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

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

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

and

TREASURY BOARD

Employer

Indexed as
Public Service Alliance of Canada v. Treasury Board

In the matter of policy grievances referred to adjudication

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Bargaining Agent: Yafa Jarrar, Nathan Hoo, and Wassim Garzouzi, counsel

For the Employer: Richard Fader, Noémie Fillion, and Patrick Turcot, counsel

Heard by videoconference,
August 30 to September 2 and November 29 and 30, 2021.

REASONS FOR DECISION

I. Policy grievances referred to adjudication

[1] It would be an understatement to say that the COVID-19 pandemic has upended our work habits, given the restrictions, lockdowns, school closures, and other measures designed to protect the public and prevent the spread of the disease. City cores were emptied as all those who could work remotely were encouraged to. Working parents found themselves at home, handling their work duties while supervising their children's forced homeschooling or tending to their preschoolers' needs.

[2] The Treasury Board ("the employer") employs over 250 000 persons in the core public administration throughout Canada. It was not spared the pandemic reality. From one day to the next, in March 2020, it had to rethink how its employees would continue fulfilling their duties outside their workplaces. The transition was not easy, but it was largely successful. Thanks to many technological tools, the federal public sector has continued to offer Canadians the services it provides.

[3] This case is about one of the measures taken to help Treasury Board employees cope with the sudden change in circumstances.

[4] In mid-March 2020, the provincial governments imposed lockdowns that forced people to remain in their homes, except for essential needs. All those who could work remotely were told to do so. For a great number of federal public sector employees, whose work revolves around a computer and a phone, this was largely possible.

[5] While home offices were being equipped, those who could not work yet did not lose any salary. For the time they were able and willing to work but were unable to because they were prohibited from entering their workplaces and the necessary equipment was not yet functional, they were granted leave with pay pursuant to a clause that exists in all federal public sector collective agreements, which allows the employer to grant leave with pay for exceptional circumstances not otherwise covered in the collective agreement. The code in the pay system for such leave is "699". For this reason, it is called "699 leave" throughout this decision, although it is provided for in the collective agreements under "leave with or without pay for other reasons". This leave is typically thought of and referred to as snowstorm leave, although its

application has been broader than that. In past applications it has generally been used to cover short-term situations.

[6] As remote work became a reality, and as schools and daycares reopened, the reliance on 699 leave lessened but did not disappear completely. For some employees, remote work is not possible. Despite schools and daycares reopening, sporadic closures continue, in reaction to COVID-19 breakouts. Households with immunosuppressed or vulnerable people face particular difficulties. In brief, 699 leave remains useful and necessary.

[7] The Public Service Alliance of Canada (PSAC or "the bargaining agent") represents a majority of employees in the federal public sector and has signed many collective agreements with the employer. It filed the two policy grievances that are the subject of this decision. The PSAC submits that the policies and guidelines that the employer has issued to guide managers in granting 699 leave breach several articles of the following collective agreements:

- Program and Administrative Services (PA), expiry date June 20, 2018;
- Border Services (FB), expiry date June 20, 2018;
- Technical Services (TC), expiry date June 21, 2018;
- Education and Library Science (EB), expiry date June 30, 2018; and
- Operational Services (SV), expiry date August 4, 2018.

[8] On September 4, 2020 and March 16, 2021, the PSAC referred two policy grievances (566-02-42036 and 566-02-42737 respectively) to the Federal Public Sector Labour Relations and Employment Board (the "Board"). The grievances deal with the employer's policy guidance on granting 699 leave. According to the PSAC, this guidance is contrary to the terms of the collective agreement and s. 7 of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; "*CHRA*"). The employer submits there is no violation of the collective agreements nor evidence of discrimination.

[9] Pursuant to s. 222(1) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2), the PSAC gave notice to the Canadian Human Rights Commission ("the Commission"), that it was raising an issue involving the interpretation or application of the *CHRA*. The Commission responded on September 18, 2020, for the first grievance, and on March 30, 2021, for the second grievance, that it intended to make submissions to the Board on the policy grievances. However, on July 27, 2021, the Commission wrote to the Board that it no longer intended to make submissions, as it believed the

parties would be able to fully explore the human rights aspects of the policy grievances.

[10] For the reasons that follow, I dismiss grievance 569-02-42036 and allow in part grievance 569-02-42737.

II. Summary of the evidence

[11] The PSAC sought to introduce an expert report entitled, "Differential Impact of the COVID-19 Pandemic on Absences from Work by Gender and Family Status" by Dr. Sylvia Fuller, who is a professor of sociology at the University of British Columbia. She has published extensively on the relationship between gender, parental status, and labour-market inequalities.

[12] Her report focused on the link between gender, family status, and absences from work during the pandemic. The target population was composed of public sector workers (not from the federal public sector), designed to match as much as possible federal public sector employees represented by the PSAC. The data was drawn from Statistics Canada.

[13] The report's key findings were that the increase in absences during the pandemic was related to gender and parental status. Women with young children were more absent than fathers with young children or women without minor children; fathers with young children were more absent than men without dependent children. Recent immigrant mothers had the highest rate of absences compared to all other groups.

[14] The employer objected to the report since it did not relate directly to the employees covered by the collective agreements at issue in this case. Moreover, absence was not a proper measure, since in the federal public sector, absence did not equate to loss of salary or of any other advantage.

[15] In the end, I decided not to admit Dr. Fuller's expert report or testimony, for two reasons. I agree with the employer that a study on one population is not necessarily useful when applied to another population, because there may be variables that are not accounted for.

[16] However, the more important reason is that I received evidence that the employer was well aware of the differential impact of the pandemic according to gender and parental status.

[17] The Treasury Board Secretariat carried out a gender-based analysis (*Gender Based Analysis Plus*) to ascertain the impact of the 699 leave guidance on several segments of the federal public sector. At the beginning of the hearing, the employer acknowledged the findings in the analysis — COVID-19 may impact certain groups more negatively than others, such as women, parents of young children, and people living with ailments that can result in more severe COVID-19 symptoms. The analysis led to a general conclusion that in determining whether to grant 699 leave, managers had to consider individual cases and always account for the employer's duty to accommodate.

[18] The gender-based analysis was based on 699 leave usage from March 15 to September 27, 2020, in fifteen organizations in the core public administration, in which 86% of 699 leave usage occurred. It focused on the five more populous occupational groups, comprising a representative range of functions (frontline work, administrative services, and policy development). Its main findings were the following:

> …
>
> • *In frontline departments, where jobs cannot be done remotely, there is a higher use of 'Other Leave with Pay (699)' for employees due to illness and work limitations. Some of these departments such as CSC* [the Correctional Service of Canada] *and CBSA* [the Canadian Border Services Agency]*, have a frontline workforce that is predominantly comprised of men.*
>
> • *Non-frontline departments report a high proportion of 'Other Leave with Pay (699)' for caregiving reasons. In general, such departments employ a higher percentage of more gender-balanced or occupational groups that are predominantly comprised of women.*
>
> …

[19] The gender-based analysis found that certain occupations with male predominance are disproportionately impacted by direct risks of COVID-19 exposure. It also found that women may be disproportionately impacted by events linked to COVID-19, such as school and daycare closures.

[20] By carrying out the gender-based analysis, and by acknowledging the need to take into consideration the employees' particular circumstances, the employer was admitting the potential discrimination that could result in granting or denying the 699 leave. In other words, the findings of the Fuller report were already admitted.

[21] The PSAC called several employees to testify to the impact that managers' handling of 699 leave (with employer guidance) had on them. I will briefly review their evidence after summarizing the development of the employer's policies on 699 leave.

[22] The employer called two witnesses, one a manager, Warrant Officer Trevor Nemish, and the other, Renée de Bellefeuille, who in May 2020 became the lead for the 699 file as the Acting Assistant Deputy Minister at the Office of the Chief Human Resources Officer (OCHRO) within the Treasury Board Secretariat. In that role, she was very much involved in developing the policies and the guidance documents in consultation with the bargaining agents, including the PSAC.

[23] The development of the 699 leave policy is common ground between the parties. I will therefore present a chronological story of 699 leave in the COVID-19 context. The goal is to understand the employer's policies and why the PSAC objects to them.

[24] Between March and May 2020, employees were granted 699 leave if they were unable to work their regular hours for several reasons, including health-and-safety concerns and childcare obligations. The number of hours of paid 699 leave depended on each employee's situation and to what extent he or she could work a certain number of hours from home.

[25] The 699 leave was granted under the clause in the collective agreements that provides for leave with pay for other reasons. For the purposes of this summary, I will quote the clause from the PA collective agreement, as follows:

> …
>
> ***53.01*** *At its discretion, the Employer may grant:*
>
> *a. leave with pay when circumstances not directly attributable to the employee prevent his or her reporting for duty; such leave shall not be unreasonably withheld;*
>
> *b. leave with or without pay for purposes other than those specified in this agreement.*

…

[26] In other collective agreements between the PSAC and the employer, this clause is found in the following places:

- clause 56.01 of the SV collective agreement;
- clause 55.01 of the TC collective agreement;
- clause 22.16 of the EB collective agreement; and
- clause 52.01 of the FB collective agreement.

[27] The collective agreements were still in effect when the complaints were made. New collective agreements have since been signed, but the clause remains unchanged.

A. The first policy grievance (569-02-42036)

1. The employer's policy and guidance on 699 leave, March to May 2020

[28] In early March 2020, the World Health Organization declared a worldwide pandemic caused by the coronavirus designated COVID-19. On March 11 and 12, 2020, the OCHRO advised federal public sector employees of several cautionary measures to take — hand washing, staying home if sick, and avoiding close contact with sick people, but it discouraged using face masks. Employees were still expected to report to work. Employees infected with COVID-19 were to take sick leave, and managers were encouraged to advance sick leave credits if needed. If a child was sent home from school because of COVID-19, it was expected that family-related leave would apply. This was the guidance on leave with or without pay for other reasons:

> *Leave with or without pay for "other reasons" cannot be used to compensate employees who have exhausted their leave allotment from another existing clause. When faced with that situation, management and the employee can consider options such as the use of annual leave or compensatory leave. If no other options are available, then leave without pay may have to be used.*

[29] In an email dated March 13, 2020, and addressed to deputy heads and heads of agencies, the Chief Human Resources Officer's message changed. Now, managers were being actively encouraged to consider telework and "alternative work arrangements". As for leave, the message was as follows:

> *The situation has evolved since my March 12th e-mail.…*
>
> *I am therefore hereby amending the advice on leave provisions contained in the FAQ document, which will be amended online.*

> Employees that are required by public health officials to self-isolate*: If in good health and able to work, employees will be asked to discuss with their managers the option to telework. If that is not possible, the employees will be granted "other leave with pay (699 code)" as per their collective agreements.*

[30] The email also provided the following statement:

> …
>
> Employees whose children cannot attend school or daycare due to a closure or because of attendance restrictions in place in relation to the coronavirus situation. *Employees will:*
>
> - *Attempt to make alternative care arrangements.*
> - *If that is not possible, they discuss with their managers, the option to telework.*
> - *If that is not possible, they will be granted "other leave with pay" (699 code).*
>
> …

[31] The email also stated that these provisions "… will remain available to employees and managers for the duration of the disruption in the respective jurisdictions but will be reassessed by the Employer on April 10, 2020".

[32] By March 21, 2020, the Government of Canada asked all employees, at all worksites, to work from home whenever and wherever possible. On-site work was to be considered only for critical service, defined as follows: "… one that, if disrupted, would result in a high or very high degree of injury to the health, safety, security or economic well-being of Canadians …". If working remotely was not at all possible, employees were eligible for 699 leave. The guidance was to remain in force until April 10, 2020.

[33] On April 6, 2020, the OCHRO provided directions effective April 10, 2020. On 699 leave, it stated the following:

> *… Employees who are able to work are generally fulfilling their duties remotely, or on-site when critical work cannot be carried out remotely. Managers can authorize 'Other Leave with Pay (699)' for employees who attest that they cannot work for the following reasons: (a) they have been diagnosed with COVID-19 or are experiencing related symptoms; (b) are at high risk for severe illness from COVID-19 and cannot work remotely; or (c) are living with a dependant that is at high risk from severe illness from COVID-19 and cannot work remotely.*

[34] The uncertainty of the situation is reflected in the following passage of the same document:

> *This updated guidance, and all other measures announced to assist our workforce throughout the exceptional circumstances caused by the fight against COVID-19,* ***will remain in effect until non-critical business is authorized to resume or as indicated otherwise by the Employer. This may occur at different times across the country, as instructions from public health authorities are issued.*** *We will continue to consult with your teams and bargaining agents as we adjust any guidance as necessary based on how the situation, and the government's response to the pandemic, are evolving.*
>
> [Emphasis in the original]

[35] The "Guide on use of Code 699", effective April 10, 2020, provides for 5 types of 699 leave related to COVID-19: employee illness (COVID); family care, including school and daycare closures, with no alternative arrangement available; technology limitations; limited work time; and other circumstances. Managers and employees were to enter leave requests according to one of the five categories, for tracking purposes.

[36] On May 10, 2020, the OCHRO sent additional guidance about the impact of schools and daycares reopening on the use of 699 leave. The significant passage is the following:

> *As schools and daycares are re-opened, we expect that employees who could not work due to childcare obligations will be able to return to work. We recognize, however, that there will be some instances where employees may be unable to work their full hours if their children are unable to return to school or daycare due to health reasons, limited availability of spaces or other restrictions put in place by provincial or territorial authorities. In these cases, employees may use 'Other Leave With Pay (699)' for hours not worked, if they are unable to make alternate childcare arrangements.*

2. Policy grievance filed May 13, 2020

[37] Following the May 10, 2020, policy statement, the PSAC filed a policy grievance, stating that it contravened the provision on leave with pay for other reasons in the collective agreements for the PA, SV, TC, EB, and FB groups, as well as s. 7 of the C*HRA*, based on family status, sex, and disability. The main issue was that the policy

did not recognize the fact that some parents might choose not to send their children to school for legitimate reasons, such as fears that the environment might not yet be safe, or immunocompromised household members. The PSAC's position was that the employer had to use 699 leave for parents who chose not to send their children to school or daycare.

[38] As a remedy, in addition to a declaration that the employer breached the collective agreements, the PSAC requested an order for the employer "… to take immediate action to grant 699 leave with pay to all workers who have childcare obligations and are unable to or choose not to send their children to school due to COVID-19 related concerns …".

B. The second policy grievance (566-02-42737)

1. The employer's policy and guidance on 699 leave, May to November 2020

[39] During this time, the employer put in place a consultative forum with different bargaining agents on the use of 699 leave. In the document sent to the bargaining agents on May 22, 2020, to guide the discussion, the employer states its wish to continue to consult with the bargaining agents "… to establish a strategy for a transition to a more standard use of leave provisions, including changing the eligibility conditions related to the use of 699."

[40] In the document, the employer states that it will be guided by these several principles in managing 699 leave:

- directions from health authorities on the measures for the provinces to take to reopen the economy and institutions;
- the health and safety of Canadians, including federal public sector employees;
- jurisdictional differences, as regional differences might affect the pace of reopening;
- the duty to accommodate "… considering employees' many different circumstances, both personal and work-related";
- fairness to employees and Canadian taxpayers, reflecting proper stewardship of public resources; and
- collective agreements and existing legislation.

[41] On June 4, 2020, the Government of Canada published a guide entitled, "Coronavirus disease (COVID-19): Employee illness and leave". It specified that managers would regularly assess, for continued leave, employees at high risk of severe illness from COVID-19 or living with someone at high risk. Employees would have to

attest to the situation preventing them from working. The guide specified the following:

> …
>
> *In all circumstances, 'Other Leave With Pay (699)' should only be used in cases where an employee would be available for work if not for COVID-19. Employees who are unavailable because they are on vacation or other leave must continue to claim the appropriate leave credits.*
>
> …

[42] The 699 leave could be granted if the employee's children were unable to attend school or daycare and no alternative arrangements could be made.

[43] On August 17, 2020, the OCHRO circulated to the bargaining agents, including the PSAC, another consultation document specifically dealing with 699 leave. Feedback was requested by August 21, 2020.

[44] This document considered possible changes to 699 leave eligibility. For each of the three categories mentioned earlier giving rise to 699 leave, new directions were envisaged.

a. 699 leave due to a COVID-19 infection or an isolation requirement

[45] The new direction was to manage such leave through sick leave credits, although employees would not be required to exhaust their sick leave. Employees would be allowed to keep a certain amount of banked leave, generally one year's accumulated leave, or 15 days. It stated, "Employees with less than an identified bank would be eligible for 699 leave immediately."

b. 699 leave due to a high risk of severe COVID-19 symptoms

[46] The assessment of being at high risk because of COVID-19 would require medical attestation. The determination would be done on a case-by-case basis, but generally, the following guidelines would apply:

- 699 leave would not be available if there was little or no COVID-19 transmission in the community surrounding the workplace or where effective measures were in place to limit workplace transmission.

- 699 leave would be available if an employee had a care requirement for a household member at high risk of severe COVID-19 symptoms if such care entailed the risk of transmission in the employee's residence; otherwise, the employee was expected to put in place mitigation measures against transmission at home.
- Eligibility for 699 leave required documented medical evidence from a qualified medical practitioner.
- Risk mitigation practices were expected for 699 leave eligibility.
- Managers would be encouraged to consult with Human Resources to ensure compliance with the duty to accommodate.

c. 699 leave for childcare responsibilities

[47] The document includes the following statement: "The Employer has a legal obligation to accommodate employees with caregiving responsibilities and to ensure its policies do not disadvantage certain groups, either through the provision of 699 leave or through other means."

[48] The document proposes a return to the previous situation, when 699 leave use was exceptional; the proposal reads as follows: "… 699 leave is only used in limited situations as a last resort after all other avenues have first been considered."

[49] Notably, the document includes the following sentence: "Employees would first be expected to use other available paid leave entitlements before being eligible for 699 (taking account of an employees' [*sic*] need to save an amount of leave for future requirements)."

[50] The section also states that an assessment from a qualified medical practitioner would be required to establish the need for long-term 699 leave if children or household members were at significant risk from exposure to COVID-19.

[51] From the document, it is clear that the employer wanted to develop more consistency in granting or denying 699 leave.

[52] In response, on August 21, 2020, the PSAC addressed a letter to Sandra Hassan, Assistant Deputy Minister, OCHRO, reiterating the position in its first policy grievance that the employer must use 699 leave with pay for childcare responsibilities related to

COVID-19, including parents who choose not to send their children to school or daycare.

[53] At that time, no vaccine was yet available, and public health authorities were expecting a second pandemic wave in the fall. According to the PSAC, the changes proposed would disproportionately affect women and people with disabilities. The letter concludes with the willingness to continue the dialogue while ensuring employees' rights.

[54] On September 3, 2020, the employer provided its response to the first policy grievance. Essentially, the employer states that its recommended case-by-case analysis of employees' situations is designed to prevent a blanket policy decision and instead account for each employee's specific circumstances.

[55] The employer concludes by offering to continue discussions through the National Joint Council.

[56] In early September 2020, Ms. de Bellefeuille met with the other bargaining agents to discuss the proposed changes to the eligibility for 699 leave. She extended the same invitation to the PSAC on September 4, 2020.

[57] On September 19, 2020, the other bargaining agents provided a draft consolidated response to the employer's August 17, 2020, proposal to change 699 leave eligibility. The bargaining agents were still waiting for the government's gender-based analysis to provide a definitive response. The other bargaining agents' position is expressed in the following manner: "The overarching principle remains that employees who are unable to report for duty due to the COVID-19 pandemic are eligible for leave with pay (coded 699) and such leave should not be unreasonably withheld."

[58] As they point out, the language may vary slightly from one collective agreement to another, but the standard for approval is always the same: leave with pay for circumstances over which the employee has no control should not be unreasonably withheld.

[59] The consolidated response emphasizes that 699 leave management must be flexible, as COVID-19 conditions fluctuate. However, the obligation remains on the employer to accommodate employees unable to work because of COVID-19. In terms of

caregiving responsibilities, the response states the following: "The Employer has a legal obligation to accommodate employees with caregiving responsibilities through the provision of 699 leave or through other means, and to ensure its policies do not disadvantage certain groups".

[60] That said, the consolidated response also acknowledges that employees are required "… to make reasonable efforts to minimize the use of 699 leave …" by being flexible with their schedules and by seeking alternate caregiving arrangements, if possible.

[61] By the end of September 2020, the OCHRO was reconsidering its 699 policy, in light of the bargaining agents' comments. The PSAC maintained its position that the initial guidance should continue to apply. According to Ms. de Bellefeuille's notes from a meeting held on September 18, 2020, with the PSAC, the areas of concern with the proposed changes were the following:

- *The requirement to use sick leave. This would unfairly penalize those working in critical positions (e.g., the Correctional Service of Canada and the Canada Border Services Agency) who had a greater risk of being sick than those staying at home.*
- *The restrictions on 699 leave would adversely impact women.*
- *Medical attestations may be difficult to obtain; the presumption should be that employees act in good faith. Requiring medical documentation should be discretionary, not mandatory.*

[62] At that meeting, the PSAC reiterated that the collective agreements cover the pandemic situation by offering a solution when employees cannot attend work through no fault of their own. Further parameters beyond the initial guidance should be negotiated at the bargaining table.

[63] On October 22, 2020, the OCHRO issued guidance to management on 699 leave that would become effective November 9, 2020. It states the following with respect to the use of 699 leave:

> *… This updated guidance, which will be effective November 9, 2020, emphasizes that this leave should be granted on a case-by-case basis, and only after remote or alternate work, or flexible work hours have been considered, and generally only after other relevant paid leave has first been used by the employee.*
>
> *Once all available options have been considered, and managers have consulted with their Labour Relations advisors, 'Other Leave With Pay (699)' could be available in situations where an employee:*

> • *has work or technology limitations,*
> • *cannot work remotely and has been diagnosed with COVID-19, is experiencing symptoms and/or is required to self-isolate,*
> • *has caregiving responsibilities as a result of such things as school or daycare closures, or COVID-19 illness or isolation requirements, or*
> • *cannot work remotely and is at high risk or has someone in their care who is at high risk of severe illness from COVID-19.*

[64] In the "Questions and Answers for Managers and Human Resources", different solutions are offered, according to employees' situations.

[65] For employees who cannot work remotely because of technological limitations or because the work cannot be done remotely, and in-person attendance is restricted, 699 leave continues to be applied.

[66] As for caregiving responsibilities, employees who choose not to send their children to school or daycare out of personal preference will not have access to 699 leave. Employees can use their paid-leave credits, such as family-related or vacation leave, or consider leave without pay.

[67] However, managers are directed to take into account the employee's particular circumstances, as indicated in the following extract:

> *Managers must use their discretion and this discretion must* ***not*** *be exercised in an arbitrary or discriminatory fashion or in bad faith. Combined with what has been mentioned above, managers should consider the specific circumstances of the employee when deciding when to grant 'Other Leave With Pay (699)'. Individual circumstances such as being a single parent, having special need [sic] dependents, or other factors that may disproportionally disadvantage an employee when compared to other populations in the federal public service must be considered.*
>
> [Emphasis in the original]

[68] A major change in the policy is that employees on 699 leave will have to use their paid leave credits. The guidance document expresses it as follows:

> *After November 9, 2020, employees will be required to draw down on their paid leave credits such as family-related or vacation leave, where applicable, after the employee has scheduled leave to cover what they would typically take as vacation during the year (note:*

> *the intent is to ensure the employees take all their vacation leave during the vacation year in which it is earned).*

[69] Employees required to self-isolate may be eligible for 699 leave if they cannot work remotely. If self-isolation results from travelling despite public health advice and Global Affairs Canada's travel advisories, then 699 leave would not be available. Employees diagnosed with COVID-19 should use their sick leave credits. If they lack sufficient sick leave credits, they are eligible for 699 leave as long as they are infectious.

[70] In the examples to illustrate the guidance, it is clear that the intent is for employees to use other available paid leave before 699 leave will be considered, if the need for leave is of some duration.

2. Policy grievance filed December 8, 2020

[71] The PSAC filed a second policy grievance about 699 leave after the new guidance was issued, effective November 9, 2020.

[72] The grievance raised the issues that employees must now exhaust all other paid leave before accessing 699 leave and that the need for verification has led to intrusive questioning by managers. According to the PSAC, the new guidance had a disproportionate impact on women, racialized employees, employees with disabilities, and employees with family obligations. It violated the no-discrimination clauses of the collective agreements as well as those on paid leave for other reasons. The guidelines resulted in an unreasonable exercise of discretion.

[73] In addition to a declaration that the new policy guidance violated the collective agreement, the PSAC sought an order that the employer "… take immediate action to grant 699 leave with pay to all …".

C. Impact on employees

[74] The PSAC called six witnesses to testify to the impact of the 699 policies on their work conditions. All six witnesses began their testimonies by stating that they were appearing before the Board because they had been summonsed.

1. Diane Mahar-Daiken

[75] Ms. Mahar-Daiken works as a passport clerk on the Canadian Forces base in Trenton, Ontario, which is an air force base that dispatches the Canadian Armed Forces and humanitarian aid all over the world. The passport office is very busy readying passports and visas on a moment's notice.

[76] Ms. Mahar-Daiken is the only person working in this position; she has been in it for 13 years. She testified that before the pandemic, the office was extremely busy. Work decreased considerably after March 2020, as international travel was curtailed.

[77] Ms. Mahar-Daiken was on medical leave from June 2019 to August 2020. During her absence, two junior officers were in the position, as there is always a need for passports and visas, even if the demand lessens. When she returned to work in August 2020, Ms. Mahar-Daiken was not expected to be in the office full-time, due to COVID-19 restrictions, although she received her full salary. She did part of her work from home, guiding the junior officers and taking online training.

[78] In late November 2020, she requested to work from home full-time, which, according to her supervisor, Mr. Nemish, was not possible. Passports and travel documents had to be issued in the office on the base.

[79] Ms. Mahar-Daiken applied for 699 leave because her health condition made her fearful of contracting COVID-19. She was told that she would need a medical practitioner's note that would clearly state that COVID-19 exposure posed a high risk to her health. She was unable to procure the note because she does not have a family doctor. Rather, her health professional is a nurse practitioner, who provided a note, which did not directly connect Ms. Mahar-Daiken's health condition and COVID-19.

[80] The employer insisted on receiving a physician's note that would clearly state that COVID-19 posed a particular risk to Ms. Mahar-Daiken, given her health condition.

[81] At the hearing, some contradictory evidence was presented about Ms. Mahar-Daiken's possibility of finding a family doctor in Trenton, which she said was impossible. Mr. Nemish stated that he had no difficulty finding a family doctor in nearby Belleville, Ontario. I need not resolve the contradiction in the context of the policy grievance. It would require an individual assessment that is not within the scope of this grievance.

[82] The point is that the bargaining agent found the medical practitioner's note an unduly restrictive requirement. I also note Mr. Nemish's statement that even with a medical practitioner note, Ms. Mahar-Daiken would have had to use all her available paid leave before 699 leave could be considered. In the end, it never got to that point, as no such note was produced.

2. Brittany Krcadinac

[83] Ms. Krcadinac works as a kitchen helper in the Department of National Defence ("the department" in this section) in Winnipeg, Manitoba. She can be assigned varied tasks — as a cashier, helping behind the sandwich bar, washing dishes, or rotating between the three. Before the pandemic, she worked shifts for an average of 32 hours per week. With the pandemic, she was first told to stay home until the end of April 2020. On her return, the sandwich bar was closed, there were no cash sales, and the dishes were made of paper, for ease of takeout. An added task was to prepackage food.

[84] As dine-in reopened, she became concerned with the possibility of contracting COVID-19 and requested 699 leave so that she did not have to work the full 32 hours on-site. She submitted a doctor's note that stated that she should work only 16 hours per week. She was told that she had to use her sick leave for the remainder of the time. She obtained a second note that said that she could not work at all from June 10 to August 10, 2020. She was told that she had sufficient sick leave credits until July 5. After that, she would be on sick leave without pay. According to the employer, she could apply for Employment Insurance sick benefits or Sun Life disability insurance.

[85] Ms. Krcadinac submitted a third doctor's note with an accompanying email, stating, "I have been informed by the union that this note is now sufficient in order to receive the 699." The note added "COVID 19 pandemic" to "medical reason" as the reason she could not attend work from June 10 to August 10, 2020. The employer asked for further clarification from the physician, taking into account the several mitigation measures it had taken to decrease employees' exposure to COVID-19 (such as plexiglass panels, social distancing, limited number of diners, personal protective equipment, etc.). The employer specifically asked whether Ms. Krcadinac was part of a vulnerable population identified by the Government of Canada as being at high risk of severe complications from COVID-19 (older individuals and those with underlying conditions or a compromised immune system). The employer also emphasized that it

did not want "… any information regarding Ms. Krcadinac's medical diagnosis, treatment or history."

[86] In response, the physician simply stated that Ms. Krcadinac's underlying medical condition put her at high risk, in light of the COVID-19 pandemic. The department accepted this last note as valid to grant 699 leave but stated that it might revisit the situation with the evolution of the pandemic and guidance from Treasury Board.

[87] Managers were told that effective November 9, 2020, "… anyone on 699 leave will have to use their paid leave prior to qualifying for 699 leave." Family-related and vacation leave had to be exhausted, according to the messaging from the department's management. Seventy-five percent of paid leave had to be submitted before the end of November, and the remainder before the end of the fiscal year.

[88] Since Ms. Krcadinac's COVID-19 situation was not related to family responsibilities but instead to her own health, according to her department, she did not have to use family-related leave. But she did have to use 96 hours of her vacation leave, which could not be carried over to the next fiscal year. She grieved that decision, and her grievance was upheld — the employer substituted 699 leave for the 96 hours of vacation leave and reinstated them.

[89] In August 2021, Ms. Krcadinac was informed that starting July 22, 2021, she would no longer receive 699 leave. She has been working full-time in her workplace since then. In cross-examination, it was established that even with reduced hours, she always received her full salary. She received 699 leave from June 2020 to August 2021. The employer provided her with another letter to her physician, asking if there were any changes in her condition and notably if vaccination, by then offered to all Canadian adults, would make a difference in the assessment of her risk. She felt that it was too intrusive and never submitted the letter to her physician.

[90] Ms. Krcadinac grieved the decision to stop the 699 leave. At the time of the hearing, the grievance had been referred to the second level of the grievance process.

3. Aaron Gervais

[91] Mr. Gervais works for the British Army Training Unit on the Suffield Canadian Forces Base in Alberta; he is a mechanic for wheeled vehicles. From March to June

2020, his workplace was closed because of the pandemic. He worked at home, doing online training. School closures required him to care for his children and supervise their online schooling while his wife worked shifts. He applied for five days of 699 leave. His application was denied, and he was told to use family-related leave instead.

[92] Mr. Gervais testified that he had four days of family-related leave remaining, which he took. For the fifth day he could not work because of childcare obligations, he was granted 699 leave.

[93] He was also granted 699 leave when he contracted COVID-19. For the days he was sick, he had to take sick leave. For the test day and the additional day of isolation according to the public heath directions, he received 699 leave.

4. Stéphane Carrier

[94] Mr. Carrier works at the Department of National Defence in quality assurance (with respect to contracts and contractors). He asked for 699 leave when he had to take care of his one-year-old because the child had a runny nose and therefore could not attend daycare under COVID-19 rules. The first time he asked, in October 2020, 699 leave was granted. The second time, in November 2020, it was denied. He was told to use either vacation leave or family-related leave, which he found objectionable — he could not attend work because of public-health directions to the daycare. If not for COVID-19, the child would have been at daycare, and he would have been at work.

5. Saira Ashraf

[95] Ms. Ashraf has been working as case a manager at Veterans Affairs Canada for 17 years. Before the pandemic, she worked in its Hamilton office, and occasionally, she teleworked. Since the beginning of the pandemic, she has worked entirely from home. Due to her family circumstances, she has requested 699 leave several times since March 2020, for two main reasons.

[96] Her mother was diagnosed with cancer. First, she was hospitalized, and then, she moved into the home. She required daily treatments. Ms. Ashraf's nine-year-old son needed help to transition to online learning. Ms. Ashraf is a single parent.

[97] She was granted 699 leave (two hours per working day) until November 2020, when the rules changed. Her manager started to question the need for the leave and suggested considering other arrangements — giving her mother her treatment outside

working hours or working a different schedule. Both options were impossible for Ms. Ashraf — her mother needed a two-hour treatment midday, and she could not work beyond her regular hours because of her family obligations.

[98] Her manager asked for a medical note to explain why her medical assistance was required. Her physician answered as best he could, but he did not answer all the questions, for privacy reasons. Finally, 699 leave was granted until March 31, 2021. After that, Ms. Ashraf no longer received it. She did not think that she should use other leave before requesting 699 leave, and she found the struggle to establish her family-obligation needs completely dispiriting.

6. Alene Abrey

[99] At the beginning of the pandemic, in March 2020, Ms. Abrey was employed as a benefit officer at Service Canada in the Canada Pension Plan disability unit, working with medical adjudicators on reassessments for eligibility to disability benefits. In January 2021, she moved to Compensation Services at Employment and Social Development Canada.

[100] Because of the pandemic, her five-year-old son was home, since schools and daycares were closed. She was granted 699 leave but was expected to work two hours per day. In May 2020, she asked for full-time 699 leave, as it was difficult to work while caring for her son. It was granted, and Ms. Abrey was expected to report to her team leader every Friday to provide an update on the childcare arrangements that she was pursuing.

[101] At the end of June, her daycare search was questioned. At the time, the pandemic still complicated the search — summer camps were closed, and babysitters were hard to find. Her husband worked in a critical position. In July 2020, he reduced his work hours, to allow her to work. The 699 leave (less the three hours per day she worked while her husband cared for the child) was finally approved until her return to work full-time on August 4, 2020, when her son's daycare reopened.

[102] In May 2021, she again requested 699 leave, as schools had closed again due to the pandemic. She was told that she would have to use all her family-related leave. Once it was exhausted, she was granted 699 leave.

III. Summary of the arguments

A. For the bargaining agent

[103] According to the bargaining agent, there are three issues to be decided in this case:

> 1) Is the 699 leave policy consistent with the collective agreement?
> 2) Is the 699 leave policy consistent with the employer's policy of "reasonableness"?
> 3) Could the 699 leave policy lead to discriminatory outcomes for protected groups?

[104] The bargaining agent does not dispute that the policy is within the realm of management rights. However, management rights must be exercised reasonably, and they may be circumscribed by the collective agreement.

[105] Management can unilaterally adopt a policy such as the one for 699 leave, but the policy must be reasonable in its application. This includes not impairing rights found within the collective agreement. The bargaining agent quoted the following passage from *Lumber & Sawmill Worker's Union, Local 2537 v. KVP Co.*, (1965), 16 L.A.C 73, which summarizes the jurisprudence on unilateral rules:

> …
>
> *34 A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:*
>
> *1. It must not be inconsistent with the collective agreement.*
>
> *2. It must not be unreasonable.*
>
> *3. It must be clear and unequivocal.*
>
> *4. It must be brought to the attention of the employee affected before the company can act on it.*
>
> *5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.*
>
> *6. Such rule should have been consistently enforced by the company from the time it was introduced.*
>
> …

[106] The 699 policy is inconsistent with the collective agreement, and it is strikingly unclear. It is difficult to understand how and when it applies with respect to

exhausting leave — sometimes, vacation leave must be exhausted, and sometimes, it can be banked.

[107] Its application can have discriminatory outcomes on groups such as women, parents of young children, people with pre-existing health conditions and employees with care obligations to vulnerable members of their households, as illustrated by the employees who testified.

[108] In the case of Mr. Carrier, the change in policy after November 9, 2020, meant that 699 leave previously granted, was denied and he was told to use family leave or vacation leave to care for his daughter at home when she could not attend school due to COVID-19 restrictions.

[109] In the case of Ms. Mahar-Daiken, 699 leave was not even considered despite the fact that due to her pre-existing condition, she was particularly vulnerable to serious health consequences if she contracted COVID-19.

[110] In the case of Ms. Abrey, 699 leave was denied in May 2021, and she was told to use family-related leave.

[111] In the case of Ms. Ashraf, intrusive questioning led her to abandon her request for 699 leave, despite the fact that it had been previously approved.

[112] In the case of Ms. Krcadinac, 699 leave was no longer granted after August 2021, despite her medically documented health issues.

[113] Mr. Gervais had to use his family-related leave to cover his absence from work when his children's school closed. When he himself contracted COVID-19, he had to use sick leave.

[114] The disproportional impact that the policy can have on some groups (women, parents, people with pre-existing conditions) shows the discriminatory aspect of the policy.

[115] Even though the collective agreement grants the employer discretion, nevertheless, it must act reasonably and fairly, which includes not negating or undermining the agreement's terms and conditions (see *Union of Canadian*

Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Canada (Treasury Board - Correctional Service), 2007 PSLRB 120).

[116] In *Smith v. Canada Revenue Agency*, 2018 FPSLREB 68, and *Coppin v. Canada Revenue Agency*, 2009 PSLRB 81, employees were denied leave with pay for other reasons when they were unable to attend work due to weather conditions. In both cases, the adjudicator ruled that it had been unreasonable to deny such leave and to replace it with either sick leave (in *Smith*) or vacation leave (in *Coppin*).

[117] In summary, the November 9, 2020, guidelines were confusing and, moreover, inconsistent with the collective agreement. Having to consider other leave before granting 699 leave was contrary to the terms of the collective agreement — each form of leave was negotiated for a specific purpose.

[118] The pandemic was unanticipated, and its duration meant a use of 699 leave that had not been seen before. But despite the fact that the parties never turned their minds to a long-term situation in which employees would be unable to report to work, leave with pay for other reasons exists in all the collective agreements referred to. Access to such leave should not be denied by looking at other forms of leave, which exist for other purposes.

[119] As it is, the policy is confusing, and managers have difficulty interpreting and applying it.

B. For the employer

[120] This a story of two pandemics — one that affected 5.5 million Canadians, who either lost their jobs or worked reduced hours for reduced pay, and one that certainly impacted federal public sector employees but without job or income loss.

[121] From the start, the Treasury Board Secretariat engaged bargaining agents to provide solutions to the upheaval caused by the pandemic. One was 699 leave, which was used at levels unprecedented before the pandemic.

[122] The 699 leave is still available to employees, even after the November 2020 guidance was introduced. Management will consider 699 leave on a case-by-case basis, taking into consideration different work arrangements, generally after other relevant paid leave has been used.

[123] The employer has the authority to provide this type of guidance, given the broad powers found in ss. 7 and 11.1 of the *Financial Administration Act* (R.S.C., 1985, c. F-11). This authority can be limited only by statute or the collective agreement.

[124] The employer submits that if an employer provides a benefit, this in itself does not establish a legal obligation to provide it. It cites *Flatt v. Treasury Board (Department of Industry)*, 2014 PSLREB 2, to that effect. I will come back to this argument and case in my analysis.

[125] The employer emphasizes that what must be considered here is the alleged violation of the collective agreement in principle, not individual applications of the guidance.

[126] According to the employer, the guidance provided in May and November 2020 allows for an individual assessment of an employee's situation and therefore is compliant with human-rights law. A policy grievance cannot address the individualized approach.

[127] Discretionary leave provisions (which provide 699 leave) were not meant to address long-term situations, and they were not meant to override situations covered by more specific collective agreement provisions. As the employer states it, discretionary leave is residual in nature.

[128] The 699 leave was never applied to long-term situations, which, according to the employer, demonstrates that that was not the parties' intent when negotiating the relevant provisions, which have existed in the collective agreements for about 40 years. Nothing in the collective agreements addresses a long-term situation, such as a pandemic, which prevents employees from reporting to work. The 699 leave provision has always been used on a short-term basis for a sudden unforeseeable event (severe snowstorm, earthquake, etc.).

[129] The matter of long-term discretionary leave should be left to the parties to negotiate in the course of collective bargaining. In the meantime, given the collective agreement's silence, management can provide guidance, as it has done.

[130] Leave should be granted according to the provisions of the collective agreement. If another type of leave applies, it should be granted before discretionary leave is considered; that is the meaning of residual leave. According to *Kwamsoos v. Treasury*

Board (Revenue Canada, Taxation), PSSRB File Nos. 166-02-13612 and 13613 (19830923), [1983] C.P.S.S.R.B. No. 105 (QL), if one type of leave applies, another cannot apply. I will come back to this case in my analysis.

[131] As for vacation leave, the employer submits that the November 2020 guidance does not require employees to use their vacation leave before 699 leave can be granted. I quote from the employer's written submission: "It simply requires managers to have a discussion with employees to arrange for the scheduling of vacation during the year it was earned."

[132] The employer argues that conditions are occurring in an ever-changing environment. Its discretion must be exercised while taking into account three sets of facts: 1) individual circumstances, 2) work conditions, and 3) the community situation. The guidance provides direction for examining each of these realities.

[133] The employer lists a number of cases in which the courts have declined assessing the safety of sending children to school or daycare, given the pandemic. That assessment properly belongs to public health authorities, who have the tools to measure the risk posed by COVID-19. According to the employer, this applies in this case: if public health authorities deem it safe for children to go to school, then parents are expected to report to work as usual, barring exceptional circumstances.

[134] In interpreting the provision on leave with pay for other reasons, the Board has applied a two-part test, from the wording of the clause itself: 1) whether the circumstances preventing attendance are attributable or not to the employee, and 2) whether leave was unreasonably withheld. In determining the first part, the Board will consider the reasonable measures that the employee took to prevent or overcome the circumstances preventing work attendance. Personal choice is generally not a valid reason not to report to work.

[135] The employer draws a distinction between the two subclauses of the clause providing leave with pay for other reasons. Subclause (a) reads as follows:

> *At its discretion, the Employer may grant:*
>
> *(a) leave with pay when circumstances not directly attributable to the employee prevent his or her reporting for duty; such leave shall not be unreasonably withheld ….*

[136] Subclause b) reads as follows:

> *(b) leave with or without pay for purposes other than those specified in this agreement.*

[137] The employer argues that since "… such leave shall not be unreasonable withheld" does not appear in the second clause, different thresholds should be applied when reviewing the exercise of discretion. In the case of (b), which would apply since pandemics are not provided for in the collective agreement, the employer need only show that it did not act in a discriminatory, arbitrary, or bad-faith manner.

[138] On the issue of discrimination, the employer submitted that it is well established in the case law that the employer does not have to accommodate an employee to the point of paying that employee if they cannot perform their duties, given reasonable accommodation.

[139] One of the main grounds of discrimination invoked by the bargaining agent is childcare obligations. According to the employer, family status discrimination in the employment context is assessed based on the test developed in *Canada (Attorney-General) v. Johnstone*, 2014 FCA 110. As stated by the employer in its submissions: "The essence of that test is that the employee must have a legal childcare obligation that will go unfulfilled because of work". If reasonable arrangements can be made for childcare, there is no *prima facie* family status discrimination.

[140] More generally, when arguing discrimination, the bargaining agent must first establish *prima facie* discrimination, following the test in *Moore v. British Columbia (Education)*, 2012 SCC 61: the person alleging discrimination (in this case, the persons whom the bargaining agent represents) has a characteristic protected from discrimination under the collective agreement or the *CHRA*, the person experienced an adverse effect related to employment, and the protected characteristic was a factor in the adverse impact.

[141] In the employment context, the employer can respond to an allegation of discrimination in several ways: by showing that its action was not discriminatory or was justified because of operational requirements, or by demonstrating that it provided reasonable accommodation.

[142] Reasonable accommodation does not mean the employee's preferred accommodation. It also well established that accommodation is a two-way street – the employee must participate in the effort to find a reasonable accommodation.

[143] The employer submits that there is nothing in the 699 guidance that would on its face be a violation of the non-discrimination clause of the collective agreement or of the *CHRA*. The Treasury Board Secretariat carried out the gender-based analysis precisely to assess potential impacts of 699 leave on different segments of the workforce.

[144] The bargaining agent has argued that the guidance is discriminatory as some groups may be adversely impacted. However, the employer disputes this, by saying that benefits should be considered not in terms of various groups but in terms of the need the benefit is meant to address. If some groups are denied a benefit not because of the purpose of the benefit, but because of a protected ground, then the provision of the benefit may be discriminatory.

[145] According to the employer, the purpose of 699 leave is to prevent the spread of COVID-19. Therefore, there is no need to provide it if the employee is appropriately on other leave, such as family-related (if the conditions apply) or sick leave if the employee is sick.

[146] There is no provision of uneven benefits in the November policy. All employees are expected to take relevant paid leave before discretionary leave will be granted. Moreover, the policy specifically directs managers to take into account each employee's particular situation, with emphasis on vulnerable groups.

[147] The bargaining agent expressed privacy concerns, and submitted that the policy allowed unduly intrusive questioning. The employer argues that the employer is entitled to information in order to determine the scope of the required accommodation.

IV. Analysis

[148] In the summary of the evidence, I wrote about a meeting held on September 18, 2021, between OCHRO and the PSAC. The last sentence of Ms. de Bellefeuille's notes reads as follows: "The tone of the meeting was professional and cordial."

[149] Before determining whether discrimination or a violation of the collective agreement occurred, I wish to emphasize that this professionalism and cordiality extended to the hearing of the grievances. I do not believe that the parties are very far apart. I also believe that the Treasury Board, as an employer, acted as best it could in a highly unusual and unprecedented situation. Employees were not laid off or deprived of their incomes. The employees who testified before me had encountered some difficulty obtaining 699 leave, but they had all received their full salary even if for a period, they worked reduced hours.

[150] The issues that I must decide are rather narrow. In the first grievance, it is whether the denial of 699 leave to parents who choose not to send their children to school or daycare is discriminatory or a violation of the collective agreement. In the second grievance, it is whether the expectation that employees should use other paid leave before applying for 699 leave is discriminatory or a violation of the collective agreement. I will consider each grievance in turn.

[151] Before doing so, I will start with general propositions about discrimination and collective agreement interpretation that apply to both grievances.

A. Discrimination

[152] Discrimination analysis is well established in the jurisprudence. The enquiry begins with determining if there is apparent, *prima facie*, discrimination. If *prima facie* discrimination is established, in the employment world, the second part of the test is determining if the employer has a valid answer to the discrimination allegation.

[153] The Supreme Court of Canada has clearly enunciated the test for discrimination in *Moore* at para. 33:

> *… to demonstrate* prima facie *discrimination, complainants are required to show that they have a characteristic protected from discrimination under the* Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a* prima facie *case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.*

[154] Thus there are two steps: the complainant (in this case, the grievor) must establish *prima facie* discrimination, and if established, the respondent (in this case, the employer) must justify its practice in light of exemptions provided by the legislation.

B. Collective Agreement Interpretation and the article at issue

[155] All the collective agreements provide for discretionary leave with pay when employees cannot report to work because of circumstances beyond their control. It is discretionary, since the wording uses the verb "may". However, the article also says that such leave shall not be "unreasonably withheld".

[156] The employer sought to distinguish between the two clauses of the article granting leave for other reasons. For the purpose of the discussion, I will reproduce the article again:

> …
>
> ***53.01*** *At its discretion, the Employer may grant:*
>
> *a. leave with pay when circumstances not directly attributable to the employee prevent his or her reporting for duty; such leave shall not be unreasonably withheld;*
>
> *b. leave with or without pay for purposes other than those specified in this agreement.*
>
> …

[157] The employer attempted to show that clause b) could be applicable, since the pandemic is a purpose not specified in the agreement. However, from the start, it is clear from the messaging from the employer that 699 leave referred to clause a): leave with pay for circumstances not directly attributable to the employee.

[158] The fact that this clause has been used in its last 40 years of existence for short durations is not determinative of the issue. The collective agreement itself does not refer to the duration of leave. No matter the duration, employees have been prevented from working because of COVID-19. The question turns on whether the policies lead to an unreasonable withholding of the benefit.

[159] The issue is whether the guidance developed around granting 699 leave was a reasonable exercise of managerial discretion. In *Association of Justice Counsel v.*

Canada (Attorney General), 2017 SCC 55, the Supreme Court of Canada expressed the test to apply in the following manner:

…

> *[24]… The well-established approach to determining whether a policy that affects employees is a reasonable exercise of management rights is the "balancing of interests" assessment, as set out in the leading arbitral decision* KVP*, and recently endorsed by this Court in* Irving *(para. 27, quoting the intervener the Alberta Federation of Labour):*
>
> > Determining reasonableness requires labour arbitrators to apply their labour relations expertise, consider all of the surrounding circumstances, and determine whether the employer's policy strikes a reasonable balance. Assessing the reasonableness of an employer's policy can include assessing such things as the nature of the employer's interests, any less intrusive means available to address the employer's concerns, and the policy's impact on employees.

[160] In other words, when is it reasonable for the employer to deny 699 leave, as it appears in the collective agreements at issue? I see *Coppin* and *Smith* as relevant to the analysis. As stated in *Coppin*:

…

> *33 In exercising its discretion, the employer must examine each request and its series of facts individually, and the employer's decision must be based on the merits of each request. There is nothing wrong with the employer developing a policy to manage leave requests after a winter storm, but that policy must by applied with some flexibility in assessing the facts of each request, considering that the key factor is whether the employee was prevented from reporting to work for reasons not directly attributable to him or her.*

…

[161] An employee is unable to come to work through no fault of his or her own. Should the employee be granted leave with pay? The answer to that question will depend on individual circumstances, and to that extent, I agree that the employer is allowed to set conditions to evaluate the employee's need and the extent that he or she cannot report to work. Requiring medical attestations and making inquiries about the possibility of flexible hours can be a reasonable exercise of managerial authority. Intrusive questioning or inconsiderate demands are not part of these policy grievances — they require individual redress.

[162] The employer argued that the provision that provides for 699 leave is a "residual" right. It cited *Kwamsoos* as an example of the case law. In that case, the adjudicator considered article 23 of the relevant collective agreement, which covered discretionary leave with pay. It specifically defined family-related leave at clause 23.12 and then provided leave for reasons not attributable to the employee at clause 23.13. The employee in that case had to take five days of leave to care for his young daughter, who had contracted chicken pox. She could not attend daycare, and it was clear that the employee had made every attempt to find other care, to no avail. The family-related leave under clause 23.12 was for two days. The employee argued that he should receive leave with pay for another three days, as he could not attend work. The adjudicator ruled that since family care was covered at clause 23.12, it could not be covered at clause 23.13.

[163] Many distinguishing features make that case inapplicable to the present situation. The provisions' wording is very different. In *Kwamsoos*, family-related leave was discretionary, on par with leave with pay for reasons beyond the employee's control. Family-related leave in the present, relevant collective agreements is not discretionary, provided conditions are met. In other words, it is part of the entitlements negotiated in the collective agreement.

[164] In *Kwamsoos*, the issue was whether the specific clause (family-related leave) precluded the use of the general clause (leave with pay for other reasons). In this case, in the relevant collective agreements, family-related leave, a negotiated right, is not part of the article on leave with pay for other reasons, which is a discretionary measure. The only issue is whether the guidance on 699 leave is a reasonable exercise of discretion, not whether a specific clause (such as family-related leave) overrides the general clause (leave with pay for other reasons), since in the current collective agreements, family-related leave, sick leave, and vacation leave are not part of the class of leave allowing discretion.

[165] In *Bitar v. Treasury Board (Statistics Canada)*, 2020 FPSLREB 2, a religious exemption was claimed, and the employee argued that leave with pay for other reasons (provided at article 52 in that collective agreement) should apply. The Board ruled that religious exemptions were already provided for elsewhere, and therefore, there was no need to apply article 52. The relevant paragraph reads as follows:

…

> ***89*** *However, article 52 was generally used in circumstances such as snowstorms, earthquakes, or active volcanoes. If a specific article deals with the subject matter at issue, the rules of interpretation require that I apply that article first. The rule against pyramiding precludes me from then looking at more general articles. In my opinion, the purpose of article 52 is to cover situations that the parties have not specifically turned their minds to, which is not the situation in this case. Here, the parties have turned their minds to how employees can fulfill their religious obligations, and that is by way of the provisions in article 31.*

…

[166] It is interesting to note that the Board acknowledged that leave with pay for other reasons is meant to cover situations the parties have not turned their minds to; this, by the employer's admission, would certainly apply to the pandemic.

[167] The employer's concerns, as expressed in the documents developed throughout the pandemic, was to limit the use of 699 leave to true needs and to prevent abuse. That is a legitimate goal for any employer, but especially for the Treasury Board, which pays its employees from public funds.

C. First grievance, file 569-02-42036

1. Is the policy guidance issued on May 10, 2020, discriminatory?

[168] The bargaining agent submits that it is discriminatory to deny 699 leave to parents who choose not to send their children to school or daycare despite their reopening. The policy discriminates on the basis of family status, and also of disability, if the fear of sending the children to school or daycare is linked to the household presence in of a person a t high-risk of serious COVID-19 consequences.

[169] The May policy does take into account medical reasons for granting 699 leave, with a medical attestation. People at risk from COVID-19 are therefore not targeted.

[170] As regards parents who prefer to keep their children at home, the question becomes one of choice, not of right. Both *Johnstone* and *Flatt* make very clear that there is no discrimination when parents make choices that may be in conflict with their work obligations.

[171] Where public health authorities have deemed that reopening schools and daycares can be safely done, parents can choose to keep their children at home, but this is a choice, and not a right protected by human rights legislation.

[172] I agree with the employer that providing a benefit does not in itself establish a legal obligation. In *Flatt*, the issue was whether the employee was entitled to the accommodation she sought. In fact, in that case, according to the Board and as confirmed by the Federal Court of Appeal, the employee did not establish *prima facie* discrimination. Therefore, her employer had no obligation to accommodate her. It had sought to do so. However, this was not an admission of an obligation, but rather an expression of good faith on its part.

[173] In the same way, although the employer has repeatedly told its managers to view the request for 699 leave in light of the duty to accommodate employees, there is no discrimination to begin with. It is not discriminatory to expect employees to fulfill their duties and make the necessary arrangements in their personal life to be able to do so, be it sending their child to daycare or to school or ensuring the care of dependents. The policy provides that exceptional circumstances must be taken into account. There is no adverse effect because of an employee belonging to one of the protected groups.

2. Does the policy guidance issued on May 10, 2020, violate the terms of the collective agreement?

[174] The main concern expressed in the first grievance was that the employer was not respecting the choice some parents may make to not send their children to school. I believe the guidance made the distinction between true medical concerns, such as a high-risk individual in the household, and personal choice, preferring not to send a child to school or daycare despite the recommendations of the public health authorities.

[175] I can find no violation of the collective agreement. It seems to me that the policy is flexible enough to allow accounting for true concerns. If the transmission rate in a given community is high, if a member of a household is high risk, or if a child is particularly vulnerable, the policy and guidance allow for that assessment. Requiring medical attestation is burdensome but does not violate the collective agreement.

[176] The provision under which 699 leave is granted states that the employee must be unable to report because of "circumstances not directly attributable to the employee". Choice is attributable to the employee. Parents can certainly choose to keep their children at home because of their preferences or fears, but in the absence of objective parameters, the employer does not have to pay for that choice.

D. Second grievance, file 569-02-42737

1. Is the November 9, 2020, policy discriminatory?

[177] The bargaining agent sought to establish that parents of young children or people living with pre-existing conditions might be adversely impacted by the policy.

[178] I do not find that being required to provide medical attestations is an adverse effect. The only possible adverse effect is having to use other leave before being granted 699 leave.

[179] I cannot see a link between a protected characteristic, such as family status or a pre-existing medical condition, and the adverse effect suffered. The adverse consequence of having to use other leave applies to all employees, not only those with protected characteristics.

[180] I am cognizant of the fact that one needs to be aware that the same rules might impact people differently because they belong to a protected group. (See *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3). However, in this case, I cannot see a different impact.

[181] There is no question that school and daycare closures impact parents of young children differently than they do other employees. There is no question that some persons are much more at risk from COVID-19 because of underlying conditions. This can impact employees or members of their households. The bargaining agent submits that requiring employees to use other leave before obtaining 699 leave will impact parents or high-risk individuals more than other employees, presumably because they will deplete their leave bank more quickly than others.

[182] However, this is a potential effect, not an established one. The policy itself does not distinguish between groups, and though it may be that family status might contribute to a quicker depletion of the family-related leave, this does not apply to sick leave or vacation leave. Moreover, family-related leave is not necessarily linked to

young children. It can be used for any member of the employee's family, such as ailing elder parents or injured siblings.

[183] The bargaining agent also argued that employees who cannot work remotely (such as border services officers or correctional officers) might deplete their sick leave bank because they are more exposed to COVID-19 than employees who can telework. I cannot see this as discrimination (and the protected ground is unclear, as these are mostly males). It is an unfortunate reality for some, and the solution lies in various mitigation measures taken by the employer, including the use of 699 leave. The use of sick leave when one is sick is proper; using sick leave to cover other purposes is not.

[184] I find the forced depletion of leave to be problematic, as I will explain later, but I have not been convinced that it is necessarily discriminatory. This is a case where its application is adverse for all.

[185] In addition, I find that the employer is aware of the needs of different vulnerable populations and that it has taken pains to stress the case-by-case assessment of every request, precisely to allow managers to gauge each employee's needs. If errors are made, they can be corrected. But those are individual instances, not the subject of a policy grievance.

[186] The employer's gender-based analysis study, as well as the consideration given to the importance of assessing cases individually, have convinced me that the employer is well aware of its responsibilities from a human rights point of view. Therefore, I do not find the November policy discriminatory.

2. Does the November 9, 2020, policy breach the collective agreements?

[187] According to the employer, the purpose of the 699 leave is to prevent the spread of COVID-19. That may well be the rationale for the employer, but that is not the purpose of the clause at issue. Its purpose is to allow the granting of leave with pay when an employee, through no fault of his or her own, cannot report to work. The key element is that it cannot be unreasonably withheld. Again, to decide if there has been a breach of the collective agreement, I must decide if the exercise of managerial discretion in developing the November policy was reasonable.

[188] The one element of the policy or guidance that strikes me as unreasonable, because it goes against the collective agreement and imposes an undue burden on

employees, is the message given to managers that they must consider other leave before granting 699 leave.

[189] I find that requiring the manager and employee to consider other paid leave is a violation of the collective agreement. Mr. Nemish's position, insisting that all leave had to be exhausted before 699 leave would be considered, was an extreme example of what can go wrong with the policy. Judging from the guidance provided in October 2020, I am not certain that he would have been told that his employee did not have to use all her leave before being entitled to 699 leave.

[190] In and of itself, the guidance is confusing, and it is wrong to the extent that it leads managers to believe that other leave must be considered before granting 699 leave. The rights and entitlements negotiated in the collective agreement exist as separate entitlements; they are not meant to be melded.

[191] Three types of leave were mentioned throughout the hearing and in the examples provided — sick leave, family-related leave, and vacation leave.

a. Sick leave

[192] Sick leave is granted as follows, according to the PA collective agreement:

> …
>
> ***35.02*** *An employee shall be granted sick leave with pay when he or she is unable to perform his or her duties because of illness or injury provided that:*
>
> *a. he or she satisfies the Employer of this condition in such manner and at such time as may be determined by the Employer; and*
>
> *b. he or she has the necessary sick leave credits.*
>
> …

[193] The numbering differs, but the wording is the same in all the collective agreements at issue.

[194] Obviously, if sick leave does apply, as in *Clark v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-23892 (19940331), [1994] C.P.S.S.R.B. No. 45 (QL), then there is no need to consider leave for other reasons.

[195] However, sick leave is precisely that — the employee cannot work due to an inability caused by illness or injury. The 699 leave does not cover that situation — it covers circumstances not under the employee's control that prevent him or her from reporting to work.

[196] Sick leave has been negotiated to ensure that employees who are ill need not worry about their income. In *Smith*, the Board ruled that it was unreasonable to grant sick leave when the employee could not report to work because of circumstances beyond his control (in that case, a snowstorm). I find it unreasonable for the employer to consider sick leave when the pandemic prevents attending at work unless, of course, the employee is ill.

b. Family-related leave

[197] The following provisions detail family-related leave in the PA collective agreement:

> …
>
> ***44.02*** *The total leave with pay which may be granted under this article shall not exceed thirty-seven decimal five (37.5) hours in a fiscal year.*
>
> ***44.03*** *Subject to clause 44.02, the Employer shall grant the employee leave with pay under the following circumstances:*
>
> *a. to take a family member for medical or dental appointments, or for appointments with school authorities or adoption agencies, if the supervisor was notified of the appointment as far in advance as possible;*
>
> *b. to provide for the immediate and temporary care of a sick member of the employee's family and to provide the employee with time to make alternative care arrangements where the illness is of a longer duration;*
>
> *c. to provide for the immediate and temporary care of an elderly member of the employee's family;*
>
> *d. for needs directly related to the birth or the adoption of the employee's child;*
>
> *e. to attend school functions, if the supervisor was notified of the functions as far in advance as possible;*
>
> *f. to provide for the employee's child in the case of an unforeseeable closure of the school or daycare facility;*
>
> *g. seven decimal five (7.5) hours out of the thirty-seven decimal five (37.5) hours stipulated in clause 44.02 above may be used to attend an appointment with a legal or*

> *paralegal representative for non-employment related matters, or with a financial or other professional representative, if the supervisor was notified of the appointment as far in advance as possible.*
>
> …

[198] Again, the numbering is different, but the same provision is found in all the collective agreements at issue.

[199] Family-related leave is a safety valve for employees who have family responsibilities that might create a sudden requirement — attending a dentist appointment with an aged parent, taking a child to the hospital emergency for worrisome symptoms, etc. To force employees to use their family-related leave in the context of COVID-19 school closures adds strain to their lives. They should not use their leave insurance policy, so to speak, to cover a situation that may be on-going. Withholding 699 leave pending the use of family-related leave is unreasonable.

[200] At first glance, it would appear reasonable to consider family-related leave for school or daycare closures, expressly mentioned in the provision. However, the pandemic is akin to the exceptional circumstances that are implied in granting leave with pay for other reasons, not the circumstances provided for in the collective agreement for family-related leave. School closures may occur for a variety of reasons and can occur quite suddenly. There is a negotiated term to cover that eventuality, albeit limited. School closures due to COVID-19 are of another order. They may last much longer and be far more disruptive. Family-related leave provides for the unforeseeable closure of schools or daycare facilities. Since the beginning of the pandemic, schools and daycares have been closed for extended periods of time. Parents have had to adjust to the reality of online schooling, which may require considerable time and attention from the parent. Again, the pandemic reality is an unforeseen event that disrupts the employee's work life and may prevent full or partial attendance at work for some employees. It is unreasonable to use leave that is meant for another purpose — short-term events — for a reality that may be ongoing. As stated by Mr. Carrier, were it not for the pandemic, his child would be at school, and he would be at work. He should not have to use family-related leave to cover that eventuality. It should not be exhausted, as in Mr. Gervais' case. That leave exists to cover other needs, such as appointments and school closures for other reasons.

c. Vacation leave

[201] The PA, FB, and SV collective agreements state, "[e]mployees are expected to take all their vacation leave during the vacation year in which it is earned." The EB collective agreement states, "[e]mployees must normally take all of their annual leave during the vacation year in which it is earned." The TC collective agreement states that the employer must make every reasonable effort "… to grant the employee his or her vacation leave during the fiscal year in which it is earned …".

[202] In all the collective agreements, carrying over vacation leave is allowed. Vacation leave is paid to an employee who retires or to the employee's estate in case of death.

[203] Vacation leave is a basic entitlement that is meant to be used to allow employees to be entirely away from work.

[204] The employer argues that vacation leave need not be exhausted before 699 leave can be granted and that the November 2020 guidance simply requires that managers discuss with employees scheduling annual leave. The employer invokes the term of the collective agreement that specifies that vacation leave should be taken in the year it is earned.

[205] All the terms that apply to vacation leave are irrelevant to 699 leave. Managers discussing vacation use with their employees predates COVID-19 and will continue long after the pandemic ends. Vacation leave simply has no bearing on 699 leave. When granting leave because the employee is unable to report to work, the status of the employee's vacation leave is irrelevant. Of course, managers can discuss vacation leave with employees and encourage them to take it. But vacation leave is of another order than 699 leave, under which the employee would be expected to work as soon as the possibility arose — a technological issue was resolved, childcare or schools reopened, or available care for a family member was secured. When on 699 leave, the employee is being paid but is not on vacation. Vacation leave should be used for its true purpose, which is enjoying life without work and without any obligation to report to work. Vacation leave is not meant to cover the inability to attend work because of circumstances one cannot alter.

[206] Management showed its ambivalence on this issue in Ms. Krcadinac's case. She was told to use vacation leave to cover her absence, only to have it reinstated when she

grieved that decision. If Ms. Krcadinac is entitled to bank her vacation leave credits, why would other employees have to use their vacation leave when requesting 699 leave? Again, discussing using vacation leave in a given year is a proper activity between a manager and his or her employee, but it should not be confused with the need for 699 leave if the employee is ready and willing to work but is unable to due to circumstances beyond his or her control.

[207] Therefore, I find that adding the requirement to consider other leave before considering an employee's request for 699 leave violates the collective agreement, as it is an unreasonable withholding of 699 leave. This conclusion is premised on the understanding that the employee is ready and able to work.

[208] Despite this conclusion, I do not think that the employer acted in bad faith, and the bargaining agent also stated that point of view. The issue is how leave is administered when applying the collective agreement. I do believe that the employer sought to maintain its employees' employment without loss of salary. That is commendable.

[209] I will not make an order to grant 699 leave to all who request it. The employer is entitled to explore and determine whether remote and flexible arrangements are possible and the extent to which an employee cannot come to work because of medical reasons that apply to the employee or to a household member. A medical attestation by a medical practitioner may be required. The community prevalence of the COVID-19 virus and public health information may be factors in deciding whether an employee can return to work safely and whether it is reasonable to expect parents to send their children to school or daycare. An employee who is sick and unable to work is expected to use sick leave.

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

(The Order appears on the next page)

IV. Order

[211] Policy grievance 569-02-42036 is dismissed.

[212] Policy grievance 569-02-42737 is partially allowed. To the extent that it requires that other leave provisions be considered before 699 leave will be considered, the policy guidance issued in October 2020, effective November 9, 2020, violates the stated clauses of the following collective agreements:

- clause 53.01, Program and Administrative Services (PA) collective agreement;
- clause 52.01, Border Services (FB) collective agreement;
- clause 55.01, Technical Services (TC) collective agreement;
- clause 22.16, Education and Library Science (EB) collective agreement; and
- clause 56.01, Operational Services (SV) collective agreement.

March 7, 2022.

Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board