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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

DIANE LEGROS

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Legros v. Treasury Board (Canada Border Services Agency)

In the matter of individual grievances referred to adjudication

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Kim Patenaude, counsel

For the Employer: Marc Séguin, counsel

Heard at Ottawa, Ontario,
August 3 and 4, 2017.
(FPSLREB Translation)

I. Individual grievances referred to adjudication

[1] Diane Legros ("the grievor") filed two grievances against her employer alleging age discrimination, contrary to the provisions of article 19 of the collective agreement between the Treasury Board and the Public Service Alliance of Canada for the Border Services Group, which expired on June 20, 2014, and the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*).

[2] The first grievance is dated August 27, 2012, and was referred to adjudication on December 12, 2013. The second grievance is dated September 4, 2013, and was referred to adjudication on April 15, 2014. Both grievances involve the employer's refusal to allow an alternation under Appendix C of the collective agreement, which deals with workforce adjustment.

[3] 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 to replace the Public Service Labour Relations Board as well as the 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) before November 1, 2014, is to be taken up and continued under and in conformity with the *Public Service Labour Relations Act* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[4] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act*, the *Public Service Labour Relations Act*, and the *Public Service Labour Relations Regulations* to, respectively, the Federal Public Sector Labour Relations and Employment Board, the *Federal Public Sector Labour Relations and Employment Board Act*, the *Federal Public Sector Labour Relations Act* ("the *Act*"), and the *Federal Public Sector Labour Relations Regulations* ("the *Regulations*").

[5] To ease reading this decision, the term "the Board" refers to the Public Service Labour Relations and Employment Board and the Federal Public Sector Labour Relations and Employment Board. Likewise, the term "the *Act*" refers to the *Public Service Labour Relations Act* and the *Federal Public Sector Labour Relations Act.*

[6] For the reasons that follow, I find that the grievor's age was a factor in the employer's decision to deny her alternation, which constituted discrimination, and I allow the grievances.

II. Summary of the evidence

[7] The grievor testified on her own behalf. She also called Bruno Loranger, a union representative, to testify. The employer called one witness, Rachelle Beaudry, who was the grievor's manager during the period of the events that gave rise to the grievances.

[8] The context of these grievances is the Deficit Reduction Action Plan (DRAP), which the federal government announced in 2010 and implemented starting in the 2011-2012 fiscal year. Under the DRAP, the entire public service had to find ways to reduce staff, to reduce government spending.

[9] Amongst other means to carry out that exercise, the government applied the "Workforce Adjustment Directive" (WFAD), which was incorporated into collective agreements entered into with the bargaining agents. The WFAD is in Appendix C of the collective agreement applicable to this case.

[10] The purpose of the WFAD is to maximize employment opportunities for employees who wish to remain with the public service despite the elimination of their positions. One of the mechanisms involves providing an incentive to employees who wish to retire from the public service to do so quickly, namely, by yielding their positions to employees who would like to continue working but whose positions are about to be eliminated.

[11] The objectives of the WFAD are set out as follows in Appendix C of the collective agreement:

> ***Objectives***
>
> *It is the policy of the Employer to maximize employment opportunities for indeterminate employees affected by workforce adjustment situations, primarily through ensuring*

> *that, wherever possible, alternative employment opportunities are provided to them. This should not be construed as the continuation of a specific position or job but rather as continued employment.*
>
> *To this end, every indeterminate employee whose services will no longer be required because of a workforce adjustment situation and for whom the deputy head knows or can predict that employment will be available will receive a guarantee of a reasonable job offer within the core public administration. Those employees for whom the deputy head cannot provide the guarantee will have access to transitional employment arrangements (as per Parts VI and VII).*
>
> [Emphasis added]

[12] The grievor's grievances originated in the second option (the underlined text), which refers to employees who may benefit from employment arrangements or transition options. Alternations are provided as a transition option and are defined as follows in Appendix C:

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

[13] In other words, when an opting employee's position is at the point of being eliminated, the alternate yields his or her position and agrees to leave the public service in exchange for compensation, such as the transition support measure, which is defined as follows in the Directive: "… a cash payment based on the employee's years of continuous employment …".

[14] Alternation terms are set out in Part VI of Appendix C. Clause 6.2.1 states the following: "All departments or organizations must participate in the alternation process." An employee wishing to leave the public service may express an interest for an alternation, concretely, by posting his or her position on a government website. It is up to management to decide whether the opting employee (the employee who wants the position) meets the requirements for the position of the alternate (the employee wishing to leave his or her position). Alternation must occur between employees at the same group and level or between employees whose positions are considered equivalent.

[15] The grievor explained that she was interested in offering her position in exchange for a transition support measure. In 2012, she was 62 years old and held a senior policy analyst position classified at the AS-05 group and level at the Canada Border Services Agency (CBSA). She was appointed to it in 2011 following a staffing process. She had been employed with the federal public service since 1989. She was not ready to retire because she had taken extended medical leave between 2006 and 2009. In addition to lost income, she had also incurred additional medical expenses, so she could not afford to retire immediately. However, by participating in an alternation, she could contemplate retirement because she would benefit from a transition support measure.

[16] When the grievor spoke to her manager, Ms. Beaudry, about her plans, Ms. Beaudry adamantly opposed them. In no way could the grievor alternate her position.

[17] At the hearing, Ms. Beaudry explained her position. In 2012, job cuts had to be envisaged after the DRAP was implemented. After closely reviewing all the positions under her responsibility, she determined that the grievor's position could be eliminated once she retired. Since the grievor was 62 years old, she was likely to retire soon, so there was no question of offering her position to someone else.

[18] The grievor saw the refusal as a serious injustice. First, she felt that her position was too important to be eliminated. The section had three analysts, and the other two did not draft policies, while she was in charge of several policy development files. Second, she had never stated an intention to retire. Third, she did not understand why she would not be eligible for a transition support measure while facilitating the continued employment of an employee affected by the DRAP.

[19] She contacted Mr. Loranger, a representative of her bargaining agent, who recommended that she post her position anyway since, based on the bargaining agent's understanding, she had a right to do so. She then posted her position on July 3, 2012, on two websites, the CBSA's and GC Forum, a general website of the Canadian government. That caused an immediate reaction from management, from both Ms. Beaudry and the director general at that time, Daniel Champagne, which was that her position could not be subject to alternation. The post was removed from the CBSA's site (by management), but it stayed on GC Forum for some time.

[20] Within the first few days of posting her position, the grievor received

approximately 15 CVs from federal government employees with similar positions that were to be abolished. She sent them to Ms. Beaudry, who responded as follows to the opting employees: "[Translation] This alternation has not been approved by management; therefore, your CV will not be considered." Management forced the grievor to remove her post from GC Forum.

[21] In August 2012, the grievor filed a grievance against management's decision to deny the alternation. She received a response at the final level of the grievance process in December 2013.

[22] In the meantime, an arbitral award was granted on April 9, 2013, in *Public Service Alliance of Canada and Professional Institute of the Public Service of Canada v. Treasury Board of Canada*, 2013 PSLRB 37 (judicial review application dismissed in 2014 FC 688). Employment upheavals caused by the DRAP had resulted in many grievances on interpreting the WFAD. In the arbitral award, one of the questions the adjudicator decided directly affected the grievor's situation. It was whether the employer could refuse an alternation if it planned to eliminate the alternate's position once he or she retired.

[23] The adjudicator responded to the question in the negative. In his view, a department is required to review an alternation based on the requirements of the position, i.e., its essential qualifications. Nothing in Appendix C's wording authorizes the department to consider more broadly its future planning in the context of an alternation. The adjudicator in that case affirmed the following with respect to the alternation refusal:

…

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

…

[24] However, it is clear that the grievor never gave notice of retiring. Mr. Loranger contacted her to notify her of the decision. He advised her to check whether the 2012 opting employees were still interested and to resume her steps on GC Forum. Ms.

Beaudry testified that from then on, human resources (HR) told her that she was required to review the CVs and to consider an alternation. She testified that she indeed reviewed the CVs and that she remained convinced that it would be problematic to replace the grievor because her position would be eliminated once she departed.

[25] In fact, the problem did not arise because Ms. Beaudry found none of the CVs acceptable. At the hearing, several of the CVs were introduced. I selected two to illustrate Ms. Beaudry's unwillingness to engage in the alternation process. For the purposes of this decision, the names of the two people who submitted the CVs shall be identified with the initials "AB" and "CD".

[26] First, the context in which the CVs were reviewed should be set out. The grievor was a policy analyst at the CBSA's real property sector. She explained that she did not have formal training in real property when she obtained the position and that her training was in fact in the medical field. However, she already had extensive experience in government policy. In 2011, when she obtained the position, the essential experience qualifications were the following:

> [Translation]
>
> - *Recent experience researching and analyzing legislative provisions (for example, acts, regulations, guidelines, and policies) to develop policies, guidelines, and procedures.*
>
> - *Recent experience providing policy development advice and guidance.*
>
> - *Recent experience consulting stakeholders about interpreting and applying policies and procedures.*

[27] In the job alternation post, the grievor communicated those essential qualifications to those interested, along with her job description.

[28] Ms. Beaudry decided that the essential experience qualifications for the position were as follows:

> [Translation]
>
> - *EX1 Experience in research and analysis.*
>
> - *EX2 Experience coordinating national programs and*

policies.

- *EX3 Experience preparing reports and giving presentations to senior management.*
- *EX4 Experience developing and implementing policies, standards, and procedures governing CBSA real property management activities for Agency infrastructure management.*

[29] When questioned at the hearing about the fourth requirement, which bore no resemblance to the essential qualifications of the position that the grievor obtained in 2011, Ms. Beaudry replied that that requirement was now an essential qualification. She emphasized the importance of having knowledge of "real property" to not confuse "movable property" and "immovable property".

[30] When questioned about the impossibility of someone holding a position in a department or organization other than the CBSA having experience in "CBSA real property", Ms. Beaudry replied that the requirement was important, since the CBSA has unique real property (border controls, etc.). She also stated that the reference to the CBSA was not crucial and that it was a matter of interpretation. Her testimony did not resolve that apparent contradiction.

[31] In December 2013, Ms. Beaudry supposedly found a document in HR's files entitled, "[Translation] Evaluation: Statement of Merit Criteria", which included the grievor's evaluation with EX4 experience. Her recent achievements were included in the justification. The document was undated. Ms. Beaudry was unable to explain what it could have been used for because the grievor had been appointed to the position for an indeterminate period in 2011, i.e., before acquiring EX4 experience.

[32] Ms. AB submitted her CV for the position. It showed a career in the public service that began in 1977. In 1992, Ms. AB became an AS-05 financial analyst. Since then, she had held several positions classified at the AS-05 or PM-05 (equivalent) group and level, in which she provided financial advice to senior management and managed diverse files. According to her CV, she is bilingual (she achieved the ECE level, i.e., a higher level than required for the grievor's position), and she had a "secret" security clearance (the same clearance as the grievor).

[33] On August 9, 2013, Ms. Beaudry replied to her, stating that Ms. AB did not meet the security or language requirements. Ms. Beaudry added that Ms. AB did not have the

necessary experience.

[34] When questioned about that at the hearing, Ms. Beaudry conceded that Ms. AB did in fact meet the security and language requirements, but she maintained that Ms. AB did not have the necessary experience, in particular with "preparing reports and … presentations for senior management." Yet, Ms. AB's CV mentions that she had advised senior management on the branch's financial status and that she had provided budget recommendations. When that was pointed out to Ms. Beaudry at the hearing, she replied that it did not mean that Ms. AB knew how to give presentations. In any case, Ms. Beaudry concluded that Ms. AB did not mention any real property experience, with the exception of steps taken to set up new employees' offices.

[35] Ms. CD was also bilingual and had a "secret" security clearance. She was a project manager; her position was classified AS-05. She was responsible for research and coordination in producing reports for small and medium businesses that export agricultural products outside Canada.

[36] Ms. Beaudry stated that Ms. CD met the security and language requirements but that she did not meet any of the four experience requirements. However, according to Ms. CD's CV, she carried out research and analysis, coordinated programs at the national level, and worked with senior management to organize work. When questioned on that point at the hearing, Ms. Beaudry replied that even so, Ms. CD did not have CBSA real property experience.

[37] The grievor sent Ms. CD's CV to Ms. Beaudry on June 18, 2013. The next day, in an email to Mr. Loranger, she related as follows a conversation that she had just had with Ms. Beaudry:

> [Translation]
>
> *I have just had a brief conversation with my director, Rachelle Beaudry.*
>
> *She mentioned to me that the CBSA's answer to me would be unchanged from last year: "No alternation. You are not an affected employee, but YOUR position will be eliminated once YOU retire (note again that I NEVER stated an intention to retire, let alone a date)."*
>
> *She even said that it would be pointless to send them additional CVs and that I would receive the same answer.*

[38] At the hearing, Ms. Beaudry confirmed that that effectively continued to be her position, despite the arbitral award and HR's recommendations.

[39] In its decision at the final level of the grievance process, the employer allowed the first grievance and recognized that an alternation could occur. In principle, that had already been granted following the arbitral award in April 2013, as evidenced by HR's position on that point. However, the employer did not acknowledge that age discrimination had occurred.

[40] The second grievance was filed because although it had been decided that the grievor was entitled to an alternation, Ms. Beaudry's attitude continued to make one impossible. Other CVs followed, and all were dismissed. Ms. Beaudry never interviewed any candidates who submitted a CV and never sent them the requirements of the position in advance.

[41] The grievor testified about facts that gave rise to a third grievance, which is not before me. The employer asked that I give no weight to that evidence, since the facts came after the grievances before me were filed. I give no weight to that evidence in this decision.

[42] In his testimony, Mr. Loranger spoke about his involvement in the bargaining agent's attempts to help the grievor. He is a labour relations officer for one of the components of the bargaining agent that represents the grievor, namely, the Customs and Immigration Union, which is a component of the Public Service Alliance of Canada. He is often consulted for WFAD interpretations. Mr. Loranger submitted a table showing the positions affected by the DRAP at the CBSA. Several AS-02 positions were affected, but no AS-05 positions were.

[43] The table seemed to establish that an alternation could not have occurred at the CBSA since no position equivalent to the grievor's was eliminated. At the hearing, the employer argued that that evidence was partial and incomplete. I simply note that none of the CVs proposed to the grievor for her position originated from the CBSA.

[44] Mr. Loranger emailed Ms. Beaudry in August 2013 in an attempt to discuss the EX4 experience (experience with real property at the CBSA), which, in his view, was an impossible requirement that violated the intent of alternations under the WFAD. Ms. Beaudry did not reply to him.

III. Summary of the arguments

A. For the grievor

[45] It is clear that the employer failed to fulfil its workforce adjustment obligations. After the 2013 arbitral award was made, HR advised Ms. Beaudry that she had to evaluate the CVs that opting employees submitted. The grievor relied on *Chênevert v. Treasury Board (Department of Agriculture and Agri-Food)*, 2015 PSLREB 52, which is factually similar to this case. That decision also deals with an alternation situation in which the manager responsible for accepting or rejecting the alternation had a closed mind because she did not agree with it. The adjudicator found that the employer had acted in bad faith by handling the opting employee's candidacy unreasonably. The employer blocked the opting employee for reasons that had nothing to do with workforce adjustment. The same rationale could apply in this case.

[46] However, contrary to *Chênevert*, in which the adjudicator found that discrimination had not occurred, in this case, there is *prima facie* (on its face) evidence of age discrimination. It is clear that the alternation was denied based on the grievor's age — Ms. Beaudry was counting on an early retirement to reduce the branch's workforce. That maneuver was untenable after the arbitral award, which clearly stated that a position for which the incumbent had not given retirement notice remained a suitable position for an alternation. However, Ms. Beaudry maintained her position by refusing to offer the slightest chance to qualified candidates that the grievor proposed. It is impossible to understand her actions other than from a perspective of age discrimination. Clearly, had the grievor been 10 years younger, her position would not have been part of Ms. Beaudry's workforce reduction calculations.

[47] The employer's participation in the alternation was purely symbolic. Ms. Beaudry did not really review the CVs; she did not communicate the position's requirements to the candidates, except to reject their candidacies, and she did not offer to meet with them to discuss their potential. She added an essential qualification that eliminated all candidates external to the CBSA, which contravened the basic principles of the WFAD. Ms. Beaudry displayed the closemindedness denounced in *Chênevert*. Her evaluations of the CVs were superficial, even wrongful. She blatantly breached her obligations under Appendix C of the collective agreement, which deals with workforce adjustment.

[48] As corrective measures, the grievor seeks the transition support measure to which she would have been entitled had she left in 2012. She also seeks damages for pain and suffering under s. 53(2)(e) of the *CHRA* as well as compensation under s. 53(3) of the same Act because the act was reckless and wilful. She submitted several decisions for calculating damages under the *CHRA.* I will address this in my reasons.

B. For the employer

[49] The employer began its arguments by emphasizing that the April 2013 arbitral award, which changed its situation, had to be taken into account. Initially, it denied the alternation in good faith. Contrary to *Chênevert*, the grievor's position had been identified as one that could be eliminated. Consequently, offering her position to an opting employee appeared contrary to the WFAD's objective, which was to maintain employment.

[50] After the arbitral award, which specified that a position such as the grievor's could be filled by an opting employee, the employer changed its position, as demonstrated by its favourable response to her first grievance and its review of the proposed CVs.

[51] The grievor did not establish that age discrimination occurred. It was not discriminatory per se for the employer to consider eliminating a position once the incumbent retired. Age played absolutely no role in its review of the CVs, in which the employer established that nobody met the position's requirements.

[52] If the Board were to allow this grievance, it would be inappropriate to grant the corrective measure sought, the lost transition support measure, since the grievor lost nothing. In fact, instead of retiring in 2012, she continued to work until 2016. Thus, she received those years of salary and improved her pension by adding several years to its calculation.

IV. Reasons

[53] Both grievances involve age discrimination. The analysis has two steps: Was there *prima facie* discrimination? If so, did the employer have a valid rationale? (See *Nadeau v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 82.) To establish *prima facie* discrimination, it is not necessary that discrimination be the sole factor; it has only to be one of the factors (see *Quebec (Commission des droits de la personne et*

des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center), 2015 SCC 39).

[54] The grievor's age appears to me to have played a major role in the employer's decisions. First, based on Ms. Beaudry's testimony, the grievor's position was identified as one that could be eliminated soon, since her age suggested that she would retire shortly. However, she had no plans to retire. Already, the stereotyped view of the grievor as being of a certain age and retiring soon had hints of discrimination. In *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665 ("*Boisbriand*"), the Supreme Court of Canada found that an employer's perception of a medical condition is just as important as the condition itself, even if the condition per se does not result in a functional limitation. In *Boisbriand*, the employer felt that the employee's medical condition could cause problems, even though they had not yet materialized. Similarly, due to the grievor's age, Ms. Beaudry was relying on the grievor retiring to meet the DRAP's objectives. For that reason, she denied her a benefit (leaving as an alternate) that others could claim.

[55] Once it was established that the grievor was entitled to an alternation, Ms. Beaudry did everything in her power to prevent one from taking place. The arbitral award and the fact that the employer allowed the first grievance did not change anything. The evidence shows blatant bad faith with respect to reviewing the proposed CVs. The addition of a requirement (EX4) that had never been part of the requirements of the grievor's position and that excluded external applicants was part of the same intention of making the alternation impossible. Ms. Beaudry confirmed it during her testimony — she continued to view the grievor's position as one that she did not want to fill because, in her view, it would no longer be funded after the grievor departed. Once again, she was counting on the grievor retiring, which she could not have contemplated with such certainty had the grievor been 10 or 15 years younger. In other words, the benefit continued to be denied, and the grievor's age was certainly a factor.

[56] Therefore, I find that the grievor has established *prima facie* discrimination. The question then becomes whether the employer could explain its decisions, in order to exclude this apparent discrimination.

[57] The employer maintained that age did not play a role in its decision to deny the alternation. Initially, its decision arose from the DRAP and the need to reduce the workforce. After the April 2013 arbitral award, the alternation was denied based on the position's essential qualifications.

[58] Thus, the employer denied that discrimination occurred. On one hand, it acted in good faith by thinking that it could eliminate positions once their incumbents retired. Once the arbitral award contradicted that position on the basis that it contravened the WFAD's principles, the employer accepted the principle of alternation.

[59] It is well known that when it comes to discrimination, intent on the part of the discriminating party does not have to be established. Instead, the discriminatory effect must be established. I believe that the grievor was clearly discriminated against based on her age and that the employer did not provide a satisfactory explanation that excludes this finding, since its only rationale is that it did in fact carry out the alternation but that it failed to find qualified applicants.

[60] However, the evidence established that Ms. Beaudry denied the alternation and that she never changed her mind, even though the arbitral award clearly established that her position on eliminating the grievor's position was not legitimate. Still, at the hearing, she remained convinced that abolishing the grievor's position once she retired was a done deal that precluded any alternation. The grievor testified that her position was filled after she retired, in 2016. It is impossible to explain Ms. Beaudry's certainty other than by finding that she believed that the grievor was about to retire due to her age.

[61] Speculating that the grievor would retire shortly, which was Ms. Beaudry's rationale for denying the alternation, was discriminatory because it was based on a stereotyped view, unsupported by the facts. In fact, the grievor waited four years before retiring.

[62] Therefore, based on all the evidence, I find that the grievor's age was a factor in the employer's decision to deny her an alternation, which constituted discrimination.

V. Corrective measures

[63] In *Chênevert*, the adjudicator found that denying the alternation was unreasonable on the grounds that the manager had shown a closed mind. However, he

was not ready to declare that the alternation should have been granted. I agree with that finding — the decision was the employer's responsibility, not the Board's, even if the employer's rejection was unfounded. The employer is responsible for deciding whether opting employees meet requirements. It is clear that Ms. Beaudry did not undertake the exercise in good faith. That does not mean that the exercise, even had it been performed in good faith, would have necessarily resulted in an alternation. Therefore, I am not prepared to award the transition support measure as a corrective measure.

[64] However, it is clear that discrimination occurred. Section 226 of the *Act* allows the Board to award damages under ss. 53(2)(e) and 53(3) of the *CHRA,* which read as follows:

> ***53 (2)*** *If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:*
>
> …
>
> ***(e)*** *that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.*
>
> ***(3)*** *In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.*

[65] I find that discrimination occurred because the grievor's age was certainly a factor in the employer's deficient participation in the alternation. The grievor was deprived of a benefit under false pretenses. She suffered significant pain and suffering, which entitles her to compensation under s. 53(2)(e) of the *CHRA*.

[66] Furthermore, the employer allowed Ms. Beaudry to act unreasonably for a long time after the arbitral award, which required her to consider the CVs of opting employees in good faith. That conduct justifies awarding damages under s. 53(3) of the

CHRA. Ms. Beaudry simply refused to acknowledge her obligation after the arbitral award. Furthermore, she continued to consider the grievor's position abolished. Her refusal was wilful and reckless.

[67] The grievor submitted to me several decisions that provide summary analyses of calculating the sums to award. The decisions reflect different approaches to awarding corrective measures to compensate persons who encountered age discrimination. Some of the decisions, such as *Cowling v. Her Majesty the Queen in Right of Alberta as represented by Alberta Employment and Immigration*, 2012 AHRC 12, and *Deane v. Ontario (Community Safety and Correctional Services)*, 2012 HRTO 1753, fall under provincial jurisdiction and therefore have limited application in a federal context. In terms of the federal context, I was referred to *Larente v. Canadian Broadcasting Corp.*, 2002 CanLII 15689 (CHRT), which is somewhat dated and involves very different facts.

[68] The relevance of the submitted decisions is that they involve age discrimination, which is a fairly rare basis for compensation under the *CHRA.* However, the analysis of the damages to award under the *CHRA* is still the same — under s. 53(2)(e), the effect on the person is considered, while under s. 53(3), it is the conduct of the perpetrator of the discriminatory practice.

[69] Quantification is still done via an imprecise calculation. It is a matter of weighing on one hand the harm suffered and on the other hand the extent to which the perpetrator of the discriminatory practice was at fault. Once again, in terms of age discrimination, the federal system provides little guidance.

[70] Although I am not prepared to declare that the alternation would have necessarily occurred had the employer acted in good faith, the fact remains that the grievor suffered over a long period (2012 and 2013). She experienced a situation that she perceived as deeply unjust and that could be attributable to her age, a prohibited ground of discrimination. How she was treated, particularly by Ms. Beaudry and the director general at that time, as not being entitled to the transition measure, was particularly humiliating. She was made to understand that she was not eligible, as any employee in an unaffected position would have been, to potential retirement with an incentive.

[71] Furthermore, the wilful and reckless refusal to adhere to the WFAD's principles,

despite an unchallenged arbitral award, warrants a significant penalty. The employer could not escape its duties by claiming that it fully complied with the WFAD while thwarting its intention.

[72] Given the grievor's pain and suffering and that she was deprived of potential retirement with an incentive due to her age, I determine that the amount of compensation to award under s. 53(2)(e) of the *CHRA* is $15 000. As a result of Ms. Beaudry's wilful refusal to comply with the principles of the WFAD despite the 2013 arbitral award, I award the grievor, under s. 53(3) of the *CHRA*, special compensation of $10 000.

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

(The Order appears on the next page)

Order

[74] The grievances are allowed.

[75] Within 30 days of this decision, the employer shall pay the grievor a sum of $25 000 pursuant to ss. 53(2)(e) and 53(3) of the *CHRA.*

October 3, 2017.

FPSLREB Translation

Marie-Claire Perrault,
a panel of the Federal Public Sector Labour Relations and Employment Board