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

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

BETWEEN

RICHARD BOUCHER, PIERRE LAFRANCE, AND JEAN-LOUIS LUSSIER

Grievors

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

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

In the matter of individual grievances referred to adjudication

Before: Steven B. Katkin, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievors: Goretti Fukamusenge, Public Service Alliance of Canada

For the Employer: Andréanne Laurin, counsel

Heard at Montreal, Quebec,
November 30, 2017, and September 12 and 13, 2018.
(FPSLREB Translation)

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Individual grievances referred to adjudication

[1] Richard Boucher, Pierre Lafrance, and Jean-Louis Lussier ("the grievors") worked for the Canada Border Services Agency ("the employer" or CBSA) as investigators in the Criminal Investigations Division in positions classified at the FB-05 group and level. They were subject to the collective agreement between the Treasury Board and the Public Service Alliance of Canada (PSAC) for the Border Services Group that expired on June 20, 2014 ("the collective agreement").

[2] On August 27, 2012, the grievors filed identical grievances against their employer, alleging that it denied them alternation under Appendix C of the collective agreement, which involves workforce adjustments (WFAs).

[3] As corrective action, the grievors asked that the employer provide them with the opportunity to alternate.

[4] In its response at the final level of the grievance process on November 8, 2013, the employer acknowledged that it had violated provisions of the collective agreement in that the reasons it refused to consider the alternation should not have been cited and that the grievors should be offered the opportunity to alternate. The response indicated that the employer adopted the position after an arbitral award was issued in April 2013. Although it was not specified in the response, it was a decision on a policy grievance, *Public Service Alliance of Canada v. Treasury Board of Canada*, 2013 PSLRB 37 ("*PSAC*"; judicial review application dismissed in 2014 FC 688).

[5] It is appropriate to reproduce excerpts from the final-level response, as follows:

> [Translation]
>
> …
>
> *As corrective action, you ask that the employer participate in the alternation process and that it provide you the opportunity to alternate. You seek full redress.*
>
> …
>
> *I note that in fact, management did refuse to consider the proposed alternation, for a number of reasons. Management acted in good faith at the time; there were no indications that the decision to deny the alternation was contrary to the WFAA.*

> *However, a Public Service Labour Relations Board (PSLRB) decision issued in April 2013 about alternation stated that the reasons for which the CBSA refused to consider the alternation should not have been cited.*
>
> *Due to that decision, I messaged Canada Border Services Agency (CBSA) senior management and reported on the PSLRB's decision. In short, I advised my colleagues that they had to consider and allow employees to participate in alternation unless the situations or the reasons identified for refusing the alternation were consistent with those outlined in that decision.*
>
> *I recognize that although it was done in good faith, the CBSA violated the collective agreement's alternation provisions.*
>
> *Therefore, my view is that the CBSA must participate in the alternation process and offer you the opportunity to alternate.*
>
> *Consequently, your grievance and the corrective actions are granted, within the previously stated limits.*

[6] The grievances were referred to adjudication on November 20, 2013. In the adjudication referral form, Form 20, the grievors alleged age discrimination, contrary to the provisions of article 19 of the collective agreement and the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*).

[7] I note that the discrimination allegation was not part of the wording of the grievors' grievances but that it was included in the referral to adjudication. Since the parties did not raise it, I need not address it.

[8] On December 10, 2013, the grievors gave notice to the Canadian Human Rights Commission (CHRC) under s. 210 of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) that the grievances raised an issue related to interpreting or applying the *CHRA*, namely, age discrimination. In a letter dated December 19, 2013, the CHRC informed the Public Service Labour Relations Board that it intended to make submissions with respect to the grievances. However, on September 22, 2016, the CHRC informed the Public Service Labour Relations and Employment Board that it did not intend to make submissions.

[9] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board to replace the former Public Service Labour Relations Board as well as the former Public Service Staffing Tribunal.

On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84.) Pursuant to s. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *PSLRA* before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

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

II. Summary of the evidence

[11] The grievors testified for themselves. Bruno Loranger, a labour relations officer for the Customs and Immigration Union (CIU), a component of the PSAC, and Daniel Paquette, a union representative, also testified for them. The employer called to testify Josée Deschamps, its human resources director for its Quebec region, and Jean-Paul Bergeron, its executive director for its Quebec region.

[12] To place the grievances in this case into context, I have reproduced the following excerpts from a decision involving the same bargaining agent, the same employer, and the same collective agreement, *Legros v. Treasury Board (Canada Border Services Agency)*, 2017 FPSLREB 32, as follows:

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

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

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

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

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

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

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

[13] In other words, when an opting employee's position is at the point of being eliminated, the alternate yields his or her position and agrees to leave the public service in exchange for compensation, such as the transition support measure, which is

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

[13] Appendix C of the collective agreement defines an opting employee as follows:

> …
>
> ***Opting employee*** *… is an indeterminate employee whose services will no longer be required because of a workforce adjustment situation, who has not received a guarantee of a reasonable job offer from the deputy head and who has one hundred and twenty (120) days to consider the options in section 6.3 of this Appendix.*
>
> …

[14] Clause 6.1.3 of Appendix C of the collective agreement provides the following:

> ***6.1.3*** *The opting employee must choose, in writing, one (1) of the three (3) options of section 6.3 of this Appendix within the one hundred and twenty (120) day window. The employee cannot change options once he or she has made a written choice.*

A. For the grievors

1. Mr. Loranger

[15] Mr. Loranger's responsibilities include analyzing grievances and presenting them to the employer at the final level of the grievance process. He represented the grievors for that purpose. According to him, the employer did not respect the directives and discriminated against the grievors based on their ages, since they had retired.

[16] It is worth noting that according to the evidence, the grievors retired after filing their grievances and before the employer responded at the final level.

[17] Mr. Loranger advised Mr. Boucher to make a discrimination complaint with the CHRC and to inform Mr. Lussier and Mr. Lafrance of it. In an email dated September 10, 2013 (Exhibit S-1-7), Mr. Boucher informed Mr. Loranger that he had made his complaint the same day and that Mr. Lussier and Mr. Lafrance would make complaints.

[18] Mr. Loranger said that he advised the grievors as much because he was responsible for a similar file involving an alternation in which the grievance alleged age discrimination.

[19] After the employer's response at the final level of the grievance process on November 8, 2013, Mr. Loranger emailed Myriam Allard, with the employer, on November 28, 2013 (Exhibit S-1-6), asking what the employer would do to allow the retired grievors to participate in alternation. Ms. Allard's response on December 10, 2013, stated that the employer had not been informed that Mr. Boucher had retired and that because he no longer occupied a public service position, he was no longer eligible for alternation.

2. Mr. Boucher

[20] Mr. Boucher indicated that according to a message from the CBSA's vice-president of human resources dated June 26, 2012 (Exhibit S-9), as part of the WFA, on April 11, 2012, letters were sent to employees, informing them that their positions were affected. That triggered the 120-day reflection period for the opting employees to consider the options set out in clause 6.3 of Appendix C of the collective agreement and to participate in alternation. Therefore, the 120-day period ended on August 8, 2012.

[21] The grievors posted their positions as being available for alternation as alternates on two alternation websites, the CBSA's site and a general Canadian government interdepartmental site, GC Forums. Mr. Boucher registered on the first site on April 17, 2012, and on the second on April 18, 2012. He had to inform his immediate supervisor and management before registering.

[22] Mr. Boucher filed his grievance because he believed that his rights had been infringed by the employer's refusal to allow him to participate in alternation, and he was convinced that the refusal was due to his age, which was 55 with approximately 32 years of service. According to him, the managers were very familiar with the grievors, their experience, and their age group.

[23] In that respect, Mr. Boucher referred to a union-management meeting that took place on May 15, 2012, which he did not attend. But the union representative, Mr. Paquette, attended and reported the minutes to Mr. Boucher. Management members included Lorraine Frigon, Director, Enforcement Division. Mr. Paquette named the grievors and reported that they had registered on two websites as alternates. Ms. Frigon allegedly then said that if they wanted to retire, they should, and that they would not be compensated. When that was reported, Mr. Bouchard became aware that his age was a factor in the employer's refusal to allow him to participate in alternation.

[24] After registering as an alternate, Mr. Boucher received emails and telephone calls from opting employees about his position. Throughout the process, he received no contacts from opting employees inside the CBSA. Early in the process, four external opting employees working for Citizenship and Immigration Canada (CIC) in the immigration area contacted him; their positions were at the PM-05 group and level. According to Mr. Boucher, one of the applicants withdrew. Applicants had to send their CVs to Robert Langlais, Director, Criminal Investigations Division, Quebec Region. Mr. Boucher said that Mr. Langlais was receptive to alternation and knew that the grievors had registered on the websites as alternates.

[25] Referring to his notes (Exhibit S-15), Mr. Boucher said that at a team meeting, their team lead, Sylvie Thibeault, informed them of nine vacant investigator positions in the Criminal Investigations Division apart from those of the grievors and stated that there was no movement in that respect. According to Mr. Boucher, no one had occupied the vacant positions for 120 days, and no CBSA internal opting employees had sought the grievors' positions.

[26] Mr. Boucher said that as indicated in a message to all CBSA employees about changes to the Security Screening Program (Exhibit S-16), as of June 28, 2012, the CBSA had implemented an Integrity and Professional Standards Strategy (IPSS). As part of it,

applicants from other organizations were subject to additional background checks and integrity assessments. The IPSS's first phase was aimed only at internal CBSA employees with respect to renewing or raising their security clearances.

[27] As an example, Mr. Boucher referred to a CBSA job opportunity advertisement with an FB-08 classification of October 4, 2012 (Exhibit S-7), which stated that candidates from other organizations would be subject to the IPSS's requirements. He also referred to a job opportunity advertisement for FB-05 investigator positions of June 2, 2012 (Exhibit S-8), which did not include the IPSS's requirements.

[28] In a letter to all employees dated July 23, 2012, the regional director general for the Quebec Region, Benoît Chiquette, announced that the CBSA was prepared to proceed with alternations. The grievors then requested a meeting with Johanne Russell, who had replaced Mr. Langlais on an acting basis, to find out whether the CBSA would offer alternation to the opting CIC employees who had applied for the grievors' positions.

[29] The meeting took place on July 26, 2012. Ms. Russell told them that the CBSA would not participate in alternations with those applicants because since the investigator position required a "secret" clearance, there was insufficient time to consider and evaluate their applications before the end of the 120-day period on August 8, 2012. In addition, even if the CIC applicants had a "secret" clearance, it was incompatible with the CBSA's "secret" clearance.

[30] In an 11-page letter to Diane Lacombe, the CIU's president, Montreal Branch, dated July 26, 2012, Mr. Boucher reported on the alternation situation and the meeting with Ms. Russell. On August 3, 2012, Ms. Lacombe forwarded the letter to Mr. Bergeron for a response, as he was the regional WFA committee's president.

[31] Mr. Bergeron replied the same day. He provided several reasons that the CBSA could not consider the CIC applicants, including the following: the time frame was restricted; before making them alternation offers, they had to meet certain employment conditions; they had to have a security clearance that met the positions' requirements; they had to pass the CBSA's required control and defensive tactics training; they had to meet a certain level of health assessment for the purposes of weapons training; and they had to pass a psychological examination to carry a service

firearm and the 17-day weapons training. According to Mr. Boucher, after August 8, 2012, the CBSA contacted the CIC people to inform them of the contents of Mr. Bergeron's letter.

[32] Mr. Boucher said that when he registered as an alternate in April 2012, the CBSA did not inform him that new security conditions would be imposed.

[33] In January 2012, Mr. Boucher met with Sylvie Paquette, his supervisor, about his performance evaluation for December 1, 2011, to February 19, 2012. As stated in part 4 of the performance management form (Exhibit S-14), which contained the supervisor's comments, at the meeting, Mr. Boucher informed her that he was thinking of retiring during the next fiscal year (2012-2013) but that he had not yet chosen any date in particular. It was then agreed that he would no longer be assigned new investigation files but instead would finish the active files and would help the other investigators.

[34] Mr. Boucher retired on October 12, 2012, to care for his father. He had 2.5 years to go to reach 35 years of service. He would have taken transition support measures by offering his position to someone who was in mid-career, which would have compensated for the less-than-35 years of service.

[35] In cross-examination, Mr. Boucher said that when the 120-day period expired, the grievors left their names on the websites as alternates. One or two people called Mr. Boucher, but after he described the working conditions, they did not follow up.

[36] In April 2012, Mr. Boucher sent an email about the 120-day period to a CIC human resources advisor, who confirmed that for opting employees, alternation could be done only within that period (Exhibit E-1). The same information was in Mr. Bergeron's August 3, 2012, letter.

[37] With respect to him registering as an alternate on the CBSA's internal website (Exhibit S-3), Mr. Boucher said that he did not add the paragraphs entitled, "[translation] other conditions" and "[translation] description" on page 3. He added the paragraph "[translation] other conditions" on page 5.

[38] When asked whether before the IPSS was announced on June 28, 2012, the CBSA recognized other organizations' "secret" clearances, Mr. Boucher replied that he

understood that the “secret” clearance was uniform and stated that he had worked with other departments, mainly the Royal Canadian Mounted Police (RCMP).

[39] In re-examination, Mr. Bouchard said that his manager did not tell him that his “other conditions” text on the CBSA’s website was not up to date. She was aware that he was registered as an alternate and that he had prepared the text.

[40] According to Mr. Boucher, with respect to the June 2, 2011, announcement of a job opportunity for an investigator, the employment conditions did not have to be met before beginning to work at the CBSA. Those chosen were informed that they had to meet the conditions. Training was in place that only the CBSA provided, such as control and defensive tactics. Mr. Boucher referred to a paragraph in the job opportunity advertisement that mentioned the condition of carrying a firearm and that stated, “[translation] you agree to qualify”. No indication was made that the person had to be qualified before joining the CBSA.

3. Mr. Lussier

[41] Mr. Lussier began his career in 1988 at Revenue Canada - Customs and Excise, and at that time, he held an enhanced reliability clearance. When he joined the CBSA in 2002, he had to obtain a “secret” clearance. At the time, CBSA officers were not armed. Mr. Lussier had to qualify in first aid, including cardiopulmonary resuscitation and control and defensive tactics. He was not required to qualify in advance.

[42] When the WFA was launched in April 2012, Mr. Lussier was 64 years old, with more than 24 years of service. In 2010, he underwent a surgical intervention, and he followed the treatments. He also had to look after his parents. He registered as an alternate on May 22, 2012. He saw alternation as an opportunity to give someone else a chance.

[43] When Mr. Lussier went on vacation in July 2012, Mr. Langlais asked him to leave his contact information with him so he could contact him, since the alternation could happen very quickly.

[44] Mr. Lussier said that unofficially, everyone at the CBSA knew that he was retiring. In October 2012, when Mr. Langlais’s assistant sent him the form to update his security clearance, he stated that he would leave in March 2013. He formalized it

when he wrote to Mr. Langlais that October and stated that he would retire on March 28, 2013.

[45] At a meeting with the grievors, Ms. Russell told them that no alternations would happen because the opting employees did not meet CBSA standards. Mr. Lussier understood that it was about firearms and the "secret" security clearance. To him, the reasons were more-or-less valid. In the Criminal Investigations Division at the time, many of the investigators were not armed, since frontline officers at the border had priority. Only two or three investigators per year were sent to qualify.

[46] Mr. Lussier saw the CV of one of the opting CIC employees and called her to find out whether she had spoken with Mr. Langlais to express her interest, which she confirmed. He found that she would be a good candidate, but it was not the grievors' role to evaluate candidates.

4. Mr. Lafrance

[47] Mr. Lafrance retired on July 31, 2013, at 57 and after 35 years of service. He believed in the WFA but filed his grievance because he felt that the rules of the game had not been respected. According to him, the qualifications of the opting employees had to be close to those of the grievors, but the employees did not have to satisfy all employment conditions in advance.

[48] The CBSA had been made verbally aware of his retirement date. It was understood that he would stop working after 35 years of service and that it was clear that he would reach 35 years in July 2013.

[49] Mr. Lafrance registered as an alternate on April 12, 2012. He wrote the work description for the position next to his name on the CBSA's internal website. He had a "top-secret" security clearance because he was a computer-search and evidence-recovery specialist. The opting employee who would have occupied his position would have taken on his investigator duties but not his specialist duties.

[50] Mr. Lafrance had a telephone discussion with one of the opting CIC employees who wanted more information on the work and on what she had to do to show her interest.

[51] Mr. Lafrance last consulted GC Forums in the fall of 2012 because he had lost faith in the system due to how the CBSA had conducted itself. After the meeting with Ms. Russell and Mr. Bergeron's message, the grievors saw that no one would be able to occupy their positions under such a specific context.

[52] With respect to the impact of not having been able to participate in alternation, Mr. Lussier said that since he was no longer able to perform his duties, the employer told him to find another position. Alternation would have relieved him of the stress of changing jobs while helping someone else. In addition, the transition support measures would have helped his family.

[53] In cross-examination, with respect to qualifications to be met in advance, Mr. Lafrance said that in his time, the language test and control and defensive tactics training took place after the person was selected. If the selected person did not meet the requirements, depending on which one, they sometimes received a second chance but otherwise had to leave the position. For him, as he no longer met the norms of his position, he had to leave his job.

[54] With respect to his retirement, Mr. Lafrance acknowledged that he had told the employer of his intention to retire and that the employer had not assumed it.

5. Mr. Paquette

[55] Mr. Paquette participated in the grievors' case as a union representative before their grievances were filed. He sat on the Montreal Branch of the CIU's executive committee.

[56] On April 10, 2012, the director general on an acting basis, Bernard Brie, and Mr. Bergeron sent a joint message about the impact of the Deficit Reduction Action Plan (DRAP) on the Quebec region. On April 11, 2012, Mr. Langlais said that the Criminal Investigations Division would not be affected. On April 13, 2012, at a union-management meeting of the division, alternation was discussed. Retirements were also on the agenda. Before the meeting, at least two investigators had retired from the division, and several had retired before February 2012. The division had at least eight vacant positions.

[57] At the May 15, 2012, union-management meeting, Ms. Frigon said that the Criminal Investigations Division was not affected by the WFA from the personnel perspective. The directors of each division attended, including Mr. Langlais, as did union representatives from different divisions. Mr. Paquette informed her that three investigators had registered as alternates and that three people from another department, of whom Mr. Langlais was aware, wished to exchange jobs with the three investigators. Mr. Paquette said that the three opting employees were experienced people and that they would adjust easily. He reminded Ms. Frigon of the alternation directive in clause 6.2 of Appendix C of the collective agreement, in which all departments had to participate. He asked what was preventing the alternation.

[58] Ms. Frigon said that she was not there to spend money but to save it and that she would not take people from other departments. She said that if they wanted to retire, they should, but that they should not expect to receive a cheque.

[59] In cross-examination, Mr. Paquette said that he believed that the alternation had to be done during the 120-day period for both the opting employees and the alternates.

[60] Ms. Frigon commented that she was not there to spend money after Mr. Paquette had presented the grievors' alternation with the opting employees. According to him, the budget for vacant positions had been allocated but had not been used for alternates, which had created a surplus.

[61] Mr. Paquette stated that Ms. Frigon's comment that the investigators should retire was aimed directly at the grievors, since they had just spoken.

B. For the employer

1. Ms. Deschamps

[62] Ms. Deschamps was the WFA resource person and point of contact. She was a member of the management committee and, in the WFA context, of the union-management committee called the "[translation] advisory committee", which consisted of the executive director, two directors of the management committee, including Ms. Frigon, Ms. Deschamps, and four union presidents from the Quebec region, including Ms. Lacombe. The role of the advisory committee, which was constituted after April

2012, was to review the cuts and options for minimizing negative impacts on CBSA employees.

[63] As part of the WFA, the CBSA had to eliminate 114 positions in the Quebec region. The positions had been identified, and employees were to be enticed to leave, voluntarily or involuntarily. Instead of directly eliminating positions, the CBSA declared employees affected. Out of the 2000 employees in the region, 263 were declared affected, which allowed 114 positions to be eliminated. It meant that the CBSA did not have to declare opting employees; no employee left the CBSA involuntarily. Employees had the option of leaving on a three-year plan with transition support measures. According to the plan, the CBSA indicated the position number with the employee's departure date. The plan was sent to headquarters for approval in early July 2012; once it was approved, the CBSA was able to proceed with other measures. A hiring freeze was put in place, and a position could not be staffed without headquarters' approval.

[64] For alternation, the 120-day period applied to the opting employee. Asked whether the CBSA was able to proceed with alternation before Mr. Chiquette's July 23, 2012, letter, Ms. Deschamps replied that it was difficult, because the CBSA had not met all its obligations, which had to be done before proceeding with alternation.

[65] It was not possible for the grievors and the opting CIC employees to effect an alternation, since the 120-day period was to end on August 8, 2012. It was impossible for the opting employees to meet all the employment conditions to proceed with the alternation before that date. The process for obtaining a "secret" security clearance took 8 months, and the CBSA did not recognize that clearance from other departments. The CBSA carried out one part of the process; the RCMP conducted another. Opting employees had to hold a "secret" clearance before proceeding with alternation.

[66] Referring to the list of employment conditions for investigators in Mr. Bergeron's August 3, 2012, letter, Ms. Deschamps said that the control and defensive tactics training took eight days and that it was not provided regularly. A set period was in place to cover a doctor's appointment for the medical checkup for the purposes of weapons training. The first-aid qualification also had to be met before alternation.

[67] Ms. Deschamps testified that if an unarmed position became an armed position, the employee occupying it had 10 years to qualify for carrying weapons. However, in appointments, promotions, or transfers to armed positions, the employees had to be already qualified.

[68] Ms. Deschamps said that one of the opting CIC employees, who was unable to reactivate her "secret" clearance during the 120-day period, chose the surplus-priority-employee option for 12 months; she was able to take the training and worked at the CBSA in spring 2013.

[69] Ms. Deschamps did not know the grievors during the relevant period.

[70] In cross-examination, Ms. Deschamps said that she was unaware of the grievors' cases because at her level, she did not work based on employee names, since the directors had the names. She said that the grievors might have emailed her but that she received hundreds of emails.

[71] She said that the list of positions to be eliminated in the region had come from headquarters. As for the possibility of alternation before July 23, 2012, Ms. Deschamps said that regional management had not yet shown that it could fulfil its plan with the 263 affected employees and that there could be a second wave. Management made some adjustments between April and July 2012.

[72] Asked whether the CBSA could make a conditional employment offer, Ms. Deschamps replied that it could but that the person could not be appointed to a position before meeting all employment conditions. In this case, the opting employees did not have enough time to meet all the conditions.

[73] With respect to the IPSS, Ms. Deschamps said that it changed the search criteria for security investigations, such as forms, but not security clearances. The "secret" clearance remained. If someone left the CBSA and returned within 90 days, the security clearance could be reactivated.

[74] As for the date of the letters from the opting employees, for the CBSA, the 120-day period's end date was August 8, 2012, but the dates differed for other departments. As for the difficulty of proceeding with alternation in the region, Ms. Deschamps said that there was a difference between telling employees that there

would be no alternation and telling them that they met their needs and later that there would be alternation. With respect to communicating with employees, they registered on websites established by the employer and could speak with their managers or their union representatives.

[75] Ms. Deschamps said that even though one of the opting CIC employees had worked at the CBSA and had met several of the employment conditions, the position she occupied then was unarmed, and she did not have the weapons qualification.

[76] In re-examination, Ms. Deschamps specified that conditional employment offers did not apply to alternation. According to the WFA, the employment conditions had to be met when the alternation took place.

2. Mr. Bergeron

[77] Mr. Bergeron's role as executive director was to support the regional director general and the director of operations. He was responsible for the WFA at the regional level, and he and Ms. Deschamps were the resource persons for the Quebec region with headquarters.

[78] Mr. Bergeron was informed of the action plan at meetings in Ottawa in January 2012. The impact on the region was that about 100 positions had to be eliminated over a 3-year period, but the decisions had to be made during the first year.

[79] Even though his August 3, 2012, letter was addressed to Mr. Boucher, Mr. Bergeron said that the three grievors were affected. Mr. Bergeron was responsible for determining whether alternation could proceed, subject to headquarters' approval. Ms. Frigon was a member of the advisory committee, but she had no influence on alternation decision making.

[80] Mr. Bergeron said that he wrote his August 3, 2012, letter to the grievors to inform them of why the alternation could not take place. First, time was restricted because the CIC employees had received affected-employee letters before the CBSA letters. They had to make their choices within the 120-day period, which was to end on August 8, 2012. Then, each department had its security clearances, and it took 6 to 8 months to obtain the CBSA's "secret" clearance. The control and defensive tactics training took 7 days and was held at the CBSA's training centre in Rigaud, Quebec. For

the medical checkup for weapons training purposes, employees could go to their own doctors. A 1-month period was in place for the psychological examination for carrying a duty firearm. The weapons training took 17 days. The language-training condition did not have to be met in advance. Therefore, it was impossible to meet the employment conditions within that time frame. No conditional employment offers were made.

[81] Mr. Bergeron said that negotiation was attempted with headquarters to reduce the number of employees who would have to leave involuntarily, and awareness was needed of the employees that would have transition support measures. The goal of the CBSA's Quebec region was to save the jobs of as many employees as possible. Consequently, it did not reach the alternation stage.

[82] Mr. Bergeron knew the grievors well and would have been happy to allow them to leave with alternation, but he could not do it for the reasons he explained.

[83] With respect to weapons training, an employee occupying a position that became an armed position had 10 years to qualify, while new recruits had to have taken the training before obtaining an armed position.

[84] In cross-examination, Mr. Bergeron said that the headquarters WFA committee made alternation decisions. CBSA headquarters and its regions had weekly conference calls. Mr. Bergeron also regularly travelled to Ottawa as part of the WFA. He said that he was confident that the cases of the grievors and the opting CIC employees had been discussed with headquarters and the CIC. Mr. Bergeron reviewed the files of the three opting CIC employees. Alternation would have occurred had they had the qualifications, but they did not meet the requirements. They did not have enough time left to meet the requirements in advance.

[85] When asked why the CBSA could not have launched the training for the opting CIC employees as of April 2012, Mr. Bergeron said that the affected employee letters had been given to 263 employees and that between 100 and 125 positions had to be eliminated. Significant negotiation had occurred with headquarters to reduce the number of positions to eliminate. Therefore, alternation could not have been done in April 2012, and even had it been possible, the opting employees would have been unable to meet the requirements for the investigator positions within the time frame.

[86] Mr. Bergeron said that it was quite likely that he discussed the grievors' cases with Ms. Frigon and that he informed her about his August 3, 2012, letter before sending it. However, he could not recall her reaction.

[87] Mr. Bergeron repeated that each organization had its own security clearances and carried out its own investigations. Only one of the three opting employees had already worked at the CBSA, and it was possible that that person's security clearance was still valid, but that was not the only requirement that the opting employees had to meet before proceeding to alternation.

III. Summary of the arguments

A. For the grievors

[88] The grievors expressed their interest in participating in alternation; they registered on the CBSA's and the GC Forums websites and continued to follow up with the CBSA. Mr. Paquette's testimony about Ms. Frigon's comment that if the grievors wanted to retire, they should, was not contradicted.

[89] According to the employer, headquarters had the alternation decision-making authority. Ms. Deschamps testified that it was difficult to meet the requirements of the investigator position within the time frame, and Mr. Bergeron said that it was impossible. No headquarters witnesses appeared to clarify some issues.

[90] The grievors raised the question of why the CBSA could not participate in alternation according to the collective agreement. Although Mr. Chiquette issued the July 23, 2012, letter stating that the CBSA was prepared to proceed with alternation, he did not testify. Mr. Langlais was involved, but did not testify.

[91] With respect to the discrimination allegation, the grievors argued that they possess a characteristic protected by the *CHRA*, i.e., age, and that they experienced the adverse effect of being excluded from alternation. According to them, their ages were a factor because the employer knew that they were to retire, and in that respect, they referred to Ms. Frigon's comments. The employer did not pay attention to the grievors' cases for the sole reason that they were to retire. They argued that on a balance of probabilities, age was a factor in refusing them alternation, and that the employer had the burden of justifying its conduct. To support that argument, the grievors cited the

following decisions: *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, [2017] 1 SCR 591; *Chênevert v. Treasury Board (Department of Agriculture and Agri-Food)*, 2015 PSLREB 52; and *Martel v. Hôtel-Dieu St-Vallier*, 1969 CanLII 3 (SCC), [1969] SCR 745.

[92] The grievors then addressed the issue of whether the employer had unreasonably refused to apply alternation, in violation of the collective agreement.

[93] The grievors stated that the employer, i.e., the Treasury Board, was responsible for implementing the alternation program. The Treasury Board is responsible for departmental operations, and it has the authority to initiate programs and to ensure their implementation. To support that argument, the grievors referred to *PSAC*, at para. 21, and to *Santawirya v. Deputy Head (Canada Border Services Agency)*, 2017 FPSLREB 10 at para. 245 (judicial review application allowed in 2019 FCA 248).

[94] Regardless of when the 120-day period began, the department should have been ready for the alternation program; see *PSAC*, at paras. 28 to 30.

[95] The employer's excuse of not being prepared to proceed with alternation was not valid; see *PSAC*, at para. 33.

[96] Mr. Chiquette's July 23, 2012, letter stated that management controls the alternation process and that the decision to proceed with it is up to management. The grievors argued that the employer should have reviewed their cases between April and July 23, 2012. Management must exercise its authority reasonably; see *Chênevert*, at paras. 149 and 150, and *Legros*, at para. 66.

[97] As a corrective measure, the grievors asked to be restored to the position they could have been in had the employer granted alternation.

[98] Each grievor asked for $25 000 in damages for the employer's discriminatory effect on him.

[99] The grievors referred to paragraph 44 of *PSAC*, where the adjudicator concluded as follows:

> *[44] … I conclude that the only situation in which a department could block a proposed alternation (other than the situations expressly provided for in the WFAA) would be where the intended alternate had already given notice of resignation or retirement to*

> *be effective at some specific date and where the department had taken the decision not to fill the position once vacated.*

[100] The grievors pointed out that in this case, the second condition was not met.

[101] They asked that if I find that the employer acted unreasonably, they be granted the payment of transition support measures, with interest. Also, each asked for compensation of $20 000 for the employer's deliberate refusal to allow alternation.

[102] I note that the parties adduced the National Joint Council's *Work Force Adjustment Directive* (WFAD).

B. For the employer

[103] The employer began its argument with an overview of the facts.

[104] The grievances allege violations of article 19 of the collective agreement, on discrimination, and clause 6.2 of Appendix C of that agreement, which deals with alternation.

[105] Between mid-April and the end of May 2012, the grievors registered as alternates on the CBSA's internal website and the interdepartmental website GC Forums. No internal CBSA employees contacted them.

[106] On July 23, 2012, the employer issued a letter to employees advising them that the CBSA was prepared to proceed with alternation.

[107] The CVs of the three affected CIC employees who offered to be opting employees were submitted to Mr. Langlais, but Mr. Bergeron received them only after the July 23, 2012, letter. The opting employees had registered on GC Forums.

[108] On August 3, 2012, the employer gave the grievors a letter explaining its refusal to proceed with alternation. The time frame was too short to meet the required conditions to fill the investigator positions. Mr. Bergeron and Ms. Deschamps said that the conditions were mandatory in advance, except for the language requirement. They testified that there was no way for the opting employees to obtain the required security clearance and to meet all the training requirements before the August 8, 2012, deadline. They said that making a conditional employment offer was not possible (see clause 6.2.6 of Appendix C of the collective agreement). Mr. Bergeron reviewed the CVs

of the three CIC employees and said that if not for the requirements, the alternation could have taken place.

[109] The grievors filed their grievances on April 27, 2012, and retired on the following dates: Mr. Boucher on October 12, 2012, Mr. Lussier on March 28, 2013, and Mr. Lafrance on July 31, 2013. The grievors said that they were personal decisions.

[110] The employer argued that these are the issues: 1) Were the grievors subjected to *prima facie* discrimination based on age? 2) Did the employer have reasonable grounds to deny alternation?

[111] In terms of discrimination, the *prima facie* burden of proof rested with the grievors. If they met that burden, then the employer would have had to offer a reasonable explanation (see *Pelletier v. Canada (Armed Forces)*, 1997 CanLII 24745 (CHRT) at para. 78). The employer argued that the grievors did not meet the burden of proof.

[112] The DRAP was imposed on all departments, and the WFAD was part of the collective agreement. According to *PSAC*, the employer may be justified refusing alternation in one of these two ways: 1) if the alternate provides a specific retirement date and the alternate's position is eliminated, or 2) the opting employee does not meet the position's requirements. This case involves the second situation; namely, the opting employees whom the grievors proposed did not meet the position's requirements, according to Mr. Bergeron's analysis.

[113] The employer's decision to deny alternation was made in good faith even before the *PSAC* decision. Clauses 6.2.4 and 6.2.6 of Appendix C of the collective agreement state that the opting employee must meet the requirements of the alternate's position and that management decides whether the opting employee meets those requirements.

[114] In this case, due to the opting employees' remaining time during the 120-day period in which the employer had to proceed with alternation, it was not possible for them to complete the required training before the time expired.

[115] With respect to the grievors' argument that the employer should have been prepared to proceed with alternation, the employer pointed out that discussions were held about trying to limit the WFA's impact on employees by proceeding with

voluntary departures. Mr. Bergeron examined the opting employees' requests during the 120-day period, but they could not obtain a "secret" security clearance within the time frame. Also, clause 6.2.8 of Appendix C of the collective agreement states that alternation must take place on a given date and cannot be done at a future date. The employer could not allow the grievors' grievances after the decision at the final level of the grievance process, since they no longer occupied their public service positions.

[116] As for the possibility of offering conditional employment when the training required as part of the WFA was completed, the employer stressed that had the training been unsuccessful, the CBSA would have had to deal with employees incapable of exercising all the duties of their positions. That would have led to additional costs and would not have contributed to WFA objectives.

[117] With respect to the weapons qualification, Ms. Deschamps and Mr. Bergeron testified that employees occupying positions that became armed had 10 years to qualify, while new employees had to comply with the requirement in advance.

[118] With respect to security clearances, at the time, one department did not recognize the security clearance of another department, and this applied to all employees. The authorities imposed the security rules, which were out of Ms. Deschamps's and Mr. Bergeron's control. Referring to paragraph 146 of *Chênevert*, the employer argued that its decision-making authority under Appendix C of the collective agreement was exercised reasonably, in good faith, and not arbitrarily or discriminatorily.

[119] According to the employer, the grievors did not demonstrate sufficient *prima facie* evidence to support their discrimination allegation. Mr. Bergeron and Ms. Deschamps testified that the employer's refusal to allow them to participate in alternation was based solely on employment conditions. The grievors claimed that the employer's decision was based on the fact that they would soon retire. The employer argued that they did not submit any evidence to support that claim.

[120] Mr. Bergeron knew the grievors well and would have been happy to help them take advantage of alternation. He testified that the only factor that influenced his decision was employment conditions, as stated in his August 3, 2012, letter.

[121] The employer argued that the grievors did not demonstrate the discriminatory effect of its decision. The fact is that they were approaching retirement, and they testified that their decisions to retire were personal. According to the employer, there is no connection between the fact that the grievors were approaching retirement and its decision to deny them alternation (see *Pelletier*, at para. 76). Mr. Bergeron explained that he made the decision after consulting headquarters and that Ms. Frigon had no influence or authority over the decision.

[122] The employer argued that the grievors did not succeed in proving *prima facie* discrimination and that they did not prove that they suffered adverse effects after alternation was denied. It pointed out that although it was sensitive to the uncertainties of life that the grievors experienced, they were not direct consequences of denying alternation.

[123] The employer emphasized several distinctions between this case and *Legros*, in which the adjudicator concluded that the grievor's age was a factor in the employer's decision to deny alternation of her position, which constituted a discriminatory act.

[124] Among others, the employer raised the following distinctions. In *Legros*, the employer continued to deny alternation, even though the grievor had submitted the applications of several opting employees. In this case, the grievors submitted applications only for the three CIC employees. In this case, the opting employees had to meet all the employment conditions for the investigator position, while in *Legros*, the opting employees had to meet only the essential qualifications, and there were no specific conditions such as the weapons requirement. The grievor in *Legros* demonstrated that her manager impeded her access to alternation and did not cooperate even after the employer decided in her favour after one of her grievances. In contrast, Ms. Deschamps and Mr. Bergeron testified that they would have been happy to have proceeded with alternation. In *Legros*, the manager added a requirement to the essential qualifications to limit alternation opportunities. This case had nothing of the sort. All the employment conditions were in effect before the WFA and remained in effect during it.

[125] The employer then responded to the grievors' arguments. As for the fact that Ms. Frigon did not testify, the employer argued that her words as reported were hearsay, which had to be evaluated based on a balance of probabilities. Moreover,

Mr. Bergeron testified that Ms. Frigon had no influence or authority over the alternation decision.

[126] With respect to the grievors' argument that the employer did not analyze the applicants' CVs, Mr. Bergeron said that he reviewed them and that he found that they did not meet the employment conditions. According to *PSAC*, at para. 33, the employer must have a true willingness to help employees seeking alternation and to consider alternation requests. The employer argued that Mr. Bergeron and Ms. Deschamps had that true willingness.

[127] As for the 120-day time frame, there were different 120-day periods, depending on the department. The grievors did not submit any evidence that after the CIC's 120-day period ended on August 8, 2012, they approached other opting employees in other departments.

[128] The grievors argued that the opting employees' security clearances merely had to be updated. Ms. Deschamps testified that that was not possible; if an employee came from another department, no recognition was possible, and obtaining a new clearance was mandatory.

[129] As for the grievors' requested corrective measures, the employer argued that if I find its refusal to grant them alternation unreasonable, the Board cannot assume that alternation would have proceeded, since it was up to the employer to determine whether opting employees met the position's requirements (see *Chênevert*, at paras. 176 and 177, and *Legros*, at para. 63).

[130] With respect to the grievors' request for interest on the requested amounts, the employer emphasized that the Board does not have the authority to award interest in grievances that deal with interpreting a collective agreement (see s. 226(2)(c) of the *Act*).

[131] As for the discrimination allegation, the employer stated that the grievors did not prove a direct link between its refusal to allow them to participate in alternation and a discriminatory act. The grievors remained in their positions until they decided to retire.

[132] The employer emphasized that the maximum damages that could be granted under ss. 53(2)(e) and 53(3) of the *CHRA* are $20 000 for each provision. The grievors did not prove that the managers' conduct in this case was wilful or reckless, as required by s. 53(3) of the *CHRA*. Mr. Bergeron and Ms. Deschamps testified that their decision was based strictly on the fact that the opting employees did not meet the employment conditions. The decision to deny alternation was in no way based on the grievors' ages. The employer had good faith; it was not possible to evaluate whether the opting employees met all the employment conditions due to the 120-day time frame.

[133] The employer asked that the grievances be dismissed. In the alternative, it requested a declaration.

C. The grievors' rebuttal

[134] The employer's position on the 120-day period meant that regardless of when the period began, the position's requirements could not be met. That meant that the positions would be excluded from the collective agreement because of the impossibility of meeting the requirements, which was not the parties' intent.

[135] Clause 6.2.6 of Appendix C of the collective agreement does not specify that the opting employee must meet the requirements of the alternate's position in advance. That has the effect of adding to the collective agreement.

[136] Mr. Bergeron and Ms. Deschamps testified that they tried to help employees wishing to alternate, but they did not submit details about their efforts.

[137] As for Ms. Frigon's comments, Mr. Paquette attended the meeting at which she made them.

[138] The situation in *Legros* was the same as in this case. In *Legros*, the "secret" clearances of the grievor and of one of the opting employees were considered equal (see paragraphs 32 to 34).

[139] The employer's refusal to allow the grievors to participate in alternation was an arbitrary decision. It excluded itself from applying the collective agreement by

including language that was not negotiated to deprive the grievors of a negotiated right in the collective agreement, which was participating in alternation.

IV. Analysis

[140] At adjudication, the grievors challenged the employer's decision to deny alternation on two fronts. First, they alleged that the denial was tainted by age discrimination. Second, they alleged that the employer's delayed evaluation and its decision on the proposed alternates' qualifications violated the WFA provisions.

[141] Even though the employer allowed the grievors' grievances "[translation] within the previously stated limits" at the final level of the grievance process, this admission was not about the issues that were submitted to me at adjudication.

[142] As indicated at paragraph 3 of this decision, the employer allowed the grievances in part at the final level of the grievance process, citing an earlier Board decision involving a policy grievance, *PSAC*, which was rendered after the grievances before me were filed but before the employer's final-level decision. Even though the policy grievance decision was referenced, and the employer admitted to having made a mistake, in its final-level response, it did not specify the part of the *PSAC* decision that applied to the grievors and on which its admission was based. I also point out that the final-level response indicated that management had to "[translation] … consider and allow employees to participate in alternation …" but that it specified that it must be done "[translation] … unless the situations or the reasons identified for refusing the alternation were consistent with those outlined in [the *PSAC* decision]."

[143] What are those situations, and are they present in this case? *PSAC* involved the application of several WFAA provisions. I read that decision carefully, and I concluded that the employer's reference to it in its final-level response rested on the adjudicator's analysis of the second and fourth issues indicated in the decision.

[144] The second issue that the adjudicator examined was aimed at determining whether the departments had a reasonable period to put an alternation process in place, while the fourth issue involved the deputy head's right to deny alternation for positions that it did not intend to fill because of impending retirements or resignations or a planned future workforce restructuring or adjustment.

[145] The adjudicator said the following about those issues:

> …
>
> *[30] The WFAA requires all departments to "participate in the alternation process" (section 6.2.1). If a department is not prepared to respond to timely requests for alternations before the close of the 120-day window, it seems to me that it would have failed to comply with this obligation. However, if a department indicates to employees that it is not yet ready to consider such requests, but succeeds nevertheless in responding within the 120-day window, there will have been no violation, in my view.*
>
> …
>
> *[36] Apart from section 6.2.4, the WFAA gives management no latitude to turn down a proposed alternation that complies with the alternation provisions. An alternation, according to the WFAA, "… occurs when an opting employee who wishes to remain in the Core Public Administration exchanges positions with a non-affected employee (the alternate) willing to leave the Core Public Administration under the terms of Part VI of this Appendix" (section 6.2.2). Aside from section 6.2.4, there is no requirement for management approval and no discretion expressly vested in management to block the proposed alternation, provided it meets the terms of Part VI of the WFAA.*
>
> *[37] The employer has argued that section 1.1.2, which requires it to "carry out effective human resource planning," is also pertinent to the employer's evaluation of proposed alternations as it would allow the employer to reject proposed alternations that would run counter to the objective of effective human resource planning. I disagree with that argument since, according to the express language of section 1.1.2, the requirement to carry out effective human resource planning is for the purpose of "… [minimizing] the impact of workforce adjustment situations on indeterminate employees, on the department or organization, and on the public service." I am therefore satisfied that the employer cannot invoke the need to carry out effective human resource planning as an independent basis for rejecting proposed alternations.*
>
> …
>
> *[42] It should be noted that the bargaining agents acknowledged in their submissions that it would be legitimate for a department to deny a proposed alternation if the intended alternate had already given notice of resignation or retirement to be effective at some specific date and if the department had taken the decision not to fill the position once vacated. Since this criterion is nowhere expressed in the WFAA, I understand the bargaining agents' position to be that they accept that an implied term to that effect would be reasonable.*
>
> …

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

[146] The *PSAC* decision did not involve any discrimination allegations or evaluating the qualifications of proposed alternation applicants. The fact that the grievors raised the discrimination issue once they had referred their grievances to adjudication supports the conclusion that the final-level response did not constitute an admission of discrimination on the employer's part.

[147] One of the issues that this case has in common with *PSAC* is that of the period during which the proposed alternation could be examined. This issue was raised in the grievors' arguments. The evidence demonstrated that even though Ms. Russell told the grievors that there was insufficient time to examine their requests, Ms. Lacombe sent their requests to Mr. Bergeron, who was responsible for the WFA committee, and he made his decision based on the factors stated in his August 3, 2012, letter, within the 120-day window. Consequently, the 120-day rule was not violated. Nevertheless, the employer made a mistake when it initially told the grievors that there had been insufficient time to examine their proposals. Mr. Bergeron's detailed response on August 3, 2012, met the policy's requirements and the decision rendered on the policy grievance, and it corrected the employer's initial declaration of insufficient time to examine the proposals.

[148] I will now turn to the grievors' discrimination allegation. In *Chênevert*, which arose from the 2012 DRAP process and raised an age-discrimination allegation in a proposed alternation context, the analysis to be undertaken read as follows:

> …
>
> *[137] To demonstrate discrimination, a grievor first has to establish a* prima facie *case of discrimination. The Supreme Court described the criterion for such evidence as follows in* Moore v. British Columbia (Education)*, 2012 SCC 61, at para 33:*
>
> > As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show that

> they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.
>
> *[138] If the grievor is able to establish a* prima facie *case of discrimination, the employer must refute the allegations or provide another reasonable explanation that is not based on discrimination. That explanation cannot come down to a simple pretext aimed at justifying the discriminatory conduct.*
>
> …

[149] The grievors relied entirely on the evidence of Ms. Frigon's declaration at the union-management meeting on May 15, 2012. Mr. Paquette testified that at the meeting, Ms. Frigon said that she opposed granting the three grievors transition support measures, given that they would retire soon and that the DRAP's intention was to save money. Mr. Boucher testified that Mr. Paquette spoke with him about that declaration and that later, he believed that he was a victim of discrimination. The employer did not challenge this allegation and in fact acknowledged in its arguments that the comment was made. Neither of the two other grievors adduced any evidence on the discrimination issue. Neither Mr. Lafrance nor Mr. Lussier referred to that issue in their testimonies, and Mr. Lussier mentioned only that he believed that the proposed alternation had been denied on the basis of qualifications, without referring to the discrimination issue. Only Mr. Boucher and Mr. Paquette testified on the issue, and both referred only to Ms. Frigon's comment. That was the only evidence that the grievors submitted to support their discrimination allegation.

[150] I find that these testimonies constitute *prima facie* discrimination against the grievors, because they submitted evidence sufficient to believe that age could indeed have been a factor in the employer's decision to deny the proposed alternation. At the very least, Ms. Frigon's comment contained, as indicated in *Legros*, at para. 54, "hints of discrimination", which require a response by the employer.

[151] *Legros* is instructive on this point, and as indicated earlier in this decision, it involved the same employer, the same DRAP process, and an age-discrimination

allegation when proposed alternations were examined. At paragraph 53, the adjudicator presented as follows the two-step analysis required in such cases: "Was there *prima facie* discrimination? If so, did the employer have a valid rationale? (See *Nadeau v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 82.) The adjudicator then stated, "To establish *prima facie* discrimination, it is not necessary that discrimination be the sole factor; it has only to be one of the factors (see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39)."

[152] There is no doubt that the grievors have a protected characteristic, age, and that they experienced an adverse effect from the employer's denial of the proposed alternations. I also find that according to Mr. Boucher's and Mr. Paquette's testimonies, and as the employer admitted, the grievors proved that age was a factor in the employer's denial of the proposed alternations. I find that the grievors established a *prima facie* case of discrimination and that the employer then had the burden, to quote the words in *Legros*, to "… explain its decisions, in order to exclude this apparent discrimination."

[153] However, I also find that the employer managed to meet its burden of responding to the allegation, as the evidence it submitted convinced me that based on a balance of probabilities, its decision to deny the alternations was based entirely on its evaluation of the qualifications of the proposed persons and in no way on the grievors' ages.

[154] As indicated earlier, the only evidence linked to age discrimination were Ms. Frigon's declarations on the imminent retirements and the need to save money. There is no doubt that she referred to the grievors' (announced or assumed) imminent retirements and that she was opposed to paying transition support measures given that they were to leave their jobs in any case. I found that as in *Legros*, there were "hints of discrimination" in that approach, because she indicated that their ages were a factor in the decision to deny the alternations. In accordance with the *prima facie* evidence criteria, the evidence that the grievors adduced required the employer to submit a satisfactory explanation that refuted the conclusion.

[155] I found that the evidence did not indicate any link between Ms. Frigon's comments and the employer's decision to deny the alternations. The comment was

made at a meeting early in the DRAP process and before July 23, 2012, when the CBSA stated that it was now ready to examine alternations. In their arguments, the grievors challenged the CBSA's failure to examine their alternation requests before the month of July 2012, which confirms the evidence presented in this case, according to which the CBSA did not examine the proposed alternations in the union-management meeting at which Ms. Frigon expressed her opinion on the issue.

[156] In Mr. Chiquette's July 23, 2012, letter, the department indicated that it was prepared to examine alternations, and at that point, the issue related to the grievors was raised again, this time with Ms. Russell on July 26, 2012, and finally with Mr. Bergeron. No evidence indicated that the grievor's ages or the fact that the employer believed in their imminent or announced retirements played a role in its deliberations on the issue. Mr. Boucher testified that Ms. Russell told the grievors that the IPSS was the obstacle to the proposed alternations, given that whoever accepted a position had to have a "secret" classification under the CBSA's process and that the CBSA did not consider security clearances granted by other departments equivalent or recognized. Mr. Boucher testified that Ms. Russell told the grievors that the issue of the security clearance specific to the CBSA prevented the department from accepting their alternation requests. In his July 26, 2012, letter to Ms. Lacombe, Mr. Boucher informed her of the situation, and on August 3, 2012, she forwarded the letter to Mr. Bergeron.

[157] According to the evidence, Mr. Bergeron decided to deny the alternations. He stated clearly in his testimony that he had made the decision based solely on the qualifications issue. His testimony was credible and unwavering on this issue and on his statement that Ms. Frigon's earlier comments had no impact on his decision. Even though Ms. Frigon's comments were contrary to the decision in *PSAC* and seem to constitute *prima facie* evidence of discrimination, I find that there is no evidence that would allow concluding that the opinions played a role in the employer's decision-making process. The offending comments were made when the CBSA was not examining the issue of alternations, and the evidence demonstrated that on a balance of probabilities, the age issue played no role in Ms. Russell's and Mr. Bergeron's decision.

[158] Therefore, I find that the employer succeeded in refuting the grievors' *prima facie* evidence and that on a balance of probabilities, it proved that age was not a factor in its decision. Therefore, I dismiss the grievors' discrimination allegation.

[159] I now turn to the second issue submitted in this case, the proposed alternates' qualifications.

[160] The grievors argued that the employer acted unreasonably when it did not examine their alternation requests between April and July 2013. To respond to this issue, I again quote the *PSAC* decision, which states the following:

> …
>
> *[30] The WFAA requires all departments to "participate in the alternation process" (section 6.2.1). If a department is not prepared to respond to timely requests for alternations before the close of the 120-day window, it seems to me that it would have failed to comply with this obligation. However, if a department indicates to employees that it is not yet ready to consider such requests, but succeeds nevertheless in responding within the 120-day window, there will have been no violation, in my view.*
>
> …

[161] I can only agree with the decision in this case, and I find that the employer did not violate the WFAA's terms and conditions, as it adhered to the 120-day time frame and responded, by submitting detailed reasons, to the grievors' request within that time frame. Even though the CBSA had been in a situation that would have allowed it to examine the alternations in spring 2012, the evidence demonstrated that the opting CIC employees would not have had enough time to become qualified and occupy the grievors' positions.

[162] With respect to the employer's decision on the qualifications of the proposed alternates who were to alternate with the grievors, the grievors acknowledged that the proposed applicants did not have the required qualifications for the positions. However, they argued that this happened every time the CBSA filled several positions. When that happened, the solution was to make conditional offers. According to the grievors, the employer's failure to use that type of conditional approval process constituted an unreasonable violation of the WFAA's provisions and, in turn, of the collective agreement.

[163] I do not agree with the fact that the employer's refusal in this case to follow the conditional approval process it used to fill positions makes its decision unreasonable. Staffing as part of regular activities is not carried out in the same context as that of conducting a workforce reduction exercise. I have no reason to believe that staffing rules can be or should be integrated into the WFAA provisions. In fact, the grievors did not submit any provision established by legislation or by a collective agreement, no policies, and no case law to support their argument on this issue.

[164] In addition, and this is the most important thing, such a suggestion goes against the clear language of the WFAA provisions, which, as can be seen as follows, state that all opting employees must be qualified for the desired positions and that it is up to the employer to evaluate the qualifications:

> …
>
> *6.2.4 An indeterminate employee wishing to leave the core public administration may express an interest in alternating with an opting employee. Management will decide, however, whether a proposed alternation is likely to result in retention of the skills required to meet the ongoing needs of the position and the core public administration.*
>
> …
>
> *6.2.6 The opting employee moving into the unaffected position must meet the requirements of the position, including language requirements. The alternate moving into the opting position must meet the requirements of the position except if the alternate will not be performing the duties of the position and the alternate will be struck off strength within five (5) days of the alternation.*
>
> …

[165] The grievors argued that the employer's decision with respect to qualifications was unreasonable, but in contrast to *Legros*, they did not allege bad faith or camouflage. Mr. Boucher testified that Mr. Langlais, the director of his division, had in fact welcomed the alternation idea, and Mr. Bergeron testified that he knew the grievors and that he would have been happy to be able to grant their requests. The evidence I am seized with confirms that on a balance of probabilities, the decision was made in good faith, and that it was based solely on the qualifications issue.

[166] The grievors' positions included very specific requirements with respect to using firearms and a security clearance procedure specific to the CBSA. They rightly

concluded that given that no CBSA employees had come forward to exchange jobs with them, alternation would have been impossible. As I concluded earlier, it would have been so even had the CBSA been prepared to examine the alternation requests in spring 2012 instead of in the summer of that year. In arguments, the grievors' representative stated that Ms. Deschamps's and Mr. Bergeron's testimonies indicated that it would have been difficult and impossible to meet the requirements of the investigator positions while adhering to the time frame, and I find that that is indeed so. However, I also accept the suggestion that even if the WFAA aims to maintain indeterminate employees' employment, not all positions lend themselves easily to alternation, given their specific requirements, and that the difficulties in this respect do not automatically constitute breaches of the WFAA.

[167] The evidence on the IPSS's recent implementation and on the requirement for a CBSA-specific security clearance was adduced to confirm the employer's allegation that the proposed alternates did not have the required qualifications for the positions that they wanted to exchange into. No evidence was adduced to indicate that the security-clearance qualifications were unreasonable or that they had been implemented in bad faith or to block alternations with other departments. As the employer remarked in its arguments, the grievors did not raise any bad-faith allegations in this case.

[168] I find that the decision on the issue of opting employees' qualifications was made in a reasonable and not an arbitrary manner, in good faith, and without discrimination. Consequently, I dismiss the grievances.

[169] Given my decision to dismiss the grievances, I will not review the remedy issue.

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

(The Order appears on the next page)

V. Order

[171] The grievances are denied.

June 17, 2021.

FPSLREB Translation

Steven B. Katkin,
a panel of the Federal Public Sector
Labour Relations and Employment Board