**Date:** 20230818

**File:** 566-02-14731

**Citation: 2023 FPSLREB 79**

*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

**HUGUES ALEXANDRE MONIZ**

Grievor

and

**TREASURY BOARD**
**(Department of Foreign Affairs, Trade and Development)**

Employer

Indexed as
*Moniz v. Treasury Board (Department of Foreign Affairs, Trade and Development)*

In the matter of an individual grievance referred to adjudication

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

**For the Grievor:** Morgan Rowe and Simcha Walfish, counsel

**For the Employer:** Karl Chemsi, counsel

Decided on the basis of written submissions, filed June 15, July 21, and August 3, 2022.

**REASONS FOR DECISION**

## I. Individual grievance referred to adjudication

[1] Hugues Alexandre Moniz ("the grievor") grieved the refusal of his employer to grant him coverage under Foreign Service Directive ("FSD") 41 - "Health Care Travel" and to provide him and his husband with financial benefits to attend the birth of their first child.

[2] The employer refused to provide coverage since the child was born through a surrogate, and therefore, the grievor and his spouse did not have to travel for health care, according to the employer's interpretation of FSD 41.

[3] For the purpose of this decision, although the Treasury Board is the grievor's legal employer, the Department of Foreign Affairs, Trade and Development, commonly referred to as Global Affairs Canada, is deemed the employer, given that the Treasury Board delegated managerial responsibilities to its deputy head.

[4] The grievor believes that the employer's interpretation of FSD 41 is wrong. In addition, it is discriminatory on the grounds of sexual orientation and family status.

[5] The facts are not in dispute. The issue is wholly a matter of interpreting FSD 41 and applying it to the grievor's situation. The parties agreed to proceed by way of written submissions.

[6] For the reasons that follow, I find FSD 41 does apply to the grievor and that the employer's interpretation and application of FSD 41 was discriminatory.

## II. Context

[7] The parties submitted an agreed statement of facts, and each party submitted an affidavit, one from the grievor, the other from Aline Taillefer-McLaren, who at the relevant time was the acting director and then the director of the FSD Policy and Monitoring Division at Global Affairs Canada. I will summarize the facts from those three documents.

[8] The grievor submitted two grievances to the employer, one concerning the refusal of benefits, the other dealing with the alleged discrimination underlying this

refusal. Both matters are before the Federal Public Sector Labour Relations and Employment Board ("the Board") in this file.

[9] At the relevant time, the grievor was employed as a management and consular officer on an acting basis at the FS-03 group and level with the employer. He is part of a bargaining unit represented by the Professional Association of Foreign Service Officers (PAFSO). Article 40 of the collective agreement between PAFSO and the Treasury Board (expiry date: June 30, 2014; "the collective agreement") includes in the collective agreement the National Joint Council's *Foreign Service Directives* ("the FSDs").

[10] From 2014 to 2019, the grievor was assigned to a foreign posting at the Canadian Consulate General in Guangzhou, China. His husband, Jing Zhu, resided with him. Mr. Zhu was not an employee of Global Affairs Canada.

[11] The grievor and his husband had decided by early 2014 that they wanted to start a family together. Legal considerations — ensuring that they would be recognized as the only legal parents of the child to be born in any country where the grievor could be working — led them to choose surrogacy in North America; they were matched with a surrogate in Indianapolis, Indiana, in the United States. The grievor's spouse is the biological father, and pregnancy was achieved with an egg donor. The contract with the surrogate made it very clear that she would have no legal or care responsibilities for the child after the birth. The grievor and Mr. Zhu thus considered it important that they both be present for the birth, to assume full responsibility for the child at birth.

[12] The couple also knew that they could not have their child in China, as Chinese laws prohibit marriage between same-sex couples, adoptions by same-sex couples and the recognition of a same-sex couple as the parents of a child born by surrogate.

[13] The birth was expected in early January 2016. In early July 2015, the grievor asked Guangzhou Head of Mission Weldon Epp to approve his coverage under FSD 41, in particular under FSD 41.3 - "Accouchement". The grievor suggested that they write to the employer's headquarters to ensure the agreement of its management in Ottawa, Ontario. Mr. Epp agreed.

[14] On July 20, 2015, the grievor provided headquarters with details about the pregnancy and expected birth and sought to begin arrangements for the birth and his

parental leave. He requested confirmation that return airfare and reasonable living expenses while awaiting the return to Guangzhou following the birth would be reimbursed for him, his spouse, and the child pursuant to FSD 41.3. He also sought confirmation that the costs of shipping goods for their child to Guangzhou would be covered under FSD 15 - “Relocation”.

[15] The grievor followed up in August with Stephen Doust, Acting Head of Mission, requesting approval of the coverage under FSD 41. He provided a detailed travel plan to Canada and then to Indiana, with flight, car rental, and accommodation itemized, for an estimated total of $17 665.89. The grievor suggested a $17 000 advance to enable arrangements for transportation and accommodation.

[16] Mr. Doust approved the plan, and shortly after that, the grievor received the $17 000 advance. Later in August, headquarters advised the grievor that his request had been referred to Working Group B and that it might also be referred to the employer’s legal services, as the situation was novel.

[17] Working groups are departmental committees that coordinate foreign-service issues and decisions on behalf of federal government departments with foreign-service employees. Working Group A is a coordinating committee; Working Group B is a subcommittee, charged with interpreting and applying FSDs on behalf of the departments. At the time of the events that gave rise to the grievance, Ms. Taillefer-McLaren was its chairperson.

[18] On August 28, 2015, headquarters advised the grievor that the conclusion was now that his request was not covered by FSD 41. Working Group A would consider the matter further. On August 31, 2015, the grievor asked for further details on the decision-making process and if he could present supporting information.

[19] Headquarters responded on September 10, 2015, to identify who had been consulted. The email also included the decision reached by Working Group B and its rationales: neither the grievor nor Mr. Zhu were under accouchement, the grievor was not eligible for travel or living expenses under FSD 41.3.1(b) because he was neither the spouse nor the common-law partner of the person giving birth, and Indianapolis was not the “nearest suitable place”, following the wording of FSD 41.3.1(b).

[20] Headquarters also added that Working Group A had been asked to confirm the policy interpretation.

[21] On September 19, 2015, headquarters forwarded the minutes of Working Group B's decision to the grievor. They read as follows:

> …
>
> *Working Group B refers the case to Working Group A with the following considerations. Working Group B discussed and concluded that FSD 41 does not apply. Based on the principle of comparability, the travel for the employee and spouse to Indianapolis would not be covered. It is recommended the employee use the provisions of FSD 50 or FSD 56.11 to cover these expenses.*
>
> *Once the new dependant is born, a non-accountable allowance (NAA) will be issued from the headquarters city to the mission for the dependant to travel to the mission. The parents will be responsible to cover the costs for the dependant's travel from Indianapolis to the headquarters city.*
>
> …

[22] On November 13, 2015, Working Group A rendered its decision and provided the following recommendation:

> …
>
> *For the child, WGA agrees that FSD 15 provides for a non-accountable relocation travel allowance (NAA) and a 300 kg net shipment if required, based on the cost from the headquarters city to the post.*
>
> *Because the child requires an escort to travel, the WGA recommends the department exercise managerial discretion under FSD 15.42 to reimburse the father's return travel from post to the location of the child, up to the return cost by the lowest available airfare between the post and headquarters city including transportation to and from the airport at these locations.*
>
> …

[23] The same day, the recommendation was approved by Leslie Scanlon, Director General, FSD Bureau, Global Affairs Canada, and communicated to the grievor.

[24] The grievor stated in his affidavit how stressful this back and forth about the application of FSD 41 had been for him and his spouse. At the same time as these events were happening, two of his colleagues at the consulate in Guangzhou also

travelled to another country with their respective spouses for the birth of a child. According to the grievor, they were granted FSD 41 coverage.

[25] The child was born on December 30, 2015. The grievor began parental leave on January 4, 2016. He filed two grievances (a discrimination and an interpretation grievance) on January 28, 2016.

[26] On July 5, 2016, the employer denied the FSD interpretation grievance at the second level of the grievance procedure. The matter was referred to the National Joint Council for the final-level grievance hearing, held in September 2017. It denied the grievance on November 29, 2017.

[27] The grievance that was referred to adjudication reads as follows:

> *I grieve the refusal by Global Affairs Canada to authorize the allowances specify under FSD 41 following the birth through surrogacy of my husband natural child and my adopted son and dependent, Oscar Zhu Moniz. Including the following:*
>
> *1. Travel expenses for me to and from Indianapolis (USA) where my son accouchement occurred, and where he received post-natal medical treatments;*
>
> *2. The payment of actual and reasonable living expenses from the time of delivery until such time that a visa allowing my son to travel to Guangzhou (China) where I am currently posted;*
>
> *3. Travel expenses to and from Indianapolis (USA) for my husband to be present at the accouchement of our child; and*
>
> *4. Living expenses, for up to five days, for my spouse, Jing Zhu.*
>
> *The refusal of my Employer is based on an inflexible, narrow and restrictive interpretation of the FSD 41. As a result, my husband and I are denied the same treatment that is commonly available to heterosexual couples having a child while posted abroad in an environment where the medical cares do not meet Canadian standards.*
>
> *It is even more appalling given that we are the only of the 3 couples who had a child in Guangzhou (China) in the last months who will be denied allowances under FSD 41 to attend the birth of our child and to cover the living expenses while waiting for the necessary documents (PCF, Diplomatic Passport, visa, etc.) for our child to travel with us to Guangzhou where I am posted.*
>
> *My Employer's decision is a blatant case of discrimination on the basis of Sexual Orientation and Family Status.*
>
> *This practice contravenes the Canadian Human Rights Act as well as our FS collective agreement, of which FSD 41 forms a part.*

[*Sic* throughout]

[28] As for remedies, the grievor asked for what was covered in the grievance, as well as any other entitlement under the FSD covering his circumstances.

[29] The grievance was referred to the National Joint Council's Executive Committee. Its decision reads as follows:

> …
>
> *The Executive Committee considered and agreed with the report of the Foreign Service Directives Committee which concluded the employee had been treated within the intent of Foreign Service Directive (FSD) 41. The Committee concluded that, as neither the employee nor the spouse at post required medical care, FSD 41 does not apply. The Committee further noted the principle of comparability whereby insofar as is possible and practicable employees serving abroad should be placed in neither a more nor a less favourable situation than they would be in serving in Canada. As such, the Committee agreed that the employee was treated equally to any other employee assigned in Canada or posted abroad who seeks the services of a surrogate. The grievance is therefore denied.*
>
> …

[30] In the end, the grievor and his spouse did not receive any compensation from the employer for travel and accommodations to attend their child's birth. They reached Indianapolis on December 31, 2015, and remained until early February 2016 to allow their son to receive maternal milk, as recommended. They then returned to Canada and waited to obtain a visa for the child, ultimately returning to Guangzhou in mid-May 2016.

[31] In his affidavit, the grievor stated that the employer's refusal to provide FSD 41.3 coverage was frustrating because the only reason he requested it was his posting. According to him, had he lived in Ottawa, no expenses would have been claimed linked to travelling back and forth from China and having to wait for the necessary paperwork to return to China with the child.

[32] In her affidavit, Ms. Taillefer-McLaren explained the employer's perspective on FSD 41 and its applicability to the grievor's situation.

[33] FSD 41 is titled “Health Care Travel” and is designed to provide an allowance to employees when they or their dependants must travel from the post where the employee is assigned to receive medical treatment.

[34] FSD 41.3 applies specifically to the situation of childbirth, termed “Accouchement” in the FSD. Subsection 41.3.1(a) covers situations in which the employee or the pregnant spouse must travel to receive medical treatment related to childbirth. Subsection 41.3.1(b) provides assistance for the other parent to travel to attend the birth of the child in the situation covered by subsection 41.3.1(a).

[35] According to the employer, since neither the grievor nor his spouse was giving birth, subsection 41.3.1(a) could not apply, and consequently, neither could subsection 41.3.1(b). This was the conclusion reached by Working Group B. It referred the matter to Working Group A to ensure that the matter was studied thoroughly. Working Group B believed that other provisions of the FSDs would better apply to the situation.

[36] FSD 56.11, titled “Post Specific Allowance”, is a non-accountable allowance designed to assist an employee travelling from a post. During the period from June 1, 2015, to May 31, 2016, the grievor received $7623 to travel from his post in Guangzhou, and, by virtue of FSD 50.3, so did his spouse.

[37] Working Group A also recommended that a non-accountable travel allowance be paid to allow for the relocation of the newborn from headquarters to post, as well as a shipment of up to 300 kg of effects required for the baby. Working Group A also recommended reimbursing travel for the father from post to the location of the child.

[38] According to the employer, as it stands, FSD 41 does not cover a surrogacy situation. Other FSD provisions could apply to help the grievor. FSD 56.2 - “Foreign Service Premium” is meant to compensate the impact from service outside Canada. During the period from April 1, 2015, to March 31, 2016, the grievor received $14 573 under that heading. Under FSD 58 - “Post Differential Allowance”, which is an allowance meant to recognize the hardship of postings, the grievor received for the same period an amount of $13 236.

[39] In all, combining FSDs 50.3, 56.2, 56.11, and 58, the grievor received an amount of $50 678 in allowances in 2015 and 2016. He would not have received it had he remained in Ottawa.

## III. Summary of the arguments

### A. For the grievor

[40] The grievor makes two main arguments, which are that the allowance under FSD 41 was denied because of the employer's erroneous and too-narrow interpretation of that directive and that the refusal to grant the allowance was discriminatory.

[41] The grievor submits that the employer's narrow interpretation of FSD 41 cannot stand. According to him, the purpose of FSD 41.3 "… is clearly to ensure that parents receive financial coverage for travel and living expenses when their child cannot be delivered at the foreign posting where one of the parents works." The application of FSD 41.3 should not be limited to circumstances in which the child's biological mother is travelling from the post.

[42] The relevant provisions read as follows:

> …
>
> ***41.1 Application***
>
> …
>
> *41.1.3 Where the deputy head is satisfied that necessary and suitable health care facilities or services are not available locally, or local treatment costs exceed costs of travel, treatment and living expenses at the nearest suitable location, another suitable location, or Canada, the following may be approved:*
>
> *(a) travel leave for the employee,*
>
> *(b) payment of actual and reasonable travelling expenses, including the lowest available airfare appropriate to a particular circumstance and/or itinerary which could include a higher standard of travel, during travelling time for an employee or dependant, and/or a young child who is obliged to accompany a parent on health care travel, and, where the need is certified by a qualified medical practitioner, for an escort, between the location of the employee or a dependant and the nearest suitable place as determined by the deputy head; or where the employee so requests, Canada or another suitable place where the required health care is available on a cost-effective basis, as determined by the deputy head ….*
>
> …
>
> ***41.3 Accouchement***
>
> *41.3.1 In cases of accouchement, where payment of actual and reasonable travelling expenses has been authorized under subsection 41.1.3 for an employee and/or a dependant who travels to the nearest suitable place; or where the deputy head determines*

> *it is cost-effective and the employee so requests, to Canada or another suitable place where accouchement may take place, the deputy head may also approve:*
>
> *(a) the payment of actual and reasonable living expenses both before and after the time of delivery where:*
>
> *(i) the visa or other re-entry regulations delay the return to the post; and/or*
>
> *(ii) the common carrier approved by the deputy head to provide the most suitable and appropriate means of transportation requires that such travel take place prior to the expected date of delivery; and/or*
>
> *(iii) there is a medical requirement acceptable to Health Canada;*
>
> *(b) an allowance for travelling expenses and living expenses, subject to FSD 70 Reporting Requirements and Verification of Allowances, for a period not to exceed five days, in accordance with subsection 41.1.3, to enable the spouse or common-law partner to be present at the birth of the child.*
>
> …

[43] The grievor argues that FSD 41 must be interpreted to allow coverage in surrogacy cases. FSD 41.3 allows financial compensation when an employee or dependant must travel to another country for the delivery of a child. The precondition is that the deputy head be satisfied that necessary and suitable health care facilities are not available locally. FSD 41.3 also provides further coverage if the employee or a dependant must await a visa to return to post.

[44] The employer's interpretation limits the coverage under FSD 41.3 to when one spouse receives approval to travel to personally give birth. That, according to the grievor, is contrary to the principles applicable to the interpretation of FSDs and precludes reading the relevant provisions in harmony with the whole of the collective agreement, including its no-discrimination clause.

[45] The grievor concedes that FSD 41.3, which deals with "Accouchement", or the delivery itself, comes under FSD 41.1.3, thus linking the coverage to health care travel. In other words, not all childbirth situations will fall within the scope of FSD 41.3. The grievor submits that benefits under FSDs 41.1.3 and 41.3 should be provided if the following conditions are met:

> …
>
> *a) Both parents are residing together at the post; and,*

> *b) Childbirth at the post is not possible because "standards of medical care and the extent of treatment facilities or specialist services are inadequate in comparison with those in Canada".*
>
> …

[46] The grievor submits that both conditions were met in his case: he resided with his husband at post, and Health Canada had stated that Global Affairs Canada staff should not deliver children at the Guangzhou post.

[47] To interpret FSD 41, one must start with its intent. By their nature, FSDs cannot specifically address every situation that may arise; therefore, their intended scope must be considered, as stated as follows in the introduction to the FSDs:

> …
>
> *To achieve the objectives of the Directives, consideration will continue to be given to situations which may arise which are not specifically dealt with in the Directives but which fall within the intent of the Directives as described in the basic principles outlined above or explained in the Introduction to a specific directive.*
>
> …

[48] The grievor notes that the FSD 41.3 simply did not envisage surrogacy in the context of a male same-sex couple. He argues that this exclusion is not intended but rather is simply a gap that occurred in its drafting. FSD 41.3 is meant to cover couples that must travel from post for a birth because the medical facilities are inadequate, and in the grievor's case, where he and his spouse cannot parent a child by law.

[49] One of the principles that the introduction to the FSDs refers to is comparability, which it defines as follows: "**Comparability** - insofar as is possible and practicable employees serving abroad should be placed in neither a more nor a less favourable situation than they would be in serving in Canada."

[50] The grievor submits that had he and his spouse been in Canada at the time of the birth, whether the surrogacy occurred in Canada or the United States, the travel and living costs would have been minimal. However, being in Guangzhou meant having a child away from post, per the Health Canada certification and by reason of the legal complications for a same-sex couple in China.

[51] Travelling to attend the birth of their child in a country with adequate medical facilities that would recognize them as the legal parents cost the grievor about

$21 000, which would not have been incurred had he been in Canada. That is precisely the purpose of FSDs: to ensure that employees are not placed in a less-favourable situation at post than in Canada.

[52] The employer's conclusion that FSD 41.3 requires that a biological mother must be covered for any benefit to be granted fails to recognize that for male partners to have a biologically related child, birth must occur through a surrogate. In other words, such a precondition excludes same-sex male couples.

[53] This runs counter to the human rights principles that are incorporated into collective agreements both because of a specific no-discrimination clause and because of the principle dictated by the Supreme Court of Canada that human rights legislation must always be considered when interpreting collective agreements (see *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 at para. 23).

[54] In addition, the grievor maintains that if the employer's interpretation of FSD 41 is the only one allowed based on its wording, then the directive itself is discriminatory on the grounds of both sexual orientation and family status, contrary to s. 7 of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; "the *CHRA*").

[55] The discrimination analysis is a two-step approach. The complainant (in this case, the grievor) must establish *prima facie* discrimination, and the defendant (in this case, the employer) may respond by providing either a non-discriminatory explanation for its conduct or by establishing an exception in accordance with the *CHRA* that, for example, it accommodated the grievor to the point of undue hardship.

[56] At the first step, the grievor need not demonstrate that discrimination was the cause for the employer's action; nor must he demonstrate that the employer intended to discriminate. All that is required is to demonstrate that a protected characteristic was a factor in the adverse impact suffered by the grievor.

[57] The grievor is part of a protected group on the basis of sexual orientation and family status, which includes family composition and the addition of a child born of a surrogate.

[58] The grievor suffered an adverse effect through the denial of the application of FSD 41.3 to his particular circumstances. This occurred because neither he nor his

spouse was the biological mother of the child, which was the only possibility envisaged by the employer. In other words, a gap in the language of the FSD deprived the grievor of its benefits. He quotes the following passage from a decision of the Court of Appeal for Ontario (see *A.A. v. B.B.*, 2007 ONCA 2) that deals with a legislative gap (and ultimately fills it) in the context of recognizing two women as being the parents of a child:

…

> *[34] … The legislation was not about the status of natural parents but the status of children. The purpose of the legislation was to declare that all children should have equal status. At the time, equality of status meant recognizing the equality of children born inside and outside of marriage. The legislature had in mind traditional unions between one mother and one father. It did not legislate in relation to other types of relationships because those relationships and the advent of reproductive technology were beyond the vision of the Law Reform Commission and the legislature of the day.…*
>
> *[35] Present social conditions and attitudes have changed. Advances in our appreciation of the value of other types of relationships and in the science of reproductive technology have created gaps in the CLRA's* [the Ontario *Children's Law Reform Act* (RSO 1990, c C. 12)] *legislative scheme. Because of these changes the parents of a child can be two women or two men. They are as much the child's parents as adopting parents or "natural" parents. The CLRA, however, does not recognize these forms of parenting and thus the children of these relationships are deprived of the equality of status that declarations of parentage provide.*

…

[59] Imposing as a rule that the grievor or his spouse must be the biological mother of the child to be born is a reflection of society's barrier to the legitimacy of same-sex couples and families. The grievor and his spouse cannot be biological mothers, yet they can be parents. Surrogacy is the primary reproductive means by which they can deliver a child. The adverse impact suffered is directly linked to their sexual orientation and family status.

[60] FSDs in general, and FSD 41.3 in particular, were amended to reflect the acceptance of same-sex partners (following decisions of the Canadian Human Rights Tribunal) by modifying "husband" to "spouse or common-law partner", and, in the case of FSD 41.3, to specify who could travel and attend the birth of a child. However, this

formal equality approach failed to take into account the needs of same-sex couples and families through the modern range of reproductive options.

[61] The grievor's sexual orientation and family status were plainly a factor in denying him the benefits of FSD 41.3. The rule that one of the persons traveling for the birth of a child must be the biological mother evidently excluded the grievor and his spouse. Thus, clearly, *prima facie* discrimination has been established.

[62] According to the grievor, the employer has not provided any justification that would disprove the discrimination.

**B. For the employer**

[63] The employer submits that the provisions of FSD 41, relating to health care travel, did not apply to the grievor as neither he nor his spouse had to travel from post to receive health care. Moreover, the employer is of the view that the grievor did not meet the test of *prima facie* discrimination as he did not demonstrate that sexual orientation or family status were factors in the alleged adverse treatment.

[64] According to the employer, the grievor mischaracterized the purpose of the benefits under FSD 41. They are not meant as a support to parents but rather to ensure that employees and their dependants receive suitable health care if it is unavailable at post. Since that did not apply to the grievor, there was no adverse treatment. FSD 41.3 did not apply since the grievor and his spouse did not require medical treatment; moreover, the surrogate mother was not a dependant and therefore was not covered by FSD 41.3.

[65] The employer also submits that the grievor did receive benefits under other FSDs, which are designed to recognize the challenges of working outside Canada.

[66] According to the employer, two issues must be decided: 1) Does FSD 41 apply to the grievor's circumstances? 2) Is the employer's interpretation and application of FSD 41 discriminatory?

[67] On the first issue, the employer submits that FSD 41 does not apply to the grievor's circumstances.

[68] The FSDs are developed jointly by the Treasury Board and the federal public sector bargaining agents through a National Joint Council process; the Treasury Board

has the final approval. At the present time, there are no surrogacy provisions in the FSDs.

[69] The intent of FSD 41, as stated in its introduction, is "… designed to ensure that an employee and/or dependant have access to necessary and suitable health care facilities and services …".

[70] The employer cites *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, on the interpretation of contracts, and quotes the following extract from *Fehr v. Canada Revenue Agency*, 2017 FPSLREB 17:

> …
>
> ***67*** *This more modern approach of contract interpretation has evolved towards being more practical and based on common sense and not being dominated by technical rules of construction. The overriding concern is to determine the parties' intent and the scope of their understanding. To do so, a decision maker must read the contract as a whole, giving words their ordinary and grammatical meanings, consistent with the surrounding circumstances known to the parties at the time the contract was formed.*
>
> …

[71] The purpose of FSD 41 is to provide employees and their dependants with access to medical care if it is inadequate where the employee is posted. FSD 41.3 applies to an employee or their dependant who is pregnant and must travel to give birth. FSD 41.3 also provides for the other parent to attend the birth of the child.

[72] The application of FSD 41.3 is conditional on FSD 41.1.3, which specifies the expenses that will be covered when "… the deputy head is satisfied that necessary and suitable health care facilities or services are not available locally …".

[73] According to the employer, the intent of FSD 41 "… is not to provide the opportunity to have children or to help parents cover the costs for travel and living expenses in a situation where they are not themselves in need of health care outside of post."

[74] The employer quotes the same passage as did the grievor from the introduction to the FSDs to the effect that new situations may arise that are not specifically dealt with, but it reaches the opposite conclusion: not only is surrogacy not specifically dealt with, but also, it does not fall within the intent of the FSDs. They allow for special

allowances related to the fact that being posted abroad may pose special challenges, and the grievor was able to avail himself of them.

[75] The employer submits that modifying FSD 41.3 to include surrogacy is an amendment to the collective agreement, which is not permissible under s. 229 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). It quotes the following extract from *Forbes v. Treasury Board (Correctional Service of Canada)*, 2021 FPSLREB 110, to support its argument:

> …
>
> *[67] The Board should be extremely cautious to not add benefits to agreements that the parties to those agreements have not bargained for. Parliament enacted such a restraint upon creative advocacy by parties in s. 229 of the* FPSLRA*, which prohibits adjudicators from rendering decisions that would alter the terms of a collective agreement.*
>
> …
>
> *[69] As noted by the employer, parties to an agreement must be understood to have chosen the precise words that form their agreement. In this case, the parties have no language dealing with the cost of medical certificates. The facts presented, which were that the grievors travelled to obtain their medical certificates, in no way makes the certificates incidental to travel.*
>
> …

[76] As for the second issue, whether the interpretation and application of FSD 41 are discriminatory, the employer states that the grievor did not meet the *prima facie* discrimination test.

[77] The employer does not dispute that the grievor has personal characteristics that fall within the prohibited grounds of discrimination under the *CHRA*, whether on the ground of sexual orientation, family status or both. It disputes whether there was indeed adverse treatment, but even if so, the grievor's protected characteristics were not a factor in the alleged adverse treatment.

[78] There cannot be adverse treatment when benefits are granted for a purpose that does not correspond to the situation of the person claiming discrimination. According to the employer, the grievor mischaracterized the intent and purpose of FSD 41.3 as being financial coverage for travel and living expenses for parents whose child cannot be delivered at the employee's foreign posting. Rather, FSD 41 ensures access to

suitable health care facilities when they are not available at the posting. It is not designed to cover parenthood by surrogacy; therefore, the grievor was not denied a benefit that is available to others.

[79] Moreover, sexual orientation or family status cannot be seen as a factor, since no employee would be entitled to be covered in a surrogacy case, regardless of their sexual orientation or family status.

[80] If a case of *prima facie* discrimination is found, the lack of benefits for travel and living expenses when neither the employee nor a dependant is the biological mother is a *bona fide* occupational requirement.

[81] According to the employer, the FSD as written corresponds to a *bona fide* requirement — it was established for a purpose rationally connected to the job and was adopted in good faith, and the employer cannot accommodate persons with the grievor's characteristics without incurring undue hardship.

[82] The employer claims that it would cause it undue hardship to apply FSD 41.3 to surrogacy situations as it would fundamentally change the nature of the benefit, which is currently based on the availability of suitable health care and does not apply in this case.

[83] The employer cites *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, for the proposition that the employer does not have to change employment conditions in a fundamental way to meet its accommodation duty. The grievor was indeed reasonably accommodated by the provision of financial assistance under several FSDs.

**C. The grievor's reply**

[84] The employer failed to apply the proper interpretative principles.

[85] The employer's interpretation of FSD 41 fails to give meaning to its entire text and context. Thus, the employer fails to take into account FSD 41.3.1(b), which demonstrates that the intent is not travel for a pregnant mother's health but rather coverage that ensures that both parents may be present at a birth, when the birth is not possible at post. This latter interpretation covers the grievor's situation as the

birth of his child could not occur at post because of both Chinese laws and the standard of health care.

[86] In addition, the employer erroneously asserts that since surrogacy is not expressly mentioned, the parties meant to exclude it for the application of FSD 41.3. That statement ignores the direction on how FSDs should be interpreted according to the introduction; that is, by considering situations not specifically dealt with in the FSDs.

[87] In other words, it is not a matter of extending benefits, as the employer argues, but rather of applying the provisions with flexibility, as indicated.

[88] In *Jonk v. Treasury Board (Foreign Affairs and International Trade)*, PSSRB File No. 166-02-28111 (19980619), [1998] C.P.S.S.R.B. No. 54 (QL), a former Board applied the relevant FSD even though the situation did not fully meet the definition because it did fall within the overarching intent of the directive.

[89] In the same way, the grievor argues, his situation fell within the intent of FSD 41.3, and his interpretation is consistent with the collective agreement, including the no-discrimination clause.

[90] Even if the employer's interpretation is found formally correct, it should be found discriminatory.

[91] The employer's analysis is based on formal equality, not substantive equality. The employer asserts that all surrogacy situations would be treated the same way, and therefore, the grievor did not suffer an adverse impact because of his sexual orientation and family status.

[92] This approach contradicts the Supreme Court of Canada's approach since *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143. It is not a matter of comparing similarly situated groups but rather of considering the impact of the policy on the individual or group concerned. The employer's argument ignores the fact that the substantive impact of its interpretation is that same-sex male couples are necessarily excluded from FSD 41.3 coverage because for them, having a biologically related child always involves surrogacy. In other words, same-sex male couples are disproportionately impacted.

[93] The case cited by the employer, *Toronto (City) v. Toronto Professional Fire Fighters' Association*, 2009 CanLII 28639 (ON LA), in which a same-sex male couple was denied coverage for a surrogate's fertility treatments, is easily distinguishable. In that case, benefits were sought for the surrogate, who was neither an employee nor a dependant. In this case, benefits were sought for the grievor and his spouse, who is a dependant.

[94] The employer's argument that it acted within the intent of FSD 41 and therefore without discrimination is contrary to the well-established principle that discrimination need not be intentional. The disproportionate impact on a protected group is the test, not intention.

[95] In addition, the employer's argument that discrimination cannot flow from the definition of the benefits and their purpose cannot stand. The employer narrowly defined the purpose of FSD 41.3 to then conclude that it excludes birth by surrogacy and thus same-sex male couples; this makes the purpose itself discriminatory.

[96] According to the grievor, "… the appropriate, non-discriminatory purpose of FSD 41 is to defray the costs of travelling from a foreign post to attend the birth of [a] child, where the child cannot be born at post."

[97] According to the grievor, the employer has not established any defence to the discrimination. The employer failed to establish a *bona fide* occupational requirement. It did not demonstrate that excluding surrogacy from coverage under FSD 41.3 was rationally connected to the job or adopted in good faith. Nor did it demonstrate that including surrogacy would cause it undue hardship. Vague allusions to cost are insufficient.

**IV. Analysis**

[98] The parties agreed to bifurcate the hearing and leave the issue of remedy for a later decision. Therefore, this decision deals only with the merits of the case.

[99] The issue before me is whether the grievor was entitled, for the birth of his child, to the benefits provided by FSD 41. He seeks treatment equal to that of other parents whose child is born elsewhere than at the posting.

[100] The analysis is twofold. Was the grievor entitled to the coverage under FSD 41? Was the employer's interpretation and application of FSD 41 discriminatory?

[101] I find that FSD 41 does apply to the grievor's situation and that he was entitled to coverage. I also find that the employer's interpretation and application of FSD 41 was discriminatory. The grievor is entitled to benefits under FSD 41.3.

**A. Whether the grievor was entitled to coverage under FSD 41**

[102] The FSDs are part of the collective agreement. This is an important point for two reasons. I am bound by the terms of the collective agreement and cannot amend them (see s. 229 of the *Act*), and the collective agreement contains a no-discrimination clause, which reflects s. 7 of the *CHRA* by prohibiting discrimination on the basis of sexual orientation and family status.

[103] For the purpose of this analysis, it is useful to reproduce the relevant passages of the FSDs, including an extract of the introduction and the text of FSD 41.3, with the general scope of FSD 41:

> …
>
> ***Introduction***
>
> *The Foreign Service Directives are co-developed by participating bargaining agents and public service employers at the National Joint Council of the Public Service of Canada.*
>
> …
>
> *To achieve the objectives of the Directives, consideration will continue to be given to situations which may arise which are not specifically dealt with in the Directives but which fall within the intent of the Directives as described in the basic principles outlined above or explained in the Introduction to a specific directive.*
>
> [The basic principles are comparability to the employee's situation while in Canada, incentives to recruit into and to retain employees in the foreign service, and provisions to carry out programs abroad.]
>
> …
>
> ***FSD 41 - Health Care Travel***
>
> ***Scope***
>
> ***Introduction***
>
> *At a number of locations abroad, the standards of medical care and the extent of treatment facilities or specialist services are inadequate in comparison with those in Canada. Additionally, at*

> *several locations, while adequate health care/facilities exist, treatment costs are excessive. This directive is designed to ensure that an employee and/or dependant have access to necessary and suitable health care facilities and services on a cost-effective basis as determined by the deputy head.*
>
> …
>
> *41.1.2 The deputy head shall determine the suitability of health care facilities by reference to the advice of a roster doctor, an official of Health Canada or other qualified medical practitioner. An assessment of the suitability of treatment centres should also take into account cultural, social and political factors.*
>
> *41.1.3 Where the deputy head is satisfied that necessary and suitable health care facilities or services are not available locally, or local treatment costs exceed costs of travel, treatment and living expenses at the nearest suitable location, another suitable location, or Canada, the following may be approved: [travel leave, travelling expenses, living expenses].*
>
> …
>
> ***41.3 Accouchement***
>
> *41.3.1 In cases of accouchement, where payment of actual and reasonable travelling expenses has been authorized under subsection 41.1.3 for an employee and/or a dependant who travels to the nearest suitable place; or where the deputy head determines it is cost-effective and the employee so requests, to Canada or another suitable place where accouchement may take place, the deputy head may also approve:*
>
> *(a) the payment of actual and reasonable living expenses both before and after the time of delivery where:*
>
> > *(i) the visa or other re-entry regulations delay the return to the post; and/or*
> >
> > *(ii) the common carrier approved by the deputy head to provide the most suitable and appropriate means of transportation requires that such travel take place prior to the expected date of delivery; and/or*
> >
> > *(iii) there is a medical requirement acceptable to Health Canada;*
>
> *(b) an allowance for travelling expenses and living expenses, subject to FSD 70 Reporting Requirements and Verification of Allowances, for a period not to exceed five days, in accordance with subsection 41.1.3, to enable the spouse or common-law partner to be present at the birth of the child.*
>
> …

[104] The parties agree on the principles of interpretation — a provision must be read in its wider context, giving meaning to its plain language but with a sense of its

underlying purpose. An extract from Brown and Beatty, *Canadian Labour Arbitration*, 5th Edition, paragraph 4:20, quoting from *Imperial Oil Strathcona Refinery v. Communications, Energy and Paperworkers Union of Canada, Local 777* (2004), 130 L.A.C. (4th) 239 at 252, reads as follows: "In the interpretation of collective agreements, their words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object, and the intention of the parties."

[105] The purpose of FSD 41.3 is where the parties part ways. According to the employer, as it is part of FSD 41, titled "Health Care Travel", FSD 41.3 must be interpreted with a view that the birth will occur outside the posting, for medical reasons. In the grievor's view, the purpose is to defray the costs of travel and living expenses to attend the birth when the birth occurs outside the posting.

[106] Each side can point to a justification for its reasoning. The employer argues that FSD 41.3 comes under travel for health care, and accouchement deals with the need for an employee or a dependant to give birth in suitable health care facilities.

[107] The grievor in turns notes that FSD 41.3 deals not only with the mother giving birth but also with the attendance of the other parent at the birth and living expenses while awaiting a visa for the newborn child.

[108] However, as in all contract interpretation, the words must be viewed in their context. FSD 41.3 - "Accouchement" is indeed part of FSD 41 entitled "Health Care Travel". However, "health care" is not defined in the directive.

[109] The purpose of FSD 41 is stated in its introduction: "This directive is designed to ensure that an employee and/or dependant have access to necessary and suitable health care facilities and services on a cost-effective basis as determined by the deputy head."

[110] Access to necessary and suitable health care facilities does not in itself restrict the application of FSD 41 to an employee or his dependant directly receiving health care; rather, they should have access to necessary and suitable health care facilities and services.

[111] FSD 41.1.2 states that it is the deputy head who determines the suitability of facilities and treatment centres. The suitability of facilities is based, among other

things, on the advice of Health Canada. FSD 41.1.2 further specifies that the assessment of the suitability of treatment centres "… should also take into account cultural, social and political factors." Like "health care", the term "services" is not defined in the directive and determining the suitability of health care "services" is not addressed in FSD 41.1.2.

[112] FSD 41.1.3 then provides that, "[w]here the deputy head is satisfied that necessary and suitable health care facilities or services are not available locally …", travel leave, travelling expenses, living expenses and other payments may be approved. The birth of the grievor's son occurred outside of China because there was no access in China to suitable health care facilities. There was no dispute that child birthing was determined by Health Canada not to be suitable in China. Otherwise, there is no indication that the employer considered the grievor's access to suitable health care services related to surrogacy in China, including cultural, social and political factors. Again, there was also no dispute that Chinese law does not recognize a same-sex couple as the parents of a child born by surrogate. According to the employer, FSD 41 did not apply to the grievor because neither he nor his spouse required medical care. I find nothing in the wording of FSD 41, or in 41.1.2 and 41.1.3, to support that interpretation or to justify why the grievor's actual and reasonable traveling expenses would not be covered under 41.1.3.

[113] FSD 41.3 - "Accouchement" concerns childbirth and is premised on the authorization of travelling expenses under FSD 41.1.3. Where such payments have been authorized, the deputy head may also approve living expenses before and after the time of delivery, including where visa or other re-entry regulations delay the return to the post (FSD 41.3.1(a)). The deputy head may also approve an allowance for travelling and living expenses to enable a spouse to be present at the birth of the child (FSD 41.3.1(b)). Again, the employer says FSD 41 did not apply to the grievor because neither he nor his spouse required medical care. However, it is difficult to reconcile that interpretation when FSD 41.3 does not strictly deal with medical care. It also provides benefits to assist parents of a newborn child. It provides for the travel and accommodation of the other parent to attend the birth. That is not medical care but rather ensuring a healthy start to parenthood. It also provides coverage for accommodation and travel while waiting for the newborn's visa — again, it is not medical but rather covers parental responsibility for a child at the most vulnerable stage of life.

[114] Furthermore, despite the employer's argument, there is no specific wording restricting the application of 41.3.1(a) to situations in which the employee is pregnant or has a pregnant spouse; or restricting 41.3.1(b) to situations where the person giving birth is either an employee or a dependant.

[115] Given that the grievor's situation was a case of childbirth, which required access to suitable health care facilities and services, there was no reason why the grievor's actual and reasonable traveling expenses would not be covered under 41.1.3. I also find nothing in the wording of FSD 41.3 to support the employer's denial of coverage under 41.3.1(a) and (b).

[116] In other words, FSD 41.3 did apply to the grievor and his spouse as parents of a newborn who should attend his birth and assume full responsibility for his well-being.

[117] The employer asserts that since surrogacy is not expressly mentioned, the parties meant to exclude it from the application of FSD 41.3. This runs counter to the way the FSDs are supposed to be interpreted, according to their introduction: "… consideration will continue to be given to situations which may arise which are not specifically dealt with in the Directives but which fall within the intent of the Directives as described in the basic principles …", one of which is comparability.

[118] Comparability means application of the FSD should not place the employee in a better or worse situation while serving outside of Canada than he would have been had he remained in Canada. According to the employer, allowing the request for travel expenses due to surrogacy would place the grievor in a more favourable situation than he would have been if he had had access to surrogacy in Indiana while serving in Canada.

[119] The argument focuses on one small part of the claimed travel expenses, from Ottawa to Indianapolis. While FSD 41 provides deputy heads with the discretion to determine whether cost-effective facilities and services can be provided at another suitable location or in Canada, this does not take away from the fact that childbirth and surrogacy services were not available to the grievor in China. He had to travel to access the necessary and suitable facilities and services. Completely denying coverage under all of FSD 41 because of surrogacy places the grievor in a less favourable situation than if he had remained in Canada.

**B. Whether the employer's interpretation of FSD 41 is discriminatory**

[120] Discrimination has long been an unfortunate reality for same-sex couples, and marriage and parenthood have been only recently made available to them. There is something heartbreaking in the grievor feeling that somehow, his parenting experience is being treated differently from that of his colleagues in heterosexual relationships.

[121] The discrimination analysis begins, as both parties have correctly stated, by determining whether there is *prima facie* discrimination. The test for discrimination, including *prima facie* discrimination, is stated succinctly in *Moore v. British Columbia (Education)*, 2012 SCC 61, as follows:

> …
>
> *[33] As the Tribunal properly recognized, to demonstrate* prima facie *discrimination, complainants are required to show that they have a characteristic protected from discrimination under the* Code; *that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a* prima facie *case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.*
>
> …

[122] *Moore* dealt with discrimination in the provincial education system in British Columbia, and the applicable legislation was the *Human Rights Code* (RSBC 1996, c. 210, s. 8) of that province. In this case, the protected characteristics are found in the collective agreement and as follows in s. 3(1) of the *CHRA*, which is applicable to the federal public sector:

> ***3 (1)*** *For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.*

[123] Section 3.1 of the *CHRA* provides that "… a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds." The grievor is part of a same-sex male couple who decided to start a family by way of surrogacy. Neither the grievor nor his spouse

could deliver a child and surrogacy was the primary reproductive means by which they could do so. Therefore, I find that the grievor has a combination of characteristics protected from discrimination on the grounds of both sexual orientation and family status.

[124] The grievor argues that he suffered an adverse impact because he was denied benefits offered to other couples who had a child outside the post. The employer submits that there was no denial of benefits, since those benefits did not cover the grievor or his spouse and, in any event, the grievor received benefits under other FSDs.

[125] The employer cites in this respect *Toronto (City)*, in which a same-sex male couple was denied coverage for a fertility treatment that was necessary for a surrogacy. The coverage was meant to cover the costs for an employee or their dependant, not the costs for third parties, who in that case were the surrogate and the egg donor. The arbitrator ruled that it was not discrimination since the plan covered employees and their dependants, not third parties.

[126] The employer's reasoning is the same: the grievor cannot claim an adverse effect since in any event, he is not covered by FSD 41.3.

[127] That reasoning is remarkably circular. Because the benefit is not offered, the grievor cannot claim entitlement to it or say that the denial had an adverse impact on him. Yet, this is precisely the subject matter of the grievance: being denied benefits equal to those offered to other employees whose child is born away from post. The grievor is seeking compensation for travel and living expenses for himself and his spouse pursuant to the directive, not for the third-party surrogate as was the case in *Toronto (City)*.

[128] I cannot but conclude that the grievor suffered an adverse impact by being denied those benefits. I have already concluded that the employer's interpretation and application of FSD 41 in denying coverage to the grievor is not supported by the wording and context of the directive. In denying those benefits, the grievor and his spouse were not compensated for travel and living expenses for the birth of their child. The benefits the grievor received from other FSDs would have been provided to him regardless of the birth of his child and did not compensate him in this regard.

[129] The third step is determinative to the *prima facie* discrimination analysis. Was the grievor's sexual orientation and family status a factor in the denial?

[130] As indicated previously, FSD 41 provides broad discretion to the employer to cover health care travel. However, nothing in the wording of FSD 41 supports the employer's position that surrogacy is excluded. In exercising its discretion, the employer did not consider elements of FSD 41 that were relevant to the grievor's situation, like the cultural, social and political factors that made surrogacy not an option for the grievor and his spouse in China. In its interpretation, the employer included conditions not found in the wording of FSD 41.3, including that coverage can only be provided to an employee who is pregnant or who has a pregnant spouse. By doing so, the employer excluded the grievor from the application of FSD 41. His protected characteristics were a factor in that exclusion because in the context of this same-sex male couple, neither he nor his spouse could get pregnant, and for them to start a family and have a biologically related child necessarily involved surrogacy.

[131] I conclude that there is *prima facie* discrimination.

[132] The employer denies the existence of *prima facie* discrimination, but in any event, it states that if there were *prima facie* discrimination, then FSD 41, and the lack of entitlement to benefits for travel and living expenses related to childbirth where an employee or dependant is not bearing the child, is a *bona fide* occupational requirement.

[133] Section 15(1)(a) of the *CHRA* provides that it is not a discriminatory practice if "… any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement…".

[134] Section 15(2) of the *CHRA* then provides that, for any practice mentioned in s. 15(1)(a) to be considered to be based on a *bona fide* occupational requirement, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

[135] The Supreme Court of Canada decision in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*"), sets out the

content of an employer's duty to accommodate and the analysis by which to assess an employer's efforts.

[136] To establish a *bona fide* occupational requirement, the employer must prove:

> …
>
> *(1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;*
>
> *(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and*
>
> *(3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.*
>
> [*Meiorin*, at para. 54]

[137] The employer argues that FSD 41 is rationally connected to the employer's purpose of ensuring that it is applicable to employees or dependants in need of receiving medical care when the standards in the place of posting are considered inadequate in comparison with those in Canada, or where the cost of treatment at the post would be excessive. Similarly, the employer argues that FSD 41 was adopted in good faith considering that the FSDs are co-developed between the employer and the bargaining agents through the National Joint Council.

[138] In my view, the employer has established that FSD 41 serves a purpose rationally connected to the performance of foreign service work, to provide access to necessary and suitable health care facilities and services for employees and dependants, and that FSD 41 was adopted in good faith for the fulfilment of that purpose. However, there was no attempt to take into account the grievor's particular situation.

[139] The employer argues that it would cause it undue hardship to accommodate the grievor by having FSD 41 cover surrogacy situations. If employees serving abroad and their dependants were provided with coverage for travel and living expenses in situations such as surrogacy, where they are not themselves requiring health care, then the purpose and rationale for FSD 41 would be undermined and the issue of the

adequacy or suitability of the health care at post would be rendered meaningless. This would fundamentally change the nature of the benefit. The broader implications include the absence of any basis for distinguishing between birth by a surrogate mother and any other means of family formation, such as adoption. Overall, according to the employer, the operational cost would be undue.

[140] It is difficult to reconcile the employer's position with the actual wording of FSD 41, which I have found to cover the grievor's circumstances and which provides broad discretion in line with the principle that situations may arise which are not specifically dealt with in the FSDs. Nor does this interpretation fundamentally change FSD 41 as suggested by the employer. The interpretation of FSD 41 in this case is still premised on the suitability of health care facilities and services at post.

[141] Otherwise, the employer provided no information with respect to operational costs, and I agree with the grievor that the employer has simply not met its burden to demonstrate undue hardship. There is no dispute that employees serving in foreign posts are or will want to become parents and that some of them will have children while posted outside Canada. This is part of the purpose and rationale of FSD 41.3 and, more broadly, the FSDs include the principle of "incentive-inducement" to attract and retain employees in a foreign service career. If the employer is willing to assume the travel costs linked to birth, it becomes difficult to justify why one type of birth (by the birth mother) provides benefits and the other (by surrogacy) does not, even more so if one protected group cannot envisage having a child without resorting to surrogacy. Without more, it also is difficult to understand how this will lead to an undue increase in costs.

[142] The employer argued that it took steps to accommodate the grievor through other types of allowances. Accommodation must be reasonable; it need not be perfect.

[143] In my view, the fact that the employer may have offered assistance under other FSDs adds nothing to the undue hardship analysis in this case, which is premised specifically on FSD 41. In the end, the grievor and his spouse did not receive any compensation from the employer for travel and accommodations to attend the birth of their child.

[144] I find that the grievor suffered adverse treatment, given the difference between the couple with a birthing mother that can apply simply for the benefits offered by FSD

41.3 and, in this case, the same-sex male couple having a child by surrogate. Sexual orientation and family status are factors in that adverse treatment and the employer's interpretation of FSD 41. The employer did not establish that its interpretation of FSD 41 is based on a *bona fide* occupational requirement. Therefore, I find that the employer's interpretation of FSD 41 is discriminatory.

## V. Conclusion

[145] Obviously, one must recognize that a surrogacy situation is novel. However, the FSDs provide that their interpretation should allow for situations not specifically addressed in the FSDs in light of their guiding principles, including comparability. Surrogacy is such a situation, in the context of FSD 41.

[146] I find that the interpretation given to FSD 41 in the grievor's case constitutes discrimination based on sexual orientation and family status. It has an adverse impact on the grievor and his spouse, as a male same-sex couple who choose to have a biologically related child by way of surrogacy.

[147] The birth of their child should have been for the grievor and his spouse a source of joyous anticipation, not undue financial preoccupation.

[148] I leave it to the parties to determine a remedy, or to ask for assistance from the Board if they are unable to come to an agreement.

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

*(The Order appears on the next page)*

## VI. Order

[150] The grievance is allowed.

[151] The grievor is entitled to coverage under FSD 41.

[152] The employer's interpretation of FSD 41 is discriminatory.

[153] In the event that the parties cannot agree on a remedy, the Board remains seized to decide that issue. Within 90 days of the receipt of this decision, the parties shall notify the Board in writing that the assistance of the Board is required to resolve the issue.

August 18, 2023.

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