013, letter.

[52] The grievor stated that upon his receipt of the July 31, 2013, letter, he spoke with his PIPSC representative and then, on August 8, 2013, went to see Mr. Pleau in his office. The grievor stated that he conveyed to Mr. Pleau that the letter and Assignment/Secondment agreement were not what was agreed to and that he was not going to sign them. He stated that Mr. Pleau told him that he should sign the documents or he would be laid off. The grievor stated that given the circumstances and the wording contained in the July 31, 2013, letter, he felt he had little choice but to sign the letter and Assignment/Secondment agreement and then file a grievance.

[53] The grievor signed the July 31, 2013, letter by initialling the bottom of the letter adjacent to the statement: "I accept this conditional employment offer". At the bottom of the page, he signed his name and dated it. Also at the bottom of the page, Mr. Pleau wrote, "Mr. Abeysuria [*sic*] notes that the position noted herein (PG-01) is in the process of being grieved." Both the grievor and Mr. Pleau initialled this statement. The grievor delivered his grievance on that same day.

[54] In cross-examination, the grievor confirmed that the settlement of the two PSST complaints and the negotiation of the MOS were carried out on his behalf by his PIPSC representative and that he did not have direct negotiations with the employer. He did state though that on one occasion he was present during a conference call with his PIPSC representative, who was discussing the settlement with the employer's

representatives. The grievor could not confirm who was on the call but stated that it was a final call and that changes were to be made.

[55] The grievor was asked in cross-examination to agree that the appointment he was getting as a result of the MOS was a conditional appointment. He did not agree, instead stating that it was a conditional offer. When pressed on this point, the grievor admitted that he knew that the appointment to the Dartmouth position was conditional upon him satisfactorily completing the training plan. He also confirmed that he was aware that the PG-01 position with HC in Winnipeg was indeterminate.

[56] Ms. Geoffroy testified that the grievor did not have all the qualification requirements for the PG-02 position in Dartmouth, and as such, he could not outright be appointed to the position without satisfactorily meeting the qualification standards, which were set out in the training plan.

[57] The grievor confirmed that he never discussed salary with any employer representative. The grievor stated that he understood that while on retraining and during the period covered by the letter of offer, he would be paid at the PG-02 group and level and that the source of this understanding was his PIPSC representative.

[58] Ms. Geoffroy testified that she never discussed with the grievor's PIPSC representative the salary the grievor would be paid during the two-year period covered by the letter of offer and training period.

[59] The grievor stated that he had reviewed the training program that had been included with the MOS and that he was sure he could complete the program with no difficulty. He stated that he had done work that was more complex, and as such, he felt that the training program would not be difficult for him. The grievor stated that while the Winnipeg job was indeterminate, in his mind he knew he would have no difficulty meeting the training plan for the Dartmouth job, and it was at the higher PG-02 level and would pay more.

[60] In cross-examination, the grievor was brought to Exhibit G-1, Tab 11, which was an email chain of six pages. The first email in the chain was dated May 6, 2013, at 3:50 p.m., and was from Ms. Kirby (the HC HR representative) to Mr. Fortier, and the last email in the chain is dated August 2, 2013, at 11:25 a.m., and is from the grievor to his PIPSC representative. The first 11 emails in the chain were between Mr. Fortier and

Ms. Kirby between May 6, 2013, and May 31, 2013. The subject matter of these emails was the grievor, his priority status, the PG-01 position, and the grievor's potential move to Winnipeg. In the midst of this email chain is the following email from Mr. Fortier to Ms. Kirby, dated May 27, 2013, at 8:35 a.m., which stated in part as follows:

. . .

> *Still no word from HQ on an ETA for a release date for Dhimuth's letter of Offer.*
>
> *I was advised last week that the delay was due to the learning plan stating that the employee would continue to be paid at the PG-01 level until assessed (during the 2 year training period) and found successful to perform the duties at the PG-02 level. HQ wasn't too sure how he would react to this.*
>
> *I am expecting we should see some progress this week*

. . .

[61] While the grievor was not a party to the first 11 emails in this chain, the entire chain was attached to the email Mr. Fortier sent to the grievor on June 4, 2013, shortly after the meeting the grievor had with him.

[62] In cross-examination, the grievor was asked how he could not have known that he would be paid at the PG-01 group and level salary since the text from the email of May 27, 2015, had been included in the email that he received from Mr. Fortier on June 4, 2013. The grievor responded that when he received Mr. Fortier's email on June 4, 2013, he did not read any of the earlier emails in the chain.

[63] Mr. Fortier did not testify before me.

[64] Ms. Geoffroy testified that Mr. Fortier did not play a role in the settlement negotiations.

[65] The grievor's PIPSC representative, who negotiated the MOS, did not testify before me.

[66] Ms. Geoffroy stated that she understood that the rate of pay that the grievor would receive from the effective date of the July 31, 2013, letter forward until such time as he met the PG-02 qualifications and the appointment became effective was at the PG-01 group and level.

[67] Ms. Geoffroy's handwritten notes dated April 12-30, 2013, of discussions she had with several people, which led to the MOS, were entered into evidence. These notes disclose that on April 12, 2013, she spoke with a national departmental staffing person (Roxanne Dench) about appointing the grievor to the PG-02 position in Downsview, noting that retraining was an issue. She confirmed in her testimony that on April 16, she had a discussion with Ms. Dench, about the potential appointment of the grievor to the PG-02 position in Downsview; again, the issue of retraining him was discussed. She added that on April 24, 2013, the PG-02 position was created in Dartmouth. On April 30, 2013, management decided to staff the Dartmouth position and advised her that it could have a retraining plan finalized the next day (Wednesday, May 1, 2013).

[68] In cross-examination, Ms. Geoffroy confirmed that with the signing of the MOS, the hearing into the complaints was no longer needed.

[69] In cross-examination, Ms. Geoffroy was asked about her understanding of what was meant in clause 4.2.4 of Appendix C of the collective agreement and in clause 1 of the MOS, which stated that the deputy head agreed to appoint the grievor, conditionally on the successful completion of the required training as specified in the attached plan, to a PG-02 indeterminate position in Dartmouth. Ms. Geoffroy stated that she understood that it meant that the grievor would be appointed to the PG-02 position once he successfully completed his training as set out in the training plan attached to the MOS.

III. Summary of the arguments

A. Objection to jurisdiction

1. For the grievor

[70] The essential character of the grievance is that the employer has breached the collective agreement. The MOS does not operate to exclude the terms contained in it from the collective agreement.

[71] The grievor is not seeking to reopen his two PSST complaints.

[72] The grievor referred to several decisions in support of his position. In *Kreway v. Canada Customs and Revenue Agency*, 2004 PSSRB 33, which dealt with the jurisdiction of an adjudicator under the former *Public Service Staff Relations Act*

(R.S.C., 1985, c. P-35) to hear a grievance arising out of an alleged breach of the WFA Directive as contained in the collective agreement, in which the grievor requested that he be appointed to a specific position. The adjudicator in *Kreway* found that the central issue before him was whether or not there had been a contravention of the collective agreement. The adjudicator went on to state that the redress being sought might have been something he could not grant but that that would not bar him from hearing the grievance.

[73] Here, the grievor states that the issue is pay at the PG-02 group and level and that it has its genesis at clause 4.2.4 of Appendix "C".

[74] The decision in *Leduc v. Clerk of the Privy Council and Secretary to Cabinet*, 2015 PSLREB 47, involved the settlement of a staffing complaint filed under the *PSEA*. The complaint was settled. As part of the settlement, the complainant was supposed to withdraw his complaint; he did not, and as such, the complaint was scheduled for a hearing. The respondents objected to the jurisdiction of the Board to hear the complaint. At paragraph 30, the Board found that the parties were bound by the settlement as of the date of the settlement; it was not conditional.

[75] In *Baker v. The Deputy Minister of Public Works and Government Services Canada*, 2013 PSST 0011, the PSST held that an employee who files a staffing complaint and then enters into a binding settlement with the deputy head is in the same position as a grievor who enters into a binding settlement agreement with an employer. A valid and binding settlement agreement in a staffing complaint constitutes a complete bar to a complainant's efforts to have the complaint heard by the PSST.

[76] In *Howarth v. The Deputy Minister of Indian Affairs and Northern Development*, 2009 PSST 0011, a complainant sought to continue a complaint already withdrawn, pursuant to a settlement reached between the parties. The PSST found that the withdrawal of a complaint under the *PSEA* is a complete bar to adjudication and that the failure to comply with the terms of the settlement do not constitute grounds for a new complaint.

[77] *Canada (Attorney General) v. Amos*, 2011 FCA 38, dealt with the jurisdiction of an adjudicator when a grievance filed under the *Act* is settled and there is an allegation that the settlement has not been complied with and the grievance has not been

withdrawn. According to the grievor, *Amos* does not apply in the circumstances as he has withdrawn his two complaints. However, the grievor submitted that *Amos* provides guidance and referred me to paragraphs 39-41 and paragraphs 44-45, which speak about the framework of the *Act*, its preamble, and how it should be interpreted. The grievor submitted that these principles enunciated by the original adjudicator in *Amos* can equally be applied to the MOS and the grievor's settlement of his complaints.

[78] In *Taticek v. Canada (Border Services Agency)*, 2014 FC 281, the applicant was not seeking to continue or revive an original complaint; rather, and unlike in *Amos*, he filed new grievances, which were based on alleged contraventions of the settlement agreement and that have not been withdrawn. The grievor submitted that the recourse in his case is to file a grievance.

[79] The grievor submitted that the material referred to adjudication in the present case falls squarely within the jurisdiction of the Board under s. 209(1)(*a*) of the *Act*.

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

[80] The employer submitted that what has to be looked at is the pith and substance of the grievance. It submitted that it is the alleged breach of the MOS (see *Mutart v. Deputy Head (Department of Public Works and Government Services)*, 2013 PSLRB 90 (aff'd 2014 FC 540), and *Boudreau v. Canada (Attorney General)*, 2011 FC 868).

[81] There is no way that this grievance can move forward independent of the MOS. It cannot stand on an alleged breach of the collective agreement alone. Just because wording from a collective agreement provision is included in the wording of the MOS does not make the grievance one that is based on a breach of the collective agreement.

[82] Clause 4.2.4 of Appendix C is not mentioned in the MOS.

[83] The employer did not submit that the grievor could not bring the grievance under section 208 of the *Act*, merely that he could not pursue the matter by way of adjudication under s. 209(1)(*a*) of the *Act*. In *Amos,* the Federal Court of Appeal noted that a grievor is not without recourse if he or she cannot bring a grievance forward to adjudication under s. 209(1) of the *Act* since he or she can always apply to the Federal Court and seek judicial review.

[84] In *Amos,* while there was a settlement entered into, the grievance that had been filed with the PSLRB had never been withdrawn.

[85] *Taticek* involves facts that are somewhat similar to those here. There was a settlement reached with respect to a complaint over issues involving staffing and appointments. The complaint was settled and, as a result, was withdrawn by Mr. Taticek. The grievances were filed when Mr. Taticek alleged that the employer had breached the settlement. *Taticek* addressed the decisions in *Howarth*, *Lebreux*, and *Maiangowi*, as well as *Amos*. In this case, the issue was not that the decision maker could not deal with the issue but that she could not implement a remedy. What *Taticek* states is that the recourse in such matters is to the Federal Court.

B. Merits of the grievance

1. For the grievor

[86] At page 3 of the MOS, it is clearly stated that the training plan is made pursuant to Part IV of the WFA directive. There is no issue that the grievor was being considered for a PG-02 position in Downsview and that instead he was offered a PG-02 position in Dartmouth.

[87] Clause 4.2.4 of Appendix C is clear. It states that the grievor shall be paid in accordance with his current appointment "… unless the appointing department or organization is willing to appoint the employee indeterminately, conditional on successful completion of retraining …". This is the language that is used in the operative part of the MOS, which states that the employer shall "… appoint the Complainant, conditionally to successful completion of the required training as specified in the attached …".

[88] The fact that the employer chose the wording from clause 4.2.4 of Appendix C indicates that the grievor was to be compensated not at the rate of his original appointed level (PG-01) but at the higher level (PG-02).

[89] Clause 4.3.2, sets out a different scheme for those employees who have been laid off. It states that when a laid-off employee is "appointed conditionally to successful completion of the required training", the employee shall be paid at the appointed level once the training plan has been successfully completed and the employee assessed as qualified at that level.

[90] The difference in language between clauses 4.2.4 and 4.3.2 of Appendix C means something. If the parties had intended that the grievor should be paid at his current group and level rate, they would have said so, just like they had stated in clause 4.3.2. The employer could have used different language in the MOS; it did not.

[91] Paragraph 4:2000 of *Canadian Labour Arbitration,* 4th edition, by Donald Brown and David Beatty ("Brown and Beatty"), sets out the general rule with respect to the interpretation of collective agreements. At paragraph 4.21100, Brown and Beatty state that normal language should be applied unless it would result in an absurdity.

[92] *Fortier v. Treasury Board (Transport Canada)*, (1997) 32 PSSRB Decisions 9 (Digest); PSSRB File No. 166-02-27013 (19971205), stands for the proposition that an adjudicator must interpret and apply the clear meaning of the words of the collective agreement unless there is an ambiguity.

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

[93] The question is what the intent of the parties was when they entered into the MOS. The ultimate problem is that the parties never discussed the issue of the grievor's pay (while he was on retraining) as part of the settlement discussions.

[94] What happened was that the parties were facing a hearing of the grievor's two PSST complaints and had appeared to reach an agreement to resolve their differences. A request was made of the PSST by the grievor, which was not objected to by the employer, to postpone the hearing; however, the request was denied by the tribunal.

[95] The evidence clearly shows that as a settlement, the parties were discussing the offer of a PG-02 position. As part of the discussions, the grievor was requesting that the letter of offer be attached to the MOS. However, the employer was stating that it could not attach it because it was not going to be available to be attached. In the end, the letter of offer was not attached.

[96] What the parties ultimately have is an agreement to make the grievor a conditional offer of appointment to a PG-02 position in Dartmouth, subject to a training plan that he had to follow and successfully complete to be appointed to the position. The MOS is silent on the salary the grievor was to be paid during the training period. It is also clear that the grievor had not met the merit criteria for the PG-02 position. If he had, it would not have been an appointment conditional upon him

successfully completing training.

[97] The grievor was an employee who had not been selected for retention. He was a surplus employee, who by default had fallen into the "Option A" criteria for surplus employees, meaning he was being retained for 12 months, during which both he and the employer would look for suitable other employment for him. Under "Option A", if he did not find a suitable other position or the employer found him suitable other employment that he did not accept, at the end of the 12 months, he would have been laid off.

[98] The grievor admitted in his evidence that he knew that the offer referred to in the MOS was conditional and knew that he had to successfully complete the training. He knew there was a risk that at the end of the training period of two years, if he was not successful in the training, he would not be appointed.

[99] Clause 4.2.4 does not come into the equation whatsoever. It was never discussed and is not written into the MOS. In the alternative, the employer submitted that clause 4.2.4 of Appendix C does not mean what the grievor suggests it means. It is a poorly written clause. The difficulty lies with the use of the word "unless" and what that word modifies. Before the word "unless", it states, "While on retraining, a surplus employee continues to be employed by the home department or organization and is entitled to be paid in accordance with his or her current appointment …". Two things are referenced before the word "unless" in clause 4.2.4 of Appendix C. First is where the surplus employee is employed, and, second, what he or she is to be paid. The question to be answered is what the word "unless" is modifying.

[100] The "unless" refers to where the employee is employed, not what he or she is to be paid. A surplus employee who is being retrained continues to be employed during the 12-month surplus period unless he or she is given a conditional offer of employment, at which point he or she is then employed by that new organization during the training period. The words that follow "unless" in clause 4.2.4 of Appendix C are, "… the appointing department or organization is willing to appoint the employee indeterminately, conditional on successful completion of retraining, in which case the retraining plan shall be included in the letter of offer."

[101] The latter part of clause 4.2.4 of Appendix C does not state that the surplus employee shall be paid at a higher level; it is silent. Part IV is about retraining. It could

be in a position at the same level, an equivalent level, a lower level, or a higher level.

[102] With respect to clause 4.3.2 of Appendix C, which deals with laid-off employees, the parties addressed the issue of pay differently. A laid-off employee is in a different situation than a surplus employee is.

[103] Section 30 of the *PSEA* states that a person cannot be appointed to a position if he or she does not meet the merit criteria for the position. The wording of the MOS clearly indicates that the grievor had not met the merit criteria of the PG-02 position; hence, the training plan was drawn up. The grievor could not be appointed to the PG-02 position outright. It was conditional. The condition, in the context of the settlement reached, relates to what had to be met before the grievor was appointed. That condition was the training that had to be successfully completed.

3. Grievor's reply

[104] It is clear that by virtue of the third page of the MOS, the employer had agreed to bind itself to Appendix C of the collective agreement and the operation of that part of the collective agreement.

[105] The first time the grievor heard about being assigned was when he received the July 31, 2013, letter of offer.

IV. Reasons

[106] The facts in this matter are largely not in dispute. The grievor began his employment in 2009 as a supply officer trainee at the PG-01 group and level in Halifax. On April 11, 2012, the grievor received notice that he was identified as an affected employee due to the discontinuance of a function and that he would be part of the SERLO process. On June 27, 2012, the grievor received notice that he was not chosen to be retained and as such was identified for layoff. The grievor was given 120 days to choose from three options, failing which he would be placed in the 12-month surplus priority period.

[107] On June 20, 2012, the grievor filed a complaint with the former PSST with respect to the April 11, 2012, notice that he was affected, and on July 10, 2012, he filed a second complaint with respect to the June 27, 2012, surplus notice.

[108] Despite the filing of the two complaints with the PSST, the WFA process

proceeded, the grievor was placed in the 12-month surplus priority period, and both he and the employer actively sought alternate positions within the federal public service. The WFA process under the collective agreement provided the grievor with certain options with respect to reasonable job offers and retraining, which ultimately resulted in a job offer materializing in Downsview that would possibly have been a match for him at the PG-02 group and level and that gave rise to the creation of a similar job in Dartmouth, also at the PG-02 group and level. As the grievor was located in the Halifax/Dartmouth area, it was preferable for him to remain there rather than move to Downsview.

[109] The hearing of the grievor's two PSST complaints was scheduled for May 2-3, 2013, in Halifax. Just before the hearing, a settlement was negotiated and an MOS was signed between the grievor and the employer. While the MOS is dated April 30, 2013, it was actually signed on May 1, 2013. The operative part of the MOS stated as follows:

. . .

> ***The Deputy Head****, without prejudice to any position he may wish to take in future cases involving similar matters or circumstances, hereby agrees:*
>
> 1. *To; appoint the complainant, conditionally to successful completion of the required training as specified in the attached, to a PG-02 indeterminate position in Dartmouth. The letter of offer will be issued in the next few days.*
>
> ***The Complainant hereby agrees:***
>
> 2. *To withdraw his complaints filed on June 15, 2012 and July 8, 2012, on the date of the signature of this agreement;*

. . .

[110] Attached to the MOS was a training plan.

[111] In accordance with the MOS, the grievor immediately withdrew his two PSST complaints.

[112] The employer provided to the grievor a letter of offer (albeit three months after the execution of the MOS) on July 31, 2013. Attached to the July 31, 2013, letter was

the same training plan as was attached to the MOS.

[113] The July 31, 2013, letter stated as follows:

> . . .
>
> *Subject: Selection process number: 2013-SVC-PRI-HQ-93874*
>
> *Position title:* *Supply Officer*
>
> *Position number:* *144652*
>
> *Group, sub-group and level:* *PG-02*
>
> . . .
>
> *On behalf of Public Works and Government Services Canada, I am pleased to offer you a conditional full-time indeterminate appointment to the above-mentioned position effective upon fulfilment of the attached retraining plan (Appendix A).*
>
> *This offer of appointment is conditional upon successful completion of the required training as described in the attached retraining plan (Appendix A). This condition must be met* ***prior to your appointment****. The Retraining Plan outlines the conditions that needs [sic] to be met and has defined your training period to remain valid until August 12, 2015. Once the conditions have been met, you will receive a formal letter of offer which will terminate your surplus priority and will set the effective date of your appointment. If you fail to meet any of these conditions by the end of the retraining period, you may be laid off.*
>
> *Until such a time as you meet the conditions stipulated in the retraining plan, you will continue to be paid in accordance with your current position at the PG-01 group and level. As a result, you will be assigned to the host organization with a starting date of August 12, 2013.*
>
> . . .
>
> *Please note that as this letter constitutes a reasonable job offer, you could be laid off if you refuse it, unless you accept another offer before your actual lay off date.*
>
> [Emphasis in the original]

[114] On August 8, 2013, the grievor accepted the offer contained in the July 31, 2013, letter. On that same day, the grievor filed the grievance that is the subject matter of the hearing before me, which reads as follows:

> *I grieve management's failure to implement the settlement agreement dated April 30, 2013, in particular, management's refusal to appoint me to a PG-02 position until after retraining has been completed violates both the settlement agreement and the AV Group Collective Agreement including the Workforce Adjustment provisions at Appendix C.*

[115] The relief sought by the grievor as set out in his grievance was the implementation of the MOS and pay at the PG-02 group and level retroactive to May 21, 2013. His position during the course of the hearing was that he was looking to be paid the difference in pay between that of an employee at the PG-01 group and level (which is the level he was paid at) and that of an employee at the PG-02 group and level for the period between August 8, 2013, and August 10, 2015.

[116] An adjudicator draws jurisdiction from the *Act*. While section 208 of the *Act* sets out what can be grieved, not everything that can be grieved can be referred to an adjudicator. Section 209 of the *Act* limits the jurisdiction of what can be heard. Here, the grievor referred his grievance to adjudication under s. 209(1)(*a*) of the *Act*, which states:

> ***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 ….*

[117] The section of the collective agreement that the grievor maintains requires interpretation or application with respect to him is clause 4.2.4 of Appendix C, which governs WFA situations and states as follows:

> *While on retraining, a surplus employee continues to be employed by the home department or organization and is entitled to be paid in accordance with his or her current appointment, unless the appointing department or organization is willing to appoint the employee indeterminately, conditional on successful completion of retraining, in which case the retraining plan shall be included in the letter of offer.*

[118] The essence of the grievor's argument is that the wording contained in part of the MOS, under the portion that covers the points to which the Deputy Head agrees, specifically, the following words: "… appoint the Complainant, conditionally to successful completion of the required training …", are taken directly from clause 4.2.4 of Appendix C of the collective agreement, where it states, "… appoint the employee indeterminately, conditional on successful … retraining …". Since Appendix C, and specifically clause 4.2.4, is part of that portion of the collective agreement that deals with WFA situations, and the grievor was part of a WFA situation, this is an interpretation of the collective agreement, and as such, I have jurisdiction. Also attached to the MOS was Ms. Geoffroy's email to the grievor's PIPSC representative of May 1, 2013, at 3:52 p.m., which stated:

> *Please find a training plan, slightly modified, in order to be easily able to make the link between the merit criteria that Mr. Abeysuriya has not met in the context of the PG-02 process. We also took off the reference to the three months.*
>
> *And yes, the training plan in [sic] for two years, and made pursuant to Part IV of the WFA Directive.*

[119] The grievor maintains that the inclusion of that wording in the MOS also incorporates clause 4.2.4 of Appendix C of the collective agreement into the MOS. Finally, on its own, clause 4.2.4 of Appendix C is clear, and as such, the grievor should be paid at the PG-02 group and level. The employer not paying the grievor at the PG-02 group and level was a breach of the collective agreement, and I have jurisdiction and can order the relief sought.

[120] This grievance is about the settlement entered into between the grievor and the deputy head. The grievor's allegation, as set out in the grievance, clearly states that management has failed to implement the settlement agreement (MOS) by refusing to appoint him to a PG-02 position until after retraining has been completed and that this violates both the settlement agreement (MOS) and the collective agreement.

[121] The MOS states very little about what the deputy head agreed to do. What is crystal clear from the evidence was that the grievor did not meet the criteria necessary to be appointed to the PG-02 position in Dartmouth and as such required training to meet those criteria. The grievor's testimony was that he knew he had to meet the standards as set out in the training program within two years, and he felt he would have no difficulty achieving them, which is why he was not interested in taking the

Winnipeg PG-01 indeterminate appointment. The grievor stated that he knew the appointment to the PG-02 position was conditional upon him being successful in the training. This is exactly what the MOS states, albeit poorly.

[122] If there is any doubt about what the grievor understood he was agreeing to in the MOS, one need not look any further than the two emails sent by his PIPSC representative to Ms. Geoffroy when they were finalizing the MOS on April 30, 2013, and May 1, 2013. The April 30, 2013, email from the grievor's PIPSC representative to Ms. Geoffroy at 3:08 p.m. stated as follows:

> *Further to our conversation of a couple of moments ago, I've had the chance to speak with Mr. Abeysuriya about the proposed settlement. If I understand correctly:*
>
> *a) The conditional letter of offer and retraining plan would be made pursuant to Part IV of the WFA provisions of the AV Group Collective Agreement, and would last for 2 years;*
>
> *b) The final details of the letter of offer and retraining plan are currently being finalized, and will be completed on or by May 2, 2013.*
>
> *As discussed this morning, as the proposed settlement does not involve an unconditional appointment, the complainant and I will need to review a copy of the letter of offer and its retraining plan prior to signing the settlement. If an electronic copy of the letter of offer can be sent on/by May 2, 2013, I can arrange a meeting with the complainant to review the letter of offer and retraining plan.*
>
> *I will send an email to the PSST immediately, requesting postponement in order to conclude our productive and expeditious settlement discussion; I understand that you will forward the Department's concurrence with the request to the PSST promptly thereafter.*
>
> . . .
>
> *N.B. In terms of changes to the settlement language itself, all that I'd suggest is changing paragraph 1 from 'letter of offer will be issued" to "attached letter of offer" and possibly changing the date to May 3, 2013. I've attached a draft.doc incorporating these changes; alternatively, we could simply strike through the last sentence of paragraph 1, add "attached", and initial the changes.*
>
> . . .

[Emphasis added]

[123] It is absolutely clear that the grievor knew he was not being immediately appointed to a PG-02 position as the email confirms his understanding. This is what the email states: "… as the proposed settlement does not involve an unconditional appointment …".

[124] Although both the grievor and the employer agreed that *Amos* did not directly apply to this case, the grievor submitted that I could draw guidance from the Court's ruling. I agree with the parties that *Amos* does not apply. *Amos* does not give carte blanche to the Board or an adjudicator under the *Act* jurisdiction to review any workplace issue or workplace issue, grievance, or complaint that is settled and subject to a settlement agreement. The Court in *Amos* stated as follows:

. . .

> ***77*** *. . . Within the specific context of this file, the Adjudicator's approach provides a sensible account of Parliament's intention while recognizing the applicable principles of statutory interpretation… The appellant's settlement agreement dispute is intrinsically related to his underlying and persisting grievance, originally referred to adjudication, and properly within the jurisdiction of the Adjudicator.*

. . .

[Emphasis added]

[125] I therefore find that I do not have jurisdiction to adjudicate this grievance. It relates to the implementation of a final and binding agreement in settlement of the PSST complaints. It does not involve the interpretation or application to the employee of a provision of the collective agreement.

[126] The grievor admitted in his evidence and the MOS specifically states that his appointment was subject to the successful completion of training. As such, whether the grievor was offered the position in Downsview or in Dartmouth, he did not have the required qualifications at the PG-02 group and level, and before he could be appointed indeterminately, he was required to successfully complete the training that was set out in the MOS.

[127] If the MOS had stated that the grievor was appointed to the PG-02 position

indeterminately, with no conditions, there would be no issue; however, that is not what the MOS stated. The appointment of the grievor to the PG-02 group and level position was as a direct result of the settlement discussions carried out between Ms. Geoffroy and the grievor's PIPSC representative. If the grievor's two PSST complaints had proceeded to hearing, and he had been entirely successful before that tribunal, at best, he would have remained at the PG-01 group and level. His complaints were about being placed in the SERLO process and about not being chosen to be retained. Those complaints were not about an appointment process for a PG-02 position; nor could the PSST have appointed the grievor to a PG-02 position.

[128] If I am incorrect, however, there is no doubt in my mind not only that the parties had reached a final and binding settlement agreement but also that the employer is not in breach of that agreement. In addition, there is also no doubt that given the grievor's admissions in his testimony as well as the documentary evidence, his understanding of the settlement was that he was not going to be unconditionally appointed to a PG-02 position.

[129] This leaves the grievor's claim for relief in his grievance, which is that he be paid at the PG-02 group and level. Generally speaking, an employee is appointed, pursuant to the *PSEA*, to a position at a certain group and level. The grievor was in a PG-01 position that was disappearing due to a WFA. He was going to be laid off unless another position could be found for him. As it happened, there appeared to be a position that was found at the PG-02 group and level in Downsview, which led to the employer creating a similar position in Dartmouth. The employer felt the grievor could be retrained and eventually satisfy the qualification criteria for that new position, and as such, was willing to offer him the position, conditionally upon him satisfactorily completing the retraining plan set out for him. This was what the employer was prepared to propose to the grievor in exchange for his withdrawal of his two PSST complaints. There is nothing in the collective agreement that requires the employer to appoint the grievor to a PG-02 position.

[130] The parties certainly could have set out in more detail the specifics of the PG-02 position, including what the grievor would be paid during the retraining period, which was going to run for two years. They did not. There is nothing in the MOS that mentions what the grievor is to be paid while he is being trained. Indeed, the evidence before me was that during the course of the settlement discussions that led to the

MOS, the salary that the grievor would be paid (during his training period) was never discussed between the deputy head's representative, Ms. Geoffroy, and the grievor's PIPSC representative. The grievor stated that his understanding that he would be paid at the PG-02 group and level came from his PIPSC representative. This, though, is certainly not evidence that there was an agreement that the grievor would be paid at the PG-02 group and level. The grievor stated that he was not directly involved in any of the settlement discussions with the employer representative, Ms. Geoffroy. Ms. Geoffroy, who did testify, stated that the salary that the grievor would be paid during his two-year training period was never discussed with the grievor's PIPSC representative.

[131] The settlement agreement reached between the parties was that the grievor was to receive an offer of a PG-02 position in Dartmouth that was conditional upon him completing the training plan that was attached to the MOS. That training plan was clearly discussed by the parties before the execution of the MOS. This is evident from the April 30, 2013, and May 1, 2013, emails sent and received by the grievor's PIPSC representative. The specifics of the training plan were set out in writing and were attached to the MOS. Salary was not discussed in the emails. The parties could have addressed salary and set it out in the MOS; they did not. The parties could have agreed that the letter of offer be attached to the MOS, and hence any issues relating to the offer would have been dealt with before the execution of the MOS; in fact, during the course of the exchanges of draft MOSs, the letter of offer was specifically addressed in the emails both sent and received by the grievor's PIPSC representative on April 30 and May 1, 2013. The grievor's PIPSC representative had originally requested that the letter of offer be attached to the MOS. In the April 30, 2013, email at 3:08 p.m. The grievor's PIPSC representative stated to Ms. Geoffroy as follows:

. . .

> *As discussed this morning, as the proposed settlement does not involve an unconditional appointment, the complainant and I will need to review a copy of the letter of offer and its retraining plan prior to signing the settlement. If an electronic copy of the letter of offer can be sent on/by May 2, 2013, I can arrange a meeting with the complainant to review the letter of offer and retraining plan.*

. . .

> *N.B. In terms of changes to the settlement language itself, all that I'd suggest is changing paragraph 1 from 'letter of offer will be issued" to "attached letter of offer" and possibly changing the date to May 3, 2013….*
>
> . . .
>
> [Emphasis added]

[132] It is clear that on April 30, 2013, the grievor and his PIPSC representative wanted the letter of offer to be attached to the MOS and wanted to review both it and the retraining plan before signing the MOS. By May 1, 2013, this had changed, as is disclosed by an email on that day between the grievor's PIPSC representative and Ms. Geoffroy. The email from the grievor's PIPSC representative to Ms. Geoffroy, which was also coincidentally sent at the same time of day (3:08 p.m.) as the April 30 email, stated:

> *In terms of the settlement document itself, the one change I would request is that "the required training as specified in the letter of offer" be changed to "the required training as specified in the attached", with a copy of the below email attached. We could cross through the "letter of offer", write "attached", and initial the change, if that would be acceptable to you? (We could, alternatively, print out a new copy with that change and send you a signed copy, for Mr. Flemming [sic] to sign)?*
>
> . . .

[133] It is clear that as of mid-afternoon on May 1, 2013, the parties had agreed not to attach the letter of offer to the MOS and instead had agreed to attach only the training plan. It would also appear that the grievor did not maintain his position of seeing and approving the letter of offer before signing the MOS. I was not provided any evidence as to why these changes were agreed to by the grievor.

[134] In support of his position that the grievance is about a breach of the collective agreement, the grievor points to the wording contained at paragraph 1 of the MOS, which sets out what the deputy head agreed to do, and how part of it is strikingly similar to part of the wording contained in clause 4.2.4 of Appendix C. Unfortunately, the fact that the wording is similar or that it may have been taken from that section does not somehow make the alleged breach of the MOS a breach of the collective agreement. The grievance is not about the interpretation of clause 4.2.4 of Appendix C.

The grievance is about the employer's alleged breach of the MOS and specifically alleges that that breach is the employer's failure to appoint the grievor to a PG-02 position.

[135] As of April 30, 2013, when the parties were concluding the MOS, the grievor was still in surplus status. Clause 4.2.4 of Appendix C of the collective agreement states that a surplus employee who is on retraining continues to be employed by the home department or organization and is entitled to be paid in accordance with his or her current appointment. The grievor argued that the portion of clause 4.2.4 that follows the word "unless" and states "… the appointing department or organization is willing to appoint the employee indeterminately, conditional on successful completion of retraining, in which case the retraining plan shall be included in the letter of offer" means that the grievor is entitled to be paid at the PG-02 group and level. I disagree with this suggested interpretation.

[136] While Appendix C of the collective agreement is about WFA, Part IV of Appendix C is entitled "Retraining". A thorough review of Part IV of Appendix C clearly shows that this part is about the responsibilities of the different parties in retraining employees who are subject to the WFA provisions.

[137] The clauses under clause 4.2 of Part IV of Appendix C deal with those employees who are designated as surplus, while the clauses under clause 4.3 deal with those employees who have already been laid off. The two classes of employees (surplus vs. laid off) are treated differently. Clause 4.2.4 is clearly about who is responsible for the retraining plan for surplus employees, while clause 4.3.2 is clearly about who is responsible for the retraining plan for persons who are laid off.

[138] Clause 4.2.4 states that the home department or organization is responsible for the retraining plans of surplus employees. "Home department" is identified by its relation to the employee who is surplus. In this case, it is PWGSC. The clause goes on to state though that if the appointing department or organization is willing to appoint the employee indeterminately conditional on successful retraining, the training plan shall be included in the letter of offer. "Appointing department" is identified as the department or organization that has agreed to appoint or consider for appointment (either immediately or after retraining) a **surplus** or **laid-off employee**.

[139] While the home department can also be an appointing department, the

appointing department is not necessarily the home department. There is a subtle difference. In the grievor's case, the home department was also the appointing department — PWGSC. A laid-off person is no longer an employee (see s. 64(4) of the *PSEA*) and no longer has a home department. Someone who is surplus is still an employee. Under clause 4.3.2, all the terms of the appointment for a laid-off employee shall come from the appointing department. A laid-off person's former home department has no role. Clause 4.3.2 of Appendix C states:

> *When an individual is offered an appointment conditional on successful completion of retraining, a retraining plan shall be included in the letter of offer. If the individual accepts the conditional offer, he or she will be appointed on an indeterminate basis to the full level of the position after having successfully completed training and being assessed as qualified for the position. When an individual accepts an appointment to a position with a lower maximum rate of pay than the position from which he or she was laid-off [sic], the employee will be salary protected in accordance with Part V.*

[140] While clause 4.2.4 does state that the surplus employee shall be paid at his or her current appointment rate, pay is not the purpose of the section or the clause. The purpose is to point out who is responsible for the training plan. After the word "unless", the clause goes on to state, "… the appointing department or organization is willing to appoint the employee indeterminately, conditional on successful completion of retraining, in which case the retraining plan shall be included in the letter of offer." This latter portion distinguishes who is responsible for the training plan. The home department is responsible unless the appointing department (which could be different) appoints the surplus employee; if the appointing department is not the home department, it is required to attach the retraining plan. The latter part of the clause, following "unless", does not equate to being paid at the rate of pay or salary of the conditionally appointed level.

[141] The grievor accepted the offer contained in the July 31, 2013, letter. The July 31, 2013, letter sets out what the respondent is going to do in a much clearer way. It states quite clearly that

1. the grievor is being offered the PG-02 position of a supply officer in Dartmouth;

2. the offer is conditional upon the successful completion of the required

training as described in the training plan that is attached (the same training plan that was attached to the MOS);

3. the training period is to be two years, until August 12, 2015;

4. the grievor will receive a formal letter of offer, which will terminate the grievor's surplus priority status and set the effective date of his appointment;

5. if the grievor fails to meet any of the conditions by the end of the retraining period (August 12, 2015), he may be laid off;

6. until such time as he meets the conditions as set out in the retraining plan, he will be paid in accordance with his current position at the PG-01 group and level;

7. he will be assigned to the host organization, with a starting date of August 12, 2013; and

8. the letter of offer constitutes a reasonable job offer, and if he refuses to take it, he could be laid off.

[142] The MOS merely stated that the deputy head would provide an offer and that the offer was conditional upon successful retraining. While the MOS did state that the grievor should receive a letter of offer "in the next few days", and it did not come for three months, it did arrive. Whether that offer came in the days following the signing of the MOS (as agreed) or weeks or months later (as it did) is irrelevant, as the grievor had upon signing the MOS withdrawn his two PSST complaints. That, though, is also irrelevant, as the ultimate outcome of the PSST complaints could not have resulted in the grievor having been appointed to the PG-02 position.

[143] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[144] I do not have jurisdiction.

[145] The grievance is dismissed.

February 22, 2016.

John G. Jaworski,
a panel of the Public Service Labour Relations and Employment Board