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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

JOY BELL, JEREMY BELL, OLIVIER BELL, MARC-ANTOINE BÉORD, MARC BOUTIN, STEPHEN E. BRIDSON, DARREN A. CAMPAGNE, CAROL COOKE, DANIELLE D'AMICO, FARAH DIRIE, MARY DOGGETT, PATRICK JAMES EMERY, PETER GALAN, MARK GAUTHIER, MARTIAL GAUTHIER, IVAN GLUSCIC, ELIZABETH GODON, JEFF GRAHAM, JOHN HIGGINSON, PIERRE JEAN, JEAN LEBLANC, TIM LEBLANC, JEFFREY T. LOWE, DOUGLAS D. LITTAY, PHILIPPE MARAZZANI, ANDREW M. MATHESON, SAMUEL T. MCCLINTOCK, RAYLENE M. MCCREADY, RICHARD PICHETTE, MICHEL RANGER, TONYA SHORTILL, KEVIN C. SMITH, BING SO, ROBERT A. ST. AMAND, DONNA C. THOMAS, BOB J. THÉBERGE, JOHN K. STEWART, AND STEPHEN THUSWALDNER

Grievors

and

TREASURY BOARD
(Shared Services Canada)

Employer

Indexed as
Bell v. Treasury Board (Shared Services Canada)

In the matter of an individual grievance referred to adjudication

Before: David Orfald, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievors: Erica Bernstein and Tia Hazra, Professional Institute of the Public Service of Canada

For the Employer: Simon Deneau, counsel

Decided on the basis of written submissions,
filed September 1 and 18 and October 18, 2017,
and on oral arguments made at a case conference on December 10, 2019.

REASONS FOR DECISION

I. Introduction

[1] This case is about whether the 38 grievors listed on the cover page of this decision ("the grievors") are entitled to keep the terminable allowances they were paid following their transfer from the Canadian Food Inspection Agency (CFIA) to Shared Services Canada (SSC) on November 15, 2011. Terminable allowances are a form of market adjustment paid above and beyond salaries, negotiated with a specific end date that must be extended in order to continue.

[2] The grievors were classified as Computer Systems (CS) employees at CFIA. As such, they were in the CFIA Informatics (IN) bargaining unit ("the CFIA-IN unit").

[3] Upon the transfer to SSC, the grievors became Treasury Board (TB) employees rather than employees of CFIA, which is a separate employer. They were placed in the CS bargaining unit at the TB ("the TB-CS unit").

[4] At both CFIA and SSC, the grievors were in bargaining units represented by the Professional Institute of the Public Service of Canada (PIPSC).

[5] At the time of the transfer, the collective agreements for both the CFIA-IN and the TB-CS units had expired, and the parties were in negotiations for their renewals.

[6] At the time of the transfer, the TB and PIPSC agreed that the former CFIA employees would continue to work under the terms and conditions that had been in place for the CFIA-IN unit until a new collective agreement was entered into for the TB-CS unit.

[7] Included in the CFIA terms and conditions of employment was a terminable allowance paid to employees classified CS, which continued to be paid to the grievors following their transfer.

[8] A new TB-CS unit collective agreement was signed between the TB and PIPSC on December 14, 2012 ("the *TB-PIPSC Collective Agreement 2012*"; expiry date, December 21, 2014). It applied to the grievors. It did not contain a terminable allowance. Therefore, the last day for which they received a terminable allowance was December 13, 2012.

[9] In November of 2013, a new CFIA-IN collective agreement was signed between CFIA and PIPSC ("the *CFIA-PIPSC Collective Agreement 2013*"), with salary increases retroactive to June of 2011. That agreement eliminated the terminable allowance, rolling all or part of it into salary retroactively, effective June 1, 2011.

[10] Following the signing of that agreement, SSC recovered the terminable allowance from the grievors for the period between November 15, 2011, and December 13, 2012. Given that this was a 13-month period, the recovery amounts were approximately $2300 to $3200 per grievor.

[11] The grievors alleged that the recovery of the terminable allowance was a violation of the *TB-PIPSC Collective Agreement 2012*. Their argument was focused primarily on the content of a memorandum of understanding in Appendix G of the agreement entitled "Memorandum of Understanding – Shared Services Canada" ("the *Appendix G MOU*" or "the MOU"), which was negotiated to establish the rates of pay for employees transferred to SSC from several separate employers, including CFIA. It makes no mention of the terminable allowance.

[12] The employer's position is that the *CFIA-PIPSC Collective Agreement 2013* retroactively altered the terms and conditions of employment for the grievors for the period from November 15, 2011, to December 13, 2012, and justified its recovery of the terminable allowance. It also argued that the terminable allowance paid to the grievors for that 13-month period amount to a pyramiding of payments.

[13] For the following reasons, I find that at the time that the *TB-PIPSC Collective Agreement 2012* was signed the parties knew or should have known that the terminable allowance issue would affect the transferred employees. They could have negotiated transitional language with respect to the terminable allowance. They did not. There was no reasonable basis for SSC to recover the allowance on the strength of *the CFIA-PIPSC Collective Agreement 2013,* a collective agreement signed by a separate employer. Therefore, the grievances are allowed.

II. Individual grievances referred to adjudication

[14] Following the employer's recovery of the terminable allowance, a total of 38 grievances were filed between October and December of 2014, all with the same wording. Most were filed in English; a few were filed in French. Of the grievors, 15 were

classified at the CS-02 group and level, 19 at CS-03, and 4 at CS-04. Most, but not all, were based in the National Capital Region.

[15] After being rejected at the second and final levels of the grievance process, the grievances were referred to adjudication on February 18, 2015.

[16] The referrals were made to the Public Service Labour Relations and Employment Board (PSLREB), as it was then called. 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 PSLREB's name to the Federal Public Sector Labour Relations and Employment Board ("the Board").

[17] Following a case conference with the parties on August 8, 2017, the Board directed that the case proceed via written submissions. On September 1, 2017, the parties submitted an agreed statement of facts supported by seven exhibits. The grievors' submissions were also made that day. The employer's submissions were submitted on September 18, 2017, and the grievors' reply submissions were made on October 18, 2017.

[18] I was assigned as a panel of the Board to adjudicate these grievances on October 15, 2019.

[19] Following a review of the parties' submissions, I invited them to make additional submissions on two Board decisions that I thought might be relevant to the case, one rendered in 2018, and the other in 2019. The parties provided their additional submissions at an in-person case conference held on December 10, 2019.

III. Summary of the evidence

A. Status of employees at the date of transfert

[20] In 2011, the federal government created SSC as a centralized agency to provide email, data centre, and network support services to 43 federal departments and agencies. As a result, a large number of employees were transferred to SSC from those departments and agencies.

[21] The mechanism by which the employees were transferred was an Order in Council dated November 15, 2011, and made under the *Public Service Rearrangement and Transfer of Duties Act* (R.S.C., 1985, c. P-34).

[22] While most employees were simply transferred to SSC from the core public administration, some were transferred from separate agencies, the largest of which included CFIA, the Canada Revenue Agency, and the Parks Canada Agency.

[23] The majority of employees in the new agency were classified under the CS standard, both before and after the transfer.

[24] Before the transfer, the 38 grievors were employed by CFIA as part of the CFIA-IN unit and were subject to the collective agreement with PIPSC signed on June 9, 2009, with an expiry date of May 30, 2011 ("the *CFIA-PIPSC Collective Agreement 2009*"). As of the transfer, CFIA and PIPSC had begun the process of negotiating a renewal collective agreement for that unit.

[25] Upon their transfer to the core public administration, the grievors became part of the TB-CS unit. In November 2011, CS employees were subject to a collective agreement between the TB and PIPSC signed on June 17, 2009, with an expiry date of December 21, 2010 ("the *TB-PIPSC Collective Agreement 2009*"). As of the transfer, the TB and PIPSC had begun the process of negotiating a renewal collective agreement for the TB-CS unit.

[26] However, the grievors were not immediately made subject to the TB-PIPSC collective agreement. The agreed statement of facts states that "[t]he parties agreed that until the effective date of the new PIPSC CS Collective Agreement, the Grievors would retain their Terms and Conditions of Employment from CFIA." The grievances described this as a "… freeze of my working conditions that was in place following my transfer …". Whether an agreement or a freeze, the result was that after November 15, 2011, the grievors continued to be governed by the *CFIA-PIPSC Collective Agreement 2009*.

[27] The *CFIA-PIPSC Collective Agreement 2009* sets out the rates of pay for the CS levels at its Appendix "A", which also sets out the provisions for paying the terminable allowance. Note that Appendix "A" also states: "(c) The Terminable Allowance specified above does not form part of an employee's salary".

[28] The rates of pay and terminable allowances in effect at CFIA as of the date of transfer were as follows:

CS group level	Salary maximum (from the *CFIA-PIPSC Collective Agreement 2009*) at line "C", effective June 1, 2010	Terminable allowance - annual amount (from the *CFIA-PIPSC Collective Agreement 2009*)
CS-02	75 130	2 112
CS-03	90 123	2 544
CS-04	103 358	2 976

B. December 14, 2012

[29] On December 14, 2012, the TB and PIPSC signed the *TB-PIPSC Collective Agreement 2012*. Upon its signature, the grievors ceased to be governed by the *CFIA-PIPSC Collective Agreement 2009.*

[30] In reaching the new collective agreement, the TB and PIPSC negotiated a number of specific provisions governing the separate-agency CS employees transferred to SSC, including the grievors. One form these provisions took was the *Appendix G MOU*.

[31] The *Appendix G MOU* regulates how any salary differences between those at a separate agency and those at the TB are to be managed. The "Rates of Pay" section of the MOU, at article 1, covers situations in which an employee's separate-agency rate of pay is **equal to or lower** than the TB rates. It reads as follows:

> *1. Employees whose rate of pay prior to their transfer on November 15, 2011, namely, November 14, 2011, meets or is less than the maximum rate of pay of the corresponding Computer Systems (CS) group and level applicable to his substantive position upon transfer on November 15, 2011, shall be paid the pay specified in Appendix "A" at the corresponding CS rates of pay for the level applicable to his substantive position and will be subject to the provisions of Article 47-Pay Administration.*

[32] Articles 2 to 4 covers the situations in which an employee's separate-agency rate of pay is **higher** than the maximum TB rate and read as follows:

> *2. Employees whose rate of pay prior to their transfer on November 15, 2011, namely on November 14, 2011, exceeds the maximum rate of pay of the corresponding Computer System [sic]*

> *(CS) group and level applicable to his substantive position upon transfer on November 15, 2011 shall be paid a "holding rate of pay", which will remain in effect:*
>
> *for the duration of this Memorandum of Agreement;*
>
> *or*
>
> *until such time as the maximum rate of pay of the corresponding CS group and level applicable to his substantive position upon transfer on November 15, 2011, is equal to or higher than the employee's holding rate of pay.*
>
> *3. An employee paid at a holding rate of pay on the effective date of an economic increase shall receive a non-compounding lump sum payment, equivalent to the percentage adjustment based on their holding rate of pay, in lieu of the economic increase. When the calculation of an economic increase results in a salary that would exceed the current job rate, the difference is to be paid as a one-time lump sum payment.*
>
> *4. On April 1, 2014 should an employees' holding rate of pay continue to exceed that of the corresponding CS group and level applicable to his or her substantive position, their rate of pay will be adjusted according to the deployment rules in the Directive on Terms and Conditions of Employment.*

[33] The *TB-PIPSC Collective Agreement 2012* also retroactively put into effect new rates of pay for the CS group. The following table sets out the maximum wage rates for the grievors' levels in that agreement compared to their maximum wage rates at CFIA:

CS group level	CFIA maximum rate of pay (from the *CFIA-PIPSC Collective Agreement* 2009)	*TB-PIPSC Collective Agreement 2012*	
		TB rate effective December 22, 2010 (line "A")	TB rate effective December 22, 2011, after increase and restructuring (line "X")
CS-02	75 130	77 103	78 452
CS-03	90 123	92 286	94 004
CS-04	103 358	105 692	107 833

[34] Given the agreement, the new TB rates in effect on the date of transfer, November 15, 2011, were those that had taken effect on December 22, 2010. The *Appendix G MOU* required that a comparison be made between the rate of pay before the transfer (for example, the maximum CS-02 CFIA rate of $75 130) to the TB maximum rate at line "A" (e.g., CS-02: $77 103).

[35] At all three levels, the maximum TB rates were higher than the maximum CFIA rates. Therefore, the grievors would have been subject to article 1 of the *Appendix G MOU* and would have been paid retroactively, in accordance with line A, as of November 15, 2011.

[36] Also as a result of the agreement, they would have received another pay increase shortly after that, effective December 22, 2011. Since the agreement was signed on December 14, 2012, both salary changes would have been made retroactively.

[37] The *TB-PIPSC Collective Agreement 2012* did not include a terminable allowance. The *Appendix G MOU* contains no language with respect to the terminable allowance. The grievors stopped receiving the terminable allowance effective December 14, 2012.

C. November 29, 2013

[38] CFIA and PIPSC signed a new collective agreement for the CFIA-IN unit on November 29, 2013 (the *CFIA-PIPSC Collective Agreement 2013*), with an expiry date of May 31, 2014. It included annual rates of pay put into effect retroactively to June 1, 2011 (i.e., before the transfer). The June 1, 2011, rates of pay included a salary restructure as well as an economic increase. The pay notes of that agreement stated that "Effective June 1, 2011 – restructure (roll-in of Terminable Allowance: 100% at CS-01/-02, 90% at CS-03/-04/-05)". It contained no terminable allowance provision.

[39] For the three levels at issue, the rates of pay at CFIA that were put in place retroactively to June 1, 2011, are in the third column of the following table:

TB-PIPSC Collective Agreement 2012	CFIA maximum rate of pay (from the *CFIA-PIPSC Collective Agreement 2009*)	Revised CFIA maximum rate June 1, 2011 (from the *CFIA-PIPSC Collective Agreement 2013*), line "A"	*TB-PIPSC Collective Agreement 2012*	
			TB rate effective December 22, 2010 (line "A")	TB rate effective December 22, 2011, after increase and restructuring (line "X")
CS-02	75 130	78 594	77 103	78 452
CS-03	90 123	94 030	92 286	94 004
CS-04	103 358	107 892	105 692	107 833

[40] On comparing the revised maximum rates of pay as of the transfer to those in effect at the TB (the fourth column), it is evident that the revised CFIA rates exceeded those at the TB in effect on November 15, 2011. The parties could not confirm if any grievors were retroactively treated in accordance with articles 2 to 4 of the *Appendix G MOU*.

D. Summer and fall 2014 – the recovery and the grievances

[41] Between July and September 2014, SSC announced that it deemed the payment of the terminable allowance from November 15, 2011, to December 13, 2012, an overpayment and that it would recover it from the employees who had transferred from CFIA to SSC.

[42] The exact amounts of the recovery were not submitted as evidence, and the parties noted that the application of each grievor's respective collective agreement entitlements, including the implementation of new collective agreements, "… amounted to various and differing financial impacts on each individual Grievor, depending on his/her level and individual circumstances." But the terminable allowance was recovered, and between October and December 2014, the 38 grievances were filed.

[43] The grievances were responded to at the second level on November 18, 2014. In the reply, the employer responded in part by stating:

> …
>
> *Following the November 29, 2013 signature of the new CFIA Collective Agreement for the CS group, Terminable Allowance (TA) benefits were eliminated and rolled into salary retroactively to June 1, 2011. These salary revisions impacted retroactively your effective salary as of November 14, 2011. Given these new provisions, TA's were now forming part of your new salary. Consequently you were entitled to receive your revised salary according to your new agreement. In order to appropriately revise and pay your new salary as of November 15, 2011, the TA had to be recovered. Without performing this recovery of TA, you would have been paid twice the same amount.*
>
> …

[44] The final-level reply to the grievances was issued on May 27, 2015, and the employer responded in part by stating as follows:

> …

> *… On November 29, 2013, a new collective agreement between CFIA and PIPSC was signed with a retroactive effective date of June 1, 2011.*
>
> *Therefore, on November 14, 2011, you were subject to the terms and conditions of employment of the collective agreement between CFIA and PIPSC, signed on November 29, 2013. This agreement does not contain a provision for the payment of a terminable allowance.*
>
> *I am therefore satisfied that you were not eligible for the payment of a terminable allowance from November 15, 2011 to December 13, 2012.*

E. The end of the terminable allowance for the CS group at the TB

[45] In preparation for the case conference, the parties were asked to clarify if and when the terminable allowance ceased for CS employees at the TB. The parties agreed that TB-CS unit employees did have a terminable allowance provision in the collective agreements that expired in 2002, 2004, and 2007. In the last one, the TB-PIPSC CS collective agreement signed on July 25, 2006, with an expiry date of December 21, 2007, the MOU setting out the terminable allowance stated that it would cease to exist on December 20, 2006. A flat-rate wage restructuring took effect on December 21, 2006, one day after the expiration of the terminable allowance, and new rates of pay were implemented for December 22, 2006.

[46] The parties' renewal agreement was the *TB-PIPSC Collective Agreement 2009*. No terminable allowance was in effect for the duration of that agreement. It was in place on the date on which the transfer took place, and it remained in place until the *TB-PIPSC Collective Agreement 2012* was signed.

F. Summary of the collective agreement referred to in this decision

[47] A total of four collective agreements have been named that are referred to several times over in this decision. Consequently, I will briefly review again the four agreements being discussed:

- The *CFIA-PIPSC Collective Agreement 2009* was signed June 9, 2009, for the CFIA-IN bargaining unit, with an expiry date of May 31, 2011 (exhibit 5). It was the agreement in effect for the grievors just prior to the date of transfer.
- The *TB-PIPSC Collective Agreement 2009* was signed June 17, 2009, for the TB-CS bargaining unit, with an expiry date of December 21, 2010 (exhibit 9). It was the agreement in effect for the TB-CS unit at the date of transfer.

- The *TB-PIPSC Collective Agreement 2012* was signed December 14, 2012, for the TB-CS unit, with an expiry date of December 21, 2014 (exhibit 6). This is the collective agreement that contains the *Appendix G MOU*.
- The *CFIA-PIPSC Collective Agreement 2013* was signed November 29, 2013, for the CFIA-IN bargaining unit (exhibit 7).

IV. Issue

[48] As I explain in my reasons later in this decision, the grievances relate to the interpretation or application of the *TB-PIPSC Collective Agreement 2012*. Accordingly, the issue to be addressed is as follows: Did the employer violate that collective agreement when it recovered the terminable allowance paid to the grievors during the period from November 15, 2011, to December 13, 2012?

V. Summary of the arguments

A. For the grievors

[49] The grievors submitted that an adjudicator should be guided by the plain and ordinary words of the collective agreement, unless doing so would lead to some absurdity or inconsistency with the rest of the collective agreement. For this general principle, they cited Brown and Beatty, *Canadian Labour Arbitration*, 4th Edition, at 4:2100, *Foote v. Treasury Board (Department of Public Works and Government Services)*, 2009 PSLRB 142 at paras. 24 to 28, and *United Nurses of Alberta, Local 121-R v. Calgary Regional Authority*, [2000] A.G.A.A. No. 69 (QL).

[50] Because the *Appendix G MOU* contains no transitional language on the terminable allowance, the employer was not entitled to retroactively recover the allowances, the grievors argued. Given that there is no stated restriction to the terminable allowance, none should be implied.

[51] In support of this argument, the grievors highlighted clause 49.02 of the *TB-PIPSC Collective Agreement 2012*, which reads, “Unless otherwise expressly stipulated, the provisions of this agreement shall become effective on the date it is signed.” As the 2012 agreement did not contain a terminable allowance, clause 49.02 explains why the terminable allowance stopped on December 14, 2012. Consequently, as of that date, the grievors were no longer entitled to it going forward.

[52] For the grievors, the fact that the *Appendix G MOU* and *TB-PIPSC Collective Agreement 2012* (at article 47) provided clear language on retroactive rates of pay, and no language on the retroactive removal of the terminable allowance, was enough to find that the recovery of the terminable allowances was a violation of the agreement. Absent a clear provision in the 2012 agreement to retroactively rescind the allowance, the employer's actions to recover the allowances must be considered a violation of the collective agreement.

[53] The grievors argued that the "… parties who negotiated this appendix were sophisticated and, consequently, in applying a plain meaning interpretation, it is advanced that their agreed upon language ought to be applied to resolve the conflict before this Board."

[54] The grievors also argued that when the parties have agreed to place restrictions on entitlements and rights, no restriction should be applied if none is stated. They submitted that the Board and its predecessors have found as much in a series of cases, including *Delios v. Canada Revenue Agency*, 2013 PSLRB 133 (upheld in 2015 FCA 117), *Professional Institute of the Public Service of Canada v. Canada Revenue Agency*, 2016 PSLREB 77 ("*PIPSC v. CRA*"), and *Fehr v. Canada Revenue Agency*, 2017 FPSLREB 17 (upheld in 2018 FCA 159). Each case involved interpreting leave provisions in two collective agreements. In *PIPSC v. CRA*, at paras. 107 and 108, the PSLREB concluded as follows:

> *[107] It is abundantly clear to me that when, in the 2012 collective agreement, the parties wanted to place restrictions or exclusions, or exclusions on restrictions, on leave, they did so.*
>
> *[108] It is also amply clear that when the parties wanted to provide a transitional provision to the 2012 collective agreement, they did so. […]*

[55] Therefore, the grievors argued, it is noteworthy that at clause 19.08 of the *TB-PIPSC Collective Agreement 2012*, the parties negotiated specific transitional language on handling the severance pay of employees transferred from a different employer or bargaining unit. Specifically, clause 19.08 describes how the "severance termination benefits" will apply to an employee appointed into the bargaining unit from one in which the former severance pay provisions still existed.

[56] As the parties were sophisticated enough to negotiate transitional provisions for the rates of pay (in the *Appendix G MOU*) and for severance pay (at clause 19.08), given

the lack of an explicit transitional provision on the terminable allowance, none should be imposed.

[57] The terminable allowance paid at CFIA was explicitly described as not forming part of salary and therefore could not be treated as part of salary retroactively absent a specific agreement, argued the grievors. The *CFIA-PIPSC Collective Agreement 2009*, in setting out the terminable allowance, contained the clause stating, "The Terminable Allowance specified above does not form part of an employee's salary." The status of a terminable allowance being separate and apart from salary was upheld in *Larose v. Treasury (Department of Public Works and Government Services) v. Library Of Parliament*, 2006 PSLRB 114 at para. 72, *Billet v. Treasury Board (Department of Veterans Affairs)*, 2006 PSLRB 28 at para. 29, and *Boudreau v. Treasury (Public Works and Government Services Canada)*, 2002 PSSRB 84 at para. 23. Given the language and jurisprudence, it was wrong of the employer to recover the terminable allowance as if it was interchangeable with salary.

[58] It would be wrong, argued the grievors, for an adjudicator to find an implied term or meaning in a collective agreement unless it is necessary for the efficacy of the collective agreement. One party finding a provision unpalatable is not enough to establish an ambiguity in the plain language of the agreement. Citing *Delios*, *PIPSC v. CRA*, *Foote*, and *United Nurses Association Local 121-R*, they argued that had the parties wanted to provide for the retroactive recovery of the allowance, they would have done so in the *Appendix G MOU*. In the grievors' argument, to find that the collective agreement allowed the recovery to take place would require amending it, which the Board is prohibited from doing under s. 229 of the *Act*.

[59] While acknowledging that the terminable allowance was rolled into salary in the *CFIA-PIPSC Collective Agreement 2013*, the grievors pointed out that they were no longer covered by that agreement. By the time it was signed, they were fully covered by the provisions of the *TB-PIPSC Collective Agreement 2012*. Their position was that unless clearly provided for, one collective agreement does not impact rights accrued in another. Once again citing *Delios* (at paragraph 18) and *Fehr* (at paragraphs 48 and 72), it is wrong of the employer to rely on another collective agreement to deny rights under an employee's current collective agreement, and therefore, in this case, it was wrong for the employer to rely on the *CFIA-PIPSC Collective Agreement 2013* to justify recovering the terminable allowance.

[60] PIPSC ("the bargaining agent") argued that its reasoning is reinforced by the Board's decision in *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2018 FPSLREB 82 ("*PSAC v. CBSA*"). A new allowance was negotiated by the parties in that case, payable to employees in the Border Services group if they worked a threshold of 75 hours in a given month. The new provision took effect on June 21, 2013. The grievance arose when the employer determined that the allowance would be payable for the month of June 2013 only if the 75-hour threshold was worked between June 21 and 30 of that month. The Board rejected that approach, interpreting the word "month" as "calendar month" and finding that when the parties want to negotiate specific transitional language, they do. PIPSC argued that that case supports its arguments in the present case, specifically that the *Appendix G MOU* lacked any transitional language that would allow the terminable allowance to be recovered, and the silence in the appendix should not be treated as an ambiguity.

[61] Finally, PIPSC argued that the Board's decision in *Public Service Alliance of Canada v. Parks Canada Agency*, 2019 FPSLREB 85 ("*PSAC v. Parks*") could be distinguished from the present case. That case also concerned the retroactive rolling-in to salary of a former terminable allowance for the CS classification. The Board dismissed the policy grievance, upholding the right of that employer to retroactively recover a terminable allowance paid to its CS employees. PIPSC submitted that *PSAC v. Parks* can be distinguished firstly because the Board's decision was based on extrinsic evidence, namely, evidence of the agreement reached in the bargaining process, and that evidence demonstrated the parties had made a *quid pro quo* bargain to trade off the terminable allowance for the salary. Secondly, it can also be distinguished because it concerned the treatment of employees within the same bargaining unit, while the present case concerns the treatment of employees in a different bargaining unit. In other words, as the grievors are no longer part of the CFIA-IN bargaining unit, any *quid pro quo* benefit reached for that unit would not flow to them.

B. For the employer

[62] The employer submitted that its recovery of the terminable allowances from the 38 grievors did not contravene the collective agreement.

[63] It argued that the grievors were governed retroactively by the terms and conditions of the *CFIA-PIPSC Collective Agreement 2013* for the period of November 15, 2011, to December 13, 2012. Because that collective agreement no

longer contained a terminable allowance, as the former ones had been rolled into salary, it was justified recovering the allowances that had been paid.

[64] The employer cited Brown and Beatty at 4:1610 for the principle that "… in the absence of contrary language, retroactive provisions must be applied to persons who were no longer in the bargaining unit when the collective agreement was settled …" That principle was upheld in *Buchmann v. Canada Customs and Revenue Agency*, 2002 PSSRB 14. In that case, the adjudicator directed that a retroactive increase negotiated to the grievor's former (PM group) rate of pay should be retroactively used to recalculate the increment received in a promotion (to the AU group).

[65] The right of an employer to retroactively recover an allowance was upheld in *Guétré v. National Film Board of Canada*, PSSRB File No. 166-08-12642 (19820714), [1982] C.P.S.S.R.B. No. 114 (QL), the employer argued. Further, in *Rice and Del Vasto v. Treasury Board (Department of National Defence)*, 2006 PSLRB 122, an adjudicator concluded that CS employees were entitled to a retroactive terminable allowance, stating that "[i]f [the employer] can reach back and remove retroactively a bonus that was paid during the retroactive period, then it can also reach back and award an allowance that was not paid during a retroactive period" (at paragraph 51). The employer argued that the reverse is also applicable.

[66] In addition, the employer noted that the 2013 agreement reached between CFIA and PIPSC explicitly provides for rolling-in the terminable allowance to salary, retroactive to June 1, 2011. The grievors had been covered by the *CFIA-PIPSC Collective Agreement 2009* until the *TB-PIPSC Collective Agreement 2012* was signed. The 2013 CFIA agreement retroactively altered those terms and conditions of employment, which justified the employer recovering the terminable allowances and is why that recovery did not represent a violation of the *TB-PIPSC Collective Agreement 2012*.

[67] For the employer, the purpose of the *Appendix G MOU* was only to ensure no salary loss upon transfer, not to guarantee the right to a terminable allowance. Similar to the grievors, it argued that an adjudicator should look to the plain and ordinary meaning of the collective agreement, citing Palmer and Snyder, *Collective Agreement Arbitration in Canada*, *Fifth Edition*, at 2.10 to 2.26. According to the employer, the plain and ordinary meaning of the *Appendix G MOU* was to provide that employees whose rates of pay were lower than the CS rates would be integrated into the newly

negotiated CS rates and to ensure that transferred employees who rates of pay were higher would not suffer a loss in salary.

[68] The employer argued that the words in a collective agreement are to be interpreted on the basis of the facts at the time of its execution, citing *Air Canada v. Canadian Union of Public Employees, Air Canada Component*, 2013 CanLII 48962 (CA LA), as well as Palmer and Snyder, at 2.23. Given the clear purpose of the *Appendix G MOU*, there was no basis to consider the terminable allowance, and the employer did not initially recover the allowances paid because the appendix refers only to rates of pay, not to the broader concept of remuneration.

[69] Only upon the signing of the *CFIA-PIPSC Collective Agreement 2013* was the terminable allowance rolled into salary, triggering the employer's reconciliation exercise.

[70] The employer also argued that a benefit that has a monetary cost must be clearly and expressly granted under the terms of the agreement (see *Tembec Industries v. Pulp, Paper and Woodworkers of Canada, Local 15*, [2010] B.C.C.A.A.A. No. 168 (QL), *Maple Leaf Fresh Foods Brandon v. United Food and Commercial Workers, Local 832* (2010), 196 L.A.C. (4th) 336 at para. 141, and Brown and Beatty, at 4:2120). The *Appendix G MOU* would have had to expressly protect the right to the terminable allowance for me to uphold the grievances, according to the employer.

[71] As for *Delios* and *Fehr*, as relied on by the bargaining agent, the employer argued that those cases did not involve the issue of the retroactivity of the entitlement in question. Neither did they involve a transfer of employees in which they were to keep their terms and conditions until a new collective agreement was signed. The employer argued that the key to the Board's decision in *Fehr* was the reasoning that its decision would "… 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." As this case does not concern similar leave provisions across two collective agreements, I should not follow *Delios*. Alternatively, I should not be bound by them simply because both were upheld by the Federal Court of Appeal (citing *Essex County Roman Catholic School Board v. Ontario English Catholic Teachers' Association* (2001), 56 OR (3d) 85 at paras. 30 and 31).

[72] The employer also argued that my analysis of this case should begin on the premise that pyramiding benefits ought to be avoided, citing both *Labatt's Ltd. v. Brewery Workers Local 304 of the Canadian Union of United Brewery, Flour, Cereal, Soft Drink, and Distillery Workers, Local 304* (1980), 24 L.A.C. (2d) 312, and *Allen v. National Research Council of Canada*, 2016 PSLREB 76. Because the *CFIA-PIPSC Collective Agreement 2013* rolled the terminable allowance into salary retroactively, the payment of it during the period in question amounted to double premiums for the same work during the same period.

[73] With respect to *PSAC v. CBSA*, the employer argued that the case is not applicable to the grievances at hand. In *PSAC v. CBSA*, the Board followed the reasoning in *PIPSC v. CRA*, which followed the *Delios* line of cases. The reasoning in *Delios*, *Fehr*, *PIPSC v. CRA*, and *PSAC v. CBSA* was that the similarity of provisions across two collective agreements required transitional language to be negotiated if a transitional result was desired. There is no similarity of provisions at issue in this case. In fact, because the *CFIA-PIPSC Collective Agreement 2009* specifically stated that the terminable allowance does not form part of salary, it would not have been included in the *Appendix G MOU*, which was negotiated to address rates of pay during the transition, according to the employer.

[74] The Board's reasoning in *PSAC v. Parks*, on the other hand, stands for the principle that an employer can recover an allowance that was rolled into salary. The Board found that because the parties agreed to substitute one form of remuneration for another, maintaining the terminable allowance would have required specific language providing for that result. The employer submitted that *PSAC v. Parks* is directly relevant to the case at hand: once an agreement had been made to roll a terminable allowance into salary, the employees did not suffer a disadvantage or lose salary, and once they were paid the new salaries, the recovery of the allowance was valid.

VI. Reasons

A. The collective agreement to be interpreted is the *TB-PIPSC Collective Agreement 2012*

[75] The parties agree on the basic principle of contract interpretation, which is that in the first instance, an adjudicator's decision must be guided by the plain and ordinary words of the collective agreement.

[76] But which collective agreement is to be interpreted? The employer's recovery of the terminable allowance for the period in question was triggered not by the signing of the *TB-PIPSC Collective Agreement 2012* but by the *CFIA-PIPSC Collective Agreement 2013*. Am I to interpret the former, or the latter?

[77] The employer took the position that the signing of the CFIA agreement in 2013 affected the grievors past November 15, 2011, specifically stating that "[t]he grievors were governed retroactively by the terms and conditions of the CF*IA-PIPSC Collective Agreement (2013) for the period of November* 15, 2011 to December 13, 2012." This was in fact the centrepiece of its argument as to why the recovery of the terminable allowance was justified and why it was triggered by the signing of the 2013 CFIA agreement.

[78] This aspect of the employer's argument is deeply flawed. It relies on the proposition that a collective agreement reached between another employer (CFIA) and the bargaining agent would apply to employees who had transferred into another bargaining unit (at the TB), not just at the moment of transfer but **past the date of transfer into the other bargaining unit.**

[79] There was no evidence that the parties had agreed on such a result. In their agreed statement of facts, they said that at the time of the transfer, "[t]he parties agreed that until the effective date of the new PIPSC CS Collective Agreement, the Grievors would retain their Terms and Conditions of Employment from CFIA." No evidence was submitted of what form that agreement took. The grievances called it a "freeze" of terms and conditions. Either way, I find that what applied to the grievors after November 15, 2011, was the *CFIA-PIPSC Collective Agreement **2009***. There is no evidence that the parties agreed that the grievors would be covered by a future collective agreement between CFIA and PIPSC. In fact, the evidence indicates an agreement that the CFIA terms and conditions would apply **until a collective agreement for the TB-CS unit was reached.**

[80] This argument was also not supported by any jurisprudence, or at least none that stands for the proposition advanced in this case. The employer cited several cases in which adjudicators accepted the principle that retroactivity can apply to the earning of bonuses or allowances (see *Guétré* and *Rice and Del Vasto*). Neither case is analogous to the transfer-of-bargaining-unit situation in this case.

[81] My analysis of the grievances must be in relation to the collective agreement that governs the grievors, which is the *TB-PIPSC Collective Agreement 2012*. Therefore, my decision on the grievance must start with the actual wording of that collective agreement and in particular the *Appendix G MOU* signed by the parties on December 14, 2012.

B. The *TB-PIPSC Collective Agreement 2012* is silent on the issue of the terminable allowance

[82] There is no dispute between the parties: the *TB-PIPSC Collective Agreement 2012* is silent on the issue of the terminable allowance, including the *Appendix G MOU*.

[83] For the grievors and their bargaining agent, silence does not represent ambiguity; it represents agreement. In the absence of specific language allowing for the recovery of the terminable allowance, the employer violated the collective agreement by recovering the terminable allowances paid to the grievors for the period between November 15, 2011, and December 13, 2012.

[84] For the employer, the silence of the 2012 collective agreement does not provide the grievors with a guarantee that they are entitled to the terminable allowance. The *Appendix G MOU* was not intended to address the issue of the terminable allowance; it was negotiated to address rates of pay. The terminable allowance at CFIA was explicitly distinguished as not forming part of the employees' pay. However, it was retroactively altered when a new collective agreement was reached between CFIA and PIPSC in 2013, the effect of which was to roll the terminable allowance into salary, retroactively. As the grievors were retroactively entitled to the revised CFIA rates of pay, then, as of November 14, 2011, their terms and conditions no longer included a terminable allowance, and therefore, the employer was justified recovering its payment for the period between November 15, 2011, and December 13, 2012.

[85] To be clear, the employer's argument was framed within its argument that the 2013 CFIA agreement retroactively covered the grievors for the November 15, 2011, to December 13, 2012 period, which I have already rejected. However, and nevertheless, I will consider how the *Appendix G MOU* is structured and the impact the 2013 CFIA agreement would have on its operation. In so doing, I will consider alternative arguments from the employer and the bargaining agent.

[86] The *Appendix G MOU* is just as the employer described it. It sets out the rates of pay that CS employees transferred from a separate employer will receive under the TB.

[87] In applying the MOU following its signing in 2012, one must compare an employee's rate of pay in effect the day before the transfer (i.e., November 14, 2011) to the (retroactively determined) rate of pay in effect at the TB on November 15, 2011. After that, the employee is wholly and completely covered by the *TB-PIPSC Collective Agreement 2012*.

[88] To illustrate this point, I will select a hypothetical example of a CS-03 employee who was at the maximum step of the CFIA pay grid on November 14, 2011. As per the collective agreement evidence cited earlier, at the time, she would have been earning an annual salary of **$90 123** per annum. The maximum CS-03 rate put into effect as a result of the *TB-PIPSC Collective Agreement 2012* was **$92 286,** which was higher than the $90 123 she was making at CFIA.

[89] Therefore, article 1 of the *Appendix G MOU* would apply. To recall, it reads as follows:

> *1. Employees whose rate of pay prior to their transfer on November 15, 2011, namely, November 14, 2011, meets or is less than the maximum rate of pay of the corresponding Computer Systems (CS) group and level applicable to his substantive position upon transfer on November 15, 2011, shall be paid the pay specified in Appendix "A" at the corresponding CS rates of pay for the level applicable to his substantive position and will be subject to the provisions of Article 47-Pay Administration.*

[90] Therefore, our hypothetical employee would have been placed into the TB-CS pay grid, effective November 15, 2011. Her pay would have increased from $90 123 to $92 286. Incidentally, she would also have received the increase effective December 22, 2011, a rate of pay of **$94 004** per year.

[91] I will also note that before the transfer, she was receiving a terminable allowance of $2544 per year, and as discussed earlier, she continued to receive that terminable allowance until December 13, 2012. It was in addition to the retroactive pay increases she received from the TB through the operation of the *Appendix G MOU*.

[92] So how does the *CFIA-PIPSC Collective Agreement 2013* affect the application of the *Appendix G MOU*, and what impact does it have after November 15, 2011?

[93] There is no doubt in my analysis that the *CFIA-PIPSC Collective Agreement 2013* had a retroactive impact on the grievors. Its clause E1.04 states that retroactive rates of pay would apply to former employees. Thus, the grievors should have received retroactive pay from CFIA for the period between June 1, 2011, and November 14, 2011.

[94] In the case before me, the parties never raised the issue of what happened to the grievors' terminable allowances for the period between June 1, 2011, and November 14, 2011. This was not in issue before me and no evidence on this point was led. However, the *CFIA-PIPSC Collective Agreement 2013* states clearly that the terminable allowance was rolled into salary effective June 1, 2011. If I follow the reasoning in *PSAC v. Parks*, it appears that CFIA and PIPSC reached a *quid pro quo* agreement to retroactively eliminate the terminable allowance in return for negotiating higher rates of pay. The logical conclusion would be the recovery of the terminable allowance between June 1, 2011, and November 14, 2011.

[95] What about after November 15, 2011? To answer this question, I will return to the hypothetical CS-03 discussed earlier. Following the signing of the *CFIA-PIPSC Collective Agreement 2013*, her rate of pay effective June 1, 2011, becomes **$94 030.** Retroactively, it was the rate of pay in effect on November 14, 2011. Following the employer's citation of the principles in *Buchmann*, this revised rate of pay requires that her treatment under the *Appendix G MOU* should be recalculated. As her CFIA rate of pay is now **higher** than the TB CS-03 $92 286 rate of pay, points 2 to 4 of the MOU should apply to that employee. In effect, she would then continue to receive that $94 030 after November 1, 2011, as a holding rate of pay and to earn lump-sum payments under article 3 of the MOU.

[96] The December 22, 2011, TB increase to $94 004 comes very close to her pay but does not exceed her holding rate. Therefore, in accordance with clause 2(b) of the MOU, her holding rate of pay would remain in effect until the TB-CS maximum rate of pay exceeded it. In her case, that would have been achieved when the maximum rate of pay for a CS-03 became $95 414 on December 22, 2012.

[97] While therefore, she would be retroactively compensated according to the CFIA rate of pay of $94 030 from June 1, 2011, to December 21, 2012, this analysis demonstrates that **the rationale for this comes not from the CFIA 2013 agreement**

but from the application and operation of the *TB-PIPSC Collective Agreement 2012* and the *Appendix G MOU*. The *CFIA-PIPSC Collective Agreement 2013* retroactively impacts the application of the appendix but only on transfer into the TB-CS unit. Were the CFIA agreement to actually fully apply to this example employee, then after November 15, 2011, she would be due a further increase to her rate of pay on June 1, 2012. That is not what the *Appendix G MOU* provides. Her wages after November 15, 2011, are to be determined solely under the provisions of her collective agreement, which was the one between the TB and PIPSC.

[98] I note that the parties were unable to establish whether in fact any grievors were retroactively treated in accordance with articles 2 to 4 of the *Appendix G MOU* or if they all remained paid at the rates implemented when they were initially treated in accordance with article 1 of the MOU. My analysis stands either way. However, I recognize that the employer's citation of the principles in *Buchmann* indicates that the proper treatment was that the grievors' pay under the MOU required a recalculation once the CFIA agreement was signed.

[99] Therefore, I now return to the question of whether there is any justification for the employer's recovery of the terminable allowance under the *TB-PIPSC Collective Agreement 2012*, and I will examine the employer's other arguments.

C. A clear monetary benefit?

[100] The first is that a benefit that has a monetary cost to the employer must be clearly and expressly granted under the terms of a collective agreement. It stated, "[i]f the parties' intention was to guarantee an absolute right to the allowance and bypass the retroactive effect of the *CFIA-PIPSC Collective Agreement 2013*, it would have included clear and express language to that effect."

[101] Through this line of reasoning, the employer effectively argued that the bargaining agent should have known at the time it negotiated and signed the *TB-PIPSC Collective Agreement 2012* on December 14, 2012, that **at some future point**, a collective agreement would be signed with CFIA that would retroactively remove the terminable allowance, which therefore the bargaining agent should have anticipated by including clear and express language to maintain the terminable allowance.

[102] I have no reasonable basis on which to assume that the bargaining agent had the ability to predict such a future, and therefore reject this argument of the employer.

D. Facts known at the time?

[103] Somewhat contradictorily, the employer also argued that the words in a collective agreement "… are to be interpreted on the basis of the facts existing at the time of its execution." The facts at the time the *TB-PIPSC Collective Agreement 2012* was signed were that the CFIA agreement clearly stated that terminable allowance was separate from salary, and there were significant differences between separate agency and TB rates of pay. The *Appendix G MOU* was negotiated to address those differences. This explains why, when it initially applied the plain wording of the appendix, the employer did not recover the allowance.

[104] I agree with this principle. At the time the *TB-PIPSC Collective Agreement 2012* was signed, no agreement with CFIA had been reached. This reinforces my conclusion that it would not be reasonable for me to interpret the *TB-PIPSC Collective Agreement 2012* on the basis of future events.

[105] At the same time, I need to also account for the fact that when the *TB-PIPSC Collective Agreement 2012* was signed, the members of the TB-CS unit, into which the grievors were being integrated, no longer had a terminable allowance in their collective agreement. In the collective agreement signed on July 24, 2006, with an expiry date of December 21, 2007, the TB and PIPSC agreed that the TB-CS unit terminable allowance would cease on December 20, 2006. A salary restructuring took place effective December 21, 2006. Subsequently, they signed another CS collective agreement, the *TB-PIPSC Collective Agreement 2009*, on June 17, 2009, with an expiry date of December 21, 2010, which also did not have a terminable allowance. That agreement was initially in effect as of the November 15, 2011, transfer and was then replaced by the *TB-PIPSC Collective Agreement 2012*.

[106] PIPSC submitted that the fact there used to be a terminable allowance under the CS collective agreement is immaterial to the grievances before me. There is no evidence before me as to the nature of the agreement reached to roll that terminable allowance into salary. Secondly, the effect of the deal that was reached in 2006 would have diminished over time.

[107] I disagree. The *TB-PIPSC Collective Agreement 2012* must be interpreted based on facts known at that time. In negotiating and signing it and the *Appendix G MOU*, the parties knew or ought to have known that they were integrating employees from separate employers where a terminable allowance was being paid into a collective agreement that no longer contained one. They should also have been aware that the TB's rates were much higher than those at CFIA. Following the earlier CS-03 example, recall that the CS-03 employee had a CFIA rate of pay of **$90 123** and a terminable allowance of $2 544 for a combined total of **$92 667**. As a result of the *TB-PIPSC Collective Agreement 2012*, her pay increased to **$92 286** effective November 15, 2011, and increased further, to **$94 004**, starting December 22, 2011. In effect, within a month of her integration into the CS rates of pay, she would have received increases well exceeding the value of the terminable allowance. Despite this, the 2012 agreement said nothing about the terminable allowance she was receiving, and therefore, she still received it for the period until December 13, 2012.

[108] In its arguments, the employer stated as follows:

> …
>
> *… When the TB-PIPSC CS Collective Agreement (2012) was signed, the employer did not take into consideration the terminable allowance when calculating the retroactive salary of the grievors in comparison with the pay rates in Appendix A of the TB-PIPSC Collective Agreement (2012) and the employees kept that allowance….*
>
> …

[109] However, I heard nothing that would indicate that the employer was prevented from considering the terminable allowance. Based on facts easily available to it at the time, it could have foreseen that the retroactive rates of pay implemented as a result of the *TB-PIPSC Collective Agreement 2012* were similar in scale to the terminable allowances. It could have negotiated transition language on the terminable allowance into the *Appendix G MOU*. For example, the parties could have reached an agreement that terminable allowances would be rolled into salary effective November 15, 2011, before considering whether the grievors would be covered by articles 2 to 4 of the MOU instead of article 1. They did not.

E. Presumption against pyramiding?

[110] Finally, the employer argued that I must be guided by the principle that there is a presumption against pyramiding benefits. It argued that this presumption "… has pertinence when the benefits that are claimed are paid for the same purpose and for the same period under two different provisions." The grievors were initially paid the terminable allowance following the transfer and kept it after the *TB-PIPSC Collective Agreement 2012* was signed. The *CFIA-PIPSC Collective Agreement 2013* rolled the terminable allowance into salary retroactively, which impacted the salaries during the November 2011 to December 2012 period. The employees should not receive the amount twice, once as a terminable allowance, and once as salary.

[111] Therefore, its argument is still built upon the foundation that the *CFIA-PIPSC Collective Agreement 2013* retroactively governed the grievors' terms and conditions of employment for the period of November 15, 2011, to December 13, 2012, a concept I have already rejected. The 2013 CFIA agreement did retroactively impact the rates of pay with which the grievors **entered** the TB-CS unit. But if that rate of pay extended past November 15, 2011, it was because of the *Appendix G MOU*, not because of the CFIA agreement.

[112] Is there still a basis for considering the principle against pyramiding benefits? The employer argued that the bargaining agent's position defies that presumption. In other words, even though the *Appendix G MOU* is silent with respect to the terminable allowance, the presumption against pyramiding should have allowed the employer to recover the allowances.

[113] In making this argument, the employer quoted the following from *Labatt's*, at para. 10: "The presumption [is] that the parties to an agreement do not intend to provide double premiums for the same work unless the contrary intention is clear on a fair reading of the agreement." However, *Labatt's* was a case about the level of overtime pay for work performed by an employee on a Sunday, a much different fact situation that specifically refers to "premiums". Further, the decision also references specific language within the collective agreement at issue, which stated that "[i]n no case will overtime or premium compensation be duplicated or pyramided". I do not find that *Labatt's* guides me to the conclusion sought by the employer in this case. Terminable allowances are not a "premium" equivalent to overtime pay, and as has

been clearly established, the *TB-PIPSC Collective Agreement 2012* contains no language about the treatment of the terminable allowance.

[114] The employer also cited *Allen* for the principle of pyramiding benefits. *Allen* involved the combined effect of severance pay and workforce adjustment layoff benefits in a context in which some employees had accessed the severance termination benefits in the relevant collective agreement, and some had not. In that context, the PSLREB determined that this principle applied, and it denied the grievances. However, the collective agreement at issue contained language that stated, "Under no circumstances shall the maximum severance pay be pyramided." Thus, the PSLREB's decision in *Allen*, like the arbitrator's decision in *Labatt's*, rested both on the principle against pyramiding and specific collective agreement language to that effect. Finally, like *Labatt's*, the situation in *Allen* concerned interpretation only within a single collective agreement, unlike the situation in this case involving different collective agreements with separate employers.

[115] In my analysis, I have concluded that the parties could have negotiated transitional language on the terminable allowance into the *TB-PIPSC Collective Agreement 2012*. They did not. While accepting that the presumption-against-pyramiding principle has some application in collective bargaining interpretation, it does not simply allow an employer to correct what was effectively a missed opportunity in negotiations.

F. Silence is not ambiguity

[116] The grievors were, on the transfer, entitled to and were paid the terminable allowance. Upon the transfer, the entitlement was maintained. The signing of the *TB-PIPSC Collective Agreement 2012* ended that entitlement, and the terminable allowance ceased on December 13, 2012. However, this agreement did not trigger a recovery. None was made until after the *CFIA-PIPSC Collective Agreement 2013* was signed. Throughout the process and at adjudication, the employer used the signing of the CFIA agreement to justify its actions.

[117] As I have concluded that the employer's reliance on the signing of the *CFIA-PIPSC Collective Agreement 2013* is without merit, I believe that the grievors have established that the employer's actions violated the collective agreement.

[118] However, I will also consider the parties' different positions with respect to whether the silence with respect to the terminable allowance in the *TB-PIPSC Collective Agreement 2012* represents an ambiguity.

[119] The bargaining agent argued that the parties that negotiated the agreement are sophisticated and that the language they agreed to ought to be applied to resolve the grievances. If no restrictions were negotiated on different entitlements, none should be imposed. It argued that the Board and its predecessors have upheld this line of argument in a number of cases, including *Delios*, *Fehr*, and *PSAC v. CBSA*.

[120] The employer argued that the reasoning in *Delios*, *Fehr*, *PIPSC v. CRA*, and *PSAC v. CBSA* is that the similarity of provisions across two collective agreements required transitional language to be negotiated if a transitional result was desired. It argued that this case does not involve similar provisions; because the *CFIA-PIPSC Collective Agreement 2009* specifically stated that terminable allowance did not form part of salary, they would not have been included in the *Appendix G MOU*, which was negotiated to address rates of pay during the transition.

[121] I recognize that most of the cases in the *Delios* line concern entitlements to leave. *Delios* concerned entitlement to personal leave of an employee who transferred from one bargaining unit to another. *Fehr* concerned the entitlement to family related leave of an employee who transferred from one bargaining unit to another. *PIPSC v. CRA* concerned employees who had taken volunteer leave under one collective agreement and then wanted to take personal leave under a subsequent collective agreement in a context in which the personal leave provisions had been enhanced following the elimination of volunteer leave. None of these cases involved pay, allowances, or issues of retroactivity.

[122] On the other hand, *PSAC v. CBSA* concerned an allowance similar in some respects to the terminable allowance. A new collective agreement, signed on March 17, 2014, introduced a "Border Services Allowance" that did not form part of salary but that was to be paid biweekly on the same basis as regular pay, provided that an employee worked at least 75 hours in a month. The new allowance took effect on June 21, 2013. The grievance concerned the eligibility to be paid the allowance for June 2013. The employer agreed to pay it only to employees who worked 75 hours between June 21, 2013, and the end of the month. The grievors argued that the allowance

should be paid to all employees who worked at least 75 hours in the **calendar** month of June 2013. The Board ruled in favour of the grievors, relying on the *Delios* line of cases for the proposition that when the parties are capable of negotiating transitional clauses in a collective agreement, then the absence of a transitional clause has to mean something.

[123] In this case, PIPSC has demonstrated that the parties did negotiate transitional language with respect to severance pay at clause 19.08, which was applicable to the grievors who transferred in from CFIA. My analysis has concluded that on the basis of facts known at the time, the parties could have negotiated transitional language with respect to the terminable allowance into the *Appendix G MOU* but did not. To that extent, I follow *PSAC v. CBSA* and find that the silence of the appendix is not an ambiguity but must be interpreted as an agreement that the terminable allowances paid to the grievors were not to be recovered.

G. No *quid pro quo*

[124] I will address one final argument made by the employer with respect to the Board's decision in *PSAC v. Parks*. On the face of it, the situation in that case is closely analogous to this matter. A collective agreement was reached between PSAC and the Parks Canada Agency that retroactively rolled the CS terminable allowance into salary. In implementing the agreement, the employer recovered the terminable allowances that had already been paid out. The bargaining agent filed a policy grievance on behalf of the affected employees.

[125] The Board dismissed the policy grievance in *PSAC v. Parks*.

[126] The employer argued that the Board's decision in *PSAC v. Parks* stands for the principle that an employer can recover an allowance that was rolled into salary. The Board recognized that the parties agreed to substitute one form of remuneration (a terminable allowance) for another (higher rates of pay). Had the bargaining agent wanted to keep the terminable allowance, it needed to specify that in the relevant collective agreement, concluded the Board. As in *PSAC v. Parks*, the *CFIA-PIPSC Collective Agreement 2013* agreement resulted in a *quid pro quo* arrangement by which one benefit was traded for another.

[127] The grievors distinguished *PSAC v. Parks* from the case at hand in several ways, particularly that the Board's conclusion rested significantly on extrinsic evidence on the nature and scope of the *quid pro quo* agreement between those parties. In this case, no extrinsic evidence was introduced, and therefore, there is no basis to reach the same conclusion. Furthermore, the situation in *PSAC v. Parks* involved employees who remained in the bargaining unit covered by the collective agreement reached between the parties.

[128] As I have already concluded, at the time that CFIA and PIPSC reached a collective agreement in 2013, the grievors were no longer part of the CFIA-IN unit. While they received retroactive pay increases for the period from June 1, 2011, to November 14, 2011, as a result of that agreement, they did so as former CFIA employees. From November 15, 2011, onwards, they were part of the TB-CS unit. Just because CFIA and PIPSC achieved a *quid pro quo* agreement did not provide the TB with the power to apply that agreement to its employees. It must compensate its CS employees within the four corners of the collective agreement that covers them, which in this case is the *TB-PIPSC Collective Agreement 2012*. The employer erred when it recovered the grievors' terminable allowances for the period from November 15, 2011, to December 13, 2012.

VII. Remedy

[129] The grievors sought as remedy that the employer's recovery of the terminable allowances for the period of November 15, 2011, to December 13, 2012, be cancelled and that they be fully reimbursed for all amounts recovered. Having upheld the grievance, I make that award.

[130] However, the grievors also requested that they receive "damages and interest" as a result of the recovery. In addition to the fact this case does not fall within the provisions of s. 226(2)(c) of the *Act* setting out when the Board can award interest, given my analysis, I do not believe that an award of damages or interest is justified in these circumstances.

[131] My order is also guided by the fact that the collective agreement between the parties provides for an implementation period of 120 days.

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

(The Order appears on the next page)

VIII. Order

[133] The grievances are allowed.

[134] Within 120 days of the issuance of this decision, the employer is to reimburse each grievor the value of the terminable allowance that was recovered from his or her pay for the period of November 15, 2011, to December 13, 2012.

[135] I will remain seized of any implementation issues brought to the Board's attention within 60 days following the end of the implementation period noted in the last paragraph.

February 25, 2020.

David Orfald,
a panel of the Federal Public Sector
Labour Relations and Employment Board