Date: 20211116

Files: 566-02-11585 and 42632

Citation: 2021 FPSLREB 125

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

PAOLA GROSSO

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Grosso v. Canada Border Services Agency

In the matter of individual grievances referred to adjudication

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

For the Grievor: Aaron Lemkow, counsel

For the Employer: Kétia Calix, counsel

Heard by videoconference,
March 1, 2, 29, and 30, 2021.

REASONS FOR DECISION

I. Introduction

[1] Paola Grosso ("the grievor") alleges that on January 24, 2008, she was discriminated against, contrary to clause 19.01 of the collective agreement between the Treasury Board and the Public Service Alliance of Canada ("PSAC" or "Alliance"), Program and Administrative Services (expiry date June 20, 2007). She alleges discrimination when the Canada Border Services Agency ("the employer" or "CBSA") denied her an opportunity to be considered for the Foreign Assignment Process for Non-Rotational Staff (FAP).

[2] Three grievances were referred to adjudication pursuant to s. 209(1)(a) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2) ("the *Act*"), alleging discrimination on the grounds of sex, membership and activity in the Public Service Alliance of Canada ("the Alliance" or "the union"), and ethnic origin.

[3] For the reasons that follow, I find that the grievor did not establish that the employer discriminated against her, as she alleged.

II. Background

[4] On January 14, 2008, the employer emailed all employees, to announce the 2008 FAP. Through the FAP, an inventory of employees would be created for selection to conduct immigration work in Canadian consulates and embassies abroad.

[5] The email set out the requirement for the written approval of a manager or director general before employees could apply, and it provided a link to the *Directive on the Foreign Assignment Process for Non-Rotational Staff* ("the Directive"), which provided more detail.

[6] The Directive included screening criteria and managerial responsibilities relative to the application process.

[7] The screening criteria included the following abilities and personal suitability criteria:

…

· *Flexibility/Adaptability*

- *Judgement*
- *Effective Interpersonal Skills*
- *Intercultural Sensitivity*
- *Team Player*
- *Capacity to handle a high volume workload*

…

[8] The section of the Directive entitled "Manager Responsibilities" provided as follows:

…

> *Managers who recommend their employees as candidates for an assignment overseas must complete and sign the form «Application for Foreign Assignment». Unsigned applications will not be considered unless there is electronic or written confirmation that the Manager and Director General have approved the employee's application. By completing the form «Application for Foreign Assignment», managers acknowledge their support for those applying for a posting abroad, as follows: Managers confirm that the applicant is an indeterminate employee and that the applicant meets the eligibility criteria for an assignment. Managers also confirm that they know the applicants well enough to confirm that they will be excellent representatives of the interests of the Government of Canada abroad and possess the necessary personal qualities.*

[9] On January 22, 2008, the grievor completed a FAP application.

[10] On January 24, 2008, a colleague informed the grievor that her application would not be recommended, and this was confirmed in a letter addressed to the grievor of that date from Tom Rankin, Chief, Border Operations, Windsor Tunnel.

III. Summary of the evidence

A. For the grievor

[11] The grievor is an immigration officer at the Windsor Tunnel, where she has worked since 1989. She has been a steward, a chief steward, and the president of the union local. In 2007 and 2008, she was the union local's chief steward. Kevin Dowler, her co-worker and a union steward at the relevant time, testified that she was the main steward, leader, and spokesperson who took concerns to management.

[12] In 2004, the customs function of the former Canada Customs and Revenue Agency was merged with the immigration function of the former Citizenship and Immigration Canada to create the CBSA. Corresponding workplace changes were made over time to implement the merger.

[13] The grievor is a legacy immigration officer, meaning that she was an immigration officer before the merger. She testified that she is critical of the merger process. She feels that specialization and knowledge were watered down. She also considers that the management style varies. Customs is "top-down", while immigration managers provide guidance that respects an officer's authority to make final decisions on the matters before them.

[14] The grievor felt that her knowledge was not being valued and that there was an unwillingness to listen to legitimate concerns. If an officer approached her with concerns, she brought the concern to a supervisor or manager. The supervisors included Superintendent Sharon Dunwoody and Superintendent Nella DeSalvo, both of whom had backgrounds in customs and not immigration.

[15] The grievor also had formal and informal meetings in her capacity as steward with Mr. Rankin, who was then the chief of the Windsor Tunnel. She stated that she brought forward many examples to show that the CBSA port-of-entry vision was not working and that customs and immigration were not compatible.

[16] The grievor recalled that she often told Mr. Rankin, "Your vision is flawed and you need new glasses." She described her manner as stern and aggressive. She explained that for her, the issue was a passion, and that meetings could become heated.

[17] The grievor stated that she believed that Mr. Rankin did not like the fact that she "talks with [her] hands" and that she is stern, very factual, and forthright. According to the grievor, Mr. Rankin told her that he did not like her tone or the way she spoke to him. She said that he did not make eye contact with her and that he did not engage. She also felt that he was more involved and direct when dealing with a male steward from customs.

[18] Moving to the FAP process, the grievor testified that she submitted her application on January 22, 2008. She felt that she was more than qualified. As an

immigration officer, she had a flexible thought process and was a critical thinker and a team player.

[19] On January 23, 2008, a union-management meeting took place. The related minutes were placed in evidence. They show that the grievor attended as one of two union representatives. She is not mentioned by name in the minutes of the meeting.

[20] On January 24, 2008, Superintendent Bob Genereux advised Mr. Dowler, the grievor's colleague and union steward, of Mr. Rankin's decision not to recommend the grievor's FAP application.

[21] Mr. Genereux testified that Mr. Rankin told him that he would not recommend the grievor's FAP application because she was not a team player and because she had demonstrated an inability to adapt to change.

[22] Mr. Dowler then telephoned the grievor to advise her that Mr. Rankin would not recommend her FAP application. He testified that she became very upset.

[23] The grievor stated that she felt punished by this decision. She was furious when told of the refusal, and she told Mr. Dowler to give her Mr. Rankin's telephone number. In her view, Mr. Rankin's decision not to recommend her FAP application deviated from the earlier practice, in which every application had been recommended.

[24] Frank Tighe, now retired, was a co-worker of the grievor. He participated in the FAP in 2001 and received an assignment to India. He testified that anyone who was interested could submit his or her name to the FAP. If an assignment came up, both the applicant and the manager would be contacted. Then the manager would have to indicate whether he or she could spare the applicant from his or her regular duties.

[25] The grievor contacted Mr. Rankin, who told her that he did not consider her a suitable candidate for the FAP. She responded, telling him that he was not qualified to say that she was not suitable, he had not worked with her, and he had no knowledge of immigration and what it entailed. She stated that he responded by stating that he had spoken with her supervisors. She considered his response untruthful.

[26] Later, the grievor called Mr. Dowler and asked him to speak to Mr. Rankin. Mr. Dowler stated that Mr. Rankin told him that he had relied heavily on Mr. Genereux and another superintendent, Eric Beck. Mr. Dowler did not believe that either Mr. Genereux

or Mr. Beck would have given the grievor a negative review, and he considered that Mr. Rankin's refusal to recommend the grievor's FAP application was retribution for her union involvement.

[27] The grievor expressed the impact on her of Mr. Rankin's refusal to recommend her for the FAP. She considered that she was not valued as an employee with knowledge and capabilities in immigration. She felt punished for being a strong female employee and a vocal union representative.

[28] The grievor testified that afterwards, she backed away from union activity. She recalled that there were no female stewards for a time after that.

[29] Mr. Dowler confirmed that after the grievor stepped back, the union tried to recruit female stewards, but that it found only one over a four-year period. Mr. Dowler felt that the rejection was traumatic for the grievor as it was the first time anyone had been turned down for the FAP.

[30] After learning of Mr. Rankin's decision not to recommend her FAP application, the grievor became aware that supervisors at the Windsor tunnel had a practice of making computer entries on the employer's "G" drive to reflect employees' performance.

[31] One such entry was made on August 1, 2007, by Superintendent DeSalvo. She wrote as follows on her interaction with the grievor on a day when the grievor came to work without her vest:

…

> *When Paola Grosso reported for duty on the above date I spoke to her regarding the whereabouts of her CBSA issued vest and she was unsure of its location or whether she had been issued a vest. I reminded her that Supt. Zivanov had issued a CBSA vest to her. Paola said she couldn't find it, it might be at home. I told Paola to go home and find her vest as it is mandatory to wear it, and it would be leave without pay to do so. Rather than take LWOP to find her vest I told Paola she could borrow a vest to wear for the remainder of the shift and to find her vest when she went home as she would be required to wear it her next shift. Paola borrowed Steve DiGiacomo's Immigration vest from the Immigration lunch room to wear for the remainder of this shift only. Paola pointed out that she does not have a proper locker in which to keep her uniform components.*

> *At the beginning of her shift I had to remind Paola that she had to wear her duty belt right from the start of the shift and she put it on.*
>
> *Paola commented that the duty belt and vest would be coming off once my shift ended.*
>
> …

[32] The grievor recalled the incident. She agreed that initially, she was not wearing all the components of her uniform. She remembered that she and a colleague laughed about how silly she looked when she then donned a vest that was too big for her. She believed that Ms. DeSalvo might have misinterpreted her comment about removing her vest and duty belt.

[33] The grievor testified that Ms. DeSalvo's entry was nasty and negative. She felt betrayed, as it was not discussed with her, and it affected her participation in the FAP.

[34] Mr. Tighe was present for the incident. He remembered Ms. DeSalvo talking to the grievor about her vest, and he considered Ms. DeSalvo's approach officious. At first, he thought it was a joke. He remembered that the grievor put on a co-worker's very large vest and that together, he and the grievor returned to Ms. DeSalvo's office. He did not understand why the vest was a concern. To him, it was much ado about nothing. He stated that he had been without his vest many times but perhaps he had been wearing it then.

[35] Mr. Tighe also recalled Ms. DeSalvo telling him to put on his duty belt that day. He stated that he always put his duty belt down as it was uncomfortable to wear. At some point, he wore it upside down, to mock Ms. DeSalvo. He corrected it when he was then told to.

[36] Ms. Dunwoody, Superintendent, posted this comment on the G-drive about an incident on August 28, 2007:

> …
>
> *On August 28, 2007 at approximately 17:30 while working in the administrative office I overheard inappropriate comments from Paola Grosso. Paola stood in front of my door and stated that she was sick of the Nazi take over [sic] by Customs and that they are all a bunch of Nazis. She then stood there and took her belt and stated, "they told me I had to wear it but not how to, so how is this" at which time she dropped her belt to the floor (she had her belt on*

> *but so loose it would just fall to the floor). She was speaking to Ace Essex at the time.*
>
> *I at this time called Chief Dundas at home and discussed the issue with him over the phone. He stated that he would take care of it in the morning.*
>
> …

[37] The grievor stated that this was an embellished account as she had not let her belt fall to the floor. From her office, Ms. Dunwoody would not have seen her actions, but she might have overheard her comments to a co-worker, Ace Essex.

[38] The grievor acknowledged the incident as inappropriate humour but stated that she had been blowing off steam and joking. She explained that she and her colleagues had a quirky sense of humour. They described the merger of customs and immigration as a Nazi takeover because they viewed it as rigid and moving forward relentlessly and without concern.

[39] She said that she was also called "the recycle Nazi" as a joke.

[40] Mr. Dowler remembered the incident. In his opinion, neither he nor Ms. Dunwoody could have seen the exchange between the grievor and Mr. Essex. He did not hear the grievor's comment about a Nazi takeover.

[41] Mr. Dowler testified that "we" called it a hostile takeover and that he did use the phrase "Nazi takeover" to describe the merger. He loved the television program *Seinfeld* and the episode about the "soup Nazi". He said the term came from that episode. He stated that he heard the phrase "Nazi takeover" quite often in the workplace until Mr. Genereux spoke to employees. Then, it ceased.

[42] Mr. Dowler recalled that on August 28, 2007, Ms. Dunwoody also told him to put on his vest. He considered it harassment as it was a hot day. He had taken it off to process refugees.

[43] Mr. Tighe recalled the merger being referred to as a Nazi takeover. He felt that he was the employee who probably had introduced the comment, and he always referred to the merger that way. He used the phrase as a reference to the Nazis entering the Sudetenland and taking over the Czech government without consultation. He employed it to describe authoritarian and draconian management. He made use of

the phrase daily for a period he estimated as 2005 until 2008, when he left the Windsor Tunnel for a position at the Windsor airport.

[44] On August 29, 2007, Mr. Genereux and Mr. Beck met with the grievor. Mr. Genereux recorded the outcome of the meeting on the G-drive as follows:

> …
>
> *Met (with Beck) with Paola (with Dowler) regarding inappropriate remarks she had made about CBSA (Nazi takeover by Customs) in the office on August 28th. Advised her that these types of remarks were inappropriate and must cease immediately or she could be in violation of the CBSA Code of Conduct and as such be subject to disciplinary action. Paola voiced several concerns about CBSA and how Immigration staff are being treated. Stated she had the right to her own opinion and to voice it under the Charter of Rights and Freedoms. I advised her that while she does have a right to her opinion she must take care in how she voices it. Paola acknolwedged* [*sic*] *she understood.*
>
> …

[45] Mr. Genereux gave evidence and identified his entry on the G-drive. He explained that the G-drive was used to note employee performance, both positive and negative. He was not entirely certain, but he believed that when he arrived at work on August 29, 2007, a CBSA chief asked him to speak with the grievor about a statement from the grievor that customs had made a Nazi takeover of immigration. Personally, he had never heard that kind of language in the workplace from the grievor or anyone else.

[46] According to Mr. Genereux, the G-drive entry accurately reflects what was said during the meeting. He told the grievor that remarks about a Nazi takeover were inappropriate and that they had to stop. She voiced concerns about the CBSA and about how staff members were being treated, to which he replied that she could have an opinion but that she had to be careful how she expressed it.

[47] The grievor remembered that she, Mr. Genereux, and Mr. Beck agreed that there were better ways for her to express herself. She testified that immigration staff often used the phrase, “Nazi takeover”. However, after the meeting, she moved on.

[48] Mr. Genereux added that he had experience supervising the grievor’s performance every day and that he completed her annual appraisal for April 1, 2006,

to March 31, 2007, which reflected positively on her work performance. He explained that the immigration office comprised 11 or 12 officers. At times, only 2 officers were on shift, and if they did not get along and help each other, the job would become very difficult. Referencing several examples of difficult immigration cases in which she was involved, he described her as flexible and as a great team player.

[49] The grievor also pointed to another entry by Mr. Genereux, who recorded that on August 28, 2007, she and others had done a "bang up job" and had shown "excellent 'teamwork'" when dealing with seven refugee claimants that day.

[50] On August 31, 2007, Ms. Dunwoody made a G-drive entry to reflect that the grievor was present in the workplace without her vest or duty belt. The grievor stated that this coincided with her taking off her vest and duty belt before leaving for a break and then being delayed in the office due to speaking with an immigration lawyer.

B. For the employer

[51] Mr. Rankin, now retired, testified that at the relevant time, he was the chief of the Windsor Tunnel with direct oversight of a group of 12 to 17 superintendents who supervised border services officers and other staff, totalling about 100 employees.

[52] Mr. Rankin knew the grievor in her union steward role and did not directly supervise her work.

[53] Mr. Rankin recalled the FAP, which is a program that continues to this day. He recalled that employees could put their names forward for consideration. Mr. Rankin testified that his responsibility was to either recommend FAP applicants or not recommend them and that 2008 was the first year of his involvement in this process. He confirmed that he received five applications.

[54] Mr. Rankin stated that he did not recommend the grievor as he felt that she did not demonstrate the abilities and personal suitability requirements of flexibility/adaptability and being a team player.

[55] Mr. Rankin relied on the G-drive entries made by superintendents who observed the grievor in the workplace. According to him, the G-drive tracked performance, compliments, complaints, and issues on the job. He recalled issues with the grievor

wearing the required vest and duty belt, and he knew of the "Nazi takeover" comment. He did not remember any specific, related conversations.

[56] Mr. Rankin stated that the grievor was obviously qualified for the work she was doing based on her experience and knowledge, but her behaviour dictated that she was not ready for a foreign assignment at that time. Given time, he felt that she would adapt and make things work, but he could not see someone exhibiting the documented behaviours as a representative of the Government of Canada overseas.

[57] Mr. Rankin did not recall referring to performance appraisals in reaching his decision. He considered that they could be bland, generic, or "cookie cutter". They were not always reliable indications of performance, in his opinion.

[58] Mr. Rankin also wrote to four superintendents on January 25, 2008, after he decided not to recommend the grievor's application and after his subsequent conversation with her. He asked for supporting information for his decision, indicating that while the superintendents had spoken with him, there was a lack of documentation. He added that if he was wrong, he would reverse his decision and endorse the grievor's application.

[59] Mr. Genereux was not included on the email, and Mr. Rankin was not certain why. Perhaps he did not work that day, or perhaps they had communicated already. He testified that he did not avoid contacting Mr. Genereux to avoid receiving positive comments about the grievor. Indeed, Mr. Genereux had conducted the counselling session on August 29, 2007.

[60] Mr. Rankin identified the email he wrote on January 28, 2008, to David MacRae, a director. Mr. Rankin included the entries from the G-drive that in his view supported the decision. The attachments included the G-drive entries of Ms. DeSalvo, Ms. Dunwoody, and Mr. Genereux addressing the grievor's failure to follow the uniform policy with respect to protective and defensive equipment, statements that the approach to managing immigration during the merger was a Nazi takeover, and counselling from Mr. Genereux.

[61] Mr. Rankin was questioned about a union-management meeting held on January 23, 2008. He had no memory of it and could not identify any impact it would have had on his decision.

[62] Ms. DeSalvo identified her G-drive entry (reproduced earlier in this decision). She remembered seeing the grievor on shift and observing that the grievor was not wearing her defensive equipment, including her vest and duty belt. She encountered the grievor in a hallway and reminded her to wear them. In her opinion, the grievor was cavalier and flippant in her response, and the grievor said that she did not know where they were or whether they were in her car trunk or at home.

[63] Ms. DeSalvo testified that the exchange was heated. In the end, the grievor found a vest and put on her duty belt. Ms. DeSalvo considered it significant that the grievor told her that she would take off her vest and duty belt when Ms. DeSalvo left.

[64] Ms. DeSalvo testified that she told the grievor that she would note their interaction on the G-drive, which she described as an informal communication medium for superintendents and management. Her purpose was to ensure the monitoring of whether the grievor was wearing her vest and duty belt.

[65] Ms. DeSalvo described her memory of an interaction with Mr. Tighe the same day as "shoddy". She recalled the grievor and Mr. Tighe joking and him wearing a duty belt upside down. Ms. DeSalvo told him to correct it. She did not make a G-drive entry as he responded immediately to the direction to wear his duty belt correctly.

[66] Ms. DeSalvo indicated her opinion that most immigration officers were resentful of what they perceived as being swallowed up in a takeover as customs and immigration merged. She recalled that the grievor was particularly vocal about it.

[67] Ms. Dunwoody recalled the events of August 28, 2007, and identified the G-drive entry she made that day to record them. She identified the G-drive as a communication tool to which management had access.

[68] Ms. Dunwoody testified that the grievor was standing in front of her office door, facing the lunchroom. She then made a comment about customs being Nazis, straightened her duty belt and dropped it to the floor, saying, "they told us we had to wear it but not how …".

[69] Ms. Dunwoody testified that she was aware that legacy immigration staff were not happy with the merger and that there was an ongoing issue with comments about a Nazi takeover by customs. In her opinion, the grievor's comment was of sufficient

concern to warrant a G-drive entry. In addition, she addressed her concern about the grievor's conduct to Chief Gerry Dundas, who said that he would deal with it.

IV. Summary of the arguments

A. For the grievor

[70] The grievor was the chief union steward for immigration issues. She brought her concerns to Ms. DeSalvo and Ms. Dunwoody several times a week, often reflecting to them that employees, including her, were frustrated and upset with the merger. Her views on the merger never affected her work, and she was a great team player.

[71] The grievor applied to the FAP on January 22, 2008. She attended a union-management meeting on January 23, 2008. While there is no evidence of what occurred during that meting, the grievor was clear about using a glasses-and-vision analogy to describe the way things were being done.

[72] On January 24, 2008, Mr. Rankin decided not to recommend the grievor's FAP application. According to him, he said that he had been influenced by information from Mr. Genereux and Mr. Beck. However, there is no evidence that he spoke with either of them.

[73] After the grievor withdrew from her steward position, the union was without a female steward for several years.

[74] The grievor and others used the phrase "Nazi takeover" to describe the merger. It was used in the playful sense of the soup Nazi from the *Seinfeld* episode, just as the grievor had also been called "the recycle Nazi". The witnesses Mr. Dowler and Mr. Tighe indicated that they were never disciplined for using the phrase.

[75] While Mr. Rankin said that he was offended by the language, there is no evidence that the grievor ever directed it at an individual or that she continued to use it after August 29, 2007, when Mr. Genereux spoke to her. Therefore, a reliance on the grievor's use of the phrase must be considered pretextual.

[76] The grievor's performance reviews were good or excellent. In 2005, Mr. Genereux recommended her for the FAP. Mr. Rankin indicated that he did not rely on performance reviews as he considered them "cookie cutter".

[77] The grievor's position was located at a port of entry. Had she received an assignment through the FAP, it would have been beyond Canada's borders. Therefore, any concern about her behaviour at a port of entry was irrelevant.

[78] Mr. Rankin's misrepresentation about relying on Mr. Genereux and Mr. Beck, his solicitation of supporting evidence after refusing to recommend the grievor's application, the grievor's action of ceasing to use the phrase "Nazi takeover", and the timeline of events from January 22 to 24, 2008, when considered together, satisfy the test of a subtle scent of discrimination.

B. For the employer

[79] The grievor was one of five applicants for the FAP in January 2008. Mr. Rankin had to consider established criteria for each applicant before making a recommendation. Two of the five applicants were recommended.

[80] Mr. Rankin evaluated information that fell within the 2007-2008 fiscal year. While he did not remember everything he considered, he testified that he relied on the G-drive entries made in August 2007 by those who worked with the grievor, who were Mr. Genereux, Ms. Dunwoody, and Ms. DeSalvo.

[81] The entries raised concerns about the grievor's personal suitability and about whether she would be an excellent representative of the Government of Canada abroad.

[82] Mr. Rankin concluded that in spite of the grievor's knowledge and experience, he would not recommend her application.

V. Analysis

[83] Clause 19.01 of the relevant collective agreement governing the grievor's employment at the relevant time provided as follows:

> *19.01 There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Alliance, marital status or a conviction for which a pardon has been granted.*

[84] These grievances concern whether the discriminatory grounds of sex and membership or activity in the PSAC were factors in the decision not to refer the grievor's name for consideration for the FAP in January 2008.

[85] It is noted that the Canadian Human Rights Commission was provided with notice of this matter. In response, it indicated that it did not intend to make submissions and that it would not participate.

[86] Turning to the merits, to demonstrate that the respondent committed a discriminatory act, the parties submitted caselaw on discrimination concerning union membership or activity and discrimination concerning human rights. The bargaining agent referred to *Lamarche v. Marceau,* 2007 PSLRB 18, involving a complaint against the employer under Part 1 of the under the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 ("the *PSSRA*"), a former iteration of the *Act*. The complaint was filed with the former Public Service Labour Relations Board ("the PSLRB"). It alleged that the employer refused to consider the complainant's application for a position as appeals team leader on the grounds that he was unavailable because he held a national position with the bargaining agent.

[87] In *Lamarche,* the PSLRB interpreted paragraph 8(2)(*a*) of the *PSSRA* to mean that no one may discriminate in regard to employment because an employee is a member of an employee organization or is exercising any right under the *PSSRA*. For the complaint to be allowed, the complainant had to show that the employer acted in a discriminatory manner toward the employee because he was a member of an employee organization or because he was exercising a right under the *PSSRA*. In this decision, the PSLRB referred to *Stonehouse v. Canada (Treasury Board)*, PSSRB File No. 161-02-137 (19770524) and *Social Science Employees Association v. Canada* (*Attorney General*), 2004 FCA 165. All these decisions dealt with complaints under former iterations of the *Act*.

[88] However, a significant change occurred with the coming into force of the *Act*, on April 1, 2005, under its then title, the *Public Service Labour Relations Act*. The Board was given the explicit power, at s. 226(2), to interpret and apply the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 ("*CHRA")*, relating to employment matters, whether or not there is a conflict between the *CHRA* and the collective agreement.

[89] The employer referred to *Veillette v. Canada Revenue Agency*, 2010 PSLRB 32, and *Gray v. Canada Revenue Agency*, 2013 PSLRB 11, which were issued after the *Act*'s coming into force. These decisions applied a human rights analysis to allegations of discrimination concerning union activities. In *Veillette*, the grievor filed three grievances: two on discrimination because of union activities and one on discrimination based on family status. The Board referred to membership in a protected group in its analysis on discrimination based on union activities and family status.

[90] *Gray* involved a grievance alleging that the grievor was discriminated against by the employer because of his union activities. The Board adopted the same analysis used in *Souaker v. Canadian Nuclear Safety Commission*, 2009 PSLRB 145, a case that dealt with human rights discrimination. Accordingly, the Board examined whether the grievor in that case had a characteristic protected from discrimination under the collective agreement clause (namely, membership or activity in the union), that he experienced an adverse impact with respect to a term or condition of employment under the collective agreement, and that the protected characteristic was a factor in the adverse impact.

[91] Although discrimination on the basis of union activities is not a prohibited ground under s. 3(1) of the *CHRA*, it is a prohibited ground under the collective agreement. In my view, all the grounds listed in the discrimination provisions found at clause 19.01 should be considered to have the same standing and be interpreted in the same manner.

[92] As in *Gray*, the evidence must demonstrate (1) that the grievor possesses a characteristic protected against discrimination under clause 19.01, (2) that she suffered an adverse employment-related impact, and (3) that the protected characteristic was a factor in the adverse impact.

[93] Firstly, the grievor is a woman who at the material time was a member of and active in the Alliance. These are personal characteristics protected from discrimination, according to clause 19.01 of the relevant collective agreement.

[94] Secondly, the evidence shows that the grievor suffered an adverse employment-related event when she did not receive Mr. Rankin's recommendation for her 2008 FAP application.

[95] The third question is whether the protected characteristics were factors in the adverse impact. As discussed below, the evidence does not satisfy me that they were.

[96] The grievor testified that she was strong and direct when she presented union positions. She gave examples of telling Mr. Rankin that the port-of-entry vision was wrong and that he needed new glasses. She stated that she was passionate when she put forward members' concerns. She speaks with her hands.

[97] The grievor testified that she felt that Mr. Rankin did not like to look her in the eye and that he preferred to speak with male union representatives.

[98] The grievor felt that the fact that she is a woman and that she expressed herself with strength when dealing with management, and Mr. Rankin in particular, were factors in the refusal to endorse her FAP application.

[99] The grievor also felt that the sequence of events from January 22 through January 24, 2008, was significant. During this period, she applied for the FAP and attended a union-management meeting, and her application was not endorsed.

[100] No convincing evidence was presented to support the grievor's feeling that the rejection of her FAP application was punishment for union activities during this period. Belief is not proof.

[101] I also weighed the evidence of the grievor's workplace behaviour as recorded in the G-drive entries.

[102] Mr. Rankin testified that he considered employees' performance in the current fiscal year. In the grievor's case, this included the observations recorded on the G-drive, including those made during August 2007, and the evidence of Ms. DeSalvo and Ms. Dunwoody, who identified their entries and spoke of their observations. Both entries relate to the grievor's clear evidence that she did not like the merger of customs and immigration.

[103] Ms. DeSalvo gave evidence of a heated discussion ensuing when, on August 1, 2007, she directed the grievor to comply with the required uniform, including wearing a vest and duty belt. The G-drive entry indicated that the grievor told Ms. DeSalvo she would only wear the uniform components until Ms. DeSalvo left the workplace for the day. Ms. DeSalvo recorded the encounter on the G-drive.

[104] The grievor did not deny the occurrence except to say that her comments had been misinterpreted. An alternate interpretation was not presented to the Board.

[105] On August 28, 2007, Ms. Dunwoody overheard the grievor refer to the merger as a "Nazi takeover". Ms. Dunwoody expressed her understanding that it was a reference to customs. She identified her entry on the G-drive.

[106] The grievor did not deny her behaviour. She acknowledged that she openly called the merger a "Nazi takeover". Other witnesses said that immigration officers commonly used the phrase.

[107] In evidence, the grievor endeavoured to excuse her use of the phrase as a joke. I find her evidence disingenuous and self-serving, and I do not accept the assertion that it was a joke. The phrase is consistent with the displeasure she expressed throughout her evidence for the changes to her workplace that resulted from the merger. The fact that it may have been used by others does not excuse it.

[108] There is no evidence that either the use of the phrase "Nazi takeover" or the reluctant compliance with uniform requirements occurred in the context of the grievor's union-steward duties. Rather, they appear to have occurred during the discharge of the duties of her position.

[109] The Directive required Mr. Rankin to confirm that the applicants he recommended would be "… excellent representatives of the interests of the Government of Canada abroad and possess the necessary personal qualities." Those qualities were specified as flexibility/adaptability, judgement, effective interpersonal skills, team player, and capacity to handle a high-volume workload.

[110] Mr. Rankin concluded that the grievor's actions impacted the flexibility/adaptability, judgement, and team-player criteria to a degree that warranted his decision that he would not recommend her application. It is clear from the evidence that he relied on the record on the G-drive as a source of information.

[111] In my view, the period of Ms. DeSalvo's and Ms. Dunwoody's direct observations and Mr. Genereux's and Mr. Beck's counselling were proximate in time and remained relevant considerations. The entries recorded facts as viewed by the authors. In content, they related to the criteria to be assessed as reflected in Mr. Rankin's conclusion. They were available for Mr. Rankin to consider, and the evidence did not

persuade me that they were inappropriate or pretextual. (See *Lamarche v. Marceau*, 2007 PSLRB 18 at para. 50.)

[112] The fact that Mr. Rankin later wrote to the superintendents to inform them of his conclusion and to ask for any further comments that supported or detracted from his decision indicates a willingness to revisit it.

[113] It was suggested that in prior years, all FAP applications were recommended. No evidence was presented to support this assertion. In any event, if it were a practice that had continued in January 2008, it would have been incompatible with the express managerial responsibilities set out in the Directive.

[114] It was also suggested that Mr. Dowler's FAP 2008 application was more favourably viewed and recommended because he is a male immigration officer and union steward. Other than the differences of sex and an application that was recommended, no substantial evidence was presented that persuaded me that discrimination was a factor in the grievor's treatment.

[115] Further, while the grievor expressed her belief that discrimination was a factor in the decision not to recommend her FAP application, I note that "… an abstract belief that a person is discriminated against, without some fact to confirm that belief, is not enough." (See *Filgueira v. Garfield Container Transport Inc.*, 2006 FC 785.)

[116] Viewed in the context of the evidence before me, I am unable to conclude that sex or membership or activity in the Alliance were factors in the adverse impact. The information that Mr. Rankin relied on was connected to the grievor's workplace behaviour as an employee. The decision he reached was a reasonable one based on the information before him and it does not suggest that sex or membership or activity in the Alliance was a factor in the adverse impact.

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

(The Order appears on the next page)

VI. Order

[118] The grievances are denied.

November 16, 2021.

Joanne B. Archibald,
a panel of the Federal Public Sector
Labour Relations and Employment Board