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Citation: 2017 FPSLREB 17

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

CHRISTINE FEHR

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Fehr v. Canada Revenue Agency

In the matter of an individual grievance referred to adjudication

Before: Bryan R. Gray, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Patrizia Campanella, counsel

For the Employer: Richard Fader, counsel

Heard at Ottawa, Ontario,
April 5, 2016.

I. Summary

[1] This case involves an individual grievance that Christine Fehr ("the grievor") filed when she changed positions within the Winnipeg, Manitoba, offices of the Canada Revenue Agency (the employer) and then requested that her annual family related leave be renewed in the same fiscal year.

[2] The grievor had fully depleted her entitlement of 45 hours of family leave in the 2013-14 fiscal year. Upon her transfer to an appeals officer (AU-01) position with the same employer, she requested more leave. Her supervisor informed her that she had none left for that year. She filed a grievance which was denied by the employer and which was then referred to adjudication on August 5, 2015. In it, she requested that she be allowed a second allocation of 45 family leave hours since she had transferred to a new position, which was covered by a different collective agreement.

[3] The facts in this matter are not in dispute. My task is to interpret the relevant collective agreement and determine whether the employer must provide a second allocation of leave in the same fiscal year when one of its employees transfers from a position represented by the Public Service Alliance of Canada (PSAC) to one represented by the Professional Institute of the Public Service of Canada (PIPSC).

[4] The grievor relies upon a legal contract interpretation argument on two key issues:

- how some collective agreement clauses contain temporal limitations, but the clause in question does not and
- the definition of "employee".

[5] The employer relies upon the plain meaning of the collective agreement clause in question and the context of the parties' intent as evidenced by their decade of practice administering that clause in their previous collective agreement.

[6] Despite my doubts that the parties actually bargained for the renewed benefit in question, I find the question of law in interpreting the clause in question is now settled as the Public Service Labour Relations and Employment Board and its predecessor considered this same question and determined that the employer breached the

collective agreement. The first of these decisions was allowed to stand, upon judicial review by the Federal Court of Appeal.

[7] Accordingly, for the reasons that follow, I prefer to take a consistent approach in relation to the question of law and contract interpretation before me and I have determined that the employer has also breached the collective agreement.

[8] 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 former Board") to replace the Public Service Labour Relations Board (the former Board). The Board heard this grievance under the authority of the related implementing statutory instruments.

[9] 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 names of the Public Service Labour Relations and Employment Board, 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 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*").

II. Agreed statement of facts

[10] The grievor worked as an SP-05 excise tax auditor from April 1, 2011, to December 2013 and acted in an SP-06 appeals officer position from January 2013 to September 8, 2013, with the CRA.

[11] The grievor's SP position was covered by the collective agreement for the Program Delivery and Administrative Services group between the CRA and the PSAC ("the CRA-PSAC collective agreement") that came into effect on October 29, 2010, and which was still in effect at the time of the hearing into this matter.

[12] The 2013-14 fiscal year ran from April 1, 2013, to March 31, 2014, inclusively.

[13] The grievor, while an acting SP-06, took 25.75 hours of family related leave under article 43 of the CRA-PSAC collective agreement (i.e., leave with pay for family related responsibilities).

[14] The grievor accepted a position as an AU-01 appeals officer with the CRA, effective September 9, 2013. The employment offer, dated July 31, 2013, was entered into evidence. This position fell under the Audit, Financial, and Scientific (AFS) collective agreement between the CRA and the PIPSC ("the CRA-PIPSC collective agreement"), which has an expiry date of December 21, 2014, and remains in effect, pending negotiations. It was entered into evidence.

[15] Between September 9, 2013, and December 12, 2013, the grievor used an additional 19.25 hours of family related leave under clause 17.13 of the CRA-PIPSC collective agreement (i.e., leave with pay for family related responsibilities).

[16] On January 8, 2014, the grievor emailed her team leader and requested an additional 11.5 hours of family related leave for dates in December 2013 and January 2014. She received a response on the same day indicating that her family related leave balance was zero and that her request was denied. A copy of that response was entered into evidence.

III. Issues

A. Does recognizing a leave entitlement renewal create an absurd cost and thus imply that the employer could not have agreed to such a provision?

[17] The grievor called Said Tawfik to testify. He is a PIPSC classification and research officer who was involved in past collective bargaining. He testified that the cost of leave entitlement was not discussed in the last round of bargaining. He did not provide any meaningful responses to the questions put to him in cross-examination.

[18] The employer called Peter Cenne, a labour relations advisor, to testify. He has worked in labour relations and collective bargaining for 29.5 years and is currently the Director of that branch. He offered his views on costs to the employer for renewing benefits. He testified to the number of employees who transition between bargaining agents within the CRA in a fiscal year and to the cost the employer could incur renewing their family related leave.

[19] Mr. Cenne stated that over 1000 "staffing actions" took place in fiscal year 2015-2016 that resulted in changes to terms and conditions of employment. He further stated that the average daily salary is $327.71 for a PIPSC member and is $262.54 for a PSAC member. By multiplying the average daily salary and the leave available and then multiplying that by the number of staffing actions that changed employees' terms and conditions of employment, he stated that the total annual cost of renewed leave would be approximately $1.8 million, including both bargaining agents (Exhibit E-7).

[20] The grievor objected to his testimony on the grounds that the employer was trying to establish the parties' subjective intents as to their negotiations of the collective agreement. The parties argued about the objection and about related matters of whether the cost of the benefits was contextual evidence or subjective intent. The parties also referred me to cases addressing the cost of a benefit as being absurd.

[21] The grievor cites *Public Service Alliance of Canada v. Communications Security Establishment*, 2009 PSLRB 121 at paragraph 179, as authority for the argument that the costs associated with a correct application of a collective agreement are not relevant to the issue to be determined.

[22] Having listened to the arguments of both parties, I chose to hear the testimony, as I did not find it related to the parties' subjective intent during the negotiations, and I considered it potentially relevant. However, in my final analysis, I placed no probative value upon the testimony regarding potential costs.

[23] As argued by the grievor, the employer's evidence on this matter is speculative. It is not possible to accurately predict how many employees would request renewals of their benefits and if so, how many would use all their available hours.

[24] As was exposed during cross-examination, the testimony of the employer's representative was not convincing as to how such leave is costed. Questions were raised as to the number of employees on leave who do not claim family related leave and whether all employees who are away on leave are replaced. Questions were also posed as to apparent discrepancies in the total cost of salaries (average cost calculations versus actual published costs) and benefits in the CRA as it relates to the quoted cost of the hours at issue with respect to family related leave. Given the somewhat tentative replies I heard to these questions, I do not find the evidence on the cost of renewed leave benefits reliable.

B. Contract law interpretation

1. Does the interpretation of the definition of "employee" in the collective agreement create an entitlement to leave renewal for employees changing bargaining agents?

[25] The grievor argues that the fact that she transferred to a new bargaining unit with its own separate and distinct collective agreement with the employer should, by the operation of contract law interpretation, have given her a renewed annual leave entitlement under her new agreement unless expressly prohibited by a limiting transition clause in her new agreement.

[26] The grievor points out other clauses in the agreement contain limiting language and argues that the lack of such language in the clause in question should be interpreted as being purposeful, thus meaning that there is no transitional limitation to stop the benefit from being used twice in one year by someone in her circumstances.

[27] In the case before me, the grievor's main argument rests upon the definition of "employee" and how this definition applies to the collective agreement in question. The former Board accepted this contract interpretation based argument when it considered a similar clause in *Delios v. Canada Revenue Agency*, 2013 PSLRB 133 ("*Delios*").

[28] The Federal Court of Appeal upheld that decision on judicial review in *Delios v. Canada (Attorney General)*, 2015 FCA 117 ("*Delios* FCA"). The grievor submits that this should settle the matter before me in her favor.

[29] In *Delios*, the former Board considered the renewal of 7.5 hours of personal leave as provided in clause 17.21 of the PIPSC-CRA agreement when the grievor in that case had already used her full entitlement provided in her former PSAC-CRA agreement. She then transferred to a new CRA position and sought another personal leave day under her new PIPSC-CRA agreement. Clause 17.21 of that agreement states as follows:

> *1. Subject to operational requirements as determined by the Employer and with an advance notice of at least five (5) working days, the employee shall be granted, in each fiscal year, seven decimal five (7.5) hours of leave with pay for reasons of a personal nature.*

[30] The decision then applies the following definition of "employee", contained in clause 2.01(j) of the agreement, to the grievor's situation:

> *"employee" means a person so defined by the Public Service Staff Relations Act and who is a member of the bargaining unit….*

[31] Having determined that that definition was specific to the collective agreement under which the grievor was currently employed, the adjudicator found the source of the personal leave entitlement was clause 17.21 of that agreement. This clause included the words "in each fiscal year" and applied to all employees covered by the agreement. The fact that the same employee might have benefitted from a similar entitlement to leave under a separate agreement in the same fiscal year was found of no material relevance.

[32] The adjudicator rejected the employer's arguments that clause 14.08 of the collective agreement in that case operated to stop an employee from earning leave credits in any month for which leave had already been credited to him or her under the terms of any other agreement to which the employer was a party.

[33] Of paramount importance in the decision, is that the adjudicator noted that the agreement in question did contain some benefit provisions in which the parties had agreed to transitional limitations but that such language was not contained in the clause at issue. Given this lack of limiting language, the adjudicator stated that he would not do what in his view would modify the agreement and read in such limiting language to the clause in question.

[34] In the matter before me, the employer pointed out that the Federal Court considered the adjudicator's decision in *Delios* on judicial review (see *Canada (Attorney General) v. Delios*, 2014 FC 1042) (*Delios FC*). The Federal Court accepted new evidence that was not available at the adjudication, which had been conducted by written submissions.

[35] The Federal Court set aside the adjudication award to the grievor as being unreasonable as it found that the adjudicator had failed to apply the plain and ordinary meaning of the language in clause 17.21 of the collective agreement at issue in that case; namely, each employee was entitled to one day of paid personal leave in each fiscal year (at paras 47).

[36] The Federal Court also found that the adjudicator erred in his finding that the definition of "employee" is determined separately by each collective agreement. Rather, the Federal Court stated that s. 2(1) of the *Act* defines "employee" as a person employed in the public service (at para. 56).

[37] The Federal Court stated that the adjudicator's reliance upon words of limitation elsewhere to read out words in the clause in question was unreasonable (at para. 52) and furthermore that the effect of the adjudication led to absurd results in light of the estimated cost of employees being able to renew leave entitlements (at para. 62).

[38] The Federal Court rejected what it said was the adjudicator's reading out of the phrase "in each fiscal year":

> *[53] In this case, instead of applying the words of the collective agreement and holding that the employee, having taken one personal day in that particular fiscal year, was not entitled to a second day in the same fiscal year, the Board chose to read out of the collective agreement the words "in each fiscal year". However, those words were put into the agreement by the parties as a result of negotiations. These words are assumed to manifest the express consent of the parties, and nothing in the evidence suggests they do not. The plain and ordinary meaning of these words is that the specified number of personal leave hours are available to an employee only once "in each fiscal year". (*para. 53)

[39] The Federal Court also found at paragraph 54 that the former Board's interpretation unreasonably defeated the express intentions of the parties.

[40] The grievor appealed this decision and had the arbitral award reinstated by the Federal Court of Appeal (*Delios* FCA). The Federal Court of Appeal found that the Federal Court had improperly considered new evidence and that it had been insufficiently deferential when it applied the correctness standard of review to the former Board's decision, which it found "reasonable" when applying what it said was the proper deferential standard of review.

[41] In the matter before me, the grievor's family related leave is contained in clause 17.13 of the CRA-PIPSC collective agreement, which states as follows:

> ***Leave With Pay for Family-Related Responsibilities***
>
> *(a) The Employer shall grant leave with pay under the following circumstances:*
>
> *(i) an employee is expected to make every reasonable effort to schedule medical or dental appointments for family members to minimize or preclude his absence from work; however, when alternate arrangements are not possible an employee shall be granted leave for a medical or dental appointment when the family member is incapable for attending the appointment by himself, or for appointments with appropriate authorities … or adoption agencies. An employee requesting leave under this provision must notify his supervisor of the appointment as far in advance as possible;*
>
> …
>
> *(b) The total leave with pay which may be granted under clause 17.13 shall not exceed forty-five (45) hours in a fiscal year.*

[42] The employer argues that the CRA-PIPSC collective agreement contains an article of general application that precludes requests such as the grievor's to renew her leave. Clause 14.08 states as follows:

> *An employee shall not earn leave credits under this Collective Agreement in any month for which leave has already been credited to him under the terms of any other collective agreement to which the Employer is a party or under other rules or regulations of the Employer.*

[43] I reject this argument for the same reason it was rejected in *Delios* as the entitlement to the leave benefit accrues from the mere existence of clause 17.13. There is no reference to earning family leave credits. I will not read into clause 14.08 an agreement-wide application. To do otherwise would be contrary to the plain meaning of the language of that clause and contrary to the bargain struck by the parties.

[44] Both parties rely upon the plain meaning of "[t]he Employer shall grant" in clause 17.13 to support their opposing arguments. The grievor submits that as in *Delios*, this clause is not qualified with an explicit temporal limitation.

[45] The employer submits that contrary to *Delios*, the language of this clause is focused on the employer's grant of leave, while in *Delios*, the clause in question stated

that the "employee shall be granted". The employer further submits that in the matter before me, the employer is the same, regardless of whether the employee is represented by PSAC or PIPSC.

[46] Since the close of the hearing in the matter before me, Adjudicator Jaworski considered these same issues of contract interpretation in *Professional Institute of the Public Service of Canada v. Canada Revenue Agency*, 2016 PSLREB 77 (*PIPSC*). After considering virtually the same questions of contract interpretation as those before me, he allowed the grievance, finding *Delios* settled the question on interpreting leave provisions in a collective agreement in which some benefit clauses contain explicit transitional limitations while others do not.

[47] When the grievor in the matter before me accepted a new position subject to a different union and different collective agreement, she became entitled to a new annual allocation of the leave benefits provided by the new agreement, except those benefits that were expressly prohibited by transitional limiting language. The facts regarding the agreement at issues before me are clear. The parties chose not to add any express limitation to the transition of the benefit clause in question.

[48] Given the clear pronouncements of the former Board in *Delios* and in *PIPSC*, and given the Federal Court of Appeal declined the invitation to overturn *Delios,* I consider the questions of contract interpretation before me to be settled law as it applies to the clause before me. The grievor is therefore entitled to renewed leave under clause 17.13 of her new agreement in the same fiscal year.

C. Evidence of context and past practice

1. Does the context of how the parties administered the leave provision over the past decade provide evidence that can be relied upon when determining the question before me?

[49] Counsel for the employer informed the hearing that the former Board decided *Delios* upon written submissions which did not include the evidence tended to support their argument over past practice. The employer then submitted this additional evidence at the Federal Court during the judicial review hearing. The Federal Court of Appeal ruled that this additional evidence should not have been accepted and stated that "[t]hat evidence should have been placed before the adjudicator for his assessment as the fact-finder …" (para. 52)

[50] The employer sought to avoid that problem, which it had caused itself in *Delios*, by seeking to tender evidence at this hearing to address how the parties have administered the clause in question for the past decade, and it tabled their expired collective agreements from that period.

[51] The grievor objected to me accepting this evidence of past collective agreements and past practice and argued that it was improper as it was related to the parties' subjective intent in their negotiations, that it was irrelevant, and that it was improper extrinsic evidence given that they have provided clear language that does not require any context to aid its interpretation.

[52] In support of her objection on this point, the grievor cites several passages from Brown and Beatty that state that parole or extrinsic evidence is that which lies outside the written contract that is being interpreted. While the authors note several exceptions, they state that the general common law rule is that such evidence is not admissible to contradict or to vary the terms of the agreement. If a term is ambiguous, then such evidence is admissible to aid in the interpretation, to explain the ambiguity. They suggest the most common forms of such evidence are the parties' negotiating history and practices. They add that for such evidence to be relied upon, it must be consensual between the parties and must not merely represent the hopes of one party (see para. 3:4400).

[53] I also note that Brown and Beatty continue by citing an arbitral award that explains past practice as being useful as an aid to clarifying ambiguity if the past conduct of one party in interpreting the agreement is applied to the administration of the clause in question, and that practice is then acquiesced to by the other party. The reason for this is that the best evidence of the meaning most consistent with the interpretation of the agreement is that mutually accepted by the parties (see *John Bertram & Sons Co. v. International Association of Machinists, Local 1740* (1967), 18 L.A.C. 362 at 367 and 368, at Brown and Beatty, at para. 3:4430).

[54] The employer argues that a review of past collective agreements between the CRA and the PIPSC, such as the one that expired on December 21, 2003, highlights the parties' intentions on family related leave with pay. Clauses 17.13(b) and (c) of that agreement state as follows:

Leave With Pay for Family-Related Responsibilities

(b) The Employer shall grant leave with pay under the following circumstances:

(i) an employee is expected to make every reasonable effort to schedule medical or dental appointments for family members to minimize or preclude his absence from work; however, when alternate arrangements are not possible an employee shall be granted up to one (1) day for a medical or dental appointment when the family member is incapable of attending the appointment by himself, or for appointments with appropriate authorities in schools or adoption agencies. An employee requesting leave under this provision must notify his supervisor of the appointment as far in advance as possible;

(ii) to provide for the immediate and temporary care of a sick or elderly member of the employee's family and to provide an employee with time to make alternate care arrangements where the illness is of a longer duration;

(iii) two (2) days [sic] leave with pay for needs directly related to the birth or to the adoption of the employee's child. This leave may be divided into two (2) periods and granted on separate days.

(c) The total leave with pay which may be granted under sub-clauses 17.13(b)(i), (ii) and (iii) shall not exceed five (5) days in a fiscal year.

[55] Similarly, the collective agreement that expired on June 21, 2001, further highlights the parties' intentions for family related leave with pay. Clauses 17.13(b) and (c) of that agreement state in part as follows:

(b) The Employer shall grant leave with pay under the following circumstances:

(i) an employee is expected to make every reasonable effort to schedule medical or dental appointments for family members to minimize or preclude his absence from work; however, when alternative arrangements are not possible an employee shall be granted up to one (1) day for a medical or dental appointment when the family member is incapable of attending the appointment by himself, or for appointments with appropriate authorities in schools or adoptions agencies. An employee requesting leave under this provision must notify his supervisor of the

> *appointment as far in advance as possible;*
>
> …
>
> *(c) The total leave with pay which may be granted under sub-clauses 17.12 (b)(i), (ii) and (iii) shall not exceed five (5) days in a fiscal year.*

[56] Both parties rely upon the arbitral decision in *Schlegel Villages v. Service Employees International Union, Local 1 Canada*, [2016] O.L.A.A. No. 104 (QL) ("Schlegel Villages"), which relies heavily upon the Supreme Court of Canada case *Sattva Capital Corp. v. Creston Molly Corp.*, 2014 SCC 53 ("*Sattva Capital*").

[57] *Schlegel Villages* stands as authority for the proposition that the contextual evidence of surrounding circumstances can be relied upon but that it cannot contradict the parties' words.

[58] *Sattva Capital* adds that contextual evidence should consist only of objective evidence of the background facts at the time the contract was executed and that it includes anything that would have affected how a reasonable person would have understood the language of the document. *Sattva Capital* concludes with the admonishment that surrounding circumstances or context cannot be used to rewrite the parties' bargain.

[59] The grievor cites *Taticek v. Canada (Border Services Agency)*, 2014 FC 281, which refers to *Eli Lilly and Co v. Novopharm Ltd*, [1998] 2 S.C.R. 129 at paragraph 54, as authority that the parties' contractual intent is to be determined by referring to the words they used drafting the contract, possibly in light of the surrounding circumstances prevalent at the time. However, evidence of one party's subjective intention has no place in the determination. That case also notes that the words of the contract must be given their plain and ordinary meaning unless the results of doing so would be absurd (at paras. 58 and 59).

[60] I agreed to hear the employers' evidence as to past practice but indicated I would reserve on what, if any, weight I would place upon it. Given my above noted findings on the interpretation and subsequent clearly understood meaning of clause 17.13 of the agreement, I have determined that I can place no weight on the extrinsic evidence tendered by the employer.

[61] I appreciate that the subsequent result in this case may seem unfair, however, I am mindful of the words of Mr. Justice Stratas in *Delios* FCA, at paras. 36 and 37:

> *[36] …Collective bargaining can be tough, each side must make difficult compromises, inequitable to the parties. As the adjudicator noted, it is not for him to modify the text of the agreement to address those issues. Rather, as the adjudicator held, it is for the next round of bargaining.*
>
> *[37] … To the extent that there is any unfairness, inequity or additional cost resulting from his interpretation of the collective agreement, it is an artifact of the collective bargaining process…*

[62] If I have erred in my determination of the clear meaning of clause 17.13, thereby rendering the evidence of past practice relevant, I would rely upon it to establish on a balance of probabilities that the parties did not, in fact, agree to administer the clause in question such that an employee such as the grievor could effectively double her annual leave entitlement.

[63] Upon my accepting the past agreements as exhibits in the hearing and reserving what, if any, weight I would place upon them, the employer then questioned Mr. Cenne as to the past practice of granting leave. He stated that to his knowledge, from having worked in the CRA's human resources and collective bargaining branch since May 2000, that a renewal of leave had never been granted in the 2000-2014 period; nor had PIPSC grieved that issue until the adjudication award was made in *Delios*. He further testified that many employees in the same circumstances as the grievor in this case would have transferred positions and bargaining agents during this same period.

[64] Had I relied upon the evidence of past practice, I would have followed a factual matrix or contextual approach consistent with the approach I took in determining two recent decisions: *Canadian Federal Pilots Association v. Treasury Board*, 2016 PSLREB 46 (upheld on judicial review in *Attorney General of Canada v. Canadian Federal Pilots Association*, 2017 FCA 100) and *Public Service Alliance of Canada v. Treasury Board (Department of National Defence)*, 2016 PSLREB 35.

[65] I allowed each of these grievances after considering the context or factual matrix of how the employees' work was being administered under the relevant articles of the collective agreements at issue. By awarding each of these grievances, I rejected the legalistic contract interpretation arguments put forth by the employer, which it

used to justify its refusal to pay overtime and a high-angle rescue allowance, respectively.

[66] My preferred approach to contract interpretation is consistent with that enunciated by the Supreme Court of Canada in *Sattva Capital*. This case considers approaches to interpreting a contract and determines that the historical approach of more strict legal arguments of interpretation should be abandoned. Rather, Justice Rothstein writes that such interpretation better involves issues of mixed fact and law applied to the words of the contract considered in light of the factual matrix (para 50).

[67] This more modern approach of contract interpretation has evolved towards being more practical and based on common sense and not being dominated by technical rules of construction. The overriding concern is to determine the parties' intent and the scope of their understanding. To do so, a decision maker must read the contract as a whole, giving words their ordinary and grammatical meanings, consistent with the surrounding circumstances known to the parties at the time the contract was formed.

[68] Considering the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own because words alone do not have an immutable or absolute meaning. When considering whether to allow the use of surrounding circumstances as evidence to assist in interpreting the agreement, the Supreme Court finds that evidence of surrounding circumstances should consist only of objective evidence, that is, knowledge that both parties had or reasonably ought to have had at or before the date of contracting. And further, the goal of examining such evidence is to deepen a decision maker's understanding of the parties' mutual objectives and intentions as expressed in the words of the contract (see paras. 42 to 47, 57, and 58).

[69] The employer also addressed the issue of whether I am bound by the *Delios* arbitral award as was upheld by the Federal Court of Appeal on judicial review. The employer noted the different wording in the clause before me as compared to the one in *Delios* and the fact that significantly different evidence was put before me than was put before the adjudicator in *Delios*.

[70] Specific to the issue of me being bound by the previous decisions upholding the *Delios* grievance, the employer referred me to the decision of the Ontario Court of

Appeal in *Essex County Roman Catholic School Board v. Ontario English Catholic Teachers' Assn.* (2001), 56 O.R. (3d) 85 at paras. 30 and 31. That Court conducted a judicial review of a labour arbitration award and upon finding that the standard of review (at that time) was patently unreasonable, it stated that the reviewing court does not decide whether the award was the only one possible or even the best possible; it decides only whether the outcome was patently unreasonable. Thus, if the court determines that the award was not patently unreasonable, it does not follow that looking forward, arbitrators will be bound to apply the interpretation of the arbitrator whose decision was affirmed by the court in judicial review proceedings.

[71] The employer points to paragraph 37 of *Delios* FCA, which states that upon a standard of review of reasonableness, the overall result is "… acceptable and defensible on the facts and the law…" and thus is "reasonable".

IV. Conclusion

[72] Despite the cogent arguments and authorities presented by the employer to the contrary, I believe consistency of collective agreement interpretation by the Board, especially when having been allowed to stand upon judicial review by the Federal Court of Appeal, is important.

[73] Such consistency can promote greater harmony within labour relations and collective bargaining by enhancing the ability of parties to predict outcomes when considering the same or similar clauses and thereby avoid costly and time consuming litigation for the benefit of all involved.

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

(The Order appears on the next page)

V. Order

[75] The grievance is allowed.

[76] The parties are directed to discuss the appropriate remedy.

[77] I will remain seized of this matter for 120 days from the issuance of this decision to deal with any issues arising from this order.

July 28, 2017.

Bryan R. Gray,
a panel of the Federal Public Sector
Labour Relations and Employment Board