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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

DENIS CHÉNARD

Grievor

and

TREASURY BOARD

(Employment and Social Development Canada and Statistics Canada)

Employer

Indexed as

*Chénard v. Treasury Board (Employment and Social Development Canada and
Statistics Canada)*

In the matter of an individual grievance referred to adjudication

Before: Chantal Homier-Nehmé, a panel of the Federal Public Sector
Labour Relations and Employment Board

For the Grievor: Stéphanie Rochon Perras,
Canadian Association of Professional Employees

For the Employer: Karl Chemsî, counsel

Heard at Ottawa, Ontario,
February 13 and 14, 2017.
(Written submissions filed March 22 and April 6 and 13, 2017.)
(FPSLREB Translation)

REASONS FOR DECISION**FPSLREB TRANSLATION**

I. Individual grievance referred to adjudication

[1] Denis Chénard (“the grievor”) held a position as an economist (EC-07) with the Income Security and Social Development Branch at Human Resources and Skills Development Canada (HRSDC) when he was declared an affected employee due to a workforce adjustment. On October 28, 2013, he was laid off under s. 64 of the *Public Service Employment Act (PSEA)*. Since 2013, HRSDC has been Employment and Social Development Canada (ESDC). For ease of reading, the use of ESDC includes HRSDC.

[2] The grievor claimed that the *Work Force Adjustment Directive* (“the Directive”) states that ESDC, the home department, and Statistics Canada, the appointing department, had a shared obligation to make every reasonable effort to retrain him. The Directive defines the “home department” as the department or organization that laid an employee off and the “appointing department” as the department or organization that is to consider appointing a laid-off employee or examining the employee’s appointment to a vacant position.

[3] As of October 28, 2013, he was on laid-off status and was benefitting from an employment priority. The Directive defines the term “laid-off person” as someone laid off under s. 64(1) of the *PSEA* who still retains an appointment priority under ss. 41(4) and 64 of the *PSEA*. A laid-off person is entitled to an absolute priority during the period set by the Public Service Commission (PSC).

[4] The grievor claimed that Statistics Canada’s refusal to offer him a retraining plan for an analyst position (EC-06) and a pool of researchers (EC-05) was, in his view, a failure to make reasonable efforts to retrain him for an appointment, contrary to what is prescribed by the Directive included in the collective agreement concluded between the Canadian Association of Professional Employees (CAPE) and the Treasury Board Secretariat for the bargaining unit of the Economics and Social Science Services group, which expired on June 21, 2014 (“the collective agreement”).

[5] The employer maintained that there was no possibility for retraining that would have facilitated the grievor’s appointment to an EC-06 position. For an employee to be eligible for retraining, the retraining must be required to facilitate the employee’s appointment to a position. According to Statistics Canada, no one-time training would

have allowed the grievor to meet the requirements of an EC-06 position. It would have taken about five years in the work environment for him to meet the criteria. As the Directive sets the maximum length of a retraining plan at two years, in the circumstances, it was not enough to allow him to achieve the level deemed necessary for the position.

[6] In addition, the employer submitted that the grievor did not introduce any evidence about the presentation of his application for an EC-05 position at Statistics Canada or his interest in being appointed to such a position. That possibility was never raised before the hearing. The obligation for departments and organizations to make reasonable efforts to retrain employees must be interpreted in the context in which a vacant position or one that is expected to become vacant is in fact being considered.

[7] The obligation created by the Directive cannot exist in a vacuum, particularly if the employee in question has never expressed interest in the position. The wording of the grievance is solely about EC-06 positions, not an EC-05 position at Statistics Canada. The corrective measures are also explicit; i.e., the grievor raised only the issue of retraining for EC-06 positions. He could not change the nature of his grievance in his arguments, invoking for the first time the claim that he is entitled to retraining for EC-05 positions. Invoking such a ground at the argument stage contravenes the well-known principle in *Burchill v. Canada (Attorney General of Canada)*, [1981] 1 F.C. 109 (C.A.).

[8] For the following reasons, I find that ESDC and Statistics Canada failed their obligations under the collective agreement.

II. Context

[9] The following facts are not contested. On April 30, 2012, HRDSC advised the grievor that he was an affected employee due to a workforce adjustment. On June 28, 2012, he was informed that his services were no longer needed due to the discontinuance of a function, in accordance with s. 64 of the *PSEA*.

[10] HRSDC determined that it could not offer him a guarantee of a reasonable job offer. The grievor had to choose between the three options under the Directive: option A, a 12-month surplus priority period; option B, a transition support measure; and option C, an education allowance.

[11] On October 29, 2012, HRSDC confirmed the grievor's choice of a 12-month surplus employee status from October 29, 2012, to October 28, 2013, to obtain a job in the core public administration.

[12] The grievor testified that during that time, he applied for several positions in the core public administration. As a microsimulation specialist, he encountered certain challenges in his job search. According to his words, most of the positions were beyond his knowledge and experience.

[13] On September 25, 2013, ESDC informed the grievor that his last day of work would be October 28, 2013, and that he would be laid off with an appointment priority for one year. Under the applicable provisions related to the Directive, his salary continued to be protected at the EC-07 group and level.

[14] A few days before the end of the priority period, on October 25, 2013, the grievor found a term policy analyst position (EC-06) for October 29, 2013, to October 28, 2014, with ESDC's Income Security and Social Development Branch, general division. That period coincided with his priority appointment lay-off period.

[15] During that lay-off period, the PSC presented the grievor with indeterminate job opportunities with several organizations, including three senior research analyst positions (EC-06) with Statistics Canada.

[16] The candidates who met the merit criteria were invited to an interview. The selection board responsible for evaluating the grievor comprised Julie Bernier, Mark Brown, and John Baldwin. Ms. Bernier explained that the candidates had to provide their CVs and a cover letter. The grievor testified that he applied to two of the three processes and that he was invited to one interview.

[17] Based on the evaluation of the documents that the grievor provided, Ms. Bernier concluded that he did not meet the experience criterion. She did not provide any details about it. Nevertheless, he was invited to an interview, due to his priority status. The evaluation had three parts: a written exam, a 1-hour interview, and a 15- to 20-minute oral presentation on a research project.

[18] After the interview, the grievor applied to the third selection process. He did not receive a response. Usually, he was never satisfied with his interviews, but this time, he had been very pleased with himself. He had the impression that these positions were

for him. He had all the qualifications and microsimulation expertise. He testified that at the interview with the selection board members, he was told that a vacant position was to be filled as well as other positions to come at the EC-05 and EC-06 levels.

[19] Ms. Bernier and Mr. Brown testified about the grievor's evaluation. The selection board members had completed an evaluation guide for the exam and interview. They filled it out as answers were provided. The three selection board members noted shortcomings related to four essential qualifications. They agreed as to their respective evaluations.

[20] In June 2014, the grievor was informed that he had failed the following four essential qualifications for the EC-06 position:

[Translation]

Knowledge and understanding of the theoretical frameworks, concepts, methods, and data sources used in one of the specialization areas (social issues, economics, demographics, health).

Knowledge of current and emerging challenges and issues and those related to policies in your area of specialization in Canada.

Ability to interpret and present research results.

Ability to plan and carry out analytical research or to create simulation models using survey, census, or administrative database data.

[21] On June 26, 2014, Gaétanne Vaillancourt, Advisor, Priority Administration, PSC, informed the grievor that his home department was responsible for identifying retraining needs. She informed him that there was no retraining as such during a workforce adjustment. The incumbent in a priority position had to have the essential qualifications for the position. Under the Directive, as a laid-off employee, he was granted a priority right for any position for which he had the essential qualifications. If the person does not possess all the essential qualifications for the position, the employer may eliminate the priority.

[22] The grievor replied to her that he could acquire the failed qualifications in two years and requested training to meet the position's requirements. He indicated that it was by far the best choice of all the positions that the PSC had proposed to him. In response to his questions, Diane Gaspé, Advisor, Priority Administration, PSC, told him

to contact Valérie Leblanc, the priority administration contact person at ESDC, for all retraining issues.

[23] On August 12, 2014, the grievor also contacted Carole Clouâtre, Human Resources Advisor, ESDC, for information on the implementation of a retraining plan for the EC-05 and EC-06 selection processes. On August 20, 2014, he emailed Ms. Bernier and representatives from his home department, which was ESDC, along with those from Statistics Canada and the PSC, requesting a retraining plan. Ms. Bernier did not respond to his request.

[24] On September 27, 2014, the decision to refuse a retraining plan for the grievor was recorded in the priority management system. He was informed of it on the same day. On October 2, 2014, he filed a grievance alleging that the employer failed its obligation to offer him a retraining program under Part IV of the Directive.

[25] The grievor did not agree that he would need five years to become functional in the EC-06 position at Statistics Canada. Although he does not have all the required competencies, such as biostatistics, he has the education and technical skills to become fully functional in the position within two years. In cross-examination, he admitted that he did not dispute that ESDC did not have a retraining program. He disputed the existence of a retraining program at Statistics Canada that would have allowed him to qualify for an EC-06 position.

III. Reasons

A. The Directive

[26] The grievor referred the grievance under s. 209(1)(a) of the *Federal Public Sector Labour Relations Act*, which reads as follows:

209(1) An employee ... may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award

[27] The grievance read as follows:

[Translation]

I am filing a grievance against the Employer (Statistics Canada) to challenge the incorrect interpretation and misapplication of Part IV, Retraining, of the Work Force Adjustment Directive (WFAD), which infringes my rights under the WFAD and the EC collective agreement concluded between the CAPE and the Treasury Board Secretariat, specifically on three (3) vacant positions at the EC6 group and level at STC.

[28] The grievor sought the following remedies:

[Translation]

A declaration that the Employer (Statistics Canada) infringed the WFAD and the collective agreement;

That the Employer (Statistics Canada) respect and apply the provisions of Part IV, Retraining, of the WFAD;

That the Employer (Statistics Canada) approve an appropriate retraining plan to retrain me for appointment to one of the three positions;

That I continue to be a surplus employee and that the planned lay-off date be extended until the end of the retraining period;

That the employer reimburse me for any loss of wages and benefits incurred as a result of the WFAD infringements;

That I be made whole.

[29] The grievance was dated October 2, 2014, and was signed by Cassandra Iwankow, Policy Director, Canada Pension Plan Disability Benefits Program, ESDC. The obligations of the home department, the appointing department, and the grievor are set out in the Directive. Part I of the Directive sets out the roles and responsibilities of departments and organizations in a workforce adjustment. Section 1.1.1 of the Directive provides that in a workforce adjustment, the employer is required to treat affected employees equitably.

[30] As the Directive is part of the collective agreement, the Board has full jurisdiction over its interpretation. It follows that since the Directive confers discretionary authority on the employer, the Board has jurisdiction to determine whether such authority was exercised in a reasonable, arbitrary, or discriminatory manner or in bad faith (see *Chênevert v. Treasury Board (Department of Agriculture and Agri-Food)*, 2015 PSLREB 52). The question is whether the home and the appointing departments exercised their authority under Part IV - Retraining in a reasonable manner.

[31] The Directive's guiding principle is maintaining employment and treating employees equitably. Section 1.1.1 is clear. A workforce adjustment has serious repercussions on affected employees. The employer has an obligation to offer affected employees every reasonable opportunity to continue their public service careers.

[32] In relation to that obligation, section 1.1.2 provides that departments and organizations must carry out effective human resources planning to minimize the impact of a workforce adjustment on indeterminate employees, on the department or organization, and on the public service. I must review the evidence with that in mind.

[33] The relevant sections of the Directive provide as follows:

Part I - Roles and responsibilities

1.1 Departments or organizations

1.1.1 Since indeterminate employees who are affected by work force adjustment situations are not themselves responsible for such situations, it is the responsibility of departments or organizations to ensure that affected and surplus employees are treated equitably and given every reasonable opportunity to continue their careers as public service employees.

1.1.2 Departments or organizations shall carry out effective human resource planning to minimize the impact of work force adjustment situations on indeterminate employees, on the department or organization, and on the public service.

...

1.1.5 Departments or organizations shall establish systems to facilitate redeployment or retraining of the department's/organization's affected employees, surplus employees, and laid-off persons.

...

1.1.23 For the surplus and/or lay-off priority periods, home departments or organizations shall pay the salary, salary protection and/or termination costs as well as other authorized costs such as tuition, travel, relocation, and retraining as provided for in the various collective agreements and directives. The appointing department or organization may agree to absorb all or part of these costs.

...

1.1.35 The home department or organization shall ensure that, when it is required to facilitate appointment, a retraining plan is prepared and agreed to in writing by themselves, the employee and the appointing department or organization.

...

*Part IV- Retraining**4.1 General*

4.1.1 To facilitate the redeployment of affected employees, surplus employees, and laid-off persons, departments or organizations shall make every reasonable effort to retrain such persons for:

(a) existing vacancies; or

(b) anticipated vacancies identified by management.

4.1.2 It is the responsibility of the employee, home department or organization and appointing department or organization to identify retraining opportunities pursuant to subsection 4.1.1.

4.1.3 When a retraining opportunity has been identified pursuant to subsection 4.1.2, the deputy head of the home department or organization shall approve up to two years of retraining.

...

4.3 Laid-off persons

4.3.1 A laid-off person shall be eligible for retraining provided that:

(a) retraining is needed to facilitate the appointment of the individual to a specific vacant position;

(b) the individual meets the minimum requirements set out in the relevant Qualification Standard for appointment to the group concerned; and

(c) there are no other available persons with a priority who qualify for the position.

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

...

B. Did ESDC and Statistics Canada exercise their authority under Part IV - Retraining in a reasonable manner?

1. Summary of the evidence

a. Management's efforts

[34] The grievor called Sylvie Bélanger, Manager, Executive Services, Statistics Canada. She was involved in his file from the beginning as the team leader of the

advisors who worked on the file. Her role was to provide opinions and advice to senior management, to evaluate him as a priority, and to determine the required retraining.

[35] After meeting with management, it was determined that retraining was not possible. The selection board had evaluated the grievor and had determined that it would take an average of four to seven years to develop the required skills and knowledge. She explained that there was no specific retraining or program as such.

[36] On August 27, 2014, she advised Ms. Vaillancourt that a retraining plan was not possible under the circumstances as there was no development program or course that would allow the grievor to acquire the essential qualifications for that position. No evidence was presented on Ms. Bélanger's efforts to identify courses or training that would have allowed him to meet the essential competencies for an EC-06 position. Although he applied for three EC-06 positions, he was evaluated only once.

[37] In cross-examination, Ms. Bélanger indicated that management had considered allowing the grievor to complete a doctorate. However, management found that it would have been unacceptable to allow him to be away for two years. In addition, it would take about five years in the workplace for him to meet the criteria, which exceeds the maximum of two years set out in the Directive. No evidence was presented to explain why it would take about five years in the workplace for him to meet the criteria.

[38] In an email dated September 18, 2014, Ali Manouchehri, Manager, CPP Disability Policy, ESDC, informed Ms. Clouâtre that the grievor had received several training courses, two networking opportunities, and help finding job opportunities in the branch's Community Development and Homelessness Partnerships Directorate and in other ESDC branches. To the best of his knowledge, the grievor was unable to find job opportunities suitable to him. He also confirmed that the grievor had had adequate time to find and apply for positions at ESDC and elsewhere in the public service.

[39] The grievor agreed that he had received training; however, it was general training, offered to all employees. It was not related to a position classified EC. ESDC did not offer training suited to his needs in the goal of finding another position. As for networking, he obtained a term position, but no specific networking efforts were made so that he could obtain an indeterminate position. The employer did not contest or refute that evidence.

[40] Ms. Iwankow indicated that she did not know if the grievor had applied for positions elsewhere. She indicated that he did not directly ask her or ESDC for retraining related to the positions in question. She explained that during the grievance process, she heard about the retraining plan request, and that she was unable to determine the courses or training program that could apply to retrain him. According to her, Statistics Canada was in the best position to determine the level of training required for the position, and ESDC was unable to provide specialized training. No evidence was submitted of the steps she reportedly took in this respect.

b. The grievor's efforts

[41] The evidence shows that the grievor communicated actively with representatives of the PSC, Statistics Canada, and ESDC to inquire about and ask for a retraining plan. He inquired about his rights and obligations under the Directive. He made several efforts to find a position. The employer did not dispute this fact.

[42] After being laid off, the grievor had trouble finding an internal position. As he was no longer an employee, he had lost access to internal public service staffing processes. Externally posted positions (external processes) were very rare. He networked and remained in contact with his former colleagues to find job opportunities. Given his specialized experience, it was difficult for him to find a position for which he could qualify. Management did not help him find a position elsewhere.

c. The grievor's evaluation

[43] After learning that he had failed, the grievor requested an informal meeting with Ms. Bernier. He was told that he had failed because his answers were too technical and because his research and presentation methods were too old. She explained to him that times had changed and that research was no longer done as it had been. Given the cuts, researchers had to network more, make research partnerships, and find funding. Her view was that his microsimulation secondment at Statistics Canada in 2011-2012 was not relevant because he had not done any research.

[44] In cross-examination, Ms. Bernier admitted that she was unfamiliar with the official core public administration classification standard document for the Economics and Social Science Services (EC) group. She stated that the selection processes for EC-06 positions at Statistics Canada required a higher standard than the core public

administration standard. No document was filed in evidence to show why the EC-06 positions at Statistics Canada required a higher standard than that of the core public administration.

[45] She confirmed that there had been potentially five EC-06 job opportunities. There was a research-related need for EC-05 and EC-06 positions. The three evaluation guides of the selection board members for the grievor's exam and interview suggested that there was a selection process for a researcher position (EC-05). However, he testified that he was not evaluated for that position or for the EC-05 positions pool. In addition, after the failure in the EC-06 selection process, he was eliminated from the other two EC-06 position processes to which he had applied.

[46] The notices for the selection processes specified that the education essential qualification was a master's or doctoral degree from a recognized university with a specialization in economics, sociology, or statistics. The grievor met the eligibility criteria in the Directive, i.e., the minimum requirements set out in the qualification standard applicable to the EC group (economist). In addition, Ms. Bernier confirmed that there were no other priorities for the EC-06 selection processes.

[47] Ms. Bélanger confirmed that the grievor was evaluated only once, even though there were several EC positions. He was evaluated only once with respect to possible training for the EC-06 position.

[48] Ms. Bernier and Mr. Brown explained that retraining was not an option for the grievor for the following reasons: he had failed the selection process, he could not immediately occupy the position and perform at an EC-06 level, he had not demonstrated the ability to lead a research program because he had no experience in expert consulting and in publishing articles, he did not demonstrate that he had sufficient independence in research and publications, he would have needed about five years of on-the-job training with the help of supervisors and mentors, and there were no one-time courses or specific programs that could have allowed him to develop the required competencies in the short term.

[49] According to Ms. Bernier, there was no university research training program based on the country's policies. Academic researchers do not do that. In addition, had there been training of less than two years, it would not have been constructive to then conduct another selection process.

[50] In cross-examination, Ms. Bernier explained that that there was no overall pass mark. Each essential criterion had to be passed to qualify. She agreed that a gap in passing most of the criteria would be minor, except for qualification K3, “[translation] Strategic challenges and issues”, which represented most of the exam. For that qualification, the grievor received a mark of 7 out of 20; the pass mark was 14 out of 20.

[51] The grievor explained that he had the knowledge and technical skills for the EC-06 position. He agreed that he would need to update certain biostatistics research methods but not training that would take five years to learn. He has experience in the following: database programming, group management in the microsimulation field, economics, and demographic and health research.

[52] There is no dispute that the grievor worked 22 years in the federal public service, including 15 years at ESDC. He holds a bachelor’s degree in economics and a master’s degree in economics with specialization in econometrics and public finance, and he has done doctoral-level studies with a specialization in econometrics. He completed all the doctoral courses except for the doctoral thesis. Although he has not published research articles, he has submitted several research articles and reports.

d. Impact on the grievor

[53] The lay-off had a significant financial impact on the grievor. He exhausted his savings plan and maxed-out his line of credit and credit cards. His spouse had to find a job so that they could meet their needs. He was forced to retire with a penalty. He suffered emotionally; he felt as though his education and experience were worthless. His relationship was tested; his spouse wanted to leave him. He lost the desire for the activities he enjoys. His life has become emotionally and financially painful. At the hearing, he sometimes had difficulty containing his emotions.

C. Summary of the arguments

1. For the grievor

[54] The grievor did not dispute that he did not meet four of the essential qualifications in the two EC-06 selection processes. However, he claimed that he met all the criteria in the Directive. He disputed the interpretation and application of the Directive, particularly Part IV - Retraining, based on senior research analyst positions (EC-06) at Statistics Canada.

[55] The grievor maintained that the refusals of ESDC and Statistics Canada to put in place a retraining plan to allow him to meet the essential qualifications of the senior research analyst position (EC-06) at Statistics Canada contravened the collective agreement. According to the Directive, a retraining plan was required so that he could reach the required level of knowledge and skills. According to him, the fact that Statistics Canada did not have a program or structure in place to retrain him did not relieve ESDC and Statistics Canada of their obligation to comply with the Directive, particularly to make every reasonable effort to retrain him for an appointment.

[56] He submitted that Statistics Canada did not provide him all the retraining opportunities he was entitled to under the Directive. He might not have been the most-qualified candidate, but the Directive does not provide for a level of competence. Even though it was found that despite a retraining plan, he would not have been able to attain an acceptable level of competency for the four essential criteria, the fact is that he was not given the opportunity to prove himself.

[57] According to the grievor, Statistics Canada has no unilateral and absolute discretion to decide whether a retraining program will be implemented in a workforce adjustment situation if it is not to its advantage or if it is not a constructive attempt to implement such a plan, in particular for laid-off people, such as him, who meet the Directive's eligibility criteria.

[58] ESDC and Statistics Canada have an obligation to offer a reasonable and appropriate retraining plan to facilitate a continued career for an employee affected by a workforce adjustment. The posting for the senior research analyst position (EC-06), submitted in evidence for the selection processes in question, indicated that four positions were to be filled along with an anticipatory pool of qualified candidates to fill current and future vacant positions. The pool could also have been used to staff similar positions with different language and security profiles for different terms, across Canada (Exhibit E-7).

[59] Despite that need or the forecast of positions at the EC-05 level and the fact that the selection process would serve as a pool for other similar positions at Statistics Canada, the evidence showed that Statistics Canada considered the grievor only for the selection process at the EC-06 level.

[60] In support of his claims, the grievor relied on the following jurisprudence: *Olson v. Canadian Food Inspection Agency*, 2007 PSLRB 24; *Olson v. Canada (Attorney General)*, 2008 FC 209; *Olson v. Canadian Food Inspection Agency*, 2009 PSLRB 6; *Robert v. Treasury Board (Supply and Services Canada)*, [1993] C.P.S.S.R.B. No. 6 (QL); and *Simmons v. Treasury Board (Forestry Canada)*, [1994] C.P.S.S.R.B. No. 80 (QL).

2. For the employer

[61] According to the employer, for the grievor to be eligible for retraining in these circumstances, section 4.3.1 of the Directive provides that retraining must be required to facilitate his appointment to the positions. In other words, a retraining plan must exist that would allow him to meet all the requirements of an EC-06 position at Statistics Canada. This situation did not involve retraining that was possible but that was refused. Instead, in this situation, the very possibility of such retraining did not exist. The jurisprudence he cited should be dismissed.

[62] The evidence showed that the grievor was evaluated carefully, fairly, and impartially. The three managers are experts in their field and were unanimous as to his results. The Board's role should not be to re-examine his application or to substitute its judgment for that of the selection board.

[63] In this case, the evidence is clear that there was no reasonable expectation that the grievor could attain an adequate level within two years, given the particular context of the EC-06 positions at Statistics Canada and his qualifications.

[64] The grievor's argument that ESDC had an obligation to identify retraining possibilities for the EC-06 position at Statistics Canada should not be retained. ESDC and Cassandra Iwankow, Policy Director, Canada Pension Plan Disability Benefits Program, could not decide on retraining for a position at Statistics Canada. Although the EC classification may be the same for both departments, the types of positions and the nature of the duties are different. In practical terms, it was not possible for ESDC to identify retraining opportunities for a vacant EC-06 position at Statistics Canada. Only Statistics Canada was able to determine whether retraining could be possible for the EC-06 position.

[65] The evidence showed that the grievor did not meet certain essential qualifications for the EC-06 positions at Statistics Canada. Five years of on-the-job

training were required. Such a possibility could not be considered and would have been contrary to the Directive, which provides for a maximum of two years. Nor did he demonstrate that two years of retraining would have been sufficient or feasible.

[66] Section 4.1.3 of the Directive authorizes a maximum of two years of retraining, and it was essential that the grievor be able to achieve the required level within that time. The retraining principle in the Directive is not intended to train an employee for a given position or to try options in the hope that the employee can attain the level.

[67] The Directive is clear that it is a matter of facilitating an appointment that may be offered conditionally. Consequently, the decision to admit an employee to retraining must be based on the fact that there is a reasonable possibility and expectation that the employee can attain the level. The Directive is also clear that it is a matter of facilitating the appointment, which can be offered conditionally. Consequently, the decision to admit an employee to retraining must be based on the fact that there is a reasonable probability and expectation that the employee can complete the retraining and be deemed qualified for the position after a period of up to two years.

[68] The right to retraining is not absolute. The Federal Court and the Public Service Staff Relations Board (PSSRB) emphasized that fact a number of times. In *Van Der Veen v. Treasury Board (Energy, Mines and Resources)*, [1989] C.P.S.S.R.B. No. 71 (QL), and *Saveland v. Treasury Board (Health and Welfare Canada)*, [1989] C.P.S.S.R.B. No. 212 (QL), the PSSRB found that the purpose of a workforce adjustment policy is not to automatically retrain all surplus employees. Candidates must have a minimum of knowledge before considering retraining. Departments must do everything in their power to retrain employees for appointments to vacant positions. However, the obligation is not absolute and is based on a reasonable effort. Surplus employees should be reassigned to other positions when possible, taking into account their qualifications.

[69] The Federal Court confirmed this interpretation of the Directive in *Carby-Samuels v. Canada (Treasury Board)*, [1994] F.C.J. No. 1284 at paras. 20 and 21 (QL). The employee in question had not completed his 14 months of retraining, and the PSSRB had found that the employer had had grounds to conclude that he could not be retrained within two years. According to the Federal Court, it was a legitimate

conclusion, with which it could not intervene. The standard training period is two years, but the wording of the Directive allows the employer to conclude that an employee cannot be retrained within that time once it becomes apparent during a shorter but nevertheless adequate training period.

[70] For all those reasons, the employer asked that the grievance be dismissed.

IV. Conclusion

[71] The grievor chose the 12-month surplus employee status from October 29, 2012, to October 28, 2013, to obtain a job in the core public administration. As provided in ss. 64 and 41 of the *PSEA*, he had an absolute priority of appointment. That status granted him the rights and compensation set out in sections 1.1.1, 1.1.10, 1.1.11, 1.1.14, 1.1.15, 1.1.16, 1.1.23, 4.1, and 4.3 of the Directive.

[72] Those sections provided for the right to be treated fairly and to be offered every reasonable opportunity to continue his public service career with a retraining period, provided that he met all the criteria in the Directive, either for a position at a comparable level or for a position at a lower level after the employer had exhausted all other possibilities.

[73] No evidence was presented to demonstrate that the home department explored all reasonable possibilities to allow the grievor to continue his public service career. That responsibility is expressly set out in section 1.1.1 of the Directive. Section 1.1.5 sets out the obligation for departments and organizations to establish systems to facilitate the redeployment or retraining of their affected, surplus, and laid-off employees. No evidence was presented to demonstrate that such systems were established.

[74] Section 4.1.1 of the Directive provides that departments and organizations must make every reasonable effort to retrain affected, surplus, and laid-off employees for appointment to vacant positions or to those anticipated to become vacant, according to management's forecast. The evidence showed that there were vacant EC-06 positions at Statistics Canada to which the grievor applied and EC-05 positions to come for which he did not apply, as they were to come.

[75] Section 4.1.2 of the Directive provides for the shared obligation of the employee, the department, and the appointing department to identify retraining opportunities. In

cross-examination, Ms. Bernier admitted that the grievor had not been consulted or invited to take part in meetings or communications with the selection board, Human Resources, or Labour Relations about retraining possibilities. The grievor confirmed that he did not have the opportunity to collaborate with ESDC or Statistics Canada to try to find retraining opportunities that would have allowed him to address the shortcomings in the failed essential qualifications.

[76] I agree with the grievor when I state that the appointing department does not have unilateral and absolute discretion to decide whether a retraining program should be implemented in a workforce adjustment situation. The Directive's wording is clear. Section 4.3.1(a) provides that a laid-off person is eligible for retraining provided that it is needed to facilitate the person's appointment to a given vacant position. Ms. Iwankow expressly indicated that she felt that Statistics Canada was better able to identify retraining opportunities.

[77] By its admission, ESDC failed its obligation as it did not examine retraining opportunities for the grievor. No evidence was presented to demonstrate the efforts made to identify courses that could have allowed him to meet the required competencies for an EC-06 position in the short term. I find that the home and appointing departments failed their obligations under section 4.1.2. Therefore, the department's conduct was arbitrary.

[78] The grievor met the criteria set out in sections 4.3.1(b) and (c) of the Directive. He met the minimum requirements set out in the qualification standard for the EC group. Although the types of positions and the natures of the duties differ between departments, it was not disputed that he has bachelor's and master's degrees in economics and that he has completed doctoral-level studies with a specialization in econometrics as set out in the qualification standard for the EC group.

[79] In his testimony, the grievor spoke at length about his academic achievements and multiple research reports, some of which had been published several years earlier. In addition, he has 22 years of experience in the public service, most of it in research as an EC at ESDC. He met the criteria set out in section 4.3.1(c). Statistics Canada confirmed that there was no other beneficiary of a priority available who had the qualifications required for the position.

[80] The evidence showed that the grievor did not meet certain essential qualifications for the EC-06 positions at Statistics Canada, which maintained that that was why he was not eligible for retraining. A retraining period **was not required** to facilitate his appointment to a specific position. According to Statistics Canada, five years of on-the-job training were required. No explanation or documentary evidence was adduced to demonstrate what the managers relied on to determine that only five years of training would suffice to allow him to meet all the criteria. The employer is correct that it is not the Board's role to re-evaluate him. However, the Directive requires a serious evaluation of his competencies based on potential retraining. According to Ms. Iwankow's testimony, ESDC did not conduct any serious evaluation of his competencies, experience, or education, and neither did Statistics Canada.

[81] I note that the grievor passed all the evaluation criteria except K3, "Strategic challenges and issues", which represented most of the exam. I do not find it credible that in practical terms, ESDC could not identify retraining opportunities for a vacant EC position at Statistics Canada or elsewhere. He applied for several positions and made many efforts to engage ESDC and Statistics Canada in discussions for a retraining plan for the selection processes in question. They continually excluded him from that discussion, despite the shared obligation set out in the Directive.

[82] I dismiss Statistics Canada's argument that the grievor was not eligible for retraining because he did not meet the criteria for the position and that there was simply no retraining solution that could have facilitated his appointment to the position in the two-year period. He confirmed that he did not have the opportunity to collaborate with ESDC or with Statistics Canada to identify retraining opportunities to allow him to address his shortcomings for the EC-06 position, specifically the K3 qualification about strategic challenges and issues.

[83] The home and the appointing departments are obligated to offer a "reasonable" and "appropriate" retraining plan to facilitate a continued career for an employee affected by a workforce adjustment. Statistics Canada and ESDC completely disregarded the grievor's education and years of experience. They arbitrarily concluded that it would take five to seven years for him to become fully functional in the EC-06 position. He was not a new graduate beginning his public service career. He had 22 years of experience and the required education. They simply examined the failed criteria and concluded that there was no specific training offered by the School of

Public Service. Ms. Bernier and Ms. Vaillancourt adduced no evidence about the courses and programs that they considered to allow him to meet the K3 qualification, “Strategic challenges and issues”.

[84] Management considered allowing the grievor to complete a doctorate. However, management found it unacceptable to allow him to be away for two years. In addition, it would have taken about five years on the job for him to meet the criteria, which exceeded the two-year maximum set out in the Directive. Again, management failed to consider his 22 years of experience and the fact that he was not a new graduate. Without any additional explanation or supporting evidence, it seems arbitrary to me that the employer found that it would take at least five years on the job for him to become fully functional. The fact that it was not convenient for Statistics Canada to wait for him to complete his doctorate is not a valid reason set out in the Directive; less so was Ms. Bernier’s explanation that it would have been a waste of time to proceed to a qualification process after the retraining period.

[85] Although there were several positions at the EC level, the grievor was evaluated only once. He was evaluated only once with respect to possible training for the EC-06 position. The employer arbitrarily concluded that he had to complete his doctorate. The evaluation of a retraining period did not account for the failed criterion. In addition, there was a research need for EC-05s and EC-06s. Ms. Vaillancourt acknowledged that vacant positions at the EC-05 level were to come. The three evaluation guides for the selection board members for the grievor’s exam and interview suggest that there was a selection process for a researcher position (EC-05). The evidence demonstrated that his candidacy was not considered for either an EC-05 position or the pool. The failure to make efforts to retrain him in anticipation of a need to fill EC-05 or other positions through a pool of candidates was a failure by ESDC and Statistics Canada.

[86] ESDC adduced no evidence that any human resources planning was carried out to minimize the impact of a workforce adjustment on the grievor. And the employer adduced no evidence to demonstrate the efforts made to help him find a position. His evidence showed that ESDC offered no support or training and that it carried out no serious search to try to find him a comparable position with a retraining period or even a lower-level position with a retraining period. ESDC adduced no evidence of a

serious attempt to try to find a comparable or lower-level position with the possibility of retraining.

[87] For all these reasons, I conclude that ESDC and Statistics Canada exercised their authority under Part IV - Retraining arbitrarily; consequently, they violated the collective agreement.

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

(The Order appears on the next page)

V. Order

[89] The grievance is allowed.

[90] I invite the parties to discuss the appropriate remedies in this matter, to reach an agreement on them.

[91] The Board shall remain seized of this matter for a period of 90 days from the date of this decision in case the parties are unable to reach an agreement under paragraph 90.

February 17, 2020.

FPSLREB Translation

**Chantal Homier-Nehmé,
a panel of the Federal Public Sector
Labour Relations and Employment Board**