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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

OONA KEAGAN

Grievor

and

TREASURY BOARD
(Department of Crown-Indigenous Relations and Northern Affairs)

Employer

Indexed as
Keagan v. Treasury Board (Department of Crown-Indigenous Relations and Northern Affairs)

In the matter of an individual grievance referred to adjudication.

Before: David Olsen, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Mariah Griffin-Angus

For the Employer: Philippe Giguère

Decided on the basis of written submissions, filed April 1 and 19, November 25, and December 9, 2022, and January 13, 2023.

REASONS FOR DECISION

I. Introduction

[1] The grievor, Oona Keagan, who was employed in a PM-04 position by Department of Crown-Indigenous Relations and Northern Affairs (CIRNAC), applied for a CX-02 position with the Correctional Service of Canada (CSC). It was a condition of employment that all candidates had to complete the CSC's Correctional Training Program (CTP), for which there was no remuneration. The grievor applied to CIRNAC for both personnel selection leave and career development leave under her collective agreement. Both applications were denied, which she grieved.

[2] The parties agreed to proceed by way of an agreed statement of facts and written submissions.

[3] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (PSLREB) to replace the former Public Service Labour Relations Board as well as the former Public Service Staffing Tribunal (PSST). On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2*

(S.C. 2013, c. 40; *EAP*) also came into force (SI/2014-84). Pursuant to s. 393 of the *EAP*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by ss. 365 to 470 of the *EAP*.

[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 *PSLREBA* 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* (*FPSLREBA*), and the *Federal Public Sector Labour Relations Act*.

II. Summary of the evidence based on the parties' agreed statement of facts

[5] The grievance was filed under the Program and Administrative Services group collective agreement between the Treasury Board and the Public Service Alliance of Canada that expired on June 20, 2014 ("the collective agreement").

[6] At the relevant time, the grievor occupied her PM-04 position located in Nova Scotia.

[7] Her supervisors were Belinda Smith, Director, Lands and Economic Development, CIRNAC, Atlantic region, and Larry Pardy, Manager, Lands, Environment, and Natural Resources.

[8] In September 2013, the grievor applied for a CX-02 position as a primary worker with the CSC in Truro, Nova Scotia, by way of a public service staffing process numbered 2013-PEN-EA-NAT-77497. The job posting indicated that all candidates had to successfully complete the CTP and stated that "there is NO REMUNERATION while on the Correctional Training Program".

[9] The grievor's application was referred for assessment. She was required to complete a "Pre-Employment questionnaire, Region/Province of Interest" form and a "Language of Work" form by October 3, 2013.

[10] CIRNAC approved the grievor taking personnel selection leave to participate in interviews and a psychological assessment administered by the Public Service Commission (PSC).

[11] On December 27, 2013, the grievor was notified that she was selected to participate in stage 1 of the CTP as a result of her success at meeting most of the required conditions and evaluations up to that stage of the process. The CTP was a multi-stage process, including online courses, a theory test (stage 1), presession online assignments and materials [stage 2], and 10 weeks of in-class training (stage 3) at the CSC's National Training Academy at its Prairie Staff College in Saskatoon, Saskatchewan.

[12] On January 9, 2014, the grievor successfully underwent a pre-placement medical assessment with Health Canada as a condition of employment for the position.

[13] On January 14, 2014, the grievor successfully underwent a psychological evaluation for the position.

[14] On January 29, 2014, the grievor was notified that she had completed stage 1 of the CTP, including all courses, informal tests, and the theory test. She did not have to take leave for stages 1 and 2.

[15] Having passed stage 1, the grievor was placed in a national pool of candidates from which she could be selected and issued a conditional letter of offer. Once she received and accepted a conditional-offer letter, she would be invited to take CTP stages 2 and 3.

[16] On February 3, 2014, the grievor received a conditional letter of offer for a primary worker/Kimisinaw position at the Nova Institution for Women in Truro. The letter included an offer to attend stage 3 of the CTP for 10 weeks in Saskatoon.

[17] If the grievor failed to complete all the stages of the CTP, she would not receive the appointment to the CX-02 position as completing them all was a condition of employment.

[18] Stage 3 of the CTP was unpaid and was to take place from March 10 to May 16, 2014. The CSC indicated to her that its Learning and Development Branch was to pay

for her round-trip travel to Saskatoon, her meals (breakfast, lunch, and dinner), and her hotel accommodations. However, it added this:

> …
>
> • *All additional costs such as salary, week-end [sic] travel home, incidentals and/or other entitlements under the Treasury Board Travel Directive and the employee's collective agreement outside of meals and accommodations may be assumed by the employee's site of employment. All expenses must be pre-approved by your site management prior to the training with CSC.*
>
> *This last point means you need to make the request to your current employer for all questions related to your salary, pensionable time, etc.…*

[19] On January 31, 2014, the grievor requested paid leave to complete stage 3 of the CTP under article 48 of the collective agreement, entitled "Personnel Selection Leave". As an alternative, she requested paid leave under article 50, "Career Development Leave". Articles 48 and 50 read as follows:

> ***Article 48***
>
> ***Personnel Selection Leave***
>
> ***48.01*** *Where an employee participates in a personnel selection process, including the appeal process where applicable, for a position in the public service as defined in the* Public Service Labour Relations Act*, the employee is entitled to leave with pay for the period during which the employee's presence is required for purposes of the selection process and for such further period as the Employer considers reasonable for the employee to travel to and from the place where his or her presence is so required.*
>
> …
>
> ***Article 50***
>
> ***Career Development Leave***
>
> ***50.01*** *Career development refers to an activity which, in the opinion of the Employer, is likely to be of assistance to the individual in furthering his or her career development and to the organization in achieving its goals. The following activities shall be deemed to be part of career development:*
>
> *(a) a course given by the Employer;*
>
> *(b) a course offered by a recognized academic institution;*
>
> *(c) a seminar, convention or study session in a specialized field directly related to the employee's work.*

> ***50.02*** *Upon written application by the employee and with the approval of the Employer, career development leave with pay may be given for any one of the activities described in clause 50.01. The employee shall receive no compensation under Article 28, Overtime, or Article 32, Travelling Time, during time spent on career development leave provided for in this Article.*
>
> ***50.03*** *Employees on career development leave shall be reimbursed for all reasonable travel and other expenses incurred by them which the Employer may deem appropriate.*

[20] Discussions ensued between the grievor, CSC officials, her managers, and Labour Relations about her leave requests and the CTP.

[21] Ultimately, on February 28, by telephone call, Ms. Smith, the grievor's director, denied her request for leave with pay under articles 48 and 50 of the collective agreement.

[22] On March 5, 2014, the grievor requested that the employer provide its decision in writing. On March 7, 2014, its decision was communicated to her by email, which noted that leave without pay for personal needs would be more applicable in the circumstances. It further indicated that management would support an application for that leave under article 44 or for leave with income averaging.

[23] Consequently, the grievor submitted a request for leave with income averaging, which Ms. Smith approved on March 3, 2014.

[24] The grievor took the mandatory CTP stage 3 in-class training. The CSC's Learning and Development Branch was to pay for her round-trip travel to Saskatoon, the CTP itself, her meals, and her hotel accommodations.

[25] On April 9, 2014, the grievor filed a grievance contesting management's denial of her leave request under articles 48 and 50 of the collective agreement.

[26] On April 22, 2014, the parties agreed to bypass the first level of the grievance process.

[27] On July 7, 2014, the employer issued a second-level grievance response, denying the grievance for the reasons set out in the response.

[28] On October 2, 2015, the employer issued a final-level grievance response, denying the grievance for the reasons set out in the response.

[29] On November 5, 2015, the grievance was referred to adjudication before the Board's predecessor.

III. Summary of the arguments

A. For the bargaining agent

1. Background

[30] On April 9, 2014, Ms. Keagan filed her grievance, which reads as follows: "I grieve the actions of the Employer for denying my leave with pay request as it relates to a selection process as a whole. I further grieve the fact that my employer is not adhering to the applicable terms and provisions of my collective agreement."

[31] As corrective action, the grievor requested that the employer grant the leave-with-pay request pursuant to article 48 or any other applicable article and requested that she be made whole.

[32] The employer did not provide particulars in its grievance replies denying leave under either article 48 or 50.

[33] The facts of this case are not in dispute. It turns on the interpretation of article 48 and, in the alternative, article 50.

2. Leave under article 48

[34] Leave should have been granted under article 48. After successfully completing stages 1 and 2 of the personnel selection process, the grievor received a conditional letter of offer. The letter, dated January 31, 2014, states this:

> *…*
>
> *… This offer is subject to meeting the following conditions:*
>
> *…*
>
> - *Pass a pre-employment medical exam;*
> - *Possess a valid Standard First Aid and Cardiopulmonary Resuscitation (CPR) 'Level C' with Automated External Defibrillator (AED) certificate;*
> - *Meet the psychological requirements determined by Correctional Service Canada;*
> - *Successfully complete the CTP which will commence on March 10, 2014. Please note CSC offers no salary or allowance during Stage 3 of CTP…*

> …
>
> *These conditions must be met* ***prior to your appointment****…*
>
> *This conditional offer will remain valid until you have met the above-mentioned conditions. Should you not be in a position to satisfy the conditions, this offer will become null and void.*
>
> …
>
> [Emphasis in the original]

[35] The letter was signed by Nathalie Lavigne from the CTP, Regional Recruitment, CSC.

3. The selection process

[36] Ms. Keagan was in the personnel selection process from late 2013 until she was appointed to the substantive CSC position in mid-2014. It stands to reason that once an employee applies for a position, they are part of the personnel selection process until they are either rejected for or appointed to the position.

[37] Ms. Keagan had not been appointed to the substantive position as of the CTP session, given that her employment offer was conditional. Indeed, s. 56(1) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*) states this:

> ***56 (1)*** *The appointment of a person from within that part of the public service to which the Commission has exclusive authority to make appointments takes effect on the date agreed to in writing by that person and the deputy head, regardless of the date of their agreement.*

[38] Furthermore, in *Gardanis v. Deputy Head (Department of Employment and Social Development)*, 2022 FPSLREB 5 at para. 37, the Board stated this:

> *[37] The rules and laws governing employment in the federal public sector include legislation and regulations as well as contract law. Hiring for that portion of the public sector in which the employer is the Treasury Board is governed by the* PSEA*. While the term "appointment" is not defined in the* PSEA*, this term is, in short, for want of a better definition, used to refer to "being hired".*

[39] Being appointed also presumably involves renumeration for labour. As Brown and Beatty point out in *Canadian Labour Arbitration*, "Wages and related forms of remuneration are among the most important provisions in all collective agreements. For most people, the compensation package is the cornerstone of the employment

relationship." Ms. Keagan would not have received any benefits from being part of the CSC workplace since she was not yet appointed to the CSC position. Rather, she had further conditions to meet before she could be issued a firm letter of offer. Indeed, in the letter quoted earlier, a failure to complete the CTP would have meant that the "offer will become null and void." It is logical to assume then that Ms. Keagan remained in the selection process.

4. The parties' intention

[40] Although the grievor took leave with income averaging, the 10-week loss of income was hugely significant. The paid-leave provision, article 48, exists specifically so that participating in an unpaid personnel selection process is not a financial hardship for public service employees.

[41] The intention of the parties is an important step to understanding the collective agreement provisions. Brown and Beatty state that "… in determining the intention of the parties, the cardinal presumption is that the parties are assumed to have intended what they have said, and that the meaning of the collective agreement is to be sought in its express provisions."

[42] The very existence of article 48 suggests that the parties intended that the bargaining unit members would receive financial support while taking part in an unpaid personnel selection process.

[43] The provision has no stated restrictions or conditions beyond the employee participating in a public service selection process. Had the parties wanted to add conditions or restrictions or to define the selection process, they would have.

[44] The grievor was granted personnel selection leave twice for the same competition as stated in paragraph 5 of the agreed statement of facts. The employer did not explain why the earlier stages fell within the provision's purview but the in-person training did not.

[45] "Personnel selection process" is not defined in the collective agreement, meaning that it should be understood broadly, rather than restrictedly, which would also unnecessarily complicate understanding and applying article 48.

[46] As was pointed as follows out in *Wamboldt v. Canada Revenue Agency*, 2013 PSLRB 55 at para. 28:

> *28 Second, parties to a collective agreement are generally considered to have attempted to arrive at an agreement that is easy to apply in daily practice. Hence, an interpretation that produces a clear result is generally to be preferred to one that produces a messy or uncertain result, if only because a clear result is more likely to produce and maintain the "… harmonious and mutually beneficial relationships between the Employer, the Alliance, and the employees …" that is one of the purposes of the collective agreement; see clause 1.01. In short, an interpretation that makes applying the provision easy in practice as a rule is to be preferred over one that makes that application difficult if not impossible.*

[47] The easiest application of article 48 would be to allow public service employees access to paid leave to complete a selection process as stated in the provision.

5. The normal or ordinary meaning of words

[48] Collective agreements are to be read within their ordinary meanings. Again, Brown and Beatty state, "In searching for the parties' intention with respect to a particular provision in the agreement, arbitrators have generally assumed that the language before them should be viewed in its normal or ordinary sense …". The leave provision was designed for employees to be paid while participating in a personnel selection process. If Ms. Keagan's situation did not fit this provision, it is not clear what would.

[49] The clause at issue states, "Where an employee participates in a personnel selection process … the employee is entitled to leave with pay …". Brown and Beatty state, "… in construing a collective agreement, it should be presumed that all of the words used were intended to have some meaning …". From this, it can be presumed that "is entitled" was chosen deliberately, meaning that the leave, upon request, is mandatory, not discretionary. The language in article 48 is not ambiguous.

[50] As Mitchnik and Etherington point out in *Labour Arbitration in Canada*, "To be ambiguous … a provision must be reasonably susceptible of more than one meaning; and the dispute cannot be satisfactorily resolved by reference to the language itself, read in the context of the collective agreement as a whole." "Personnel selection leave" may be undefined, but it is not ambiguous in the context of the provision. There is no

other possible meaning for the provision beyond the ordinary, common-sense understanding.

[51] Article 48 was crafted to confer the specific benefit of an employee being "… entitled to leave with pay for the period during which the employee's presence is required for purposes of the selection process …" and "… for such further period as the Employer considers reasonable for the employee to travel to and from the place where his or her presence is so required." The use of "is entitled" suggests that this leave is not discretionary. It does not say "may be entitled", which would confer discretionary powers to the employer. Indeed, there is no restrictive language relating specifically to a selection process; any discretion comes in the second part, related to travel.

[52] There are no specific conditions that a grievor must meet to take this leave beyond participating in a public service personnel selection process. The provision does not allow for any equivocation or for the employer to add additional conditions.

[53] The collective agreement language and the grievor's leave request are clearly in sync. In an email dated March 7, 2014, for instance, Ms. Smith denied the leave request but wrote, "… denied your request for leave… as a candidate in a federal competitive selection process" and that the employer supported her leave "… for the period of your training/selection process."

[54] In an email dated February 6, 2014, from Mr. Pardy to Ms. Keagan, he states that "… we are unable to approve leave with pay under Article 48 for this training. This is because the training is not a selection process stage but rather mandatory training that must be completed as a condition of employment."

[55] This is reading a meaning into the provision that does not exist. The provision does not exclude "mandatory training", and there is no consideration of a "condition of employment" versus training as part of a selection process. Presumably, any part of the selection process is mandatory. Consider, for example, the grievor's invitation to attend the psychological assessment, which stated this: "Failure to attend the evaluations … will result in your application no longer being considered in this process … you will be disqualified from the appointment process". The grievor was granted personnel selection leave for the psychological assessment, and the employer did not articulate the difference between one mandatory part of the process and another.

[56] The conditional offer letter of January 31, 2014, cited at paragraph 34, clearly outlines the fundamental contract principle of condition precedent, meaning that conditions had to be met before Ms. Keagan would receive her appointment. If she did not pass stage 3 of the CPT, she would not be appointed. The Public Service Alliance of Canada ("the bargaining agent") argues that Ms. Keagan was in the selection process until she received an unconditional letter of offer or an appointment offer from the CSC. If she had not yet been appointed, it stands to reason that she was still in the selection process, meaning that she should have been granted the leave.

6. Leave under article 50

[57] In the alternative, the employer should have granted leave under clause 50.01(a), which grants career development leave for a course given by the employer.

[58] If the employer did not consider the CTP part of the personnel selection process, it should have been considered under career development as the federal public service provided it. It might not have been training specific to her CIRNAC substantive position, but given that both CIRNAC and the CSC fall under the Treasury Board's purview, it stands to reason that the provision applies.

[59] On February 12, 2014, Mr. Pardy told the grievor as follows that the employer had discussed approving the leave request under article 50:

> *I spoke with Dougal. He is not inclined to support Article 48 but acknowledges the case that can be made under Art 50 (Career Dev leave).*
>
> *Initially, he saw it as opening a broad precedent (another dept, long training period) but I suggested it was quite narrow - a Fed employee seeking career development training for a very specific and firm job within the Federal government.…*
>
> …
>
> [*Sic* throughout]

[60] In an email dated March 7, 2014, Ms. Smith wrote, "Also as discussed with you, LED management is supportive of your career development and aspirations, and will support either Leave Without Pay for Personal Needs and/or Leave with Income Averaging for the period of your training/selection process."

[61] Although it was not a formal grievance reply, it indicates that even employer representatives recognized that the CTP was necessary for the grievor's career development.

[62] In *Ewen v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 113 at para. 55, the former Board stated as follows:

> *[55] The exercise of discretion cannot be arbitrary, discriminatory or in bad faith. This principle was followed in* Salois *and* Allad. *D.P. Jones and A.S. de Villars, in* Principles of Administrative Law, *2nd edition (1994), discussed the exercise of discretion as follows:*
>
> …
>
> … unlimited discretion cannot exist. It is an abuse for a delegate to refuse to exercise any discretion by adopting a policy which fetters his or her ability to consider individual cases with an open mind.
>
> …
>
> After all, the existence of discretion implies the absence of a rule dictating the result in each case; the essence of discretion is that it can be exercised differently in different cases. Each case must be looked at individually, on its own merits. Anything, therefore, which requires a delegate to exercise his or her discretion in a particular way may illegally limit the ambit of his or her power.
>
> …

[63] The employer did not provide any reasons for rejecting the leave under article 50. Without particulars, it is difficult for the employer to argue that the CTP, if it considered the CTP outside the scope of personnel selection leave, did not meet the standard of career development. It failed to consider Ms. Keagan's individual circumstances and exercised its discretion in an arbitrary manner.

[64] Mitchnik and Etherington reaffirm that as follows:

> *Nonetheless, even if the agreement reserves to the employer a discretion, it is well established that the exercise of this discretion is not unfettered and that, at a minimum, management must make its decision in good faith and without discrimination; undertake a genuine exercise of discretionary power, as opposed to rigid adherence to a policy external to the collective agreement; give consideration to the merits of the individual application under review; and turn its mind to all relevant facts, while excluding irrelevant considerations. In addition, many arbitrators will hold*

> *the employer to a standard of fair and reasonable decision-making [sic].*

[65] Career development can mean a wide range of activities. The employer's failure to properly consider training provided by a public service department means that it did not meet the standard of fair and reasonable decision making.

7. Remedy

[66] The bargaining agent respectfully asks that the employer be found in violation of the collective agreement for denying leave under article 48 and for Ms. Keagan to be made whole.

[67] In the alternative, the bargaining agent respectfully requests that the employer be found in violation of the collective agreement for denying leave under article 50 and for Ms. Keagan to be made whole.

B. For the employer

[68] As the bargaining agent points out, the facts of this case are not in dispute and are set out in detail in the parties' agreed statement of facts and supporting joint book of documents. This matter turns on the interpretation of the language of articles 48 and 50 of the collective agreement.

[69] Nevertheless, the employer wishes to bring some specific facts to the Board's attention. First, the CTP is not a selection process stage. Rather, it is a distinct three-part mandatory training program that all new recruits must complete as a condition of employment.

[70] It was made clear to all new recruits, including the grievor, when applying for the position that they had to be willing to undertake mandatory training at a CSC regional staff college and that CTP participants were not paid.

[71] The CSC reinforced that point in its conditional letter of an offer of employment to the grievor of January 31, 2014, which she later signed.

[72] The CSC paid the grievor's meals, accommodations, and transportation to and from her principal residence to the CTP session site and back.

[73] The grievor was not deprived of all her income when she participated in the CTP. She requested and was approved for leave with income averaging.

[74] The grievor was approved for all the personnel selection leave she requested for the activities in the personnel selection process that were not part of the CSC's separate and distinct CTP for new recruits.

IV. Issues before the Board

[75] The first issue involves determining whether the grievor was entitled to personnel selection leave for her time going through stage 3 of the CTP, which included 10 weeks of in-class training at the CSC's National Training Academy. Meanwhile, the second issue involves determining if she was entitled to career development leave with pay in the alternative.

[76] In resolving those issues, when interpreting a collective agreement dispute, the Board's central task is to determine the parties' intent as revealed in the words they used in the agreement.

[77] One interprets a provision within the context of the collective agreement as a whole, gives its words their ordinary meanings (unless doing so would result in an absurdity or the agreement gives them special meaning), and considers the circumstances known to the employer and the bargaining agent when they entered into the agreement. In addition, the Board's decision may not have the effect of requiring the amendment of a collective agreement or an arbitral award.

V. The burden of proof

[78] It is trite law that any benefit involving a monetary cost to the employer must be clearly and expressly granted in the terms of the collective agreement. The burden was on the bargaining agent to demonstrate that the grievor was entitled to a monetary benefit founded on a proper interpretation of the agreement and that the employer violated the agreement's terms.

[79] For the reasons that follow, the grievor failed to establish that she was entitled to either personnel selection leave under article 48 or career development leave under article 50 to participate in stage 3 of the CTP.

[80] The first issue involves determining whether the grievor was entitled to personnel selection leave while attending the 10-week CTP stage 3.

[81] In this case, the employer does not contest that the decision to grant personnel selection leave is not discretionary; nor does it contest the general purpose of the provision advanced by the bargaining agent. However, the parties disagree on the ambit of article 48's scope and intent and whether they intended for it to extend to cover the 10-week CTP stage 3.

[82] The employer's position is that the bargaining agent's interpretation attempts to expand and stretch the ambit to include paid leave to attend the separate and distinct national CTP, which it does not (see *Wamboldt*, at para. 27; and *Bédard v. Treasury Board (Canadian Grain Commission)*, 2019 FPSLREB 76 at para 38.). Rather, the CTP is a separate and distinct three-part mandatory 10-week training program that all new CSC recruits must complete as a condition of employment.

[83] Article 48 has no clear or explicit language that would lead to the conclusion that the parties intended such a result. In their normal or ordinary senses, the phrases "personnel selection process" and "training program" have different meanings and refer to different activities.

[84] Moreover, the bargaining agent's interpretation that the ambit of article 48 is absolute and that it captures all activities relating to personnel selection processes, including a 10-week training program, is also inconsistent with the Board's past interpretation of the provision.

[85] The Board has interpreted a similar provision and determined that not all activities relating to personnel selection processes are covered by both the language and intent of the provision and that it is not the Board's role to extend the provision's ambit beyond its language and intent. Specific and clear language is required to that effect.

[86] Moreover, the bargaining agent's interpretation and circumstances do not accord with the typical and normative situations that historically, the parties and the Board have recognized in the case law as being captured by the ambit of article 48's language and intent. Such typical situations include leave to take written examinations or attend interviews.

[87] In this case, this situation is not normative and is quite far removed from the situations discussed earlier in this decision. It stretches both the provision's language and intent to find that a mandatory, separate and distinct 10-week training program for new recruits falls within its ambit. Moreover, had it been intended that the provision would capture other situations, such as that training program, then the parties would have or should have specifically and clearly expressed it.

[88] As mentioned, it is well recognized that any benefit involving a monetary cost to the employer must be clearly and expressly granted in the collective agreement's terms. As a case in point, the parties did include express language in the provision to include other types of situations or activities as evidenced by the explicit inclusion of the phrases "… including the appeal process where applicable …" and "… travel to and from the place where his or her presence is so required."

[89] The well-recognized *expressio unius est exclusio alterius* rule means that the express mention of a thing implies the exclusion of another. Consequently, had the parties intended for personnel selection leave to extend to other categories of activities apart from those recognized in the case law (which the parties are presumed to be familiar with), they would have explicitly said so, just as they did for the appeal process and travel.

[90] In this case inconsistencies arise when the bargaining agent's interpretation of article 48 is read with the rest of the collective agreement. This is problematic, as it is trite that one interprets the words of a provision within the context of the agreement as a whole and that an interpretation that would lead to inconsistencies with the rest of the agreement should be avoided. A review of the rest of the agreement reveals that the parties took positive and clear steps elsewhere in it to provide an employee with leave to participate in a training course, session, and program. However, article 48 includes no such clear and unambiguous language. Surely, had the parties intended for the ambit of article 48 to cover such situations, they would have explicitly and clearly provided language to that effect as they did consistently elsewhere in the agreement.

[91] Moreover, the parties also make clear and explicit use of the terms "training", "training sessions", and "training courses" elsewhere in the collective agreement. However, those terms are absent from the personnel selection leave clause. The presence of those expressions elsewhere and their absence from that clause must

mean something. As noted in *Bruce Power LP v. Society of United Professionals*, 2019 CanLII 24930 (ON LA), sometimes the words that the parties did not use can be significant particularly when, as in this case, the parties are sophisticated users of language in collective agreements. Moreover, the parties' specific use of the terms "personnel selection processes" and "training courses" in clause 26.01 is also significant. In keeping with the rule against redundancy, the parties' distinct use and reference of both terms in clause 26.01 further implies that they are not interchangeable and that they should be given distinct meanings.

[92] In sum, the presumption of harmony and coherence with the rest of the collective agreement implies that had the parties wanted the ambit of article 48 to capture the CSC's mandatory CTP for new recruits, the provision could have been made simple and clear in many other ways, such as by using similar terms or explicit language found elsewhere in the agreement to confer such a benefit upon the grievor.

[93] In this case, it must be understood that the parties chose the precise words that form their agreement. In this case, they have no clear and explicit language dealing with personnel selection leave to attend a separate and distinct mandatory training program for new recruits. Nor is this situation normative under the provision.

[94] The bargaining agent's interpretation would result in a significant monetary benefit being conferred upon the grievor absent any clear and explicit language to achieve it. Such an action would run afoul of the well-known interpretation principle that a benefit that has a monetary cost to the employer must be clearly and expressly granted under the collective agreement.

[95] It is highly unlikely that the employer would have agreed to assume such a liability without clear wording to that effect. Article 48's ambit ought not to be altered or broadened by written submissions made at an adjudication hearing. Such issues are best left for the parties to resolve at the bargaining table.

[96] For all these reasons, the first portion of the grievance, contesting the employer's denial of personnel selection leave under article 48, should be denied.

[97] The second issue before the Board involves determining whether the grievor was entitled to career development leave for the time she attended the CTP.

[98] In its submissions, the bargaining agent recognizes that article 50 was not drafted in terms of an absolute entitlement. Rather, and uniquely, granting it remains at the employer's sole discretion. As the bargaining agent points out, such a discretion is not subject to review by the Board except to the extent of ensuring that it has not been exercised in an arbitrary, discriminatory, or bad-faith manner. The employer's discretion is made clear by the parties' definition of "career development" in the provision, which grants the employer the sole discretion to determine if the career development activity in question is likely to be of assistance to the employee in furthering their career development and to the organization, in this case CIRNAC, in achieving its goals. Clause 50.01 reads as follows:

> ***50.01*** *Career development refers to an activity which, in the opinion of the Employer, is likely to be of assistance to the individual in furthering his or her career development and to the organization in achieving its goals. The following activities shall be deemed to be part of career development:*
>
> *(a) a course given by the Employer;*
>
> *(b) a course offered by a recognized academic institution;*
>
> *(c) a seminar, convention or study session in a specialized field directly related to the employee's work.*

[99] Moreover, the provision includes additional clear and unambiguous language confirming the employer's discretion when choosing whether to grant career development leave with pay to an employee who applies for it. Clause 50.02 reads in part as follows: "Upon written application by the employee and with the approval of the Employer, career development leave with pay may be given for any one of the activities described in clause 50.01."

[100] This case has no evidence that the employer's denial of career development leave was made in an arbitrary manner as the bargaining agent alleges.

[101] The parties' uncontested and joint evidence demonstrates that the employer considered the grievor's request, discussed it with her and others, and sought more information from different individuals, including her, the CSC, and Labour Relations and a Treasury Board interpretation on the provision's use and application.

[102] Ultimately, in accordance with the discretion conferred to it under article 50, the employer determined that in its opinion, the grievor's request did not fit the ambit of

the provision. However, the language of article 50 provided the employer with sole discretion to determine if the career development activity was likely to help the grievor further her career development and the organization achieve its goals (in this case, CIRNAC).

[103] Moreover, the Board should be reluctant to step into the employer's shoes and usurp the discretion conferred on it under article 50, for the employer was most familiar with the grievor's duties and CIRNAC's goals. Thus, it follows that the employer was best situated to determine if the CTP was likely to help the grievor's career development and CIRNAC achieve its goals.

[104] In any case, as the former Board indicated in *Beaulac v. Canada Border Services Agency*, 2011 PSLRB 6, the provision's objective is to provide leave for short-term training, with the objective of acquiring knowledge to allow the employee to better perform his or her duties. In this case, the bargaining agent explicitly recognized in its submissions that the CTP was not relevant to the grievor's substantive position at CIRNAC. It failed to provide any detailed information or supporting documentation to demonstrate how the CTP would have been relevant to the improved performance of the grievor's substantive duties as a land, environment, and natural resources officer at CIRNAC.

[105] Moreover, and contrary to the bargaining agent's submissions, the distinct and specific use of the word "organization" in the provision is significant where it states, "Career development refers to an activity which, in the opinion of the Employer, is likely to be of assistance … to the organization in achieving its goals." That is because in their normal or ordinary senses, the words "employer" and "organization" have different meanings. For example, in the *PSEA*, the word "employer" is defined as the "Treasury Board", which is consistent with the collective agreement's definition. Meanwhile, the word "organization", which is not defined in the agreement, is defined as any portion of the federal public administration named in Schedule I, IV, or V to the *Financial Administration Act* (R.S.C., 1985, c. F-11; *FAA*).

[106] In this case, the organization that received and that was tasked with approving or denying the grievor's leave request under article 50 was CIRNAC (which is listed in Schedule I to the *FAA*) and not the CSC. Due to the provision's specific wording, thus, it

is irrelevant if the training course was likely to assist the CSC or the employer (the Treasury Board).

[107] In any case, a mere difference of opinion between the parties or an ungenerous decision on granting career development leave did not make the employer's decision arbitrary. The fact that another manager or the Board might have granted the request does not amount to a breach of the collective agreement.

[108] Furthermore, the parties' uncontested evidence demonstrates that the employer first discussed its decision in detail with the grievor by a telephone call and that it later provided her a decision in writing. It also explored and supported alternative options with her that could have helped facilitate her participation in the CTP, such as leave with income averaging, which she accepted.

[109] Lastly, the grievor was afforded a clear and full opportunity to present any additional supporting documentation and written submissions on why she should have been granted career development leave to attend the CTP during the internal grievance process. Both employer responses at the second and final levels explicitly state that it considered and reviewed her circumstances, documentation, and submissions. Both responses also provided her with corresponding reasons maintaining the denial of the leave under clause 50.03.

[110] For all these reasons, the second portion of the grievance, contesting the employer's denial of career development leave under article 50, should also be denied.

VI. Events subsequent to the written exchange of arguments

[111] During my deliberations, on October 31, 2022, I requested that the parties provide written submissions with respect to the relevance and application, if any, of s. 36 of the *PSEA* to interpreting article 48 of the collective agreement. Section 36 reads as follows:

> ***36*** *In making an appointment, the Commission may use any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i).*

A. The employer's submissions

[112] The employer responded on November 25, 2022, in part as follows:

> …
>
> *Section 36 of the* PSEA *provides wide discretion for those vested with staffing authority in public service appointment processes to choose and use assessment methods that it considers appropriate in selection processes, such as a review of past performance and accomplishments, interviews and examinations to determine if the person meets the established qualifications.*

[113] In this case, the parties' uncontested evidence demonstrates that the CSC, which was vested with the staffing authority under s. 36 of the *PSEA*, confirmed that the CTP was not a selection process but rather a separate and distinct mandatory training for new recruits as a condition of employment.

[114] Included in the parties' joint book of documents is the following email, dated February 3, 2014, from Chrissy Estabrooks to Mr. Pardy, in which this fact is evidenced:

> *Hi Larry,*
>
> *We have looked into this particular situation in the past for other employees. We actually contacted Corrections Canada directly as we needed further information on the training in order to determine how to apply the collective agreement properly. Corrections Canada advised that, for the online portion of the training, it is expected that the employee would complete this during evenings and weekends (as Oona notes in her email). As for the in class portion, CSC advised us that Article 48 would not apply to this particular training at it is not a selection process stage but rather mandatory training that must be completed as a condition of employment.*
>
> …
>
> [*Sic* throughout]

[115] The bargaining agent failed to present evidence to rebut this point, which is determinative of the issue of whether the grievor was entitled to personnel selection leave under clause 48.01 to attend the 10-week in-person portion of the CTP.

[116] The grievor should not have received personnel selection leave. Under clause 48.01, to attend the CTP, it had to be part of a personnel selection process, but the applicable staffing authority (the CSC) determined that it was not and instead that it

was a separate and distinct mandatory training that its new recruits had to complete as a condition of employment.

[117] Moreover, were the parties' intent to capture such a situation within the ambit of clause 48.01 of the collective agreement, they would have included clear and explicit language to achieve it, as it is trite law that a benefit with a monetary cost must be clearly and expressly granted under a collective agreement.

[118] Lastly, even if the organization, ANNDC, or the grievor disagreed with the CSC's determination that the CTP did not form part of the personnel selection process, they had no authority to question or contest the CSC's determination since the CSC is solely responsible, under s. 36 of the *PSEA*, for choosing and using the assessment methods that it considers appropriate in a selection process.

[119] The bargaining agent cannot get around those facts. Consequently, it failed to discharge its burden and to demonstrate on a balance of probabilities that the employer violated clause 48.01 of the collective agreement when it denied the grievor's request for personnel selection leave.

B. The bargaining agent's submissions

[120] The bargaining agent also replied on November 25, 2022, as follows:

> …
>
> *1. The parties were asked to provide their assessment of the relevance and application, if any, of section 36 of the Public Service Employment Act regarding Article 48 of the collective agreement.*
>
> *2. Section 36 of the* Public Service Employment Act *reads:*
>
> > 36 In making an appointment, the Commission may use any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i).

[121] The fundamental question in this grievance, with respect to article 48, is whether the in-person CTP was part of the CSC's personnel selection process. The answer affects the type of leave that would have been most appropriate, either paid, under article 48, or unpaid.

[122] The bargaining agent argues that the required CTP was part of the training process. Without passing it, the grievor could not receive an appointment to the CX-02 position.

[123] Section 36 of the *PSEA* sets the scope of assessing candidates for appointment and confirms that the assessment process can be flexible in scope and encompass multiple methods.

[124] However, fundamentally, this is not a staffing grievance, which is typical when s. 36 of the *PSEA* is considered. The parties disagree on whether the CTP constituted a part of the selection process, and s. 36 is of limited assistance. The grievance does not contest that the deputy head has the discretionary authority to assess the merits of candidates through a range of methods. However, the conditional letter of offer already outlined the selection process, which included the in-person CTP part. The condition precedent outlined in the letter required that a condition (i.e., completing the CTP) be met before being appointed to the CX-02 position.

[125] The parties were asked to provide their replies to the respective submissions filed on November 25, 2022.

[126] On December 9, 2022, the parties filed their replies.

C. The employer's reply submissions

[127] The fundamental question raised by this grievance is determining whether the grievor could receive personnel selection leave under the language of article 48 to attend the CTP, which she was required to complete and pass as a condition of employment under s. 11 of the *FAA*.

[128] Contrary to the bargaining agent's submissions, the grievor was not required to complete and pass the CTP as a selection process stage. She was required to pass it to fulfil an important condition of employment to be appointed to the CX-02 position.

[129] This was made clear to the grievor in her conditional letter of offer, which stated that she had to meet a list of conditions before being appointed to the CX-02 position. Moreover, the parties' evidence makes it clear that the CTP was not a selection process stage. Rather, it was separate and distinct mandatory training, which new recruits had to complete and pass as a condition of employment.

[130] This is a key and crucial distinction as establishing the conditions of employment for someone to be appointed to a public service position is derived not from the *PSEA* but from s. 11.1(1)(j) of the *FAA*, which states as follows (see the joint book of documents, tab 1, page 19 (the grievor's conditional letter of offer), and tab 2, pages 12 and 13 (Ms. Estabrooks' email to Mr. Pardy):

> ***11.1 (1)*** *In the exercise of its human resources management responsibilities under paragraph 7(1), the Treasury Board may*
>
> …
>
> ***(j)*** *provide for other matters, including terms and conditions of employment not otherwise specifically provided for in this section, that it considers necessary for effective human resources management in the public service.*

[131] The former PSST also discussed this important distinction in *Praught v. President of the Canada Border Services Agency*, 2009 PSST 1 ("*Praught and Pellicore*"). In that case, it ruled that requiring candidates to complete and pass a mandatory control and defensive tactics (CDT) training program, provided by the Canada Border Services Agency (CBSA), to be appointed to a border services officer position did not constitute an essential qualification established or evaluated by the deputy head under the *PSEA* staffing regime. Rather, it was a condition of employment, which the employer established and required pursuant to the *FAA* and over which the PSST had no jurisdiction.

[132] The bargaining agent's interpretation would also produce absurd results since program and administrative services group members who apply for a selection process and are required to meet a condition of employment before being appointed could be entitled to paid selection process leave for the time required to fulfil that condition of employment.

[133] Such an outcome could not have been the parties' intent when they negotiated article 48. The employer should not be required to pay selection process leave to the grievor for it to satisfy a condition of employment under the *FAA*. The bargaining agent is clearly stretching the language of article 48 far beyond its original meaning and intent. It is attempting to confer significant monetary benefits without clear and unambiguous language to that effect.

[134] As set out in *Wamboldt*, "… a benefit that has a monetary cost to the employer must be clearly and expressly granted under the collective agreement …". As leave with pay has a monetary cost to the employer, it must be clearly and expressly granted. Nowhere does article 48 speak of leave with pay for the purposes of completing and passing a mandatory training program required as a condition of employment under the *FAA*. Consequently, the requested benefit is not clearly or expressly granted, and the grievance must fail on this basis.

D. The bargaining agent's reply submissions

[135] The bargaining agent respectfully submits that the employer mischaracterized the issue. The employer relies on an email from the CSC advising CIRNAC that the CTP was not part of a selection process. In addition to that being inaccurate, CIRNAC was responsible for approving the grievor's leave, not the CSC.

[136] A common-sense reading of the invitation letter to attend the CTP session suggests that conditions had to be met before a final letter of offer could be received confirming Ms. Keagan's appointment to the CX-02 position. By arguing that the CTP was not part of the selection process, it would seem that the employer is arguing that the "selection process" was over by that point. Yet, Ms. Keagan had not been appointed to the CX-02 position at that point; she was required to take the CTP and meet further conditions before being appointed.

[137] If the CTP was not part of the selection process, and Ms. Keagan was not an appointed employee with all the benefits that would confer, including pay, then her status in relation to the CSC is unclear. If she either failed to complete the CTP or did not meet its standards, she would not have been appointed. Logically, this means that the selection process could not have possibly been completed before the CTP.

[138] A selection process can include a wide range of mechanisms and tools as the *PSEA* allows a deputy head flexibility in determining how the process should proceed.

[139] When negotiating a collective agreement, it is not required that the parties capture every possible situation that could arise. Instead, the collective agreement, as articulated by Brown and Beatty, is intended to be interpreted in the context of understanding the intent of the parties. The parties intended that the paid benefits of career development leave and personnel selection process leave be made available to

the bargaining unit members. Applying a restrictive approach undermines the collective agreement's intent and purpose (see the grievor's book of authorities, tab 4).

E. On the applicability of *Praught and Pellicore*

[140] On December 14, 2022, the Board wrote to the bargaining agent and asked that it reply to the employer's December 9, 2022, submission, in particular to whether or not the PSST's decision in *Praught and Pellicore*, referred to in that submission, applies to the circumstances of this case.

[141] The bargaining agent submits that that decision is not applicable. Its context and facts are significantly different. For one thing, the subject of employment conditions appeared within the context of an abuse-of-authority allegation in a staffing complaint. Second, the primary question was whether changing the conditions of employment after the position was advertised was an abuse of authority. Finally, the analysis of the condition of employment was specifically limited to exploring the deputy head's authority during staffing procedures.

[142] None of that applies to this case. Not much detail is provided about the training mentioned at paragraphs 5 and 6 of *Praught and Pellicore*, so it is not clear how this is applicable or relevant to the matter at hand. The training (CTP) required of the grievor in the present matter had to be completed in the course of proceeding toward a possible appointment.

[143] Collective agreement provisions are not meant to capture every situation or nuance. A common-sense reading of article 48 suggests that the parties intended to allow the paid leave to be available to the bargaining unit members for selection processes. The employer's interpretation of article 48 would undermine the provision's intent and would introduce uncertainty as to its applicability.

VII. Analysis

A. Was the grievor entitled to personnel selection leave?

[144] Did the grievor participate in a personnel selection process, and if so, was she entitled to be paid for the time she attended stage 3 of the CTP,

1. The facts

[145] The facts are not in dispute. The parties submitted an agreed statement of facts and a joint book of documents.

[146] The grievor held a PM-04 position at CIRNAC.

[147] The grievor applied for a CX-02 position with the CSC by way of a public service staffing process. The job posting indicated that all candidates had to successfully complete the CTP and that "there is NO REMUNERATION while on the Correctional Training Program".

[148] The job posting read in part as follows:

> …
>
> ***Statement of Merit Criteria and Conditions of Employment***
>
> *Applicants who meet the following criteria will also be assessed against the* ***Statement of Merit Criteria and Conditions of Employment*** *for this position.*
>
> …
>
> [Emphasis in the original]

[149] The job posting recited the essential qualifications for the work to be performed and that had to be met for a person to be appointed, including official language, efficiency, education, occupational certification, experience, asset qualifications, organizational needs, and operational requirements.

[150] Under the heading "Conditions of Employment", a number of requirements were listed, including security and reliability, driver's licence, and medical and psychological tests.

[151] Under the heading "Other Information", the poster states this in part:

> …
>
> *In order to qualify for appointment for a Primary Worker/Kimisinaw position, all candidates must successfully complete and pass the Correctional Training Program (CTP) and the Women Centred Training program (WCT).…*
>
> …
>
> *Applicants may be assessed through verification of the information/authorisation provided in pre-employment*

> *questionnaire, written exams, interview/reference checks and psychological assessment. Successful candidates will be placed in a partially assessed pool of candidates for selection. Those selected will be invited to attend CSC's Correctional Training Program (CTP) and the Women Centred Training Program (WCT).*
>
> …

[152] The grievor passed the CTP's first stage and was placed in a national pool of candidates from which she could be selected and sent a conditional letter of offer, which, if accepted, would have meant inviting her to take the CTP at the CSC's Prairie Staff College.

[153] On February 3, 2014, the grievor received a conditional letter of offer for a primary worker/Kimisinaw position at the Nova Institution for Women in Truro. The letter, dated January 31, 2014, reads in part as follows:

> …
>
> *…It is with great pleasure that I invite you to join the Correctional Service of Canada (CSC).*
>
> *I am pleased to offer you a full-time indeterminate appointment to the above noted position. This offer is subject to meeting the following conditions:*
>
> ***ALL REGIONS***
>
> …
>
> - *Successfully complete the CTP which will commence on March 10, 2014. Please note CSC offers no salary or allowance during Stage 3 of CTP; however, financial travel assistance may be available according to your geographic location.…*
>
> *These conditions must be met* ***prior to your appointment****. By accepting this offer you are also accepting these conditions.*
>
> …
>
> [Emphasis in the original]

[154] Ultimately, the grievor accepted the offer and took the mandatory in-class training as part of the CTP.

[155] The joint book of documents includes an email exchange dated February 3, 2014, between Ms. Estabrooks and Mr. Pardy that reads as follows:

> …

> *We have looked into this particular situation in the past for other employees. We actually contacted Corrections Canada directly as we needed further information on the training in order to determine how to apply the collective agreement properly. Corrections Canada advised that, for the online portion of the training, it is expected that the employee would complete this during evenings and weekends (as Oona notes in her email). As for the in class portion, CSC advised us that Article 48 would not apply to this particular training at it is not a selection process stage but rather mandatory training that must be completed as a condition of employment.*
>
> …
>
> [*Sic* throughout]

[156] Based on the evidence, I have no difficulty concluding that the requirement that the grievor attend the mandatory in-class part of the CTP was a condition of employment.

2. Was attending stage 3 of the CTP a stage in a personnel selection process as defined in article 48?

[157] Article 48 of the collective agreement reads as follows:

> ***48.01*** *Where an employee participates in a personnel selection process, including the appeal process where applicable, for a position in the public service as defined in the* Public Service Labour Relations Act*, the employee is entitled to leave with pay for the period during which the employee's presence is required for the purposes of the selection process and for such further period as the Employer considers reasonable for the employee to travel to and from the place where his or her presence is so required.*

[158] The only relevant evidence is in the email exchange dated February 3, 2014, which purports to reflect the CSC's view that article 48 would not apply to that particular training as it was a condition of employment.

[159] The bargaining agent argues that the provision has no stated restrictions or conditions beyond the employee participating in a public service selection process and that the grievor was granted personnel selection leave twice for the same competition. As the term "personnel selection process" is not defined in the collective agreement, it should be understood broadly rather than restrictedly since that would unnecessarily complicate understanding and applying the article.

[160] Article 48 should be viewed in its normal or ordinary sense, and it is presumed that all the words used in it were intended to have some meaning. The provision was crafted to confirm the specific benefit of being entitled to leave with pay for the period during which an employee's presence is required for selection process purposes.

[161] The use of the word and title suggest that the leave is not discretionary. Nor are there any specific conditions that an employee must meet to take the leave beyond participating in a public service personnel selection process. The grievor was in the CSC's selection process until she received an unconditional letter of offer or appointment offer from the CSC. Had she not yet been appointed, it stands to reason that she was still in the selection process, in which case she should have been granted the leave.

[162] The employer argues that the parties' uncontested evidence demonstrates that the CTP was not a selection process stage but rather a separate and distinct mandatory training for new recruits as a condition of employment. The employer recites the extract from the joint book of documents included in the email dated February 3, 2014, and argues that this evidence is determinative of the issue of whether the grievor was entitled to personnel selection leave.

[163] It argues that this is a key and crucial distinction as the establishment of conditions of employment to be appointed to a public service position is not derived from the *PSEA* but from s. 11.1(j) of the *FAA*, which provides that when exercising its human resources management responsibilities, the Treasury Board may provide for other matters, including terms and conditions of employment not otherwise specifically provided that it considers necessary for effective human resource management in the public service.

[164] The employer relies on *Praught and Pellicore*, at paras. 71 to 74, as illustrative of this distinction.

[165] The employer also argues that any benefit involving a monetary cost to it must be clearly and expressly granted in the collective agreement's terms.

3. Conclusion

[166] I have carefully considered all the parties' arguments. The burden of proof was on the bargaining agent to demonstrate that the condition of employment that the

grievor attend the CTP was a stage in the selection process within the meaning of article 48.

[167] Relying on Ms. Estabrooks' email reciting the CSC's view, the employer argued that the uncontradicted evidence demonstrates that the CTP was not a selection process stage. Although the email is hearsay evidence, the Board has the power under s. 20(e) of the *FPSLREBA* to accept any evidence, whether or not it would be admissible in a court of law. As the email is included in the agreed joint book of documents, it is admissible and relevant and is deserving of some weight, although it is not determinative.

[168] In *Praught and Pellicore*, which the employer cited, the PSST considered a complaint of abuse of authority under s. 77(1)(a) of the *PSEA*. It had to determine whether it had jurisdiction, which required distinguishing between situations in which the employer exercised its PSC-delegated authority under the *PSEA* to assess candidates and appoint them to positions on the basis of merit and situations in which the employer exercised its general management authority under the *FAA* to establish terms and conditions of employment. At paragraph 69, the PSST stated as follows:

> *[69] These complaints were filed under paragraph 77(1)(*a*) of the* PSEA*, which provides employees with a right to make a complaint to the Tribunal on the grounds of "an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2)". Subsection 30(2) reads as follows:*
>
> ***30.** (2) An appointment is made on the basis of merit when*
>
> (a) *the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency; and*
>
> (b) *the Commission has regard to*
>
> *(i) any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,*
>
> *(ii) any current or future operational requirements of the organization that may be identified by the deputy head, and*
>
> *(iii) any current or future needs of the organization that may be identified by the deputy head.*

[169] In *Hammond v. Deputy Head of Service Canada*, 2008 PSST 8 at para. 24, the PSST stated as follows:

> *[24] Under subsection 30(2) deputy heads can establish qualifications. The PSC or the deputy head, when delegated, is authorized to determine whether a person is qualified; in other words, to assess people. Practically speaking, these authorities are exercised by managers and assessment board members. Accordingly, an allegation of abuse of authority under paragraph 77(1)(*a*) is limited to those exercising the authority to establish qualifications and assess candidates.*

[170] Thus, the PSST had jurisdiction to determine if an abuse of authority occurred in the establishment or assessment of the essential asset qualifications, operational requirements, and organizational needs.

[171] The parties in the case of *Praught* and *Pellicore* referred to successfully completing the CDT as an essential qualification throughout the hearing. However, on both statements of merit criteria (one issued May 4, and the other issued May 8, 2007), this requirement was listed under the heading, "Conditions of Employment".

[172] The establishment of conditions of employment in the public service is a general management authority derived from the *FAA*, which states this at s. 11.1(1)(j):

> ***11.1 (1)*** *In the exercise of its human resources management responsibilities under paragraph 7(1)(e), the Treasury Board may*
>
> *…*
>
> ***(j)*** *provide for other matters, including terms and conditions of employment not otherwise specifically provided for in this section, that it considers necessary for effective human resources management in the public service.*

[173] The PSST stated this at paragraph 74 of *Praught and Pellicore*:

> *[74] Under the* PSEA*, Treasury Board is the "employer" in relation to the CBSA. Managers are delegated certain management authorities from Treasury Board, such as the authority to determine terms and conditions of employment, as set out above. The tribunal concludes that Mr. Williams was not exercising authority under subsection 30(2) of the* PSEA *when he decided to amend the condition of employment relating to CDT. Thus, this amendment is not subject to a complaint of abuse of authority under section 77 of the* PSEA *and the Tribunal has no jurisdiction in this matter.*

[174] I find this reasoning persuasive, and together with the email reciting the CSC's position, determinative of this issue. The fact that the CSC, as a condition of employment, has decided to conditionally appoint new recruits, both from in and outside the federal government, who have successfully undergone a selection process, and to provide them with on-the-job training , which must be completed satisfactorily before confirming a recruit's appointment, in my view is an exercise of its delegated management authority under the *FAA*.

[175] The requirement to attend the mandatory training as a condition of employment was not an exercise of management's delegated authority under the *PSEA*.

[176] Article 48 is entitled "Personnel Selection Leave". Its introductory words read as follows: "Where an employee participates in a personnel selection process, including the appeal process where applicable, for a position in the public service as defined in the *Public Service Labour Relations Act …*".

[177] In context, in my view, the express references in article 48 to the personnel selection process, including the appeal process for a public service position, refer to the appointment process set out at s. 15 and other sections of the *PSEA*.

[178] The condition that the grievor undergo training was not a step in the selection process and did not engage article 48 of the collective agreement.

[179] I conclude that the bargaining agent failed to meet its burden to demonstrate that on a balance of probabilities, the employer contravened article 48 of the collective agreement.

[180] As an alternative to article 48, on January 31, 2014, the grievor requested paid leave under article 50.

B. Was the grievor entitled to career development leave?

[181] Article 50 of the collective agreement reads as follows:

> ***Career Development Leave***
>
> ***50.01*** *Career development refers to an activity which, in the opinion of the Employer, is likely to be of assistance to the individual in furthering his or her career development and to the*

> *organization in achieving its goals. The following activities shall be deemed to be part of career development:*
>
> *(a) a course given by the Employer;*
>
> *(b) a course offered by a recognized academic institution;*
>
> *(c) a seminar, convention or study session in a specialized field directly related to the employee's work.*
>
> ***50.02** Upon written application by the employee and with the approval of the Employer, career development leave with pay may be given for any one of the activities described in clause 50.01. The employee shall receive no compensation under Article 28, Overtime, or Article 32, Travelling Time, during time spent on career development leave provided for in this Article.*
>
> ***50.03** Employees on career development leave shall be reimbursed for all reasonable travel and other expenses incurred by them which the Employer may deem appropriate.*

1. The grievor, CSC officials, her managers, and Labour Relations discussed her denied leave requests

[182] On February 7, 2014, the grievor emailed Ms. Smith, Ms. Estabrooks, and Mr. Pardy. She thanked Ms. Estabrooks for her email of the same date advising the grievor that she had spoken with corporate Labour Relations that morning and that the Treasury Board would be contacted for an interpretation. She stated that she would let them all know as soon as she had more information.

[183] On February 12, 2014, Mr. Pardy told the grievor as follows that the employer had discussed approving the leave request under article 50:

> *I spoke with Dougal. He is not inclined to support Article 48 but acknowledges the case that can be made under Art 50 (Career Dev leave).*
>
> *Initially, he saw it as opening a broad precedent (another dept, long training period) but I suggested it was quite narrow - a Fed employee seeking career development training for a very specific and firm job within the Federal government. As well, there are no travel costs to us, which is provided for in the collective agreement. It also puts Oona on an equal footing with her Fed colleagues at Corrections.*
>
> *However, Dougal would like the time to discuss with Chrissy and possibly HQ.*
>
> *Can you hold them off till Friday.*
>
> …
>
> [*Sic* throughout]

[184] In an email dated March 7, 2014, Ms. Smith wrote to the grievor, stating in part as follows:

> …
>
> *As discussed with you on the telephone on February 28, 2014, management has denied your request for leave with pay pursuant to articles 48 and 50 related to your participation in a training session that you plan to attend as a candidate in a federal competitive selection process.*
>
> *Based on the situation, the provision from the collective agreement that would apply for this purpose is Leave Without Pay (LWOP) for Personal Needs under Article 44.…*
>
> *Also as discussed with you, LED management is supportive of your career development and aspirations, and will support either Leave Without Pay for Personal Needs and/or Leave with Income Averaging for the period of your training/selection process.*
>
> …

2. Conclusion

[185] The bargaining agent argues that employer representatives recognized that training was necessary for the grievor's career development.

[186] The bargaining agent argues that the exercise of discretion cannot be arbitrary, discriminatory, or in bad faith. It submits that the employer did not provide any reasons for rejecting the leave under article 50 and that without particulars, it must be concluded that the employer failed to consider the grievor's individual circumstances and that it exercised its discretion in an arbitrary manner. In conclusion, it argues that career development can mean a wide range of activities and that the employer's failure to properly consider training provided by a public service department means that it did not meet the standard of fair and reasonable decision making.

[187] The employer argues that the bargaining agent's submissions recognize that article 50 was not drafted in terms of providing an absolute entitlement. Rather, granting career development leave remains at the employer's sole discretion, which is not subject to review by the Board except to the extent of ensuring that it was not exercised in a manner that was arbitrary, discriminatory, or in bad faith.

[188] The employer refers to the opening words of clause 50.01, which it argues grants it the sole discretion to determine if the career development activity in question is likely to be of assistance to the employee in furthering their career development as well as to the organization, in this case CIRNAC, achieving its goals.

[189] The collective agreement language confers on the employer wide discretion in granting career development leave by stating, "in the opinion of the Employer" (see clause 50.01). When it exercises its discretion, the employer must determine that the activity "… is likely to be of assistance to the individual in furthering his or her career development and to the organization in achieving its goals" (see clause 50.01).

[190] The *PSEA* defines "organization" as meaning any portion of the federal public administration named in Schedule I, IV, or V to the *FAA*. The CSC is listed in Schedule IV, and CIRNAC is in Schedule I (as of 2014, when it was named the Department of Indian Affairs and Northern Development).

[191] In this context, the word "organization" refers to the grievor's then-current employer, CIRNAC.

[192] It is difficult to see how the grievor's future CSC employment would help CIRNAC achieve its goals.

[193] The uncontested and joint evidence demonstrates that the employer considered the grievor's request, discussed it with her and others, sought more information from others including the grievor, the CSC, and Labour Relations and referred to a Treasury Board interpretation on the provision's use and application.

[194] The employer argues that there is no evidence that the career development leave request was denied in an arbitrary manner.

[195] The extracts that are recited at page 37 of the joint book of documents that outline the discussions between the grievor, CSC officials, her managers, and Labour Relations concerning her leave requests indicate that management had an open mind, that it was supportive of the grievor's career development and aspirations, and that it supported the conclusion that the employer did not exercise its discretion with respect to granting leave under article 50 in an arbitrary fashion.

[196] The bargaining agent did not meet its onus on a balance of probabilities of establishing a contravention of article 50 of the collective agreement.

[197] In conclusion, the grievance, about articles 48 and 50 of the collective agreement, is denied.

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

(The Order appears on the next page)

VIII. Order

[199] The grievance is denied.

May 2, 2023.

David Olsen,
a panel of the Federal Public Sector
Labour Relations and Employment Board