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File: 466-LP-00401

Citation: 2020 FPSLREB 78

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

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

BETWEEN

KAREN NORDRUM

Grievor

and

LIBRARY OF PARLIAMENT

Employer

Indexed as
Nordrum v. Library of Parliament

In the matter of a grievance referred to adjudication mentioned in paragraph 63 (1)(c) of the *Parliamentary Employment and Staff Relations Act*

Before: John G. Jaworski, adjudicator

For the Grievor: Herself

For the Employer: George Vuicic, counsel

Heard at Ottawa, Ontario,
June 12 to 14, 2018.

REASONS FOR DECISION

I. Grievance referred to adjudication

[1] Karen Nordrum ("the grievor") was employed at the Library of Parliament (LOP or "the employer"). Her position was in the Library Science (LS) group, classified at the LS-3 group and level. On October 5, 2015, she filed a grievance stating as follows:

> *Statement of grievance - Karen Nordrum*
>
> *I grieve my termination of employment from the Library of Parliament effective September 24th, 2015 as referenced in the letter that I received from the Library of Parliament dated September 23rd, 2015.*
>
> *Corrective Action Requested:*
>
> *That my termination of employment from the Library of Parliament as referenced above be rescinded.*
>
> *That I be made whole.*
>
> [Emphasis in the original]

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

[3] The parties agreed that the grievor would proceed first.

[4] During the course of the hearing, the grievor stated that she was not seeking reinstatement into a position but merely an order forgiving the reimbursement she was required to make of her maternity and parental allowance ("top-up") that the employer had recovered.

II. Summary of the evidence

[5] The grievor has a Bachelor of Arts degree from Simon Fraser University, which she obtained in 1995, and a Master of Library and Information Studies degree from McGill University, which she obtained in 1997. She joined the LOP in 1998 as a

reference librarian classified at the LS-1 group and level. In 1999, she moved up to the LS-2 group and level. In 2003, she went on an assignment to the House of Commons (HOC) for one year. In 2004, on her return to the LOP, she became the PARLMEDIA manager, classified at the LS-2 group and level, which was later reclassified up to the LS-3 group and level in September of 2008. Her terms and conditions of employment were governed, in part, by a collective agreement entered into between the LOP and the Public Service Alliance of Canada ("the Alliance") for the Library Science group, which expired on August 31, 2014 ("the collective agreement").

[6] As of the hearing and since February of 2017, Lynn Brodie was retired from the LOP. At the times relevant to the matters at issue in the grievance, she was the director general of Information and Document Resources Services at the LOP, a position she held for about 14 or 15 years. When she retired, she had 35 years of service with the LOP. With respect to the matters at issue in this grievance, Ms. Brodie was designated as the grievor's supervisor, or direct report; however, she had never supervised the grievor's work.

[7] As of the hearing and for about 10 years before it, Jennifer Angus (she is identified as Jennifer Sweet in the documents filed as exhibits) was the LOP's manager of employee services. Her duties and responsibilities included overseeing compensation, leave, and pension matters. As of the hearing, she had 17 years of service with the LOP.

[8] As of the hearing and for about 2 years before it, Stephanie Montcalm was the LOP's manager of classification and staffing. Before 2016 and for about 10 years before that, she was a classification and staffing advisor.

[9] As of the hearing and at the times relevant to the facts that gave rise to the grievance, Linda Koo was a labour relations officer with the Union of National Employees, which is a component of the Alliance.

[10] Sometime in 2006, the grievor went on an assignment at the HOC. No copy of the assignment agreement was produced to the hearing. Between October of 2007 and February of 2008, she was on maternity leave.

[11] Article 19 of the collective agreement is entitled "Other Leave With or Without Pay". Parts of clauses 19.03, 04, 07, 08, 10 are relevant to the matters at issue in this grievance and state as follows:

> *19.03 Maternity Leave Without Pay:*
>
> *a) An employee who becomes pregnant shall, upon request, be granted maternity leave without pay for a period beginning before, on or after the termination date of pregnancy and ending not later than eighteen (18) weeks after the termination date of pregnancy.*
>
> . . .
>
> *19.04 Maternity Allowance:*
>
> *a) An employee who has been granted maternity leave without pay shall be paid a maternity allowance in accordance with the terms of the Supplemental Unemployment Benefit (SUB) Plan described in paragraphs c) to i), provided that she,*
>
> *(i) has completed six (6) months of continuous employment before the commencement of her maternity leave without pay,*
>
> *(ii) provides the Employer with proof that she has applied for and is in receipt of maternity benefits under the Employment Insurance or Québec Parental Insurance planes in respect of insurable employment with the Employer,*
>
> *and*
>
> *(iii) has signed an agreement with the Employer stating that:*
>
> *A) she will return to work on the expiry date of her maternity leave without pay unless the return to work date is modified by the approval of another form of leave;*
>
> *B) following her return to work, as described in section A), she will work for a period equal to the period she was in receipt of the maternity allowance;*
>
> *C) should she fail to return to work in accordance with section A), or should she return to work but fail to work for the total period specified in section B), for reasons other than death, lay-off, early termination due to lack of work or discontinuance of a function of a specified period of employment that would have been sufficient to meet the obligations specified in section B), or having become disabled as defined in the* Public Service Superannuation Act, *she will be indebted to the Employer for an amount determined as follows:*
>
> *(remaining period to be*

worked following her return to work)

(allowance received) X ———————————————————— *[total period to be worked as specified in B]*

However, an employee whose specified period of employment expired and who is rehired by the Library of Parliament within a period of ninety (90) days or less is not indebted for the amount if her new period of employment is sufficient to meet the obligations specified in section B).

b) For the purpose of sections a)(iii)B) and C), periods of leave with pay shall count as time worked. Periods of leave without pay during the employee's return to work will not be counted as time worked but shall interrupt the period referred to in section a)(iii)B), without activating the recovery provisions described in section a)(iii)C).

c) Maternity allowance payments made in accordance with the SUB Plan will consist of the following:

(i) where an employee is subject to a waiting period of two (2) weeks before receiving Employment Insurance maternity benefits, ninety-three per cent (93%) of her weekly rate of pay for each week of the waiting period, less any other monies earned during this period,

and

(ii) for each week that the employee receives a maternity benefit under the Employment Insurance, or Québec Parental Insurance plans, she is eligible to receive the difference between the gross weekly amount of the Employment Insurance or Québec Parental Insurance plan maternity benefit she is eligible to receive and ninety-three per cent (93%) of her weekly rate of pay less any other monies earned during this period which may result in a decrease in Employment Insurance or Québec Parental Insurance plan maternity benefits to which she would have been eligible if no extra monies had been earned during this period.

. . .

e) The maternity allowance to which an employee is entitled is limited to that provided in paragraph c) and an employee will not be reimbursed for any amount that she may be required to repay pursuant to the Employment Insurance Act *or the* Parental Insurance Act *in Québec.*

f) The weekly rate of pay referred to in paragraph c) shall be:

(i) for a full-time employee, the employee's weekly rate of pay on the day immediately preceding the commencement of maternity leave without pay . . . .

. . .

g) The weekly rate of pay referred to in paragraph f) shall be the rate to which the employee is entitled for her substantive level to which she is appointed.

h) Notwithstanding paragraph g), and subject to subparagraph f)(ii), if on the day immediately preceding the commencement of maternity leave without pay an employee has been on an acting assignment for at least four (4) months, the weekly rate shall be the rate she was being paid on that day.

i) Where an employee becomes eligible for a pay increment or pay revision while in receipt of the maternity allowance, the allowance shall be adjusted accordingly.

j) Maternity allowance payments made under the SUB Plan will neither reduce or increase an employee's deferred remuneration or severance pay.

. . .

19.07 Parental Leave Without Pay:

a) Where an employee has or will have the actual care and custody of a new-born child (including the new-born child of a common-law spouse), the employee shall, upon request, be granted parental leave without pay for up to two (2) periods of up to a total thirty-seven (37) consecutive weeks in the fifty-two (52) week period beginning on the day on which the child is born or the day on which the child comes into the employee's care.

. . .

19.08 Parental Allowance:

a) An employee who has been granted parental leave without pay, shall be paid a maternity allowance in accordance with the terms of the Supplemental Unemployment Benefit (SUB) Plan described in paragraphs c) to i), providing he or she,

(i) has completed six (6) months of continuous employment before the commencement of her maternity leave without pay;

(ii) provides the Employer with proof that he or she has applied for and is in receipt of . . . benefits under the Employment Insurance or Québec Parental Insurance plans in respect of insurable employment with the Employer;

and

(iii) has signed an agreement with the Employer stating that:

A) the employee will return to work on the expiry date of his/her parental leave without pay, unless the return to work date is modified by the approval of another form of leave;

B) following his or her return to work, as described in section A), the employee will work for a period equal to the period of time referred to in section 19.04a)(iii)B), if applicable;

C) should he or she fail to return to work in accordance with section A) or should he or she return to work but fail to work the total period specified in section B), for reasons other than death, lay-off, early termination due to lack of work or discontinuance of a function of a specified period of employment that would have been sufficient to meet the obligations specified in section B), or having become disabled as defined in the Public Service Superannuation Act, *he or she will be indebted to the Employer for an amount determined as follows:*

$$\text{(allowance received)} \times \frac{\text{(remaining period to be worked following her return to work)}}{\text{[total period to be worked as specified in B]}}$$

However, an employee whose specified period of employment expired and who is hired by the Library of Parliament within a period of ninety (90) days or less is not indebted for the amount if his or her new period of employment is sufficient to meet the obligations specified in section B).

b) For the purpose of sections a)(iii)B) and C), periods of leave with pay shall count as time worked. Periods of leave without pay during the employee's return to work will not be counted as time worked but shall interrupt the period referred to in section a)(iii)B), without activating the recovery provisions described in section a)(iii)C).

c) Parental Allowance payments made in accordance with the SUB Plan will consist of the following:

(i) where an employee is subject to a waiting period of two (2) weeks before receiving Employment Insurance parental benefits, ninety-three per cent (93%) of his/her weekly rate of pay for each week of the waiting period, less any other monies earned during this period;

(ii) other than as provided in subparagraph (iii) below, for each week in respect of which the employee receives parental, adoption or paternity benefits under the Employment Insurance or Québec Parental Insurance Plan, the difference between the gross weekly amount of the parental, adoption or paternity benefits under the Employment Insurance or Québec Parental Insurance plan benefits he or she is eligible to receive and ninety-three per cent (93%) of his or her weekly rate of pay less any other monies earned during this period which may result in a decrease in Employment Insurance or Québec Parental Insurance Plan benefits to which he or she would have been eligible if no extra monies had been earned during this period;

(iii) where an employee has received the full eighteen (18) weeks of maternity benefit and the full thirty-two (32) weeks of parental benefit under the Québec Parental Insurance Plan and

> *thereafter remains on parental leave without pay, she is eligible to receive a further parental allowance for a period of two (2) weeks, in the amount of ninety-three per cent (93%) of her weekly rate of pay for each week, less any other monies earned during this period.*
>
> . . .
>
> *e) The parental allowance to which an employee is entitled is limited to that provided in paragraph c) and an employee will not be reimbursed for any amount that he or she is required to repay pursuant to the* Employment Insurance Act *or the* Parental Insurance Act *in Québec.*
>
> *f) The weekly rate of pay referred to in paragraph c) shall be:*
>
> *(i) for a full-time employee, the employee's weekly rate of pay on the day immediately preceding the commencement of maternity leave without pay . . . .*
>
> . . .
>
> *g) The weekly rate of pay referred to in paragraph f) shall be the rate to which the employee is entitled for the substantive level to which she or he is appointed.*
>
> *h) Notwithstanding paragraph g), and subject to subparagraph f)(ii), if on the day immediately preceding the commencement of parental leave without pay an employee is performing an acting assignment for at least four (4) months, the weekly rate shall be the rate the employee was being paid on that day.*
>
> *i) Where an employee becomes eligible for a pay increment or pay revision while in receipt of parental allowance, the allowance shall be adjusted accordingly.*
>
> *j) Parental allowance payments made under the SUB Plan will neither reduce or increase an employee's deferred remuneration or severance pay.*
>
> *k) The maximum combined maternity and parental allowances payable under this collective agreement shall not exceed fifty-two (52) weeks for each combined maternity and parental leave without pay.*
>
> . . .
>
> *19.10 Leave Without Pay of the Care and Nurturing of Children:*
>
> *Subject to operational requirements, an employee shall be granted leave without pay for the personal care and nurturing of the employee's children in accordance with the following conditions,*
>
> *a) An employee shall notify the Employer in writing as far in advance as possible but not less than four (4) weeks in advance of the commencement date of such leave; unless, because of an urgent or unforeseen circumstance, such notice cannot be given;*
>
> *b) Leave granted under this clause shall be for a minimum period of three consecutive weeks;*

> *c) The total leave granted under this clause shall not exceed five (5) years during an employee's total period of employment in the Library of Parliament.*
>
> [*Sic* throughout]

[12] Over several days between January 29 and February 15, 2008, the grievor and representatives of the HOC and the LOP entered into an amended assignment agreement by which her HOC assignment was extended. The portions relevant to this proceeding are as follows:

> . . .
>
> *Once duly signed by the persons responsible, this agreement authorizes the extension of the assignment of Karen Nordrum of the Library of Parliament to the position of Senior INET Project Manager within Multimedia Services, Information Service Directorate (ISD) at the House of Commons from August 1, 2007 to August 31, 2009.*
>
> *The following conditions shall be in effect during the assignment:*
>
> *1) During the assignment, Karen Nordrum shall remain an employee of the Library of Parliament; at the end of the assignment, Karen Nordrum may return to her former position, however should the position not be available, Ms. Nordrum will return to a position with the Library of Parliament equivalent to her current salary with the Library of Parliament and at a rate of remuneration of not less than her present salary ($77, 125) plus any increases that may become due to her, during the period of the assignment, according to the Library of Parliament's salary system unless other arrangements have been agreed to by all parties concerned. If the Library of Parliament is subject to workforce reduction during or at the end of this assignment, Karen Nordrum will be accorded the same treatment and entitlements as all other employees of the Library of Parliament;*
>
> . . .
>
> *5) This position is not represented by a bargaining agent and Karen Nordrum shall have the right to annual, sick and other leave as provided for in the working conditions of the terms and conditions for the ADG group of the House of Commons. A report of leave taken shall be provided quarterly to the Library of Parliament*
>
> *6) It is agreed that, in case of extended absence or sick leave, the home and host institutions may agree to end or suspend the assignment until Karen Nordrum is fit to return to work;*
>
> . . .

> *10) It is agreed that the period of the assignment may be extended with the agreement of all parties concerned, or shortened with two weeks' prior notice by any party . . . .*
>
> . . .

[13] The grievor stated that for a period between February and March of 2008, she returned to work for six weeks, and then, between March and August of 2008, she was on parental leave. She said that between September of 2008 and April of 2009, she returned to work at the HOC.

[14] On October 20, 2008, the grievor emailed Paula Ghosh, who, at that time, was the director of human resources (HR) at the LOP. The email stated as follows:

> . . .
>
> *Thanks for the LS collective agreement you sent me last week.*
>
> *To follow-up on our phone conversation, I'd like to confirm that I won't be returning to the Library to my substantive position of Parlmedia Manager, as I wish to continue with my secondment at the House of Commons.*
>
> *If you could please send me the official letter you mentioned re: my new classification and guaranteed return to the Library at the top of the LS-3 pay scale, I'd appreciate it.*
>
> *Thanks again for clarifying my employment details. I'll ask Nathalie to contact you if she has any questions about my upcoming leave.*
>
> . . .

[15] On October 28, 2008, Ms. Ghosh wrote to the grievor, stating as follows:

> . . .
>
> *This is to formally advise you that your substantive position of Manager, PARLMEDIA was reclassified from the LS-2 to the LS-3 level effective September 19, 2008. In view of this action, your salary protection status for the position of Manager, PARLMEDIA is no longer in effect. I would also like to take this opportunity to inform you that you will no longer receive a terminable allowance, as it is no longer in force at the Library of Parliament, effective April 1, 2008.*
>
> *As per our conversation, you stated that you are not interested in returning to your substantive position at this time, as you would prefer to continue your assignment at the House of Commons. Therefore, we will staff the Manager, PARLMEDIA position indeterminately through a competitive process. At the end of your assignment with the House of Commons, you will return to a position with the Library of Parliament at the LS-03 level, or*

> *equivalent, and at a salary of $79,904 per annum, plus any increases that may become due to you during the period of your assignment, according to the Library of Parliament's salary system.*
>
> *Please confirm receipt of this letter by signing and returning the duplicate copy as soon as possible. . . .*
>
> . . .

[16] On November 3, 2008, the grievor signed the October 28, 2008, letter.

[17] An email chain between the grievor and Ms. Ghosh between February 12 and 24, 2009, was entered into evidence. During this time frame, the grievor was expecting her second child. The relevant portions of the emails are as follows:

> [The grievor to Ms. Ghosh, February 12, at 2:01 p.m.:]
>
> . . .
>
> [Name deleted] *suggested that I contact you, since she confirmed this morning that my contract with the HOC will not be renewed. This means that as of September 1st, I'll revert to my substantive position at the Library - which will be mid-way through my maternity/parental leave.*
>
> ***Could it please be confirmed in writing that my leave benefits will continue at the same rate throughout the entire year's leave? It's my understanding that they should remain unchanged, since they're calculated on the salary I was making here at the HOC (and not my lower LOP substantive position salary), but I'd like to make sure of this before I go on leave.***
>
> *She also mentioned that in her discussion with you that you mentioned the Library is eagerly looking for more staff, which was reassuring to hear, since I have no idea where I'll be posted to in the Library when I return to work next year!*
>
> *I plan on going on sick leave at the end of next week at the earliest – if we could touch base either by phone or by email before then, I'd really appreciate it.*
>
> . . .
>
> [Ms. Ghosh to the grievor, February 23, at 8:52 a.m.:]
>
> . . .
>
> *A question – are you speaking of the top-up you receive? If so, technically, according to the LS collective agreement, you are only entitled to the top-up reflective of your substantive salary, therefore, as of your date of return to us (which occurs during your mat leave), you should return to a LS-3 salary.*

> *There is a clause that says that if you are in an "acting" position before starting mat leave, that you will be paid at that rate. There is nothing to cover you regarding a secondment at a higher rate of pay.*
>
> *We have decided, in this one incident and without precedence [sic], that we would treat your higher rate of pay as an acting. That entitles you to the higher rate of pay (top-up) during your mat leave, but given that the end date occurs during your leave, you will return to us at your LS-3 salary when you come back.*
>
> *The reason I had not replied to you, is that we will be sending you a formal letter, outlining the coverage, and your obligations, should you not return to work following your mat leave. Therefore, although this is my written commitment, it is without context, and should not be treated as binding.*
>
> *Having said that, I wish you the best, and we look forward to your return to the Library.*
>
> . . .
>
> [The grievor to Ms. Ghosh, February 24, at 1:15 p.m.:]
>
> *Thanks so much for your detailed response - I really appreciate the consideration you've given me in my unusual situation.*
>
> *Looking forward to receiving the written confirmation - please mail everything to me at my home address, since I'm now working from home.*
>
> . . .

[18] On March 10, 2009, Ms. Ghosh wrote to the grievor, stating as follows:

> . . .
>
> *This is to formally advise you that the Library of Parliament has decided to utilize your last rate of pay while on Secondment at the House of Commons in order to calculate the maternity/parental allowance benefits (top-up). Please be advised that any salary changes that become effective after your period of maternity/parental leave has begun, that would have an impact on salaries at the House of Commons, will not be utilized in your (top-up) calculation.*
>
> *This decision is an exception and is made without prejudice and precedence [sic].*
>
> *At the end of your maternity/parental leave, you will return to the Library of Parliament at your LS-3 salary.*
>
> . . .

[19] In April of 2009, the grievor went on maternity leave again, until March of 2010.

[20] On April 8, 2009, a compensation and benefits advisor at the LOP wrote to the grievor and advised her of the terms and conditions of her upcoming maternity leave and parental leave without pay. The relevant portion of the letter states as follows:

. . .

Parental LWOP

This leave may be taken as a single period of leave without pay of up to 37 weeks. It must be taken within 52 weeks of the date of birth of your new-born child.

(if it is following maternity leave without pay)

However, due to your maternity leave, the maximum duration of your parental leave cannot go beyond 52 weeks following the date of birth of your new-born child.

Extensions are allowed in cases where your new-born child is hospitalized. Please refer to your collective agreement for specific details.

Leave Without Pay for the Care and Nurturing of Pre-School Age Children

The collective agreement provides that the minimum period of time that can be taken under this type of leave, is three weeks. The total maximum for all periods of this type of leave taken during your career is five years.

In the event that you proceed on this type of leave immediately following your maternity/parental leave, a new application form will be required. I will also provide you with a new Letter of Entitlement.

. . .

SUPPLEMENTAL ALLOWANCES

Maternity Allowance

In accordance with your collective agreement, you must meet the requirements listed below:

a) Be on authorized maternity leave without pay;
b) Completed six months of continuous employment;
c) Provide me with proof of receipt of EI or QPIP maternity benefits;
d) Sign the attached agreement and undertaking(s);
e) Repay a proportionate amount of your maternity allowance corresponding to the amount of time you failed to work in compliance with your Agreement & Undertaking, as described in the paragraph above (i.e. end of term or resignation).

The allowance is not paid in recognition of other EI or QPIP benefits such as sick benefits or parental benefits.

> *Two-week waiting period*
>
> *This payment represents 93% of your bi-weekly pay and is payable at the end of the two-week waiting period under Employment Insurance.*
>
> *Maternity Leave Allowance Top-up Payments*
>
> *You are entitled to receive the difference between 93% of your weekly pay and your EI or QPIP maternity benefits as a top-up payment.*
>
> ***Note:*** *The employer will* **not** *reimburse any amounts you may have to repay pursuant to the* **EI Act** *or the* **Parental Insurance Act**.
>
> . . .
>
> [Emphasis in the original]
>
> [*Sic* throughout]

[21] In cross-examination, the grievor stated that she had received the April 8, 2009, letter, that she had been aware that the maximum period of leave without pay for care and nurturing was five years, and that she had understood that if she did not return to work after her leave or if she resigned, she would be required to repay the maternity-parental allowance (top-up) that she had received. On April 22, 2009, she signed the agreement and undertaking attached to the April 8, 2009, letter, which stated as follows:

> . . .
>
> *I have read the attached letter* [April 8, 2009, letter] *as well as clauses 1905 and 1908 of the Terms and Conditions of Employment for Library Science Employees and I clearly understand and recognize that if I do not return to work, I will be indebted to the Library of Parliament for the amount received for the maternity and parental leave top-up.*
>
> . . .

[22] The grievor stated that between March and June of 2010, she was an electronic services librarian. However, in cross-examination, she confirmed that it had been only on paper as she did not return to work during this period; she was on either one leave or a combination of them. On June 10, 2010, she began the two-year care-and-nurturing leave that she had requested. Its terms and conditions were set out in a letter dated June 10, 2010, which was sent to her by the same LOP compensation and benefits advisor who had sent her the April 8, 2009, letter.

[23] The grievor testified that her spouse was a full-time professor at the University of Ottawa. She also testified that at some point between June of 2010 and an unspecified date in 2011, the family moved residences from Ottawa, Ontario, to Tamworth, Ontario (northwest of Kingston, Ontario); however, they maintained an apartment in Ottawa.

[24] The grievor testified that in January of 2012, before the end of her two years of care-and-nurturing leave, she requested an extension to that leave, which she said Ms. Brodie denied, due to budget cuts. However, in April of 2012, she said that the LOP changed its position and agreed to an extension. However, the evidence disclosed that its position change came with a caveat, which was that she would be put on priority status for job postings and vacancies during the extension period, with no guaranteed job for her. In short, she would have to apply for positions and be appointed into one before her leave ended; otherwise, she would be deemed to have resigned.

[25] Entered into evidence was an email sent April 16, 2012, at 6:20 p.m. ("the April 16 email"), from Ms. Brodie to Shirley Squires, who, at the time, was the HR director at the LOP, the relevant portions of which state as follows:

> *Good conversation with Karen. To her initial question about the budget I explained that it did not refer to the LOP or have an impact that affected her situation.*
>
> *She was pleased to be offered the option of extending her LWOP with the understanding that she would be on a priority list for 3 years and then if no position is available she would be deemed to have resigned. She would still have to pay back the maternity top up. I suggested to her that she could decide to pay it back in instalments during the period of her LWOP if she thought that she would not return to the LOP.*
>
> *I put it to her as an option that benefited [sic] us since I could staff indeterminately and an option that benefited [sic] her since it would let her stay home with her young children but it carries a risk for her. There might not be a job after 3 years and she would still owe us a fair amount.*
>
> *I gave her until May 11, 2012 to decide on her options.*
>
> . . .
>
> *I tried to be as clear as I could that should her priority status not lead to a job for which she was qualified then she would be deemed to have resigned, that it wasn't a layoff. I referred her*

> *to Jennifer to confirm exactly how much of her 5 years are left for Care and Nurturing and any other questions.*
>
> *She asked how she might find out about openings at LOP and I suggested that some months before she wishes to return she should advise me (could be HR) and we would find a way for HR to email her job openings. . . .*
>
> . . .

[26] In cross-examination, the grievor was brought to the April 16 email, specifically to the portion that discusses the risk to her, being deemed to have resigned, paying back the top-up if she did not return to work, and paying it back in installments. She stated that she recalled conversing with Ms. Brodie at or about that time but not the specifics. She said that she did not keep notes of their conversations. When counsel for the employer read the paragraph to her about being deemed to have resigned, the grievor admitted to recalling the discussion about priority status and having to pay back the allowance but not the part about being deemed to have resigned. The grievor stated that she did not deny that the conversation took place, including the part about being deemed to have resigned; she just did not recall it.

[27] Ms. Brodie testified about the April 16 email. She said that it accurately captured her conversation with the grievor that day. She further stated that the grievor was concerned about the size and amount of the potential repayment of the top-up that she might have had to pay back, which is why Ms. Brodie looked into the option of paying it in installments. She said that from the discussion, her impression was that the grievor was not sure about returning to work and that she very much enjoyed being at home with her young children. She said that she made it very clear to the grievor that the option of extending the care-and-nurturing leave included a risk to her that if a position were not available that she was qualified for, she would be deemed to have resigned. She said that it was made clear to the grievor and that she gave the grievor until May 11, 2012, to make a decision.

[28] On April 19, 2012, at 1:55 p.m., Ms. Angus emailed Ms. Brodie (“the April 19 email”), the relevant portions of which state as follows:

> . . .
>
> *As promised, here is a summary of my conversation with Karen yesterday afternoon.*

> *Her main question what was the remaining balance of Care & Nurturing she could request. I advised her that the period would be from September 1/12 to June 9/15. This would mean that she would have requested the total of 5 years as indicated in her collective agreement. Her current Care and Nurturing leave covers the period of June 10, 2010 to August 31, 2012.*
>
> *Her second question was that she wished to get clarification on the risks associated with this request as you had indicated in your most recent conversation with her. I simply reiterated that the risk is that she could not be guaranteed any type of reintegration to work. Meaning, the Library of Parliament could not guarantee her a job, for which she is qualified for, at any point in time. I also confirmed with her that her priority status would be for the period of September 1/12 to August 31/15.*
>
> *She also asked how she would be made aware of job openings at the Library while on priority status. I advised her that the Staffing section would have something in place to ensure that she is notified of* ***all*** *job openings and that she also had a responsibility of ensuring that she advises us of any changes to her personal email account and to ensure that her resume is up to date and ready in the event that the Library of Parliament would require to review it. She seemed to think that should she wish to come back to the Library prior to June 9/15 and that a position for which she was qualified for was available that she would simply be placed in said position. I advised her that those details would need to be looked into should that situation arise. . . .*
>
> *At no time did she mention anything about layoffs or a Work Force Adjustment nor did I bring it up during the conversation.*
>
> *I advised her to seek financial counselling regarding the overpayments. She also indicated that should she not return to work or should there be no position available for her at the end of her priority status, she will more than likely be repaying back said overpayments at the very end of it all either by way of a lump sum payment or instalments. . . .*
>
> . . .
>
> *She is grateful for your May 11, 2012 deadline but she did confirm that she will more than likely be getting back to you in a few days with her final decision.*
>
> . . .
>
> [Emphasis in the original]
>
> [*Sic* throughout]

[29] Ms. Angus testified that the April 19 email accurately reflected her discussion with the grievor on that day. She said that she explained to the grievor the risk that came with any leave without pay in excess of one year. The potential consequence is that after one year, the employer is not obligated to hold an employee's position and

can staff it on an indeterminate basis. She said that she explained it to the grievor. She said that the grievor told her that she fully understood.

[30] In cross-examination, the grievor was brought to the April 19 email. She confirmed that she recalled speaking to Ms. Angus at or about that time and that she did not make any notes of their conversation. She confirmed that the statement in the April 19 email was accurate about her being mainly concerned about the balance of care-and-nurturing leave. She also recalled Ms. Angus discussing with her the risks that Ms. Brodie had previously discussed and that Ms. Angus told her that there was no guarantee of a job or the length of her priority status. While she could not confirm the exact words spoken with respect to the third paragraph of the April 19 email, she did confirm that it sounded right. The grievor confirmed that with respect to potential job openings, she knew that she had to have the correct qualifications, and that the LOP would assess whether she had them. While she stated that she only vaguely recalled the discussions about overpayments, she acknowledged that Ms. Angus probably did tell her to seek financial counselling, but she did not recall. She did confirm that Ms. Angus told her about the repayment, which was likely to be in a lump sum.

[31] On April 19, 2012, at 3:05 p.m., the grievor emailed Ms. Brodie and copied Ms. Angus, stating as follows:

. . .

> *To follow-up on our phone conversation from earlier this week, this email confirms that as of September I'll be continuing my leave without pay for care & nurturing until June 09, 2015. Jennifer asked that I Cc her on this message, so that she can start preparing a leave request form for me to submit to the LOP.*
>
> *I'm very happy to be able to continue raising my young children at home for a while longer. These early childhood years fly by so quickly!*

. . .

[32] On August 28, 2012, Ms. Angus wrote to the grievor with respect to the extension of her leave without pay for the care and nurturing of children ("the August 28 letter"). The relevant portions of it state as follows:

. . .

We have been advised that your current Care and Nurturing period of leave without pay (LWOP) has been extended. With this approved extension, you will have exhausted the total of five (5) years allowable for this type of LWOP. The following information is intended to help you understand your options and responsibilities concerning benefits and deductions during this period, along with reintegration from leave provisions.

Your LWOP will commence on September 1, 2012, and end on June 9, 2015.

Your anticipated return to work date is June 10, 2015.

REINTEGRATION FROM LEAVE

In October 2008, while on secondment from the Library of Parliament to the House of Commons, you stated that you were not interested in returning to your substantive position (Manager, PARLMEDIA). As such, you were notified that action would be taken to fill your substantive position on an indeterminate basis. On November 3, 2008, you acknowledged receipt of this notification and accepted the conditions associated with your decision.

Prior to the end of your first period of Care and Nurturing (June 10, 2010 to August 31, 2012 inclusively), you were notified that your services were required and were asked to return to duty at the Library of Parliament effective Tuesday, September 4, 2012. At that time, you requested an extension for the remaining allowable time of LWOP for Care and Nurturing (September 1, 2012 to June 9, 2015 inclusively). Your request was approved by Ms. Lynn Brodie on the understanding that the Library of Parliament is unable to guarantee you a position for which you are qualified at the end of this LWOP. This was reiterated during a telephone conversation with me on April 19, 2012. You will have a priority status for consideration of vacancies at the Library of Parliament for the period of September 1, 2012 to August 31, 2015 inclusively. If during this priority for reintegration period you have not been appointed to a position for which you are qualified within the Library of Parliament, you will cease to be an employee of the Library of Parliament.

Should you have any questions pertaining to your reintegration from leave, please contact Roland Desjardins, Manager, Employee Relations . . . .

. . .

Overpayments

<u>Regular Pay</u>

As previously mentioned in an email sent to your attention on August 4, 2010, an overpayment occurred due to the fact that you were paid at a higher rate of pay for the period of March 18, 2010 to June 9, 2010 inclusively and it is still outstanding. The total gross amount of this overpayment is $2,160.30. On August 4, 2010

> *you indicated that you wished to apply the recovery method upon your return to duty. Should this not be the case or should you not return to duty, the overpayment will be recovered from any monies owed to you or a cheque can be made payable to the Receiver General for Canada. For ease of reference, a copy of the August 4, 2010 email has been attached to this letter.*
>
> *<u>Maternity/Parental leave allowances (top-up payments)</u>*
>
> *The total gross amount owed to the Receiver General for the allowances you received while on your maternity/parental leaves is $41,207.58. Various options for repayment of these allowances are available to you and can be discussed at greater length prior to your return to duty. However, should you not return to duty, this amount will be recovered from any monies owed to you or a cheque can be made payable to the Receiver General for Canada.*
>
> . . .
>
> [Emphasis in the original]

[33] In cross-examination, the grievor was brought through the August 28 letter. She confirmed that she understood the following:

- if she did not find another job at the end of the priority period, she would cease to be an LOP employee;
- if she did not return to work, she would be responsible for repaying the top-up; and
- the agreement was between her and the employer on the terms and conditions of her leave, and it was binding on both of them.

[34] Counsel for the employer specifically brought the grievor to the section about the lack of guarantee of a position when the leave without pay ended and stated that it was clear that if during the priority period, she did not secure an appointment, she would no longer be an LOP employee. Additionally, if she did not return to work, she would have to repay the monies paid to her under clause 19.08 of the collective agreement. The grievor's response was that "it was clear in [her] mind that there may be no vacancies". However, she also said the following: "[it] never crossed my mind that I wouldn't return to work because I didn't qualify for positions that were available." When it was put to her that she knew that she had to qualify for positions before she could be appointed, she agreed. However, she also stated that she had assumed that she would qualify for those positions.

[35] On February 21, 2013, the grievor and Ms. Angus exchanged emails about the changes to severance pay that a number of bargaining agents had negotiated with several federal public sector employers. The grievor inquired about the amount

of her potential payment and how and when she could receive it. Ms. Angus responded by explaining how to calculate the current gross severance pay amount and explained that if the grievor exercised this option, payment would be by way of direct deposit and could be processed only in April of 2013. She also included the following paragraph:

> . . .
>
> *As you know the LoP has accepted the balance of care and nurturing leave for you. However, should you decide not to return to the LoP, please remember that you would still owe the Receiver General for a large portion of the last maternity/parental leave top up payments that you received. I am unaware of what your future plans are at this time, nor do I expect you to advise me as such but you might want to consider deferring the payment as this amount could be used to offset the top up monies that could be owed.*
>
> *Just a tought [sic]. . .*
>
> . . .

[36] On March 5, 2015, Ms. Angus emailed the grievor as follows:

> . . .
>
> *The reason for my email is that we have not been in contact since my last letter to you which is dated in 2012. . .it was time to touch base!*
>
> *Our records indicate that your Care and Nurturing period of leave without pay comes to an end on June 9, 2015.*
>
> *Since you have been on leave without pay, you have been receiving all competition notifications for positions within the Library of Parliament.*
>
> *Can you confirm that you are still interested in pursuing employment at the Library of Parliament?*
>
> *Please confirm at your earliest convenience but* ***no later than Friday March 20, 2015 at noon****.*
>
> . . .
>
> [Emphasis in the original]

[37] On March 6, 2015, the grievor replied to Ms. Angus and simply asked if they could discuss Ms. Angus's March 5 email by phone, as she had some questions. In their evidence before me, they both confirmed that a telephone conversation took place sometime that morning, after 11:15 a.m. After the call, Ms. Angus emailed the grievor a

copy of the most recent LS collective agreement. Still on March 6, at 12:42 p.m., the grievor replied, stating as follows:

> *Thanks Jennifer, for sending me the most recent LS collective agreement.*
>
> *Could you please confirm in writing (email is fine) the following:*
>
> *1. That I've effectively lost my LS-3 classification – both for salary and for jobs I may be qualified? If so, where is this specified in the collective agreement? I was under the impression that after returning to work from leave I would be reinstated at this level?*
>
> *2. That should I not be appointed to a position for which I've applied by the end of August, that I will have been terminated by the LOP (and will not have resigned)?*
>
> *Also, who is my shop steward? If you could please provide me with their name and contact info, I'd appreciate it.*
>
> . . .

[38] Ms. Angus replied at 1:06 p.m., as follows:

> *You have not lost your LS-3 classification but rather your substantive LS-3 position. The reintegration wording in your letter of August 2012 indicates "position you are deemed qualified for". This could mean a position at the LS-3 level but it could also mean other positions at different levels.*
>
> *It is not the Library terminating your employment but rather your employment being terminated due to your request for an extended period of time for a leave of absence and for which you were notified that the employer could fill your position on an indeterminate basis. As mentioned during our telephone conversation today, we can certainly define the wording and how to qualify the termination. What I can confirm is that this termination, should it occur (you have indicated a willingness to return to duty at the end of your leave without pay (June 10, 2015)) will* . . . [the balance of email was missing, and no other copy of it was available].
>
> . . .

[39] On March 11, 2015, the grievor and Ms. Angus exchanged emails, as follows:

> [The grievor to Ms. Angus, at 11:43 a.m.:]
>
> . . .
>
> *I'm still confused about how I've apparently kept my LS-3 classification yet lost my LS-3 substantive position. What does keeping my classification mean exactly? If I'm not given an LS-3 position (or equivalent level) or paid an LS-3 salary when I return,*

> *am I back at square one, career-wise? Would I have effectively lost all my years of service at the Library? This was never suggested to me, either over the phone or in writing anywhere. If this is indeed the case, it's really not much of a choice - either be demoted to a possibly entry-level position with a significant pay cut, or else be terminated with $40K to repay.*
>
> *Are these my only options? Let me know if this would be easier to discuss over the phone.*
>
> . . .
>
> [Ms. Angus to the grievor, at 2:56 p.m.:]
>
> . . .
>
> *Your letter dated August 28, 2012 indicated that in October 2008, you notified the Library that you were not interested in returning to your substantive position of Manager, PARLMEDIA and that the employer (LoP) would be taking action in filling that job on an indeterminate basis. As such, you no longer have a substantive LS-3 position to return to on June 10, 2015. Your last paid classification was at the LS-3 level but this does not mean that there was a guarantee of being paid at the LS-3 level upon return to duty at the end of your 5-year Care and Nurturing period of leave without pay. I know that an LS-2 position will be posted shorty and Staffing will be sending you this competition notice. Other positions at other levels may also come up between now and June 10 however it is not possible to know what those are at this time. I encourage to apply for the positions that become available. Also, if you think it would be of assistance to us, please send to Stephanie's attention an updated curriculum vitae for our files.*
>
> *I refer you to the letter dated August 28, 2012 which contains information that could be of assistance to you.*
>
> *As I explained to you in our last phone conversation, should a return to duty not be possible, the repayment of the owing top-up allowances can be done in various ways (1 lump sum payment, 12 post-dated cheques or 24 post-dated cheques).*
>
> . . .
>
> [*Sic* throughout]

[40] In cross-examination, counsel for the employer brought the grievor through the March 6, 2015, email exchanges. She confirmed the following:

- she recalled giving up her substantive LS-3 position; and
- she understood that if she did not receive a new appointment, her employment would end.

[41] On June 9, 2015, Ms. Angus wrote to the grievor, stating as follows:

. . .

> *On 28 August 2012 you received a letter pertaining to your request to extend your Leave without Pay for the Care and Nurturing of Children. Your request was approved on the understanding that there was no guarantee of reintegration at the end of your leave without pay period and that, in the event no position was available at the end of your leave, you would have priority status for appointment at the Library of Parliament for the period of 1 September 2012 to 31 August 2015. The letter also explained that if during this priority for reintegration period you were not appointed to a position for which you were deemed qualified within the Library of Parliament, you would cease to be an employee of the Library of Parliament. For ease of reference, a copy of the letter dated 28 august 2012 is enclosed.*
>
> *The Library of Parliament has since implemented a new* Staffing Policy *that took effect on 19 January 2015. In order to provide you with the maximum benefit of priority status under the auspices of this new policy, you will be accorded administrative priority status from* ***10 June 2015 to 9 June 2016 inclusively****. As an employee accorded administrative priority status, you will be on leave without pay for the year or until you are appointed to a position within that period of time. A copy of the* Staffing Policy *is attached.*
>
> *As an employee with administrative priority status, you may be appointed to a position for which you are qualified at the LS-3 or an equivalent level or to a position at one (1) level lower (or its equivalent). Should you be appointed to a position at one (1) level lower you would be granted a return to level priority status and salary protection for a period of one (1) year as of the date you were appointed to the position at the lower level.*
>
> *Human Resources will actively work to identify positions suitable at your level or one (1) level lower. You will continue to be considered an internal applicant for the duration of your priority status. You also are encouraged to apply to Library job opportunities at any level that are of interest to you. For ease of access, we will continue to send you all advertised posters.*
>
> ***Outstanding Repayments***
>
> *The letter you received dated 28 August 2012 also notified you of outstanding overpayments. These amounts still need to be recovered. In the event you do not return to work you will be required to commence the repayment process* ***effective 10 June 2016****. There are repayment options available to you which can be explained further. . . .*
>
> . . .
>
> [Emphasis in the original]

[42] Ms. Angus stated that she sent that letter to the grievor because she had had little to no contact with her. She referred to it as an olive branch. She also wanted to remind the grievor of the outstanding payments that were referred to in the August 28

letter. She stated that the LOP had received no indication from the grievor about her position. Ms. Angus stated that the June 9 letter was a benefit to the grievor as it extended her leave and gave her another year in which to potentially be appointed to a new position within the LOP, which would also have potentially alleviated the need for her to repay the top-up.

[43] The new staffing policy was entered into evidence. It took effect on January 19, 2015, and applied to all staffing activities for which the LOP has authority under the *Parliamentary Employment and Staff Relations Act* (R.S.C., 1985, c. 33 (2nd Supp.); *PESRA*). The sections of it that may be relevant to this matter are as follows:

> . . .
>
> ***POLICY REQUIREMENTS***
>
> . . .
>
> ***PRIORITY STATUS***
>
> *The Library recognizes its obligation to consider employees with priority status in priority to all others when staffing positions at the Library.*
>
> *After initiating a staffing action, hiring managers shall consult Human Resources for information regarding employee(s) with priority status. Managers shall consider employee(s) from the priority list in relation to the requirements of the position to be staffed. In some cases, training and development may be provided to employees with priority status, as required, in order to facilitate appointment. Where consideration has been given to employee(s) with priority status and no appointment can be made, managers may proceed with another type of staffing process.*
>
> . . .
>
> *Unless specified otherwise in other policies or guidelines, an employee with priority status is normally considered for positions at the same group and level, or its equivalent. However, in order to maintain employment continuity, it may be necessary under certain circumstances to consider an employee with priority status for positions at one (1) level lower, with salary protection. In such cases, the employee would be granted a return to level priority for a period of one (1) year.*
>
> *Additional information on the different types of priorities is provided in* Appendix A – Priority Status.
>
> . . .
>
> ***POST-ASSESSMENT FEEDBACK SESSIONS***
>
> *Unsuccessful employees shall be advised, with a reasonable time period, of their results in the staffing process and of their access to*

a post-assessment feedback session provided by the hiring manager in the official language of the employee's choice.

A feedback session is intended to provide the employee with information on why (s)he was not selected. During the feedback session, only the employee's performance in relation to the assessment guide will be discussed. Information about the performance of other candidates shall not be discussed.

Feedback sessions are not intended to be a re-assessment [sic] of the employee; rather feedback sessions are intended to allow the employee to understand why (s)he was not successful.

. . .

APPENDIX A – Priority Status

. . .

Normally, priority status applies to indeterminate employees and the different circumstances for priority status at the Library are as follows:

. . .

C. Administrative

Administrative priority is accorded to:

> *employees returning from an extended leave of absence for non-medical reasons and whose positions have been staffed on an indeterminate basis. The priority status begins on the expiry date of the granted extended leave of absence or on the date the employee confirms his or her availability to return to work, if such a date is earlier than the expiry date of the granted leave of absence; or*

> *to employees who, following an appointment to another indeterminate position, have been unable to meet the requirements of the new position; or*

> *employees appointed on an indeterminate basis to a bilingual non-imperative position and who are unable to meet the official language proficiency levels required of the position within the specified period, if prescribed in their offer of employment letter; or*

> *employees granted leave without pay for relocation of spouse/common-law partner. The priority status begins on the expiry date of the granted leave without pay or on the date the employee confirms his or her availability to return to work, if such a date is earlier than the expiry date of the granted leave without pay; or*

> *employees on compassionate grounds and under exceptional circumstances.*

. . .

D. Return to level

> *Priority status for a one (1) year duration is also accorded to employees with medical, surplus or administrative priority who accept an indeterminate appointment to [sic] one (1) level lower position. Return to level priority status is accorded for appointment to a position at a level equivalent to the employee's previous substantive position.*
>
> . . .

[44] Ms. Angus testified that the staffing policy referred to in the June 9 letter was new and that before then, the LOP did not have a written staffing policy. She said that the LOP had decided to extend the grievor's leave without pay and her priority status for an extra year.

[45] On June 24, 2015, the grievor emailed Ms. Angus, stating as follows:

> . . .
>
> *To follow up on our phone conversation yesterday, I wanted to express in writing my surprise (and dismay) at learning about the new, revised staffing policy on the last day of my official leave without pay. This new policy gives me an additional year to find a position at the Library, which contradicts the signed agreement from 2012, which had given me priority status until August 31st of this year.*
>
> *I have applied for five positions over the last few months, and to my disappointment have so far been turned down for three (two competitions are still open). I don't wish to keep this up for another year. You mentioned that it wouldn't have been fair to have not extended the benefits of the new policy to me, however, it's not fair to put me and my family in this state of limbo and uncertainty for yet another year. I have to make decisions for my family and my career, and until this is settled, our lives are on hold. I know you can't change the policy, however it's my wish for the Library to stick to the terms of the original 2012 agreement and either hire me soon, or else let me go without penalty.*
>
> *As you mentioned, if you could please pass this along to management, I would really appreciate it. Please keep me posted.*
>
> . . .

[46] Ms. Angus forwarded that email to Ms. Squires and two others, stating as follows:

> . . .
>
> *As mentioned, the call with Karen lasted approximately only 5 minutes. She simply wished to advise me of her feelings regarding the priority extension. Stephanie (Staffing) was with me on the call.*

> *I mentioned to Karen on more than one occasion during the call that the employer truly believed that extending to her the provisions of the new Staffing Policy would provide her with an additional year (should she not return in a position at the Library) to get some finances in order before repaying back the top-up allowances, (among other much less substantial overpayments) and that should the organization decide to waive the extended administrative priority that the top-up allowances repayment would commence as soon as September 2015. All times this was mentioned, that fact was not acknowledged by her. As well, on more than one occasion, I reiterated to her that her situation was not considered as a WFA situation (in response to her statement of "let me go") as she made reference to that terminology on more than one occasion.*
>
> *I advised her that I would pass along her official request to my immediate supervisor so it can be passed up the ladder to the person who has authority to make the final decision regarding her request.*
>
> . . .

[47] Ms. Angus testified that after the grievor's email of June 24, 2015, she spoke to the grievor by telephone. She stated that she explained to the grievor the risk of withdrawing from the extra year that the employer had offered. She stated that the grievor had used the terms "let me go" and "penalty", and she wanted to ensure that the grievor was aware that her situation was not one of a workforce adjustment.

[48] During this period, Ms. Angus was in contact with the grievor's bargaining agent representative, Ms. Koo. Ms. Koo testified that she advised the grievor with respect to the grievor's return to work after her care-and-nurturing leave and eventually, with respect to her grievance.

[49] Ms. Koo corresponded with the grievor on August 14, 2015, by email with respect to a concern the grievor had raised about her belief that the employer had breached clause 19.10 (leave without pay for the care and nurturing of children). In her email, Ms. Koo wrote as follows:

> . . .
>
> *Having thoroughly reviewed your case with you and with Your union rep at the Local, I do not see a violation of the collective agreement. You mentioned that you feel article 19.10 has been violated, it has not as far as I can see. You asked for and was authorized by LOP to take every type of leave that you requested. You also agreed to give up your substantive position so that you could continue on your assignment with The House of Commons*

> *for a longer period and that is why there is no substantive position for you to return to. The employer (LOP) had a right to staff indeterminately when you were on leave for more than a year and they did.*
>
> *You have an admin priority as a result of having been on mat leave, followed by parental leave and care & nurturing. At the end of taking such leave you must return to the employ of the employer, otherwise you will owe the top up allowance amounts and other benefits amounts owing as a result of having been off more than 3 months. All of which has been laid out and clarified by way of letters from the LOP as well as the end date of your priority status, which the LOP offered to extend for a further 10 months which you did not wish to take advantage off and has been respected. So, your priority status will end on August 31st and as of September 1st, 2015, you will have to start paying the amounts owing to the Receiver General of Canada. The only way that that will not happen, is if you were to be the successful candidate in a competitive process and be appointed to a position at the LOP. To increase your chances as being successful, I urge you to ask for a post-board interview which could give you invaluable insight and help you to better prepare for any further positions that could become available, either term or permanent.*
>
> . . .
>
> [*Sic* throughout]

[50] Ms. Koo testified that she had urged the grievor to take part in post-board interviews because the grievor had applied for positions and had not been successful.

[51] Ms. Angus wrote to the grievor on July 16, 2015, the relevant portions of which stated as follows:

> . . .
>
> *This letter is in response to a written request you submitted to the Library of Parliament by email on June 24, 2015 asking that your administrative priority status not be extended from June 10, 2015 to June 9, 2016 inclusively. The Library regrets that you do not wish to benefit from this additional 10-month window within which to secure another position with the organization. The extension to June 2016 also would apply to the commencement of repayment of monies still outstanding/owing and would provide you extra time to take any financial measures you deem necessary prior to the commencement of repayment.*
>
> *Notwithstanding the above, the Library accepts your request to maintain the original date of August 31, 2015 (as indicated in your benefit letter dated August 28, 2012) as the end date of your priority status. As such, effective September 1, 2015 you will cease to be an employee of the Library of Parliament.*

> *We take this opportunity to reiterate that your situation is not, nor was it ever deemed to be, a Work Force Adjustment (WFA) situation. At no time was it ever suggested to you that you would be treated as a WFA should you not secure another position at the end of your leave without pay for care & nurturing. All outstanding overpayments and/or monies owing must be reimbursed starting September 1, 2015. For ease of reference, a reiteration of the monies owed is included herein.*
>
> . . .
>
> ***1. Overpayments and Monies Still Outstanding/Owing***
>
> . . .
>
> *Maternity and Parental Leave Allowances*
>
> *As indicated in your letter dated August 28, 2012, the total gross amount outstanding/owing is $41,207.58. As discussed this past March with Ms. Jennifer Sweet, various options for repayment of these allowances are available to you. Attached is an agreement which outlines these options. It must be duly completed and signed by you and returned to the attention of Ms. Sweet no later than August 31, 2015, end of business day, with all (1, 12 or 24) postdated cheques included.*
>
> . . .
>
> ***4. Repayment***
>
> *A written confirmation of your decision on how you wish to pay back your regular pay overpayment and maternity and parental leave allowances still owing is required by August 31, 2015, end of business day. Should no written confirmation be submitted to the Library by this date, the Library will have no choice but to pursue other means of recovery for monies owing/outstanding.*
>
> . . .
>
> [Emphasis in the original]

[52] On September 4, 2015, Ms. Squires wrote the grievor, the relevant portions of which were as follows:

> . . .
>
> *When you accepted the terms of your leave extension in 2012, you did so knowing there was no guarantee of reintegration at the end of your leave period. This provision was discussed with you and the Library would not have granted the extension of your leave had you indicated beforehand that you did not want to proceed with this leave under these terms. Your reintegration was predicated on being qualified for appointment to a position available at the Library at the time your leave period was ending. As you were unsuccessful in demonstrating your qualification for available positions, your employment with the Library came to an end on 31 August 2015.*

> *Understanding the impact of the cessation of your employment, we previously offered to extend your administrative priority period to 9 June 2016. While you declined our offer, I reiterate this offer and ask that you reconsider your decision given the significant benefit this extension represents to you both financially and in terms of the potential to secure a position. Note that if you accept this offer, your coverage under the disability insurance and death benefit plans automatically continue [sic] and premiums will either be recovered from your salary should you secure a position with the Library or owed and repaid by you after 9 June 2016, if you are not appointed to a position by that date.*
>
> *I kindly ask that you reply to this renewed offer by Wednesday, 9 September 2015, as we are delaying notification of your employment end date to the Pension Bureau. In the event you decline or opt not to reply to this offer, your employment end date for pension purposes will be 10 September 2015.*
>
> *Irrespective of your decision on the renewed offer of extended priority status, and unless you indicate otherwise, the Library will continue to send you internal job postings until 9 June 2016. Even if you do not wish to extend your priority status, the Library will continue to consider you for internal opportunities should you wish to apply to any of the job openings sent to you.*
>
> . . .

[53] Entered into evidence was an email exchange dated September 18, 2015, between the grievor and Ms. Squires, which was copied to Mses. Angus and Koo. The subject matter was a proposal that the grievor put forward with respect to an assignment (which she misidentified as a secondment). Her initial emails about the proposal were not entered into evidence.

[54] The grievor's testimony disclosed that she proposed that the LOP enter into an assignment agreement with a non-government employer that would allow her to be notionally an LOP employee and as such would permit her to work, to satisfy the return-to-work requirement in the collective agreement with respect to the top-up and thus extinguish her requirement to repay it. The non-government employer she referred to was in fact her husband, and the business she suggested being assigned to was their family business, a nursery in Tamworth. She identified the sole proprietor as her spouse. When the information in her response to questions about the business in the September 18, 2015, email were fleshed out in cross-examination, it also became clear that she had been working in several capacities at the business for a number of years.

[55] On September 21, 2015, Ms. Squires emailed the grievor and Ms. Koo, the relevant portions of which read as follows:

> . . .
>
> *The Library has carefully considered the work situation proposed by Karen, based on our teleconference call of Sept 16, along with written information provided by Karen on Sept 17, followed by further clarification sought and received by the Library on Sept 18.*
>
> *Working for a common-law partner represents a significant conflict of interest under the circumstances and is not a suitable arrangement for purposes of entering into a secondment agreement. Had an arm's length organization been seriously interested in exploring a secondment agreement with us, we would have been more than willing to discuss and explore ways of making such an arrangement work that is fair and appropriate/reasonable for all parties. Despite our respective efforts, this concludes our attempts to secure a host organization for secondment purposes.*
>
> *In terms of potential opportunities within the Library, I am pleased to inform Karen that an immediate need has just arisen to backfill the indeterminate position of Preservation Librarian at the LS-3 group and level within the Information and Document Resource Service (IDRS). Attached are the job description and assessment criteria for the job. Also, I resend the job competencies and guide to interview skills originally email to you on July 14, 2015. Please let us know if you would like to be considered for this opportunity no later than by noon on Wednesday September 23, 2015. We anticipate an interview could then be convened within a week of your acceptance to be interviewed.*
>
> *Given your extended absence from the work of IDRS, Lynn Brodie, Director General, IDRS, has kindly extended the offer to speak to you in advance of an interview in order to provide some context that may be of assistance to you in preparing for an interview, should you wish to be considered for this opportunity. Lynn can be reached by email at* [email address omitted], *or by telephone at* [telephone number omitted].
>
> . . .
>
> [Emphasis in the original]

[56] On September 23, 2015, the grievor emailed Ms. Koo in response to further email correspondence on her situation. She stated as follows:

> . . .
>
> *I've already spent too much time trying to return from leave, and I have now been obligated to seek other opportunities. None of the information provided in your message changes the fact that I have*

> *been terminated after spending months attempting to return to work following a fully authorized leave, and billed tens of thousands of dollars to boot. If the LOP is so willing to "assist" why has this happened? None of the process you describe, including job interviews, post-board interview, etc. had ever been mentioned prior to my attempting to resume working. And let's not forget the LOP's repeated advice to apply for positions well below my level of experience (i.e. technician positions). That is not an offer of assistance, that is an offer of steep demotion. The Library never seriously intended to allow me to return from leave, something further in evidence in the recent statement that there was "no guarantee" of a job upon completing my leave.*
>
> . . .

[57] On September 23, 2015, Ms. Squires emailed the grievor a letter dated that day at 5:23 p.m., the relevant portions of which state as follows:

> . . .
>
> *I am writing to you further to the letter you received on 4 September 2015 regarding your employment status with the Library. In the intervening weeks, the Library and the union have worked concertedly on options to assist you in securing alternate employment and/or means of assisting you with reimbursing the monies owed to the Library. We regret that these efforts have not resulted in a positive outcome. We are similarly disappointed that you reiterated your decision not to extend your priority employment status with the Library and yesterday declined the opportunity to be considered for a librarian position that has just become available. You cease to be an employee of the Library of Parliament effective 24 September 2015, per the circumstances included in the letter of 4 September 2015.*
>
> *The Library will continue to send you our internal staffing postings until 9 June 2016. We will consider you an internal applicant for any opportunities you wish to apply for that are sent to you during that period of time.*
>
> . . .

[58] The grievor responded by email on September 25, 2015, the relevant portions of which state as follows:

> . . .
>
> *I acknowledge receipt of your 23 September letter. Let me start by reiterating that I never asked for an extension of leave, particularly since such an extension was never previously mentioned during my leave (until I expressed my wish to return to work), is not part of the collective agreement, and, contrary to what your September 4 letter states, has no positive financial*

benefits. Such an extension would in fact be a significant financial burden, both in terms of lost wages and added deficiencies. I simply do not understand why the Library keeps mentioning this extension when what I have been requesting for several months is precisely the opposite: to conclude my leave and return to work.

Second, your 23 September letter states that my termination is effective 24 September. But your September 4 letter indicated that, in keeping with all previous written correspondence, my employment ceased on August 31. I consider that I have been terminated by the Library as of that date. I certainly do not want to pay any additional deficiencies as a result of this contradictory information.

. . .

Fourth, you mention a position that "just became available" for which I could have been considered. I have already been "considered" 5 times by the library over the past several months, and was turned down every time. I have also already been terminated by the Library, effective August 31, as per your September 4 letter. I'm simply bewildered why this position is even proposed and why I should expect the outcome to be any different from previous applications. I was fully qualified for the other positions, as my employment record shows. The Library simply decided that I was not. The very notion that I should demonstrate my qualifications in order to be reintegrated had never been mentioned prior to my attempt to return. The August 28, 2012 letter stipulating the conditions of my leave simply mentions that I will be considered for positions for which I am qualified. I assumed this meant that I would be reintegrated to a position as it becomes [sic] available. Not that I would be turned down multiple times for positions for which my established employment record shows that I am indeed qualified.

Lastly, this protracted, chaotic process has thrown my professional and personal life into considerable disarray. I have not been receiving the wages I expected at the end of my leave, I was repeatedly informed that I could expect a steep demotion upon returning to work, I have been terminated by the Library, and I am now being asked to repay a considerable amount of money, as a direct result of the Library's decision to not permit me to return from leave for the care and nurturing of my two children. I will vigorously dispute the validity of the process I have been subjected to and of the monies I am expected to repay. The Library gives parents the ability to take unpaid leave to care for their children. It should not punish them for availing themselves of this leave and prevent them for returning to work. As you no doubt know, this is particularly damaging for women wishing to balance their work and family obligations.

. . .

[*Sic* throughout]

[59] Entered into evidence was a copy of the October 28, 2015, third-level grievance reply, the relevant portions of which state as follows:

> . . .
>
> *On October 21st, you and your union representative explained to the grievance committee that you expected to be considered qualified for and appointed to a position at your former job classification from vacancies available at the time your leave without pay for care and nurturing of children was ending. You further explained that you believe your employment relationship with the Library was involuntarily terminated given you were considered for five (5) job opportunities between March 24 and July 14, 2015 for which you were unable to demonstrate that you were qualified.*
>
> *It is the assessment of the grievance committee that in all five (5) staffing processes, for which you were considered, you exercised neither due diligence nor your right to recourse within timelines prescribed in your collective agreement.*
>
> *Specifically:*
>
> - *Selection committee notes for staffing activities consistently reflect lack of preparation on your part during these processes.*
> - *You opted not to seek post-interview feedback available for each position against the advice of Human Resources and your union representative.*
> - *You did not act on offers to speak with Library managers who were able and willing to assist you in understanding and preparing for job opportunities after nearly ten years of absence from the Library.*
> - *You did not file a staffing grievance in relation to any of the opportunities you had to be reintegrated into the Library.*
> - *The committee notes that, as a point of reference, even employees who lose their jobs due to workforce adjustment are not automatically deemed qualified for other jobs at the Library. They must prepare for competitive processes to demonstrate their qualification for positions being staffed.*
>
> . . .

[60] The grievor confirmed that the last time she worked for the LOP was in 2006.

III. Staffing processes

[61] The evidence disclosed that while the grievor was on care-and-nurturing leave, without pay, she applied for the following four positions on the stated dates:

- on March 24, 2015, a project coordinator position;

- on May 1, 2015, a manager position in the Research Publications group;
- on May 1, 2015, a research librarian position; and
- on May 13, 2015, a team leader position in the Information Service Reference and Strategic Analysis Division.

[62] The evidence also disclosed that on June 23, 2015, the grievor applied for a senior reference librarian position in the Legal and Social Affairs Division.

[63] Entered into evidence were different documents related to the posters for the five positions to which the grievor applied between March 24 and June 23, 2015. The evidence further disclosed that for one reason or another in each process, she was found not qualified. When she was notified of her failure to qualify in four of the five processes, she was invited to contact the person responsible for each process, if she wished further information. In cross-examination, she confirmed that she was offered those invitations but that she declined to accept any of them.

[64] Ms. Montcalm testified about staffing processes at the LOP in general and specifically about those in which the grievor was involved in 2015. She also explained that "administrative priority" means that employees accorded it are assessed and considered in priority over all other candidates for a position at their level or one level lower. She stated that being an administrative priority does not guarantee that someone will be appointed to a position; an employee with that priority must still demonstrate that he or she meets the qualifications of the position in question.

[65] Ms. Montcalm testified that the competencies and knowledge for a particular position are assessed as part of the staffing process. The selection board determines whether a particular candidate meets the qualifications for a particular position and usually has three members, consisting of the hiring manager, an HR advisor, and one other manager.

[66] The grievor did not file a grievance with respect to any of the five staffing processes.

[67] The grievor testified that for a period during her care-and-nurturing leave, she did not receive job posters. However, in her evidence before me, she did not provide any details as to when that period occurred or how long it lasted. Ms. Montcalm did confirm that although it was initially believed that the grievor was receiving all the vacancy notifications for LOP positions during her care-and-nurturing leave, it was

determined that in fact, she was not receiving them all. Ms. Montcalm stated that the period was between June and November of 2014. She also stated that she believed that there were on average 40 to 55 vacancies per year at the LOP.

IV. Summary of the arguments

A. For the grievor

[68] The grievor submitted that before she went on leave, she was a skilled employee.

[69] Before she went on maternity and parental leave, there was no question of her return to work or her skills having to be proven in the agreement between her and the employer; nor was there a mention of a reintegration or a job loss.

[70] The grievor stated that although she was made aware in August 2012 that the care-and-nurturing leave without pay carried with it a risk of job loss, this point was not set out in the first agreement for that leave. She stated that that occurred likely because there was no written staffing policy. None was in place until January of 2015. She was not advised of one and was not shown a copy of one until June 9, 2015.

[71] The grievor submitted that all her decision making with respect to taking the extended care-and-nurturing leave without pay was based on information that the employer provided to her and that had been written down.

[72] The grievor stated that the evidence disclosed that she sought clarification from the employer. Even before she went on the extended care-and-nurturing leave without pay, she had sought clarification and was told that the "details would be looked into at the time they arise."

[73] The grievor submitted that when she was informed of the risks in March of 2015, it was a horrifying surprise.

[74] The grievor stated that she was qualified as an LS-3. Her assignment agreement with the LOP and the HOC stated that she would return to the LOP into an LS-3 position. The employer stated that she would be placed in that position without having to go through a staffing process and that she would receive some training.

[75] The grievor stated that the employer never explained to her why she was required to take exams and attend oral interviews; she stated that she participated willingly, despite it not being what she agreed to.

[76] The grievor submitted that she did not return to work not of her volition but of that of the employer. It terminated her employment. She did not resign.

[77] The grievor stated that the ending of her employment took a toll; it has caused her years of stress and has had a significant financial impact.

[78] The grievor stated that she would like the decision to reflect that it was a termination of employment. She does not seek a reinstatement to her position but a reversal of the requirement to pay back the top-up, along with damages for stress, anxiety, and upheaval.

B. For the employer

[79] The grievor requested an extension to her care-and-nurturing leave without pay, which the employer granted, with certain specific terms and conditions.

[80] The grievor's substantive position was filled in 2010 when she chose to extend her assignment to the HOC; she did not have a substantive position at the HOC. It was clear from Ms. Brodie that when the grievor continued at the HOC and eventually returned to the LOP, she was placed in a notional position at the LOP.

[81] When the grievor spoke of returning to work in that notional position, she did not actually return to the LOP and perform work; it was notional and was in place so that she could use up her accumulated leave.

[82] The agreement to extend the care-and-nurturing leave without pay was made on the understanding that when that leave ended, the employer would not be able to guarantee the grievor a position for which she would be qualified. It was to make her a priority, and she was to be provided opportunities with respect to vacancies. However, if she did not qualify for a position, she would be deemed to have resigned.

[83] If the grievor was not employed after her care-and-nurturing leave without pay ended, she would be required to pay back to the employer the maternity-parental allowance (top-up) that it had paid to her.

[84] The employer did not impose the terms and conditions on the extension of the care-and-nurturing leave without pay; they were a part of a deal that the grievor entered into, and she cannot avoid the consequences of her choice. In accordance with the terms of her agreement, her employment ended. As such, the grievance should be dismissed.

[85] This is not a personal issue with the grievor; nor is it being suggested that she was not a good employee. The termination of employment must be upheld because that was the deal.

[86] The evidence is that the conditions of the extension of her care-and-nurturing leave without pay were made clear to her several times. Ms. Brodie had a conversation with her in April of 2012 that was reflected in the April 16 email. Ms. Brodie testified that what she discussed with the grievor about the agreement to extend the leave was accurately set out in the April 16 email to Ms. Squires. There is no credibility issue; the facts are not in dispute. The discussion took place. There was a risk, which was that if the grievor extended the leave for the full period, there would be no position when the leave ended, and she would be deemed to have resigned. She would be required to return the top-up that she had received.

[87] Ms. Brodie expressly cautioned the grievor about the risk, which was that if there was no job, she would be out of a job and would have to repay the top-up. She told the grievor that the LOP could not guess as to where things would stand down the road. If the priority status that the grievor was placed on did not lead to a job, she would be deemed to have resigned.

[88] Ms. Angus also had a discussion with the grievor a few days after the grievor had spoken to Ms. Brodie. This conversation was also summarized in the April 19 email from Ms. Angus to Ms. Brodie, which Ms. Angus testified was an accurate summary of her discussion with the grievor at that time. In addition, the email was contemporaneous with the discussion. The grievor was seeking clarification of the risks, and Ms. Angus confirmed them.

[89] Ms. Angus told the grievor that at no point was there a guarantee of a job for which she was qualified. The grievor asked whether if she returned early, and a position for which she was qualified was available, she would be put into it. Ms. Angus

replied that she could not confirm that. Ms. Angus also repeated to her that if she did not return to work, she would be required to repay the top-up.

[90] The grievor was also sent a letter from Ms. Angus, the August 28 letter, reiterating the agreement which the grievor requested in her April 19, 2012 email to Ms. Brodie that was copied to Ms. Angus.

1. What does "qualified" mean?

[91] The grievor interpreted the word "qualified" through a number of assumptions she made based on her discussions with the LOP. She assumed that "having to qualify" meant something akin to being treated like an extension of her assignment.

[92] The employer determines whether someone is qualified. It had to evaluate the grievor's qualifications and determine if she met the qualifications for a position that needed filling. Persons seeking appointment to a position must be qualified.

[93] The grievor assumed that she was qualified for positions, yet she had not worked for the LOP in any capacity, as of 2015, for nine years.

[94] The grievor also assumed that she would be treated as if she had been workforce adjusted, meaning that certain rules would apply. She was told that that was not the case.

[95] The grievor participated in a number of staffing processes and was not successful. A number of staffing processes were open, and she started to apply only after the employer's representatives contacted her in March of 2015.

[96] When the grievor was not successful in processes, she was offered post-process feedback and tips to assist her in future processes. Even at the end of her care-and-nurturing leave, the employer offered to extend her priority status for another year. She declined.

[97] This is not a situation in which the employer did not want her to return to work. It took steps to assist her in the hiring processes. It gave her every opportunity to return to work.

[98] In the end, the grievor simply gave up. She convinced herself that she would not qualify for a position, and as such, she decided not to take advantage of the extended

leave and priority offered by the employer, despite strong encouragement from both the employer and her bargaining agent.

[99] The grievor had decided that she did not want to return to work. She and her family moved to Tamworth, and her children went to schools there and in Kingston. She also started a family business, which she said had real growth potential. Her concern was not about coming back to work but about having to pay back the top-up. She considered it a penalty to pay back the money she had received.

[100] The risks were explained to the grievor. She knew them and acknowledged and accepted them. The terms of the agreement she entered into must be upheld.

[101] The employer referred me to *Cyr v. Treasury Board (Revenue Canada - Taxation)*, PSSRB File No. 166-02-27995 (19991215), [1999] C.P.S.S.R.B. No. 131 (QL), *Mirvish Enterprises Ltd. v. I.A.T.S.E., Local 822*, 2012 CarswellOnt 6679, *Canadian Blood Services v. Health Sciences Association of Alberta*, 2009 CarswellAlta 2474, *CUPE, Local 804 v. Summerside (City) (Sonier)*, 2017 CarswellPEI 38, *Commercial Credit Corporation v. Newall Agencies Ltd.*, 1981 CarswellBC 235, and *Works v. Works*, 2002 NSSC 159.

[102] The employer requested that the grievance be dismissed.

C. The grievor's reply

[103] The grievor submitted that her understanding was different from that of the LOP and the LOP knew that and did not dissuade her.

[104] The grievor submitted that:

- her personal situation is irrelevant and her family was willing to move back to Ottawa;
- she was never fully informed of the risks and had she, she would have returned to work in 2012;
- she was not aware of all the vacancies;
- it was speculation that she had convinced herself she would not qualify;

V. Reasons

[105] This grievance involves an unusual situation, albeit one in which most of the facts are largely not in dispute. In dispute is how those facts should be interpreted with respect to the severing of the employment relationship between the grievor and the employer.

[106] The jurisdiction of an adjudicator with respect to employment issues at the LOP and the HOC falls under the *PESRA*.

[107] Section 62(1) of the *PESRA* allows LOP and HOC employees to present a grievance with respect to a very wide spectrum of issues surrounding their employment relationship with their employer, which in this case is the LOP. Section 63(1) gives the Board jurisdiction to adjudicate grievances filed under s. 62(1) and reads as follows:

> ***Reference to Adjudication***
>
> . . .
>
> ***63 (1)*** *Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> ***(a)*** *the interpretation of application in respect of the employee of a provision of a collective agreement or an arbitral award,*
>
> ***(b)*** *disciplinary action against the employee resulting in suspension or a financial penalty,*
>
> ***(c)*** *the termination of employment of the employee, other than rejection on probation in respect of an initial appointment,*
>
> ***(d)*** *demotion of the employee,*
>
> ***(e)*** *where the employee has been denied an appointment, the employer's evaluation of the skill, fitness and ability of the employee with respect to the employee's qualification for the appointment, or*
>
> ***(f)*** *subject to subsection 5(3), the employer's classification of the employee, or*
>
> *and the grievance has not been dealt with to the satisfaction of the employee, the employee may refer the grievance to adjudication.*
>
> [Emphasis in the original]

[108] Other than via the death of an employee, there are two ways to sever an employment relationship: mutually or unilaterally. A mutual ending of the employment relationship in the federal public sector involves a voluntary resignation (which, depending on the circumstances, could be referred to as retirement). In a resignation situation, an employee submits a resignation notice.

[109] A unilateral severing of the employment relationship, often colloquially referred to as the "firing of an employee", "an employee being fired", "an employee being discharged", or "an employee being terminated" refers to the unilateral act of the employer in ending the employee's employment.

[110] The use of the phrase "termination of employment" in s. 63 of the *PESRA*, refers to the unilateral severing of the employment relationship between the employer (in this case the LOP) and the employee, by an act of the employer. It does not refer, in a general sense, to the mere ending of the employment relationship.

[111] The evidence disclosed that the grievor commenced her employment with the LOP in 1998 and that she filled a number of different positions, ending at the LS-3 group and level. Her last substantive position was as the PARLAMEDIA manager between 2004 and 2006. The last day she actually did any work for the LOP was in 2006 while in that position. In 2006 she moved to the HOC on assignment to fill a senior INET project manager position there. While it appears that an assignment agreement was entered into, none was entered into evidence.

[112] In 2007 the grievor had her first child and went on maternity leave from October of that year until February of 2008. In 2008, she notionally returned to work at the LOP. She "notionally" returned because she did not show up and carry out any work; she just used up other types of leave before going on parental leave. Over several days between January 28 and February 15, 2008, she and representatives of the HOC and the LOP entered into an amended assignment agreement under which her assignment was extended from August 1, 2007, to August 31, 2009.

[113] Between March and August of 2008, the grievor was on parental leave. In August of 2008, she returned to work at the HOC in the senior INET project manager position.

[114] In October of 2008, the grievor and Ms. Ghosh (at that time, the LOP's HR director) discussed the grievor giving up her substantive PARLMEDIA position. Their discussions culminated in an exchange of correspondence between them on October 20 and 28, 2008, in which the grievor told Ms. Ghosh that she would not return to her substantive position at the LOP and that she wished to continue her HOC assignment. On October 28, Ms. Ghosh confirmed that the LOP would staff the grievor's position, that she would remain on her HOC assignment, and that when the assignment ended, she would return to a position at the LOP at the LS-3 level or equivalent. The grievor agreed to this arrangement by signing the October 28, 2008, letter on November 3, 2008, and she confirmed her agreement by checking a box at the bottom of the letter that stated: "I acknowledge receipt of this notification and accept the aforementioned conditions."

[115] At a date that was not provided to the hearing, the LOP staffed the grievor's former position of PARLMEDIA manager.

[116] The amended assignment agreement was for a term of 25 months and had an end date of August 31, 2009. The evidence before me was that it was not extended. In April of 2009, the grievor went on maternity leave until March of 2010.

[117] In February of 2009, the grievor and Ms. Ghosh exchanged emails discussing the grievor's employment situation pending her maternity-parental leave with respect to her expected second child. In an email to Ms. Ghosh on February 12, 2009, the grievor confirmed that she was aware that her HOC assignment would not be renewed; as such, a question arose as to the amount of her entitlement for her maternity-parental leave allowance.

[118] By letter dated April 8, 2009, the grievor was informed of the benefits she was entitled to with respect to her maternity, parental, and care-and-nurturing leave. In accordance with the collective agreement, to be entitled to receive the maternity allowance under it, certain conditions had to be met. In addition, the grievor was required to sign an agreement and undertaking with respect to repaying the maternity or parental allowance if she did not return to work. She signed the agreement and undertaking on April 22, 2009, confirming that she had read the letter of April 8, 2009, and as well clauses 19.05 and 08 of the collective agreement and that she understood that if she did not return to work, she would be indebted to the LOP for the amount she received for the maternity and parental leave allowance top-up.

[119] In fact, the grievor did go on maternity-parental leave and did receive a maternity-parental leave allowance (a top-up). After her maternity-parental leave ended, she applied for two years of care-and-nurturing leave without pay. It was granted and commenced on June 10, 2010, and was to conclude on June 9, 2012. In January of 2012, she requested three more years of care-and-nurturing leave; the maximum that could be granted under the collective agreement was five years. The employer refused her request.

[120] In April of 2012, the conversation about extending the grievor's care-and-nurturing leave without pay restarted. It is unclear how it occurred. However, a telephone discussion took place on April 16, 2012, between the grievor and Ms. Brodie, who, at that time, was the designated person the grievor reported to. Subsequent to

that conversation, Ms. Brodie emailed Ms. Squires (the LOP's HR director) about it. The email was contemporaneous with the discussion, and the relevant portions clearly indicate that the extended leave without pay for care and nurturing would be granted on the understanding that there would not necessarily be a position for the grievor to return to and that she could well be without a job at the end of the leave. The relevant portion stated as follows:

> . . .
>
> *She was pleased to be offered the option of extending her LWOP with the understanding that she would be on a priority list for 3 years and then if no position is available she would be deemed to have resigned. She would still have to pay back the maternity top up. . . .*
>
> *I put it to her as an option that benefited [sic] us since I could staff indeterminately and an option that benefited [sic] her since it would let her stay home with her young children but it carries a risk for her. There might not be a job after 3 years and she would still owe us a fair amount.*
>
> *I gave her until May 11, 2012 to decide on her options.*
>
> . . .
>
> *I tried to be as clear as I could that should her priority status not lead to a job for which she was qualified then she would be deemed to have resigned, that it wasn't a layoff. I referred her to Jennifer to confirm exactly how much of her 5 years are left for Care and Nurturing and any other questions.*
>
> *She asked how she might find out about openings at LOP and I suggested that some months before she wishes to return she should advise me (could be HR) and we would find a way for HR to email her job openings. . . .*
>
> . . .

[121] Both the grievor and Ms. Brodie gave evidence about the telephone conversation. The only written record of it is in the April 16 email. The grievor's recollection of the discussion, when cross-examined by counsel for the employer, was not incongruent with the April 16 email or the evidence of Ms. Brodie, except for the fact that she said that she did not recall the part of the discussion about being deemed to resign.

[122] Two days later, Ms. Angus also spoke to the grievor by telephone, after which she emailed Ms. Brodie (the April 19 email), the relevant portions of which state as follows:

As promised, here is a summary of my conversation with Karen yesterday afternoon.

Her main question what [sic] was the remaining balance of Care & Nurturing she could request. I advised her that that period would be from September 1/12 to June 9/15. This would mean that she would have requested the total of 5 years as indicated in her collective agreement. Her current Care and Nurturing leave covers the period of June 10, 2010 to August 31, 2012.

Her second question was that she wished to get clarification on the risks associated with this request as you had indicated in your most recent conversation with her. I simply reiterated that the risk is that she could not be guaranteed any type of reintegration to work. Meaning, the Library of Parliament could not guarantee her a job, for which she is qualified for, at any point in time. I also confirmed with her that her priority status would be for the period of September 1/12 to August 31/15.

She also asked how she would be made aware of job openings at the Library while on priority status. I advised her that the Staffing section would have something in place to ensure that she is notified of ***all*** *job openings and that she also had a responsibility of ensuring that she advises us of any changes to her personal email account and to ensure that her resume is up to date and ready in the event that the Library of Parliament would require to review it. She seemed to think that should she wish to come back to the Library prior to June 9/15 and that a position for which she was qualified for was available that she would simply be placed in said position. I advised her that those details would need to be looked into should that situation arise. . . .*

At no time did she mention anything about layoffs or a Work Force Adjustment nor did I bring it up during the conversation.

I advised her to seek financial counselling regarding the overpayments. She also indicated that should she not return to work or should there be no position available for her at the end of her priority status, she will more than likely be repaying back said overpayments at the very end of it all either by way of a lump sum payment or instalments.

. . .

She is grateful for your May 11, 2012 deadline but she did confirm that she will more than likely be getting back to you in a few days with her final decision.

. . .

[Emphasis in the original]

[*Sic* throughout]

[123] Both the grievor and Ms. Angus gave evidence about this telephone conversation. The only written record of it is the April 19 email. The grievor's recollection of the discussion, when she was cross-examined by counsel for the employer, was not incongruent with the April 19 email or the evidence of Ms. Angus. Although she could not state with precise detail what exactly was said, she did agree that the topics reflected in the email were discussed.

[124] Shortly after Ms. Angus sent the April 19 email to Ms. Brodie, the grievor emailed Mses. Brodie and Angus and told them that as of September (of 2012), she would continue her care-and-nurturing leave without pay until June 9, 2015. Ms. Angus wrote to the grievor with respect to the extension (the August 28 letter), the relevant portion of which stated as follows:

> . . .
>
> ***REINTEGRATION FROM LEAVE***
>
> *In October 2008, while on secondment from the Library of Parliament to the House of Commons, you stated that you were not interested in returning to your substantive position (Manager, PARLMEDIA). As such, you were notified that action would be taken to fill your substantive position on an indeterminate basis. On November 3, 2008, you acknowledged receipt of this notification and accepted the conditions associated with your decision.*
>
> *Prior to the end of your first period of Care and Nurturing (June 10, 2010 to August 31, 2012 inclusively), you were notified that your services were required and were asked to return to duty at the Library of Parliament effective Tuesday, September 4, 2012. At that time, you requested an extension for the remaining allowable time of LWOP for Care and Nurturing (September 1, 2012 to June 9, 2015 inclusively). Your request was approved by Ms. Lynn Brodie on the understanding that the Library of Parliament is unable to guarantee you a position for which you are qualified at the end of this LWOP. This was reiterated during a telephone conversation with me on April 19, 2012. You will have a priority status for consideration of vacancies at the Library of Parliament for the period of September 1, 2012 to August 31, 2015 inclusively. If during this priority for reintegration period you have not been appointed to a position for which you are qualified within the Library of Parliament, you will cease to be an employee of the Library of Parliament.*
>
> . . .
>
> ***Overpayments***
>
> *Regular Pay*

> *As previously mentioned in an email sent to your attention on August 4, 2010, an overpayment occurred due to the fact that you were paid at a higher rate of pay for the period of March 18, 2010 to June 9, 2010 inclusively and it is still outstanding. The total gross amount of this overpayment is $2,160.30. On August 4, 2010 you indicated that you wished to apply the recovery method upon your return to duty. Should this not be the case or should you not return to duty, the overpayment will be recovered from any monies owed to you or a cheque can be made payable to the Receiver General for Canada. For ease of reference, a copy of the August 4, 2010 email has been attached to this letter.*
>
> *Maternity/Parental leave allowances (top-up payments)*
>
> *The total gross amount owed to the Receiver General for the allowances you received while on your maternity/parental leaves is $41,207.58. Various options for repayment of these allowances are available to you and can be discussed at greater length prior to your return to duty. However, should you not return to duty, this amount will be recovered from any monies owed to you or a cheque can be made payable to the Receiver General for Canada.*
>
> . . .
>
> [Emphasis in the original]

[125] In cross-examination, the grievor was brought to the August 28 letter, and she confirmed that she received it and understood that there was no guarantee of a job for her upon the end of her care-and-nurturing leave without pay. She also acknowledged that if she did not return to work, she would be responsible for repaying the top-up that she had received.

[126] The evidence is clear that what was agreed in April of 2012, and finalized when the grievor went on her extended three years of care-and-nurturing leave, was an agreement between her and the employer that included the potential severing of the employment relationship. The employer had indicated that she would not be granted an extension to the care-and-nurturing leave she had been on, which was to run out at the end of June of 2012.

[127] The grievor did not have a specific position to return to at the LOP as she had told it in 2008 that she did not wish to return. The difficulty occurred when the assignment was not extended. The hearing was not privy to the reasoning behind that decision. That said, the grievor had certain protections while she was on maternity-parental leave and during the first two years of her care-and-nurturing leave. This was because of a built-in protection in the collective agreement with respect to

the maternity-parental leave and because the employer acceded to her request with respect to the first two years of care-and-nurturing leave.

[128] The employer was not obligated to extend the grievor's care-and-nurturing leave, and when she initially asked it to, it refused. That said, it was prepared to allow her to remain on that leave, albeit without having to ensure that there would be a position for her when it expired. The arrangement they reached was that the employer could fill its vacant positions, and she could stay on the leave. Her risk was that there might not be a position for her to return to if she were not qualified for any of the vacant positions at or near the time she returned. She knew the risk and opted to take it.

[129] While in some of her documentary and other evidence, the grievor suggested that the lack of a position was a complete surprise to her, the documentary evidence, as well as the evidence of both Mses. Brodie and Angus, disclosed that they made her aware of the risk. While the grievor did not state that the "deemed resignation" was not discussed and her evidence was that she did not recall it, it is difficult to fathom that she would recall and confirm the discussions about the top-up repayment and not put two and two together. The top-up repayment would happen only if she did not return to work. If she knew that she would return to work, and she had or thought she had a position, there would have been no need whatsoever to discuss paying back the top-up, let alone the option for paying it in installments. These discussions, which the grievor clearly recalled having, are also set out in the documentation.

[130] The grievor also submitted that she did not know that she was required to submit to exams or oral interviews to secure a position while she was on priority status. The evidence before me clearly disclosed that she knew she had to be qualified and that all the employer was doing was giving her a priority status. It is disingenuous for her to suggest that she did not have to somehow demonstrate her qualifications to her employer, and her employer was not allowed to assess whether or not she met the qualifications for a specific position.

[131] The type of priority the grievor was given did not in any way either pre-qualify her or negate the requirement of her qualifying for a position that became available. She had to demonstrate that she had the qualifications. By 2015, when she was going

through the staffing processes, she had not actually worked in a position at the LOP for nine years; she had been away from the LOP longer than she had been there.

[132] The employer provided me with the decisions in *Commercial Credit Corporation Limited* and *Works*, with respect to the concepts of "mutual mistake" and "unilateral mistake". *Works* states as follows at paragraph 14:

> *14 He also dealt with the issue of mistake. He said: [page5]*
>
> *I find it difficult to characterize what occurred here as a case of mutual mistake as that term is understood . . . In any event, the test to be applied is set out in* Smith v. Hughes *. . .*
>
> > *If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.*
>
> *Thus as Houlden J.A. held for this court in* Walton v. Landstock Investments Ltd. *(1976), 72 D.L.R. (3d) 195 at p. 198, "Mutual assent is not required for the formation of a valid contract, only a manifestation of mutual assent . . . Whether or not there is a manifestation of mutual assent is to be determined from the over*[t] *acts of the parties.". . .*
>
> . . .
>
> *In cases of unilateral mistake, if the unmistaken party is ignorant of the other's mistake the contract is valid in law . . . .*

[133] Clause 19.10 of the collective agreement provides for care-and-nurturing leave, which is granted subject to operational requirements. The employer granted the grievor two years of that leave, which was to end on August 31, 2012. She requested that it be extended for another three years, which the employer refused. However, it was prepared to grant the leave on the understanding that the position that she would have returned to in 2012 had been filled, without risk to it, meaning that the risk transferred to her. In short, she gave up her guaranteed position. The employer did not terminate her from it. The parties reached an arrangement in which she secured an additional three years of care-and-nurturing leave on the understanding that if she did not apply for and successfully obtain a new position at the LOP (albeit, she was on a priority list), she would be without employment.

[134] The evidence is abundant that there was a very real inherent risk if the grievor took the employer's offer of extending the care-and-nurturing leave. She was well-aware of the risk and chose to ignore it. In her evidence before me, she clearly indicated that she knew that she had to be qualified for positions and that the employer would determine if she was qualified. What she failed to consider was that perhaps she would not qualify for one, which she as much said in her evidence.

[135] I am also skeptical of the grievor's intentions in attempting to secure a vacant position. Ms. Montcalm's evidence was that on average, between 40 and 55 vacancies came up per year at the LOP. The evidence disclosed that while there was a time in which the grievor did not receive notifications of postings, she started to apply for positions only after Ms. Angus contacted her in March of 2015, after almost three years since the extension of the leave. The grievor applied for only four positions during her priority status, none of which she was found qualified for. Indeed, she did apply for a fifth position, which she also did not qualify for. In four of the five applications, she was offered the option of a post-process debrief, which she declined.

[136] The grievor was also offered an extension to the priority period of a further year, which could well have yielded a position. Astonishingly, she turned it down. It certainly had no downside as she would still have been an LOP employee, albeit without a salary, and she could still have applied to internal job postings with a priority status if she qualified for them and would not have had to pay back the top-up (at least for another year or potentially ever, if she secured a position). The position she took left her without employment and having to pay back the top-up. In turning down the option, she stated in an email on September 23, 2015, to Ms. Squires that the protracted chaotic process had thrown her professional and personal life into considerable disarray. There is absolutely no evidence of it, as she had been on one form of leave or another at her behest for close to 6½ years. The process of competing for jobs took place between March and June of 2015, which was a relatively short span of 3 months.

[137] This, coupled with the fact that the grievor attempted to negotiate an assignment under which she would have worked for her husband's sole proprietorship, a nursery in Tamworth, at which she was already working, further suggests to me that she was not serious about returning to work. It could not in any way be considered as federal public sector employment and most certainly would have been a sham.

[138] This brings me back to s. 63(1) of the *PESRA*. While s. 62 provides that an employee may grieve almost anything about the terms and conditions of his or her employment, ss. 63(1) circumscribe the grievances that can be heard by an adjudicator under the *PESRA* at adjudication. The grievor referred her grievance to adjudication under s. 63(1)(c), alleging a termination of employment, meaning that the employer unilaterally ended the employment relationship. As I have found that it did not unilaterally sever the employment relationship but instead that it was severed by her resignation. I do not have jurisdiction. Therefore, the grievance is dismissed.

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

(The Order appears on the next page)

VI. Order

[140] The grievance is dismissed.

July 27, 2020.

John G. Jaworski
adjudicator