**Date:** 20230907

**File:** 566-02-12132

**Citation: 2023 FPSLREB 81**

*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

**NAFISSA DIOP**

Grievor

and

**TREASURY BOARD**
**(Department of Public Works and Government Services)**

Employer

Indexed as
*Diop v. Treasury Board (Department of Public Works and Government Services)*

In the matter of an individual grievance referred to adjudication

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

**For the Grievor:** Geoff Dunlop, counsel

**For the Employer:** Véronique Newman, counsel

Heard via videoconference,
November 29 and 30, 2022.

**REASONS FOR DECISION**

## I. Introduction

[1] This grievance is about the required repayment of maternity and parental allowances in a situation in which the grievor left the core public administration to work for a separate agency before completing her required return-to-work period.

[2] The grievor is Nafissa Diop. In 2008, she began working at Public Works and Government Services Canada (PWGSC), now commonly known as Public Services and Procurement Canada (PSPC). PWGSC is part of the core public administration of the federal government. As such, the grievor's legal employer while working at PWGSC was the Treasury Board. Employed at the CR-04 group and level, she was part of the Program and Administrative Services (PA) bargaining unit, represented by the Public Service Alliance of Canada (PSAC or "the union").

[3] From July 2013 to July 2014, the grievor took consecutive periods of maternity and parental leave without pay. During her leave without pay, she received the maternity and parental leave allowances provided for in articles 38 and 40 of the PA group collective agreement between PSAC and the Treasury Board. The collective agreement at issue in this grievance expired on June 20, 2014 ("the collective agreement").

[4] Maternity and parental allowances paid under the collective agreement are commonly referred to as a "top-up" because they are paid in addition to the Employment Insurance (EI) benefits employees receive during periods of maternity and parental leave without pay.

[5] As will be detailed later in this decision, employees who receive the top-up must agree to return to work for a period equal to the period they were in receipt of the allowances. The collective agreement at issue requires employees to complete their return to work with the employer, the Treasury Board, or with one of three separate agencies specifically listed in the collective agreement. If they do not, they are required to repay the allowance or a portion of it.

[6] The grievor began her return to work in July 2014, but that September, she was offered a position with the National Energy Board (NEB). Now called the Canadian Energy Regulator (CER), the NEB is a separate agency within the federal government.

The NEB was not one of the three separate agencies listed in the relevant clauses in articles 38 and 40 of the collective agreement at issue.

[7] The grievor began working at the NEB in January of 2015 and therefore did not complete her return-to-work period with the employer. As such, she was required to repay a portion of her top-up, totalling $9692.11.

[8] The grievor did not dispute that she was treated in accordance with articles 38 and 40. However, she argued that when the employer required her to repay part of her top-up, it discriminated against her on the basis of sex, in contravention of the no-discrimination article of her collective agreement, article 19. I will note that the grievance referred to a second ground of discrimination, family status, but the grievor did not pursue this ground at the hearing.

[9] The grievor argued that only women, or primarily women, experience an adverse impact of having to repay a portion of the maternity and parental top-up in these circumstances, and that this meets the test for a finding of discrimination. She sought an order that she be refunded the top-up she repaid, along with damages for pain and suffering under s. 53(2)(e) of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; "*CHRA*").

[10] The employer argued that the repayment requirements in articles 38 and 40 do not discriminate based on sex. The articles are freely negotiated collective agreement provisions that require repaying the top-up if an employee does not return to work for the employer or one of the three separate agencies listed in the articles. The grievor signed an agreement to return to work but then made a personal choice to work for a separate agency not listed in the clauses at issue. Because she did not fulfil her return-to-work agreement, she was required to repay a portion of the top-up, in accordance with the collective agreement. This treatment did not amount to discrimination based on sex, it argued.

[11] The employer also argued that if the maternity and parental allowance repayment clauses in the collective agreement are found to discriminate based on sex, PSAC bears equal responsibility and should be found jointly liable for any damages.

[12] I have structured this decision as follows. First, I will explain the structure of the maternity and parental leave collective agreement provisions and how they

intersect with the employment structures under the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). Second, I will review the evidence concerning the grievor's situation in more detail. Third, I will analyze the parties' arguments, following which I will provide my reasons for decision. A final section provides some concluding comments.

[13] I am sympathetic to the grievor and understand why she experienced confusion for having to repay a portion of her top-up, given that her decision to work at the NEB meant that she would continue to work for a part of the federal government.

[14] However, for the reasons that follow, I find that the grievor has not established that she was discriminated against based on her sex. As such, her grievance is denied, and no corrective action is ordered.

[15] That said, following testimony from the grievor about the difficulties she faced addressing the tax implications of the repayment, I make a recommendation to the employer.

[16] In this decision, "the Board" shall refer to the Federal Public Sector Labour Relations and Employment Board, as well as its predecessors.

## II. The collective agreement, the return-to-work, and separate agencies

[17] I will start with a review of the collective agreement provisions at issue.

[18] As noted, article 38 provides for maternity leave without pay and the payment of a maternity allowance. Article 40 provides for parental leave without pay and the payment of a parental allowance. I will summarize the essential structure of these articles as they apply to the grievor (the articles have slightly modified provisions for residents of Quebec, which are not germane to this grievance).

[19] The collective agreement at issue in this grievance states the following:

- The employer shall grant up to 18 weeks of leave without pay to employees for maternity leave (clause 38.01) and up to 37 weeks for parental leave (clause 40.01). It is well known that many employees take the 2 leaves consecutively; that is, back-to-back. Since the period of parental leave must end within the 52 weeks following the birth of a child, an employee who takes

a combined period of maternity and parental leave would have a combined leave without pay of 52 weeks.

- Under the provisions of the federal *Employment Insurance Act* (S.C. 1996, c. 23), employees on maternity and parental leave are entitled to receive EI benefits.
- Subject to 3 conditions, employees are entitled to receive a maternity or parental allowance, which tops up their EI benefits to 93% of their pre-leave salary (clauses 38.02 and 40.02).
- The first of these conditions is that they must have completed six months of continuous employment before commencing the leave.
- The second condition is that the employee must provide the employer with proof that they have applied for maternity or parental EI benefits and that they are in receipt of those benefits, although they can apply for an advance.
- The third condition is that the employee sign an agreement to "return to work" for a period equivalent to the period for which she was paid benefits. Thus, an employee who takes a combined 52 weeks of maternity and parental allowances would need to return to work for 52 weeks following the completion of her leave.
- An employee who does not complete all or a portion of her return-to-work period must repay all or a portion of the allowance she received, in accordance with a formula in the articles.

[20] It is not necessary to reproduce the entirety of the collective agreement articles in question, as the issue in this grievance focuses solely on the return-to-work provisions. The return-to-work provision for the maternity allowance is found at clause 38.02(a)(iii), which reads as follows:

| | |
|---|---|
| ***38.02 Maternity Allowance*** | ***38.02 Indemnité de maternité*** |
| *(a) An employee who has been granted maternity leave without pay shall be paid a maternity allowance in accordance with the terms of the Supplemental Unemployment Benefit (SUB) Plan described in paragraphs (c) to (i), provided that she:* | *a) L'employée qui se voit accorder un congé de maternité non payé reçoit une indemnité de maternité conformément aux modalités du Régime de prestations supplémentaires de chômage (RPSC) décrit aux alinéas c) à i), pourvu qu'elle :* |

| | |
|---|---|
| *…* | […] |
| *(iii) has signed an agreement with the Employer stating that:* | *(iii) signe une entente avec l'Employeur par laquelle elle s'engage :* |
| *(A) she will return to work on the expiry date of her maternity leave without pay unless the return to work date is modified by the approval of another form of leave;* | *(A) à retourner au travail à la date à laquelle son congé de maternité non payé prend fin à moins que l'Employeur ne consente à ce que la date de retour au travail soit modifiée par l'approbation d'un autre type de congé;* |
| *(B) following her return to work, as described in section (A), she will work for a period equal to the period she was in receipt of maternity allowance;* | *(B) suivant son retour au travail tel que décrit à la division (A), à travailler une période égale à la période pendant laquelle elle a reçu l'indemnité de maternité;* |
| *(C)* ***should she fail to return to work for the Employer, Parks Canada, the Canada Revenue Agency or the Canadian Food Inspection Agency*** *in accordance with section (A), or should she return to work but fail to work for the total period specified in section (B), for reasons other than death, lay-off, early termination due to lack of work or discontinuance of a function of a specified period of employment that would have been sufficient to meet the obligations specified in section (B), or having become disabled as defined in the* Public Service Superannuation Act*, she will be indebted to the Employer for an amount determined as follows:* | *(C) à rembourser à l'Employeur le montant déterminé par la formule suivante* ***si elle ne retourne pas au travail avec l'Employeur, Parcs Canada, l'Agence du revenu du Canada ou l'Agence canadienne d'inspection des aliments*** *comme convenu à la division (A) ou si elle retourne au travail mais ne travaille pas la période totale stipulée à la division (B), à moins que son emploi ne prenne fin parce qu'elle est décédée, mise en disponibilité, ou que sa période d'emploi déterminée qui aurait été suffisante pour satisfaire aux obligations précisées à la division (B) s'est terminée prématurément en raison d'un manque de travail ou par suite de la cessation d'une fonction, ou parce qu'elle est devenue invalide au sens de la* Loi sur la pension de la fonction publique *:* |
| *(allowance received) X (remaining period to be worked following her return to work) / [total period to be worked as specified in (B)]* | *(indemnité reçue) X (période non travaillée après son retour au travail) / [période totale à travailler précisée en (B)]* |

| | |
|---|---|
| *however, an employee whose specified period of employment expired and who is rehired* ***in any portion of the Core Public Administration as specified in the*** **Public Service Labour Relations Act** ***or Parks Canada, the Canada Revenue Agency or the Canadian Food Inspection Agency*** *within a period of ninety (90) days or less is not indebted for the amount if her new period of employment is sufficient to meet the obligations specified in section (B).* | *toutefois, l'employée dont la période d'emploi déterminée expire et qui est réengagée* ***dans un secteur de l'administration publique fédérale spécifié à l'Administration publique centrale de la*** **Loi sur les relations de travail dans la fonction publique** ***ou Parcs Canada, l'Agence du revenu du Canada ou l'Agence canadienne d'inspection des aliments*** *dans les quatre-vingt-dix (90) jours suivants n'a pas besoin de rembourser le montant si sa nouvelle période d'emploi est suffisante pour satisfaire aux obligations précisées à la division (B).* |

[Emphasis added]

[21] The parental leave clause at 40.02(a)(iii) is identical to the equivalent maternity leave clause, except that it refers to the parental allowance and uses both male and female pronouns to describe an employee's obligations.

[22] The essential feature of the return-to-work provision at issue is that to fulfil her commitment, the employee must do so with the employer, also referred to in the clause as "the Core Public Administration", or with the Canada Revenue Agency (CRA), Parks Canada, or the Canadian Food Inspection Agency (CFIA).

[23] In the collective agreement, the definition of "employer" references the Treasury Board.

[24] "Employer" is also defined at s. 2 of the *Act*, as follows, where the existence of separate agencies is also introduced:

| | |
|---|---|
| … | […] |
| **employer** *means Her Majesty in right of Canada as represented by* | **employeur** *Sa Majesté du chef du Canada, représentée :* |
| *(a) the Treasury Board, in the case of a department named in Schedule I to the* Financial Administration Act *or another portion of the federal* | *a) par le Conseil du Trésor, dans le cas d'un ministère figurant à l'annexe I de la* Loi sur la gestion des finances publiques *ou d'un autre secteur de l'administration* |

| | |
|---|---|
| *public administration named in Schedule IV to that Act; and* | *publique fédérale figurant à l'annexe IV de cette loi;* |
| *(b) the separate agency, in the case of a portion of the federal public administration named in Schedule V to the* Financial Administration Act. *(*employeur*)* | *b) par l'organisme distinct en cause, dans le cas d'un secteur de l'administration publique fédérale figurant à l'annexe V de la* Loi sur la gestion des finances publiques. *(*employer*)* |
| … | […] |

[Emphasis in the original]

[25] PWGSC is a department listed in Schedule I to the *Financial Administration Act* (R.S.C., 1985, c. F-11; "*FAA*"). The CRA, Parks Canada, and the CFIA are all listed as separate agencies under Schedule V to the *FAA*.

[26] Although the NEB was also listed in Schedule V to the *FAA* when the grievance was filed, it was not one of the three agencies listed in clauses 38.02(a)(iii)(C) or 40.02(a)(iii)(C) of the collective agreement at issue in this grievance.

[27] Following a discussion with the parties, I took note of the fact that the parties agreed to broaden the scope of the return-to-work provision in the collective agreement for the PA group signed on October 23, 2020, with an expiry date of June 20, 2021 ("the 2021 PA agreement"). In that agreement, the maternity allowance return-to-work clause at 38.02(a)(iii)(A) now reads as follows:

| | |
|---|---|
| ***38.02 Maternity allowance*** | ***38.02 Indemnité de maternité*** |
| … | […] |
| *iii. has signed an agreement with the Employer stating that:* | *iii. signe une entente avec l'employeur par laquelle elle s'engage :* |
| *A. she will return to work* ***within the federal public administration, as specified in Schedule I, Schedule IV or Schedule V of the*** **Financial Administration Act** *on the expiry date of her maternity leave without pay unless the return to work date is modified by the approval of another form of leave ….* | *A. à retourner au travail* ***au sein de l'administration publique fédérale, auprès d'un des employeurs mentionnés aux annexes I, IV ou V de la*** **Loi sur la gestion des finances publiques**, *à la date à laquelle son congé de maternité non payé prend fin à moins que l'employeur ne consente à ce que la date de retour au travail soit* |

*modifiée par l'approbation d'un autre type de congé* […]

[Emphasis added]

[28] The parental leave clause at 40.02(a)(iii)(A) in the 2021 PA agreement was revised in the same way, except that it refers to parental leave and uses both male and female pronouns.

[29] In other words, under the 2021 PA collective agreement, an employee in the PA bargaining unit can fulfil her return-to-work obligations at any part of the federal public administration listed in Schedules I, IV, of V to the *FAA*. This includes Treasury Board departments (Schedule I), those agencies which are portions of the core public administration (Schedule IV), and separate agencies (Schedule V).

[30] The current version of Schedule V to the *FAA* lists approximately 20 separate agencies, including the CRA, Parks Canada, the CFIA, and the CER (taking the place of the NEB).

[31] In other words, had the grievor taken her maternity and parental leave under the terms of the 2021 PA collective agreement, she would have been able to fulfil her return-to-work obligations by working at the NEB-CER.

[32] The 2021 PA collective agreement was the one in effect as of the date of the hearing into this matter; however, it is not the collective agreement at issue in this grievance.

[33] I also note that the collective agreement to which the grievor was subject, once she began working at the NEB, contained a maternity and parental allowance clause similar to the ones now in effect with the 2021 PA collective agreement. That collective agreement was between the NEB and the Professional Institute of the Public Service of Canada (PIPSC) and had an expiry date of October 31, 2014 ("the NEB-PIPSC collective agreement"). At clause B9.02 of that agreement, titled "Maternity and Parental Allowances", the return-to-work provision requires an employee to "… return to work either with the National Energy Board or for any other Federal public service employer listed in Schedules I, IV and V of the *Financial Administration Act* …".

[34] In other words, had the grievor taken her maternity and parental leave and related allowances at the NEB and then left the NEB to work for PWGSC, she would

have fulfilled the return-to-work provisions under the NEB-PIPSC collective agreement and would not have been required to repay her allowance. However, once again, the NEB-PIPSC collective agreement is not at issue in this grievance.

**III. Summary of the evidence**

[35] The essential facts of this case can be briefly summarized, based on the agreed statement of facts, the joint book of documents submitted by the parties, and the testimony of the grievor. The employer did not call any witnesses.

[36] The grievor began working for PWGSC in October of 2008, in Calgary, Alberta. She worked as a procurement assistant classified at the CR-04 group and level.

[37] The grievor was on a combined period of maternity and parental leave without pay from July 8, 2013, to July 6, 2014. During that time, she received the maternity and parental allowance top-ups described earlier in this decision.

[38] Before proceeding on leave without pay, in June of 2013, the grievor signed both a "Maternity Leave Agreement and Undertaking" and a "Parental Leave Agreement and Undertaking". Paragraphs 2 and 4 of the maternity leave agreement read as follows:

> *2. In conformity to clause 38.02(a) (iii) (A), and (B), I undertake to return to work for the Employer* ***on 07/07/2014*** *unless this date is modified with the Employer's consent. Following my return from maternity leave without pay, I will work for a period equal to the period I was in receipt of the maternity allowance.*
>
> …
>
> *4. I recognize the implications of clause 38.02(a) (iii) (C) of the collective agreement if I were not to return to work as stipulated above.*
>
> [Emphasis in the original]

[39] The parental leave agreement includes the equivalent statements, except that they reference the clauses in article 40.

[40] The grievor testified that she signed the maternity and parental leave agreements but that she understood "employer" to mean the federal public service or the Government of Canada. She testified that she had been provided the forms and that she signed them. She did not obtain or seek advice from her employer or union before signing them.

[41] The grievor returned to work at PWGSC in her CR-04 position on July 7, 2014.

[42] On September 2, 2014, the grievor was offered a position at the NEB, starting on October 14, 2014. At PWGSC, she had been a procurement assistant. The position at the NEB was that of a procurement officer, which represented both career progression and a pay increase.

[43] After submitting her resignation to PWGSC, the grievor was informed that she would have to repay a portion of her maternity and parental leave allowances in the amount of $14 654.56. After learning of this, the grievor discussed the issue with the NEB and with PWGSC. The NEB agreed to delay her start date, and PWGSC management allowed her to rescind and delay her resignation.

[44] The grievor's last day of work at PWGSC was January 11, 2015.

[45] By delaying her departure, the grievor reduced the amount of the allowance that she was required to pay back by about $5000, to $9692.11. This amount was deducted from her pay at the NEB at the rate of $197.80 biweekly. It took 49 pay periods for the allowance to be fully repaid, and therefore, the repayment was completed by the end of December 2016.

[46] I will take note that in the form detailing the overpayment, the amount owed by the grievor was described as an overpayment related to "… Maternity/Parental top-up allowance received for 52 weeks." In other words, in its notice of salary overpayment, the employer did not distinguish between the maternity and parental leave allowances.

[47] However, at the hearing, the employer did argue a distinction between the two allowances.

[48] I take note that by working for PWGSC from July 7, 2014, to January 11, 2015, the grievor fulfilled approximately 27 weeks of her required return-to-work period. This left approximately 25 weeks of it not fulfilled. In effect, the grievor fulfilled the terms of her maternity allowance return-to-work provision, which was 17 weeks, and she fulfilled 10 weeks of her parental allowance return-to-work provision. The amount that she was required to repay was in effect equal to 25 weeks of her parental allowance.

[49] This grievance was filed on November 20, 2014. It alleged a violation of article 19, the no-discrimination article of the collective agreement. The grievance went through the internal grievance process. I take note of the union's written grievance presentation at the final level, which was included in the joint book of documents. That presentation focused on article 38, on maternity leave. It stated that following a human rights complaint by a CRA employee who accepted a position at the Treasury Board, PSAC and the Treasury Board had gone through a process of reaching "[b]ridging agreements" to allow for transfers between the Treasury Board and separate agencies. It described the failure to include the NEB in the list of agencies in article 38 as an "oversight", given that the NEB-PIPSC collective agreement allowed for bridging.

[50] The employer's final-level reply describes the grievance as being related to both maternity and parental allowances, and it denied the grievance. The reply states that the employer is not in a position to act outside the terms of the collective agreement.

[51] The grievance was referred to adjudication on February 9, 2016, pursuant to s. 209(1)(a) of the *Act*.

[52] Since her grievance raised issues involving the interpretation or application of the *CHRA*, the grievor gave notice of the issue to the Canadian Human Rights Commission (CHRC) per s. 210(1) of the *Act*. The CHRC declined to participate in this process.

[53] On June 28, 2021, the grievor left the NEB, now the CER, and returned to work at PSPC.

[54] Finally, I wish to take note of the grievor's testimony about the tax implications of her repayment. She testified that when she received the maternity and parental allowances in 2013 and 2014, she paid income taxes on them. Her repayment, which totalled $9692.11, was the gross amount of the allowances she had earned. She testified that when she tried to change her 2014 income tax return, the CRA asked her to provide a revised T4 slip for 2014. By then it was 2017, and she testified that PWGSC did not know how to supply her with a revised T4 slip.

[55] Included in the joint book of documents was a letter to the grievor from a compensation advisor at the NEB dated March 7, 2017, which stated as follows:

…

***RE: MATERNITY TOP-UP ALLOWANCE REPAYMENT***

…

*Please accept this letter as official receipt for the recovery of the maternity allowance paid to you as follows:*

*2014 - $5,142.80*

…

*This gross amount of $5,142.80 was recovered from earning* [*sic*] *in 2016. As we recovered the gross amount, as opposed to the net amount of the overpayment, you may be entitled to a refund of Tax, CPP and EI paid on these payments.*

*Please provide a copy of this letter to the Canada Revenue Agency for any adjustments or reassessments of your tax returns that may be required.*

*Please contact our office should you require additional information.*

…

[56] The grievor testified that she provided that letter to the CRA but that it told her that a revised T4 slip was required. She testified that the matter is still not resolved.

## IV. Summary of the arguments

### A. For the grievor

[57] The grievor argued that the return-to-work provisions in the maternity and parental leave articles in the collective agreement at issue, as they pertained to her, violated the no-discrimination clause of that collective agreement, article 19, which reads as follows:

| | |
|---|---|
| ***19.01*** *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Alliance, marital status or a conviction for which a pardon has been granted.* | ***19.01*** *Il n'y aura aucune discrimination, ingérence, restriction, coercition, harcèlement, intimidation, ni aucune mesure disciplinaire exercée ou appliquée à l'égard d'un employé-e du fait de son âge, sa race, ses croyances, sa couleur, son origine nationale ou ethnique, sa confession religieuse, son sexe, son orientation sexuelle, sa situation familiale, son incapacité mentale ou physique, son adhésion à l'Alliance ou son activité dans celle-ci, son état matrimonial ou une* |

| | |
|---|---|
| | *condamnation pour laquelle l'employé-e a été gracié.* |
| … | […] |

[58] The grievor did not dispute that the employer applied articles 38 and 40 correctly. Under the terms of those articles, she was obligated to repay a portion of her maternity and parental allowances, and she did.

[59] However, she argued that the employer's requirement that she repay a portion of her allowances was wrong. She was an employee of the federal government who became pregnant and then took maternity and parental leave. She saw an opportunity to progress within her career in the federal public service and took the position at the NEB. She did not know about the distinction between the core public administration and separate agencies. That distinction is the kind of thing lawyers learn about during a summer course in law school, she argued, and was not evident to her when she agreed to accept the position at the NEB.

[60] Everything else about her transition to the NEB was seamless: her sick leave credits transferred from PWGSC to the new employer, her vacation-leave credits transferred, and her other benefits continued without interruption. In fact, the transition to the NEB was so seamless that even her debt to the Crown transferred. It was the NEB that deducted $197.80 from the biweekly paycheques she received from it.

[61] The grievor acknowledged that maternity and parental allowances were put in place to ameliorate a historic disadvantage facing women and parents of young children. But the return-to-work provisions in the collective agreement at issue still created a barrier for those who wished to advance their careers elsewhere in the federal public service. That is a barrier faced only by women or disproportionately by women.

[62] The grievor argued that the case law suggests that the Board should look for the subtle scent of discrimination and that the situation she faced stinks.

[63] The grievor centred her arguments on the decision of the Supreme Court of Canada (SCC) in *Fraser v. Canada (Attorney General)*, 2020 SCC 28. *Fraser* involved a group of female members of the Royal Canadian Mounted Police (RCMP) who

participated in a job-sharing program but were denied the ability to buy back pension rights on the same basis as full-time employees or employees who took leave without pay. The members successfully used s. 15(1) of the *Canadian Charter of Rights and Freedoms* (enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.); "the *Charter*") to win the pension buy-back rights they sought.

[64] The grievor argued that *Fraser* is the best and most recent decision on to how to adjudicate claims of discrimination; for earlier cases, see *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC) ("*Meiorin*").

[65] The grievor argued that *Fraser* stands for the principle that in discrimination cases, the Board should apply an "adverse impact analysis" to determine whether discrimination has taken place. At paragraph 30, the SCC stated that "[a]dverse impact discrimination occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground …". At paragraph 39, it framed this kind of barrier as systemic discrimination, and, quoting from its earlier decision in *Ont. Human Rights Comm. v. Simpsons-Sears*, 1985 CanLII 18 (SCC), it said, "If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory."

[66] The grievor argued that the adverse impact she faced was that she was not allowed to fulfil her return-to-work obligation at the NEB. She was faced with the choice of either repaying the allowance or forgoing her career advancement.

[67] By extension, any woman who before completing their return to work went to work at any agency other than the CRA, Parks Canada, or the CFIA also had to repay all or a portion of their maternity and parental allowances. The clauses act as a barrier to career development, the grievor argued.

[68] The employer does not have to **intend** to discriminate against women; all that is required to establish that discrimination took place is to demonstrate that the barrier at issue created "built-in headwinds" that resulted in a disproportionate impact on a protected group; see *Fraser*, at paras. 53 to 55, the grievor argued.

[69] The Board should not require a high evidential bar that the repayment provisions disproportionately affect women, the grievor argued; see *Fraser*, at paras.

99 to 104. Statistical evidence can be used; see *Fraser*, at paras. 58 and 59. She cited as authority a Statistics Canada study that demonstrates that more women take parental leave than men; see Feng Hou, Rachel Margolis, and Michael Haan, *Estimating Parental Leave in Canada Using Administrative Data*, Statistics Canada, August 29, 2017 ("*Estimating Parental Leave*"). The Board can also take guidance from the conclusions of the SCC in *Fraser* about the historic discrimination faced by women in the workplace, she argued; see also *Lavoie v. Treasury Board of Canada*, 2008 CHRT 27 at para. 145, and *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R 1219 at 1237.

[70] The purpose of an adverse-impact inquiry is to focus on the protection of groups who have experienced disadvantages, the grievor argued; see *Fraser*, at paras. 70 to 77. In so doing, courts (and this Board) should avoid the flaw of overemphasizing personal choice when analyzing impacts; see *Fraser*, at paras. 91 and 92. Therefore, this grievance should not be rejected because of the grievor's personal choice to have a child or to work at the NEB.

[71] The grievor also argued that the SCC cautioned against the misuse of a narrow or "mirror" comparator group as a test for determining whether a policy causes a discriminatory impact; see *Fraser*, at para. 94.

[72] The issue in this case is not the return-to-work provision per se, the grievor argued. The essential structure of the maternity and parental allowances scheme is justified: the employer grants leave without pay and provides the top-up allowances. The return-to-work provision creates an incentive to return to the workplace and is effectively a form of reverse earned leave. That is not discriminatory, she argued. However, the issue is that maternity and parental leave are treated differently than other forms of earned leave in the context in which an employee returns to work elsewhere in the public service, such as at the NEB. In the grievor's case, her sick leave and vacation leave transferred seamlessly. Only her maternity and parental leave return-to-work provisions did not transfer seamlessly. This was a negative barrier that the grievor and other women faced under the collective agreement at issue, and the Board should declare it discriminatory, she argued.

[73] Once it is established that the impact of the provision is discriminatory, the employer can then attempt to provide a reasonable, non-discriminatory explanation for the provision, show that the provision is a *bona fide* occupational requirement, or

show that it would experience undue hardship by eliminating the barrier, the grievor argued. However, the employer has no such explanation, other than that the language of the collective agreement was freely negotiated and that she made a personal choice.

[74] The grievor argued that the Board should declare the requirement to repay her maternity and parental allowances discriminatory under the collective agreement. She argued that the Board can find the clauses discriminatory and that it is within the Board's jurisdiction to, as she put it, "read the clauses down". A non-discriminatory form of the clauses would be the wording found in the 2021 PA collective agreement, she argued.

[75] The grievor also argued that she should receive damages for pain and suffering under s. 53(2) of the *CHRA* in the amount of $20 000. In support of these arguments, she cited *Abreu v. Transport Fortuna*, 2020 CHRT 35, *Douglas v. Treasury Board (Correctional Service of Canada)*, 2020 FPSLREB 51, and *Youmbi Eken v. Netrium Networks Inc.*, 2019 CHRT 44.

[76] With respect to a question about the impact of the grievor's return to work at PWGSC in 2021, the grievor argued that the clauses in question do not specify a time frame for the completion of the return-to-work requirement. The grievor has served her time and then some, and she should be reimbursed for the allowances that she was required to repay.

**B. For the employer**

[77] The employer argued that the issue in this case is not whether the collective agreement is discriminatory. The grievor accepted the maternity and parental leave allowances under the conditions provided for in the collective agreement. She did not fulfil the commitment she signed because she chose to work for a different employer. She has not made out a *prima facie* case that she was discriminated against on the basis of her sex, it argued.

[78] The employer argued that the grievor fulfilled the return-to-work requirement for her maternity allowance, which consisted of a 2-week waiting period and 15 weeks of top-up. By delaying her departure from PWGSC, her total return-to-work period lasted from July 7, 2014, to January 11, 2015. This means she completed her maternity allowance return-to-work commitment but did not fulfil the entire return-to-work

commitment for her parental allowance. This distinction should affect the Board's analysis of whether discrimination took place, the employer argued.

[79] The employer argued that the test for discrimination is well established. To make out a *prima facie* case of discrimination, a grievor must first demonstrate that they have a characteristic protected from discrimination, that they experienced an adverse impact, and that the protected characteristic was a factor in the adverse impact. If they meet that burden, the employer must provide a non-discriminatory explanation or rely on a statutory exception to justify the conduct or practice; see *Bassett v. Treasury Board (Correctional Service of Canada)*, 2017 PSLREB 60 at paras. 56 to 59, and *Moore v. British Columbia (Education)*, 2012 SCC 61 ("*Moore*") at para. 33.

[80] The employer agreed that the grievor demonstrated that she has a characteristic protected from discrimination (she is a woman) and that she suffered an adverse impact (having to repay a portion of her parental allowance). However, it argued that the grievor has not provided tangible evidence that there was an adverse impact on her career development or that the provision in question has the effect of holding back women seeking promotions. Such evidence would be required before the Board could conclude that an adverse impact exists; see *Canada (Attorney General) v. Bodnar*, 2017 FCA 171 at para. 26, and *Eady v. Treasury Board (Correctional Service of Canada)*, 2019 FPSLREB 71 at paras. 107 and 108.

[81] More crucially, the grievor has not made out the third part of the *prima facie* test, the employer argued, because there is no nexus between her sex and the adverse impact. The SCC has emphasized that a nexus must exist between the protected characteristic and the adverse impact; see *Moore*, at para. 33, *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para. 52, and *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 ("*Elk Valley*") at para. 69.

[82] The distinction made out in the collective agreement, between those who fulfil their return-to-work requirement and those who do not, is based on the employer that the employee is working for. This is not connected to any protected ground, the employer argued. The grievor's sex was not a contributing factor in her decision to work for the NEB. The fact that she is a woman is not enough. It has to play a role in creation of the adverse impact, it said.

[83] The employer argued that the Board should follow the principles adopted by the British Columbia Human Rights Tribunal (BCHRT) in a case that involved the requirement to return to work following a period of maternity leave top-up; see *Singh v. BC Hydro*, 2011 BCHRT 200 at paras. 50 to 54. In that case, the BCHRT found as follows, at paragraph 53:

> *[53] … The nature of the employment relationship does not ground a complaint under the* [British Columbia Human Rights Code]*, whether considered as permanent versus temporary, or on the basis of future commitment to the job. There does not appear to be a nexus between the denial of maternity top-up benefits in this case and grounds of sex or family status.*

[84] When looking for evidence of discrimination, courts often make a comparison between the grievor or complainant and another group that does not share the protected characteristic of the grievor or complainant, the employer argued; see *Association of Justice Counsel v. Treasury Board*, 2012 PSLRB 32 ("*Association of Justice Counsel*") at paras. 44 to 46, and *Battlefords and District Co-operative Ltd. v. Gibbs*, 1996 CanLII 187 (SCC) ("*Battlefords*") at paras. 21, 34, and 43 to 46.

[85] Two comparisons are relevant in this case, the employer said.

[86] Like maternity leave, parental leave also requires a return to work following the receipt of a parental allowance. The return-to-work obligation must be fulfilled with the same list of employers as in the maternity allowance clause.

[87] The employer argued that the distinction it made between the grievor's maternity allowance and parental allowance requirements is important because both men and women are entitled to receive the parental allowance. The grievor has not made out a case that parental allowance is received mostly by women, it said. The *Estimating Parental Leave* document cited by the grievor was not entered into evidence but was provided only as an authority. The document relates to EI benefits generally, not the usage of parental allowance in the federal public service or under the collective agreement. The Board lacks the evidence needed to conclude that the parental allowance is received primarily by women, it said.

[88] Another type of leave requiring a return to work is education leave without pay, found at article 49. That article provides the employer with the discretion to approve education leave without pay and an education allowance of up to 100% of an

employee's salary. As a condition, the article requires that the employee return to the service of the employer for a period not less than the period of leave granted. No separate agencies are listed in that clause as eligible for fulfilling that return-to-work obligation. Employees who do not meet the requirement may be required to repay all or a portion of the education allowance they were paid.

[89] All employees can apply for education leave and must commit to return to work. The employer argued that women who take maternity leave are treated no differently.

[90] In *Fraser*, the SCC did not entirely dismiss the requirement that there be a nexus between the protected characteristic and the adverse impact, the employer argued. At paragraph 38, the SCC emphasized that an adverse impact must occur because of the protected characteristic for it to be found discriminatory. At paragraph 41, the SCC explained that not all distinctions and differentiations in treatment are discriminatory. In *Fraser*, the complainants provided evidence that primarily women engaged in the job-share program; see paragraphs 57 and 97. That evidence has not been provided in this case.

[91] It is important to choose the appropriate comparator group, the employer argued. In *Battlefords*, the SCC made a comparison between employees who accessed disability insurance for mental health reasons and employees who accessed disability insurance for other reasons. Because the disability plan at issue provided a lesser benefit for those with a mental-health disability, it found the plan discriminatory toward those with such disabilities. The principle is that when a benefit is provided, an employer cannot provide it in a discriminatory manner; see also *Renfrew County and District Health Unit v. Ontario Nurses' Association*, 2013 CanLII 51843 (ON LA) ("*Renfrew Nurses*") at 13 to 18.

[92] However, the comparison that should be made in this case is between women who take maternity leave and other employees who benefit from an allowance while on leave without pay: parental leave and education leave, the employer argued. The limitations that are placed on the maternity allowance (spelling out where the return-to-work requirement must be fulfilled) are not related to a protected characteristic and so do not amount to discrimination, it argued.

[93] Maternity and parental allowances should not be compared to the treatment of sick leave and vacation leave under transfers to a separate agency, the employer argued. Sick leave and vacation leave are earned credits that are used later. That is not how maternity and parental leave and the related allowances work. Furthermore, the transfer of vacation-leave credits is not automatic; the parties have agreed to a specific clause in the collective agreement (clause 34.16) to provide an employee transferring to an employer listed in Schedule V to the *FAA* with the option of not being paid out their unused vacation credits, provided that the appointing organization will accept such benefits.

[94] If the Board finds that the grievor has established a nexus between her sex and the adverse impact that she experienced, the employer has a reasonable non-discriminatory explanation: the plain wording of the collective agreement; see *Li v. Sihota*, 2014 BCHRT 70 at para. 15. The employer cannot choose to apply the collective agreement or not apply it to a particular grievor at its fancy; see *Guertin v. Treasury Board (Veterans Affairs Canada)*, PSSRB File No. 166-02-18256 (19890710) at 4.

[95] The collective agreement was negotiated between the employer and PSAC for the employees in the specific (PA) bargaining unit; see the *Act*, at s. 111. Separate agencies enter into their own collective agreements; see the *Act*, at s. 112. There are differences in benefits across the public service because of the negotiations that take place between distinct parties. This is not discriminatory, the employer argued.

[96] The limitation in the clause at issue required employees to return to work with the employer or one of three separate agencies. When the grievance was filed, Schedule V to the *FAA* included 22 separate agencies beyond the CRA, Parks Canada, and the CFIA. The maternity leave provisions are a precisely worded monetary benefit negotiated by the parties to the collective agreement and make no distinction based on sex, the employer argued. The Board must apply the plain language of the collective agreement; see *Chafe v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112 at paras. 50 and 51, and *Forbes v. Treasury Board (Correctional Service of Canada)*, 2021 FPSLREB 110 at paras. 58, 59, and 67.

[97] The varying provisions across federal collective agreements governing maternity and parental allowances have been recognized by the Board, the employer argued; see *Zimmermann v. Treasury Board (Department of Indian Affairs and Northern*

*Development)*, 2008 PSLRB 87. Employees make the choice to accept a maternity or parental allowance, and they make a choice about where to work; the employer simply administered the clause as negotiated.

[98] Should the Board disagree with the employer's arguments, the employer emphasized that the overpayment at issue is related only to the parental allowance. In this particular case, the employer eliminated the adverse impact on the grievor of having to repay a portion of her maternity allowance by allowing her to remain employed until January 11, 2015. This left only a portion of her parental allowance requiring repayment.

[99] The grievor has not established that she experienced pain and suffering that would justify a claim of $20 000 in damages under the *CHRA*, the employer argued. It allowed her to delay her resignation and agreed to a very long period of repayment. She has not provided the required evidence from a health professional; see *Nadeau v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 82 at para. 304 (upheld in 2015 FC 1287). The damages she seeks should be reserved for the most egregious of cases; see *Abreu*, at para. 111.

[100] If the Board does award the grievor damages and require the employer to repay the grievor her remaining top-up, PSAC should be held jointly liable, the employer argued. Section 10 of the *CHRA* applies equally to unions, it said, and unions have been found jointly liable for discriminatory collective agreement language; see *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at para. 37, and *Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (SCC).

[101] When asked about the impact of the grievor's return to PWGSC in 2021, the employer argued that the requirement of the maternity leave clause is that she "(A) … return to work on the expiry date of her maternity leave …" and then work the period required. Therefore, the return-to-work period had to be fulfilled immediately following her return. The grievor has not made out a case that would support an argument that her return to PSPC years later would fulfil the requirement.

[102] With respect to the grievor's suggestion that the Board could read down the language in the collective agreement to mirror that found in the 2021 PA collective agreement, the employer argued that s. 229 of the *Act* prevents the Board from amending the collective agreement.

### C. Rebuttal for the grievor

[103] The grievor argued that the decision of the BCHRT in *Singh* can be distinguished because the complainant in that case was a term employee whose term ended before she could complete her return-to-work requirement. In this grievance, the grievor did complete a return-to-work period, albeit at the NEB.

[104] The grievor argued that the ruling of the arbitrator in *Renfrew Nurses* can be distinguished because that case involved discrimination based on disability. It is not clear that the union in that case relied on sex discrimination or arguments about the broader social context affecting women who become parents.

[105] With respect to the Board's decision in *Zimmerman*, the grievor argued that it is not a comparable case because there was no allegation of discrimination.

[106] Finally, the grievor argued that there are no cases cited by the employer that apply an adverse-impact analysis like the SCC did in *Fraser* or *Meiorin*. As such, the employer asks the Board to take the wrong approach to adjudicating this grievance. While recognizing that different collective agreements can have different provisions, depending on context, an adverse-impact analysis requires looking beyond what appears to be neutral, on its face. *Fraser* states that one must look beyond and, in the context of accepting that a group has faced historical disadvantages, determine whether in fact the provision in question is not as neutral as it appears.

## V. Reasons

[107] To properly frame my reasons for decision, I think that it is important to start by recognizing that the entire regime of maternity and parental leave and related allowances is a positive measure designed to address the historic discrimination in the workplace faced by women who parent young children. That historic discrimination is well-recognized by the SCC in the opening paragraphs of *Fraser*.

[108] The maternity and parental leave provisions allow employees to take leave from their positions to care for newborn and adopted children. If they are indeterminate employees, this means they can return to their jobs. Periods of maternity and parental leave are included in the calculation of continuous employment for the purposes of severance pay, and "service" for the purpose of calculating vacation leave; see clauses 38.01(g) and 40.01(g) of the collective agreement at issue.

[109] More significantly, the regime of maternity and parental allowances means that employees who are pregnant or become parents can maintain most of their income (93%) during their period of leave without pay. The top-up provided by the employer is a significant benefit for employees who can take advantage of it.

[110] I accept as a matter of argument and common sense that without the top-up, many mothers and other parents would not be able to afford to live on EI benefits alone for a year. The allowances mean that many parents, during their infant's first year of life, have the opportunity to provide their child with direct, full-time care, which they otherwise would not have. This brings many benefits to both the children and their parents.

[111] In short, the regime that provides for maternity and parental leave and related allowances is designed to ameliorate a whole series of career, economic, and social barriers that would otherwise be faced by mothers and other parents of young children.

[112] The parties have very clearly agreed that this regime for the allowances comes with a price: the return-to-work provisions embodied into the collective agreement. For each week of allowances received, an employee is required to return to work for an equivalent period. If 52 weeks of combined allowances are received, then the employee must return to work for 52 weeks. If she does not, she is obligated to repay the allowances, in proportion to the amount of time not worked.

[113] The grievor — and, I wish to emphasize, her union in representing her — took the position that the return-to-work requirements in and of themselves are legitimate. They were negotiated to encourage the return to work and retention of employees who take advantage of the maternity and parental allowances. The return-to-work requirement itself is not discriminatory, they said. If an employee chooses to resign and not return to work, they must repay the allowances they received. That is the price, or the *quid pro quo*, for having received the top-up.

[114] Similarly, it is not disputed by the grievor and her union that if an employee chooses to leave the public service and work elsewhere during her return-to-work period, for example with a private-sector company, she is obligated to repay the appropriate portion of her maternity and parental allowances. That she must do so is not discriminatory.

[115] The human rights issue raised by this grievance is whether it is discriminatory for the collective agreement to provide that an employee must fulfil their return-to-work obligation only at the Treasury Board, the CRA, Parks Canada, or the CFIA, thus excluding work that is performed for other separate agencies, such as the NEB-CER.

[116] The grievor's allegation is that articles 38 and 40 violate the no-discrimination article of the collective agreement because the return-to-work provisions are limited to the Treasury Board and those three agencies. To address that discrimination, the Board should allow the return-to-work provision to be fulfilled at any separate agency listed in Schedule V to the *FAA*, the grievor and her union argued.

[117] In assessing the parties' arguments, I want to get a couple of issues out of the way.

[118] First, the employer emphasized that a significant distinction should be made between whether the grievor was required to repay her maternity or parental allowance. Technically, in this case, I agree that it was the latter. After the grievor returned to work at PWGSC on July 7, 2014, she worked for approximately 27 weeks before starting to work at the NEB. Therefore, she fulfilled the 17-week return-to-work requirement associated with her maternity allowance and approximately 10 weeks of the return-to-work requirements associated with her parental allowance. By deduction, the amount that she had to repay was approximately 25 weeks of her parental allowance. I also note that the grievor signed separate return-to-work agreements with respect to her maternity and parental allowances.

[119] However, for the remainder of the evidence in front of me, the maternity and parental return-to-work obligations were treated as an integrated whole. First, the letter providing the grievor with the option of receiving an advance payment of three weeks' allowance described it as an advance on her "maternity/parental allowance payments". Second, based on her original departure date of October 14, 2014, the grievor would not have completed her entire maternity allowance return-to-work obligation. Her initial overpayment calculation was approximately $14 000. That included both allowances together; I found no evidence that a distinction was made between the maternity and parental portions. Third, the employer's revised demand for overpayment, prepared on December 29, 2014, and based on the departure date of January 12, 2015, said that the grievor had been overpaid for her maternity and

parental allowances. Finally, the employer's final-level grievance reply made no distinction between maternity and parental leave and related allowances.

[120] The grievor clearly took the two leaves as an integrated package. I do not think that the decision should turn on a distinction between which allowance she repaid.

[121] Secondly, I do not think that this decision should be resolved on the basis that the grievor failed to establish that the parental leave in the collective agreement is taken primarily by women, as argued by the employer. It argued that the *Estimating Parental Leave* document cited by the grievor, which demonstrates that women are the predominant users of parental leave EI benefits, should not be assumed to represent usage patterns of parental allowances within the Treasury Board or, specifically, the PA group. It argued that the evidence falls short of what the SCC relied on in *Fraser*, at paras. 57 and 97.

[122] I agree with the employer that the evidence that the grievor provided was less precise and specific than what the SCC appears to have relied on in *Fraser*. That said, nothing prevented the employer from providing more specific data related to parental allowance usage, had it wished. It, not the union, would have access to such data. I am unconvinced that the employer had reason to believe that this grievance was only about the maternity allowance and that therefore, it was not prepared to generate such data. Given the content of its final-level reply at the departmental level, and given its clear arguments that the grievor had been required to repay only a portion of her parental allowance, it was aware that the usage of the parental allowance was an issue.

[123] In short, I am not prepared to reject this grievance on the basis that the grievor failed to make out a convincing case that primarily women use parental allowances, and therefore, primarily women face the adverse impact of having to repay the allowance if they do not fulfil their return-to-work obligation. There is no reason to presume that parental allowance usage rates in the federal public service or the PA group differ significantly from EI parental benefits usage rates generally in Canada. There is enough evidence in this case to infer that at least for the sake of argument, primarily women make use of the provisions of article 40 and that they do so often in combination with the maternity leave provisions in article 38. Several of the employer's forms reflect this combination. I also take guidance from the recognition that the SCC accepted in both *Fraser* and *Brooks* that women bear primary child-raising

responsibilities in Canadian society and from the findings of the Canadian Human Rights Tribunal in *Lavoie*, all cited by the grievor in her arguments.

[124] I will note as an aside that in this decision, I have not addressed the distinction that is now increasingly being made with respect to the use of maternity leave and allowances by "women" vs. "pregnant employees". I wish to acknowledge that there are pregnant employees who do not identify as women and who do not accept the female pronouns used in article 38 or the binary male and female pronouns used in article 40. However, I will continue in this decision to rely on the language of the collective agreement and the language used by both parties in their arguments before me, and I will leave that issue for another day.

[125] I now turn to what I think is the key issue in adjudicating this grievance, which is that the parties put forward very different arguments on whether the maternity and parental allowance clauses in the collective agreement amount to discrimination.

[126] As made evident in the preceding section, the grievor and her union argued that following the SCC's decision in *Fraser*, the Board should adopt an adverse-impact analysis in determining this grievance. It is women, or predominantly women, who face the adverse impact of having to repay their maternity or parental allowance top-up if they go to work at a separate agency before completing their return-to-work obligation. This is enough, the grievor argued, to establish a *prima facie* case of discrimination, thus requiring the employer to provide a legitimate reason for the discriminatory treatment.

[127] In contrast, the employer argued that to make out a *prima facie* case of discrimination, the grievor had to establish a nexus, or a causal relationship, between her protected characteristic (her sex) and the adverse impact she faced (having to repay a portion of her parental allowance). In particular, it relied on the formulation of the SCC in *Moore*, at para. 33, which reads 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.*

[128] It also relied on a series of other discrimination cases, including *Bassett*, *Bodnar*, *Eady*, *Association of Justice Counsel*, *Battlefords*, *Renfrew Nurses*, *Elk Valley*, and *Singh*, which used this approach.

[129] Aside from its evidentiary arguments, which I have already addressed, the employer argued that no such causal link or nexus exists because the distinction created in the collective agreement is based on where the employee works. Where an employee works is not a protected ground. In this case, the grievor chose to work for an employer not listed in the return-to-work clause; that is the cause of her requirement to repay a portion of her allowance. Her sex was not a factor.

[130] The grievor's argument in reply was that none of the case law cited by the employer uses the adverse-impact analysis adopted by the SCC in *Fraser* or *Meiorin*. The employer asks the Board to rely on the personal choice of the grievor or on the use of a narrow comparator group, which are analytical tools that the grievor states were rejected by the SCC in *Fraser*.

[131] On a close read of *Fraser*, a debate about the appropriate analysis for an adverse effect discrimination claim is clearly evident. *Fraser* was not a unanimous decision of the SCC. The reasons of the majority, agreed to by six justices, are found at paragraphs 1 to 139. Those reasons were provided by Justice Abella. A dissent by Justices Brown and Rowe is found at paragraphs 140 to 230. A second dissent, by Justice Côté, is found at paragraphs 231 to 256.

[132] Justices Brown and Rowe took the position that the majority decision in *Fraser* went too far in promoting substantive equality, essentially imposing its policy preferences in a manner outside the institutional competence of the courts. Their dissent also relied on the argument that a claimant must establish a causation between the law and the adverse impact. They took the position that there must be a distinction in treatment that is based on the protected ground (at paragraph 171), that the search for an adverse impact must be a search for causation i.e. that state conduct contributes to the adverse impact (at paragraph 175), that correlation is not the same as causation (at paragraph 180), and that causation between the law and the disadvantage must be clearly demonstrated (at paragraph 181).

[133] Justice Côté focused on the lack of an established "nexus" in the majority decision, stating that it "… reduces the step one analysis to a mere search for disproportionate impact evidenced by statistical disparity …" (at paragraph 243). The Justice also stated that "[a] nexus between the impugned legislation and the disproportionate impact is required" to make a finding of discrimination (at paragraph 248).

[134] Justice Abella, writing for the majority in *Fraser*, clearly rejected those dissents at paragraphs 131 to 136.

[135] The grievor and her union argued that *Fraser* significantly alters the test for discrimination, and that the employer's arguments and case law do not take account of the SCC's ruling. The extent of the justices' debates, as evidenced through the dissents, does indicate that *Fraser* signals some important considerations, particularly around the analysis of claims of indirect discrimination and the level of evidence required to establish that a protected ground was a factor in the creation of an adverse impact.

[136] I do agree that *Fraser* provides much guidance that supports the grievor's arguments. I have accepted that women or primarily women use maternity and parental benefits. They face a requirement to return to work with the employer, the CRA, Parks Canada, or the CFIA, and because of that, they experience "headwinds" should they wish to try to continue their careers at one of the other separate agencies not listed in the collective agreement. According to *Fraser*, such headwinds can be an indication that a group may be experiencing discrimination; see paragraphs 33, 47, and 53.

[137] If one compares the experience of the grievor with that of an employee who transfers to a separate agency like the NEB and who is **not** in the midst of a return-to-work period, it is easy to think that she experienced a headwind.

[138] However, a careful read of *Fraser* indicates that more than mere headwinds are required to establish that discrimination is in fact occurring.

[139] I do not find that the majority decision in *Fraser* alters the basic test for discrimination as set out in *Moore* at paragraph 33. For the purposes of this case, this can be summarized as follows: the grievor must ultimately establish 1) that she has a

characteristic protected from discrimination, 2) that she experienced an adverse impact, and 3) that the protected characteristic was a factor in the adverse impact.

[140] Ultimately, this is a case about the interpretation and application of the collective agreement and a claim of discrimination, not a claim pursuant to s. 15(1) of the *Charter*. In determining a grievance, the Board can interpret and apply the *CHRA* (see s. 226(2)(a) of the *Act*) and in a claim of discrimination under the *CHRA* the test in *Moore* generally applies (see for example, *Davidson v. Canada (Attorney General)*, 2021 FCA 226 at para. 54). While this is not a *Charter* case, jurisprudence under s. 15(1) of the *Charter* may be of assistance in considering the question of discrimination (see *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 at 175 and 176).

[141] In this case, the first two criteria to establish *prima facie* discrimination are not an issue. Sex is a prohibited ground of discrimination. The grievor experienced an adverse impact in the form of the repayment of part of her allowance. Where the dispute lies is with the third criteria: whether sex was a factor in the adverse impact.

[142] Taken as a whole, *Fraser* may reflect a debate at the SCC about what it takes to establish whether sex was a **factor** in the adverse impact, but it doesn't depart from the requirement that a protected characteristic be found to be a factor. In other words, the concept of discrimination still must be based on some form of differential treatment based on a protected ground.

[143] When Justice Abella rejected the dissents of their three colleagues, she still recognized that the concept of discrimination is based on differential treatment. She said the following at paragraph 136:

> *[136] For over 30 years, the s. 15 inquiry has involved identifying the presence, persistence and pervasiveness of disadvantage,* ***based on enumerated or analogous grounds.*** *Its mandate is ambitious but not utopian: to address that disadvantage where it is identified so that in the pursuit of equality, inequality can be reduced one case at a time. That is why there is a s. 15(1) breach in this case — not because women continue to have disproportionate responsibility for childcare and less stable working hours than men, but because the pension plan "institutionalize[s] those traits as a basis on which to unequally distribute" pension benefits to job-sharing participants … This is '"discrimination reinforced by law', which this Court has denounced … Contrary to the views of my colleagues, there is nothing "extraordinary" about holding, as we do here, that such*

> *discrimination violates s. 15(1) of the* Charter*. Based on our jurisprudence, it would be extraordinary if we did not.*
>
> [Emphasis added]

[144] This concept is articulated similarly in the no-discrimination article of the collective agreement, article 19, which reads as follows:

| | |
|---|---|
| ***19.01*** *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee* ***by reason of*** *age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Alliance, marital status or a conviction for which a pardon has been granted.* | ***19.01*** *Il n'y aura aucune discrimination, ingérence, restriction, coercition, harcèlement, intimidation, ni aucune mesure disciplinaire exercée ou appliquée à l'égard d'un employé-e* ***du fait de*** *son âge, sa race, ses croyances, sa couleur, son origine nationale ou ethnique, sa confession religieuse, son sexe, son orientation sexuelle, sa situation familiale, son incapacité mentale ou physique, son adhésion à l'Alliance ou son activité dans celle-ci, son état matrimonial ou une condamnation pour laquelle l'employé-e a été gracié.* |
| … | […] |

[Emphasis added]

[145] This principle can also be found in *Fraser*, at para. 41, where the SCC relies on its previous decision in *Andrews* at 174, in which it concluded as follows:

> *I would say then that discrimination may be described as a distinction, whether intentional or not but* ***based on grounds*** *relating to personal characteristics of the individual or group, which* ***has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others,*** *or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.*
>
> [Emphasis added]

[146] Furthermore, at paragraph 50 of *Fraser*, Justice Abella stated as follows:

> *[50] To prove discrimination under s. 15(1), claimants must show that a law or policy* ***creates a distinction based on a protected ground,*** *and that the law perpetuates, reinforces or exacerbates disadvantage. These requirements do not require revision in adverse effects cases. What is needed, however, is a clear account*

> *of how to identify adverse effects discrimination, because the impugned law will not, on its face, include any distinctions based on prohibited grounds … Any such distinctions must be discerned by examining the* ***impact*** *of the law ….*
>
> [Emphasis added and in the original]

[147] In conclusion, *Fraser* does not deviate from the essential requirement that the grievor must establish more than an adverse impact and must demonstrate that a protected ground of discrimination was a factor in that adverse impact.

[148] I began this section by recognizing that the entire regime of maternity and parental leave and related allowances is a positive measure designed to ameliorate historical disadvantages faced by women and parents of young children. I have noted and will repeat that the grievor and her union accept the return-to-work requirement as a reasonable requirement in return for the generous maternity and parental allowances provided by the employer through the collective agreement. The grievor and the union held that the repayment requirement itself is not discriminatory. Therefore, they held that the requirement to repay the allowances legitimately applies to those who do not return to work or who leave the federal government entirely.

[149] Given this, it is not appropriate to compare the grievor's treatment with those who transfer to a separate employer when they are **not** in the midst of a return-to-work obligation. The obligation to return to work is an inherent requirement to receiving the allowances and is accepted as such by the grievor and her union. Of course, she was treated differently from an employee who did not take maternity or parental leave; that is the price of receiving the allowance.

[150] So, to which other group should the grievor be compared?

[151] The clauses in question create two groups of employees: those who fulfil the return-to-work requirement and do not have to repay their allowance, and those who do not fulfil the return-to-work requirement and do have to repay it.

[152] What the grievor and her union argue is that the Board should recognize a third group: those like the grievor, who returned to work at the group of separate agencies that are not listed in articles 38 and 40 but that are still part of the federal government by virtue of being listed in Schedule V to the *FAA*. They argue that it is this subset of employees that is being discriminated against. They argue that it is this subset of

employees that should be moved from the group having to repay its allowances to the group that does not have to repay its allowances.

[153] In other words, the differential treatment at issue in the clauses at issue is between those employees who stay and work at the Treasury Board, the CRA, Parks Canada, or the CFIA and those who do not. Once the return-to-work obligation is accepted as non-discriminatory, it is the only comparison that can be applied, because it is the source of the differential treatment.

[154] That does not mean that I am relying on a "mirror" or narrow comparator group, as cautioned against in *Fraser*, at para. 94. It is quite simply the logical conclusion from the grievor's arguments about which group of employees is being treated differently (those who went to work for the NEB and similar Schedule V employers), in comparison to another group of employees (those who returned to work with the four employers listed in the clauses).

[155] There is no evidence at all of differences in gender composition between these two groups. Following from the logic of the grievor's statistical arguments about who takes maternity and parental leave, I presume that both groups are predominantly women. Therefore, there is one group of women (or predominantly women) who do not have to repay their allowance, and a second group of women who do. What differentiates these two groups? The federal-government employer at which they completed their return-to-work commitment. One's place of employment within the federal government is not a protected ground under article 19 or the *CHRA*.

[156] As argued by the employer, I think that it is also reasonable to compare the treatment of women taking maternity and parental leave under the collective agreement with the treatment of employees under the collective agreement who take education leave without pay and an education allowance, even though granting education leave and the allowances is entirely discretionary. Both face a return-to-work requirement, but if anything, the maternity and parental requirements are easier to fulfil. Working at the CRA, Parks Canada, or the CFIA does not satisfy the return-to-work requirement in the education allowance provision.

[157] In short, I find no basis for concluding that articles 38 and 40 of the collective agreement discriminate against the grievor or other employees in her circumstances,

using the text of article 19, "by reason of" sex, or that sex was otherwise a factor in the grievor having to repay part of her allowance.

[158] This is not a *Charter* challenge questioning how the federal government has structured employers in the federal public service. This is a collective agreement interpretation grievance. Clearly, the collective agreement provisions affecting the return-to-work requirements of the maternity and parental allowances can vary from one employer to another (contrast the collective agreement at issue in this case to the NEB-PIPSC collective agreement; see also *Zimmerman*) or over time (contrast this collective agreement with the 2021 PA collective agreement).

[159] The differential treatment that the grievor experienced under her collective agreement was based on the public service employer that she works for. That is not a protected ground of discrimination. As such, she failed to make out a *prima facie* case of discrimination, and articles 38 and 40 were correctly applied. The grievance must be denied.

[160] With respect to the grievor's argument that she completed her return-to-work requirements after returning to work at PSPC in June 2021, I will note that this issue arose from a question asked of the parties, and was not argued extensively.

[161] I do not find the grievor's argument to be supported by either the facts, or the wording of the collective agreement.

[162] The record before me was that the grievor resigned from her position at PWGSC effective October 14, 2014. The department accepted that her resignation be rescinded and delayed, and she therefore resigned January 11, 2015. She did not take a leave of absence to work at the NEB; she left the department and the core public administration. Nearly six years later, she applied to return and was accepted.

[163] The collective agreement provision at clause 38.02(a)(iii)(B) states that in order to receive the maternity allowance, an employee must sign an agreement that says: "following her return to work … she will work for a period equal to the period she was in receipt of maternity allowance …" Clause 38.02(b) allows for the return-to-work period to be prolonged by a period of leave without pay. Clauses 40.02(a)(iii)(B) and 40.02(b) provide equivalent provisions with respect to the parental allowance.

[164] The plain language of the collective agreement requires employees to return to work **following** the conclusion of their maternity or parental leave without pay. It allows that return to be delayed if they take an approved leave without pay. If they fail to do so, they must repay all or a portion of the maternity or parental allowance. I accept the employer's argument that in this context, the word "following" means the return to work must happen immediately after the conclusion of their leave(s) without pay. The language does not provide that an employee who resigns their position and returns at a later date can effectively fulfill their return-to-work period retroactively, and thereby reclaim the allowance or portion they were required to repay.

**VI. Concluding comments**

[165] Given my finding that the grievor has not made out a *prima facie* case of discrimination, I need not address the alternative argument of the employer, which was that the mutually-agreed-upon collective agreement provides a reasonable justification for the clauses in question.

[166] Nor do I need to address the employer's argument that PSAC ought to bear a portion of the responsibility (and damages) for any discriminatory treatment experienced by the grievor.

[167] At the same time, I think that it is important to recognize that the parties are jointly responsible for the language in their collective agreement. PSAC could just as easily have been a respondent to a complaint about these clauses, as it negotiated them, ratified them, and signed them into the collective agreement.

[168] In my view, the proper place for the parties to address whatever barriers existed in the collective agreement was at the bargaining table, and as noted, they have done so. As discussed, the 2021 PA collective agreement contains an altered provision to address the situation faced by employees like the grievor that allows employees to complete their return-to-work requirement with any Schedule I, IV, or V employer.

[169] As I stated at the outset, I appreciate that Ms. Diop might not have fully understood in advance the implications of accepting a job at the NEB, despite the clear content of the maternity and parental allowance undertakings that she signed. I understand her confusion and disappointment at having to repay a portion of the allowances she received, given that she continued to work for the federal government

writ large. I can also understand her frustration given the changes made in the 2021 collective agreement. However, the job of the Board is to apply the collective agreement as written, and I find that it has not been violated.

[170] This leaves one remaining issue that I will comment on, which is the income tax impact of the grievor's repayment. The grievor testified that she paid income taxes on the allowances that she received in the years that she received them (2013 and 2014). The grievor paid back those allowances in 2015 and 2016, in the gross amount of $9692.11. Given that she repaid that amount, her taxable income for at least 2014, if not also 2013, should be reduced appropriately. This should result in a recalculation of her income tax liabilities for those years. All other things being equal, she should receive a refund of the taxes that she paid on the $9692.11. This is a potentially significant tax refund.

[171] The grievor testified that the CRA has insisted that she provide revised T4 slips before it can change her tax returns; based on the evidence before me, neither the NEB nor PWGSC-PSPC has done that. All that has happened is that the NEB provided a letter stating that the grievor repaid $5142.80 in 2016. This falls short of recognizing the total amount of repayment and apparently does not suffice for the CRA.

[172] The grievor is left in a situation in which she has paid taxes on $9692.11 of income that she has not, in the final analysis, received. That is wrong. This is not a problem of her making, nor one she can solve without action from her employer.

[173] I am not seized with a grievance about this and therefore cannot make an order with respect to this injustice. However, I would strongly suggest that it behooves the grievor's employer, now PSPC, to provide Ms. Diop with the assistance she requires to fully rectify it.

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

*(The Order appears on the next page)*

## VII. Order

[175] The grievance is denied.

September 7, 2023.

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