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

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

BETWEEN

SLIM REHIBI AND KARINE LAVOIE

Grievors

and

DEPUTY HEAD
(Department of Employment and Social Development)

and

DEPUTY HEAD
(Department of Public Works and Government Services)

Respondents

Indexed as
Rehibi v. Deputy Head (Department of Employment and Social Development)

In the matter of individual grievances referred to adjudication

Before: Amélie Lavictoire, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievors: Bernard Desgagné, representative

For the Respondents: Richard Fader, Kétia Calix, Marie-France Boyer, and Larissa Volinets Schieven, counsel

Heard by videoconference,
November 28 to December 2, 2022, and
July 10 to 14 and 20 and September 12, 2023.
Written submissions filed August 28, 2023.

[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Introduction

[1] The adoption and implementation by the Treasury Board ("the respondent" or "the employer") of a vaccination policy applicable to all employees in the core public administration (or "public servants") was unprecedented. The question for the Federal Public Sector Labour Relations and Employment Board ("the Board") to decide in these grievances is whether the application of the *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police* ("the Policy") was an administrative measure intended, among other things, to protect the health and safety of public servants in the core public administration or whether it was disguised discipline aimed at correcting the behaviour of employees who refused to be vaccinated by punishing them.

[2] The respondent adopted the policy on October 6, 2021. It required that all public servants in the core public administration be fully vaccinated against the SARS-CoV-2 virus unless accommodation was provided based on a prohibited ground of discrimination under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*). The SARS-CoV-2 virus is best known by the name of the illness it causes, COVID-19. From this point, I will refer to the virus as "COVID-19" or "the COVID-19 virus".

[3] Employees who refused to be fully vaccinated or to attest to their vaccination status before the date determined by the employer were placed on leave without pay until they were vaccinated, the Policy was abolished, or its application was suspended.

[4] On November 15, 2021, Slim Rehibi and Karine Lavoie ("the grievors") were placed on leave without pay because of their refusal to comply with the Policy. They remained on leave without pay until the Policy's application was suspended in June 2022. As the Policy's application has been suspended, in this decision, it will be described as a measure that was imposed in the past.

[5] When the Policy was adopted and implemented, Mr. Rehibi worked onsite. Conversely, Ms. Lavoie worked from home under a telework agreement. She had a telework agreement well before what is commonly known as "the COVID-19 pandemic" began. Both grievors refused to be vaccinated, on principle. They maintained their refusal to be vaccinated throughout the period during which the Policy was in force.

[6] The grievors did not apply to be exempted from the Policy as an accommodation under the *CHRA*. Thus, there is no issue of compliance with the *CHRA* in the context of these grievances.

[7] They referred almost identical grievances to adjudication before the Board under s. 209(1)(b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), which is the section that permits referring grievances to adjudication about disciplinary action resulting in, among other things, suspension or financial penalty.

[8] The grievors were not represented by a bargaining agent. Their grievances are among many nearly identical grievances that have been referred to adjudication under s. 209(1)(b) of the *Act* by employees with the same representative. The parties proposed the present grievances as files that could be heard as a priority so that the parties could benefit from the Board's findings as to the nature of the Policy. The files were combined and heard together. Before the Board, the grievors alleged that the leave without pay that was imposed on them as a consequence for not complying with the Policy was disguised discipline that sought to correct their behaviour and induce them to become vaccinated. The respondent argued that the Policy was an administrative measure. It raised an objection to the Board's jurisdiction to adjudicate the grievances.

[9] The Board derives its jurisdiction solely from the *Act*. It has no inherent jurisdiction. The scope of the Board's jurisdiction to hear a grievance is defined in s. 209 of the *Act*. According to s. 209(1)(b), an employee can refer an individual grievance to adjudication if that grievance is related to "… a disciplinary action resulting in termination, demotion, suspension or financial penalty …". The question that I must decide in this case is whether the Policy, when it was applied to the grievors to place them on leave without pay, was disguised discipline. To do that, I must rely on the evidence on the record. Neither the respondent's characterization of its decision nor the grievors' feelings that they were treated unfairly are in themselves decisive factors (see *Canada (Attorney General) v. Frazee*, 2007 FC 1176 at paras. 21 and 23).

[10] For the grievances to be adjudicable, I must conclude that the Policy's application was disguised discipline. If I find that the Policy was an administrative measure, I do not have jurisdiction to hear the grievances, and they must be dismissed.

[11] This is the Board's first decision about its jurisdiction over grievances alleging that the Policy's application was disguised discipline. The hearing for these files took 10 days. The Board received extensive documentary evidence, and 9 witnesses were heard, including 2 expert witnesses.

[12] The hearing took place in two phases. On February 3, 2023, Pierre Marc Champagne, a respondent counsel during the first phase of the hearing, was appointed as a full-time Board member as of March 13, 2023. He did not participate in the second phase of the hearing; nor did this panel of the Board and Mr. Champagne discuss this matter.

[13] For the reasons that follow, I find that the grievors did not meet their burden of demonstrating that on a balance of probabilities, they were subjected to disguised discipline. Although the imposition of leave without pay for failing to comply with the Policy had an adverse effect on them, I find that the Policy was an administrative measure. For that reason, the grievances must be dismissed, for lack of jurisdiction.

II. Interlocutory decisions

[14] Several interlocutory decisions were rendered before and during the hearing. Some of those decisions influenced how the hearing unfolded. The reasons for those decisions are set out in the paragraphs that follow.

A. Evidence of a violation of *Charter*-protected rights

[15] As will be explained in more detail in the reasons, the grievors alleged that their leave without pay under the Policy's application was a violation of their rights protected by the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act, 1982*, 1982, c. 11 (UK); "the *Charter*"). They sought to present evidence of the violation because, according to them, the infringement of their rights demonstrated that their leave without pay was disproportionate to its purported purpose and that it sought to correct their behaviour by punishing them. Evidence and arguments related to the *Charter* were, according to them, at the heart of this debate.

[16] In the first phase of the hearing, the grievors relied on the rights protected under ss. 2(a), 7, and 15 of the *Charter*. However, in the second phase, they abandoned their arguments with respect to ss. 2(a) (freedom of conscience) and 15 (right to

equality) of the *Charter*. In the closing arguments, the grievors' representative confirmed that the grievors were now relying only on s. 7 of the *Charter*. Only the right protected by s. 7 of the *Charter*, specifically, the right to liberty and security of the person, will be discussed in this decision.

[17] Before the hearing, the respondent raised an objection, arguing that the Board could not **apply** the *Charter* to answer the question of whether the Policy's application was disguised discipline; that is, the analysis to confirm whether the Board had jurisdiction to hear the grievances. The respondent argued that the Board has no inherent jurisdiction over *Charter* issues and that it could **hear** arguments based on the *Charter* only after concluding that it had jurisdiction to hear the grievors' grievances. It based its objection on *Chamberlain v. Canada (Attorney General)*, 2015 FC 50 ("*Chamberlain FC 2015*"), and *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 115 ("*Chamberlain PSLRB*"). According to the respondent, the case law has not recognized an alleged *Charter* violation as being part of the analysis to conclude whether a measure was disciplinary and not administrative. For that reason, it argued that evidence of a *Charter* violation cannot be considered in the Board's analysis of whether it has jurisdiction to hear a grievance alleging disguised discipline.

[18] In the context of a pre-hearing conference, the Board informed the parties that the employer's objection would be dealt with as part of the decision on the merits of this case. It allowed the grievors to present the evidence that according to them supported their allegations that the violation of their *Charter*-protected rights demonstrated that placing them on leave without pay was disguised discipline. It informed them that first and foremost, their *Charter* evidence and arguments had to demonstrate that the Board had jurisdiction to hear the grievances. It invited the parties to present arguments in their final submissions on its jurisdiction to hear *Charter*-related arguments in the context of these files and to deal with them.

[19] The grievors then requested the right to postpone to later in the hearing the decision as to whether they would present counter-evidence with respect to s. 1 of the *Charter*. They were already aware of the vast majority of the evidence that the respondent intended to present to justify adopting and implementing the Policy. The respondent had indicated that it intended to rely on evidence similar to the evidence it had presented in the context of litigation pertaining to the constitutionality of

ministerial orders imposing a mandatory vaccination requirement for federally regulated marine, air and rail transportation. The respondent had also indicated that it did not intend on presenting additional evidence with respect to s. 1 of the *Charter*. Since the grievors knew the evidence that the respondent would rely on and the burden was on them to demonstrate disguised discipline, the Board informed them that they had to present all their evidence on the allegations that a *Charter*-protected right had been violated. They could not wait until after the respondent's evidence closed to decide whether they would present counter-evidence with respect to s. 1.

[20] The grievors submitted a "Notice of Constitutional Question", as required by s. 57 of the *Federal Courts Act* (R.S.C. 1985, c. F-7). The Board did not receive any response to that notice.

[21] I will return to the grievors' *Charter* arguments and the Board's jurisdiction to hear and decide *Charter* issues in my analysis.

B. Decisions on the grievors' evidence

[22] The Board made two interlocutory decisions with respect to the grievors' evidence. As the grievors argued that those decisions, especially the second, allegedly deprived them of the opportunity to make their case, I will set out the reasons for those decisions.

[23] The first decision was rendered during preparations for the hearing and after several discussions at pre-hearing conferences about the evidence that each party wished to present. At that time, the grievors were represented by counsel.

[24] Counsel for the grievors presented a preliminary list of witnesses that included, among others, three main witnesses, who were the grievors and Mr. Rehibi's manager. No objection was made to the relevance of those testimonies. Those three people testified at the hearing.

[25] The preliminary list of witnesses also included seven secondary witnesses, as well as an undefined number of people who, according to the grievors' counsel, were reported to have suffered side effects from being administered a vaccine against COVID-19. The respondent objected to the relevance of the evidence that the secondary witnesses could offer. At the Board's request, the grievors' counsel filed a

written description of the relevance, according to counsel, of the testimony of each proposed witness. The parties then made oral arguments on the relevance.

[26] The Board may accept any evidence, whether admissible in a court of law or not (see s. 20(e) of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365)). However, it is required to exercise that discretion in a way that does not compromise the general principles of procedural fairness, including the principle that evidence must be relevant to the facts and issues.

[27] After reading the description that counsel for the grievors provided as to the relevance of the witness testimony, and after hearing the parties' arguments on it, I concluded that the evidence that all the secondary witnesses could offer was not relevant to the matter before the Board, which is whether the grievors' leave without pay was disguised discipline. None of the potential secondary witnesses was a federal public servant. None had been subject to the Policy or had been involved in any way in its development, implementation, or suspension. They were people or representatives of groups of people who, according to them, reportedly were criticized or censored on social media or sanctioned by a professional order or by an employer other than the Treasury Board for criticizing COVID-19 vaccines while, as noted previously, other potential witnesses were people who stated that they had suffered side effects from a COVID-19 vaccine.

[28] Although he stated that he intended to call as witnesses an expert witness and a representative of a group of federal public servants who opposed COVID-19 vaccination, counsel for the grievors subsequently said that he had changed his mind.

[29] The first phase of the hearing took place from November 28 to December 2, 2022. On consent, and at counsel for the grievors' suggestion, the usual order of presenting evidence was changed somewhat to enable Carole Bidal, the associate assistant deputy minister responsible for developing and implementing the Policy, to testify before the grievors presented their evidence. That change to the order for presenting evidence was made because Ms. Bidal's testimony on the development and implementation of the Policy would provide the factual context for the remaining oral evidence.

[30] During the first phase of the hearing, the Board heard all Ms. Bidal's evidence, followed by the testimonies of the grievors' three witnesses. Ms. Bidal's examination

and cross-examination took place over two full days. The Board also heard a large part of Dr. Jason Kindrachuk's evidence. He was an expert witness whom the respondent called. Counsel for the grievors cross-examined him for several hours before the first phase of the hearing ended. It was planned that his cross-examination would continue in April 2023 on the dates scheduled for the hearing's resumption.

[31] Before describing the sequence of events, I would like to point out that at the beginning of the hearing day on December 2, 2022, and before Dr. Kindrachuk's testimony began, counsel for the grievors confirmed that their evidence was closed. The grievors were present throughout that phase of the hearing.

[32] I turn now to the second interlocutory decision on the grievors' evidence.

[33] In February 2023, and between the hearing's first and second phases, counsel for the grievors informed the Board that he no longer represented the grievors. All signs point to him apparently deciding to terminate his involvement in this case. The grievors did not terminate the professional relationship with their counsel.

[34] After their counsel withdrew from the case, and for the remainder of the hearing, the grievors had a new representative. The representative asked the Board to allow the grievors to reopen their evidence. The respondent objected.

[35] The grievors argued that their right to a fair hearing would be threatened if they were denied the right to reopen their evidence. They insisted on the importance that they be able to present evidence refuting the respondent's allegations that "[translation] … the health emergency that COVID-19 allegedly caused was of unprecedented gravity", "[translation] … the crisis could be resolved only if most of the population was inoculated with a messenger-RNA-based product described as a vaccine", that "[translation] … in fall 2021, the health system was overburdened because of COVID-19", that it was "[translation] … necessary to inject all federal public servants, without exception, with a vaccine …", and that the fact that "[translation] … depriving public servants who did not wish to be injected with the vaccine of their salaries for an indeterminate period was merely an administrative measure …".

[36] The request sought the right to call 19 additional witnesses, including 4 expert witnesses, and to again cross-examine Ms. Bidal. The request also sought the right to

examine — and not cross-examine — a respondent witness who was to testify during the second phase of the hearing, Ms. Lavoie's manager.

[37] The grievors filed a written description of the nature of the evidence of each additional witness whom they wished to call and the relevance of each one's testimony. At a case management conference, the parties had the opportunity to make their arguments supporting their respective positions. After reading the grievors' description as to the relevance of those testimonies, and after listening to the parties' arguments on the matter, I denied the grievors' request. At the time, I said that my reasons for the interlocutory decision would be included in my decision on the merits. Here they are.

[38] The grievors' request was based on certain allegations against their former counsel that he had misrepresented them and that he had failed to follow their instructions. They stated that only during the first hearing phase did they learn that their counsel would not call expert witnesses to support their allegations. I will not comment on the allegations against the former counsel. They were not established in evidence and are not the subject of this case.

[39] The decision to allow a request to reopen evidence is a matter of the Board's discretionary power, which should not be exercised lightly, especially when the request is based solely on an allegation of counsel's ineffectiveness. As *Mediatube Corp. v. Bell Canada*, 2018 FCA 127 at para. 34, instructs, courts must be on guard to ensure that the ground of ineffectiveness of counsel does not become too easy a route to a complete re-do of a trial. I am of the opinion that that call for caution should also apply to a party's requests to reopen its evidence in the context of the adjudication of a grievance.

[40] Counsel is their clients' agent, and a client who has retained counsel's services will generally be bound by counsel's decisions, including those about the litigation strategy (see *Quindiagan v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 769 at para. 26, citing *Jouzichin v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1886 (QL) at para. 2). Therefore, a party that changes representation after its evidence is closed does not by that fact alone have the right to reopen its evidence. That is due to the importance of ensuring procedural fairness, which is a right to which both parties to a dispute must be entitled. The generally

accepted rules on the order of evidence presentation are intended to allow grievors to present all their evidence and to allow the respondent to know the evidence against it and to present its defence based on the evidence that the opposing party submitted (see *Johnson v. Canadian Broadcasting Corporation*, 1994 CanLII 284 (CHRT)).

[41] In this case, the grievors' counsel stated that his litigation strategy included presenting three witnesses and that it relied on cross-examining the respondent's witnesses, especially the expert witnesses, to refute the respondent's allegations. As I noted earlier, the nature of the evidence that the respondent presented at the hearing was well known before the hearing began. Its documentary evidence on the safety and efficacy of vaccines, the process for approving them, and the scientific data that the employer relied on in developing the Policy was already well known. The expert reports had been forwarded to the grievors' counsel well before the hearing began. This is not a case in which the grievors could have claimed to have been surprised by the opposing party's evidence.

[42] The grievors' counsel explained his litigation strategy several times in the context of pre-hearing conferences and in the email exchanges in the Board's file. In writing and verbally, he confirmed that he did not intend to call expert witnesses to refute the respondent's evidence. He also set out his theory of the case at the beginning of the hearing.

[43] If the grievors were unaware of their counsel's adopted litigation strategy and the witnesses that counsel planned to call before the hearing began, it is undeniable that they were aware of those things at the early stages of the hearing's first phase. They were present during that first phase.

[44] The grievors did not inform the Board of any concerns about their counsel's adopted litigation strategy while the hearing's first phase was underway. If their concerns really were based on their counsel's failure to call witnesses who, according to them, were necessary to contradict the respondent's allegations, they could have informed the Board of those concerns well before closing their evidence. Although that would have led to a delay in the hearing, they could also have taken steps to change their representative before closing their evidence.

[45] It is revealing that the grievors stated that they contacted their counsel to express their concerns not during the hearing phase that corresponded to adducing

their evidence but rather after their evidence was closed, Ms. Bidal's cross-examination was complete, and Dr. Kindrachuk's cross-examination was already well underway.

[46] Only on the evening of December 2, 2022, and again in January 2023, did the grievors, according to them, ask their counsel to take steps to inquire into certain matters before cross-examining the respondent's witnesses and asking the Board for permission to reopen their evidence.

[47] If the grievors were not satisfied with their counsel's representation, the fact remains that they did not act promptly to voice their concerns. They did not contact their counsel to express their concerns until their evidence was closed. They failed to share those concerns with the Board during the first phase of the hearing. Only after their counsel withdrew from the case did they inform the Board of their concerns about the representation that their counsel had provided. Their request and their representative's arguments at the case management conference on this matter left a clear impression that their concerns expressed to their counsel after the first hearing phase and after their evidence closed were those of clients upset by the fact that a hearing, and in particular the cross-examination of the respondent's expert witnesses, was not proceeding as they had hoped. The impression that I was left with was not one of the concerns of clients surprised to learn of a litigation strategy adopted by their counsel.

[48] The Board was responsible for ensuring procedural fairness. To ensure it, the Board had to consider the rights and interests of each party to the dispute. Since the burden of proof for disguised discipline rests with the grievors, the nature and extent of the evidence that they would present at the hearing was the subject of many discussions and email exchanges. The respondent prepared its evidence on the basis of the three witnesses that the grievors identified and developed its litigation strategy accordingly. The respondent had the right to know the totality of all the evidence presented against it before beginning to present its evidence. Granting the grievors' request, in whole or in part, would have resulted in increasing the number of witnesses that they would present from 3 to a maximum of 21. That would have significantly delayed the hearing's second phase and extended its overall duration as well as caused significant prejudice to the respondent in that it would have been required to respond to evidence that had increased exponentially during the hearing.

[49] For the reasons just set out, I concluded that the grievors' request to call additional witnesses should be denied. However, because of their stated objective of wanting to refute the respondent's allegations about, among other things, vaccine safety and efficacy and the existence of a health emergency that justified imposing the Policy, I allowed them broad latitude in their cross-examination of the respondent's witnesses in the hearing's second phase. I did that to give them the opportunity to demonstrate the relevance of the different themes listed in paragraph 35 of this decision and, if applicable, to draw evidence with respect to those subjects during cross-examination.

[50] Despite my earlier conclusion with respect to the grievors' request, I must note that I was, and continue to be, of the opinion that, although some of the themes outlined at par. 35 might arguably be relevant, there was a significant gap between those themes and the description that was presented to me — orally and in writing — of the several additional witnesses' evidence.

[51] As I noted earlier, the grievors stated that they wanted to present evidence refuting the allegations about the seriousness of the health emergency, the impact of COVID-19 on the healthcare system, and the necessity for the government to use an mRNA-based vaccine as a tool to respond to the virus's spread. They also stated that they wanted to present new evidence refuting allegations that it was "[translation] … necessary to inject all federal public servants with a vaccine, without exception …" and that "[translation] … depriving public servants who did not wish to be injected with the vaccine of their salaries for an indeterminate period was merely an administrative measure …".

[52] As mentioned earlier, the grievors sought the right to again cross-examine Ms. Bidal, to call 19 additional witnesses, including 4 expert witnesses, and to be able to examine — and not cross-examine — Ms. Lavoie's manager.

[53] The grievors stated that they "[translation] had to ask a few more questions" of Ms. Bidal, without further clarification or explanation. They could not describe or explain how and why Ms. Bidal's cross-examination, which had been very lengthy, would have been incomplete or insufficient to make their case. They also did not provide any information that could have explained to the Board why it was necessary, according to them, to have the right to examine Ms. Lavoie's manager. The employer

had committed to calling the manager as a witness. It was already planned that the grievors would have the opportunity to cross-examine her. Without further clarification, I would not have granted those two requests.

[54] The grievors also requested the right to call, as an additional witness, the person who signed the letter informing Ms. Lavoie that she would be placed on leave without pay. The only explanation offered to support that request was that the testimony would be used to "[translation] determine whether the procedural safeguards were complied with". Such a request, in the absence of allegations that procedural safeguards were not complied with, was, in my view, a fishing expedition.

[55] I will now move on to the expert evidence. The grievors wished to present four expert witnesses, two of whom had previously been proposed as ordinary witnesses as part of their counsel's request, which was the subject of the interlocutory decision on the grievors' evidence described earlier. The two witnesses' evidence had been found to be irrelevant.

[56] The expert witnesses' evidence was described as being about the natural immunity that can be acquired against COVID-19, the data collected through a system in the United States for self-reporting side effects of a COVID-19 vaccination, the history of technology used to develop mRNA vaccines, and the efficacy and safety of COVID-19 vaccines. In my opinion, only the last theme was relevant to these grievances because the employer strongly emphasized vaccines' safety and efficacy in its Policy-related communications. However, the evidence of the person proposed as an expert witness on that matter had already been found irrelevant during preparations for the hearing's first phase, even though he had been proposed as an ordinary witness. Allowing the grievors to call that witness at this stage of the hearing because of allegations about their former counsel would have allowed them to do indirectly what I had previously prohibited them from doing directly.

[57] As noted earlier, the grievors also requested the right to call more than a dozen additional ordinary witnesses, including a physician who would have testified about alleged deficiencies in the Canadian system used to track adverse events for COVID-19 vaccines, someone who would have testified about contracts to manufacture COVID-19 vaccines, a physician who apparently treated a vaccinated public servant who died of cancer, the spouse of a vaccinated public servant who died of a heart attack, and two

Canadian Armed Forces members who would have testified about the development of the Canadian Armed Forces' vaccination policy, the number of COVID-19 cases, and vaccine side effects in the armed forces. That evidence would have had the effect of significantly broadening the debate before the Board and leading it well beyond examining the Policy's application to the grievors.

[58] Added to those additional witnesses were eight federal public servants. The departments and agencies for which they worked are unknown. The list of those additional witnesses included a public servant who would have testified about the impact of COVID-19 cases on Coast Guard operations after the Policy was implemented, a public servant whose son apparently suffered a side effect from the COVID-19 vaccine, a public servant who was supposedly required to be away from work for several days after being vaccinated, and a public servant who reportedly suffered a side effect described as serious and required sick leave. Two other public servants who were placed on leave without pay for not complying with the Policy would have testified about their employer's refusal to grant them accommodation, while another public servant would have testified about her feeling that she was forced to be vaccinated because she was a single parent. The last additional witness was the grievors' representative in the second phase of the hearing. The written description of his testimony set out that he would have testified about side effects from the COVID-19 vaccine that he reportedly observed in his relatives and colleagues.

[59] The Board is seized with the grievors' individual grievances, not a group grievance. First and foremost, the Board must review the Policy's application to the grievors. The fact that the grievors challenged the Policy and that the Policy applied to the entire core public administration does not change the nature of the grievances that I am seized of. It also does not have the effect of granting the grievors the right to present evidence that has nothing to do with their particular circumstances. For that reason, the additional ordinary witnesses' evidence was irrelevant to the matter that the Board is seized of, which is whether the grievors' placement on leave without pay was disguised discipline.

III. Summary of the evidence

[60] As I noted, the grievors presented three witnesses, themselves and Mr. Rehibi's manager, Nathalie Bard.

[61] The respondent called six witnesses, including one expert witness with expertise in COVID-19 and COVID-19 vaccination (Dr. Kindrachuk), one expert witness with expertise in COVID-19 screening (Dr. Guillaume Poliquin), the managers of Mr. Rehibi and Ms. Lavoie (Chantal Nadeau and Claudine Blondin), the associate assistant deputy minister responsible for developing and implementing the Policy (Ms. Bidal), and the director general of Health Canada's Biologic and Radiopharmaceutical Drugs Directorate who approved the first vaccines against COVID-19 for use in Canada in December 2020 (Dr. Celia Lourenco).

[62] Testimony took place over nine days, and a large number of documents were admitted into evidence. I have considered all the evidence presented to me at the hearing. However, for the sake of brevity, I will summarize only the evidence that I feel is most relevant to the issues before me in these grievances.

[63] As previously indicated, the grievors had the burden of proving disguised discipline. Meeting it can require, among other things, presenting evidence on the respondent's intent and the effect of the measure imposed on the grievors (see *Bergey v. Canada (Attorney General)*, 2017 FCA 30 at para. 37; and *Frazee*, at paras. 22 to 24). For that reason, I allowed the grievors broad latitude in cross-examining the employer's witnesses. However, I find that a significant part of the evidence that resulted from the cross-examinations proved irrelevant to the issues that I must decide in this case. I will explain more in my analysis as to why I reached that conclusion.

[64] In their written submissions, the grievors also included statements and allegations that they described as publicly known information. According to them, the Board should accept that information as evidence as it denied them the right to reopen their evidence. What they described as publicly known information is far from it. Rather, it is data, articles, reports, and allegations that they could have presented to the respondent's witnesses in cross-examination or that they would have wished to present in evidence had the Board allowed them to call additional witnesses. By including those statements and allegations in their written arguments, they attempted to do indirectly what the Board had not allowed them to do directly. For that reason, I will not consider statements and allegations that have no basis in the evidence adduced at the hearing and that the grievors added to their written arguments.

[65] In its written submissions, the respondent also included a reference to an investigation report that had not been admitted into evidence at the hearing. I will not consider it.

A. Overview of the timeline

[66] The Policy was adopted in October 2021, and it was suspended in June 2022. However, its development and implementation were part of the broader temporal context of the respondent's response, as the employer of the 260 000 public servants in the core public administration, to the spread of the COVID-19 virus.

[67] That period is engraved in the memories of many people. However, I offer the following timeline as a reminder of the factual and temporal context relevant to this case. It was drawn from the documentary evidence and testimonies. I would like to make it clear that the timeline is not exhaustive. It seeks only to locate in time the respondent's development and implementation of the Policy and its application to the grievors.

[68] Since the grievors focused on the relevance, according to them, of the process for the market authorization of COVID-19 vaccines and the emergence of certain COVID-19 variants to the Policy's development and implementation, including the Alpha, Beta, Delta, and Omicron variants, I have included in the timeline some steps in the vaccine authorization process and the approximate periods in which the variants would likely have become the dominant variants in Canada as a whole. It is impossible for me to identify with certainty the day, week, or even month in which a variant became dominant. I do not think that it is necessary for me to do so to enable me to analyze the relevance and weight to give the grievors' arguments raised in a labour relations grievance adjudication process. The approximate periods identified in the following timeline are derived from Dr. Kindrachuk's expert report, specifically Figure 6 in it. They are consistent with the testimonies of Drs. Kindrachuk and Lourenco.

[69] In early March 2020, the World Health Organization (WHO) declared a worldwide COVID-19 pandemic. The SARS-CoV-2 virus was detected in Canada.

[70] On March 15 and 16, 2020, the departments in which Mr. Rehibi and Ms. Lavoie worked asked their employees to work remotely, except for those employees who

provided essential services. In the following weeks, many measures were implemented in the workplace, including wearing masks, physical distancing, and communicating various instructions on COVID-19 symptoms, hand hygiene, and surface disinfection. As I will describe later in the summary of the evidence, Mr. Rehibi continued working onsite, while Ms. Lavoie continued working remotely.

[71] In April 2020, the Prime Minister of Canada said that things would return to normal only when a COVID-19 vaccine became available.

[72] In May and June 2020, the Government of Canada's chief human resources officer and the Treasury Board of Canada's president reported through messages and statements that departments were beginning to plan for employees to go back to working onsite in larger numbers. The messages stated that the COVID-19 transmission curve had flattened and that by June 2020 it was declining.

[73] On September 16, 2020, the Minister of Health approved an interim order to allow greater flexibility in the process of authorizing the importation and sale of COVID-19 vaccines. No changes were made to the nature or extent of data that vaccine manufacturers had to submit as to the vaccines' safety and efficacy. The requirements to be met and Health Canada's analyses and audits remained the same as for other vaccines against infectious respiratory diseases. The flexibility sought by the order was primarily intended to allow manufacturers to report ongoing data on the vaccines' quality, safety, and efficacy so that Health Canada could analyze the data as it became available. The order also allowed Health Canada to impose additional conditions on manufacturers.

[74] In the summer and early fall of 2020, a growing number of public servants in the core public administration worked, in whole or in part, onsite either on their employer's premises or those of third parties. On September 4, 2020, at least 60 000 public servants were working onsite.

[75] On November 24, 2020, because of a rapid increase in the number of COVID-19 cases, the chief human resources officer recommended that deputy heads and heads of agencies in the federal public service continue prioritizing remote work. The anticipated increase in onsite work was put on hold, for all practical purposes.

[76] In November or December 2020 (approximately), Alpha became the dominant variant in Canada.

[77] On December 9 and 23, 2020, Health Canada approved the first two vaccines against the COVID-19 virus, both of which were mRNA based. Unlike vaccines that use a live virus to trigger an immune response, mRNA vaccines teach the body's cells how to make a protein that triggers an immune response. Once it is triggered, the body produces antibodies that help fight a COVID-19 infection, if necessary. The vaccines were to be administered in two doses at an interval of several weeks.

[78] In December 2020, a public vaccination campaign began. Some groups of people were identified as having access to vaccination on a priority basis.

[79] In January 2021 (approximately), the Beta variant appeared in Canada.

[80] In April 2021, vaccination against COVID-19 for the general population began, as vaccines were becoming available in greater quantities. The public vaccination campaign took place over several months in 2021, at different speeds in various regions of the country.

[81] In May 2021, the Treasury Board's president issued a statement strongly encouraging federal public servants to be vaccinated. A few weeks later, the chief human resources officer sent a message to deputy heads and heads of agencies about an update to federal workplace occupancy guidelines, in anticipation of the gradual relaxation of public-health restrictions.

[82] In summer 2021, the Treasury Board Secretariat carried out analyses with respect to vaccination. Adopting a vaccination policy for the entire core public administration was one option analyzed.

[83] In late July 2021 (approximately), the Delta variant became the dominant variant in Canada.

[84] On August 13, 2021, the Treasury Board, the federal cabinet committee that is the legal employer of public servants in the core public administration, announced its intention to adopt a vaccine policy applicable to the entire core public administration, including the Royal Canadian Mounted Police.

[85] On October 6, 2021, the Policy was adopted. It came into force immediately. Its implementation was described as gradual. Public servants were required to attest to their vaccination status by October 29, 2021, failing which they would be placed on leave without pay a few weeks later.

[86] On November 8, 2021, the chief human resources officer shared with deputy heads and heads of public service agencies an update on the guidelines, to help departments and agencies gradually increase the occupancy rate and plan for public servants' return to their workplaces in greater numbers. The amended guidelines came into force on November 15, 2021.

[87] On November 15, 2021, the Policy was fully implemented. The grievors were placed on leave without pay until they complied with the Policy, it was revoked, or its application was suspended.

[88] On December 16, 2021, in response to the spread of Omicron, a new COVID-19 variant, the Treasury Board's president issued a statement that departments and agencies should suspend any planned increase in the occupancy of their premises and review the current occupancy levels.

[89] In late December 2021 or early January 2022 (approximately), Omicron became the dominant variant in Canada. It had mutations that distinguished it from all the earlier variants. Eventually, it proved much more transmissible. It led to a significant increase in the number of COVID-19 cases and in the hospitalization rate.

[90] In the first months of 2022, Canadian and international scientific communities conducted studies and analyses to assess Omicron's impact on the COVID-19 vaccines' effectiveness.

[91] On February 28, 2022, the Treasury Board's president issued a statement that departments and agencies could resume planning to gradually increase the number of public servants working onsite.

[92] On June 14, 2022, the Treasury Board announced that the Policy would be suspended on June 20, 2022. The grievors were informed that they would be able to return to work as of June 20, 2022.

[93] Ms. Lavoie returned to work on June 20, 2022, and Mr. Rehibi did the same, on July 4, 2022.

B. COVID-19, screening, and the COVID-19 vaccines

[94] Before describing the evidence presented at the hearing on COVID-19 and the COVID-19 vaccines, it is necessary to clarify what the grievors contested and did not contest. Their position changed somewhat between the first and second hearing phases.

[95] The grievors' position advanced in the second phase of the hearing indicated that they do not contest the virus's existence. They also do not contest that the virus can lead to infections, serious illnesses, and death. However, they contest the existence of a real health emergency in Canada, the veracity and reliability of the scientific data on the efficacy and safety of mRNA-based vaccines against the COVID-19 virus, and data on the hospitalization rate due to COVID-19. In their written submissions, the grievors also appear to contest the WHO's declaration of a COVID-19 pandemic. As part of the cross-examinations of the employer's witnesses, the grievors sought to question the reliability and veracity of the data that the respondent relied on at the hearing and to cast doubt on the scientific methodology used in some studies that examined the vaccines' efficacy and safety. A significant part of the evidence from those cross-examinations proved irrelevant to the issues that I must decide in the adjudication of these grievances. In my analysis, I will further explain why I reached that conclusion.

[96] Instead of asking me to take judicial notice of facts pertaining to the COVID-19 virus, the efficacy and safety of vaccines, or the vaccine approval process as courts have done in *Parmar v. Tribe Management Inc.*, 2022 BCSC 1675, *R. v. Morgan*, 2020 ONCA 279, *Khodeir v. Canada (Attorney General)*, 2022 FC 44, and *J.N. v. C.G.*, 2023 ONCA 77, the respondent presented evidence with respect to those subjects. I will set out the evidence that was presented to me at the hearing and will deal with it in my analysis.

[97] The evidence presented at the hearing on the COVID-19 virus, the COVID-19 vaccines, and vaccine approval for the Canadian market came mainly from Dr. Kindrachuk, an expert witness, and Dr. Lourenco. Evidence was also presented on COVID-19 screening from a second expert witness, Dr. Guillaume Poliquin.

[98] Because of the positions they hold and the duties they perform, the three witnesses have advanced knowledge of COVID-19, the virus's transmission, COVID-19 vaccination, and the changing epidemiological situation due to the impact of different variants. In cross-examination, the three witnesses spoke about those themes. Their testimonies were very similar. I did not identify any significant differences of opinion or contradictions. Therefore, to reduce repetition as much as possible, in the following paragraphs, I will describe only their testimony with respect to their particular areas of expertise or experience.

[99] Evidence with respect to the COVID-19 virus and vaccination will be described first. Then, I will continue with the summary of the evidence with respect to the strengths and weaknesses of screening as a tool to respond to the spread of the COVID-19 virus. Finally, I will provide a summary of the evidence related to the process that led to Health Canada approving COVID-19 vaccines.

[100] I will address the admissibility of each expert witness's evidence in the section of this summary of the evidence that deals with that evidence.

1. Expert evidence on COVID-19 and vaccination

[101] Dr. Kindrachuk is a virologist and an associate professor in the Department of Medical Microbiology and Infectious Diseases at the University of Manitoba. He also holds the Canada Research Chair in Emerging Viruses. His field of expertise is the study of emerging viruses, the infections they cause, and their impact on global health. He is a member of the Coronavirus Variants Rapid Response Network, which is a network of interdisciplinary researchers who seek to coordinate, facilitate, support, and accelerate rapid-response research on COVID-19 virus variants across Canada. In 2020, Dr. Kindrachuk completed a 12-month secondment to the Vaccine and Infectious Disease Organization at the University of Saskatchewan, where he helped lead research related to the COVID-19 virus. He has conducted scientific studies on the COVID-19 virus and is a member of WHO COVID-19-virus working groups. He has been recognized as an expert witness is at least one other case pertaining to mandatory COVID-19 measures.

[102] In the hearing's first phase, the grievors did not object to recognizing Dr. Kindrachuk as an expert witness. However, in the second phase, more specifically in their written submissions, the grievors expressed strong reservations about his

testimony, notably on his independence and credibility. They made allegations of an apparent conflict of interest that according to them could have resulted from direct or indirect funding to Dr. Kindrachuk's employer. I will say no more about those allegations, which were not presented to Dr. Kindrachuk at the hearing and were not supported by the evidence on the record.

[103] In *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 ("*White Burgess*"), the Supreme Court of Canada instructs that the process for determining the admissibility of an expert's opinion testimony is a two-stage analysis. First, the Board must ensure that the proposed testimony meets the four threshold requirements set out in *R. v. Mohan*, [1994] 2 S.C.R. 9, namely, relevance, necessity, the absence of an exclusionary rule, and a properly qualified expert. The decision to exclude testimony at this first stage of the analysis should be made only in cases in which the proposed expert cannot or will not provide fair, objective, and impartial evidence.

[104] If the criteria set out in *Mohan* are met, the case law instructs that the Board should move on to the second stage of the analysis, which is to consider the expressed concerns about an expert witness's independence or impartiality as part of the overall evaluation of the costs and benefits of admitting the evidence (see *White Burgess*, at paras. 10 and 54). The costs identified in the case law include, among others, the risk that the decision maker will rely on the expert's opinion instead of making an effective and critical assessment of the evidence, the danger that admitting expert evidence could lead to inordinate delays and costs, and the danger that expert evidence would distract the judge from the facts rather than help (see *White Burgess*, at para. 18). *White Burgess* also instructs to take into account that expert evidence may be impervious to effective cross-examination by counsel who are not experts in the field.

[105] At the hearing, I recognized Dr. Kindrachuk as an expert witness on the COVID-19 virus and the vaccination against it.

[106] His testimony about the COVID-19 virus's transmission and vaccination's role — in itself, as well as compared to measures other than vaccines — in reducing COVID-19 transmission and infections was relevant to the employer's reasons for adopting the Policy, as well as to certain choices made when developing it.

[107] The Board is an administrative tribunal with expertise in labour law. It has no scientific expertise. Dr. Kindrachuk's expert opinion was necessary to enable the Board to assess the technical and scientific nature of the issues in dispute relating to COVID-19 and the importance of vaccination as a tool that the employer could use. The grievors did not invoke any rule of exclusion; nor are any such rules recognized in law applicable in this case. As for the criterion of the expert's sufficient qualification, the considerable knowledge and experience that Dr. Kindrachuk has acquired are described in paragraph 101 of these reasons. I concluded that he would be able to testify fairly, objectively, and impartially.

[108] I also concluded that the overall assessment of costs and benefits favoured admitting Dr. Kindrachuk's testimony. His evidence was relevant to the employer's position that vaccination against COVID-19 was the most effective response to the spread of the COVID-19 virus. In my opinion, the evidence was unlikely to usurp my role as a decision-maker because it did not address the issue before the Board, which was whether placing the grievors on leave without pay was disguised discipline. It was simply evidence aimed at describing the scientific knowledge available to the employer at the time the Policy was developed, implemented and suspended. In this case, the challenge of effectively cross-examining an expert witness was also minimized because the grievors were already aware of most of Dr. Kindrachuk's testimony and his report had been sent to the grievors well before the hearing. It was not anticipated that admitting Dr. Kindrachuk's evidence could result in excessive delays and costs (see *White Burgess*, at para. 18).

[109] Dr. Kindrachuk's expert opinion was ruled admissible.

[110] In summary, Dr. Kindrachuk's testimony was as follows:

- The COVID-19 virus is transmitted by an infected person to others primarily through respiratory droplets and aerosols. It can also be transmitted through direct or indirect contact with mucous membranes.
- A person infected with COVID-19 may be symptomatic, asymptomatic, or presymptomatic. A person in the presymptomatic phase does not yet have symptoms of the disease but will become symptomatic.
- The severity of the disease in an infected person varies widely. The disease varies from asymptomatic in some cases to a severe and critical illness in others. A COVID-19 infection may, in some cases, result in the hospitalization

and even death of the infected person. The highest risks of serious illness are associated with age and underlying health problems.

- Although symptomatic people are the primary vector of the virus's transmission, it can be transmitted by an infected person several days before disease symptoms appear, which is a unique characteristic of COVID-19 that contributes to its rapid spread. Viral transmission can also occur with asymptomatic illness.

- The risks of transmission may be influenced by factors such as the stage of infection, the environment, the modes of contact, the socioeconomic factors and, as will be described later, the virus variant circulating in the community.

- No single intervention or measure can provide total protection from COVID-19 infection. An intervention consisting of layered protection measures is the best protection against infection.

- Non-pharmaceutical interventions, such as wearing a mask, ventilation, physical distancing, and hand hygiene can help reduce virus transmission in communities. However, they do not provide immunological protection against the disease in the event of infection. Each non-pharmaceutical intervention provides additional protection but does not guarantee total protection against infection. Virus transmission can still occur.

- Vaccination provides an additional layer of protection against COVID-19. Vaccines alone cannot block or prevent the virus's transmission. The best protection is provided by an intervention that combines vaccination with non-pharmaceutical interventions.

- Vaccines do not provide 100% protection, and post-vaccine immunity varies between people. There is a risk of post-vaccination infection.

- The primary objective of vaccination against COVID-19 is not to prevent the virus's transmission. Rather, the goal is to reduce the risk of serious illness, hospitalization, and death. Vaccination is a safe mechanism that provides a comprehensive level of protection against COVID-19's serious consequences.

- Although it is not the primary objective of vaccination against COVID-19, vaccination reduces the infectious period of the disease by mitigating symptoms, thus reducing the overall symptomatic and infectious period and the time during which the person could transmit the virus in the community.

- The benefits of vaccination manifest at the individual and group levels. Among the benefits of vaccination at the group level is one that is particularly relevant to the workplace. Excluding unvaccinated employees from a workplace reduces the risk of transmitting the virus in the workplace, including the risk of transmitting the virus to vaccinated individuals. The risk of post-vaccination infection remains. However, the risk of transmitting the virus in a work environment composed only of vaccinated people appears to be significantly reduced.

- The two main categories of COVID-19 vaccines are mRNA vaccines and viral-vector-based vaccines. Unlike the mRNA vaccines described earlier, viral-vector-based vaccines use a harmless virus as a viral vector. The vaccines that Pfizer and Moderna marketed were mRNA vaccines, while the vaccine that AstraZeneca marketed was a viral-vector-based vaccine.

- Although some consider it a "new" technology, mRNA vaccines have been at different stages of preclinical and clinical development for nearly 30 years. They have been studied closely in clinical trials against other infectious diseases.

- Prioritizing intervention based on natural immunity instead of vaccine immunity involves important public health considerations. Natural immunity is caused by the body's immune response to a COVID-19 infection. Such an intervention can lead to serious illnesses resulting from the initial COVID-19 infection and significantly impact the healthcare system. In addition, natural immunity can vary considerably from between people and can weaken over time.

- Viruses can mutate. Coronaviruses are no exception. However, not all mutations lead to the emergence of a new variant. Some mutations can have little or no impact on the virus's behaviour. Although it is possible that a new variant may emerge during prolonged transmission of the virus, there is no guarantee that it will occur.

- It is impossible to predict a virus's behaviour.

- In other, earlier coronavirus outbreaks, such as severe acute respiratory syndrome (SARS), variants of concern did not appear. Variants of concern are new variants that affect the severity of the disease or that have increased transmissibility or the ability to evade diagnosis or immunity. Based on that experience, the scientific community did not necessarily expect that any COVID-19 variants of concern would emerge that could affect a vaccine's ability to provide protection against infection from the virus.

- Over time, COVID-19 variants were identified. Alpha, Delta, and Omicron were the most present variants in Canada. They succeeded one another in what were described as "waves" of COVID-19 transmission.

- Despite those variants, vaccines continued to provide protection against COVID-19's serious consequences. For some time, the vaccines significantly reduced the COVID-19 infection rate in vaccinated people.

- Once a variant of concern is identified, the scientific community must conduct studies to determine whether the variant will cause changes in viral behaviour or vaccine efficacy. The studies may take several months because they must consider and analyze several potentially confounding factors, such as the public health measures in place in the geographic area under study, the availability of vaccines and booster doses, the percentage of the population that is fully vaccinated, and the time that has elapsed since vaccination, among others.

- Because of mutations, the Omicron variant was able to evade the immunological response created by the vaccine more than were the earlier variants. That led to more post-vaccination infections, a significant increase in the number of COVID-19 cases, and therefore, an increase in hospitalizations due to COVID-19 or for a reason incidental to COVID-19. However, the vaccines continued to provide protection against COVID-19's serious consequences.

- The coronavirus spike protein, which is the protein that mRNA COVID-19 vaccines target, is subject to mutations. However, mRNA vaccines result in an immune response that targets the entire spike protein, so that if there is a mutation in a specific spike-protein region, an immune response will still occur for the rest of the protein. It means that normally, the vaccine will continue to protect against COVID-19's serious consequences, even if the vaccine is less effective at blocking infection.

- Although the effectiveness of vaccines in reducing infection rates in vaccinated people was reduced with Omicron's emergence, the scientific data demonstrates that the virus's transmission by a vaccinated person infected with the Omicron variant was likely reduced compared to an unvaccinated person infected with the same variant.

- Over time, studies of Omicron have shown that the vaccine's ability to prevent infection was reduced, yet the protection provided by the vaccine against serious consequences remained high. However, the protection diminished rapidly.

2. Expert evidence on COVID-19 screening

[111] Dr. Poliquin is the vice-president of the Public Health Agency of Canada's (PHAC) National Microbiology Laboratory. He holds a doctorate in medical microbiology and infectiology. He is also a physician with a clinical practice in pediatric infectious diseases.

[112] Dr. Poliquin was the lead author of the PHAC's first draft guidelines for using rapid antigen detection tests to detect a COVID-19 infection. He helped develop several COVID-19 diagnostic and tracking tools. He has authored peer-reviewed scientific publications dealing with the effectiveness of COVID-19 diagnostic testing. He has been recognized as an expert witness in at least one other case pertaining to mandatory COVID-19 measures.

[113] The grievors expressed strong reservations about Dr. Poliquin's qualification as an expert witness notably with respect to his credibility and independence due to his participation in a video that the respondent prepared and that the grievors were required to watch as part of the Policy's implementation. Although the "strong

reservations" were not themselves an objection to qualifying the witness as an expert, all the same, I offer the following comments on Dr. Poliquin's testimony.

[114] Dr. Poliquin's testimony met the criteria set out in *Mohan* and *White Burgess* described earlier in this decision. His testimony about COVID-19 screening, including the strengths and weaknesses of screening as a tool to respond to the spread of the COVID-19 virus, was relevant to the employer's choice to prioritize vaccination over screening. His expert opinion was necessary for the reasons set out in the analysis of the need for Dr. Kindrachuk's testimony. Dr. Poliquin's expert opinion was necessary to enable the Board to assess the technical nature of COVID-19 screening, as well as the effect of the emergence of the virus variants on the effectiveness and specificity of the screening tests.

[115] The grievors did not rely on any rules of exclusion; nor are any of the rules recognized in law applicable to this case. As for the criterion of the expert's sufficient qualification, the considerable knowledge and experience that Dr. Poliquin has acquired is described in paragraphs 111 and 112 of these reasons.

[116] I concluded that Dr. Poliquin would be able to testify fairly, objectively, and impartially. I do not share in any way the reservations that the grievors expressed about the witness's credibility or independence.

[117] Neither Dr. Poliquin's comments in the respondent's video nor his testimony at the hearing raised any doubt in my mind as to his understanding of his obligation to the Board, namely, to provide the Board with fair, objective, and impartial assistance. His participation in the video, alone, is clearly insufficient to support a conclusion that his opinion would have been influenced by the earlier relationship with the respondent or that his opinion would not result from an objective review of the questions that would be posed to him. I was satisfied with his independence and impartiality.

[118] As part of my overall assessment of the costs and benefits of admitting Dr. Poliquin's testimony, I considered the grievors' reservations about Dr. Poliquin's independence and impartiality. I weighed the relevance, reliability, and necessity of his testimony against the risk factors described earlier, including time and costs, difficulties ensuring the effective cross-examination of an expert witness, the danger that the expert evidence would be a distraction from the real issues, and the risk that

the evidence could cause the decision maker to rely on the expert's opinion instead of examining the evidence critically and effectively.

[119] Dr. Poliquin's evidence was relevant to the employer's decision to prioritize vaccination over screening. In my opinion, the evidence was unlikely to usurp my decision-maker role because it did not address the issue of whether applying the Policy to the grievors was disguised discipline. It was simply evidence that sought to explain the scientific knowledge available to the respondent at the time the Policy was developed and implemented. Most of Dr. Poliquin's evidence was already known and his report had been sent to the grievors well before the hearing. It was not anticipated that admitting Dr. Poliquin's evidence could result in excessive delays and costs (see *White Burgess*, at para. 18).

[120] I concluded that the potential usefulness of Dr. Poliquin's testimony outweighed the risks associated with it (see *White Burgess*). He was recognized as an expert witness on COVID-19 screening. His expert opinion was ruled admissible.

[121] The general principles of Dr. Poliquin's testimony are as follows:

- Screening is inferior to vaccination as a tool to stop the spread of a virus like COVID-19. Unlike vaccination, screening does not reduce the virus's transmission. Only actions taken as a result of a positive screening for COVID-19 can reduce the virus's transmission.

- The objective of screening is to identify positive COVID-19 cases. It does not protect against serious illness or death due to COVID-19 infection. Vaccination protects against serious illness and death.

- Two types of screening tests were commonly used in Canada in response to the spread of the COVID-19 virus; they were rapid screening tests, also known as rapid antigen detection tests, and molecular detection tests commonly known as "PCR tests". The molecular detection tests analyzed in a laboratory are superior to the rapid screening tests that can be carried out at home. They are more sensitive and thus more effective in detecting a viral load shortly after an infection and while the infected person may be unaware of having contracted the COVID-19 virus.

- Although rapid screening tests have a lower sensitivity, they have an excellent specificity; i.e., the test user may be confident that a positive COVID-19 screening result is indeed a case of COVID-19 infection. Those tests can be a useful tool during periods of high virus transmission, when laboratories handling molecular detection tests are unable to meet the demand.

- Before the availability of COVID-19 vaccines, public health measures aimed at infection control focused on identifying positive COVID-19 cases, contact

tracing, and using isolation to control the virus's spread. At that time, molecular detection testing was used on a large scale, notably because of its greater accuracy and reliability.

- Screening is imperfect, regardless of the nature of the test used.

- Public health systems relying solely on screening are less effective than vaccination-based systems. Screening, especially by means of home-based rapid antigen tests, does not identify all COVID-19-infected people. An infected person may transmit the virus before symptoms occur or in the absence of symptoms, which means that the person may transmit the virus, although nothing leads them to believe that they are infected with COVID-19. Several factors can influence screening sensitivity, such as the dominant variant at the time and the timing of swabbing and how it is performed.

- A system relying solely on screening is also less effective because those infected with COVID-19 who have received negative screening results will be less likely to comply with the suggested health measures because of their belief that they are negative for COVID-19.

- The appearance of the Omicron variant further reduced the effectiveness of any system relying solely on screening.

- Omicron was fundamentally different from the earlier variants. Its emergence required a comprehensive review of previous research and findings on the earlier variants, including with respect to screening and the protection provided by vaccination. Much of the research and studies conducted on the COVID-19 virus and the first variants had to be redone.

- Because of the multiple confounding factors that had to be considered and analyzed, several months, including a significant part of early 2022, elapsed before the Canadian and international scientific communities could reach a consensus on Omicron's impact on screening, vaccine protection, and, in particular, vaccine protection against serious forms of the disease.

- Omicron had a high transmission rate during the period before a COVID-19 infection could be confirmed by screening. A person's ability to rely on the accuracy of a negative rapid antigen test result decreased. In addition, the increase in the number of positive cases that the Omicron variant caused resulted in demand for molecular testing that rapidly surpassed Canadian laboratories' capacity.

- Changes to the PHAC's advice on COVID-19 screening were required, including reduced access to molecular screening and new instructions on the swabbing method.

3. The approval of the COVID-19 vaccines

[122] At the relevant time, Dr. Lourenco was the director general of Health Canada's Biologic and Radiopharmaceutical Drugs Directorate. She was responsible for the

scientific review and regulatory authorization of vaccines for the Canadian market. She authorized COVID-19 vaccines for use in Canada. She was not involved in the Policy's development or implementation.

[123] Her testimony can be summarized as follows:

- Health Canada is the regulatory body for vaccines. It is also responsible for the pharmacovigilance process, which monitors side effects or adverse reactions after vaccination.
- The PHAC is the organization responsible for monitoring the epidemiology of infectious diseases and vaccine effectiveness, that is, whether vaccines have the desired effect in the community when they are administered. The PHAC also collects data on post-vaccination side effects or adverse reactions. On that last topic, the PHAC and Health Canada have overlapping responsibilities.
- Dr. Lourenco was responsible for deciding whether to authorize COVID-19 vaccines. No one intervened to influence her decision.
- She decided to approve the vaccines based on the information and data submitted by manufacturers, the analyses that members of her team conducted on that data, and the data from Canadian and international studies on the safety of the vaccines for which authorization requests were made.
- Applications for vaccines' regulatory authorization were approved based on the data available at the time, notably data from three-phase clinical trials involving tens of thousands of participants, laboratory and animal studies, and data on the manufacturing, purity, and safety measures taken to ensure the vaccines' quality and effectiveness.
- Because of the importance of identifying a vaccine that could help curb the virus's spread globally, international regulators, including Health Canada, worked together to agree to the minimum data required to allow approving COVID-19 vaccines, notably the time over which to collect the clinical trial data.
- Canadian regulatory requirements were not relaxed. The applications for vaccine regulatory authorization were reviewed, studied, and analyzed in the same way as for any other vaccine, with the only exception being the one described in the timeline, which was the fact that data from studies and trials or on measures taken to ensure vaccine quality and effectiveness could be submitted by manufacturers and analyzed by Health Canada on an ongoing basis.
- The approval process for the vaccines was conducted with the same rigour as for any other vaccine. The process was faster than normal only because additional human resources were assigned to the task and because those involved in studying and analyzing the applications worked a significant amount of overtime.

- A vaccine is approved only if it has been demonstrated that its benefits outweigh its risks, including the risk of side effects.

- The main measure of a vaccine's effectiveness is its ability to prevent infection in people at risk who receive it. If it prevents infection, the vaccine is also supposed to prevent transmission, because if a person is not infected with COVID-19 because of a vaccine, they will not be able to spread the virus.

- Vaccines are not 100% effective at protecting against infection, regardless of the type of vaccine. However, they can be very effective at protecting against infection and serious illnesses, hospitalization, and fatal diseases.

- Post-vaccination infections can occur; it means that a person who has received two doses of the COVID-19 vaccine can still be infected with COVID-19 later on. That type of infection became more frequent with the Omicron variant.

- The effectiveness of COVID-19 vaccines was the subject of clinical trials that assessed the vaccines' ability to prevent COVID-19 infection and their effectiveness against serious forms of the disease. When they were authorized, the data on the vaccine efficacy of mRNA vaccines against an infection after two doses were administered was 94% and 95%.

- After the vaccines were approved, Health Canada continued to receive and analyze data on their efficacy and safety. The data came from, among others, manufacturers, Canadian and foreign scientists, and the PHAC. With the passage of time, the vaccine efficacy data set out that vaccine immunity decreased over time. The vaccines provided good protection for several months after vaccination before it decreased.

- The technology used to develop and prepare the mRNA vaccines had been studied and researched for more than a decade. The COVID-19 pandemic provided an opportunity to bring those vaccines to market. The COVID-19 vaccines were also the first vaccines authorized for humans with respect to a coronavirus. The quantity, quality, and nature of the data submitted to Health Canada for regulatory approval were similar to the data presented for other types of vaccines.

- As with all vaccines, Health Canada monitored the COVID-19 vaccines for safety and efficacy in the population after they were released, including monitoring for side effects. That monitoring can lead to the removal of a vaccine from the market if the data reveals that the risks associated with the vaccine are greater than the benefits. It did not happen.

- A team of Health Canada scientists analyzed reports of side effects after COVID-19 vaccination, as Health Canada does for any other vaccine. The purpose of this analysis is to confirm or exclude a causal link between the vaccine and the side effect. Some rare but potentially serious side effects have occurred in the past following the administration of other types of vaccines. Reports that may have suggested the presence of such side effects as a result of the COVID-19 vaccines were carefully reviewed and prioritized.

- For the COVID-19 vaccine, side effects for which a causal link has been established or for which a causal link cannot be ruled out are posted on the PHAC's website. Most side effects are not significant or dangerous. They include, for example, side effects such as fatigue, muscle pain, headache, and fever.

- Very few cases of serious side effects were reported for which a causal link could be established or could not be ruled out, especially when their numbers are compared to the total number of COVID-19 vaccine doses administered.

- The risk from COVID-19 infection, notably the risk of serious illness, hospitalization, and death, is greater than the risk from the vaccine itself.

C. The Policy's development

[124] As I mentioned earlier, Carole Bidal is the associate assistant deputy minister of employee relations and total compensation at the Office of the Chief Human Resources Officer, Treasury Board of Canada Secretariat. She has held that position since September 2021. In addition to a number of other duties and responsibilities, she was responsible for developing and implementing a vaccine policy applicable to the entire core public administration, including the Royal Canadian Mounted Police. She advised and guided the Treasury Board on the Policy. However, the Treasury Board made the decision to adopt the Policy.

[125] The following chronology, taken from Ms. Bidal's testimony, provides an overview of the evidence that I heard with respect to the Policy's development. The Policy's content will be described in a subsequent section of the summary of evidence.

[126] As of March 2020, the Treasury Board had to respond to the emergence of a virus, the effects and transmissibility of which were not well known at the time. It asked a significant number of public servants who had previously worked onsite to work remotely. According to Ms. Bidal, the health and safety risk posed by COVID-19 was the only reason for that sudden and major change in operations in the core public administration.

[127] At that time, remote work was a temporary measure that enabled the employer to meet its obligations under Part II of the *Canada Labour Code* (R.S.C. 1985, c. L-2; *CLC*); that is, its occupational health and safety obligations. According to Ms. Bidal, the employer's intention was to ensure that public servants in the core public administration would return to the workplace as soon as it could be done safely.

[128] The employer did not ask all public servants in the core public administration to work remotely. Those who provided essential services did not stop working onsite, while others were asked to work remotely in March 2020 but returned to the employer's premises in summer 2020.

[129] As noted in the timeline described earlier, approximately 60 000 of the 260 000 public servants in the core public administration worked onsite as of September 2020. Some public servants worked closely with the public or departmental clients, while some worked on third-party premises. They were mainly public servants that Ms. Bidal described as "frontline" workers. They included, among others, correctional officers, border services officers, nurses, Coast Guard members, and Royal Canadian Mounted Police members as well as public servants working to support them. In addition, many public servants were required to work onsite, to enable the employer or a department to meet its legal obligations, and many of them had duties that could not — in whole or in part — be performed remotely, and they had to work onsite full-time, part-time, or on an ad hoc basis. They included, among others, public servants working in the areas of national security, foreign affairs, public safety, national defence and food inspection. As described later in these reasons, Mr. Rehibi held a position the duties of which were performed entirely onsite at the time.

[130] According to Ms. Bidal, in September 2020, the majority of public servants in the core public administration were still working remotely because the employer had an obligation to ensure that their health and safety were protected, and there were no COVID-19 vaccines at that time.

[131] As described in the timeline, the Treasury Board expressed its intention to increase the number of public servants working onsite in summer 2020. The number increased during the summer and early fall. However, in the fall, an increase in the number of COVID-19 cases resulted in the temporary suspension of efforts to increase onsite work.

[132] In December 2020, a public vaccination campaign began. In the following months, COVID-19 vaccines gradually became available across the country. Since the vaccines were to be administered in two doses at an interval of several weeks, the vaccination campaign was still underway when, in May 2021, the Treasury Board again indicated its intention to take steps to increase the number of public servants working

onsite. Ms. Bidal testified that it would have been premature, in May 2021, to consider imposing a vaccine obligation on public servants in the core public administration. Vaccine access was still restricted by certain eligibility criteria, and vaccine availability was uneven across the country.

[133] According to Ms. Bidal, her team began conducting analyses with respect to a vaccination policy when vaccines became available across the country. The public health recommendations stated that vaccination was the best tool against infection, virus transmission, hospitalization, and serious illness. The adoption of a vaccination policy for the entire core public administration was one of the options under review. According to Ms. Bidal, the analyses got underway in summer 2021.

[134] In her testimony, Ms. Bidal described the information sources available to her both when her team began the initial analyses and when the time came to develop and implement the Policy. Ms. Bidal received advice from her team, as well as advice and guidance from other departments, such as the Department of Justice, Public Services and Procurement Canada (PSPC), and the PHAC, among others. She also received questions and comments from the different core public administration departments on implementing the Policy.

[135] I would like to highlight two important contextual factors relative to the Policy's development. In summer 2021, the Treasury Board did not — and could not collect — data on the vaccination rate of public servants in the core public administration. That vaccination rate was unknown.

[136] The second point that I wish to emphasize is that when the Policy was being developed, the COVID-19 virus's first mutations had already been identified, notably the mutations commonly known as the Alpha and Delta variants. The PHAC's advice and findings stated that the vaccine was very effective against the Delta variant. According to Ms. Bidal, while the Policy was being implemented, Omicron appeared, but Delta was still the dominant variant. The information, advice, and guidance available to her at that time did not lead her to believe that there was a need to review the recommended approach because of the Omicron variant's emergence.

[137] Ms. Bidal testified that she considered several factors when developing the Policy. Some were related to COVID-19 and vaccines, while others were related to the Treasury Board's legal obligations as the employer. She also considered factors that

were more related to the activities of the core public administration's several departments and agencies. I will describe the factors in that order.

[138] Among these factors were an important amount of data, information, and advice on COVID-19 and vaccination. Ms. Bidal received epidemiological data, data on vaccination rates in the Canadian population, and the number of COVID-19 cases among public servants who worked onsite, as well as the number of public servants affected by office closures due to COVID-19 outbreaks. Ms. Bidal also considered the PHAC's findings and advice on the vaccines' efficacy and safety and on the importance of vaccination in response to COVID-19.

[139] The PHAC's information and advice can be summarized as follows:

- The vaccines were highly effective against the COVID-19 virus, including the Delta variant, which at the time was an emerging variant that was more transmissible than its predecessors and that posed a greater risk of serious illness and hospitalization than the original virus strain and the earlier variants.
- The benefits of vaccination outweighed the risks of side effects.
- Vaccination was the most effective tool to reduce the spread of the virus and to protect against serious illness, hospitalization, and death.
- Vaccination was an essential tool for economic recovery and to safely achieve global immunity.
- It was strongly recommended that all Canadians eligible for vaccination be fully vaccinated.

[140] When developing the Policy, and in particular when determining the length of time to give public servants to attest to their vaccination status and the date on which those who did not attest would be placed on leave without pay, Ms. Bidal considered vaccine availability across the country and the fact that the most commonly available vaccines required administering two doses 8 to 10 weeks apart (depending on the province in which a public servant lived). She also considered the time required after the second dose for maximum vaccine efficacy. Ms. Bidal explained the relevance of the different delays and wait times between dose administrations because it was not operationally feasible for the employer to require vaccination only when a public servant was called in to work onsite. If so, several weeks or months would elapse between the request that the public servant work onsite — either permanently, in the short term, or an ad hoc basis — and when the public servant would be considered

fully vaccinated and therefore less at risk of infection, serious illness, hospitalization, or death. Doing so would have been not only ineffective and long but also would have significantly impacted the provision of services to citizens.

[141] Ms. Bidal also considered factors related to the Treasury Board's legal obligations as the employer, including obligations under the *CLC*, collective agreements, the *Charter*, and the *CHRA*.

[142] Among the Treasury Board's obligations, the one under Part II of the *CLC* was paramount. According to Ms. Bidal, the employer was required to take all possible steps to protect the health and safety at work of the 260 000 public servants in the core public administration, without exception.

[143] The availability of COVID-19 vaccines meant that in summer and fall 2021, the employer had a new tool at its disposal to protect the health and safety of public servants, which in the PHAC's opinion was the best tool to protect against infections, serious illnesses, hospitalizations, and death. According to Ms. Bidal, to achieve her goal of protecting the health and safety of public servants, all — or almost all — of them had to be vaccinated. Vaccination was to be in addition to the health and safety measures already in place, such as wearing a mask, physical distancing, ensuring hand hygiene, and so on.

[144] In cross-examination, Ms. Bidal stated that the Policy sought to protect not only the health and safety of public servants but also that of those with whom public servants interacted in the workplace, namely other public servants, members of the public, clients, and third parties. She also specified that the employer's obligations under the *CLC* also applied when an employee worked remotely, meaning they applied in the employee's home. According to her, an employee who became infected with COVID-19 at home could, if they had to return to the office to work, either with or without notice, put their colleagues and clients at risk of infection.

[145] Ms. Bidal also considered the employer's obligation to provide all public servants with a workplace free from harassment. She acknowledged that mandatory vaccination was controversial at the time and that it was important that the Policy include measures to respect the choice of those who did not want to become vaccinated, especially when they returned to work after their period of leave without pay.

[146] The employer's accommodation and legal obligations in this respect were also considered when developing the Policy. Ms. Bidal testified to the importance of providing certain exemptions from the Policy's application, to reflect the employer's duty to accommodate under the *Charter* and the *CHRA*.

[147] In addition, Ms. Bidal stated that she considered factors related to the activities and operations of the core public administration's many departments and agencies. The Policy was to apply to all core public administration jobs and workplaces. Although some public servants work in an office with little or no contact with the public, others work on third parties' premises or in daily and close contact with clients or members of the public. There is not one single model of public servant or employment in the core public administration, and the Policy was intended to ensure everyone's safety. In addition, Ms. Bidal considered the Government of Canada's need to maintain services to Canadians while ensuring public servants' health and safety.

[148] Ms. Bidal said that in 2021, more and more departments wanted to increase the number of their employees working onsite. Some departments wanted to increase the presence of employees in the employer's premises to address ongoing service delivery problems and operational difficulties caused by the prolonged period of remote work, including integrating new employees and training. According to Ms. Bidal, processing applications that had to be mainly done onsite, such as processing confidential documents and access-to-information requests, was in some departments significantly behind schedule due to remote work.

[149] Ms. Bidal acknowledged that the Policy's scope and extent were unprecedented. She also stated that it was an intentional choice to recommend adopting a policy that would apply to the entire core public administration. According to her, adopting a policy that would have allowed applying a vaccine obligation on a case-by-case basis would have prevented the employer from achieving its objective of protecting public servants' health and safety by achieving the highest possible vaccination rate. A discretionary vaccine policy would have been akin to a vaccine recommendation. In addition, a policy with a nature or application that would have varied from department to department would have made implementing and applying the Policy very difficult and would also not have enabled the employer to achieve the desired objective of protecting all public servants' health and safety at work.

[150] Ms. Bidal stated that the potential impact of leave without pay for those public servants who refused to comply with the Policy was examined in comparison with the Policy's potential benefit. According to her, in light of the scientific data and advice available to her at the time, notably the opinions that vaccines were a tool of critical importance to protecting public servants from COVID-19, her opinion was that the need to respect the employer's obligations under Part II of the *CLC* exceeded the impact on public servants who would refuse to become vaccinated.

[151] The Policy was adopted on October 6, 2021.

[152] According to Ms. Bidal, leave without pay for failing to comply with the Policy was recorded in the files of the employees concerned as leave without pay, without further detail. The code used to record the leave in the pay system was the same as that used for any other leave without pay.

D. The Policy

[153] As noted, the Policy came into effect on October 6, 2021, and its application was suspended on June 20, 2022. As of the date of this decision, the Policy has not been abolished.

[154] The Policy applied to the 86 departments and organizations that make up the core public administration, and their employees.

[155] The expected result of the Policy was that all public servants in the core public administration be fully vaccinated except those who were accommodated because of a certified medical contraindication, religion, or some other prohibited ground of discrimination under the *CHRA*.

[156] All public servants were required to attest to their vaccination status, regardless of whether they worked onsite or remotely or had a telework arrangement in place. In this decision, the expression "telework" describes a situation where a public servant works from home in accordance with a formal agreement between that public servant and their department. The expression "working remotely" describes a public servant who is temporarily working remotely at their employer's request, as it was for thousands of federal public servants as of mid-March 2020.

[157] The Policy sets out these three objectives:

- to take every precaution reasonable in the circumstances to protect the health and safety of employees against COVID-19, including vaccination;
- to improve the COVID-19 vaccination rate across Canada of employees in the core public administration; and
- to ensure that all employees, including those working remotely because of the pandemic and teleworking, are fully vaccinated "… to protect themselves, colleagues, and clients …" against COVID-19, given that operational requirements may include an ad hoc onsite presence.

[158] In fall 2021, three vaccines were available. Two required administering two doses, several weeks apart, to achieve the maximum vaccine protection and to be considered "fully vaccinated" as the National Advisory Committee on Immunization had defined it. The Policy did not dictate which vaccine against COVID-19 a public servant should receive. However, it was necessary for an employee to be "fully vaccinated" to comply with the Policy, unless the employee received an exemption due to an accommodation. Employees who refused to be fully vaccinated or refused to disclose their vaccination status were required to attend an online training session on COVID-19 vaccination. If a public servant did not attest to their vaccination status by October 29, 2021, they were placed on leave without pay as of November 15, 2021.

[159] Among other things, the Policy provided that deputy heads of organizations that were part of the core public administration and managers within those organizations were responsible for ensuring a respectful, inclusive, and equitable environment, in particular by not tolerating harassment or other prohibited conduct against an employee because of their vaccination status.

[160] The Policy was accompanied by additional information, namely the *Framework for implementation of the Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police* ("the Implementation Framework") and a document for managers responsible for implementing the Policy entitled, *Managers' Toolkit for the Implementation of the Policy on COVID-19 Vaccination for the Core Public Administration including the Royal Canadian Mounted Police* ("the Toolkit"). Both were living documents, which means that they could be updated as scientific knowledge and public-health guidelines evolved. The Toolkit was updated twice. As for the Implementation Framework, it appears to not have been updated.

[161] The Implementation Framework provided a detailed description of the requirements for implementing and applying the Policy, including time limits, the vaccination attestation required to comply with it, processing sick leave applications, the participation of public servants who refused to be fully vaccinated in a mandatory virtual training session, the protection of personal information, the obligation to accommodate public servants who could not be vaccinated, and procedures to follow with respect to public servants who chose not to be fully vaccinated.

[162] For its part, the Toolkit had resources for managers, such as forms, decision trees, and questions and answers on a variety of topics, including vaccination and COVID-19 and employee safety and well-being, as well as information and instructions about, among other things, vaccination attestations and accommodation-request processes.

E. The evidence concerning Mr. Rehibi

[163] As of the hearing, Mr. Rehibi held the same position and performed the same duties as he had before the Policy was implemented.

[164] He has been a support clerk with Service Canada (an organization in Employment and Social Development Canada or EDSC) since November 2020. It is his first position as a federal public servant. He was, and still is, proud to work for the federal government.

[165] Service Canada hired Mr. Rehibi shortly after he lost his private-sector job at the beginning of the pandemic. Initially, he was hired for a defined period of two years. An indeterminate appointment, originally scheduled to start in December 2021, was postponed due to Mr. Rehibi's failure to comply with the Policy. The indeterminate appointment took place on August 2, 2022, which was less than one month after he returned to work once his leave without pay ended.

[166] Mr. Rehibi provides administrative support to Service Canada officers who process Old Age Security benefits for the province of Quebec. He manages documents related to processing such applications. The tasks include, among others, receiving and sorting mail, digitizing and archiving paper documents, sending digitized documents to officers, printing and sending letters to benefit claimants, and entering data in a computer system.

[167] According to Mr. Rehibi's managers, Nathalie Bard and Chantal Nadeau, ESDC had identified as an essential service processing social benefits claims, such as Old Age Security benefits applications. While on March 16, 2020, ESDC asked many Service Canada employees to work remotely due to the spread of COVID-19, support clerks and all other employees who contributed to providing essential services were required to work onsite at Service Canada's premises. At that time, all Mr. Rehibi's duties were to be performed onsite, as benefits claims were received on paper.

[168] With the passage of time and due to changes in how certain tasks could be performed, it became possible for support clerks to occasionally work remotely on an alternating basis. However, as Ms. Bard and Ms. Nadeau explained, because of the nature of the work to carry out, it was impossible for the employer, from an operational standpoint, to allow support clerks to exclusively or predominantly work remotely or telework during the pandemic, with the exception of employees entitled to accommodation. Both Ms. Bard and Ms. Nadeau testified that on a typical day in fall 2021, when the Policy came into force, approximately 75% of the employees in their teams worked onsite. A rotational system had been put in place to allow support clerks interested in working remotely to do it occasionally.

[169] According to Ms. Bard, Mr. Rehibi did not show any particular interest in working remotely, which was also reflected in his testimony. Mr. Rehibi explained that he had tried the experience of working remotely only a few times. He worked onsite. According to him, although some of a support clerk's duties could be performed remotely, an onsite presence was required to respond to requests from the officers processing benefits claims.

[170] When Mr. Rehibi worked onsite before the Policy was implemented, many occupational health and safety measures had been put in place in the workplace, among them physical distancing, wearing a mask, and daily self-screening. Work surfaces were regularly disinfected. Using an antiseptic gel was recommended. Limitations were imposed on floor occupancy rates, and remote work was imposed as a preventive measure for those who had been in close contact with a COVID-19-infected person. Management ensured contact tracing in the event of positive COVID-19 cases in the workplace.

[171] According to Ms. Nadeau, the different measures described in the previous paragraph were to protect the health and safety of employees working onsite and to prevent the spread of COVID-19 in the workplace, which could have led to closing the office temporarily, which would therefore have significantly impacted delivering social benefits to an elderly clientele whose welfare could have depended on the benefits. Those measures remained in effect after the Policy was implemented.

[172] Before the Policy was adopted, Mr. Rehibi had sought information on the Internet and social media about the risks associated with COVID-19. Having found that he did not possess any of the characteristics or comorbidities that could render him likely to come down with a serious form of the disease or complications if he contracted COVID-19, he conducted a comparative assessment of the benefits and risks of vaccination. According to his testimony, an earlier experience in his personal life would have led him to conclude that no medical intervention is 100% effective and that all medical interventions carry a risk.

[173] He concluded that the risks associated with contracting COVID-19 were lower than the risk that could arise from a vaccine, the composition of which he did not know and that according to him, was at an experimental stage.

[174] On August 13, 2021, ESDC informed its employees, including Mr. Rehibi, of the Government of Canada's announcement of its intention to require vaccination throughout the public service. An update was sent a few days later. On October 6, 2021, ESDC informed its employees, including Mr. Rehibi, of the Policy's adoption, and it shared with them more information on, among other things, the vaccination requirement, the requirement to attest to one's vaccination status, the process to follow to apply for an accommodation, and the employer's intention to place any employee who refused to attest to their vaccination status, or refused to be vaccinated, on leave without pay as of November 15, 2021. ESDC sent other communications in the weeks that followed.

[175] Neither the announcement in August 2021 that a vaccination policy for federal public servants would be adopted, the Policy's adoption in October 2021, nor the mandatory training on vaccination against COVID-19 that he was required to take led Mr. Rehibi to reconsider his decision not to become vaccinated. The various messages about the Policy, vaccination, and COVID-19 sent by ESDC to its employees did not

influence his decision. He testified that the consequences of failing to comply with the Policy, particularly leave without pay, did not lead him to doubt his decision. Once his decision was made, he stood by it. However, he sought to be discreet and to keep to himself his vaccination status and his decision not to comply with the Policy.

[176] Mr. Rehibi explained that his refusal to comply with the Policy was a matter of principle. He stated that the more insistence on COVID-19 vaccination, the more he resisted. He stated that he did not feel compelled to accept what he was asked to do, which was to become vaccinated. He testified that had he had to choose between becoming vaccinated or losing his job, he would have preferred to lose his job.

[177] As noted earlier, Mr. Rehibi did not apply to be exempted from the Policy's application as an accommodation under the *CHRA*. On November 15, 2021, he was placed on leave without pay. He continued to be entitled to health and dental insurance during the leave. The employer continued to make its contribution to the pension plan.

[178] According to Ms. Nadeau, onsite employee attendance increased between October 2021 and June 2022, the period during which the Policy was applied.

[179] Mr. Rehibi stated that he found another job shortly after his leave without pay began. For that reason, he testified that he did not "[translation] suffer too much financially" from the leave without pay that was imposed on him. Although the new job paid less than his Service Canada employment, he was able to work enough overtime to close the wage gap. Before landing this job, he applied for employment insurance. His application was denied.

[180] Shortly after the announcement was made that the Policy would be suspended, Mr. Rehibi was informed that his leave without pay would end on June 20, 2022. He was invited to return to work. Since he held another job and had to give notice to that other employer, Mr. Rehibi returned to his position only on July 4, 2022.

[181] According to Mr. Rehibi, given the dates of his departure on leave and of his return shortly after the Policy was suspended, some of his colleagues apparently inferred that he had refused to comply with the Policy. Although he said that he felt that some colleagues were more emotionally distant on his return to work, Mr. Rehibi stated that he did not have any negative experiences or interactions with colleagues or

managers because of his refusal to comply with the Policy, either before or after his leave without pay. He described his return to work as having been done respectfully.

[182] Mr. Rehibi has no disciplinary record. Ms. Bard and Ms. Nadeau described him as an excellent employee.

F. The evidence concerning Ms. Lavoie

[183] As of the hearing, Ms. Lavoie held the same position and performed the same duties as before the Policy was implemented.

[184] She is a translator-advisor and team leader at PSPC's Translation Bureau. Since 2003, she has worked on a team responsible for translating texts from Agriculture and Agri-Food Canada, the Canadian Food Inspection Agency, the Canadian Grain Commission, the Canadian Dairy Commission, and the Canadian Nuclear Safety Commission. Her tasks include the quality control of translations carried out by private companies and freelancers, as well as training and mentoring new translators. As a translator-advisor, she can also be required to translate "priority" texts, such as those meant for a minister or the prime minister.

[185] A translator-advisor is also responsible for translating secret texts, which are documents that require a "secret" clearance to be handled and processed. They must be translated onsite on electronic devices designated for this purpose. They cannot be translated remotely.

[186] Ms. Lavoie takes great pride in her career and the service that she provides to the Canadian public.

[187] Since 2015, Ms. Lavoie had been working from her home under a telework agreement. Telework was the norm for Ms. Lavoie's team. A significant portion of the team teleworked full-time well before the pandemic.

[188] Ms. Lavoie's telework agreement was to be renewed annually, which it was from 2015 to 2021. The agreement allowed Ms. Lavoie to work full-time from home but also set out that she would be required to be in the workplace at her employer's request. Ms. Lavoie stated that she understood that her employer could terminate the telework agreement at any time and that it could ask her to return to the office at any time,

particularly because of a need to translate a secret text, to attend a meeting, or to participate in training.

[189] In 2021, the telework agreements of all Translation Bureau public servants were replaced with interim work agreements. For the purposes of this case, it is sufficient to point out that under the interim work agreement, Ms. Lavoie still worked from home and was still required to return to the office at her employer's request.

[190] In March 2020, when PSPC asked its employees to work remotely, very little changed for Ms. Lavoie in terms of how she carried out her daily work.

[191] Shortly after asking all its employees to work from home if they could, PSPC revised its instructions to its employees to clarify that only employees who provided essential services should be in the workplace. According to Ms. Lavoie's manager, Claudine Blondin, a translation service is an essential service. Thus, secret texts had to be translated onsite, as before. The public servants and managers who were in the workplace were required to sign their names in an attendance record before they arrived at the office.

[192] Ms. Lavoie testified that before the pandemic, the frequency with which she was required to be in the workplace to translate secret texts varied from once a month to once every three months. She entered the workplace for training sessions and team meetings. In her grievance, she stated that before the pandemic, she had to go to the office once or twice a month, for all reasons combined.

[193] Between March 2020 and the date on which the Policy came into force in November 2021, Ms. Lavoie did not have to be in the office to translate a secret text. She testified that she was in the office twice during that period, once to update a password that could not be updated remotely, and a second time to have a photograph taken to renew her access card. When she went to the office on those occasions, it was only very briefly. According to her, she interacted with very few employees onsite.

[194] Although Ms. Lavoie's name appears only once in the attendance record presented at the hearing and Ms. Blondin stated that she remembered a single time when Ms. Lavoie had to be on the employer's premises, I accept Ms. Lavoie's testimony that she was in the office twice for administrative reasons and not to translate a secret text. If Ms. Lavoie did not have to work onsite to translate a secret text, it was likely

due to the fact that the client department responsible for most of the secret-text-translation requests that Ms. Lavoie's team handled had significantly changed its operations, which resulted in a significant decrease of secret texts to translate.

[195] In her testimony, Ms. Blondin described PSPC's attempts and efforts to increase public servants' attendance on the employer's premises, as well as the course corrections required when a new COVID-19 wave swept across the country. According to her, the presence of public servants working onsite had increased by June 2020. However, as described in the timeline, the pandemic did not allow a continuous or linear increase in onsite work.

[196] I will now explain why Ms. Lavoie decided not to become vaccinated or to comply with the Policy. The reasons are not quite identical.

[197] Ms. Lavoie stated that she had never considered becoming vaccinated. She did not experience an internal struggle. Taking the vaccine was never a choice, in her mind.

[198] She stated that she had experienced what she believed was a side effect from a tetanus vaccine a few years earlier. The experience had frightened her. Since no vaccine is 100% safe, in her opinion, she said that she did not want to become vaccinated, much less with a vaccine that required administering two doses.

[199] Shortly after the COVID-19 vaccines became available in Canada, she conducted research on the Internet to find out about the dangerousness of COVID-19 and the side effects of the COVID-19 vaccine. In her opinion, she had no comorbidities or risk factors that could have made her more likely to become seriously ill or hospitalized because of a COVID-19 infection, let alone die from one. This research did not change or influence her initial decision that she did not want to become vaccinated.

[200] She testified that her decision not to become vaccinated had nothing to do with how COVID-19 vaccines were designed. The fact that the most commonly available ones were mRNA vaccines was not a factor that influenced her decision.

[201] Ms. Lavoie stated that the choice between complying with the Policy by becoming vaccinated to keep her salary and refusing to comply and losing her salary indefinitely was difficult. However, she stated that she refused to comply with the Policy because of her opinion that it constituted a measure to intimidate, influence, and ultimately "[translation] segregate" a portion of the public service. She shared with

Ms. Blondin her opinion that the Policy was an intimidation tactic that sought to force her to undergo a medical procedure with which she disagreed. According to Ms. Blondin, their conversation had been cordial and devoid of tension. Nothing indicates that Ms. Blondin attempted to influence or induce Ms. Lavoie to become vaccinated. However, during that conversation and at other times after the Policy was adopted, she attempted to ensure that Ms. Lavoie understood the consequences of failing to comply with the Policy.

[202] Ms. Lavoie was placed on leave without pay on November 15, 2021. She stated that she was prepared to suffer some financial consequences because of her choice to refuse to become vaccinated. However, she said that she felt punished for making that choice.

[203] During her leave without pay, Ms. Lavoie took steps to find another job but was unsuccessful. She took care of her children, whose school lessons were taught remotely. That period without pay was stressful. Her sleep was disrupted. Her mood changed. Her family also had to make financial sacrifices because of the loss of her salary and that of her spouse, who was also on leave without pay for failing to comply with a vaccination policy, such as changes to their diet and family activities. However, she never reconsidered her decision not to become vaccinated. She stated that she would never become vaccinated against COVID-19.

[204] Ms. Lavoie returned to work on June 20, 2022. She stated that while some colleagues seemed unaware of the reason for her leave, she felt that her relationship with other colleagues was colder on her return from leave. Their conversations became more about work than their personal lives.

[205] She testified that she found it difficult to turn the page since returning to her position, given that the Policy had only been suspended and could be applied again in the future.

[206] Ms. Lavoie had a good relationship with her manager. Her manager described Ms. Lavoie as a good employee with a good work performance. Ms. Lavoie has no disciplinary history.

G. The Policy's suspension, and the end of leave without pay

[207] The Policy set out that its necessity and content would be reviewed at least every six months.

[208] From November 2021 to February 2022, Ms. Bidal was informed — through her team — of new epidemiological and scientific data from the PHAC on the impact and nature of the Omicron variant. The PHAC's advice and guidance indicated that the vaccine still provided protection against serious illness, hospitalization and death.

[209] In February 2022, the Policy's revision was underway. Ms. Bidal stated that at that time, she did not wish to change the employer's recommended approach in the absence of greater scientific certainty about virus mutations and their impact on vaccine efficacy against the virus's transmission. She stated that she wanted to be cautious to ensure that any decision that the employer made with respect to the Policy would balance the health and safety of public servants in the core public administration with that of those who had been placed on leave without pay because of failing to comply with the Policy.

[210] The Policy's application was suspended on June 20, 2022. At that time, approximately 98.5% of public servants had become vaccinated.

[211] As of the hearing dates, the Policy had not been abolished.

IV. Reasons

[212] The parties submitted written arguments setting out the factual and legal basis of their respective positions, followed by an oral reply at the hearing. Although I did not include a summary of their arguments in this decision, I considered them all. However, I will deal only with those that, in my opinion, are most relevant to the issues in dispute.

A. Legal framework

[213] An employer that raises an objection to the Board's jurisdiction to hear a grievance referred to adjudication under s. 209(1)(b) of the *Act* and that intends to defend an action as administrative and not disciplinary must adduce evidence that can establish that the action was employment-related and that it was not done for any other reason (see, in the context of a rejection on probation, *Canada (Attorney*

General) v. Leonarduzzi, 2001 FCT 529 (CanLII) at para. 37). In this case, the employer must adduce evidence that can demonstrate that applying the Policy to place the grievors on leave without pay was an employment-related action.

[214] The Board's analysis does not end there.

[215] Since the grievors argue that the employer's employment-related reason is merely a pretext, they have the burden of proof of demonstrating that on a balance of probabilities, they were subjected to disguised disciplinary action, which in this case was a suspension or financial penalty. They did not specify whether they allege that their leave without pay was a suspension or financial penalty. They did not allege that they were demoted or dismissed.

[216] To distinguish a disciplinary action from one that was not disciplinary, the Board must consider both the employer's true intent — as opposed to the stated intent — and the action's impact on the employee's career (see *Bergey*, at para. 37). A fact-based analysis is required.

[217] It is appropriate to consider the different factors that were first set out in *Frazee* and that were repeated in, among others, *Chamberlain v. Canada (Attorney General)*, 2012 FC 1027 ("*Chamberlain FC 2012*"); *Basra v. Canada*, 2008 FC 606; and *Bergey*. The Board must try to identify the employer's true intent when it imposed the impugned action, specifically whether it intended to correct the grievors' conduct by placing them on leave without pay or to punish them. In the context of its analysis of the impact of the action on the grievors, the Board must consider whether the Policy's application had an immediate adverse effect on the grievors and whether that effect was significantly disproportionate to the employer's cited administrative ground. Finally, the Board must consider whether placing them on leave without pay was likely to either impact their career prospects or be invoked in future disciplinary action.

[218] Assessing those factors just mentioned may help the Board determine whether an employer action was in fact disciplinary, even if the employer denies any disciplinary intent (see *Chamberlain FC 2012*, at para. 57).

[219] The vast majority of workplace actions are purely administrative in nature and are not intended to be a form of punishment (see *Frazee*, at para. 20, citing *Porter v.*

Treasury Board (Minister of Energy, Mines and Resources), PSSRB File No. 166-02-752 (19731128) at 13).

[220] The case law states that an employer action that has an adverse impact on an employee is not necessarily disciplinary. While some actions are clearly disciplinary, others require assessing the factors set out earlier to conclude whether the employer's action was in fact intended to impose discipline. These grievances fall into the second category. An analysis must be made in light of the facts and circumstances of this case.

B. The case law with respect to other vaccination policies

[221] Although the Policy's implementation may be described as an unprecedented event in the core public administration, many other COVID-19 vaccination policies that were adopted and implemented have been the subjects of courts' and labour arbitrators' decisions. The respondent identified 27 such decisions in its written submissions, but the total is higher. At this stage of my analysis, I will refer only to some of them, to illustrate the trend with respect to policies that imposed leave without pay as the only consequence for failing to comply with a vaccination policy.

[222] Several vaccination policies were considered reasonable and therefore not disciplinary in circumstances in which employees were called on to work onsite (see, among others, *Parmar*; *Canadian National Railway Company v. United Steelworkers, Local 2004* (unreported; October 12, 2022); *Canada Post Corporation v. Canadian Union of Postal Workers* (2022), 339 L.A.C. (4th) 353; and *Regional Municipality of York v. Canadian Union of Public Employees, Local 905*, 2022 CanLII 78173 (ON LA)).

[223] Policies that applied to employees who work remotely or telework — in whole or in part — were also considered reasonable and therefore not disciplinary (see, among others, *Lakeridge Health v. CUPE, Local 6364*, 2023 CanLII 33942 (ON LA); *Canadian Union of Public Employees, Local 1866 v. Worksafe New Brunswick*, 2023 CanLII 1 (NB LA); and *Nova Scotia Union of Public & Private Employees, Local 13 v. Halifax Regional Municipality*, 2022 CanLII 129860 (NS LA)).

[224] That said, some policies that would have been or were considered reasonable when they were implemented were deemed — in whole or in part — no longer reasonable due to the Omicron variant's appearance and impact on vaccine efficacy

(see, among others, *FCA Canada Inc. v. Unifor, Locals 195, 444, 1285*, 2022 CanLII 52913 (ON LA); and *Power Workers' Union v. Elexicon Energy Inc.*, 2022 CanLII 7228 (ON LA)).

[225] Each policy mentioned earlier was reviewed and analyzed, among other things, in light of its content, the employer's duty to ensure that its employees' health and safety were protected, the work environment, the nature of the tasks that the employees performed, and the particular circumstances of the COVID-19 pandemic. Few of the contested policies addressed in the decisions mentioned in the previous paragraphs were vaccination policies that were applied to a pan-Canadian workforce that held a wide range of positions in a wide range of work environments. They were also part of a statutory and jurisprudential framework different from the one governing the core public administration and the Board. For that reason, I consider that the decisions on those policies are a useful source of information but that none can be considered as containing an analysis that is a complete answer to the questions before the Board.

[226] I would also add that certain vaccination policies have also been challenged under s. 7 of the *Charter* (see, for example, *Syndicat des métallos, section locale 2008 v. Procureur général du Canada*, 2022 QCCS 2455 ("*United Steelworkers*"); *Syndicat canadien de la fonction publique, section locale 1108 v. CHU de Québec - Université Laval*, 2023 QCTA 353; and Military Grievances External Review Committee, *Annex I — Constitutionality of the Canadian Armed Forces COVID-19 vaccination policy*, dated July 18, 2023 (additional resources for case summaries 2022-078, 2022-109, 2022-125, and 2022-162 are available on that Committee's website as of the date of this decision). I will discuss those decisions in my analysis of the grievors' arguments about s. 7 of the *Charter*.

C. Analysis of the Board's jurisdiction: the *Frazee* and *Bergey* factors

1. The employer's stated intent

[227] As I noted earlier, an employer that argues that a contested action is administrative and not disciplinary must produce evidence that it was related to employment and not to any other reason (see *Leonarduzzi*, at para. 37).

[228] The *Financial Administration Act* (R.S.C., 1985, c. F-11; *FAA*) provides the Treasury Board with authority over human resources matters in general. It has the

authority to adopt policies applicable to the core public administration and to determine the conditions of employment of public servants in the core public administration. It is not contested that the Treasury Board had the legal authority to adopt a vaccination policy by virtue of the powers conferred on it by the *FAA*, in particular under ss. 7(1) and 11.1(1).

[229] Also not contested is that as an employer, the respondent is required under Part II of the *CLC* to ensure the health and safety of public servants in the core public administration. That obligation includes preventing and eliminating health and safety risks. It applies to all public servants. It applies to those who work solely or predominantly onsite, to those who work from home under a telework agreement, and to those who worked remotely temporarily because of the spread of COVID-19. The employer is also responsible for ensuring public servants' health and safety, regardless of whether they are likely to suffer serious consequences from a COVID-19 infection and whether they are hesitant to be vaccinated.

[230] Ms. Bidal stated that COVID-19 posed a significant risk to the health and safety of public servants in the core public administration. According to her, in the weeks and months after the global pandemic was declared, the employer ensured that the health and safety at work of all public servants in the core public administration were protected by prioritizing remote work for those who could perform their tasks remotely and by imposing all the public-health measures that were recommended at the time, to protect, to the extent possible, those public servants required to work onsite because of their duties.

[231] Ms. Bidal testified that starting in March 2020, the employer always intended to ensure that all public servants in the core public administration would return to the workplace as soon as it was possible to do it safely. She explained that over time, a growing number of departments wanted to increase the number of public servants working onsite, to respond to operational problems that had been caused by the long period of remote work. The documentary evidence, specifically the many departmental messages in evidence, supports Ms. Bidal's testimony that the employer's objective had always been to have the public servants in the core public administration return to its premises as soon as it was possible to do it safely.

[232] She explained that when COVID-19 vaccines that Health Canada found safe and effective became widely available across the country, the respondent could consider a return to work onsite in larger numbers. The Policy was a tool to achieve that goal while enabling the employer to further protect the health and safety of those public servants already working onsite.

[233] Ms. Bidal described the Policy's development, specifically how it was based on PHAC's advice and guidance that COVID-19 vaccination was the most effective tool available to protect public servants. According to PHAC, vaccinating all public servants (except those entitled to accommodation) was the safest way to achieve the employer's goal of protecting the health and safety of public servants in the core public administration when they returned to the workplace in greater numbers, either exclusively, occasionally, or on an ad hoc basis. Vaccination would add an additional layer of protection that would, along with other preventive measures, help fight or limit the spread of COVID-19 and protect public servants from its serious consequences. PHAC's advice was consistent with the evidence that the expert witnesses and Dr. Lourenco presented at the hearing.

[234] The Policy's wording and that of the Implementation Framework and the Toolkit confirm Ms. Bidal's testimony. All those documents identify protecting the health and safety of public servants in the core public administration as the Policy's primary goal. It is useful to reproduce the objectives set out in the Policy. Two are directly related to health and safety, and one specifically mentions operational requirements that might require onsite presence:

- to take every reasonable precaution, in the circumstances, to protect employees' health and safety against COVID-19, including vaccination;
- to improve core public administration employees' COVID-19 vaccination rate across Canada; and
- to ensure that all employees, including those working remotely because of the pandemic and those teleworking, are fully vaccinated "… to protect themselves, colleagues, and clients …" against COVID-19, given that operational requirements could include an ad hoc onsite presence.

[235] In their testimonies, two of the managers responsible for applying the Policy, Ms. Blondin and Ms. Nadeau, stated that at all times, senior management in their respective departments described the Policy as an administrative action for protecting

public servants' health and safety, with a view to returning to onsite work in greater numbers.

[236] Although the duration of the grievors' leave without pay was indeterminate when they were placed on it, the evidence sets out that — on the face of it — the leave's duration was related to the pandemic's evolution and the employer's cited employment-related reason. It suspended the Policy when the scientific data and advice available to it set out that the spread of the Omicron variant had significantly reduced vaccine efficacy and that the benefits of vaccination in the workplace — although still present — had been reduced due to the variant's ability to evade vaccine immunity. The employer ended the grievors' leave without pay. They were reinstated to their duties.

2. The grievors' arguments that they were subjected to disguised disciplinary action

[237] Since the employer produced evidence that the Policy was an employment-related action, I must now consider whether the grievors met their burden of proving that they were subjected to disguised disciplinary action.

[238] The grievors' arguments on the different factors set out in *Frazee* and *Bergey* overlap somewhat. In the following paragraphs, I will address their arguments in my analysis of the *Frazee* factor which I consider the most relevant. There will be some repetition, to enable me to present their arguments as accurately as possible.

a. The employer's true intent was to correct the grievors' behaviour or to punish them

[239] The case law states that the essential characteristic of a disciplinary action is an intention to correct an employee's misconduct by disciplining or punishing them in some way. The grievors must demonstrate that the employer intended to take disciplinary action against them, to punish them or to correct their behaviour, but that it disguised the disciplinary action by giving it a different form (see *Peters v. Treasury Board (Department of Indian Affairs and Northern Development)*, 2007 PSLRB 7).

[240] The grievors argued that adopting and implementing the Policy met a political objective on the Prime Minister of Canada's part that had nothing to do with protecting the health and safety of public servants in the core public administration.

[241] They argued that the Prime Minister had publicly expressed strong frustrations with unvaccinated people and had used unflattering language about them. According to the grievors, the Policy reflected the Prime Minister's expressed frustrations and was intended to create a coercive regime to impose vaccination on those public servants who had not already been vaccinated and to correct the behaviour of those who would refuse to be vaccinated by depriving them of their salary for an indefinite period and by prohibiting them from accessing Employment Insurance benefits. The lack of discretion applying the Policy and the employer's stated objective to seek to minimize as much as possible the number of exemptions from the Policy further illustrate, according to them, the vindictiveness of the action imposed on the grievors.

[242] The grievors argued that if the Policy's true objective was protecting the health and safety of public servants, the employer would have acted with greater caution and rigour. It would have carefully reviewed all available scientific data on COVID-19, the efficacy and safety of COVID-19 vaccines, and the rates of serious illness, death, and hospitalization due to COVID-19. It would have reviewed the methodology used in the studies behind that data. An employer concerned with protecting the health and safety of its employees would have calculated the risk of COVID-19 for its employees and the risk reduction for them were they vaccinated. It would not have accepted, without questioning, PHAC's advice on the importance of vaccination, specifically the importance of vaccination for all public servants, or Health Canada's approval of COVID-19 vaccines based on data from vaccine manufacturers.

[243] According to the grievors, had the respondent wished to protect public servants' health and safety, it would have waited for scientific certainty as to the dangers and benefits of the vaccines to its employees. No mRNA vaccines had ever been administered, and caution was required. An employer concerned about its employees' health and safety would also have compared vaccination's benefits and risks and would have considered that virus mutations could make the vaccines less effective. It would have been more open-minded with respect to the less-invasive and uncertain steps that could have been taken to protect public servants' health and safety, such as COVID-19 treatments, imposing leave with pay on those who were unvaccinated, or modifying the duties of those who did not wish to be vaccinated so that they could work only remotely. According to the grievors, the fact that the employer did not take any of those steps disproves its claim that the Policy was an administrative action that had as its objective protecting the health and safety of public servants in the core

public administration. They argued that the employer's lack of rigour illustrated the Policy's arbitrary and therefore disciplinary nature.

[244] Finally, the grievors argued that depriving an employee of seven months of salary without news or updates is, in itself, an indicator of an intent to punish.

[245] The respondent denied any intent to discipline.

[246] The employer's Policy and formal communications about it do not refer to discipline as a consequence of not complying. However, this is not determinative in itself. As noted earlier, the Board must consider the employer's true — as opposed to its stated — intent. A fact-based analysis is required to identify the employer's true intent.

[247] First, I will address the grievors' allegation that the Treasury Board developed and implemented the Policy to comply with any kind of wish of the Prime Minister to punish any public servant who refused to be vaccinated by depriving them of their salary. Although the Prime Minister of Canada did express frustration with those who refused to be vaccinated, the evidence adduced at the hearing does not support that allegation in any way. As I will explain in the following paragraphs, the evidence instead demonstrates that the Policy's true objectives are set out in the Policy itself. The main objective was to protect the health and safety of public servants in the core public administration.

[248] Beginning in March 2020, the employer faced an unprecedented situation, which was the need to maintain its operations and services to Canadians in the presence of a virus that posed a risk to the health of its entire workforce. The situation that the employer faced was made more complex due to the uncertainty as to the virus's behaviour, the pandemic's epidemiological evolution, and the changing circumstances that the emergence of the COVID-19 virus variants created, each of which had very different behaviours and consequences. The evidence adduced at the hearing demonstrated that the COVID-19 virus was unpredictable and that the scientific community made great efforts to understand the COVID-19 virus's behaviour and consequences. The scientific knowledge evolved over time, particularly as variants gradually emerged.

[249] It is not contested that from March 2020, the employer implemented many workplace health and safety measures that did not involve vaccines. It is also uncontested that it also immediately adjusted its operations in response to the virus's emergence by encouraging remote work when possible. Ms. Bidal, Ms. Nadeau, and Ms. Blondin testified to the actions that the employer took to ensure public servants' health and safety, to the extent possible, in a context of uncertainty and fluctuation in the number of COVID-19 cases in the community and on the employer's premises.

[250] Ms. Bidal's testimony and the numerous departmental communications adduced in evidence, some of which were listed earlier, support the respondent's position that its intention and objective were always to have public servants in the core public administration return to its premises as soon as it was possible to do it safely. Although the grievors argued that it was not necessary for public servants to return to work onsite and that the employer could have extended remote work or modified the duties of public servants who refused to be vaccinated until the COVID-19 danger had passed, they did not deny that the employer wanted to increase onsite work as soon as it was possible to do it safely.

[251] However, the nature of the COVID-19 virus meant that the employer's efforts to achieve its goal of returning to onsite work were not without setbacks and obstacles. During the period relevant to these grievances, COVID-19 was a moving target of sorts, for both the employer and the scientific community. This is illustrated in the timeline described earlier, including attempts to increase onsite work that failed due to the emergence of variants that led to changes in the virus's transmission and level of danger.

[252] I accept Ms. Bidal's testimony that before the vaccines were widely available, the respondent did not continue its efforts to significantly increase onsite work in the presence of new COVID-19 "waves" because of its duty to protect its employees' health and safety.

[253] The data and the scientific advice available to the employer showed that screening alone was not an effective way to ensure the health and safety of people such as public servants in the core public administration. A system based solely on screening would have provided much less protection than a vaccination-based system. Dr. Poliquin's evidence was consistent with that advice.

[254] Ms. Bidal testified that before COVID-19 vaccines were widely available across the country, the employer could not consider adopting a vaccination policy. The data and the scientific advice available to the employer set out that vaccination, in conjunction with measures not involving vaccines, such as wearing a mask and physical distancing, was the most effective tool to protect against COVID-19's adverse effects. The COVID-19 vaccines were the tool most highly recommended by the scientific community. When the vaccines became widely available, the employer began to develop the Policy.

[255] Before the Policy was developed and implemented, the employer had no data on the vaccination rate of public servants in the core public administration.

[256] The evidence presented at the hearing — both the testimonies and documentary evidence — supports the respondent's position that it developed the Policy to ensure that the gradual return of public servants in the core public administration to the workplace could be done safely, which conformed with its obligation under Part II of the *CLC* and the *CHRA*. As I will explain later in these reasons, the grievors disagree that a progressive return to the workplace was required in the circumstances. They argue that the employer could — and should — have continued to encourage remote work rather than impose the Policy. They also argue that it should have allowed those public servants who refused to be vaccinated to continue working remotely. However, their disagreement does not render unreasonable or unfounded the employer's desire to ensure the progressive and safe reintegration of public servants in the core public administration.

[257] The employer's duty to ensure that its employees' health and safety were protected was an omnipresent theme in the formal communications on the Policy that were adduced in evidence, including several that the grievors received. Occupational health and safety was also an underlying theme of the overall evidence that Ms. Bidal, Ms. Nadeau, and Ms. Blondin adduced at the hearing. They testified that in their respective departments, at all times, the Policy and the vaccines were presented and described as occupational health and safety measures. They stated that a disciplinary intent was never raised, considered, or discussed. The Policy had the same objective as the measures not involving vaccines that the employer implemented beginning in March 2020.

[258] In the cross-examinations of the respondent's witnesses, and in their written and oral arguments, the grievors discussed at length the reliability and accuracy of the scientific data and public-health advice on COVID-19 and vaccination that the Treasury Board Secretariat relied on when developing the Policy. However, they did not dispute that the Policy had been developed, as Ms. Bidal stated, in consultation with PHAC and Health Canada, among others, and that its development had been based on scientific advice, guidance, and data.

[259] Some reminders are required about the data and advice available to Ms. Bidal. She described the advice and guidance, but they are also reflected in the documentary evidence, including an evergreen document that PHAC prepared on public-health considerations related to implementing a COVID-19 vaccine requirement in the federal public service.

[260] The advice and guidance available to the employer indicated that COVID-19 was very contagious and that a COVID-19 infection could have serious and even fatal consequences. Because it was transmitted through droplets and aerosols, the virus was more easily transmitted in indoor spaces, such as workplaces. It was transmitted not only by people with symptoms of the disease but also by people infected with COVID-19 who had no symptoms. The virus could be transmitted for several days before a screening test could detect an infection and before the infected person developed symptoms. Unvaccinated people were at a greater risk of serious consequences, hospitalization, and death than were fully vaccinated people.

[261] Most importantly, PHAC's view was that although no vaccine provides 100% protection and that post-vaccine infections are possible, the COVID-19 vaccines were very effective, especially in terms of protecting against the disease's serious consequences. When the Policy was being developed and implemented, Ms. Bidal relied on PHAC's advice that vaccination reduced the infection rate and therefore the COVID-19 transmission rate. As Dr. Kindrachuk explained, although a virus may mutate, and new variants may emerge, scientific knowledge at the time did not suggest that a highly transmissible variant that could evade vaccine immunity would emerge. That said, before and after the Omicron variant appeared, PHAC's advice was that the benefits of COVID-19 vaccination outweighed its potential risks.

[262] The employer relied on the advice and information that it received from PHAC, among others. It relied on Health Canada's approval of the vaccines as evidence of their efficacy and safety. It also relied on the updates it received on follow-ups by both PHAC and Health Canada on the side effects of the vaccination. I cannot accept the grievors' argument that the employer was required to question the advice and guidance from PHAC and Health Canada, which are an agency and a department with expertise in public health and processes to ensure vaccine safety and efficacy. In the particular circumstances of the COVID-19 pandemic, the employer could not be criticized for failing to question the advice and data that the subject-matter experts provided it. That does not indicate disciplinary intent.

[263] Through these grievances, the grievors attempted to put on trial the data, advice, and scientific studies on which the employer relied to develop the Policy. I would even go as far as to say that they tried to put on trial the federal government's management of the COVID-19 pandemic as they also sought to challenge Health Canada's scientific rigour in approving COVID-19 vaccines and in monitoring the vaccines' side effects and PHAC's analysis of data and statistics with respect to the virus and its effects, vaccination, and hospitalization and death rates. They implicitly asked the Board to review the Policy in light of today's scientific knowledge and in light of the COVID-19 pandemic's evolution since the period relevant to these grievances. They asked me to consider the effects of the Omicron variant and the increase in the number of COVID-19 cases and hospitalization rates caused by that new variant to infer that the Policy was doomed to fail and therefore clearly was disciplinary.

[264] According to the grievors, the questions central to these grievances are as follows: "[translation] Did the COVID-19 virus really cause a health emergency? What is the actual effectiveness of the experimental gene therapies against COVID-19 that have been qualified as vaccines? What are the health risks of these so-called vaccines?" They addressed those issues at length in the cross-examinations of the employer's witnesses and in their written and oral arguments.

[265] The grievors went down the wrong path. None of those questions directly addresses the analysis that the Board must carry out, which is to decide whether when it was applied to the grievors and led to their leave without pay, the Policy was disguised disciplinary action. The impugned action must be considered in light of the

employer's knowledge and circumstances at the time, not in light of today's knowledge and circumstances.

[266] In cross-examination, the grievors presented the expert witnesses and Dr. Lourenco with what they described as methodological flaws in scientific studies that PHAC used in its analysis of the efficacy and safety of COVID-19 vaccines, attempts to conceal data contrary to the data that the employer relied on, and scientific studies contradicting those that the employer presented at the hearing. The exercise was intended to support their claim that the employer would have ignored or rejected scientific evidence and conclusions that did not support its proposed vaccination policy.

[267] The exercise did not have the desired results. The witnesses did not deny the existence of side effects to the COVID-19 vaccine, opposing views on messenger RNA vaccines, and studies with data and findings that were different from those that PHAC or Health Canada used. In light of Ms. Bidal and Ms. Lourenco's testimonies and the significant documentary evidence that, in all periods relevant to the grievances, the respondent considered a significant amount of scientific data and advice from subject-matter experts, I consider unfounded the grievors' allegations that the employer ignored or rejected scientific data and conclusions that did not support its proposed vaccination policy.

[268] The action under consideration in these grievances is the employer's decision to adopt and implement a vaccination policy that resulted in the grievors being placed on leave without pay. Adjudication is not the forum for debating decisions and analyses made and conducted by departments and agencies other than the Treasury Board. The mere fact that Health Canada and PHAC also intervened and were involved in managing COVID-19, including with respect to vaccination, does not mean that their actions and decisions can be subjected to a Board decision. For that reason, I find that the grievors went down the wrong path by lingering on the decisions made and analyses performed by departments and agencies other than the Treasury Board, such as Health Canada's approval of vaccines and PHAC's data analysis and advice.

[269] The main issue that I must decide in this case is not whether the Policy is ill-conceived, poorly designed, or badly executed but whether it constitutes disciplinary action (see *Frazee*, at para. 21). Therefore, the grievors' arguments that PHAC did not,

according to them, carry out all the analyses that they consider relevant and necessary or that Health Canada did not — again according to them — subject the vaccine manufacturers' data to a sufficiently rigorous review, are irrelevant to the central issue of whether the employer's intent — admitted or disguised — was disciplinary in nature.

[270] A careful review of the evidence demonstrates that the employer had legitimate operational considerations. It also had sufficient credible and reliable information that imposing a vaccination policy on public servants in the core public administration was a safe and effective approach to its operational objective of increasing the number of employees working onsite. The information that it had available at the time set out that COVID-19 vaccination provided protection against COVID-19 infection and transmission and its serious consequences.

[271] I agree with the respondent's argument that as an employer, it could not afford to wait for scientific certainty before taking action by imposing a vaccination policy (see *Elementary Teachers' Federation of Ontario v. Ottawa-Carleton District School Board*, 2022 CanLII 53799 (ON LA) at paras. 44 to 47; and *Ontario Nurses' Association v. Eatonville/Henley Place*, 2020 ONSC 2467 at para. 78).

[272] The evidence adduced at the hearing set out that at least 60 000 public servants were working onsite when the Policy was developed and implemented. Mr. Rehibi was one of them. The fact that his work team did not experience a COVID-19 outbreak before the Policy was adopted is not determinative; nor does it lessen the importance of the employer's duty to protect all its employees' health and safety at work.

[273] In addition, in the absence of accommodation measures, all public servants had to remain available to attend the employer's premises on request, including those working from home under a telework agreement. Ms. Lavoie acknowledged in her testimony that she was onsite twice, for administrative reasons. She also acknowledged that she could have been required to work onsite, at her employer's request. She could have been required to work onsite to attend training sessions or meetings. She could also have been required to work onsite on very short notice. Some of her tasks could not be performed remotely. The distinct possibility of having to attend the employer's premises resulted in an obligation on the part of the employer to ensure her health and safety and that of her colleagues, when onsite. I accept Ms. Bidal's testimony that

it would have been ineffective and not operationally feasible for the employer to require that an employee such as Ms. Lavoie be fully vaccinated only when she was called to work onsite or otherwise attend the employer's premises. Weeks or months would elapse between the request that the employee work onsite and when the employee would be considered fully vaccinated and therefore less at risk of serious illness, hospitalization, or death.

[274] The scientific evidence available to Ms. Bidal indicated that vaccines were the safest and most effective tool to protect all public servants' health and safety. Therefore, it was reasonable for the employer to consider not only the risks associated with the presence of unvaccinated employees in the workplace but also the risks of public servants becoming seriously ill with COVID-19.

[275] The evidence available to the employer supported a conclusion that having all public servants in the core public administration vaccinated was a reasonable step to achieve its objective of protecting them all. In other contexts, policies based on similar conclusions were found consistent with the precautionary principle and reasonable (see, for example, *Toronto District School Board v. CUPE, Local 4400*, 2022 CanLII 22110 (ON LA); *Coca Cola Canada Bottling Inc. v. Teamsters, Local 213*, 2022 CanLII 60956 (BC LA); *Unifor Local 973 v. Coca-Cola Canada Bottling Limited*, 2022 CanLII 25769 (ON LA); and *Power Workers' Union*).

[276] The advice that PHAC provided to Ms. Bidal and on which she relied when developing the Policy indicated that a policy that provided little discretion in terms of its implementation and that applied to as many employees as possible was the best tool to minimize risks to employees as much as possible. The scientific data available at the time indicated that excluding unvaccinated individuals from a workplace reduced the risk of transmitting the virus in the workplace, including the risk of transmission to vaccinated individuals. Dr. Kindrachuk's evidence was consistent with that advice. The evidence as a whole presented at the hearing does not allow me to conclude, as the grievors submitted, that adopting a vaccine policy that gave little discretion in its implementation was arbitrary. Rather, the evidence indicates that it was a science-based decision to minimize as much as possible the risks to public servants in the core public administration.

[277] Ms. Bidal testified that after six months, the employer reviewed the Policy's content and necessity. Although it appears that the review exercise was not announced or communicated publicly while it was underway, Ms. Bidal's testimony set out that the employer reviewed the emergence of the Omicron virus and its particular characteristics, including its greater transmissibility and its increased ability to evade vaccine immunity. Its duty to ensure the health and safety of public servants in the core public administration led it to take a cautious approach; it wanted to wait for advice and guidance on that variant's impact on vaccine efficacy before deciding whether to suspend the Policy's application.

[278] It would have been preferable, from a transparency perspective, had the employer publicly communicated that a Policy review was underway or had been completed. However, I cannot conclude that that lack of communication is an indication of disciplinary intent.

[279] I will now turn to the grievors' argument that the length of their leave without pay indicates that the employer had disciplinary intent, specifically to punish public servants who refused to be vaccinated or to correct their behaviour. They cited *Lemieux v. Deputy Head (Correctional Service of Canada)*, 2021 FPSLREB 20, to support their argument, specifically paragraph 111.

[280] In *Lemieux*, the Board found disciplinary a suspension without pay of 11 months, which was the duration of an investigation into a criminal charge made against the grievor in question. However, the Board did not, as the grievors suggested, conclude that the suspension was disciplinary solely because of its duration. Several other factors were considered. The Board's decision in *Lemieux* was made in a very particular factual context in which an employer had imposed a suspension without pay on the basis of speculation and a presumption that the criminal charges against the grievor were founded. Paragraph 111, cited by the grievors, is not part of the Board's analysis but rather is part of the summary of the arguments made by the grievor in question.

[281] The jurisprudence states that the length of a leave without pay is a factor relevant to whether the action was reasonable and justified (see *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at paras. 86 to 93). A finding

that the length of a suspension might, in itself, constitute disciplinary action is intimately linked to the entirety of each case's circumstances.

[282] The duration of the grievors' leave without pay was indeterminate. They were on leave without pay for seven months. Clearly, it was a long period.

[283] Although the duration of the grievors' leave without pay was indeterminate, it was governed by specific factors. It could not be said to be indefinite (see *Cabiakman v. Industrial Alliance Life Insurance Co.*, 2004 SCC 55 at para. 62). It was anticipated that the leave without pay would end once the grievors were vaccinated or once the Policy was abolished or its application was suspended due to changes in the pandemic's evolution. The circumstances in which their leave without pay would end were known to them (see *Potter*, at paras. 86 to 93).

[284] In the very specific circumstances of a pandemic with an uncertain evolution, and considering the importance of the employer's duty to ensure its employees' health and safety, I cannot conclude that seven months of leave without pay must be, by that very fact and without any further indication of disciplinary intent on the employer's part, considered disciplinary.

[285] Finally, I will address two other allegations made by the grievors that they believe are indicative of the Policy's punitive and disciplinary nature; namely, their deprivation of Employment Insurance benefits and the employer's alleged failure to consider options that were less invasive and less uncertain than vaccination. I will not dwell on the second allegation, which will be addressed again in my analysis of the grievors' *Charter* argument. For the moment, I wish only to reiterate that a contested action does not have to be the best one. It need not be perfect. Even though the employer could have considered other options, it does not make the Policy a disciplinary action. However, as will be described later in these reasons, the evidence presented at the hearing set out that the employer was aware of other options and that it made its choice with the objective of prioritizing the action that provided the most health-and-safety protection.

[286] On the Employment Insurance issue, the denial of Employment Insurance benefits did not arise from the Policy itself. The evidence presented at the hearing indicates that the decision to deny benefits to public servants who had refused to comply with the Policy was made by the Labour Program, which is a federal institution

that is part of ESDC. It was not the Treasury Board's decision. Ms. Bidal was made aware of the decision in the course of her duties. She was not consulted or informed beforehand. Mr. Rehibi's benefits claim was denied. However, he had found another job long before he learned that his claim had been rejected. Since the respondent did not deny the benefits and the denial did not result from the Policy itself, I will not consider that factor in my analysis.

[287] From the grievors' testimonies, and especially that of Ms. Lavoie, it is clear that they felt punished for not complying with the Policy. However, as the case law states, an employer action that has an adverse effect on a public servant is not necessarily disciplinary action. Similarly, the opinion of the public servant affected by the impugned action that it was disguised disciplinary action does not necessarily make it, without more, disciplinary action.

[288] For the reasons set out earlier, I find that the grievors did not demonstrate that the employer's intention was to correct their behaviour by placing them on leave without pay.

b. The Policy's implementation had an immediate adverse effect on the grievors

[289] I turn now to the issue of whether the Policy had an immediate adverse effect on the grievors.

[290] There is no dispute that the grievors' leave without pay had an adverse effect on them. The disagreement between the parties concerns whether or not that adverse effect was immediate and whether it resulted from a choice made by the grievors.

[291] The grievors argued that the Policy's application, i.e., their leave without pay, had an immediate adverse effect on them. Due to their failure to comply with the Policy, they were deprived of their salaries for an indeterminate period. They were excluded from their duties without knowing when they could return to work. According to them, they were also stigmatized because their departure on leave without pay on the dates set out in the Policy let everyone know the reason for the leave, which was that they did not comply with the Policy. They argued that those adverse impacts did not result from a choice on their part. They argued that they did not have the freedom to choose whether to comply with the Policy, given that they were aware of the dangers of vaccination and thus could not comply with it.

[292] The respondent submitted that the adverse effect that the grievors alleged that they suffered, leave without pay, resulted from their decisions not to comply with the Policy. According to the respondent, the Policy offered them the choice to either attest to their vaccination status or refuse to provide their attestations and be temporarily placed on leave without pay. They made their choices, and their allegations that the leave without pay had repercussions on them cannot have the effect of transforming their leave without pay into disciplinary suspensions (see *Knox v. Treasury Board (Canadian Food Inspection Agency)*, 2017 PSLREB 40 at para. 135). In addition, the respondent submitted that the grievors were free to seek alternative employment during the period of their leave without pay, which they did.

[293] As noted earlier, the Policy came into force on October 6, 2021, and the grievors were placed on leave without pay as of November 15, 2021, more than one month later. Between October 6 and 29, 2021, public servants in the core public administration were required to attest to their vaccination status. The evidence demonstrates that the departments for which Mr. Rehibi and Ms. Lavoie work took several steps to inform their employees about the Policy, its purpose, and the consequences of not complying with it. They provided their employees with information about, among other things, COVID-19 and vaccination against the virus.

[294] The Policy also provided that two weeks after the deadline to attest to their vaccination status, public servants who refused to become fully vaccinated or to disclose their vaccination status were to attend an online information session on COVID-19 vaccination. Only two weeks after the deadline to provide their attestations and after the information session were the grievors placed on leave without pay.

[295] The history of events, examined in this way, demonstrates that the grievors' leave without pay was not an immediate consequence of the Policy's coming to force. It followed later once the Policy had been fully implemented.

[296] As previously indicated, the fact that an action taken by an employer has an adverse effect on an employee does not necessarily make that action disciplinary. Moreover, whether the adverse effect is immediate or not is not, in itself, determinative. The presence of an immediate adverse effect is only one factor among others that may suggest the presence of disciplinary intent.

[297] The grievors argued that the Policy did not give them a real choice. I will return to that argument in my *Charter* analysis. At this point in my analysis, which is whether the Policy had an immediate adverse impact on the grievors, I would like to point out that their testimonies do not support their argument that the alleged dangers of vaccination meant that they did not truly have a choice to comply with the Policy.

[298] Ms. Lavoie stated that she refused to comply with the Policy because, in her opinion, it was an action to intimidate and influence the grievors into being vaccinated. For his part, Mr. Rehibi stated that he did not feel compelled to be vaccinated. He testified that the more that vaccination against COVID-19 was emphasized, the more he resisted. Although both have personal reasons for hesitating to be vaccinated, they did not raise any alleged vaccination risks when they explained why they refused to comply with the Policy. They were informed of the Policy and of the consequences of not complying with it. They had time to think about it and made informed decisions not to be vaccinated. They made their choices on principle, and the adverse effects on them resulted from their choices.

[299] The grievors' testimonies also do not support their claim that they were stigmatized by the Policy's application. It is reasonably likely that some of their colleagues might have inferred that given the dates and duration of the grievors' leave, they had been placed on leave without pay due to refusing to comply with the Policy. However, they did not present evidence on that point. In their testimonies, they did not describe any professional or social experiences or interactions that could support a conclusion that they would have been mistreated or criticized in the workplace.

[300] Although they described their interactions with certain colleagues as less friendly or personal after their leave without pay than before, they did not describe any conflicts, reproaches, or criticisms. On the contrary, Mr. Rehibi testified that his return to work after his leave without pay was respectful.

[301] For the reasons set out above, I find that the adverse effect on the grievors resulted from the decision they made.

c. The effect of the employer's decision to place the grievors on leave without pay is disproportionate to the employer's cited administrative ground

[302] As I indicated earlier, when the impact of an action is significantly disproportionate to the administrative ground that the employer cited, it may be

considered disciplinary. However, the threshold will not be met if the impugned action is considered a reasonable response to honestly held operational considerations; it will be considered reasonable and not disciplinary (see *Frazee*, at para. 24, citing *Toronto East General & Orthopaedic Hospital Inc. v. A.A.H.P.O*, 1989 CanLII 9391 (ON LA)).

[303] The grievors based their argument that the Policy's impact is disproportionate on what they characterized as a violation of their right protected by s. 7 of the *Charter*. They argued that the Policy's application, notably being deprived of their salaries for a period that was then indefinite and eventually turned out to be seven months, infringed their right protected by s. 7 of the *Charter*.

[304] The grievors argued that the Policy was an arbitrary and overly broad action that had disproportionate financial and psychological consequences for them. According to them, it was not necessary for the employer to opt for vaccination for all its employees. The scientific community did not suggest a vaccination rate as high as 100%. They also argued that vaccination posed a risk to their health. They argue that the Policy was useless. The Omicron variant's emergence greatly reduced the effectiveness of the protection provided by vaccine immunity. The grievors even went so far as to argue that vaccination led to an increase in COVID-19 cases by making vaccinated people more susceptible to the virus.

[305] In addition to what the last paragraph set out, the grievors' arguments focused largely on the principle of minimal impairment, including the other options that they believe that the employer should have prioritized over vaccination, as well as on the other means that the employer could have used to address the problem of public servants who refused to comply with the Policy.

[306] The respondent argued that applying the Policy was a reasonable response to honestly held operational considerations. The consequences of applying it were not disproportionate to the cited administrative ground. The only impact on the grievors was that they were placed on leave without pay temporarily, until the Policy's application was suspended. For its part, the employer was required under the *CLC* to protect its employees' health and safety. The scientific evidence set out that the best way to do it was to require the vaccination of all public servants in the core public administration, with the exception of employees entitled to accommodation.

[307] The respondent also submitted that the Board does not have jurisdiction to hear and consider the grievors' *Charter* arguments before concluding that the impugned action was indeed disguised disciplinary action (see *Chamberlain PSLRB*, at paras. 69 and 121; upheld in *Chamberlain FC 2015*). It also submitted that the Board has no residual jurisdiction to consider the employer's actions in light of the *Charter* (see *Marleau v. Treasury Board (Royal Canadian Mounted Police)*, 2023 FPSLREB 47 at para. 26). As I previously indicated, I allowed the grievors to present their *Charter* evidence.

[308] It is clearly established in law that the Board can resolve constitutional questions that are related to matters of which it is properly seized (see *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 at paras. 60 and 61; and *R. v. Conway*, 2010 SCC 22 at para. 78). The Board has already done so (see, among others, *Association des members de la Police Montée du Québec v. Treasury Board*, 2019 FPSLREB 70; and *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55). The respondent did not dispute that the Board may hear and decide *Charter* arguments if it is properly seized of the grievors' grievances.

[309] It has also been clearly established that the Board does not have jurisdiction over a grievance referred to adjudication under s. 209(1)(b) of the *Act* on the sole grounds that it alleges a violation of the *Charter* or of related legislation, such as the *CHRA*. That was the fact situation in *Chamberlain FC 2015* and *Chamberlain PSLRB*, which are the decisions on which the respondent based its argument.

[310] In my view, the employer's argument that the Board cannot hear and consider *Charter* arguments until it has concluded that it has jurisdiction to hear a grievance is too restrictive in that if it were accepted, this argument would not allow the Board to hear evidence and arguments about the values underlying the *Charter*.

[311] *Frazee* states that how the employer chooses to characterize its decision is not in itself a determinative factor. It may be necessary for the Board to consider the effect of the impugned action on the grievors, including whether the action's impact is significantly disproportionate to the employer's cited administrative ground.

[312] *Frazee* and *Bergey* did not define or delineate the nature of the evidence on which the Board can rely when it considers the effect of a contested action. Rather, those decisions set out that when the impact of an employer action is significantly

disproportionate to the cited administrative ground, and the action is not a reasonable response to honestly held operational considerations, the action may be considered disciplinary (see *Frazee*, at para. 24). This analysis is intimately linked to the facts of each case, including the nature of the impugned action.

[313] It is reasonable to believe that the effect of an action imposed on a public servant may vary, depending on its nature. The effect or impact can be financial or personal. It could also translate into, among other things, an impact on the career path of the person concerned. However, I cannot rule out the possibility that the effect of a contested action can also be illustrated by its incompatibility with the values underlying the *Charter*.

[314] The Policy's adoption and implementation were unprecedented actions in the core public administration. Never before had the respondent adopted a vaccination policy that led to leave without pay for those public servants who refused to comply with it. I cannot accept the employer's argument that to support their allegations that the Policy's effect was significantly disproportionate to the employer's cited administrative ground and therefore that it was disciplinary in nature, the grievors are unable to argue that the action imposed on them was inconsistent with the values underlying the *Charter*.

[315] If accepted, the respondent's argument would leave no room for the Board to hear evidence of an alleged impact on the values underlying the *Charter* when such an impact would be relied on as an indication that the effect of the impugned action would be of such magnitude and importance that it could be considered disciplinary and not administrative. I cannot accept the respondent's argument that the door would be closed to any evidence and argument on that subject when, in the exercise of its discretion, the Board considers such evidence relevant to considering an impugned action's impact on a grievor. Concluding otherwise would be, in my view, contrary to the case law that states that an administrative tribunal such as the Board must act in accordance with the values underlying the *Charter* when carrying out its duties (see *Conway*, at para. 78).

[316] In *Doré v. Barreau du Québec*, 2012 SCC 12 at para. 35, the Supreme Court of Canada stated that administrative decisions must always consider fundamental values and that administrative bodies "… are empowered, and indeed required, to consider

Charter values within their scope of expertise." As a decision maker, I must ask myself how to best protect the *Charter* value at issue, considering the *Act*'s objectives (*Doré*, at para. 56).

[317] As the Supreme Court of Canada recently reiterated in *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 at para. 64, the analytical framework established in *Doré* applies not only when an administrative decision directly infringes rights guaranteed under the *Charter* but also when the administrative decision merely involves a value underlying one or several *Charter* rights, without restricting those rights. As an administrative decision maker, I have an obligation to consider the values relevant to the exercise of my discretionary power (*Commission scolaire francophone des Territories du Nord-Ouest*, at para. 65).

[318] The respondent cited *Marleau* to support its position that the Board does not have jurisdiction, or residual jurisdiction, to consider the employer's actions in light of the *Charter*. *Marleau*, which is a recent Board decision, dealt with a complaint that a Royal Canadian Mounted Police employee made against the employer. His complaint alleged that the employer engaged in an unfair labour practice by imposing the Policy. The complainant alleged, among other things, violations of ss. 2 and 7 of the *Charter*. The Board's analysis of the *Charter* is set out in two brief paragraphs. The most relevant of them, paragraph 26, states that the Board's view was that the complainant did not demonstrate how the *Charter* provisions on which he relied applied and that he did not explain how his *Charter*-related allegations related to the *Act*'s provisions that confer jurisdiction on the Board. However, it is not so in this case. The grievors demonstrated and explained the relevance, according to them, of their *Charter* arguments to the *Act*'s provision that confers on me my jurisdiction as an adjudicator.

[319] I do not suggest that evidence and arguments on the values underlying the *Charter* should be allowed in all cases in which a grievor alleges disguised disciplinary action. In the vast majority of cases, *Charter* allegations and arguments will not apply or will be irrelevant to the analysis of the *Frazee* factors. However, my view is that exceptional circumstances may arise in which a grievor could be permitted to present evidence and arguments on the values underlying the *Charter* in a debate about the allegedly disproportionate effect of an impugned action. I believe that this case is one.

[320] In this case, the grievors presented evidence and arguments relating to what they described as a violation of their rights protected by s. 7 of the *Charter*, which provides, "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[321] The grievors argued that the Policy was intended to force them to be vaccinated or risk being deprived of their income for an indeterminate period. They argue that that is a violation of the right to security of the person guaranteed under s. 7 of the *Charter*. They also argue that they did not have the freedom to choose to comply with the Policy. They could not comply with it because they were aware of the dangers of COVID-19 vaccination.

[322] In *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at para. 55, a majority of the Supreme Court of Canada stated that the right to security of the person guaranteed under s. 7 of the *Charter* protects both a person's physical and psychological integrity.

[323] The protection of physical integrity includes a person's right to decide whether, and to what extent, they will agree to undergo medical procedures. As *Ciarlariello v. Schacter*, [1993] 2 S.C.R. 119, states at page 135 (repeated in *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at para. 101), the right to respect for physical integrity includes each person's right to "… decide what is to be done to one's own body. This includes the right to be free from medical treatment to which the individual does not consent."

[324] The grievors were not required to be vaccinated. They were not vaccinated. Their decision not to be vaccinated was respected. The evidence cannot support a conclusion that their physical integrity was compromised.

[325] I find that the grievors' argument with respect to s. 7 of the *Charter* is more akin to an argument that the Policy was an attack on their psychological integrity, meaning that according to them, they have suffered psychological harm because they felt compelled to comply with the Policy or risk being deprived of their salaries.

[326] The aspect of the right to security of the person that protects psychological integrity protects a person from severe psychological suffering caused by the state (see

Blencoe, at para. 57); this means repercussions more severe than ordinary stress or anxiety (see *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at para. 60). In a context that is not penal, as in this case, the right to security of the person includes only "… serious psychological incursions resulting from state interference with an individual interest of fundamental importance" (see *Blencoe*, at para. 82).

[327] According to the respondent, the nature of the psychological harm that the grievors claim to have suffered is comparable to that of any employee placed on leave without pay or who would suffer a loss of salary.

[328] The Policy's impact on the grievors cannot be characterized as constituting a psychological injury of a severity similar to what was described in *Blencoe* and *G.(J.)*.

[329] The grievors' made a choice. Those choices had consequences. The grievors were, however, free to find other jobs during their leave without pay. Ms. Lavoie took steps to find another job. She could not find one. She suffered considerable financial consequences from being deprived of her salary. She also reported experiencing stress due to the loss of income and uncertainty about the length of the leave without pay. Her sleep was disturbed. Although she testified about a period during which her mental health had deteriorated, her evidence was that that period began in June 2021, before the adoption and implementation of the Policy. Based on the evidence presented to me at the hearing, I accept that Ms. Lavoie experienced stress and anxiety. However, I do not accept that she suffered serious psychological harm as a result of the Policy.

[330] Mr. Rehibi described the decision as difficult. Although he was placed on leave without pay, he quickly took steps to find a new job and was successful. He stated that he did not "[translation] suffer too much financially" from his leave without pay. Although I accept that Mr. Rehibi experienced stress, in his testimony, he did not describe having suffered psychological harm.

[331] I do not share the grievors' opinion that the Policy did not offer them a real choice. Each made a choice. The choice was difficult and could result in significant financial consequences, but their testimonies set out that neither of them decided to comply with the Policy, on principle. The consequences that they suffered resulted from their choices.

[332] Arguments that the adverse effects of a vaccination policy, such as the one contested in these grievances, cannot be considered to be the result of the employee's choice were analyzed and dismissed in cases about vaccination policies offering choices similar to the Policy contested in this case (see, for example, *Health Employers Assn. of British Columbia v. Health Sciences Assn. (Influenza Control Program Policy)* (2013), 237 L.A.C. (4th) 1 (BC LA) at para. 160, in which an arbitrator found that a policy that provided employees with the choice between wearing a mask or undergoing influenza vaccination was not a mandatory vaccination policy; *Parmar*, at para. 154, in which a judge found that a vaccination policy that offered a choice between vaccination and leave without pay did not impose vaccination but offered each employee a choice between the two options set out in the policy; and *Syndicat canadien de la fonction publique*, at para. 289, in which an arbitrator found that a policy that encouraged employees to be vaccinated was not compulsory vaccination, even though the choice they made had a significant financial consequence).

[333] The Policy offered the grievors a choice: to be vaccinated and maintain their salaries, or refuse to be vaccinated and be placed on leave without pay. They made their choices. Their testimonies set out that they knew and understood the consequences that would result from their choices.

[334] Neither the *Charter* nor the values underlying it provides protection from the consequences of the grievors' decisions (see, for example, *Lewis v. Alberta Health Services*, 2022 ABCA 359, which is about a vaccination policy in a medical context).

[335] Although the grievors suffered financial consequences from the Policy's application, the case law states that economic interests are not protected by s. 7 of the *Charter* (see *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3 at para. 45; and *Reference re ss. 193 and 195.1(1)(C) of the criminal code (Man.)*, [1990] 1 S.C.R. 1123 at 1169 to 1171 and 1179; see also, in the context of vaccine policies, *Toronto District School Board*, at 31; *Bailey v. New Brunswick Power Corporation*, 2023 CanLII 2832 (NB LA) at para. 120; and *Syndicat canadien de la fonction publique*, at para. 288).

[336] The grievors cited *United Steelworkers* and the findings of the Military Grievances External Review Committee on the constitutionality of the Canadian Armed Forces' ("the Armed Forces") COVID-19 vaccination policy to support their *Charter* position.

[337] In *United Steelworkers*, a judge of the Superior Court of Quebec found first that certain ministerial orders of the minister for Transport Canada ordering compulsory vaccination in marine, air, and rail transportation infringed on the liberty and security of the person in their psychological dimension and then found that the action respected the principles of fundamental justice and therefore did not violate s. 7 of the *Charter*.

[338] The grievors relied on the first finding and wanted to distinguish the second on the basis that in *United Steelworkers*, the vaccines' efficacy and safety were not contested. The respondent submitted that *United Steelworkers* is an isolated case that is inconsistent with the existing case law on vaccination policies.

[339] I will not comment on the merits of *United Steelworkers*. It is not necessary for me to do that.

[340] In *United Steelworkers*, the Superior Court of Quebec was seized of a judicial review application that challenged the constitutionality of ministerial orders that decreed compulsory vaccination through COVID-19 vaccination policies that businesses under federal jurisdiction had adopted for their employees. The vaccination policies in question provided that refusing to be vaccinated could result in leave without pay or dismissal. The specific cases under consideration in *United Steelworkers* included situations in which dismissals had resulted from not complying with a vaccination policy. It is clear that the Superior Court of Quebec's conclusion that the ministerial orders infringed on the liberty and security of the person in their psychological dimension is at least partly based on the fact that dismissal could have resulted from refusing to comply with the vaccination policies in question (see, among others, paragraphs 171 and 176). For that reason, I consider that the Superior Court of Quebec's finding in *United Steelworkers* that the impugned action violated s. 7 of the *Charter* can be distinguished from this case, particularly because dismissal was not a consequence of failing to comply with the Policy under consideration in these grievances.

[341] Although I find that the Superior Court of Quebec's conclusion that the ministerial orders infringed on the liberty and security of the person in their psychological dimension can be distinguished, I still find relevant certain other conclusions reached in *United Steelworkers*, including that the impugned action

complied with the principles of fundamental justice and therefore was not contrary to s. 7 of the *Charter*.

[342] Recall that s. 7 of the *Charter* provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." A person invoking s. 7 must demonstrate not only that the impugned action or decision infringes one of the rights set out in that section but also that the infringement is contrary to the principles of fundamental justice (*Blencoe*, at para. 47). As the Superior Court of Quebec stated in its reasons, s. 7 contains its own internal justification mechanism, and an action that violates the right to security of the person will not violate s. 7 if it is "[translation] … made to measure so that it is neither arbitrary nor excessive in scope and, finally, provided that it is also not completely disproportionate" (*United Steelworkers*, at paras. 152 to 154).

[343] In the course of its analysis, the Court concluded that the impugned action was not arbitrary, in particular because the evidence demonstrated that unvaccinated people were at higher risk of developing more severe forms of COVID-19, which could have impacted the activities of the employers in question. The Court also concluded that although the action's impact could be described as severe, it was not possible to state that the action was overly broad. The Court based that last conclusion on a finding that the applicants had not established that the action's impact was unrelated to the objective. The Court added that, where mandatory vaccination has been deemed necessary in the workplace, it follows that an employee who is not vaccinated cannot work (*United Steelworkers*, at para. 202). Finally, the Court concluded that the effect of the action on the persons concerned was proportionate to its important objective of reducing the risks associated with COVID-19 and the safety of maritime, air, and rail transportation. It also indicated that it would "[translation] … minimize the seriousness of the situation [facing the country] from fall 2021 to characterize the pandemic as a mere episode that did not require a strong response …" (*United Steelworkers*, at para. 208).

[344] Although it found that the impugned action did not violate s. 7 of the *Charter*, the Superior Court of Quebec still considered the issue of the justification of the action under s. 1 of the *Charter*. It stated that had it concluded that the impugned provisions

violated s. 7 of the *Charter*, the provisions would have been justified as a reasonable limitation on that right (*United Steelworkers*, at para. 251).

[345] In the second case that the grievors cited, the Military Grievances External Review Committee concluded that the Armed Forces' policy violated the complainants' right to liberty and security. As was the case in *United Steelworkers*, the External Review Committee's conclusion on that subject was based on an important fact that distinguishes the Canadian Armed Forces' policy from the one under consideration in the case at hand: refusing to comply with the Armed Forces' policy constituted misconduct. That policy provided for disciplinary action and discharge from the Armed Forces for those refusing to comply with it. The stated disciplinary intent and the nature of the consequence of not complying with the Armed Forces' policy make the External Review Committee's decision easily distinguishable from these grievances.

[346] I have considered those decisions and all the case law that the parties cited in relation to the *Charter*. As I must review and analyze the Policy in light of its content, the evidence presented to me at the hearing, the Treasury Board's duty to ensure that its employees' health and safety are protected, and the particular context of the core public administration, I find that none of those decisions is a complete answer to the matters at issue in these grievances. I also find that the grievors did not demonstrate that the Policy's application, in particular placing them on leave without pay, constituted an infringement of their rights protected by s. 7 of the *Charter* or impacted the values underlying s. 7.

[347] Returning now to the grievors' arguments about the principle of minimal impairment.

[348] I cannot accept the grievors' suggestion that the employer could have waited until the COVID-19 pandemic was over before meeting its operational needs. Even if it could have waited, which I will not decide, it was not required to wait out this uncertain period before taking action to address its operational needs. When the Policy was adopted and implemented, the advice and information available to the employer set out that vaccination was a safe and secure way to meet its operational needs while respecting its *CLC* obligations.

[349] The respondent is the employer of over 260 000 public servants working in more than 86 departments and agencies. The positions that those public servants hold,

and the tasks that they perform, vary considerably. It is false to believe that all public servants in the core public administration were in positions the duties of which could be performed remotely at the time relevant to these grievances. In the exceptional circumstances of a pandemic that impacted the entirety of the employer's operations, it was reasonable and effective for an employer to adopt a policy that applied to its entire workforce. That enabled the employer to ensure consistency and certainty in its policy's application. When it comes to a vaccination policy related to a virus such as COVID-19, the evidence presented at the hearing demonstrates that consistency in application is of great importance.

[350] I accept Ms. Bidal's testimony that adopting a vaccine policy that would have granted the different departments and agencies of the core public administration discretion when applying its requirements would not have enabled the employer to achieve its objective of protecting public servants' health and safety by achieving the highest possible vaccination rate. Dr. Kindrachuk's testimony corroborated hers on the importance of uniformity when implementing a vaccination policy.

[351] I also cannot accept the grievors' argument that the employer could and should have allowed those public servants who refused to be vaccinated to work exclusively remotely by modifying their duties so that onsite work was not required.

[352] It is not possible for me to conclude that having those who refused to comply work exclusively remotely could have been a solution for all departments and agencies and for all the positions that they held. Mr. Rehibi is a case in point. He works as a support clerk. His work was performed exclusively onsite before March 2020. As of the hearing dates, his work was still performed almost exclusively onsite. It is not reasonable to expect that Service Canada would have been required to redesign its business model and to change how it operated to that extent to accommodate a choice that as Mr. Rehibi explained, was made on principle.

[353] Ms. Lavoie had been working from home under a telework agreement long before the COVID-19 virus appeared. Under her agreement, she was required to work onsite on request, either to attend meetings and training sessions or to translate secret texts. She did this a few times a month before March 2020. Between March 2020 and her placement on leave without pay, she went to the office twice, for administrative reasons.

[354] The fact that Ms. Lavoie did not have to perform any onsite translations between March 2020 and being placed on leave without pay in November 2021 is not determinative. It does not change the fact that her tasks included, and still include, translating secret texts. Those translations must be completed onsite and on the devices designated for that purpose. When Ms. Blondin, Ms. Lavoie's manager, described the grievor's duties, she explained that they comprise two categories: mentoring and reviewing the work of other translators, and translating secret texts. Translating secret texts is an important part of her duties. I find it unreasonable to expect that the Translation Bureau would have exempted the grievor from performing a significant portion of her duties to accommodate a choice that as she explained, was made on principle.

[355] I will deal very briefly with the grievors' allegation that the Policy's effect was disproportionate to its objective because the Policy turned out to be unnecessary. They cited *Sault Area Hospital v. Ontario Nurses' Association*, 2015 CanLII 55643 (ON LA), and *St. Michael's Hospital v. Ontario Nurses' Association*, 2018 CanLII 82519 (ON LA), to support their argument.

[356] On that subject, I repeat what I mentioned earlier. It is the knowledge and circumstances that existed when the Policy was developed and implemented that are relevant to the analysis of these grievances. When the Policy was developed and implemented, the information available to the employer set out that the vaccines were very effective at protecting against infection and serious diseases, hospitalizations, and lethal diseases. The situation was quite different in *Sault Area Hospital* and *St. Michael's Hospital*, two decisions about influenza vaccination policies that were imposed in the presence of clear indications that the vaccines in question provided little protection.

[357] The Omicron variant became dominant after the Policy was implemented and the grievors were placed on leave without pay. The evidence presented at the hearing demonstrated that the scientific community required several months before it was able to fully understand that variant's impact on vaccine immunity. The Policy was suspended once the employer was satisfied that the scientific evidence no longer demonstrated a net benefit to vaccination due to the new variant.

[358] With some hesitation, I will address an additional allegation raised by the grievors; namely, their claim that the COVID-19 vaccine caused an increase in the number of COVID-19 cases and that it made vaccinated people more susceptible to the virus. I will state only that no evidence substantiated that allegation and that the expert witnesses and Dr. Lourenco debunked it. If the number of COVID-19 cases increased after the Policy's implementation, the scientific evidence presented at the hearing set out that the Omicron variant was responsible for it.

[359] I agree with the respondent's argument that not only was the impact of the Policy's application not disproportionate to the intended objective but also that the period during which the Policy remained in effect was not disproportionate, although that period no doubt seemed very long to the grievors.

[360] The evidence presented at the hearing corroborates the respondent's position that the Policy's development, implementation, and continued application were based on the scientific evidence available at the time. Predicting the behaviour of the virus was difficult, if not impossible. The employer continued to inquire about the evolution of the scientific knowledge of COVID-19 and vaccines. When the Omicron variant became dominant, the employer took the time it deemed necessary to fully understand the variant's repercussions on vaccine efficacy before making a decision on the Policy.

[361] The amount of time that the employer took to review the need to continue or suspend the Policy's application in the presence of the Omicron variant does not seem unreasonable to me when it is assessed in the light of an ever-changing scientific data context. The respondent's decision to suspend the Policy's application was based on the evolution of the scientific knowledge of the Omicron variant and its impact on vaccine efficacy. The grievors did not demonstrate that it was unreasonable for the respondent to proceed that way (see, among others, *Coca-Cola Canada Bottling Limited v. United Food and Commercial Workers Union Canada, Local 175*, 2022 CanLII 83353 (ON LA) at para. 49; and *Toronto (City) v. Toronto Civic Employees' Union, CUPE, Local 416*, 2022 CanLII 109503 (ON LA) at paras. 112 to 117, which address the maintenance of a mandatory vaccination policy after the Omicron variant emerged).

[362] Given the evidence as a whole, I find that the grievors did not demonstrate that the effect of the employer's decision to place them on leave without pay due to their failure to comply with the Policy was disproportionate to its cited administrative

ground. Despite their arguments, considered in light of the values underlying the *Charter*, specifically s. 7, the grievors did not meet their burden in that respect.

d. The action is likely to have repercussions on the grievors' career prospects

[363] The grievors did not specify the repercussions that their leave without pay might have had on their career prospects, if any.

[364] The evidence presented to me does not allow me to conclude that the Policy's implementation had such an impact. The grievors' managers confirmed that the reason behind the grievors' leave without pay is not mentioned in their employee files. Nothing in their files indicates that they failed to comply with the Policy. After their leave without pay, they both returned to their positions. Far from suffering repercussions on his career prospects, Mr. Rehibi obtained an indeterminate appointment shortly after he returned from leave without pay.

[365] Given the lack of evidence that would allow me to conclude that the Policy's application was likely to impact the grievors' career prospects, I will give this factor very little weight in my analysis.

e. The Policy is likely to be invoked in future disciplinary actions

[366] The Toolkit, which is a briefing document that the Treasury Board Secretariat prepared to support managers when implementing the Policy, contained many questions and answers, including whether progressive discipline would be imposed on public servants who refused to be vaccinated. The answer stated that a public servant who did not comply with the Policy would be placed on leave without pay; nothing more. The testimonies of Ms. Bidal, Ms. Blondin, and Ms. Nadeau corroborated that statement in that it was not foreseen that the employer would invoke the grievors' lack of compliance in any future disciplinary actions.

[367] Both grievors had clean disciplinary records. Their failure to comply with the Policy is not mentioned in their employee files. Should they be subjected to disciplinary action in the future, there is nothing to suggest that the employer would raise their lack of conformity with the Policy or that their leave without pay would be considered in the context of progressive disciplinary action.

[368] I find that this factor in the *Frazee* analysis is not determinative in this case and that it cannot support a conclusion that the Policy can be considered disciplinary.

V. Conclusion as to the Board's jurisdiction to hear the grievances

[369] In the first paragraph of this decision, I described the Policy's adoption and implementation as unprecedented. The exceptional nature of the action led the grievors to challenge it. However, the fact that the Policy was unprecedented does not make it, by that very fact, a disciplinary action.

[370] The employer provided supporting evidence for its position that the Policy is an employment-related measure.

[371] Having considered all the factors set out in the case law to determine whether the Policy was truly administrative or disciplinary, I conclude that the Policy, meaning its development, implementation, and application to the grievors, was an administrative action based on the scientific evidence available at the time and that it was adopted to address legitimate operational considerations. It was an action that the respondent took to ensure that the health and safety of public servants in the core public administration were protected. It was a reasonable response to an operational need that was established by evidence, which was a need to safely increase the number of staff working onsite. The Policy's main objective was to ensure that the employer complied with its legal obligations to its employees.

[372] It was up to the grievors to demonstrate that on a balance of probabilities, they were subjected to disguised disciplinary action, even though the employer denies it.

[373] I have considered the different factors the assessment of which may help the Board determine whether the employer's intention was in fact to impose discipline on the grievors for their failures to comply with the Policy. Three of those factors were found particularly relevant to these grievances.

[374] For the reasons set out earlier, I find that the grievors did not demonstrate that the employer's intention was to punish them or to correct their behaviour by placing them on leave without pay. Furthermore, although imposing leave without pay for failing to comply with the Policy had an adverse effect on them, I find that they did not demonstrate that the effect of the employer's decision to place them on leave without pay — and to keep them on leave until the Policy's application was suspended — was disproportionate to the employer's cited administrative reason. I also find that the adverse effect on the grievors resulted from their decisions. They knew and

understood the consequences of failing to comply with the Policy. Although the choice of whether to comply with the Policy was difficult and had consequences, they made informed choices, on principle.

[375] I find that the grievors did not meet their burden of demonstrating that they were subjected to disguised disciplinary action. For that reason, the Board does not have jurisdiction to hear the grievances.

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

(The Order appears on the next page)

VI. Order

[377] The respondent's objection to the Board's jurisdiction to adjudicate the grievances is allowed.

[378] The grievances are dismissed.

March 28, 2024.

FPSLREB Translation

Amélie Lavictoire,
a panel of the Federal Public Sector
Labour Relations and Employment Board