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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

LARRY ANDERSON, HARBIR BOPARAI, AND RONALD BRODA

Grievors

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

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

In the matter of individual grievances referred to adjudication

Before: Audrey Lizotte, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievors: Geoff Dunlop, counsel

For the Employer: Peter Doherty, counsel

Decided on the basis of written submissions, filed April 19 and May 6 and 13, 2022.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] This matter concerns three individual grievances filed by Larry Anderson, Harbir Boparai, and Ronald Broda ("the grievors") on May 26 to 29, 2012.

[2] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board to replace the former Public Service Labour Relations Board as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to s. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) before November 1, 2014, is to be taken up and continue under and in conformity with the *Public Service Labour Relations Act* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

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

[4] For ease of reading, the term "Board" in this decision refers to the current Board and any of its predecessors.

[5] At all material times, the grievors were border services officers classified at the FB-03 group and level and employed by the Canada Border Services Agency ("CBSA" or "the employer").

[6] The grievances are substantively the same. Each grievance alleges that the employer failed to grant the grievors their first pay increment on the appropriate date while they were employed as full-time indeterminate employees on a seasonal basis.

[7] The collective agreement at issue in this matter was concluded on January 29, 2009, between the Treasury Board and the Public Service Alliance of Canada for the Border Services Group bargaining unit, and it expired on June 20, 2011 ("the collective agreement").

[8] As for the most part the facts were not in dispute, the parties agreed to proceed by way of written submissions.

[9] The grievors take the position that the employer's failure to grant their first pay increments on the anniversary dates of their first appointments violated the collective agreement, which states that for full-time and part-time employees, "[t]he pay increment period for employees at levels FB-1 to FB-8 is the anniversary date of such appointment."

[10] The employer denies that it violated the collective agreement. It argues that the collective agreement is silent on seasonal employees, and as such, it correctly followed the Treasury Board's *Directive on Terms and Conditions of Employment* ("the Directive") and the Treasury Board's *ARCHIVED - Pay increments (PSTCER sections 27 and 29 to 45)* ("the Pay Increments Policy") when it determined that the grievors were entitled to a pay increment after a period calculated to equate 12 months of actual work in their respective positions.

[11] The employer did not raise any timeliness objection and agrees that the grievances were properly referred to adjudication.

[12] However, the employer raised a preliminary objection on the basis that the grievors have advanced new arguments that were not presented during the grievance process, which it argues is prohibited based on the *Burchill* principle (see *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.)).

[13] In their reply submissions, the grievors argue that the nature of the grievances remain the same and therefore the *Burchill* principle does not apply.

[14] For the reasons laid out in this decision, I conclude that the employer's preliminary objection should be dismissed and that the grievances should be allowed.

II. Summary of the agreed-upon facts

A. The initial full-time indeterminate appointments on a seasonal basis

[15] The grievors were initially appointed in Victoria, British Columbia, as border services officers classified at the FB-03 group and level ("the Victoria positions").

[16] Mr. Anderson's letter of appointment offered him a "… full-time indeterminate appointment on a seasonal basis …" effective May 1, 2010. It stated that he was required to work from May 1 to September 30 of every calendar year. It stated that he would be required to provide services in any of the CBSA's West Coast and Yukon District locations and that his initial assignment would be at the Victoria or Sidney, British Columbia, location. It stated that he was subject to a 12-month probationary period that excluded any off-duty periods for seasonal employees. Finally, the letter stated that his employment was subject to the "*Public Service Terms and Conditions of Employment Policy and Directives*".

[17] Mr. Anderson worked in that position from May 1 to September 30, 2010.

[18] Mr. Boparai and Mr. Broda each received the same appointment letter as did Mr. Anderson. The only difference was that their appointments were effective one year later, on May 1, 2011.

[19] The grievors worked together at the Victoria or Sidney port in the CBSA's West Coast and Yukon District from May 1 to September 30, 2011.

B. The subsequent part-time indeterminate appointments on a seasonal basis

[20] On August 16, 2011, certain employees at the CBSA's Sidney and Victoria ports received a message about seasonal hours. It indicated that the CBSA's Pacific Highway District might be able to offer separate seasonal contracts for the off-season.

[21] On September 28, 2011, the employer circulated a link to a job opportunity advertisement for the appointment of indeterminate seasonal border services officers in its Pacific Highway District. The area of selection was open to "… employees of the CBSA providing front-line public protection services (e.g. Border Services Officer) and who occupy a position in the West Coast and Yukon District".

[22] Between September 27 and October 1, 2011, all three grievors responded to the advertisement.

[23] On October 12, 2011, each grievor received a letter from the employer, informing them of their seasonal layoff and their entitlements while on off-season status. The letter included the following statement:

> …
>
> ***SUBJECT: SEASONAL LAYOFF***
>
> *The purpose of this letter is to advise you of your entitlements while in off-season status.…*
>
> *For purposes of establishing an entitlement to severance pay, vacation leave and statutory increments; a seasonal employee is deemed to have completed one year of continuous employment for each year of seasonal employment. However, the calculation of the severance payment, vacation leave, and statutory increments includes only those periods in which the employee was* ***actually employed*** *or was on vacation, sick or compensatory leave.*
>
> …
>
> [Emphasis in the original]

[24] Also on October 12, 2011, each grievor received an offer for a part-time indeterminate appointment on a seasonal basis effective October 13, 2011. The letter stated that they would be required to work 30 hours per week from October 1 to April 30 of every calendar year. The letter stated that they could be required to provide services at any of the CBSA's Pacific Highway District locations and that their initial assignment was at the Port of Douglas in Surrey, B.C.

[25] The grievors accepted the offers of employment and started in their seasonal positions in the CBSA's Pacific Highway District on October 13, 2011 ("the Port of Douglas positions").

[26] On November 17, 2011, Mr. Broda wrote to the employer, inquiring whether he would be subject to two separate probationary periods since he was subject to two separate seasonal contracts. The employer responded as follows:

> …
>
> *Your probation is considered continuous and will be considered complete as of April 2012 (after 1 year).*
>
> *As you are considered "dual employment" all your leave entitlements are separate for each district. Leaves(s) [sic] earned during employment with WCY cannot be carried over to the separate period of employment with Pacific Highway District, and vice versa.*

…

[27] On January 13, 2012, the employer emailed the following to Mr. Anderson, responding to his inquiry into his compensation concerns:

> …
>
> *I will try to clarify what is a confusing situation.* ***The "system" does not recognize your previous employment****. You are employed by the Pac Hwy District, and your entitlements are based on that employment;* ***there is no connection to your employment with Victoria.*** *Although you are* ***employed by the same organization****, you are in a way employed in* ***two separate jobs****.* ***While you are in the Pac Hwy District your "home" port is Pac Hwy District. When you return to Victoria, that is considered your home port****. The two jobs run independent of each other.* ***Each contract runs completely independent from the other, i.e. increments, leave credits.***
>
> ***However, because your are employed by the same organization, anything to do with compensation and benefits, comes through one office****. In order to keep the "two jobs" separate, two different PRI's were utilized.…*
>
> …
>
> [*Sic* throughout]
>
> [Emphasis in the original]

C. The full-time indeterminate appointments on a year-round basis

[28] On February 29, 2012, while the grievors were working in their Port of Douglas positions, they and other staff received an email from David Rizzo, Chief, Sidney/Northern Operations, and Nina Patel, Chief, Victoria Operations, advising them that the employer would convert the seasonal staff employed at that time in Victoria or Sidney to full-time indeterminate employment on a year-round basis if they wished. The grievors did.

[29] On March 28, 2012, the grievors received a letter to advise them of a change to their "… hours of work from Indeterminate Seasonal to Indeterminate Full-time Year-round …" effective May 1, 2012.

[30] In or around April, 2012, the grievors resigned from their Port of Douglas positions, effective April 30, 2012.

[31] On May 1, 2012, the grievors returned to work in Victoria or Sidney but from then on as full-time, indeterminate, year-round border services officers.

[32] Mr. Anderson received his first pay increment effective June 27, 2012.

[33] Mr. Boparai and Mr. Broda received their first pay increments effective November 27, 2012.

III. The individual grievances and the grievance process

[34] The wording in all three grievances is identical, as follows, with the sole exception of the appointment date:

> …
>
> *I have been continuously employed with Canada Border Services Agency since May 1, 2011* [or May 1, 2010, for Mr. Anderson] *and the employer has not granted my pay increment. I grieve that the employer is not compensating me according to my collective agreement and any other CBSA and Treasury Board of Canada Secretariat Policies or Regulations that may apply.*
>
> …

[35] As a corrective measure, the grievors requested the following: "I request that I be afforded the pay and benefits to which I am entitled and any other corrective action appropriate in the circumstances, and that I be made whole."

[36] As part of the documents jointly provided to the Board, two documents entitled "Grievance Hearing" outline the points raised during the grievance process meetings held on July 7 and 8, 2012. They are for the most part identical aside from the appointment date of Mr. Anderson, which is one year earlier than those of Mr. Boparai and Mr. Broda. Those documents provide the following:

> …
>
> ***Arguments***
>
> *- The griev*[o]rs *do not meet the criteria for dual employment. Management is claiming that the employees were working under dual employment. Dual employment refers to indeterminate employees who are on approved leave without pay (LWOP), and who accept a specified period employment with another organization (see attachment 1 Specified Period Appointments during Extended Period of Leave without Pay (Dual Employment) from the Public Service Staff Relations Act – PSSRA). These employees were not on LWOP; they are laid off at the end of season*

and are employed by the same organization. Dual employment has a distinct home position and a host position (see attachment 2 – Definitions under PSSRA). HR stated that while they are in PacHwy District their home port is PacHwy District and when they return to Victoria; that is considered their home port. How can one have two home ports? It defeats the criteria of dual employment. In this case Victoria should be the home port and PacHwy District would be the host port. Even if they are deemed to be on LWOP, section 9 of specified period appointment states appointments that occur during LWOP are included in the calculation of continuous employment and continuous service (see attachment 3, section nine of specified period appointments during extended periods of LWOP (dual employment)). In addition the policy also states that on return to indeterminate status of the home position, periods of employment that occurred during LWOP count for the purposes of continuous employment (see attachment 4 – section 10 of specified period appointments during extended period of LWOP (dual employment)).

- The probation period is continuous therefore their service and employment should be considered continuous.…

*- **The griev**[o]**rs are entitled to a pay increment upon** **their anniversary date,** supported by various policies: the FB Collective Agreement (attachment 7), Treasury Board (TB) policy on pay increment 4.1 (attachment 8), TB Definitions (attachment 9) and TB directives on terms and conditions of employment part 5 (attachment 10).*

- As indeterminate seasonal employees, all periods they have worked would be included in the pay increment period, TB pay increment policy 4.13 (attachment 11).

The griev[o]*rs would like to reiterate the following:*

- The griev[o]*rs ha*ve *been continuously employed in the core public service since May 1, 2011 [or May 2010 for Mr. Anderson].*

- They are employed by the same agency, in the same region, in the same classification and the same job. The only difference is the location.

*- **They should not have two separate anniversary dates because of this.***

*- **They should have one anniversary date which would be from the appointment date in the initial letter of offer from WC&Y District**.*

- The probationary period was considered continuous.

- Various policies state that all periods of employment during LWOP count for continuous employment and continuous service.

- Management is saying that they were employed in two separate positions.

> *- Part 4.13 of the pay increment policy states all periods during which the employee performed the duties of the position are included in the calculation of the pay increment period. Therefore the time worked in both positions should be credited towards their pay increment and benefits towards service.*
>
> *- It is the union's position that management is in contravention of appendix A of the CA and the following TB policies: specified period employment during extended LWOP, TB policy on pay increment, and the directive on terms and conditions of employment.*
>
> ***Corrective Actions***
>
> *- We request the griev*[o]*rs be afforded the pay and benefits to which they are entitled and any other corrective action appropriate in the circumstances and that they be made whole by the following:*
>
> *- Their time worked at both locations is recognized as continuous employment and continuous service.*
>
> *- That this time be merged together and included toward their pay increment and other benefits towards length of service.*
>
> *-* ***That they are compensated in back pay from the anniversary of when their first pay increment would be due****.*
>
> *- That all annual leave earned at PacHwy District be paid out and that all sick leave earned is transferred to WC&Y District if it has not been already.*
>
> …
>
> [*Sic* throughout]
>
> [Emphasis added]

IV. Summary of the arguments

A. For the grievors

[37] The grievors maintain that the employer violated the collective agreement when it failed to grant them their first pay increments on the anniversary dates of their first appointments.

[38] According to the grievors, the Board's fundamental task when interpreting a collective agreement is to ascertain the intent of the parties by looking first to the plain meaning of the language that they agreed to. The grievors refer to Brown and Beatty, *Canadian Labour Arbitration*, 5th ed. ("*Brown and Beatty*"), at paragraph 4:21, which is the leading text on labour arbitration.

[39] The grievors argue that the Board has followed the approach set out in *Brown and Beatty* in innumerable cases, including those concerning the calculation of pay increment periods. They state that the applicable canons of interpretation were usefully summarized in *Cruceru v. Treasury Board (Department of Justice)*, 2021 FPSLREB 30.

[40] According to the grievors, when the collective agreement language is read in conjunction with ancillary documents such as an employer's internal policy, those ancillary documents are separate from and subordinate to the collective agreement unless they are incorporated into it by reference.

[41] The grievors argue that this case turns on the interpretation of the Pay Notes provisions in Appendix A of the collective agreement ("the Pay Notes"), which apply to both full- and part-time employees and state that "[t]he pay increment period for employees at levels FB-1 to FB-8 is the anniversary date of such appointment."

[42] The grievors argue that the plain meaning of the Pay Notes requires granting pay increments on anniversary dates.

[43] They argue that the Board has previously described pay increments as a presumptive entitlement and as a collective agreement benefit that can be ousted only if based on clear language. They state that the parties to the collective agreement set out in clear terms that a pay increment is granted on the anniversary date of an employee's appointment. Used in its normal, ordinary sense, the key term "anniversary date" in the collective agreement refers to a single, specified date occurring once each year. That meaning applies whenever anniversary dates are used to mark historical events, milestones in a relationship, or significant occasions. That is also congruent with the online Oxford Dictionary's definition, which defines "anniversary" as "the date on which an event took place in a previous year."

[44] The grievors argue that based on a plain reading of the Pay Notes, the fact that they were seasonal employees, or that they were subject to two separate seasonal appointments, is entirely irrelevant. The collective agreement does not distinguish between full- and part-time employees or between employees working on a seasonal or year-round basis. The parties to the collective agreement must be presumed to have meant what they have said expressly — all employees in those positions receive pay increments on their anniversary dates.

[45] The grievors highlight that the parties to the collective agreement chose to modify that general rule in specific circumstances, which they did expressly. For example, the general leave provisions in clause 33.02 specify that an extended leave without pay granted to an employee for reasons other than illness will interrupt a pay increment period. Clauses 38.01(g) and 40.01(g) go on to clarify that the interruption does not apply to those on maternity or parental leave without pay. Thus, the parties to the collective agreement clearly turned their minds to what periods should and should not count toward a pay increment, and they chose not to distinguish between employees working year-round and those working on a seasonal basis. In this case, none of the defined exceptions to the general pay increment rule apply; therefore, the grievors' pay increment period is governed by the Pay Notes.

[46] The grievors argue that they each received full-time indeterminate appointments on May 1; therefore, the anniversary date of their appointments is May 1 of the following year.

[47] In terms of the Directive, the grievors argue that it applies throughout the core public administration, including to term, indeterminate, part-time, and seasonal employees. Both the Federal Court and the Board have found that the Directive is incorporated by reference into collective agreements (see *Broekaert v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 90). However, the Directive is fully consistent with the interpretation that the grievors advanced.

[48] They point out that the Appendix to the Directive defines a "Pay increment period" as "… in respect of a position, the period between pay increments for the position as set out in the relevant collective agreement or terms and conditions of employment." The Directive sets out an alternative method to calculate a pay increment period but only "[w]hen the relevant collective agreement is silent …". The collective agreement in this case is not silent but rather clearly defines the pay increment period as being based on the anniversary date of the employee's appointment; therefore, the alternative pay increment in the Directive does not apply.

[49] The grievors argue that the purported justification that the employer put forward relies on an outdated policy. They argue that in addition to not being incorporated into the collective agreement, the employer's Pay Increments Policy was not even in force by the time they received their appointments. They state that the Pay

Increments Policy was a guide to the *Public Service Terms and Conditions of Employment Regulations* ("the regulations"), which was in force from 1993 until the Directive expressly replaced the regulations on April 1, 2009. While the Pay Increments Policy sets out clear and detailed pay increment rules applicable to seasonal employees, the Directive that replaced the regulations does not. Instead, the Directive introduced in 2009 defines a pay increment period by reference to the collective agreement language. Thus, the employer purports to rely on an outdated guide to the regulations that was the predecessor to the Directive. The Pay Increments Policy is not binding on the parties or applicable in this case.

[50] The grievors maintain that the Board should follow its previous decision in *Broekaert*, which bears numerous similarities to this case. The issue in that case was whether casual employees were entitled to a pay increment after 12 months of employment. As in the present case, the binding language in *Broekaert* (in that case, found in the *Terms and Conditions of Employment Policy*) clearly stated that "… the pay increment period shall be 12 months …". However, Mr. Broekaert's employer tried to rely on its *Pay Administration Volume*, which stated that pay increment periods should be prorated based on hours actually worked.

[51] In *Broekaert*, the Board interpreted the *Terms and Conditions of Employment Policy* in accordance with its plain meaning and found no binding authority that could override it. In particular, it rejected the submission of Mr. Broekaert's employer that its *Pay Administration Volume* could take precedence over the collective agreement at issue. The grievors argue that the analysis in *Broekaert* is on all fours with their case. The parties are bound by the collective agreement and the Directive, which is incorporated into the agreement by reference. Those documents clearly define a pay increment period, which must be applied to the exclusion of other, non-binding documents.

[52] According to the grievors, the employer has essentially taken the position that the grievors' pay increment period should be prorated based on the length of the season. If the employer is correct that the summer- and winter-seasonal appointments had separate, prorated pay increment periods, then summer-seasonal border services officers appointed effective May 1 would receive their first pay increment 26 months after the dates of their initial appointments. The grievors argue that it is inconceivable that the parties to the collective agreement contemplated that result when they agreed

to peg the pay increment period, for all full- and part-time employees, to the "anniversary date" of their appointments, as the collective agreement states.

[53] The grievors argue that the central issue in this case boils down to whether the key phrase "anniversary date" in the collective agreement means what it says. They submit that it must be given its normal and ordinary meaning. To the extent that the employer's internal policies and manuals are inconsistent with that clear language, they should be disregarded. There is no binding language that suggests an alternate meaning — for the grievors, who were appointed on May 1, the "anniversary date of such appointment", per the collective agreement, is May 1. As such, Mr. Anderson's first pay increment should have been granted on May 1, 2011, while that of Mr. Boparai and Mr. Broda should have been granted on May 1, 2012.

[54] The grievors also included arguments in their submissions as to why other policies and manuals were not applicable. However, they are not reproduced in this decision since the employer did not rely on them in its submissions.

B. For the employer

1. Preliminary objection

[55] The employer states that the grievors raised new arguments at adjudication that it did not have the opportunity to address during the grievance process. According to the employer, the grievors cannot raise new arguments at adjudication based on the principles enunciated in *Burchill*.

[56] The employer highlights that during the grievance process, the grievors argued that their Port of Douglas employment should have counted toward the calculation of their pay increment periods for their Victoria positions. The employer states that it rejected this argument at each level of the grievance process on the basis that each grievor worked two separate positions, and that under the collective agreement scheme, each position was subject to its own, separate pay increment period.

[57] The employer points out that the grievors no longer contest that they worked two separate positions or that their Port of Douglas employment should count toward the pay increment periods of their Victoria positions. Rather, the grievors now argue that pursuant to the Pay Notes, they were entitled to pay increments on the anniversaries of the dates of their appointments to the seasonal Victoria positions,

regardless of whether they worked in the winter off-season. The employer argues that this is a novel argument, not previously raised in the grievance process and that the grievors have changed the nature of the grievances. As a result, it argues that the grievances should be dismissed.

2. The merits of the grievances

[58] The employer argues that should the Board determine that it has jurisdiction to render a decision on the merits of the grievances, it properly determined the grievors' pay increment dates according to the scheme of the collective agreement.

[59] The employer argues that the grievors were entitled to a pay increment only after a total of 12 months of actually performing the duties of the Victoria positions. The time they spent off-season from the Victoria positions did not count toward the calculation of their 12-month pay increment periods.

[60] The employer argues that the grievors have mistakenly construed the Pay Notes, which is a broad statement that does not address the specific case of seasonal employees who work only part of the year. It states that neither the Pay Notes nor any other part of the collective agreement mentions seasonal employees with respect to determining pay increment dates.

[61] The employer argues that when the collective agreement is silent on an issue pertaining to pay administration, the employer can then refer to the Directive. In this case, section 5.3 of the Directive expressly provides for determining pay increment periods in cases that are not contemplated by the collective agreement. It reads as follows: "When the relevant collective agreement is silent, the pay increment period is 12 months and is calculated in accordance with this Appendix."

[62] The employer argues that unlike the Pay Notes, the Directive refers to an increment "period", and states that it is for a duration of "12 months". It states that nothing in the wording of section 5.3 of the Directive requires that the 12 months comprising the pay increment period must be consecutive. The Directive also states that the increment period "is calculated". The employer argues that this indicates that pay increments under that section are determined through calculation, not by an automatically occurring anniversary date from the date of appointment.

[63] The employer states that it advised the grievors how their pay increment dates would be calculated in the layoff letters for their respective summer-seasonal Victoria positions. The letters stated this:

> …
>
> *For purposes of establishing an entitlement to severance pay, vacation leave and statutory increments; a seasonal employee is deemed to have completed one year of continuous employment for each year of seasonal employment.* ***However, the calculation of the severance payment, vacation leave, and statutory increments includes only those periods in which the employee was actually employed or was on vacation, sick or compensatory leave.***
>
> …
>
> [Emphasis in the original]

[64] The employer states that the layoff letters clearly communicated that the 12-month pay increment period for seasonal employees was calculated based on the total periods in which a seasonal employee actually worked or was on certain types of leave.

[65] The employer argues that the approach for calculating pay increment periods outlined in the layoff letters aligns with the approach set out in the Pay Increments Policy. Section 4.13 of the Pay Increments Policy addresses as follows how pay increment dates are determined in the case of seasonal employees:

> *4.13 Seasonal employees*
>
> *All periods during which the employee performed the duties of the position, or was on leave of absence with pay, are included in the calculation of the pay increment period.*
>
> *Unless otherwise provided in the relevant collective agreement, pay plan or specific terms and conditions of employment, pay increments are not affected by periods of leave without pay.*
>
> *Note: The off-season is not included in establishing the pay increment date.*
>
> …

[66] The employer argues that although the Pay Increments Policy is an archived Treasury Board policy, it continues to provide guidance on matters of pay administration, as long as it has not been superseded by new policy. The employer argues that section 4.13 of the Pay Increments Policy, pertaining to seasonal employees, has not been superseded or replaced by any other policy.

[67] The employer argues that the Treasury Board is empowered under s. 11.1(1)(c) of the *Financial Administration Act* (R.S.C., 1985, c. F-11; "*FAA*") to "… determine and regulate the pay to which persons employed in the public service are entitled for services rendered …". The Federal Court of Appeal recognized that this is a wide power that authorizes federal employers to "… do anything that is not expressly or implicitly prohibited by a collective agreement or a law …" (see *Canada (Attorney General) v. Association of Justice Counsel*, 2016 FCA 92 at para. 24; see also *Brescia v. Canada (Treasury Board)*, 2005 FCA 236 at paras. 50 and 55; *Canada (Attorney General) v. Public Service Alliance of Canada*, 2017 FCA 208 at para. 14; *Cooke v. Treasury Board (Department of the Environment)*, 2021 FPSLREB 42 at para. 28; and *Broekaert*, at paras. 37 to 39).

[68] The employer argues that in this case, there was a gap in the collective agreement scheme, including the Directive, with respect to how the pay increment periods for seasonal employees should be calculated. Under s. 11.1(1)(c) of the *FAA*, the Pay Increments Policy filled the gap. Therefore, the employer could refer to the Pay Increments Policy when it calculated the grievors' pay increment periods according to the time they actually worked in their Victoria positions.

[69] According to the employer, the grievors improperly rely on *Broekaert* to argue that Treasury Board policies, like the Pay Increments Policy, are inapplicable. The employer argues that unlike in *Broekaert*, there is no contradiction between the collective agreement's scheme and Treasury Board policy in this case. Rather, the employer argues that the Pay Increments Policy directly supports the collective agreement scheme by clarifying how pay increments should be calculated when the collective agreement is silent and section 5.3 of the Directive applies.

[70] The employer argues that the grievors' reference to the Pay Increments Policy during the grievance process is a demonstration that initially, the grievors shared the employer's view that the Pay Increments Policy was both applicable and relevant and that their pay increment dates should be calculated based on the total time they actually performed the duties of their positions.

[71] In summary, the employer argues that it properly followed section 5.3 of the Directive and section 4.13 of the Pay Increments Policy in determining the grievors' pay increment dates for their Victoria positions. Accordingly, the employer determined

that their pay increment dates should be calculated based on the total time that they actually performed the duties of the Victoria positions, excluding the time they spent off-season.

[72] The employer adds that the grievors' interpretation of the collective agreement would lead to two absurd consequences.

[73] First, applying the Pay Notes to seasonal employees would lead to an absurd and unfair outcome for year-round border services officers. Seasonal border services officers would be entitled to the pay increment at the same time as their year-round colleagues, despite working only a fraction of the year. The employer argues that this would create two tiers of pay increment entitlements: an entitlement after a full year of work, and an entitlement after only one season — regardless of the length of that season. It states that the parties to the collective agreement could not have intended to create a double standard for year-round and seasonal border services officers.

[74] Second, the employer argues that the grievors' contention that pay increments occur automatically for all full-time and part-time employees on the anniversaries of their appointments, regardless of how much time they actually work, is at odds with the letter and spirit of clause 33.02 of the collective agreement, which provides that "… time spent on such leave [leave without pay] which is for a period of more than three (3) months shall not be counted for pay increment purposes."

[75] The employer argues that clause 33.02 of the collective agreement demonstrates that the pay increment date for employees under the collective agreement is not automatic in all cases. It further demonstrates that the parties to the collective agreement did not intend for the pay increment period to comprise extended periods of leave without pay during which an employee does not work. Therefore, it would be absurd for the parties to the collective agreement to have intended that the pay increment period for seasonal employees would include extended off-season periods during which they do not perform their positions' duties.

[76] According to the employer, the grievors' argument that seasonal employees are subject to automatic pay increment dates is inconsistent with the collective agreement, which must be read in its entire context and in harmony with other incorporated pay-administration provisions, such as section 5.3 of the Directive. The employer argues that it clearly communicated to the grievors how the pay increment periods for

seasonal employees would be calculated, both through the layoff letters and through the publicly accessible Pay Increments Policy. As a result, the employer states that the grievors are not entitled to a shorter pay increment period than are their year-round border-services-officer colleagues.

[77] The employer also included in its submissions a response to the arguments raised by the grievors during the grievance process (based on the 2 seasonal appointments amounting to a period of 12 months of continuous employment); however, since the grievors no longer rely on those arguments, it is not necessary to reproduce them in this decision.

C. The grievors' reply

1. Preliminary objection

[78] The grievors maintain that based on the plain meaning of the Pay Notes, all employees, including them, receive pay increments based on the anniversary dates of their appointments. They argue that the employer's argument that the grievors were barred from raising that argument at adjudication pursuant to the Federal Court of Appeal's decision in *Burchill* fundamentally misconstrues the principle enunciated in that decision. They state that *Burchill* applies only when a party raises an allegation at adjudication that has "… so altered the original grievance as to change its nature and make it a new grievance".

[79] The grievors state the only issue during the grievance process, and now at adjudication, was and is whether the employer violated the collective agreement by failing to grant their pay increments on the appropriate dates. They state that the nature of the grievances remains the same, and therefore, the *Burchill* principle does not apply.

[80] The grievors state that in *Burchill*, the grievance initially alleged that Mr. Burchill had indeterminate employment status and that he should not have been laid off. At adjudication, Mr. Burchill claimed for the first time that his layoff was, in fact, disguised discipline. The Federal Court of Appeal found that the adjudicator lacked jurisdiction to consider the new grievance as it had not been presented and dealt with during the grievance process, writing that "… it was not open to the applicant … either to refer a new or different grievance to adjudication or to turn the grievance so

presented into a grievance complaining of disciplinary action leading to discharge …" (at paragraph 5).

[81] According to the grievors, *Burchill* prevents a grievor from attempting to introduce a new grievance at adjudication. In *Schofield v. Canada (Attorney General)*, 2004 FC 622 at para. 16, for example, the Court prevented a grievor from introducing a claim that he had been demoted when the grievance initially claimed that he had been prematurely recalled from an overseas assignment. However, *Burchill* does not prevent introducing new arguments, provided that the grievance has not changed.

[82] The grievors argue that this point is clearly set out in *Delage v. Treasury Board (Department of Fisheries and Oceans)*, 2008 PSLRB 56. In that case, Mr. Delage alleged that his employer had failed to include a period of parental leave in the calculation of a retroactive payment, contrary to the collective agreement, entitling him to compensation. That remained the issue at adjudication, but Mr. Delage introduced a new human rights argument in support of his grievance, which led to a *Burchill* objection. The Board dismissed the objection on the following grounds:

> …
>
> *13 The grievor alleges in his grievance that the employer failed to comply with clause 18.07(c)(vii) of the collective agreement by refusing to include the period of parental leave in the calculation of the retroactive amount paid to him following the reclassification of his position. He asks that the employer correct this situation by revising the retroactive payment.*
>
> *14* ***The grievor's failure to present a human rights argument at the various levels of the grievance process and the fact that he only did so at the adjudication stage does not change the nature of the grievance. The details of the grievance and the corrective action requested remain exactly the same.***
>
> *15 Whether or not the grievor presents a discrimination argument based on family status does not change what is at issue. In fact, the grievance is based on the interpretation of clause 18.07(c)(vii) of the collective agreement. According to the documents on file, the issue in the grievance is whether the expression "pay revision" includes a reclassification like the one that occurred in this case. A number of arguments can be advanced to consider the reclassification as a pay revision. The opposite can also be argued.* ***The parties are free to present arguments at adjudication that were not presented during the internal grievance process.***
>
> *16 The rule established in* Burchill *is irrelevant to resolving the employer's objection. In* Burchill, *the Court states that a grievance presented at adjudication cannot differ from the one presented in*

> *the internal grievance procedure. The complaint to be considered by the adjudicator must be stated in the grievance. In this case, the grievance referred to adjudication is identical to the one filed internally. In addition, the complaint is clearly stated in the grievance.*
>
> *…*
>
> *21 In summary, the presentation of a human rights argument at adjudication, even where the argument was not presented to the employer within the internal grievance procedure, does not in any way constitute a change in the grievance as it is understood in* Burchill *and in the other decisions filed by the employer.*
>
> *22* ***In the grievance filed at the first level of the grievance procedure and later referred to adjudication, the grievor clearly set out what he was accusing the employer of having done, along with the corrective action requested. Those factors are not affected by accepting a human rights argument****.*
>
> *…*
>
> [Emphasis in the original]

[83] The grievors argue that the analysis in *Delage* applies directly to the employer's *Burchill* objection in this case. Each grievance alleges that the grievors were continuously employed for over one year without receiving a pay increment, that the employer failed to compensate the grievors in accordance with the collective agreement, and that the grievors ought to be compensated for the pay and benefits to which they are entitled. Like in *Delage*, the grievors clearly set out what they allege the employer of having done, along with the corrective action requested — the nature of the grievances remains exactly the same. The grievors argue that the issue was, and remains, whether the employer breached the collective agreement by failing to grant their pay increments on the appropriate dates. They argue that they are free to reframe their arguments and to introduce new arguments to support their position.

[84] The grievors ask that the Board dismiss the employer's objection.

2. The merits of the grievances

[85] According to the grievors, the crux of the employer's position on the merits of the grievances is that the collective agreement is silent with respect to when the grievors should receive their pay increments. All the employer's arguments, and the language upon which it relies, rest on that central premise. The grievors argue that the employer's position is fundamentally incompatible with the plain language in the Pay

Notes, which define the pay increment period by reference to the anniversary date of the initial appointment.

[86] The grievors argue that in light of this clear language, the employer cannot argue that the collective agreement is silent on the issue of pay increments or that there is a "gap in the Collective Agreement scheme" when it comes to seasonal employees. The grievors each received a "… full-time indeterminate appointment on a seasonal basis …" in their appointment letters, and the Pay Notes plainly apply to full-time employees. Nothing in the collective agreement sets out different pay increment rules for seasonal employees.

[87] The grievors state that the employer is correct that the Pay Notes are a broad statement. However, they argue that this demonstrates that the Pay Notes were intended to apply equally to all full- and part-time border services officers, including full-time indeterminate seasonal employees. Had the parties to the collective agreement intended to exclude seasonal employees from that part of the Pay Notes provisions, they would have done so, as they did at clause 33.02, which sets out a different calculation with respect to leave entitlements for employees on approved leave without pay.

[88] The grievors argue that given that the Pay Notes expressly define the border services officers' pay increment period, the remainder of the employer's arguments must be rejected.

[89] The grievors highlight that the employer relies on the Directive, but the Directive clearly states that a pay increment period is "… the period between pay increments for the position as set out in the relevant collective agreement or terms and conditions of employment." The Directive then goes on at section 5.3 to provide a pay increment calculation that applies only when the relevant collective agreement is silent. As such, they argue that the calculation at section 5.3 does not apply in this case.

[90] The grievors further argue that the employer relies on its Pay Increments Policy, which was based on a document that was replaced by the Directive.

[91] As for the letters sent to the grievors informing them of their entitlements while in off-season status, the grievors argue that those letters are irrelevant insofar as they conflict with the Pay Notes.

[92] The grievors also note that the employer misquoted the Pay Notes in its submissions by omitting the phrase "pay increment period". The employer stated that "[u]nlike the Pay Note [*sic*], the *Directive* refers to an increment 'period'". The grievors point out that this appears to be a mistake on the employer's part, as both the Pay Notes and the Directive refer to "pay increment periods".

[93] In terms of the employer's argument that the parties to the collective agreement could not have intended for border services officers working a fraction of the year to receive the same pay increments as their year-round colleagues, the grievors argue that the employer could make the same argument with respect to part-time employees, who also work fewer hours than their full-time colleagues. However, the grievors point out that under the Pay Notes, all employees receive their pay increments on the anniversary dates of their initial appointments, regardless of hours worked. They argue that this is not an absurd or unfair result but rather what the parties to the collective agreement expressly agreed to when they defined the pay increment period by reference to the "anniversary date", rather than "12 months of year-round employment".

V. Analysis and reasons

A. Preliminary objection

[94] The grievors argued for the first time at adjudication that they were entitled to a pay increment on the anniversary dates of their first indeterminate appointments based solely on the plain reading of the Pay Notes. The employer argues that that is contrary to what the grievors presented in their individual grievances and during the grievance process, in which they argued that they should have received their pay increments based on having been continuously employed for a period of 12 months.

[95] The employer objects to the introduction of this "new" argument by the grievors and, relying on *Burchill*, argues that the grievances should be dismissed on the basis that the grievors have changed the nature of the grievances.

[96] For the reasons that follow, I disagree.

[97] It is worth reproducing again the grievances' wording. They state as follows:

> …
>
> *I have been continuously employed with Canada Border Services Agency since May 1, 2011* [or May 1, 2010, for Mr. Anderson] *and the employer has not granted my pay increment. I grieve that the employer is not compensating me according to my collective agreement and any other CBSA and Treasury Board of Canada Secretariat Policies or Regulations that may apply.*
>
> …

[98] As a corrective measure, the grievors request the following: "I request that I be afforded the pay and benefits to which I am entitled and any other corrective action appropriate in the circumstances and that I be made whole."

[99] Based on the two documents entitled "Grievance Hearing" (reproduced earlier in this decision), which purport to outline the points raised during the grievance process meetings held on July 7 and 8, 2012, the grievors argued that they "… should not have two separate anniversary dates …" and that "[t]hey should have one anniversary date which would be from the appointment date in the initial letter of offer from WC&Y District." As corrective action, they requested to be "… compensated in back pay from the anniversary of when their first pay increment would be due."

[100] As was held in *Delage*, the *Burchill* decision cannot be interpreted as a blanket pronouncement preventing grievors from raising any new arguments at adjudication to support their cases. Indeed, grievors are free to raise new arguments at adjudication to support their positions, provided that those arguments do not change the nature of the dispute that the parties discussed during the grievance process.

[101] In this case, the "new" argument to which the employer objects does not in any way change the nature of the grievances. The parties have disputed and continue to dispute the appropriate date on which the grievors were entitled to their first pay increments and the consequential pay and benefits issues that are attached to it. This is, and has always been, the fundamental issue between the parties, and the nature of their dispute has not changed by virtue of a "new" argument being brought forward to advocate that point at adjudication.

[102] Whether the grievors argue that they should have received their pay increments on their first anniversary dates based on having been continuously employed, or

whether they argue that they should have received their pay increments on those very dates based solely on the plain reading of the Pay Notes, it remains that they are pursuing the same dispute; i.e., they should have received a pay increment on the anniversaries of the dates on which they were first appointed. At all times, the employer knew that the exact dates of the pay increments were at issue, and it cannot genuinely claim to have been taken by surprise with respect to the nature of the dispute being pursued at adjudication.

[103] As a result, the employer's preliminary objection is dismissed.

B. The merits of the grievances

[104] The issue to be determined is **when** the grievors became eligible for their first pay increments.

[105] The essential facts are not in dispute. The grievors were each appointed to an FB-03 "… full-time indeterminate appointment on a seasonal basis …" in Victoria, effective May 1, 2010, in the case of Mr. Anderson, and effective May 1, 2011, in the case of Mr. Boparai and Mr. Broda. They were required to work from May 1 to September 30 of every calendar year and were placed on a "seasonal layoff" from October 1 to April 30 of each year.

[106] In March 2012, the grievors were advised of a change to their "hours of work" to take effect May 1, 2012, at which point they returned to their Victoria positions as full-time indeterminate employees on a year-round basis.

[107] Mr. Anderson received his first pay increment effective June 27, 2012, which was approximately 26 months after his initial appointment. Mr. Boparai and Mr. Broda received their first pay increments effective November 27, 2012, which was approximately 19 months after their initial appointments. These dates represent the dates on which the grievors completed a period equivalent to 12 months of **actual work** at their Victoria positions.

[108] The grievors maintain that they should have received their first pay increments on the anniversary dates of their initial appointments, which corresponds to May 1, 2011, for Mr. Anderson, and May 1, 2012, for Mr. Boparai and Mr. Broda.

[109] The grievors base their argument on the plain and ordinary reading of the language in the collective agreement.

[110] Article 62 of the collective agreement provides the pay-administration provisions. The relevant sections read as follows:

ARTICLE 62	***ARTICLE 62***
PAY ADMINISTRATION	***ADMINISTRATION DE LA PAYE***
62.01 Except as provided in this Article, *the terms and conditions governing the application of pay to employees are not affected by this Agreement.*	***62.01 Sauf selon qu'il est stipulé dans le présent article,*** *les conditions régissant l'application de la rémunération aux employé-e-s ne sont pas modifiées par la présente convention.*
62.02 An employee is entitled to be paid *for services rendered at:*	***62.02 L'employé-e a droit****, pour la prestation de ses services :*
(a) ***the pay specified in Appendix A*** *for the classification of the position to which the employee is appointed, if the classification coincides with that prescribed in the employee's certificate of appointment ….*	*a.* ***à la rémunération indiquée à l'appendice A*** *pour la classification du poste auquel l'employé-e est nommé, si cette classification concorde avec celle qu'indique son certificat de nomination* […].
62.03 *(a) The rates of pay set forth in Appendix A* ***shall become effective on the dates specified.***	***62.03*** *a) Les taux de rémunération indiqués à l'appendice A* ***entrent en vigueur aux dates précisées.***
…	[…]

[Emphasis added]

[111] Put simply, clause 62.01 means that the Treasury Board terms and conditions governing the application of pay apply, **except** when article 62 provides otherwise. In this case, it does.

[112] Clause 62.02(a) specifies that an employee is entitled to be paid at the pay rates specified in Appendix A. It is uncontested that all three grievors were employees, and as such, pursuant to clause 62.02(a), they were entitled to the pay specified in Appendix A. Moreover, clause 62.03(a) confirms that the rates in Appendix A are effective on the dates specified in that Appendix.

[113] Appendix A details in a grid format the annual rates of pay applicable for each classification in the Border Services Group (FB). Appendix A also includes the Pay Notes that are the subject of this dispute. Among other things, these Pay Notes define the pay increment period. They read as follows:

FB - BORDER SERVICES GROUP ANNUAL RATES OF PAY	***FB – GROUPE : SERVICES FRONTALIERS, TAUX DE RÉMUNÉRATION ANNUELS***
…	[…]
PAY NOTES	***NOTES SUR LA RÉMUNÉRATION***
PAY INCREMENT FOR FULL-TIME AND PART-TIME EMPLOYEES	***AUGMENTATION D'ÉCHELON DE RÉMUNÉRATION POUR LES EMPLOYÉ-E-S À TEMPS PLEIN ET À TEMPS PARTIEL***
1. ***The pay increment period for employees at levels FB-1 to FB-8 is the anniversary date of such appointment****. A pay increment* ***shall be*** *to the next rate in the scale of rates.*	*1.* ***La période d'augmentation d'échelon de rémunération pour les employé-e-s aux niveaux FB-1 à FB-8 est la date anniversaire de ladite nomination****. L'augmentation d'échelon de rémunération* ***sera*** *au taux suivant de l'échelle de taux.*
…	[…]

[Emphasis added]

[114] In the grievors' opinion, the language in the Pay Notes is clear. It provides that for full-time and part-time employees, the pay increment period is the anniversary date of the appointment. As a result, they believe that the fact that they were hired on a seasonal basis is irrelevant to the determination of the date of their first pay increment.

[115] The employer, on the other hand, believes the collective agreement is silent as it relates to seasonal employees. As a result, it argues that it is necessary to turn to the Directive and the Pay Increments Policy to determine the applicable pay increment period.

[116] I am unable to agree with the employer's argument. A plain reading of the collective agreement's Pay Notes clearly shows that the collective agreement is **not**

silent. Rather, it explicitly defines the pay increment period for full-time and part-time employees as being the anniversary dates of their appointments.

[117] As the grievors noted, the rules of interpretation were recently reviewed and summarized in *Cruceru* as follows:

> …
>
> *[84] As outlined in authoritative sources such as* Brown and Beatty, *at paragraph 4:2100, and as recognized throughout the Board's case law, canons of interpretation such as the following guide this analysis: (1) the parties are assumed to have meant what they said, (2) the meaning and intent of the collective agreement is to be sought in its express provisions, (3) the words of a collective agreement must be given their grammatical and ordinary sense, (4) they must [sic] read in their entire context, in harmony with the scheme of the collective agreement, and (5) when the same words reappear, they are to be given the same interpretation.*
>
> …

[118] Based on a plain and ordinary reading of the Pay Notes, the pay increment period is the "anniversary date" of an employee's appointment. I believe that the term "anniversary date" is self-explanatory and that it does not leave room for debate. It is plainly what it says — a date that once set, is repeated each year.

[119] Furthermore, based on a plain and ordinary reading of the Pay Notes, only two criteria must be met for an employee to be eligible for a pay increment on their anniversary date: they must (1) be a full-time or part-time employee, and (2) have been appointed at levels FB-1 to FB-8. There are no other criteria. There is no mention that an employee must actually perform the duties of their position continuously throughout the year without interruption; nor is any exception expressly made for indeterminate full-time or part-time employees who are hired to work on a seasonal basis.

[120] As such, I find that the language of the collective agreement is clear as it relates to the pay increment period. However, when seeking to determine the intention of the parties regarding specific clauses in the collective agreement, the analysis does not stop there. As pointed out in *Brown and Beatty*, at paragraph 4:21, adjudicators must also ensure that the interpretation of specific clauses in a collective agreement is in harmony with the rest of the agreement and would not result in absurd or inconsistent outcomes. It reads as follows:

> *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 unless to do so would lead to some absurdity or inconsistency with the rest of the collective agreement, or unless the context reveals that the words were used in some other sense.…*

[121] The employer argues that the exception highlighted in *Brown and Beatty* applies in this case. It argues that applying the Pay Notes to seasonal employees would lead to an absurd and unfair outcome for year-round border services officers.

[122] The employer argues that seasonal border services officers would be entitled to the pay increment at the same time as their year-round colleagues, despite working only a portion of the year. It argues that the parties to the collective agreement could not have intended to create a double standard for year-round and seasonal border services officers.

[123] However, as the grievors point out, this so-called double standard already exists as both full-time and part-time employees benefit from a pay increment on their anniversary dates despite the fact they do not work the same number of hours in a year. I also observe that it is entirely possible that a seasonal employee could work the same number of hours as a part-time employee over the course of a year, with the sole difference being how the employer assigned the hours that were worked. As such, I cannot agree that applying the plain language of the collective agreement to the grievors would lead to an absurd outcome, as argued by the employer.

[124] The employer also points to clause 33.02 of the collective agreement and argues that the grievors' interpretation is at odds with it and would lead to another absurdity or inconsistency with the collective agreement. Clause 33.02 is located in the general leave section of the collective agreement and provides as follows:

33.02 *Except as otherwise specified in this Agreement:*	***33.02*** *Sauf disposition contraire dans la présente convention :*
(a) where leave without pay for a period in excess of three (3) months is granted to an employee for reasons other than illness, the total period of leave granted shall be deducted from "continuous	*a. lorsqu'un congé non payé est accordé à un employé-e pour une période de plus de trois (3) mois pour un motif autre que la maladie, la période totale du congé accordé est déduite de la période d' « emploi*

employment" for the purpose of calculating severance pay and from "service" for the purpose of calculating vacation leave;	*continu » servant à calculer l'indemnité de départ et de la période de « service » servant à calculer les congés annuels;*
(b) time spent on such leave which is for a period of more than three (3) months shall not be counted for pay increment purposes.	*b. le temps consacré à un tel congé d'une durée de plus de trois (3) mois ne compte pas aux fins de l'augmentation d'échelon de rémunération.*

[125] The employer argues that this demonstrates that the pay increment date is not automatic in all cases and that the parties to the collective agreement did not intend for the pay increment period to comprise extended periods of leave without pay during which an employee is not working.

[126] I agree with the employer to the extent clause 33.02 creates an exception to the general rule in the Pay Notes. Indeed, looking at the entire scheme of the collective agreement, it is clear that the parties to the collective agreement turned their minds to creating an exception to a pay increment occurring on one's anniversary date. This exception is explicitly detailed in clause 33.02 and excludes from the calculation of a pay increment period time granted to an employee of leave without pay for more than three months, other than sick leave (or maternity or parental leave without pay granted under clauses 38.01(g) and 40.01(g)). However, since the grievors were technically on seasonal layoff from their Victoria positions, this exception does not apply to them.

[127] The parties to the collective agreement could have extended the exception in clause 33.02 to periods of seasonal layoff; however, they did not. The fact that they chose to limit the exception to pay increments occurring on an anniversary date to only certain periods of leave without pay in excess of three months does not appear absurd given that these periods of leave without pay are at an employee's request. This stands in stark contrast to periods of layoff which are unilaterally imposed by the employer.

[128] Once again, I do not believe that applying the plain language of the collective agreement to the grievors would result in an absurd outcome or inconsistent application of the collective agreement as the employer suggested in relation to clause 33.02. To the contrary, the employer's position would result in the need to read into

the collective agreement an exception that does not exist. As a decision maker, I do not possess that authority.

[129] The scope of a decision maker's authority in a case as the one before me was summarized well in *Chafe v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112, in which the Board stated this at paragraph 50:

> *50 I start with the trite but true observation that my authority as an adjudicator is limited to and by the express terms and conditions of the collective agreement. I can only interpret and apply the collective agreement. I cannot modify terms or conditions that are clear. Nor can I make new ones. The fact that a particular provision may seem unfair is not a reason for me to ignore it if the provision is otherwise clear ….*

[130] In this case, the Pay Notes are very clear. They provide that for full-time and part-time employees at levels FB-1 to FB-8, the pay increment period is the anniversary date of such appointment. The collective agreement provides for a sole exception to the pay increment period occurring on the anniversary date of an employee's appointment. It is clause 33.02. It excludes from the calculation of the pay increment period any leave without pay granted to an employee of more than three months, other than sick leave (or maternity or parental leave under clauses 38.01(g) and 40.01(g)).

[131] I find no reason why the provisions of the collective agreement as it relates to the pay increment period should not be applied as just stated.

[132] The grievors were all hired as FB-03 employees in "full-time indeterminate appointments". The fact that the appointments were on a seasonal basis does not change that the grievors were appointed as full-time employees. Had the employer not wished for them to benefit from the entitlements of full-time employees, it could have hired them on a different basis. It did not.

[133] Since the grievors were hired as full-time employees, they are covered by the plain wording of the Pay Notes that applies to full- and part-time employees. Further, the exception in clause 33.02 does not apply to them as they were not on a granted leave of absence without pay during their off season from their Victoria positions.

[134] I conclude and find that the grievors were entitled to pay increments on the anniversary dates of their respective appointments to the Victoria positions, being May

1, 2010, for Mr. Anderson, and May 1, 2011, for Mr. Boparai and Mr. Broda. Therefore, Mr. Anderson was entitled to his first pay increment on May 1, 2011, and Mr. Boparai and Mr. Broda were both entitled to their first pay increment on May 1, 2012.

[135] Since the Pay Notes' language is clear, and based on the application of clauses 62.01, 62.02(a), and 62.03(a), any reliance on external directives or manuals would violate the collective agreement. On this point, I find that *Broekaert* is entirely distinguishable since the collective agreement language in that case was silent, which made it necessary to refer to external documents to make a determination. That is not so in this case.

[136] However, had I concluded that the collective agreement was silent as it relates to the grievors, the outcome would have been the same, since section 5.3 of the Directive provides "[w]hen the relevant collective agreement is silent, the pay increment period is 12 months and is calculated in accordance with this Appendix". As the Appendix to the Directive does not address how a pay increment period should be calculated for full-time employees hired on a seasonal basis, the grievors would have been entitled to a pay increment 12 months after their initial appointments. The Pay Increments Policy would have been of no assistance since it purports to apply and interpret the regulations that were explicitly replaced by the Directive effective April 1, 2009. Therefore, it stands to reason that the Pay Increments Policy was likewise replaced by the Directive.

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

(The Order appears on the next page)

VI. Order

[138] The employer's objection based on the *Burchill* principle is dismissed.

[139] The grievances are allowed.

[140] I order the Treasury Board to recalculate Mr. Anderson's salary and any related benefits based on his first pay increment occurring on May 1, 2011.

[141] I order the Treasury Board to recalculate Mr. Boparai's and Mr. Broda's salaries and any related benefits based on their first pay increment occurring on May 1, 2012.

[142] I order the Treasury Board to pay the grievors the difference between the amounts recalculated under paragraphs 140 and 141 respectively of this decision and the amounts that were paid to them before those recalculations were made, less the customary deductions, within 60 days of this decision.

[143] The Board will remain seized for a period of 90 days of the issuance of this decision with respect to any issues that arise with the calculation of the amounts referred to in paragraphs 140, 141 or 142 of this decision.

July 31, 2023.

Audrey Lizotte,
a panel of the Federal Public Sector
Labour Relations and Employment Board