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File: 566-02-08043

Citation: 2021 FPSLREB 131

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

CATALIN OBREJA

Grievor

and

TREASURY BOARD
(Department of the Environment)

Employer

Indexed as
Obreja v. Treasury Board (Department of the Environment)

In the matter of an individual grievance referred to adjudication

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

For the Grievor: Crystal Stewart, Professional Institute of the Public Service of Canada

For the Employer: Karen Clifford, counsel

Heard at Toronto, Ontario,
September 15 and 16, 2016, June 13, 2017, October 24 and 25, 2017,
and by written submissions,
filed October 30 and November 1, 2017.

REASONS FOR DECISION

I. Grievance before the Board

[1] The grievor, Catalin Obreja, held a meteorologist position classified at the MT-03 group and level in the Defence Weather Services Section of Environment Canada in Trenton, Ontario. He was laid off from that position on September 13, 2012. On November 26, 2012, he was rehired as a term-employee physical sciences officer at a salary protected at the PC-02 group and level in his preferred location of Toronto, Ontario. His term was continually renewed until he was hired indeterminately in that position on June 6, 2016.

[2] He grieved that the employer violated the objectives and intent of the workforce adjustment ("the WFA") appendix, Appendix "G", of the collective agreement between the Treasury Board ("the employer") and the Professional Institute of the Public Service of Canada for the Applied Science and Patent Examination Group that expired on September 30, 2011 ("the collective agreement"). He alleged that the employer engaged in disguised disciplinary action against him by ensuring that no guarantee of a reasonable job offer ("GRJO") was made to him other than for his relocated position. He maintained that it was retaliatory and discriminatory conduct against him on the basis of his union activities and that it was contrary to the *Official Languages Act* (R.S.C., 1985, c. 31 (4th Supp.); "the *OLA*"), the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "the *PSEA*"), and article 44 of the collective agreement.

[3] The grievance was referred to the former Public Service Labour Relations Board ("PSLRB") in January 2013, under s. 209(1)(a) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *PSLRA*"). 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 ("the PSLREB") to replace the PSLRB as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 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 section 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 sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[4] 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 PSLREB and the titles of the *Public Service Labour Relations and Employment Board Act* and the *PSLRA* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act* and the *Federal Public Sector Labour Relations Act* ("the *Act*").

[5] In response to the grievance, the employer submitted that the grievor received a GRJO as required by the WFA appendix. Furthermore, he received two additional GRJOs at his substantive group and level during his surplus period. Once he rejected the initial GRJO, subject to the layoff provisions of the WFA appendix, his layoff was done pursuant to s. 64 of the *PSEA*. Thus, it is not a matter for which the Board has jurisdiction, per s. 211 of the *Act*. Moreover, during the layoff period, he received another GRJO, for which he negotiated a later start date in his preferred location of Montreal in the spring of 2013. Ultimately, he refused it and kept working as a term-employee physical scientist classified at the PC-02 group and level in Toronto.

[6] For the reasons that follow, I find that the grievor did not establish a breach of the WFA provisions. He also did not establish that the employer's actions were discriminatory or retaliatory conduct due to his union activities.

II. Summary of the evidence

[7] As a result of a transition project initiated by the Department of National Defence to consolidate weather forecasting operations at the Joint Meteorological Centre in Gagetown, the grievor and other employees were advised that their work unit would be moved there from Trenton. The employer considered it a relocation and not the discontinuance of a function. According to the local Labour-Management Consultation Committee (LMCC) meeting minutes, the discussions about relocating the services began as early as July 14, 2009. A joint employer-union committee was struck to discuss issues as they arose.

[8] Abdoulaye Harou, Director, Defence Weather Services, from 2007 to 2014, testified on behalf of the employer. He explained that the service consolidation discussions began in 2008. The LMCC meetings were meant to keep the staff informed

of developments. He disagreed that the consolidation was about saving money. Although the majority of employees were relocated to Gagetown, some went to other locations.

[9] The grievor testified about second-language training for meteorologists in Trenton. He believed that his union activities in this respect set him on a collision course with the employer and were the precursor to his problems with receiving a GRJO in his preferred locations. He maintained that bilingual employees have more opportunities in the context of a WFA. He claimed that all the employees in the office were concerned that they would not meet the language requirements of the available positions.

[10] During the November 9, 2009, LMCC meeting, the grievor inquired about management's commitment to completing second-language training for all Trenton employees within two years. It responded that it was a balance between keeping the Trenton operations running and the requirement to meet the policy objective of second-language training. It could approve only one employee for the training. When it refused to send more employees for training, the grievor and other employees made complaints with the Office of the Commissioner of Official Languages.

[11] The Office of the Commissioner of Official Languages investigated and recommended second-language training for all employees. So, management sent everyone to language training. The complaints were made in 2009, shortly after the employees were notified that their jobs were being relocated to Gagetown. The grievor believed that his section was short-staffed and that there was no money to send all employees to language training.

[12] In cross-examination, the grievor stated that he was one of the nine employees who complained to the Office of the Commissioner of Official Languages. He was not aware that complaints were confidential and that the employer was not aware of the complainants' identities. A report on the complaints was released in summer 2012. He agreed that he circulated it to several managers immediately before he filed his grievance in September 2012. He was concerned about retaliation.

[13] In July 2011, the grievor and another employee made a staffing complaint concerning a non-advertised appointment process for an MT-06 manager position on an acting basis. The grievor alleged that the employer abused its authority when it

appointed someone to it who did not have the required language profile. He claimed that the employer retaliated against him. It did not retaliate against the other employee, only him. He based his retaliation allegation on the complaint and the events that took place before his grievance was filed and referred to the Board, including his union activities and official languages complaint.

[14] In cross-examination, the grievor agreed that he listed all his MT-05 experience in his application for the MT-06 manager position on an acting basis. He agreed that he was never denied any acting opportunities. He did not request second-language proficiency retesting during the WFA period. He maintained that the employer retaliated against him.

[15] On September 12, 2011, the grievor was declared affected, and he received a notification letter. He was informed that his position would be relocated effective that date and that he had six months to decide if he wanted to move with the position or be treated as if he were being subject to a WFA.

[16] On November 22, 2011, the grievor declined to move with the position. He explained that at that time, the information that management shared was chaotic, and that WFA training sessions had not yet been offered. The employer implemented an Internal Priority Clearance System (IPCS) to match positions for all affected employees. According to the grievor, the IPCS was more generous because it offered temporary assignments. Human Resources gave a presentation about it to the meteorologists. The grievor indicated that the employer specifically referred them to positions, in addition to the assistance that the Public Service Commission (PSC) provided to them.

[17] The grievor recalled that Human Resources promised a smooth matching process for employees, with the use of the IPCS. However, when he started contacting managers in other regions for positions, he did not receive responses. According to his understanding of the WFA appendix and the priority directive, all staffing processes should have stopped. All available positions were to be declared to the PSC, and the affected employees were to be matched automatically.

[18] All the affected employees were encouraged to contact managers directly if they were aware of any vacant positions. In November 2011, the grievor discovered that positions in the Meteorology Group (MT) were available at the Ice Meteorology Centre (IMC) in Ottawa, Ontario. When he contacted the relevant manager, she told him that

she had no vacancies. He did not obtain a position there, which he claimed seriously affected his personal life.

[19] On November 29, 2011, at the LMCC meeting, the grievor raised the fact that several advertisements for acting opportunities and assignments in different regions were not offered to the affected employees working in Trenton. That issue and the application of the National Joint Council's *Travel Directive* were discussed. He helped an employee file a grievance against management's inaccurate application of the *Travel Directive* in the context of an acting opportunity. The grievor pursued the grievance on the employee's behalf.

[20] The grievor felt that somehow, he was causing management trouble. He claimed that evidence of it is in an email he received through an access-to-information request that is dated December 9, 2011, in which Mr. Harou states, "I kind of sensed that CO was behind all this." The grievor interpreted Mr. Harou's statement as meaning that the grievor filed the grievance just to cause trouble.

[21] On December 15, 2011, the grievor was declared surplus and was notified that he would receive a GRJO. He told the employer that he was interested in being referred to indeterminate employment during his surplus status in his preferred Ontario locations of Toronto (the Greater Toronto Area or "GTA"), Whitby, Oshawa, Port Hope, Cobourg, Brighton, Belleville, Kingston, and Cornwall.

[22] In cross-examination, the grievor agreed that he did not wish to obtain an indeterminate position in Ottawa, even though he complained about not being offered a position in the ICMC there. He agreed that the regions he identified had positions only in the Physical Sciences (PC) Group, not the MT Group.

[23] Previously, the grievor stated that he would accept assignments in the following locations: Trenton, Toronto, Ottawa, Montreal, Dartmouth, Nova Scotia, and Charlottetown, Prince Edward Island. In 2009, he met with Mr. Harou to make Mr. Harou aware of his preferred relocation areas. According to the grievor, while he wanted to be within driving distance of his family, and listed all the areas around Trenton, he was also interested in positions in the Maritimes. There were few regions for meteorologists in Canada and he wanted to expand his opportunities. Eventually, however, his areas of interest changed.

[24] From December 2011 to March 2012, after the grievor received the surplus letter, alternate employment had still not been found for him, with his qualifications, and he had not been matched to any positions for which, in the PSC's opinion, he met the essential qualifications.

[25] In March 2012, the grievor filed a grievance with respect to shift scheduling. He alleged that the Trenton location was understaffed, which made it difficult to put together shifts that respected the labour code. In cross-examination, he stated that he met with the manager to discuss the grievance and that he found her trustworthy. She wrote to him, to explain the situation. He agreed that the grievance was denied at the first level because it did not meet the collective agreement's requirements. He agreed that the manager did not seek to retaliate against him and that she worked with him to resolve the matter. Ultimately, he did not pursue the grievance because he trusted the acting manager's answer.

[26] On March 12, 2012, the grievor was offered what the employer considered the GRJO. It was the MT-03 position relocated to Gagetown. He rejected it on June 22, 2012.

[27] In a letter from David Grimes, Assistant Deputy Minister, Meteorological Service of Canada, the grievor was informed that the offer letter for his relocated position to Gagetown constituted the GRJO and that his layoff date was September 12, 2012. Mr. Grimes informed the grievor that he would receive a 30-day layoff notice. Mr. Grimes explained that were the grievor laid off, he would no longer be an employee, but he would be entitled to a 12-month appointment priority to a public service position for which he met the essential qualifications.

[28] On March 21, 2012, Human Resources reminded the grievor to update his mobility area, to find alternate employment. He referred to his email dated February 29, 2012, in which he identified Cornwall and Kingston as National Capital Region locations. He also indicated that the GTA was mentioned for the Oshawa and Whitby locations. He stated that his "… location preferences may change in the next few months, as of now, the existent profile … fits [his] needs and the realities 'in the field' …".

[29] Human Resources responded that in the grievor's February 29, 2012, email, he indicated only a preference for Kingston and Cornwall. The email referenced their

discussion on March 9, 2012, in which he stated that in addition to those two locations, he was also interested in those in a 120 km radius of Trenton. Human Resources informed him that he had to be more specific. He responded that he wished to add Toronto (the GTA), Cornwall, Kingston, Belleville, and Trenton.

[30] In March and April 2012, the grievor alleged that MT positions were available. He claimed that an MT-03 position was available in Trenton, which should have been offered to him. However, the manager staffed it with an employee from the mobility pool. He could do nothing to challenge the appointment. The employee was classified MT-02 and was appointed as part of a development program for new meteorolgists. The grievor discussed it with Mr. Harou, who informed him that he had no claim to the position. The National Occupational Classification code stated that it belonged in Trenton, but later, the employee was posted to Ottawa. The grievor had an email exchange with Mr. Harou and Human Resources about the position. He claimed that as an employee with priority status, he had preference over anyone in the mobility pool. He maintained that the appointment breached the WFA provisions.

[31] Mr. Harou explained that these positions were part of the Meteorologist Operation Internship Program (MOIP), in which MT-02s are hired for promotion to MT-03. The positions were in Trenton and were not new. They had no impact on the WFA or the grievor's entitlements. He did not lose an opportunity on account of the MOIP.

[32] In April 2012, the grievor made a staffing complaint on behalf of an MT-05 colleague who was a priority for appointment. The grievor explained that he assisted the employee as part of his union activities. The MT-05 employee was told that no positions were available for him in Toronto. Subsequently, it was determined that an employee at the MT-03 level had been promoted to the MT-05 position.

[33] The grievor spoke to Human Resources about it, which refused to do anything. He made a staffing complaint on behalf of the priority employee. Ultimately, the language requirements for the position changed, and it was determined that the priority employee did not meet them. A second advertisement was posted. Further to his inquiries, the grievor was able to find a position for the priority employee.

[34] In cross-examination, the grievor agreed that a vacancy in an organization chart does not necessarily imply an operational requirement to staff it.

[35] The grievor complained about an employee who was promoted to an MT-03 position and who was relocated to the ICMC in Ottawa in April 2012. The grievor had contacted the ICMC manager several months before, to inquire about available positions, but the manager had told him that no positions were available. He claimed that he should have been informed of that position and that it should have been offered to him as a priority appointment.

[36] In cross-examination, it was put to the grievor that the employee appointed to the ICMC position was bilingual and met the language requirements. The grievor could not dispute this fact. In further cross-examination, he agreed that Ottawa was not identified as one of his preferred locations in April 2012 and that at that time, he did not meet the language requirements of that position.

[37] In cross-examination, the grievor stated that he took a period of combined medical, personal, compensatory, and annual leave in the spring of 2012. At the time, his second-language testing was expired. He did not use that time for language training. He did not believe that any requirement for language testing interfered with the employer's ability to market him for positions.

[38] On July 5, 2012, the grievor applied for MT-05 meteorologist instructor stream and operational meteorologist stream anticipatory positions in Gagetown and Winnipeg, Manitoba. He was unsuccessful. In cross-examination, he agreed that he did not indicate that he had any mobility restrictions and that he had to update his language proficiency. He stated that he wanted to qualify for the pool. He agreed that he applied for the position shortly after he turned down the employer's GRJO to Gagetown. Had he been offered an MT-05 position in Gagetown, he would have taken it. He maintained that he would have used the promotion to find another position in a location of interest to him. He agreed that he made the staffing complaint shortly after filing his grievance with respect to the GRJO.

[39] Throughout the WFA process, the grievor continued to represent employees as a union steward, and he represented several of them in their complaints. He made a second-official-language complaint against the appointment of an employee in Halifax, Nova Scotia. Ultimately, he withdrew it because the employee met the language requirements.

[40] The grievor claimed that in July 2012, other MT-03 positions were available in the Ontario Storm Prediction Centre but that the relevant manager had told him that none was available. He alleged that MT-03 incumbents were promoted to MT-05. When a promotion occurs, a position becomes available. He stated that he could not challenge the manager on the availability of positions. Other than his testimony, the grievor did not present any other evidence as to the availability of MT-03 positions in the Ontario Storm Prediction Centre in July 2012.

[41] In August 2012, the PSC offered the grievor an MT-03 assignment, which was scheduled to end in September 2012. For reasons unknown, the offer was withdrawn. On August 13, 2012, he received the notice of his layoff, effective September 13, 2012.

[42] On August 15, 2012, the grievor asked Public Works and Government Services Canada for information about his pension. On August 20, 2012, he filed the grievance before the Board in which he alleged that the employer violated the WFA provisions and that it retaliated against him by not providing him with a GRJO in any of his preferred locations.

[43] On August 29, 2012, Mr. Harou confirmed that some MTs would work in Trenton past September 12, 2012, because they were waiting to be posted out of there. Mr. Harou stated that three MTs were posted to Gagetown. The other three MT-03s were waiting for a posting decision by the Forecasters/Posting and Certification Committee because they were not interested in moving to Gagetown. The last two MT-05s were moved out in summer 2013 to Gagetown and Winnipeg. Some staff members were already working in Gagetown. At that time, work was being performed from both locations, Trenton and Gagetown.

[44] Mr. Harou went on to add that by November and December 2012, most of the work was to be performed in Gagetown. The Gagetown and Trenton locations would operate as one. Mr. Harou confirmed that the planned official closure of Trenton was summer 2013, as the last MTs were to be relocated. Both offices would operate with the staff on hand.

[45] In August 2012, Mr. Harou was aware that the grievor's preferred locations for an indeterminate position were Cornwall, Kingston, the GTA, Belleville, Peterborough, and Trenton. For determinate positions, he was interested in Queen PEI, Montreal, Ottawa, or Gatineau, Quebec.

[46] On September 7, 2012, the grievor was offered an MT-03 position in Edmonton, Alberta. He was informed that it constituted a GRJO in accordance with the WFA provisions. He declined the offer because the position was in Edmonton, which was not one of his preferred locations.

[47] On September 10, 2012, Mr. Harou wrote to the grievor to offer him another opportunity for an MT-03 position, this time in Gander, Newfoundland. The grievor was informed that it constituted another GRJO. He stated that he could not accept it. He informed Mr. Harou that he had added two locations to his areas of interest. The grievor stated that much still had to be done before all options with respect to his areas of interests were exhausted. In a hiring process with priority interest for a PC-02 position, he had provided positive references and asked if an offer letter would be forthcoming. He also expressed an interest in covering the position of an MT employee in Trenton who was to go on parental leave.

[48] In cross-examination, it was put to the grievor that no MT went on parental leave at that time and that the individual in question went on parental leave in November 2012 but started it only on December 1, 2012. The grievor responded that he was not surprised that the employee started the parental leave later.

[49] On September 11, 2012, the grievor updated his areas of interest for indeterminate positions in Cornwall, Kingston, the GTA, Belleville, Peterborough, Trenton, P.E.I., and Dartmouth. In addition, for determinate positions, he added Queens, Montreal, Ottawa, and Gatineau.

[50] On September 12, 2012, the grievor was informed that another surplus priority employee with more experience than him had been selected for the PC-02 compliance promotion position he had applied for. He did not contest the appointment.

[51] Effective September 13, 2012, the grievor was laid off and ceased to be an employee. On the same date, he requested the transfer value of his pension under the Public Service Pension Plan. A payment was issued in accordance with his payment instructions on December 19, 2012. He was informed that if he became re-employed and a plan member under that plan, he would have the option of reinstating the service for which he received the transfer value. He felt that he had no choice because he needed an income. Even after applying to all these positions and after all his efforts, he had to prepare for a long term without income. He felt that it was his only choice.

[52] In cross-examination, the grievor recognized that a series of GRJOs were made to him, one each in Gagetown, Edmonton, and Gander, but none in his preferred locations. He disagreed that had he taken any of them, he would have had continued employment and not suffered a pension loss. He stated that he could not take any of them because they were not in his preferred locations. The possibility of accepting one and then asking for a transfer was never discussed with him. He agreed that the IPCS was an internal system instituted by the employer and that it was not provided for under the collective agreement. It was to help affected employees find alternate employment.

[53] The grievor stated that a substantial amount of overtime was being performed in Trenton before the relocation. He knew that an employee was to go on parental leave until 2014. He hoped that this would be an acceptable arrangement with Mr. Harou and that by 2014, something would come up. The remaining MT-03s worked the overtime. He claimed that they worked over 140 hours of overtime after he left. He claimed that he should have been allowed to continue working in Trenton until he moved to Toronto to accept the PC-02 term position.

[54] In cross-examination, it was put to the grievor that Mr. Harou would testify that the overtime worked in Trenton did not increase because the employees relocated to Gagetown picked up the slack. The grievor disagreed. He stated that an estimated number of hours was produced for the shift schedule. He maintained that only when Gagetown became fully operational did the amount of overtime worked reduce. He agreed that the overtime figures were lower for the fiscal year that included the layoffs. He did not have any evidence that casuals were hired to work in Trenton during the relocation.

[55] In further cross-examination, it was put to the grievor that Mr. Harou would testify that employees were on duty in Trenton temporarily, to facilitate the opting employees' relocations to Gagetown. The grievor disagreed that the remaining working employees in Trenton had agreed to relocate to Gagetown.

[56] Operations ended in Trenton in summer 2013, and all the MT-03s went to Gagetown. The grievor was the only one laid off. None of the MT-05s went there. He did not know why the employer could not extend the surplus period before laying him

off and assumed that if given a desire or need, the employer could extend the surplus period.

[57] The grievor claimed that Mr. Harou had no credibility. He claimed that there were anomalies in how management applied the WFA appendix. He refused to meet with Mr. Harou because Mr. Harou was already aware of his preferred locations to relocate to. He felt that sharing information with Mr. Harou was of no benefit. He believed that his discussions with Human Resources were more beneficial than would have been any discussion with Mr. Harou.

[58] The grievor's relationship with Mr. Harou was friendly; he felt no negative intention from him. The problem was that nothing would be resolved with Mr. Harou. The grievor stated that no labour relations matters would ever be resolved with Mr. Harou unless a formal grievance was filed or a complaint was made. He felt that working with Mr. Harou was a disaster. He never discussed with Mr. Harou the possibility of accepting a position outside his preferred locations with an option of asking for a transfer.

[59] On November 26, 2012, the grievor declined a term employment opportunity in Ottawa and informed Human Resources that he was no longer interested in term opportunities in Ottawa, Gatineau, or Hull, Quebec. On November 27, 2012, he was rehired on a four-month term as a program officer in the Environmental Protection Operations Department (EPOD) - Environmental Stewardship at the salary-protected PC-02 group and level in his preferred location of Toronto.

[60] On December 19, 2012, Mr. Grimes denied the grievance at the final level of the grievance process. He informed the grievor that Trenton would cease to have meteorologists by June 30, 2013. They were all to have been deployed by then. Meteorological employees in Trenton were to receive no alternative working arrangements after the closing date. Gagetown and Trenton had been operating as a single unit with only one shift schedule since December 1, 2012. There were no vacancies in the grievor's preferred locations. Mr. Grimes reminded the grievor that as a surplus employee and as per the WFA directive, he had to be trainable and mobile. Positions in locations with vacancies were offered to him, even though they were outside his preferred locations. Mr. Grimes stated that the grievor's union activities did not influence his WFA status or the GRJOs offered to him. He stated that the employer

would continue to help the grievor find meaningful indeterminate employment fitting his qualifications.

[61] On January 7, 2013, the grievor recognized all the support that his current manager was providing him in his term position at EPOD - Environmental Stewardship. The grievor inquired about his term-employee status. As a laid-off priority, his entitlement would continue until he was appointed indeterminately, he refused an indeterminate appointment, or his priority expired on September 13, 2013. Surplus employees and leave-of-absence returnees take precedence over those with a layoff priority.

[62] In cross-examination, the grievor admitted that he had a dedicated person in Human Resources helping him find opportunities, Nathalie Audet. Others there also helped him find employment. He agreed that Human Resources did not retaliate against him.

[63] On January 24, 2013, the grievor contacted Human Resources to add Montreal as one of his preferred locations for indeterminate employment.

[64] On February 25, 2013, the grievor was offered an MT-03 indeterminate position in Gagetown. He declined it because it was not one of his preferred locations.

[65] On March 5, 2013 the Manager, Prediction Training Section, Meteorological Service of Canada, in Montreal, invited the grievor to meet after he expressed his interest in an indeterminate MT-03 position. He responded that he could not commit to a start date sooner than November 15, 2013, due to personal obligations.

[66] In cross-examination, the grievor agreed that the Montreal office was willing to have him on board as an indeterminate employee as early as June 3, 2013, but that it was his choice to remain a term employee. He testified that he could not buy back his pension because he had no guarantee of permanent employment. He negotiated a start date of January 2014. At that point, in April 2013, the grievor had received an offer for indeterminate employment as an MT-03 in his field with a matching language proficiency, in Montreal. The employer agreed to pay for his relocation for his preferred start date. He agreed that the manager in Montreal did not retaliate against him. By 2013, he was no longer being retaliated against. The retaliation ended in September 2012.

[67] On March 18, 2013, the grievor's term position as a physical sciences officer classified at the PC-02 group and level in Toronto was extended from March 31 to September 30, 2013. He stated that he had no guarantee that he would be offered consecutive terms.

[68] On April 9, 2013, the grievor was offered the indeterminate operational meteorologist position classified at the MT-03 group and level in Montreal effective October 1, 2013. On April 26, 2013, the employer agreed to change the start date to January 6, 2014, to accommodate his wishes. He discussed with management at the time an opportunity to transfer from Montreal to Toronto as an MT-03 in March of 2015.

[69] In May 2013, the grievor was offered several positions but at classifications other than MT-03. The MT-03 assignments offered to him were for the short term. On May 31, 2013, the employer posted a job opportunity advertisement for four meteorologist instructor positions classified at the MT-05 group and level.

[70] In cross-examination, the grievor agreed that his preferred locations changed continuously from July 25 to September 12, 2012, and that only in January 2013, when he found out about an indeterminate position in Montreal, did he add it as a preferred location. Other than in January and March 2012, he did not identify Ottawa as a preferred location. He admitted that he was interested in an MT-05 position in Gagetown, which was the relocated location. He would move there only for a promotion to an MT-05 position.

[71] In cross-examination, it was put to the grievor that frequent changes to his preferred locations would make it harder for the employer to find him a position. He disagreed that doing so limited the possibility of obtaining offers. He disagreed that it was beneficial to meet with Mr. Harou, to make Mr. Harou aware of his location preferences.

[72] In further cross-examination, the grievor agreed that Mr. Harou met with the affected employees in May 2008 and June 2011. He agreed that Mr. Harou tried to find out about his interests and desires, to place him in a suitable position. He stated that he had nothing to add to their 2008 meeting. He recalled scheduling a time to meet with Mr. Harou in September 2011 to receive his letter, but they did not discuss his preferred locations or his interests because it would have served no useful purpose. He

recalled that he was again invited to meet with Mr. Harou in June 2012, this time to discuss not only the relocation but also anything that the staff would have liked to bring to Mr. Harou's attention. The grievor declined to meet because Mr. Harou already knew of his preferred locations.

[73] In cross-examination, the grievor did not recall that it was through the WFA process that he was referred to the full-time term PC-02 position in November 2012. He agreed that he received referrals to positions through the WFA stream. Throughout the process, he recognized that Human Resources was continually available to him and that it assisted him. Ultimately, the term position he occupied was renewed in March 2013. He secured a term position in the nuclear environmental stewardship branch at the end of September 2013. There was no guarantee of a third term, but it was renewed.

[74] In further cross-examination, the grievor recalled that he was rehired indeterminately in January 2014 as an operational meteorologist at the Quebec Storm Prediction Centre. He believed that he could not buy back all his pension since he had been rehired. He agreed that initially, the offer letter specified an October 2013 start date. Had he wanted to, he could have begun working full-time as of then.

[75] In further cross-examination, the grievor was asked about remedies. In his grievance, he asked for the retaliation to stop and to be made whole. As a result of the WFA process, he incurred losses, including of family time, and he accessed funds that he should have never accessed. He had to change his life plans. He had no employment certainty. From the time that he was laid off in September 2012, life was difficult for him. He still believes that it all could have been avoided to the benefit of all parties had the employer extended the surplus period or offered him a position in his preferred locations. The employer should have let him continue to work until he moved to Toronto as a term employee in November 2012.

[76] The employer called Ms. Audet, who was a WFA advisor at the time of the grievance. She explained that her duties were to support surplus and affected employees. The WFA was under way because of the Deficit Reduction Action Plan of 2012, which impacted the entire federal public service. She was in regular contact with the grievor by email and phone as of February 2012. She assisted approximately 100 employees. Compared to other employees, she had the most contact with the

grievor. She inherited most of the MTs that had been declared affected. Most of the MTs relocated or accepted other positions.

[77] Ms. Audet explained that two systems helped surplus employees find employment, the Priority Information Management System (PIMS), which was public-service wide, and the IPCS, which was solely within the department. In addition, all employees with priority status could express an interest in staffing opportunities through self-referral. All surplus employees were matched or flagged for opportunities. Once matched, they were notified of existing opportunities for which they could qualify. They were asked if they were interested, hiring managers were contacted, and prospective employees were then assessed. Once deemed qualified through an appointment process, they were appointed to positions with formal offer letters.

[78] Ms. Audet explained that in some situations, assignment opportunities or appointment processes did not result in any offers. In those cases, the employees received referrals and were matched, but because of budget cuts, if there was no funding or someone with a priority qualified for the opportunity, they would not be appointed. Moreover, the employees had to meet linguistic requirements to be appointed. Both systems would refer employees not to promoted positions, only to equivalent positions. Employees could still apply for promotions via the usual process.

[79] Ms. Audet knew that the grievor was a union steward because he had told her that he was one from 2009 to 2012. She was never directed to treat him differently, and his union activities had no impact on how the systems treated him.

[80] Ms. Audet indicated that she was aware of the grievor's preferred locations as indicated in the affected employee data document dated December 2011. Those locations for indeterminate employment were Toronto (the GTA), Whitby, Oshawa, Port Hope, Cobourg, Brighton, Belleville, Kingston, and Cornwall. For assignments, the grievor indicated Trenton, Toronto, Ottawa, Montreal, Dartmouth, and Charlottetown. To her knowledge, all EC positions were in Toronto, and his preferred regions had no MT or PC positions.

[81] Ms. Audet explained that surplus-status employees receive a layoff date that is not extended. None of the files she worked with had a layoff date extended. Surplus-status employees were part of a pool and were considered priorities for appointment.

They had to be mobile and to meet the language requirements of positions before being referred and assessed for them. If successful, they were appointed. The grievor was laid off in September 2012, which entitled him to a priority appointment.

[82] Ms. Audet identified the grievor's mobility preferences in an email to Ginette Arseneau on January 31, 2013. For indeterminate opportunities, he indicated Halifax, P.E.I., Cornwall, Kingston, Toronto, Belleville, Peterborough, and Trenton. For determinate opportunities, he indicated Halifax, Queens in P.E.I., Montreal, Cornwall, Kingston, Toronto, Belleville, Peterborough, and Trenton. Those locations had been consistent since October 2012.

[83] Ms. Audet recalled the PC-02 compliance position that the grievor applied for in September 2012, just before his layoff. The manager emailed Human Resources to inform it that she told the grievor that another priority employee was appointed who met the language requirements. She indicated to the grievor that the appointee was assessed against the merit criteria and was a better fit. The appointment was fiscally responsible and allowed her to stay within the salary cap.

[84] Ms. Audet confirmed that Human Resources provided the grievor with all the opportunities she was aware of based on his mobility preferences and the information it had. It did not omit presenting any opportunities to him.

[85] In cross-examination, Ms. Audet was referred to an email dated April 2, 2012, from the grievor to Mr. Harou and Human Resources, in which he refers to an MT-02 employee who was appointed to an indeterminate MT-03 position in Trenton as part of the Professional Development and Apprenticeship Program. At that time, the grievor was identified as a priority appointment and indicated that his preference was for Trenton. She stated that she was not involved in that process. Ms. Audet explained that had a staffing process been run for an MT-03 position, the grievor would have been referred to it. However, the process was part of the Professional Development and Apprenticeship Program, which differed from a regular appointment process. All surplus priority appointments had to meet the merit criteria and language requirements.

[86] In further cross-examination, Ms. Audet was asked about extending surplus and layoff dates. She responded that they are not extended. Her interpretation of the collective agreement is that the guarantee is to not be laid off earlier than the expected

layoff date but that that date cannot be extended. She continually referred positions to the grievor that she was made aware of either through the system or through colleagues and managers. To the extent possible, the offers were made in accordance with his mobility preferences.

[87] Mr. Harou explained that in November 2009, he decided to meet with staff one-on-one because they could not attend the LMCC meetings and could not participate in plenary meetings on the subject. He wanted to gain an understanding of their personal situations and their preferences for certain areas. He wanted a better understanding of their personal needs and their families and to accommodate them, especially for those with health issues. He recalled that he held four separate sessions, one in 2009, two in 2011, and one in 2012. Mr. Harou recalled only one session with the grievor, when he gave the grievor his letter. The grievor mentioned only that he was not prepared to move to Gagetown and did not specify any other concerns. The meetings were helpful for human-resources planning reasons, for discussing with other managers where people could go, and for discussing with them their relocation needs. Some employees were prepared to go to Gagetown immediately, which he was able to accommodate. Others wanted to stay in Trenton longer and were also accommodated. Those who wanted to relocate were able to negotiate their moves with the manager of the relocated position. He was able to place everyone except the grievor.

[88] Mr. Harou also had a meeting with the grievor in May 2008. In an email to Human Resources on September 12, 2012, Mr. Harou transcribed his meeting notes. In his notes, Mr. Harou indicated that the grievor stated that he would not go to Gagetown under any circumstances but that he would be interested in temporary duty assignments, that the grievor did not believe in the project, that the grievor applied to MT-05 competitions, that the grievor made the national pool but was not selected, and that the grievor's locations of interest by order of preference were Dartmouth, Montreal at the Canadian Meteorological Centre, and Toronto. Mr. Harou indicated that the grievor's list from May 2008 differed significantly from the list he provided in 2012. In his email, Mr. Harou indicated that the grievor could have updated his list at their one-on-one discussions, but the grievor always declined to meet with him.

[89] In cross-examination, Mr. Harou was asked why he messaged Human Resources about his conversation with the grievor four years earlier. He stated that it was in response to the grievance that the grievor had recently filed, in August 2012.

Mr. Harou explained that for planning purposes, it was important for him to meet with employees to discuss their affected status and information that had to be sent to the PSC, not just their preferred locations. Everyone was placed except the grievor, who was the only MT-03 not in a mobility pool.

[90] In cross-examination, Mr. Harou explained that once an employee is in a mobility pool, the employee is part of that pool for three years. Employees begin at the MT-01 level and are developed to the MT-02 level and then the MT-03 level. They remain in that mobility pool at the MT-03 level for three years. The grievor had already completed the three years and was no longer in the pool. The conditions of employment provided that the employer could move employees to any location. It is a condition of employment that employees agree to be mobile. Employees keep the same position number even when they move.

[91] Mr. Harou explained that during the transition period, managers offered temporary duty assignments in Gagetown. The purpose was to provide employees with an opportunity to work there so that they could decide whether to move there. In 2008, the grievor mentioned to Mr. Harou that he was interested in a temporary duty assignment, but he did not avail himself of that opportunity. Mr. Harou disagreed with the grievor that temporary duty assignments were made available because management was desperate for help. Mr. Harou stated that their purpose was to provide employees with an opportunity to make an informed decision about moving.

[92] Mr. Harou explained that the WFA process created new MT-06 and MT-05 positions; the number of positions in Gagetown increased. To help employees become more marketable, Mr. Harou created a workshop in 2009 to help them become familiar with the staffing process, approach appointment processes, and prepare for interviews. All employees were invited. The grievor did not take part.

[93] Mr. Harou recalled that several GRJOs were made to the grievor but that he declined them all because they were not in his preferred locations, which had no MT positions. Mr. Harou was not aware of available positions that were not offered to the grievor.

[94] In cross-examination, Mr. Harou was asked about the GRJOs. He agreed that the initial GRJO offered to the grievor was the relocated position in Gagetown. He stated that it was permissible under the WFA provisions of the collective agreement. However,

the grievor was offered two more GRJOs, in Gander and Edmonton, before he was laid off.

[95] Mr. Harou recalled that the grievor was laid off as of September 13, 2012. Mr. Harou confirmed that no term or casual employees were hired to work in Trenton, which had enough employees to cover the shifts. The transition from Trenton to Gagetown did not impact overtime, which did not increase or decrease. The transition project came in under budget. Mr. Harou confirmed that the grievor never informed him that he would be interested in moving to Ottawa as an MT-03. The grievor could not have been offered that position because he did not meet its language requirements. The employee transferred to Ottawa was part of the mobility pool, and it had been determined long before that he would be transferred to Ottawa. Moreover, the employee was not affected by the WFA because he was in the mobility pool. They are not WFA positions.

[96] In cross-examination, Mr. Harou recalled that employees had to meet the language requirements of a position to be considered for appointment to it. He recalled that the grievor's second-language results were not at the required level. He recalled informing the grievor to take language training. Mr. Harou did not recall the grievor requesting language training until he applied for an MT position in Montreal. Mr. Harou stated that he tried to accommodate all employees and to place them in their preferred areas. He always tried to be clear and to provide as much information as possible.

[97] In further cross-examination, Mr. Harou stated that there was enough budget room for employees to update their language training. All employees were informed that they could take second-language training, of which the grievor was aware. He took language training when he was offered the position in Montreal. During the WFA process, he did not take second-language training.

[98] Mr. Harou stated that had the grievor accepted the GRJO in Gagetown, Edmonton, or Gander, Mr. Harou could have brought the request forward for the grievor to relocate, which would have been brought to the forecast prediction committee for consideration. That committee considers staff movement for a variety of reasons, including personal issues, family issues, and interest in expanding

experience. Employees are aware of the committee and the possibility of requesting a relocation.

[99] In cross-examination, Mr. Harou stated that he recalled telling the grievor to accept one of the GRJOs and then to request a transfer. Human Resources advisors could have helped him request one. Mr. Harou agreed that a transfer was not guaranteed and that a position had to be available.

[100] The grievor was not the only union steward impacted by the relocation. Mr. Harou listed several names of individuals active in the union who were relocated. There was no retaliation. Mr. Harou stated that he tried to accommodate all employees to the best of his abilities. No employees were retaliated against because they made complaints with the Office of the Commissioner of Official Languages. Mr. Harou had no issues with the grievor's inquiries about the implemented transition measures or the appointment processes. The travel claims issues he raised were resolved satisfactorily with management. Mr. Harou disagreed that he felt that the grievor had caused him trouble.

[101] In cross-examination, Mr. Harou agreed that the Forecast Prediction Committee met twice a year and that he mentioned it to the grievor during their face-to-face meeting, at which the grievor was given the layoff letter.

[102] Mr. Harou testified that the grievor was a hard worker, with good performance appraisals, when from 2011 to 2012, he was an acting MT-05. He never intended to discipline the grievor; there was nothing to discipline him for. The GRJOs offered to him in Edmonton and Gander were legitimate. Those offices required employees. The grievor could have accepted one of those positions and applied to the Forecast Prediction Committee at any time for a transfer or relocation. There was no guarantee that he would have received one right away, but they were options.

[103] Mr. Harou was aware that the grievor was not interested in moving to Gagetown in 2012. When he found out that the grievor was interested in an MT-05 position there, he became flabbergasted, because he recalled the grievor not being interested in moving there; yet, the grievor applied for the MT-05 position. There were no MT-04 positions. Mr. Harou knew that the grievor had been an MT-03 for approximately 10 years. The grievor would have been at the last salary echelon at the MT-03 group and level. The salary difference between the MT-03 and MT-05 levels was between $3000

and $4000. Had the grievor accepted the relocation to Gagetown, or the positions in Edmonton or Gander, he would have had no break in service. He received three job offers and refused to meet with Mr. Harou.

[104] In redirect, Mr. Harou confirmed that the grievor was the only employee he could not find a position for. Mr. Harou stated that he consistently brought up the grievor's name at all meetings at which the WFA was discussed with management so that they could try to find him a position. Mr. Harou made use of all his opportunities to find the grievor a position. Mr. Harou was kept informed of persons retiring, new positions opening, and vacancies. He took every opportunity to market the employees.

III. Summary of the arguments

A. For the grievor

[105] The grievor claimed that he should have been considered for the MT-03 position in Ottawa. Section 40 of the *PSEA* provides that as a surplus employee, under the WFA provisions, he benefitted from a priority of appointment over all other employees benefitting from one. His appointment to the position was subject to s. 30 of the *PSEA*, which provides that appointments must be made pursuant to merit.

[106] The grievor alleged that the employer applied the WFA appendix in a retaliatory manner because of his union activities before and during the WFA process. He maintained that the employer violated the *OLA* and article 44 of the collective agreement. He maintained that it engaged in disguised disciplinary action against him by ensuring that no GRJO was made to him other than to his relocated position.

[107] The grievor filed his grievance before being laid off. He was forced to cash out his pension, and he suffered a break in service. As a result, he was out of work from September 12 to November 26, 2012, when he secured term employment.

[108] Before his layoff, he took detailed steps to obtain the MT-03 position in Ottawa through self-referral. He should have been considered for it. The employer failed to carry out effective human-resources planning to minimize the impact of the WFA as required by its clause 1.1.2.

[109] The employer had been aware since 2008 that the grievor could not relocate to Gagetown under any circumstances. Throughout the relevant time, the grievor asked questions at the LMCC meetings about the Forecast Prediction Committee and MOIP.

As of July 2011, the MT-03 position in Ottawa was available. The decision was made to post the trainee to that position instead of the grievor effective September 12, 2012. Even though the grievor refused to meet with Mr. Harou, they had multiple email exchanges, and Mr. Harou was fully aware of the grievor's preferences, including that the grievor was interested in that position.

[110] In November 2011, the appointed trainee did not meet the language requirements of the MT-03 position in Ottawa. The grievor self-referred for it, and Mr. Harou and the hiring manager told him that no positions were available. The employer breached the WFA provisions. In the time between the decision being made to appoint the trainee and his appointment, the grievor's language skills could have been retested.

[111] The employer argued that the grievor breached his obligation to remain mobile. He gave evidence about his family situation, his spouse, and his need to remain in driving distance of his son. He was mobile, but he changed his preferences because his wife moved. He was open to other locations and other PC positions.

[112] The grievor disputed that the GRJOs he received were reasonable. He was the only MT offered three separate GRJOs. Edmonton and Gander are very far from Trenton and the surrounding regions that he had identified.

[113] The grievor maintained that the GRJOs were not reasonable and that they were made in retaliation for his union activities, the complaints he made with the Office of the Commissioner of Official Languages, his heavy involvement with the LMCC meetings, and his intense questioning. It is not about the employer not liking the union but about how it applied the WFA provisions to him.

[114] Human Resources never mentioned to the grievor that he could have accepted the GRJOs in Gander and Edmonton and then asked for a transfer. Had it been suggested to him, he never would have cashed out his pension, and he would not have suffered a break in service. A guarantee of a possible transfer was never made. Work remained to be done in Trenton. The employer could have extended his surplus status. Furthermore, a colleague was about to go on parental leave. The grievor could have occupied that position.

[115] The employer had an obligation under the WFA provisions to find an available position in one of the grievor's preferred locations. The position in Ottawa was a reasonable GRJO, and it should have been offered to him. He benefitted from a legislative priority over employees in the MOIP.

[116] The GRJOs in Gander and Edmonton were offered in retaliation to the grievor's union activities. He actively raised issues all the time. The employer was aware that he could not move to either location. More could have been done to help him find a position in his preferred locations. No extra effort was made to find him a position, because of his union activity.

[117] The grievor referred me to *Charette v. Parks Canada Agency*, 2015 PSLREB 43, in support of his argument that the employer has an obligation to treat all employees affected by a WFA equitably with respect to the collective agreement provisions on actions for it to take vis-à-vis all employees subjected to layoff.

[118] The grievor also referred me to *Donald v. Treasury Board (National Defence)*, PSSRB File No. 166-02-28605 (19990728), to support his position that a relocated position is not a GRJO when the employee chooses not to move with his or her relocated position. He also submitted that the employer could have extended the surplus period. He agreed that the WFA provisions were different from the ones in dispute before the Board in *Donald*.

B. For the employer

[119] The grievance is about the grievor's layoff. It was a termination of employment under s. 211 of the *Act*, which provides that the Board does not have jurisdiction to hear a grievance about a termination made under s. 64(1) of the *PSEA*. The only way the Board can take jurisdiction is if somehow, the grievor convinces it that the layoff was disguised discipline or retaliation and a breach of article 44 of the collective agreement. The grievance must stand or fall on the employer's application of the WFA appendix.

[120] The employer relied on *Sampson v. Treasury Board (Indian and Northern Affairs Canada)*, PSSRB File No. 166-02-26494 (19960513), [1996] C.P.S.S.R.B. No. 34 (QL) at para. 46, *Hobbs v. Treasury Board (Indian and Northern Affairs Canada)*, PSSRB File No. 166-02-21685 (19920407), [1992] C.P.S.S.R.B. No. 51 (QL), and *Denike v. Treasury Board*

(Transport Canada), PSSRB File No. 166-02-14264 (19831107), [1983] C.P.S.S.R.B. No. 128 (QL) at paras. 12 and 15, to support its position.

[121] In the alternative, the employer met its obligations under the collective agreement by providing the grievor with options for continued employment. Furthermore, it conducted extensive and effective human-resources planning.

[122] The employer maintained that the Ottawa position was a red herring. The grievor consistently refused to meet with Mr. Harou. He never informed Mr. Harou that his location preferences had changed. He never indicated that he was interested in a position in Ottawa. Mr. Harou did not know that Ottawa was a location of interest for the grievor; it required a bilingual employee. As per s. 30 of the *PSEA*, appointments are made based on merit, which includes language proficiency.

[123] The employer agreed with the grievor that he benefitted from a legislative priority of appointment under the WFA appendix over any employee in the MOIP. When he self-referred to the disputed position in Ottawa in November 2011, he indicated that he spoke French but that he had to be retested for his proficiency. When he contacted the manager later in November, she responded that she did not have a position for him. She did not say that no position was available. She said that she did not have a position “for [him]”. He did not meet the essential qualifications at that time.

[124] In cross-examination, the grievor stated that his language proficiency had to be retested. When asked if he took the steps to do it, he answered that he did not. He failed to keep his language proficiency up to date, for which he had an obligation under clause 1.4.2(b) of the WFA appendix.

[125] When the grievor was declared surplus, he did not identify Ottawa as a preferred location. He added it only in 2012. But he did not meet the position’s essential language requirements and therefore did not meet the merit criteria under the *PSEA*. He never raised it in his grievance because he knew that he did not meet the position’s essential qualifications.

[126] The grievor presented no evidence to support his allegation that positions were available for which he was not considered. In cross-examination, he agreed that Ms. Audet had been helpful; he said that she was excellent.

[127] The employer did not breach the WFA provisions of the collective agreement. It went through extensive human-resources planning and made significant efforts to ensure that all employees were placed. The grievor alleged that he was not treated equitably. The question is how he fared compared to others in the same process. The employer submitted that he received three GRJOs, which was more than anyone else received. Many families packed up and left for different parts of the country.

[128] The WFA provisions with respect to the right to be treated equitably state that it is a not a substantive right. The only substantive right that the collective agreement provisions conferred on the grievor was the right to a GRJO. He was offered three GRJOs. As per clause 3.1.4 of the WFA appendix, he was offered his relocated position on March 12, 2012.

[129] The employer argued that the provisions setting out the WFA appendix's objectives are general and introductory and do not confer substantive rights on employees or create obligations for the employer. They are only guiding principles; it is not possible to violate the objectives. See *Attorney General of Canada v. Lâm*, 2008 FC 874 at paras. 23 to 25 and 28, *Mackwood v. National Research Council of Canada*, 2011 PSLRB 24 at para. 12, and *Chênevert v. Treasury Board (Department of Agriculture and Agri-Food)*, 2015 PSLREB 52 at para. 150.

[130] Employees are not guaranteed a job of their choice for life. Rather, the predominant obligation of the WFA appendix is the promise of a GRJO. An employer that offers positions to surplus employees at their substantive classification levels fulfils its obligations. See *Khurana v. Treasury Board (Veterans Affairs)*, PSSRB Files No. 166-02-24750 to 24752 and 25270 (19941107), [1994] C.P.S.S.R.B. No. 136 (QL) at 7.

[131] The evidence is not in dispute that the grievor received a GJRO. Furthermore, he received two more at his substantive group and level during his surplus period. During his layoff period, he received a further GRJO for which he negotiated a later start date rather than agreeing to start working in Montreal in the spring of 2013.

[132] The definition of "reasonable job offer" in the collective agreement's WFA provisions specifies that surplus employees must be both trainable and mobile. The word "mobile", in its ordinary and regular use, when referring to individuals or a workforce, means having an ability or willingness to move places of residence.

[133] In *Sampson*, the Board's predecessor determined that a surplus employee who did not want to move his family, and thus restricted his mobility so much that the employer was not even able to provide him with a GRJO was deemed to have breached employees' obligations under the WFA. He was held to be the author of his misfortune.

[134] The grievor provided no evidence of disguised discipline or retaliation. He testified that Mr. Harou was always courteous and a gentleman to him and that Ms. Audet was excellent. He had the burden of demonstrating a nexus between the fact that he was a union steward and the outcome of the WFA. He did not demonstrate any such link. His interpretation would require that the Board ignore the negotiated and agreed-to provision that surplus employees must be mobile.

[135] The staffing complaint that he made was not done in his capacity as a union representative. It was a personal complaint that he made on his own in July 2011. The decision to relocate the work to Gagetown had already been made. Everyone received the relocation notice in September 2011.

[136] The evidence is that the grievor was a hard-working employee with good performance evaluations. There is no evidence of any disciplinary intent towards him. Indeed, in a situation such as this, in which an entire work unit was relocated, and everyone received identical letters that their work unit was being relocated, the grievor would somehow have to prove that he was negatively singled out. However, the evidence is to the contrary. He received a GRJO for his relocated position and two more GRJOs. He admitted that had he taken the first GRJO or one of the other two GRJOs, he would not have suffered any loss.

[137] The grievor had the onus of establishing that on a balance of probabilities, he was laid off for disciplinary reasons or for alleged unsatisfactory performance. The jurisprudence cited in *Nadeau v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 31 at paras. 146 to 148, stands for the established principle that there must be an intent to punish or correct culpable behaviour to establish disguised discipline. There was no such evidence in the grievor's case.

IV. Analysis

[138] The grievor maintained that the employer's GRJOs were retaliatory and discriminatory conduct on account of his union activities and that they were not compliant with the WFA provisions of the collective agreement.

[139] The following provisions of the WFA appendix are relevant to the issue before the Board:

> …
>
> ***Objectives***
>
> *It is the policy of the* [employer] *to maximise 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 employment availability 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).*
>
> ***Definitions***
>
> …
>
> ***Guarantee of a reasonable job offer*** *(*garantie d'une offre d'emploi raisonnable*) - is a guarantee of an offer of indeterminate employment within the Core Public Administration provided by the deputy head to an indeterminate employee who is affected by workforce adjustment. Deputy heads will be expected to provide a guarantee of a reasonable job offer to those affected employees for whom they know or can predict employment availability in the Core Public Administration. Surplus employees in receipt of this guarantee will not have access to the options available in Part VI of this Appendix.*
>
> …
>
> ***Reasonable job offer*** *(*offre d'emploi raisonnable*) - is an offer of indeterminate employment within the Core Public Administration, normally at an equal level but could include lower levels. Surplus employees must be both trainable and mobile. Where possible, the search for a reasonable job offer will be conducted as follows: 1) within the employee's headquarters as defined in the Travel Directive; 2) within forty kilometres (40 km) of the employee's place of work or of the employee's residence whichever will ensure continued employment; and 3) beyond forty kilometres (40 km). In*

Alternative Delivery situations, a reasonable offer is one that meets the criteria set out in type 1 and 2 of Part VII of this Appendix. A reasonable job offer is also an offer from a FAA Schedule V employer, providing that:

(a) The appointment is at a rate of pay and an attainable salary maximum not less than the employee's current salary and attainable maximum that would be in effect on the date of offer.

(b) It is a seamless transfer of all employee benefits including a recognition of years of service for the definition of continuous employment and accrual of benefits, including the transfer of sick leave credits, severance pay and accumulated vacation leave credits.

…

Part I

Roles and responsibilities

1.1 Departments or Organizations

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

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

1.1.3 *Departments and organizations shall establish workforce adjustment committees, where appropriate, to manage the workforce adjustment situations within the department or organization, and they shall notify PIPSC of the responsible officers who will administer this Appendix.*

…

1.1.7 *Deputy heads will be expected to provide a guarantee of a reasonable job offer for those employees subject to workforce adjustment for whom they know or can predict employment availability in the Core Public Administration.*

1.1.8 *Where a deputy head cannot provide a guarantee of a reasonable job offer, the deputy head will provide one hundred and twenty (120) days to consider the three (3) options outlined in Part VI of this Appendix to all opting employees before a decision is required of them. If the employee fails to select an option, the employee will be deemed to have selected option (a), twelve (12) month surplus priority period in which to secure a reasonable job offer.*

…

1.1.14 *Deputy heads shall apply this Appendix so as to keep actual involuntary lay-offs to a minimum, and a lay-off shall normally occur only where an individual has refused a reasonable job offer, or is not mobile, or cannot be retrained within two (2) years, or is laid-off at his or her own request.*

**

1.1.15 *Departments or organizations are responsible to counsel and advise their affected employees on their opportunities of finding continuing employment in the public service and shall, to the extent possible, help market surplus employees and laid off persons to other departments or organizations unless the individuals have advised the department or organization in writing that they are not available for appointment.*

1.1.16 *Appointment of surplus employees to alternative positions, whether with or without retraining, shall normally be at a level equivalent to that previously held by the employee, but this does not preclude appointment to a lower level. Departments or organizations shall avoid appointment to a lower level except where all other avenues have been exhausted.*

1.1.17 *Home departments or organizations shall appoint as many of their own surplus employees or laid-off persons as possible, or identify alternative positions (both actual and anticipated) for which individuals can be retrained.*

1.1.18 *Home departments or organizations shall relocate surplus employees and laid-off individuals, if necessary.*

1.1.19 *Relocation of surplus employees or laid-off persons shall be undertaken when the individuals indicate that they are willing to relocate and relocation will enable their redeployment or reappointment, providing that*

(a) there are no available priority persons, or priority persons with a higher priority, qualified and interested in the position being filled;

or

(b) no available local surplus employees or laid-off persons who are interested and who could qualify with retraining.

…

1.1.31 *Departments or organizations shall provide surplus employees with a lay-off notice at least one month before the proposed lay-off date, if appointment efforts have been unsuccessful.*

1.1.32 *When a surplus employee refuses a reasonable job offer, he or she shall be subject to lay-off one month after the refusal, however not before six (6) months after the surplus declaration date. The provisions of 1.3.3 shall continue to apply.*

1.1.33 *Departments or organizations are to presume that each employee wishes to be redeployed unless the employee indicates the contrary in writing.*

…

1.4.2 *Employees who are directly affected by workforce adjustment situations and who receive a guarantee of a reasonable job offer, or who opt, or are deemed to have opted, for option (a) of Part VI of this Appendix are responsible for:*

(a) actively seeking alternative employment in co-operation with their departments or organizations and the PSC, unless they have advised the department or organization and the PSC, in writing, that they are not available for appointment;

(b) seeking information about their entitlements and obligations;

(c) providing timely information to the home department or organization and to the PSC to assist them in their appointment activities (including curriculum vitae or resumes);

(d) ensuring that they can be easily contacted by the PSC and appointing departments or organizations, and attending appointments related to referrals;

(e) seriously considering job opportunities presented to them (referrals within the home department or organization, referrals from the PSC, and job offers made by departments or organizations, including retraining and relocation possibilities, specified period appointments and lower-level appointments).

…

Part III

Relocation of a work unit

…

3.1.2 *Following written notification, employees must indicate, within a period of six (6) months, their intention to move. If the employee's intention is not to move with the relocated position, the deputy head, after having considered relevant factors, can either provide the employee with a guarantee of a reasonable job offer or access to the options set out in section 6.3 of this Appendix.*

…

3.1.4 *Although departments or organizations will endeavour to respect employee location preferences, nothing precludes the department or organization from offering the relocated position to employees in receipt of a guarantee of a reasonable job offer from their deputy heads, after having spent as much time as operations permit looking for a reasonable job offer in the employee's location preference area.*

…

[*Sic* throughout]

[140] The grievor alleged that the employer applied the WFA appendix in a retaliatory manner because of his union activities before and during the WFA process. He maintained that the employer engaged in disguised disciplinary action against him by ensuring that no GRJO was made to him other than the one to his relocated position.

[141] The employer responded that the grievor had the onus of establishing that on a balance of probabilities, he was laid off for disciplinary reasons or for alleged unsatisfactory performance. In its view, the jurisprudence cited in *Nadeau*, at paras. 146 to 148, stands for the principle that an intent to punish or correct culpable behaviour is required to establish disguised discipline. There was no such evidence in the grievor's case.

[142] The grievance was referred to the Board under s. 209(1)(a) of the *Act*, as a collective agreement interpretation matter, not as a disciplinary matter under s. 209(1)(b). That said, article 44 of the collective agreement protects against discrimination for, among other things, union membership and activity. However, the Board finds that the grievor did not establish discrimination or retaliation on account of his union activities. It is not in dispute that the grievor was a union steward and involved in union activities. Given his allegations, he had the burden of demonstrating some nexus between his union activities and the outcome of the WFA. He did not demonstrate any such link. He testified that Mr. Harou was always courteous and a gentleman to him and that Ms. Audet was excellent.

[143] The grievor testified at length about complaints he made pursuant to appointment processes under the *PSEA* and with the Office of the Commissioner of Official Languages. He testified about representing union members with their grievances. However, his involvement in union activities do not, on their own, establish that they were a factor in the employer's actions. Further, his impression that he was causing management trouble, based on his interpretation of one line in an email, is also not convincing. This evidence is not sufficient to establish discrimination or retaliation by Mr. Harou, Ms. Audet, or other employer representatives because of his actions.

[144] The grievor testified at length about his experience gained through acting opportunities at the MT-05 group and level, which he was never denied. There was no

evidence of the employer subjecting him to adverse treatment in the workplace. Furthermore, Mr. Harou testified that the grievor was a high performer and that no reason existed to reproach him.

[145] The grievor also did not establish that the employer's actions violated the WFA appendix. The definition of "reasonable job offer" compels the employer to make an offer of indeterminate employment within the core public administration normally at an equivalent level, but it could include lower levels. It requires that surplus employees be both trainable and mobile.

[146] Thus, the first criterion of the definition requires that it be an offer of indeterminate employment in the core public administration. In this case, the employer satisfied this criterion not once but thrice. All three offers were for indeterminate positions within the public service.

[147] The second criterion requires that the offer be at an equivalent level, without excluding job offers at lower levels. In this case, the offers made were at the MT-03 level, which was an equivalent level. Therefore, this criterion was also satisfied.

[148] For the final criterion, the definition states that when possible, the search for a GRJO will be conducted as follows: 1) within the employee's headquarters as defined in the *Travel Directive*; 2) within 40 km of the employee's place of work or residence, whichever will ensure continued employment; and 3) beyond those 40 km.

[149] The GRJOs made to the grievor were beyond 40 km because no other MT-03 positions were available within his headquarters area as defined in the *Travel Directive*. Mr. Harou and Ms. Audet testified that positions classified at the MT-03 group and level were scarce across the country and that none was available near Trenton. The entire MT work unit had been relocated to Gagetown.

[150] Clause 3.1.2 of the WFA appendix provides that after receiving written notification and within six months, employees must indicate their intention to move. In March 2012, the grievor declined to move to his relocated position in Gagetown. The deputy head informed the grievor in writing that he would provide the grievor with a GRJO.

[151] The grievor recognized that a series of GRJOs were made to him, one each in Gagetown, Edmonton, and Gander, but none in his preferred locations. He disagreed

with the employer's statement that had he taken any of the GRJOs, he would have had continued employment and would have incurred no pension loss. He stated that he could not take any of them because none was in any of his preferred locations. The possibility of accepting them and then asking for a transfer was never discussed with him.

[152] Although I believe the grievor's statement that the possibility of accepting one of the GRJOs and then requesting a transfer was never discussed with him, he was aware that it was a possibility but chose not to raise it with the employer. Mr. Harou testified that had the grievor discussed it with him, he could have taken certain measures to have the grievor relocated. Moreover, he categorically refused to meet with Mr. Harou to discuss options or opportunities for continued employment.

[153] The grievor maintained that the employer had an obligation to make him a GRJO in one of his preferred locations. Clause 3.1.4 of the WFA appendix states that although departments or organizations shall endeavour to respect employee location preferences, nothing precludes them from offering relocated positions to employees in receipt of GRJOs from their deputy heads, after spending as much time as operations permit looking for a GRJO in their preferred locations.

[154] The evidence demonstrated that the employer made significant efforts to help the grievor find employment in his preferred locations. He agreed that his preferred locations had no MT but only PC positions. He and Ms. Audet interacted significantly, and he agreed that she made all efforts to attempt to find him a position. Moreover, his preferred locations changed multiple times over the course of several months. In December 2011, for indeterminate employment, they were Toronto (the GTA), Whitby, Oshawa, Port Hope, Cobourg, Brighton, Belleville, Kingston, and Cornwall. In February 2012, he indicated only Kingston and Cornwall. In April 2012, he complained about an employee in the MOIP who was promoted to an MT-03 position and was moved to Ottawa. Yet, he had never identified Ottawa as a preferred location for indeterminate employment.

[155] In cross-examination, the grievor agreed that he had not wished to obtain an indeterminate position in Ottawa, even though he complained about not being offered a position in the ICMC there. Similarly, he stated that he was not interested in moving to Gagetown and that he could not move there because of family obligations, which is

why he declined the GRJO made to him in March 2012. The grievor stated that he had family obligations but did not explain why those obligations prevented him from relocating, aside from it being more preferrable. Moreover, it is difficult to reconcile the grievor's position with the fact that he subsequently applied for an indeterminate MT-05 position in Gagetown.

[156] Had the grievor accepted the relocation to Gagetown or the positions in Edmonton or Gander, there would have been no break in his service. He received three GRJOs. I find that the employer did not breach the WFA provisions but that it conducted the relocation of the metrological services in conformity with its obligations under the collective agreement. I find that the grievor did not uphold his obligations under the WFA provisions. He had an obligation to remain trainable and mobile. His refusals of the three GRJOs and his application for a promotion in his position's relocated location demonstrates that he failed to uphold his obligations under the collective agreement and resulted in his break in service.

[157] I agree with the employer that the definition of "reasonable job offer" in the collective agreement's WFA provisions specifies that surplus employees must be both trainable and mobile.

[158] In *Sampson*, the Board's predecessor determined that a surplus employee who did not want to move his family, and thus restricted his mobility so much that the employer was not even able to provide him with a GRJO, was deemed to have breached employees' obligations under the WFA. An offer does not become unreasonable just because the employee does not want it or does not want to move. When interpreting a collective agreement, the Board must determine the parties' true intent. To do that, it must use the ordinary meanings of the words that the parties used unless it would lead to an absurdity. The parties are presumed to have intended to mean what the agreement states. The whole of the collective agreement forms the context in which the words used are to be interpreted.

[159] The collective agreement contains certain mandatory provisions, and the employer respected its obligations, including the definition of "reasonable job offer" and the fact that one must be indeterminate. This is the negotiated wording. Also negotiated was that surplus employees must be mobile. It is mandatory wording in the definition of what constitutes a "reasonable job offer" under the WFA appendix and its

application under clause 1.1.14. That last clause of the WFA appendix is clear that lay-off will normally occur when an employee refuses a reasonable job offer or is not mobile. Overall, the grievor's interpretation would require that the Board ignore the negotiated and agreed-to provisions of the WFA appendix. Therefore, I find that he did not establish that the employer violated the collective agreement.

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

(The Order appears on the next page)

V. Order

[161] The grievance is dismissed.

November 24, 2021.

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