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File: 166-02-36204

Citation: 2007 PSLRB 7

Public Service
Staff Relations Act

Before an adjudicator

BETWEEN

KAREN KATHRYN PETERS

Grievor

and

TREASURY BOARD
(Department of Indian Affairs and Northern Development)

Employer

Indexed as
Peters v. Treasury Board (Department of Indian Affairs and Northern Development)

In the matter of a grievance referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Dan Butler, adjudicator

For the Grievor: Herself

For the Employer: Richard Fader, counsel

Heard at Vancouver, British Columbia,
March 7 to 9 and October 17 to 20, 2006.

I. Grievance referred to adjudication

[1] Karen Peters ("the grievor") is employed as a senior advisor (ES-05) in the Federal Treaty Negotiation Office (FTNO) of the Department of Indian Affairs and Northern Development (DIAND) in Vancouver, British Columbia. In her grievance, she contests actions of her employer that she argues constitute a demotion and disciplinary action resulting in a financial penalty. The employer argues that there has been neither a demotion nor disciplinary action resulting in a financial penalty, and that I am consequently without jurisdiction to consider the grievor's reference to adjudication.

[2] On March 24, 2005, the grievor presented a grievance at the final level. This grievance reads in part, as follows:

. . .

> *I hereby am resuming, in amended form, the grievance I presented to management June 29, 2004 . . . .*
>
> *The grievance I filed . . . and which I am now resuming, is of a continuing nature and refers to a course of conduct and actions which have been carried out by management from January 2001 and are continuing to the present date.*
>
> *I grieve that management's conduct and actions constitute disciplinary action resulting in termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act . . . . I am presenting this grievance at the final departmental level, in accordance with Article 40.18 of the Agreement between Treasury Board and the Canadian Association of Professional Employees.*
>
> *I grieve that management has taken various disciplinary actions leading to demotion or dismissal . . . . The collective effect of these unlawful efforts to discipline, demote and dismiss me, which continues to this day, is that I have suffered, and continue to suffer, various forms of injury, including, without limitation, loss of salary, injury to my health, defamation, loss of professional reputation and loss of future career prospects. The most recent incident of management's disciplinary actions toward me resulting in injury is my receipt in the mail on February 21, 2005 of a letter dated February 16, 2005 from Mr. Jeff Goldie. I grieve that, had it not been for the disciplinary actions taken by management in violation of established policies, procedures, codes of conduct and directives governing human resources management, I would have been properly appointed to my reclassified position . . . .*

. . .

[3] As corrective action, the grievor requested:

. . .

- *reverse injury by reinstating me to the title, duties and classification of my substantive ES6 position*
- *reverse injury by providing me with ES6 salary retroactive to when I assumed the ES6 duties of my position (January 2001)*
- *establish January 2001 as the effective date of the reclassification of my substantive position*
- *retraction and apology in wording to be approved by me by Mr. Friedlaender in writing, and verbally in all the fora I have good reason to believe I was slandered and libelled*
- *compensation for emotional distress, threats to loss of my livelihood, embarrassment, humiliation, undermining my professional reputation, characterizing me as unfit for my job*
- *general, aggravated, special and punitive damages for false and defamatory expressions made by Mr. Friedlaender concerning me*
- *interim and permanent injunction restraining Mr. Friedlaender from having any influence on my career and future prospects*
- *aggravated damages for injury to my health*
- *declaration of the "Board Report" as null and void*
- *written retraction for my personal file, and destruction (expungement) of all files and documents in the department relating to this matter, including the "Board Report"*
- *reimbursement for all legal fees incurred by me*
- *adjustment of my sick leave arrangement to allow for further sick leave without penalty (given that I have nearly reached my maximum amount of sick leave, but I continue to suffer physical and psychological damage attributable to management's tactics and strategies to get rid of me).*

[*Sic* throughout]

[4] The grievor referred her grievance to the Public Service Labour Relations Board ("the Board") for adjudication on June 16, 2005, under subparagraphs 92(1)(*b*)(i) and (ii) of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 *("*the *PSSRA").*

[5] On August 5, 2005, the employer wrote to request that the Board dismiss the reference to adjudication without a hearing for lack of jurisdiction. The employer took the position that the reference cannot be considered by an adjudicator because the grievor never transmitted her grievance to the final level of the departmental grievance process. The employer also argued that there was no disciplinary action resulting in a suspension or financial penalty, and that the grievor was not terminated or demoted pursuant to paragraph 11(2)(*f*) or (*g*) of the *Financial Administration Act* (*FAA*).

[6] On April 1, 2005, the *Public Service Labour Relations Act* (*PSLRA*), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the *PSSRA*.

II. Preliminary matters

[7] At the outset of the hearing, the grievor confirmed that her grievance alleges discipline involving a financial penalty under subparagraph 92(1)(*b*)(i) of the *PSSRA*, and a demotion under subparagraph 92(1)(*b*)(ii) of the *PSSRA*.

[8] The employer withdrew the first of its two objections to my jurisdiction to hear this matter: i.e., the objection that the reference to adjudication could not be received because the grievor did not transmit her grievance to the final level of the departmental grievance process. The employer maintained its second objection to jurisdiction based on its position that the employer neither disciplined the grievor nor demoted her pursuant to the *FAA*.

A. Disclosure Request

[9] The grievor raised a preliminary matter respecting disclosure of information. She drew my attention to correspondence between herself, Board staff and the employer, starting on February 27, 2006, in which she sought disclosure from the employer of various types of information in advance of this hearing (correspondence on file). The grievor acknowledged that the employer had subsequently disclosed some of the information she sought, but stated that there remained two outstanding items from

her original request of February 27, 2006: 1) a summary from the employer of what the employer's witnesses would say in their testimony; and 2) correspondence and notes of conversations between the Board and the employer, if any, which had not been shared with the grievor.

[10] In support of her request, the grievor argued that she had provided full disclosure of the details of her grievance to the employer on March 24, 2005, in an attachment to her grievance. The employer never replied to her grievance. The grievor contends that this failure placed her in a position of disadvantage facing the adjudication process. Moreover, the grievor provided the employer notice of her disclosure request several days prior to this hearing but the employer had only responded, and then only in part, on the eve of the hearing. Regarding correspondence and conversations between the Board and the employer, the grievor argued that, as a matter of fairness, she should know about all contacts that occurred between the Board and the employer in the period leading up to this hearing.

[11] The employer opposed the disclosure request. The employer indicated that it had been as open and transparent as possible, as evidenced by the provision of documents and authorities to the grievor on the day before the hearing, as soon as counsel for the employer had had an opportunity to consult with his client. The employer questioned the utility of "will say" summaries and expressed concern about the negative impact on the adjudication process if the Board or adjudicators were to adopt the practice of requiring advance production of "will say" summaries. The employer also indicated its understanding that the Board routinely copied all relevant correspondence to both parties. In this respect, the employer argued that there was no "live issue" before the adjudicator.

[12] After consideration of the arguments made by the parties, and after examining the file, I ruled orally against the grievor's request, with written reasons to follow.

[13] These are the reasons: While I understand that the grievor feels that that there is an element of unfairness in a situation where the employer did not reciprocate her early disclosure of her evidence and arguments, her decision to disclose detailed information was voluntary and did not, in my view, trigger a binding requirement on the employer to reciprocate. While the collective agreement is not in evidence in this case, standard contract provisions with this employer, as well as the *PSSRB Regulations and Rules of Procedure, 1993* ("the former *Regulations*"), provide a

mechanism for an employee to advance a grievance to adjudication in the absence of a final-level reply from the employer. The employer's failure to reply to the grievor does not, therefore, give rise to an unfair situation for the grievor in and of itself. Even were I to accept that the failure of the employer to reply at the final level raises an issue of fairness, this issue can be freshly addressed in the course of an adjudication hearing. I rely, in this regard, on the longstanding principle enunciated in *Tipple v. Canada*, [1985] F.C.J. No. 818 (C.A.).

[14] The grievor acknowledges that the employer has made a partial disclosure of the information she sought. The grievor requests, in addition, that the employer furnish summaries of what the employer's witnesses will testify to at the hearing. Disclosure of "will say" summaries has not been a general practice in adjudication proceedings under the *PSSRA*, nor do the *PSSRA* or the former *Regulations* require the parties to produce "will say" summaries in advance of a hearing or at the outset of a hearing. In this regard, an adjudication hearing differs from a court, where formal, advance disclosure rules may apply. Adjudication hearings provide an opportunity for evidence to be led and tested, with the benefit of a degree of flexibility not always available in a court of law. Should a situation arise where a party encounters unexpected evidence and wishes time to evaluate the material, an application for the time to do so can be made to, and entertained by, an adjudicator at the hearing.

[15] The grievor, moreover, did not identify a special reason for requiring "will say" summaries in the circumstances of this case, other than the absence of a final-level reply from the employer. She did not indicate in her argument that the nature of the evidence to be led poses a special challenge, nor that there are factors in this case that might make it difficult to address an issue of evidence during the course of the hearing without creating prejudice for one or the other party.

[16] On a more basic level, I believe it to be in the general interest of all parties to avoid unnecessary formality in adjudication hearings, not to speak of the delays that might result were adjudications suspended at the outset to allow for the production of "will say" summaries.

[17] As to the possibility of undisclosed communications between Board staff and the employer, I find no evidence in the file that Board staff have not observed their normal practice of sharing written correspondence with both parties. With respect to oral communications, if any, between Board staff and the employer I am not in a

position to conduct an assessment of conversations unknown to me, and have been given no concrete reason to believe that such an assessment is required. Should the grievor wish to bring to my attention a specific allegation that there has been unshared communications, I will be pleased to address the allegation as necessary. Absent such an allegation, I cannot identify an issue on which I must or can rule, or a basis for making a ruling.

[18] For these reasons, I do not grant the grievor's disclosure requests.

B. Jurisdictional objection

[19] The grievor alleges that she has suffered a disciplinary financial penalty and a demotion. The employer's jurisdictional objection asserts exactly the opposite: i.e. that there was neither a disciplinary penalty nor a demotion. Given that the parties contest the basic facts on which the grievance is based, I requested evidence to assist me in determining, as a preliminary matter, whether the employer disciplined and/or demoted the grievor, a precondition to my assuming jurisdiction in this matter.

[20] On request from the grievor, without opposition from the employer, I ordered the exclusion of witnesses.

III. Summary of the evidence

[21] At the hearing of March 7 to 9, 2006, the grievor testified on her own behalf and the employer led evidence through three witnesses. All exhibits introduced by the parties are on file at the Board and are available for examination.

[22] The Financial Arrangements and Cost Sharing Directorate (FACS) of the FTNO in the British Columbia region of the DIAND hired the grievor on an indeterminate basis to the position of Senior Advisor, Operations (ES-05), in January 2001 (Exhibit E-1). Michael Friedlaender, currently Director of Financial Arrangements, was the hiring manager and responsible supervisor. He had known the grievor previously while both were located in Ottawa, and was happy to recruit her to the Vancouver office. Mr. Friedlaender remained the grievor's supervisor until spring 2004, when he accepted a promotion to the position of Director.

[23] A generic job description dated November 10, 2000, describes the duties of the grievor's position at the ES-05 group and level at the time (Exhibit E-5). According to Mr. Friedlaender, ES-05 remained the grievor's substantive classification throughout

the period examined in this hearing. An organization chart dated September 2, 2003, shows the grievor's ES-05 position situated as one of three middle-level managerial roles in the FTNO, the other two of which were classified at the ES-06 level (Exhibit G-1 tab 21). The grievor testified that, in her view, there were no distinctions between the duties of these three managerial positions from 2001 onwards.

[24] A Senior Negotiator (ES-06) position in the FTNO became vacant in the fall of 2001, when its incumbent left for an assignment outside the FACS. Mr. Friedlaender judged the grievor to be the best-qualified replacement candidate and assigned her the duties of the ES-06 position on an acting basis. On Mr. Friedlaender's request, acting pay was authorized, initially for the four-month period beginning November 5, 2001 (Exhibit E-6). The grievor testified that during the acting assignment management required her to perform the duties of her substantive ES-05 position in addition to those of the ES-06 role.

[25] Towards the end of the four-month acting period, the grievor expressed concerns about the weight of her combined workload to Ms. Leda Smith, a human resources officer (Exhibit G-16). She nonetheless agreed to continue the assignment while Mr. Fredlaender conducted a permanent staffing action. The grievor's performance review for the year ending March 31, 2002, recognized the additional contribution involved in her acting assignment and characterized this assignment as an opportunity for the grievor to develop leadership and management skills (Exhibit G-1, tab 2).

[26] Her heavy workload continued to pose concerns for the grievor into the new fiscal year. By June 2002 she asked to return to her substantive duties at the ES-05 level (Exhibit E-7). Acting pay ceased on June 28, 2002. In the grievor's words, ". . . we put acting on hold pending further consultations." Mr. Friedlaender testified that the acting assignment ended because he had held a competition in May and June to staff the Senior Negotiator position on a permanent basis. The grievor and several other candidates applied for the position, but Mr. Friedlaender found none of the candidates qualified. Because the grievor had failed to qualify in the competition, Mr. Friedlaender felt unable to continue her acting assignment.

[27] Following the competition, Mr. Friedlaender consulted with DIAND Human Resources representatives and decided to offer the grievor a tailored development program to help her qualify for promotion to the ES-06 level. During his subsequent

absence on summer vacation, departmental staff continued discussions with the grievor about this possibility. Mr. Friedlaender learned prior to the end of his vacation that the grievor had decided to decline the offer of a development program.

[28] Mr. Friedlaender does not recall further discussions with the grievor about the possibility of a development program. In his view, the grievor had made her decision and had returned to her substantive position as Senior Advisor, Cost Sharing Operations, at the ES-05 level. Mr. Friedlaender felt that his relationship with the grievor changed significantly after he found her unqualified for promotion to the ES-06 level. He speculated that the grievor may have felt betrayed by the outcome, since he had urged her to apply but had then found her unqualified.

[29] In fall 2002, the grievor expressed dissatisfaction to Mr. Friedlaender with the ES-05 classification of her substantive position, contending that the existing job description did not adequately reflect her real duties, which she argued should be recognized at a higher level. After several conversations Mr. Friedlaender accepted that the grievor had a legitimate concern. He obtained support from his principals for reviewing the grievor's job description and engaged a consultant to work on revisions, with both the grievor and Mr. Friedlaender being directly involved in the process. Mr. Friedlaender was later surprised to receive an email from the grievor in June 2003 in which she requested a complete and current job description (Exhibit E-8). He felt that he had kept the grievor fully aware of the consultant's work, as well as of the steps ahead in the reclassification process. He responded to the grievor to this effect (Exhibit E-8).

[30] During this period Mr. Friedlaender started to think about the requirement under Public Service Commission (PSC) procedures and staffing guidelines to assess the grievor against the qualifications of the reclassified ES-06 job, should reclassification proceed (Exhibits E-20 and E-21). He had recently noticed shortcomings in the grievor's performance as a manager, and was aware of other employees at the ES-05 group and level who were carrying out their managerial duties in a relatively more competent fashion. When Mr. Friedlaender subsequently met with the grievor on September 16, 2003, he talked to her about his concerns. He felt that, with some work, she could overcome these shortcomings. At the meeting, Mr. Friedlaender suggested that the grievor consider management training and the possibility of working with a

mentor. The grievor took extensive notes and said she would get back to Mr. Friedlaender with her reaction to his suggestions.

[31] Mr. Friedlaender summarized his notes from the September 16, 2003, meeting three weeks later (Exhibit E-9). He testified that the grievor did not get back to him with respect to his training and mentorship suggestions. He sent a follow-up email with one specific suggestion, to which the grievor did reply.

[32] In cross-examination, Mr. Friedlaender agreed that the meeting was the first time he had raised concerns to the grievor about her performance, although he stated that the issues giving rise to these concerns occurred over the previous six months. He conceded that he did not raise his concerns about the grievor's managerial abilities directly with her again until January 2004, primarily because relations with the grievor became difficult soon after the September meeting, and also because the grievor took a period of sick leave later that fall. Mr. Friedlaender acknowledged that he did not follow up on the September 16, 2003, meeting by providing a written record of his comments and concerns to the grievor. He did not complete a performance review for the grievor for 2003–2004 repeating his concerns in view of the difficulties that emerged in his relationship with the grievor. He consulted on his decision not to complete a performance review with the FTNO's Human Resources section and with Jeff Goldie, Associate Executive Director (EX-02) of the FTNO, to whom Mr. Friedlaender reported.

[33] The grievor testified that Mr. Friedlaender made no effort at the September 16, 2003, meeting to ensure that she understood the next steps required of her. He did not inform her of the future consequences of failing to meet what Mr. Friedlaender described at the meeting as ". . . my standard for managers, especially ES-06 managers," and skirted around the implications of his concerns about the grievor's managerial abilities. The grievor said that she was not informed at the meeting that Mr. Friedlaender would attempt to declare her surplus.

[34] Mr. Goldie first became directly involved in this matter when he met with the grievor, at her request, on October 10, 2003, in the company of Sharon McKay, a human resources consultant, to discuss reclassification of the grievor's position. At the meeting, the grievor outlined concerns about her supervisor, Mr. Friedlaender, and questioned whether he would objectively assess her against the qualifications for the ES-06 level. Mr. Goldie took note of these concerns but declined to comment. The

grievor suggested a mediated discussion with Mr. Friedlaender, and Mr. Goldie committed to follow up on this proposal. The grievor also expressed her disagreement with the requirement to be assessed for the reclassified position. Mr. Goldie responded by indicating that management could not automatically appoint the grievor to the position, and outlined the steps to be followed. Mr. Goldie testified that both he and Ms. McKay felt that, as a result of the meeting, the grievor understood the requirement for an assessment of her qualifications against the ES-06 requirements. They recommended that the grievor contact her bargaining agent representatives, who might discuss the reclassification process further with the FTNO's staff relations section.

[35] Mr. Goldie pursued the grievor's suggestion of mediation with Mr. Friedlaender, who indicated reservations but was willing to consider the option. Shortly afterwards, a staff relations officer briefed Mr. Goldie that the grievor was absent from work, and that this absence was probably related to the concerns expressed by the grievor during the meeting of October 10, 2003. Mr. Goldie spoke to the grievor by telephone and summarized his conversation in an email to Mr. Friedlaender dated October 26, 2003 (Exhibit E-17). The email reports that the grievor felt it was unfair that Mr. Friedlaender expected her to perform management duties without reclassifying her. Mr. Goldie again explained the requirement for an incumbent to be assessed against the qualifications of a reclassified position. He suggested developmental training, an idea that the grievor discounted. Mr. Goldie also asked whether the grievor was still interested in the idea of a facilitated dialogue with Mr. Friedlaender. The grievor replied that she did not think the option would be useful at the time, and said that the best option would be for her to work outside the FACS.

[36] Mr. Friedlaender continued the reclassification process (Exhibits E-10, E-11) and finalized a revised job description for the position of Manager, Cost Sharing Operations, at the ES-06 level (Exhibit E-15) after exchanging a number of drafts with the grievor and with classification advisors. He testified that he had originally anticipated that the grievor would be successfully assessed for the newly described role, because she had performed her Cost Sharing duties well. He had also hoped that their earlier meeting on September 16, 2003, to discuss concerns had started a process through which the grievor would bring her skills up to the required level in anticipation of the reclassification assessment. From his perspective, however, ". . . things started going downhill . . . ." at this time.

[37] In December 2003, following discussions with Mr. Goldie, Mr. Friedlaender attempted to set up a mediated discussion with the grievor. Mr. Friedlaender and the grievor met with a mediator but the process ended after the grievor questioned the impartiality of the mediator and declined to sign a mediation agreement. A second attempt to initiate mediation also failed when the grievor again declined to sign a mediation agreement, given her concerns about the impartiality of the mediator.

[38] When the new job description was finalized, Mr. Friedlaender initiated a formal reclassification review (Exhibit E-11) and approved a new statement of qualifications for the ES-06 position, against which the grievor would be assessed (Exhibit E-12). The two key differences in the ES-06 job compared to the ES-05 position occupied by the grievor, as reflected in the revised statement of qualifications, were greater emphasis on the ability to manage staff and a stronger reference to the requirement to negotiate and manage Cost Sharing agreements.

[39] A freeze on reclassifications imposed by the federal government between December 2003 and March 2004 delayed the reclassification assessment exercise. Once the freeze ended, Mr. Friedlaender formally assessed the grievor's qualifications against the requirements for the reclassified ES-06 position and summarized the results in a board report dated April 8, 2004 (Exhibit G-1, tab 1). Mr. Friedlaender found the grievor unqualified for appointment to the ES-06 level.

[40] The grievor received advance indication of the results of the assessment through her bargaining agent representative, who had learned of the situation in a conversation with a DIAND Staff Relations representative. The bargaining agent representative immediately sent an email to the grievor advising her that the employer was proceeding with the reclassification, had found her unqualified and would consequently be declaring her surplus under the Work Force Adjustment Directive (WFAD). He outlined redress mechanisms that the grievor might wish to explore to deal with this situation, including a complaint or a request to investigate to the PSC, an appeal, or a WFAD grievance (Exhibit G-11). The grievor and her bargaining agent representative met with Mr. Friedlaender and a human resources officer around March 24, 2004, at which time management confirmed that the grievor was unqualified for the ES-06 position and would be declared an "affected employee." The bargaining agent representative requested the assessment on which the decision was based.

Mr. Friedlaender replied that he had not completed the assessment report, but that he would provide the grievor a copy when it was done.

[41] The decision to declare the grievor an "affected employee" under the WFAD was made by Mr. Goldie. Staff relations advisors told Mr. Goldie that the employer was obligated to notify the grievor to this effect once Mr. Friedlaender decided she was unqualified for the reclassified ES-06 position. Mr. Goldie saw an opportunity in this situation to facilitate the grievor's appointment to another position within the department in line with an interest in a different job the grievor had earlier expressed to him. While staff relations advisors indicated that the grievor's affected status did not create a legal reappointment priority, there was nevertheless a perceived obligation to assist the grievor in finding another position. Mr. Goldie confirmed in a letter dated April 8, 2004 (Exhibit G-2), that the grievor was an "affected employee." This letter also identified an interim three-month assignment for the grievor in a different directorate.

[42] Once he had determined that the grievor was not qualified for promotion to the ES-06 group and level, but before issuing his formal board report on April 8, 2004, Mr. Friedlaender consulted with his advisors and principals on how management could stabilize or protect the grievor in an indeterminate ES-05 position. The resulting decision of the Acting Regional Director General, recorded on April 3, 2005, re-established an indeterminate ES-05 position (Senior Advisor, Cost Sharing Operations) with the grievor as the incumbent, and created a new ES-06 job entitled Manager, Cost Sharing Operations (Exhibits E-13 and E-15). Mr. Friedlaender decided to deploy Alan Greer to take on the duties of Manager (Exhibit E-14). Mr. Friedlaender also revised reporting relationships so that all staff in the Cost Sharing area, including the grievor, reported to Mr. Greer. When the grievor sought clarification, Mr. Friedlaender confirmed that the grievor continued to be an indeterminate ES-05, now reporting to Mr. Greer, but that she was an "affected employee," whose duties may change (Exhibit G-5).

[43] In spring 2005, management finalized a new generic job description for the grievor's Senior Advisor position (Exhibit E-16) and confirmed the classification of the duties at the ES-05 group and level (Exhibit G-7).

[44] On April 30, 2004, the grievor requested a PSC investigation under section 7.1 of the *Public Service Employment Act* (*PSEA*):

. . .

> *I am asking the PSC to investigate Mr. Friedlaender's erroneous and inaccurate assessment of my qualifications against the Statement of Qualifications for the ES-06 position, his decision not to issue me a letter of offer of appointment to the ES-06 level, and his decision to assign the title, duties and classification of my position to Mr. Alan Greer, while I continue occupy* [*sic*] *that position.* (Exhibit E-2)

. . .

[45] In cross-examination, the grievor stated that a bargaining agent representative had drafted this request. The grievor confirmed that she had signed the request, but also indicated that she did not know at the time how she should respond to the situation. The grievor testified that she subsequently received conflicting information in discussions with PSC representatives on whether her problem involved a staffing redress mechanism or was a staff relations matter. She ultimately decided to withdraw her appeal both because of the confused messages from her contacts with the PSC and because a bargaining agent representative advised her that the PSC was ". . . not the right place to go." She also testified, however, that she felt that she ". . . was being taken down the garden path by the union." The grievor confirmed that she initiated withdrawal of the appeal.

[46] The grievor filed three grievances on April 30, 2004 — the first against the effective date of the ES-06 reclassification, the second seeking retroactive acting pay, and the third contesting Mr. Friedlaender's assessment of her qualifications. The text of these grievances is not in evidence. At the second level of the grievance procedure, the Associate Regional Executive Director General partially upheld the acting pay grievance and concluded that the grievor should receive ES-06 acting pay for the period August 1, 2002, to April 22, 2004 (Exhibit G-8). With respect to the assessment of her qualifications, the decision stated that the assessment was properly documented and ". . . support[ed] the conclusion of your manager that you do not meet the qualifications at this level, at this time."

[47] The grievor also launched a National Joint Council (NJC) grievance to challenge the employer's decision to declare her an "affected employee" under the WFAD. The text of this grievance is also not in evidence. The departmental liaison officer responsible for NJC grievances granted the grievance and confirmed in writing on December 9, 2004, that Mr. Goldie would rescind his letter of April 8, 2004

(Exhibit G-3). Mr. Goldie wrote to the grievor on January 14, 2005 (Exhibit E-18) to indicate that ". . . you are no longer considered to be an "affected employee" . . . ."

[48] In response to Mr. Goldie's letter, the grievor requested confirmation on a number of points, including ". . . my position number and a current and complete statement of the duties of my position, including the classification level and point rating allotted by factor to my position, and an organization chart . . . ." (Exhibit G-19). Mr. Goldie replied in writing on February 16, 2005, indicating that ". . . you continue to be in Position 29740 at the ES-05 level with duties as assigned on April 8, 2004 and reporting to Alan Greer." He also noted that the grievor had declined an offer of an ES-05 position in a unit outside the FACS (Exhibit G-20), having previously expressed an interest in changing jobs.

[49] The exchange of letters continued. On March 9, 2005, the grievor wrote to Mr. Goldie and stated that "It appears to me that regional management is not prepared to implement the final departmental level Workforce [*sic*] Adjustment grievance decision, and is continuing with its intentions of getting rid of me" (Exhibit G-21). She testified that she believed that the intent of the WFAD grievance decision should have been to restore her to the status she enjoyed before receiving Mr. Goldie's letter of April 8, 2004: i.e., to the status of performing duties at the ES-06 level. The September 2004 grievance decision confirming her entitlement to ES-06 acting pay (Exhibit G-8) reinforced her conviction to this effect. From the grievor's perspective, the grievance decision proved that ES-06 duties had been assigned to her, and that she had demonstrated the required standard of performance in carrying out these duties. Mr. Friedlaender's board report was the only basis for ". . . taking away her duties," according to the grievor. By issuing the board report and then "reclassifying her position" down to the ES-05 level, the grievor contends that the employer had imposed a financial penalty.

[50] In his response to the grievor's letter of March 9, 2005, Mr. Goldie reconfirmed her indeterminate status at the ES-05 level, noted that she had declined his offer to meet with her and her bargaining agent representative to discuss her concerns, and stated that he remained prepared to hold such a meeting (Exhibit E-19).

[51] The grievor filed the current grievance on March 24, 2005, six days after the PSC officially notified the employer that the grievor had withdrawn her appeal (Exhibit E-23).

[52] The grievor presented three organization charts (Exhibit G-6), in addition to the chart dated September 2, 2003, referenced above. The first additional organizational chart bears the date June 14, 2004, and locates the grievor in the position of Manager, Cost Sharing Operations, at the ES-06 group and level (Exhibit G-6). The second additional organization chart is dated November 4, 2004, and shows the name "A. Greer" under the title of Manager, Cost Sharing Operations, at the ES-06 group and level, with the grievor's name immediately below, followed in parentheses by (ES-05) (Exhibit G-6). The third additional organizational chart is dated August 16, 2005, and depicts the grievor as occupying the position of Senior Advisor, Cost Sharing Operations, at the ES-05 group and level, reporting to A. Greer as the manager at the ES-06 group and level (Exhibit G-6). The grievor testified that the last organizational chart indicates that the effects of the erroneous Workforce [*sic*] adjusment had not been reversed, and that she has not been reinstated to her ". . . substantive ES-06 position."

[53] During her testimony, the grievor challenged many of the conclusions found in Mr. Friedlaender's board report of April 8, 2004 (Exhibit G-1 tab 1). She characterized this report as ". . . the instrument created by Mr. Friedlaender to discipline me . . . ." and ". . . to attempt to surplus me . . . .," and stated that Mr. Friedlaender wrote the report ". . . specifically with the intent to remove me from my position."

[54] The grievor offered documents, of which the following are examples, to contradict statements found in the board report: a series of emails outlining the grievor's attempts to pursue the possibility of management training and mentorship, contrary to Mr. Friedlaender's statement that she had refused to do so (Exhibit G-1, tab 8); further emails concerning the grievor's relationship with a subordinate employee, Jiri Hornburg, which, in the grievor's view, do not support Mr. Friedlaender's contention that the grievor had not effectively supervised employees, had failed to complete an assessment of Mr. Hornburg's performance, and had been unwilling to cooperate in efforts to improve her supervisory relationship with Mr. Hornburg (Exhibit G-1, tab 3); and other correspondence and documents that show that the grievor had prepared an updated work plan for use by Paul West, her back-up while on vacation, contrary to Mr. Friedlaender's assertion that she had departed abruptly without regard for the consequences to the FACS's operations (Exhibit G-1, tab 11).

[55] The board report, according to the grievor, also contradicted earlier performance appraisals that she had received, all of which were positive (Exhibit G-1, tab 2). Notably, there was no performance review undertaken for 2003–2004. The grievor testified that Mr. Friedlaender instead wanted the board report to stand alone as a statement of her performance. The grievor introduced the DIAND's performance review policy (Exhibit G-10), which she characterized as indicating that Mr. Friedlaender violated policy and imposed discipline on her when he failed to perform the required performance review in 2003–2004.

[56] The grievor pointed to other events prior to the April 2004 board report to illustrate her contention that there had been acrimonious relations between her and Mr. Friedlaender for some time, for reasons unknown to her. The grievor presented several exchanges of emails in which Mr. Friedlaender, from her perspective, mistreated a request for vacation leave, and later singled her out for discipline when she allegedly arrived late for work on Christmas Eve (Exhibit G-1, tab 13). The grievor entered documents in evidence to support her contention that Mr. Friedlaender violated policy in the course of establishing an effective date for the reclassification to the ES-06 group and level (Exhibits G-12, G-13, G-14 and G-15). The grievor testified that Mr. Friedlaender held closed-door meetings with the grievor's subordinate, Mr. Hornburg, allowed Mr. Hornburg to avoid dealing with the grievor, and directly granted requests for vacation from Mr. Hornburg without the grievor's knowledge. The grievor charged that allegations made by, and hearsay evidence gathered from Mr. Hornburg were later accepted by Mr. Friedlaender as true in preparing the board report. Mr. Friedlaender did not, as required by employer policy, inform the grievor about the allegations made against her, and did not conduct a thorough investigation. This failure became particularly offensive when, according to the grievor, the allegations became public knowledge and the subject of water cooler discussions in the workplace. The grievor challenged what she believed was Mr. Friedlaender's assessment that Mr. Hornburg departed from the FTNO because of the grievor. She indicated that Mr. Hornburg had informed her at the end of his first year that he would not remain following the completion of his two-year term, so that he could become the primary caregiver for his newborn child. Mr. Hornburg actually left as planned at the end of two years, at a time when the grievor was no longer his supervisor, further undermining any argument that the grievor was responsible for his departure.

[57] In cross-examination, the employer asked the grievor to confirm that she had never successfully competed for an ES-06 position. The grievor confirmed this fact. When asked if she had ever received a letter of offer for an ES-06 position similar to the original letter of offer in 2001 for her ES-05 position (Exhibit E-1), the grievor responded that she had not. She acknowledged that Mr. Friedlaender had told her in September 2003 that, if her position was reclassified to the ES-06 level, there would have to be an assessment of the grievor's qualifications. In later testimony, however, she said that Mr. Friedlaender skirted around and "did not exactly describe" the possible negative consequences of rewriting her work description.

[58] Shelagh Ryan-McNee is Director of Human Resources for the British Columbia region of the DIAND. Ms. Ryan-McNee outlined her understanding of the process required in a situation where a position is reclassified upwards. An incumbent of a position in these circumstances has a right to be assessed for the position but not a right to the position. The DIAND's human resources section expects a written report in which the responsible manager assesses how the incumbent meets or fails to meet the requirements outlined in the statement of qualifications. If the manager finds that the incumbent is not qualified, the normal practice is for the manager to meet with the incumbent and to discuss gaps in his or her qualifications, with the objective of creating a remedial development plan. Should the incumbent wish to challenge the assessment of his or her qualifications, he or she may request an investigation under section 7.1 of the *PSEA*. Ms. Ryan-McNee referred to a document entitled "PSC Staffing Module F" (Exhibit E-20) as well as a PSC report entitled "Audit of Staffing File Documentation" (Exhibit E-21) as authorities depicting the reclassification process and outlining the requirement to assess an incumbent.

[59] Concerning the organization chart of June 14, 2004, which shows the grievor occupying a position classified at the ES-06 group and level (Exhibit G-6), Ms. Ryan-McNee noted that classification references in organization charts reflect positions, not the people in the positions. The presence of the name of the grievor in a box identified as ES-06 does not mean that she was classified or paid at the "ES-06" level, but, instead, reflects the fact that the position of Manager, Cost Sharing Operations, had been reclassified by the date of the organization chart. Ms. Ryan-McNee knew of nine recent situations where positions were reclassified, with four of nine incumbents involved found by their employer to be unqualified. At some

point, these four employees would probably also show up in organization charts associated with positions identified at the higher, reclassified level.

[60] In cross-examination, the grievor asked Ms. Ryan-McNee how often employees receive "affected" letters when they are found unqualified for a reclassified position. Ms. Ryan-McNee replied that the employer had learned from the ruling in the grievor's NJC grievance and did not subsequently issue "affected" letters to other employees who found themselves in a similar situation.

[61] The employer closed its case. The grievor declined the opportunity to present reply evidence.

IV. Summary of the arguments

[62] The grievor requested permission to submit her arguments in writing following the hearing. The employer expressed its preference to offer arguments orally, but did not oppose granting the grievor's request, provided that the employer would have an opportunity to review the grievor's written submission and comment in reply, as required. I endorsed proceeding according to the stated preferences of the parties. I directed the grievor to provide her written position to the Board, with a copy to the employer, by April 6, 2006. I directed the employer to submit reply comments, if any, by April 20, 2006. Board staff, on my behalf, confirmed these procedures in a letter to the parties dated March 13, 2006.

V. Arguments for the employer

[63] The employer takes the position that employees in the Public Service do not own their positions. Rather, they occupy their positions.

[64] When a position in the Public Service is reclassified upward, procedures under the authority of the *PSEA* govern the employee and the employer. The PSC has established the principle and the requirement that an employee in a position reclassified upward must be assessed against merit (Exhibits E-20 and E-21). In these circumstances, a different method for determining the most qualified employee applies. The employer has the option either of conducting an open competition under subsection 10(1) of the *PSEA* or of assessing an employee against individual merit, measured against the qualifications required for the reclassified position, under subsection 10(2):

. . .

> *10(1) Appointments to or from within the Public Service shall be based on selection according to merit, as determined by the Commission, and shall be made by the Commission, at the request of the deputy head concerned, by competition or by such other process of personnel selection designed to establish the merit of candidates as the Commission considers is in the best interests of the Public Service.*
>
> *10(2) For the purposes of subsection (1), selection according to merit may, in the circumstances prescribed by the regulations of the Commission, be based on the competence of a person being considered for appointment as measured by such standard of competence as the Commission may establish, rather than as measured against the competence of other persons.*

. . .

[65] Subsection 5(2) of the *Public Service Employment Regulations, 2000*, confirms that the option of a *PSEA* subsection 10(2) selection can be used where an employee is to be appointed to his or her reclassified position:

. . .

> *5(2) A selection referred to in subsection 10(2) of the Act may be made in any of the following circumstances:*
>
> . . .
>
> *(b) when an employee is to be appointed to their reclassified position and*
>
> *(i) the position has been reclassified as a result of a classification audit or grievance,*

. . .

The employer submits that these regulations and PSC policies clearly contemplate that the employee will be assessed as part of a subsection 10(2) appointment.

[66] Appointment by individual merit in the case of a reclassification is not mandatory, as confirmed by the Federal Court in *Zilberman v. Canada (Attorney General)*, [2000] F.C.J. No. 811 (QL). The option of a competitive process always exists:

. . .

> *10. The legislation provides that a person may be appointed without competition in certain circumstances, that is when the position is a reclassification of the person's existing position. The legislation does not say that appointment by individual merit shall (i.e., must) be used in those circumstances.*
>
> . . .
>
> *12. At the trial level, Mr. Justice Rothstein had held that subsection 10(2) was permissive, not mandatory:*
>
> > *[25] The object of the* Act *is to ensure that the best person be placed in every available position. Subsection 10(2) gives the government the opportunity to staff a position through a procedure which does not require holding competitions in certain specified circumstances which are deemed not to warrant a competition. In light of the overall purpose of the* Act*, I must conclude that Parliament and the Governor-in-Council merely intended that, in the circumstances of subparagraph 4(2)(*b*)(ii) of the* Regulations*, the government has the option of not holding competitions.*
>
> . . .

[67] The employer's choice in this case of the more "employee-friendly" option of individual merit assessment reflects the good faith of the managers involved toward the grievor. Had they wished to make it more difficult for her to be successful, it seems logical that they would have instead selected the option of an open competition. In his testimony, Mr. Friedlaender made it clear that he had expected a favourable assessment of the grievor, and that she would be promoted to the ES-06 position.

[68] Mr. Friedlaender assessed the grievor against the statement of qualifications for the reclassified ES-06 position, Manager of Cost Sharing Operations (Exhibit E-12). He found that the grievor did not meet the required qualifications. The grievor did not like the assessment and the resulting decision, but her disagreement with the outcome does not mean that an adjudicator under the *PSSRA* has jurisdiction to address the situation. An adjudicator is not ". . . a labour relations doctor charged with curing everything." Section 92 of the *PSSRA* limits his or her jurisdiction. In this case, the jurisdiction of the adjudicator flows from paragraph 92(1)(*b*):

. . .

> *92(1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> *(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*
>
> *(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),*
>
> *(i) disciplinary action resulting in suspension or a financial penalty, or*
>
> *(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the* Financial Administration Act, *or*
>
> *(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,*
>
> *and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.*

. . .

[69] In the grievor's case, was there discipline resulting in a financial penalty? Was there a demotion? The employer strongly asserts that there is no evidence of either. None of the traditional signs of discipline can be found. There are no disciplinary letters on file. There is no record of a financial penalty. The testimony of both Mr. Friedlaender and Mr. Goldie reveal that the managers acted in good faith in their treatment of the grievor and neither disciplined nor demoted the grievor.

[70] In *Browne v. Treasury Board (Revenue Canada – Customs, Excise and Taxation)*, PSSRB File No. 166-02-27650 to 27661 (1997) (QL), the adjudicator considered a situation where the grievor alleged a demotion as well as a disciplinary financial penalty. The decision found that, in light of subparagraph 11(2)(*g*) of the *FAA*, there is no demotion where an employee's classification and pay remains unchanged. The decision also cautioned against importing the concept of a "constructive dismissal" to the Public Service:

. . .

> *15. Even a cursory reading of paragraph 11(2)*(g) *of the* Financial Administration Act *makes it clear that the circumstances in which the grievors found themselves do not constitute a demotion as that term is used in the* FAA. *The grievors acknowledged that their classification remained the same, with the same rate of pay; accordingly, it cannot be said that they were placed in a position at "a lower maximum rate of pay" as provided under paragraph 11(2)*(g). *It is true that in the private sector a substantial diminution in responsibilities may well be viewed as a constructive dismissal, which is actionable in common law; however, in order to succeed in their grievances, the grievors must bring themselves within the four corners of the* Public Service Staff Relations Act *and as noted above, this they have failed to do.*

. . .

[71] *Browne* also confirms that matters arising from an appointment process involve the redress provisions of the *PSEA*, not of the *PSSRA*:

. . .

> *16 . Underlying the grievors' dissatisfaction is their belief that they should have been appointed to what they viewed as their equivalent positions in the new organization, that is, as Team Leaders and Manager, Audit (see the last three paragraphs of the grievors' written submissions). These issues, which concern the appointment process, are clearly outside the ambit of the grievance and adjudication process; if there is any avenue of redress in respect of such matters, it undoubtedly falls within the purview of the* Public Service Employment Act, *and not the* PSSRA. *Indeed, the judgment cited by the grievors (i.e.* Canada (Attorney General) v. Laidlaw et al. *(now reported as (1997),* 127 F.T.R. 305*), which was a judicial review of a Public Service Commission appeal board decision dealing with very similar facts as the instant case, plainly demonstrates this point.*

. . .

[72] Paragraph 11(2)(*g*) of the *FAA* establishes the employer's authority to demote and the linkage of a demotion to a situation where an employee is placed in a position with a lower rate of pay:

. . .

> *11(2) Subject to the provisions of any enactment respecting the powers and functions of a separate employer but notwithstanding any other provisions contained in any*

> *enactment, the Treasury Board may, in the exercise of its responsibilities in relation to personnel management including its responsibilities in relation to employer and employee relations in the public service, and without limiting the generality of sections 7 to 10,*
>
> . . .
>
> *(g) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed in the public service, and establishing the circumstances and the manner in which and the authority by which or by whom these measures may be taken or may be varied or rescinded in whole or in part;*
>
> . . .

Section 92 of the *PSSRA* binds an adjudicator to paragraph 11(2)(*g*) of the *FAA* in determining whether a demotion has occurred.

[73] The pith and substance of the grievor's case is a claim against Mr. Friedlaender's assessment of her qualifications in the April 8, 2004, board report (Exhibit G-1, tab 1). Her grievance challenges the fact that she was not appointed to the ES-06 position, Manager, Cost Sharing Operations. There is no evidence that the result was a demotion for the grievor. At all relevant times, the grievor was classified at the ES-05 level, subject to an acting assignment. Her issue is, thus, a staffing matter, not discipline or demotion.

[74] An adjudicator's authority to consider a grievance is further limited where another administrative procedure for redress exists and applies, as provided by subsection 91(1) of the *PSSRA*:

> . . .
>
> *91(1) Where any employee feels aggrieved*
>
> *(a) by the interpretation or application, in respect of the employee, of*
>
> *(i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or*
>
> *(ii) a provision of a collective agreement or an arbitral award, or*

> *(b) as a result of any occurrence or matter affecting the terms and conditions of employment of the employee, other than a provision described in subparagraph (a)(i) or (ii),*
>
> *in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, the employee is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.*

. . .

[75] In most recent cases, the subsection 91(1) limitation relating to the existence of an "administrative procedure for redress" has been applied where matters fall under the *Canadian Human Rights Act*. *Canada (Attorney General) v. Boutilier*, [2000] 3 F.C. 27 (FCA) (QL), is frequently cited in this respect:

. . .

> *23. In summary, the principle set out in* Byers Transport *governs these cases. It is consistent with the wording and purpose of the statute, with Cooper, and with virtually all of the jurisprudence of this Court. The dispute resolution system in federal labour matters is, therefore, not as simple as one would like it to be. If another administrative procedure for redress is available to a grievor, that process must be used, as long as it is a "real" remedy. It need not be an equivalent or better remedy as long as it deals "meaningfully and effectively with the substance of the employee's grievance". . . . possible delay in securing redress administratively itself is not significant, unless perhaps it is so pronounced that it can be said that no real remedy is available to the grievor at all. Differences in the administrative remedy, even if it is a "lesser remedy," do not change it into a non-remedy.*

. . .

The original intent of subsection 91(1) was to prevent overlapping use of redress mechanisms between the *PSSRA* and the *PSEA*, which is the issue in the grievor's case.

[76] Section 7.1 of the *PSEA* offers a real remedy applicable to the grievor's claim against the assessment of her qualifications for the ES-06 position:

. . .

> *7.1 The Commission may conduct investigations and audits on any matter within its jurisdiction.*

. . .

[77] Section 7.5 of the *PSEA* provides the possibility of real corrective action:

. . .

> *7.5 Subject to section 34.5, the Commission may, on the basis of any investigation, report or audit under this Act, take, or order a deputy head to take, such corrective action as the Commission considers appropriate.*

. . .

[78] *Lawson v. Treasury Board (Revenue Canada – Taxation)*, PSSRB File No. 166-02-25530 (1995), confirmed that section 7.1 of the *PSEA* is ". . . another administrative procedure for redress . . . ." within the meaning of subsection 91(1) of the *PSSRA*.

[79] The *PSEA* provides two other redress options: section 21 for appeals where a person is ". . . appointed or about to be appointed . . . ." under the *PSEA*, and section 34 where the subject is a deployment. Where neither section 21 nor 34 applies, the wide grant of remedial authority under section 7.1 remains available.

[80] When the grievor contacted the bargaining agent to determine how to challenge Mr. Friedlaender's assessment of her qualifications for the ES-06 position, the bargaining agent correctly advised her concerning redress options under the *PSEA* (Exhibit G-11). The grievor did file a request for an investigation under section 7.1 of the *PSEA* (Exhibit E-2). For reasons that are not clear, the grievor chose to withdraw her action (Exhibit E-23). The fact that the grievor withdrew this action does not enlarge the jurisdiction of an adjudicator under section 92 of the *PSSRA*. Even if the parties in this case were to agree to place her grievance before an adjudicator, the adjudicator remains without jurisdiction.

[81] In her testimony, the grievor focused on situations where the employer allegedly did not act in accordance with employer policy. Employer policies aim to guide behaviour in departments, but the employer is the sole arbiter of its own policies. Employer policies do not create externally enforceable legal rights, and an adjudicator is not mandated to police employer policies. *Glowinski v. Canada (Treasury Board)*, 2006 FC 78 (QL), has very recently supported the view that policies are not legally

enforceable, unless there is clear statutory authority that Parliament intends to give a policy the force of law:

. . .

> *42. The Court is of the view that it should not interpret or reconcile inconsistent and conflicting Treasury Board policies and should not give legal effect to a multitude of such policies. I agree with Justice Rouleau in Girard, supra, that if the Treasury Board intended these policies to have a legal effect the Treasury Board would have exercised its right to enact these policies by way of regulation under the applicable section of the Financial Administration Act.*
>
> *43. . . . A Court of law should not give policies the force of law unless Parliament clearly intended such policies to be given the force of law and such policies are clear, and not inconsistent with other policies.*

. . .

[82] In summary, it is patently obvious that there is neither a financial penalty nor a demotion in this case. The grievor's concern involves a staffing decision for which there is another administrative procedure under the *PSEA*. An adjudicator, therefore, has no jurisdiction to consider this grievance. The adjudicator should deny the grievance in its entirety.

VI. Arguments for the grievor — post-hearing issues

[83] Within the time limit set at the hearing, the grievor submitted her written arguments. Her submissions were composed of a 77-page document entitled "Grievor's Closing Arguments," an additional binder with 71 subsections described as an "Affidavit of Karen Peters," and a book of authorities containing 16 documents.

[84] The employer challenged the grievor's submission on the grounds that it allegedly contained facts and documents not placed in evidence at the hearing. The employer asked that I refuse to accept the grievor's written argument and her affidavit, and that I require her to resubmit her argument in a form free from the introduction of facts and documents not in evidence. In the alternative, the employer requested a 30-day extension to submit its written reply.

[85] The grievor replied on April 10, 2006, to contest the employer's submission. The grievor's reply reads in part as follows:

. . .

- *. . . As I pointed out to the Board on two occasions before the hearing, I had already presented a detailed "will say" statement in the form of my lengthy grievance, and I felt it unfair that the employer was deciding not to reciprocate.*

- *At the hearing, I heard the adjudicator advise both parties that this is an informal process. Given that the Board had not earlier addressed my specific requests, the adjudicator's directive that this is an informal process gave me some assurance. I understood his comments to mean that there would be no surprises and an unrepresented litigant like me would have every reasonable opportunity to present her case.*

- *Mr. Friedlaender gave evidence which, for the most part, surprised me. It is fundamentally at odds with my understanding of the true state of affairs. If I had been given a "will say" statement or other form of reasonable disclosure, I would have been in a better position to challenge Mr. Friedlaender during the hearing.*

- *Concerned about the surprising statements made by Mr. Friedlaender, immediately after the hearing I conducted further research and identified numerous documents that cast very serious doubt about the accuracy of Mr. Friedlaender's version of the facts. My new evidence is all intended to show the true state of affairs of how the employer — notably Mr. Friedlaender — is using a disguised discipline to financially punish and demote me.*

- *These new documents are all property of the employer. There cannot possibly be any prejudice to the employer if the adjudicator now considers these documents.*

. . .

[86] The grievor asked that I allow her to make further written arguments respecting the introduction of new evidence, because ". . . this letter does not constitute the entirety of my submission." She also requested that her letter be accepted as an application to enter new evidence, indicated her willingness to be cross-examined on her affidavit and all documents, and agreed to the employer's request for a 30-day extension to submit a written reply.

[87] Board staff conveyed my ruling to the parties on April 11, 2006:

. . .

> *Please note that the adjudicator will rule on the admissibility or appropriateness of specific portions of the grievor's submission in his final decision.*
>
> *Please also note that the evidentiary phase of this matter is complete, both parties having closed their case and the employer having made submissions.*
>
> . . .

The ruling extended the date for the employer's reply submission to May 26, 2006, and offered the grievor an opportunity to provide final comments by June 15, 2006.

[88] The employer immediately wrote to the Board to express its concerns about my ruling:

> . . .
>
> *It is the position of the employer that the issue of the admissibility of fresh evidence at this stage is not a matter that can, in accordance with the principles of procedural fairness, be left to a final decision. The prospect of this information being accepted places the employer in a position where it cannot participate fully in the evidentiary process.*
>
> *The concerns of the employer are as follows: (a) that if these documents are accepted into evidence, this will be done outside the hearing process and the employer will have no opportunity to address the admissibility of documents on a case by case basis, (b) the employer will have no opportunity to cross-examine the grievor on any of these documents, and (c) the admission of this evidence places the grievor in violation of the principle in* Browne v. Dunn*, the remedy of which is that the employer would have to recall its witnesses to provide them an opportunity to respond.*
>
> *The position of the employer is that the evidentiary portion of the hearing has been closed and the grievor should be directed to resubmit her material free from the inclusion of new evidence. In the alternative, should the Adjudicator take the position that the grievor is allowed to present fresh evidence, the hearing should be reopened and scheduled for dates mutually agreeable to the parties.*
>
> . . .

[89] Through Board staff, I invited the grievor to comment on the employer's submissions. The grievor challenged each point raised by the employer and submitted that my most recent procedural ruling had the effect of affording the employer ample

opportunity to raise its concerns on all questions in a reply submission. The grievor indicated that she looked forward to the opportunity to reply to the employer's arguments, following the established timetable, and also to address at that time any employer request to re-open the hearing.

[90] In order to discuss this situation in more detail with the parties, I scheduled a telephone conference call for May 3, 2006. On several occasions prior to the conference call, the grievor contacted Board staff to ask for information about the purpose of the call and its precise agenda, as well as to make disclosure requests concerning communications between Board staff and the parties. As an example of the latter, the grievor asked ". . . that [a named Board registry officer] provide me with an itemized list of all verbal, written and electronic communications with the employer respecting this matter from its inception." On my instructions, Board staff wrote to the grievor to provide clarification related to the Board's administrative practices and procedures. Board staff also reconfirmed that the concerns expressed by the employer in its submissions respecting the grievor's written arguments comprised the main subject for the conference call, noting that the grievor was free to raise any of her own concerns at that time.

[91] The Board's letter did not address the grievor's inquiries and concerns to her satisfaction. On the day of the planned conference call, the grievor wrote to the Board in part as follows:

. . .

- *It is not fair procedure to allow the employer to "discuss" its issues after the employer has made written submissions and I have provided written replies;*

- *It is not fair procedure to provide an open platform for the employer to "discuss" their issues after a ruling has been made setting out a schedule for further written submissions;*

- *It is not fair procedure to provide the employer with a platform not described in the materials you have sent me describing the adjudication process;*

- *It is not fair procedure to inform me of the reason why the employer is being provided this platform and what the outcome might be;*

> - *It is not fair procedure to give the employer the opportunity to prepare for the teleconference, and deny me the same opportunity to prepare; and*
>
> - *It is not fair procedure to deal with these questions by directing me to raise my concerns at the beginning of the teleconference. . .*
>
> *It is my right to have my case considered in a principled, fair, orderly and transparent process. This process does not appear principled, fair, orderly or transparent.*
>
> . . .

[92] The grievor gave notice of her intention to dial into the conference call in order to monitor the employer's statements, but stated that she would not provide any responses because, in her view, she was not given the opportunity to prepare. She indicated that she was prepared to speak to the issue of scheduling future cross-examinations consistent with an agenda proposed by her in an earlier letter.

[93] I respectfully disagree with the grievor's assessment of the fairness of the conference call procedure. It was simply a practical effort to ensure that I hear fully the views of the parties and have an opportunity to discuss with them how to proceed. It was akin, by nature, to a sidebar meeting with the parties convened during the course of a hearing to address process-management issues. Board staff, on my behalf, did attempt to make clear the purpose of the procedure to the grievor. Board staff also informed the grievor, as mentioned above, that she was free to raise any of her concerns during the conference call.

[94] During the conference call, the employer reiterated its position that I should direct the grievor to resubmit her arguments purged of facts and documents not placed in evidence at the hearing. The grievor repeated her concerns about the fairness of the procedure, about her ability to argue against "the largest legal firm in the country" without more preparation, and about the propriety of my reconsidering the initial ruling of April 11, 2006, in response to the employer's submission. After some further effort to discuss procedural options ranging from maintaining the April 11, 2006, ruling to reopening the hearing, I concluded the teleconference and reserved my decision.

[95] The grievor wrote to the Board the following day to outline her objections (on file) to the conduct of the conference call.

[96] This is a situation where I must balance, on the one hand, considerations of procedural fairness as embodied in the normal rules for conducting a hearing and, on the other, the practical requirement to address a significant posthearing disagreement between the parties over the admissibility of parts (as yet unidentified) of a lengthy written argument submitted by the grievor. The exchange of views following my initial ruling of April 11, 2006, revealed in more detail the dimensions of the procedural disagreement between the grievor and the employer. It convinced me that I needed to revisit my ruling either to confirm that it remained the best approach for concluding this process or to consider other options.

[97] My objective in reconsidering the situation was to find a balanced approach that addresses the admissibility and procedural fairness issues raised by the employer, while, at the same time, taking into consideration the grievor's apparent conviction that she had not been adequately heard (i.e. that there remained important information pertinent to testimony given at the hearing that I should receive).

[98] What the grievor is seeking to do is clear. She admits in her letter of April 10, 2006, that she conducted further research after the hearing and found "new evidence," apparently to challenge further the testimony of Mr. Friedlaender. Normally, information to impugn a witness is properly adduced during cross-examination or, in some circumstances, as "reply evidence." If a party does not have the information immediately at hand at the hearing, or if it requires further time and effort to develop the evidence, that party may apply to the adjudicator for a break or an adjournment. In the case of this hearing, the grievor did not apply for an adjournment, declined the opportunity to offer reply evidence and closed her case.

[99] Once the parties completed presentation of their evidence at the hearing, the grievor asked to be allowed to present her arguments in writing at a later date, so that she could take the time necessary to outline her case effectively. The employer did not object, but asked to proceed with its own arguments orally at that time. I accepted this approach, believing that it was appropriate to afford a self-represented grievor extra flexibility, while granting the employer its preference.

[100] The current dispute between the parties is the unanticipated consequence of the procedure adopted at the hearing. The grievor's attempt to introduce new evidence after the fact is obviously irregular. The employer claims that, if I do not intercede, it may find itself in a situation where it cannot test the grievor's new evidence through

cross-examination. The employer is also concerned that the grievor may try to impugn the testimony of the employer's witnesses without a proper *Browne v. Dunn* warning giving the witnesses the appropriate opportunity to respond.

[101] The grievor justifies her submission of new evidence by referring to the absence of advance "will say" statements from the employer, and by invoking, in her support, observations I made at the hearing about the relative informality of the adjudication process compared to court procedure. As to the former, I ruled orally at the hearing that the employer was not obligated to furnish "will say" statements. My written reasons on this point are contained in this decision. The absence of "will say" statements as a result of my ruling does not create a procedural fault for which the post hearing admission of new evidence becomes a justified remedy. On the second issue, I made comments on procedural flexibility at the hearing in the context of discussing with the grievor the admissibility of evidence at the hearing. These comments were not in any way intended to suggest that there is an open-ended mandate to depart from the normal rules for conducting a hearing at the discretion of a party.

[102] With these observations in mind, I nonetheless recognize that authorities on arbitral procedure accept that there are situations where it is open to a decision maker to exercise discretion and permit a party to submit new evidence after closing its case. (See, for example, the discussion in Gorsky, Usprich and Brandt, *Evidence and Procedure in Canadian Labour Arbitration* (1994) at 12-8 through 12-14). While the circumstances of this case do not easily fit under the usual situations identified where new evidence might be allowed, I am mindful that this is a case where the grievor is self-represented and is dealing with arbitral procedure for the first time. In her several written submissions to the Board in advance of the hearing, the grievor has demonstrated an ability to express herself in an organized and effective fashion. At the hearing, the grievor was able, with guidance, to navigate the hearing process without substantial difficulty. Nonetheless, it seems possible to me that her unfamiliarity with the hearing process may have led her at times to have unfounded expectations about what actually does or should occur. I am also not entirely convinced in retrospect that the grievor understood, in declining the opportunity to lead evidence in reply, that her proof was closed, even though I tried to explain the elements of procedure to her at every juncture.

[103] I decided that I was prepared, in light of the emerging circumstances of this case, to re-open the hearing. This was clearly an exceptional measure. I did so for two purposes: to take an extra step to ensure the grievor's right to be heard, and to provide the employer an opportunity to challenge any additional evidence that might be tendered. I wish to emphasize, however, that I did not reopen the hearing to allow the grievor an unfettered right to lead new evidence. This possibility, in my view, would tip the balance of procedural fairness excessively against the interests of the employer. Instead, I re-opened the hearing for the purpose of allowing the grievor to take up the opportunity that she previously declined to lead reply evidence. As such, the normal rules limiting the subject matter of reply evidence applied. These rules are designed to ensure that a party does not use the opportunity to lead additional evidence to split its case or fill gaps in the evidence after the fact. For its part, the employer would be able to test any reply evidence that was admitted through cross-examination and/or the recalling of witnesses, if it so chose. I would then hear the grievor's argument orally as well as any further arguments from the employer. I chose to return to the normal format of an oral argument by the grievor because the original reason for allowing her to proceed in writing no longer applied (i.e. the need for time to consider the employer's main argument).

[104] While I understand that the employer may have felt that this new arrangement goes well beyond what procedural fairness demands on behalf of the grievor, I believe that the opportunities available to the employer under this procedure to test the evidence, recall witnesses and make further arguments clothed it with appropriate balancing protections.

[105] As part of giving effect to this revised procedure, I returned all of the grievor's written submissions to her without reading them, save for noting the general configuration and nature of the contents. In my opinion, reading these documents in detail, given the admissibility objection before me, would not have been appropriate. Under my new ruling, the grievor remained free to draw from this material to the extent consistent with the rules for leading reply evidence and submitting arguments.

[106] Board staff conveyed my ruling to the parties on May 4, 2006. The ruling reads in major part as follows:

. . .

. . . after considering their written and oral submissions, the adjudicator has reconsidered the procedural ruling communicated to the parties by the Board on April 11, 2006. This ruling is now rescinded.

In its place, the adjudicator rules as follows:

1. The written argument, affidavit and book of authorities submitted by the grievor will be returned to the grievor. The adjudicator has not reviewed the details of the grievor's submission other than to scan the general contents so as to understand the context in which the employer raised its objection to the admissibility of the documents.

2. The adjudicator orders that the hearing be re-opened on dates to be determined by the Board after consultation with the parties.

3. When the hearing resumes, the grievor will have the opportunity to lead reply evidence within the limitations normally associated with reply evidence. That is to say, reply evidence will be limited to rebutting testimony of the employer on new issues that could not have been canvassed by the grievor in her evidence-in-chief. In this regard, the adjudicator notes the discussion of reply evidence offered in Gorsky, Usprich and Brandt, Evidence and Procedure in Canadian Labour Arbitration *(Carswell):*

"Reply evidence is usually limited to rebutting matters newly raised in the second party's evidence that could not have been reasonably anticipated by the first party . . . . The party beginning cannot divide its case by presenting its evidence and then, when this is shaken by the other side's evidence, attempt to add confirmatory evidence . . . . It is not open to the first party, under the pretence of a reply, to endeavour to bolster the case which it was required to make in the first instance."

The adjudicator will consider any objections to the admissibility of reply evidence as it is led at the hearing.

4. The employer will have the opportunity to cross-examine evidence led in reply. The employer may apply at the hearing to recall a witness or witnesses and the adjudicator will consider such an application in the context of the reply evidence that has been adduced.

5. Once the evidence has been closed, the adjudicator will immediately hear the grievor's <u>oral</u> arguments followed by any oral reply arguments by the employer. If the employer introduces new arguments at the reply stage, the grievor will have an opportunity to comment at the hearing.

> *6. Reasons for this procedural decision will accompany the adjudicator's ruling on the employer's preliminary objection.*
>
> . . .
>
> [Emphasis in the original]

VII. Evidence in reply for the grievor

[107] The hearing reconvened on October 17, 2006. On application by the grievor, opposed by the employer, I extended the original order for the exclusion of witnesses.

[108] The grievor once again testified on her own behalf and introduced 28 further exhibits, which are available at the Board for examination.

[109] The grievor explained that she had been surprised by the statement in Mr. Friedlaender's testimony to the effect that she was covered by the generic ES-05 work description. She introduced a document outlining the "performance plan" signed in April 2000 for her ES-05 position at that time (Exhibit G-23). She contrasted the performance objectives set in this document with the higher-level managerial objectives subsequently established for the position of Senior Advisor, Operations (ES-05), which she had applied for, won and accepted effective January 2, 2001 (Exhibits G-30, G-28 and E-1). The managerial duties of the latter position were consistent with the direction approved for the FACS in an organizational change proposed plan that featured three management positions at the ES-06 level (Exhibit G-24). The grievor testified that the position of Senior Advisor, Operations, was never considered to be comparable to other ES-05 positions. Her responsibilities as lead person in the Operations sector were confirmed by the employer's September 2001 list of FACS assignments (Exhibit G-29). She also tendered an April 2002 email from Ms. Smith that referred to the grievor as ". . . a relatively new manager . . . ." (Exhibit G-31).

[110] As to Mr. Friedlaender's statement that the grievor "was always an ES-05," the grievor referred to her grievance of April 30, 2004 (Exhibit G-32), which sought a retroactive date of January 1, 2001, for the approved reclassification of her substantive position to the ES-06 level. The record shows that the employer granted the grievance in part, and authorized pay at the ES-06 level retroactive to August 1, 2002, for the position of Senior Advisor, Operations (Exhibits G-8 and G-33). Thus, the employer had recognized that her substantive position was not at the ES-05 level beginning in

August 2002, though the grievor had originally been appointed to that position as an ES-05. The grievor understood that the employer's response to her grievance ". . . had appointed [her] retroactively at the ES-06 level to August 1, 2002 . . . ."

[111] A January 2002 list of FACS file assignments shows that the grievor had also temporarily assumed a leadership role with respect to land claims (Exhibit G-34) upon the departure of Craig Atkinson from the ES-06 manager position in this area. The grievor received acting pay at the ES-06 level for the period of November 2001 through June 28, 2002, for performing the land claims job in addition to her own, even though the duties of the two positions were not different.

[112] Mr. Friedlaender testified that the employer ceased acting pay for the grievor in respect of the land claims functions. The grievor contends that she, not the employer, made the decision for her to return to her substantive position, triggering the end of acting pay, as confirmed by Exhibit E-7. The grievor stated that she had once seen in her personnel file an email from Cathy Chalupa, the acting director replacing Mr. Friedlaender during his absence in the summer of 2002 that confirmed that the decision for the grievor to return to her substantive position was hers, not the employer's. Her more recent check of the personnel file failed to locate this document.

[113] Previously, on June 13, 2002, Mr. Friedlaender offered the grievor an extension of the acting appointment to August 4, 2002 (Exhibit G-37). Because of what the grievor felt to be increasing hostility towards her on Mr. Friedlaender's part, she accepted this extension on June 18, 2002, on the condition that it could be shortened at her discretion. She exercised this discretion to terminate the acting appointment on June 26, 2002. The grievor testified that Mr. Friedlaender had earlier approached her to extend the acting arrangement until October 2002, an option that the grievor had rejected. The grievor views Mr. Friedlaender's repeated offers to extend this acting appointment as demonstrating that she was capable of performing the duties of the Senior Negotiator position at the ES-06 level, despite the fact that the employer then determined that she did not meet the qualifications in a competition posted for this position (Exhibit G-36).

[114] Mr. Friedlaender testified that he offered the grievor a development program following the competition to address the deficiencies identified in that process. The grievor contends that this testimony is contradicted by her 2001–2002 performance assessment, signed June 26, 2002, in which Mr. Friedlaender states that she had just

successfully completed a development program (Exhibit G-1, tab 2). The grievor stated that the land claims acting assignment was the only development opportunity she was ever offered, and that she had at no time rejected an offer of another development program. In the wake of learning that she had not won the competition, she had asked for feedback about the reasons for the decision and received none. She recalls that Ms. Chalupa at one point said to her that ". . . there was nothing specific, we just thought you weren't ready."

[115] After the competition, Mr. Friedlaender and Ms. Chalupa approached the grievor with a proposal that the grievor continue to perform the duties of the vacant ES-06 land claims position and that, in recognition of her workload, the employer would backfill the grievor's substantive position. There was no reference in this conversation to any performance issues, and the grievor never heard the words "developmental opportunity." Asked what his plans were for the future, Mr. Friedlaender stated that he would at some point run another competition for the ES-06 position, to which the grievor would be welcome to apply. The grievor recalls not being able to engage Mr. Friedlaender in any further conversation on his plans. She ". . . sized it up quickly . . . ." and ". . . in the larger context of his severe bullying and strange behaviour when he made the proposal . . . ." decided that she had no choice but ". . . to see this as a disguised scheme to remove me from his organization." The grievor rejected the proposal and "marched up to HR and demanded that acting cease immediately." The grievor felt that she had to establish herself in her substantive position and sever all ties with the vacant land claims position. She never heard anything further about a development program until reading a reference in the April 2004 board report to the effect that she had rejected a development program in June 2002 (Exhibit G-1, tab 1) and then seeing a similar reference in the grievance decision of September 12, 2004 (Exhibit G-8).

[116] The grievor disputes Mr. Friedlaender's testimony that she approached him in fall 2002 to indicate that she was unhappy with the classification of her substantive position. An email from Mr. Friedlaender to Ms. Smith dated August 6, 2002, indicates that he decided earlier to begin the process of drafting a new job description for the position (Exhibit G-38). The grievor testified that she did not approach him to discuss reclassification between the end of the land claims competition and the date of this email. It was, instead, Mr. Friedlaender who notified the grievor via email before August 6, 2002, that he was undertaking a rewrite of the job description. The grievor

indicated that she was not familiar at the time with how the reclassification process can be abused. She felt afraid, but ". . . didn't know what to be afraid of."

[117] The grievor disputes Mr. Friedlaender's statement that he had a generally positive relationship with the grievor prior to the land claims competition. She referred to her email of June 18, 2002, to Richard Frizell, Associate Executive Director of the FTNO, in which she identified her wish to explore a move to a different position (Exhibit G-42). When Mr. Friedlaender found out about this email, the grievor testified that he called the grievor into his office and indicated his anger about what she had done. The grievor interpreted his response as discipline.

[118] The grievor addressed Mr. Friedlaender's testimony that he had been surprised to receive an email, dated October 6, 2003, in which the grievor requested a complete and current job description (Exhibit E-8), this despite the fact that the reclassification process was moving forward. The grievor stated that Mr. Friedlaender did not express surprise when he replied to this request. The grievor indicated that she was involved at the technical stage when her job description was actually rewritten. In November 2002 Brian McKenney replaced Mr. Friedlaender, who had departed on extended medical leave. In a meeting with Mr. McKenney, the grievor recalls seeing in Mr. McKenney's notes a reference to putting the reclassification process on hold ". . . because it was tricky." It was the grievor's impression that this reference originated with Mr. Friedlaender. The grievor also noted an email dated October 7, 2003, in which Mr. Friedlaender expressed to Mr. Goldie his concern that the grievor's October 6, 2003, email might be ". . . a precursor to further steps by her . . . ." (Exhibit G-45). The grievor identified another email from Mr. Friedlaender, this time to Laurie McIlvena in Human Resources which she claims also demonstrates that Mr. Friedlaender was not surprised by her October 6, 2003, request (Exhibit E-10).

[119] Mr. McKenney proceeded with the reclassification process (Exhibit G-43). The Executive Committee approved moving forward with the process on April 14, 2003 (Exhibit G-44). The Regional Executive Committee approved the proposal to review the position on October 7, 2003 (Exhibit G-46).

[120] The grievor concluded her evidence in reply by challenging Mr. Friedlaender's evidence to the effect that the grievor had rejected mediation in December 2003. She stated that it was the employer who was not interested in mediation. The grievor had declined to sign the mediation agreement ". . . on careful legal review . . . ." because of

a reference that she felt would have waived her right to file future grievances (Exhibit G-48). The DIAND refused to remove this clause. The grievor expressed her willingness to participate in mediation without a signed agreement in an email to Ms. Smith and Mr. Friedlaender (Exhibit G-49).

[121] In cross-examination, the employer asked the grievor whether she recalled receiving telephone calls from Ms. Smith or Ms. Chalupa during her three-week absence from work after she learned the results of the land claims competition. The grievor neither recalled being absent nor receiving calls from Ms. Smith or Ms. Chalupa. She indicated that she frequently received work-related calls when she was on leave. When she was away on medical leave from October 14, 2003, to November 30, 2003, Mr. Friedlaender contacted her at home and, in her words, ". . . disciplined me for getting ill when there was work to get done."

[122] The employer referred the grievor to an email dated January 6, 2004, from Mr. Friedlaender that reported on a recent meeting between them to ". . . clear the air. . . ." (Exhibit G-17). The grievor indicated that this email had not been sent to her, but that she had received a copy. She described the email as a ". . . self-serving note to file . . . ." on Mr. Friedlaender's part.

[123] The grievor could not recall how many positions at the ES-04 group and level she had been asked to staff as part of her managerial responsibilities. She initially could not remember which position was referenced in the April 2004 board report comment to the effect that she had failed to initiate a staffing action despite repeated requests (Exhibit G-1, tab 1). She then recalled that Mr. Friedlaender had had an issue respecting the time required to staff an ES-04 position. She could not at first recall when this position became vacant or, initially, that Mr. Friedlaender had linked his concern about the staffing process to her taking vacation in August. She then clarified her recall by stipulating that she could remember that Mr. Friedlaender tried to withhold approved vacation leave because ". . . he held up some arbitrary thing that had to be done." According to the grievor, Mr. Friedlaender ". . . did this every time . . . ." and that it caused her stress. She also later recalled that the previous incumbent of the ES-04 position, Isaac Ferby, had left in February or March 2003.

[124] Regarding Exhibit G-1, tab 13, the grievor did remember that Mr. Friedlaender sent her an email about staffing on May 5, 2003. She contends that her response to this email demonstrates the thoroughness of her approach to the duties of her

position. She does not remember whether she ever ended up staffing the ES-04 position. She did not recall that a person was selected from an eligibility list to fill the position. She did not recall performing interviews for the position.

[125] The employer asked the grievor whether she had been denied vacation leave in 2003. She replied that she did not remember, but stated that Mr. Friedlaender ". . . would have sport with me . . . ." and that ". . . he made it very difficult."

[126] With respect to Mr. Goldie's communications with her in November 2003 about the possibility of her receiving coaching (Exhibit G-1, tab 8), the grievor stated that she had not been interested in the type of coaching referred to by Mr. Goldie because she had found out that it was "lifestyle" coaching.

[127] The employer referred the grievor to the grievance response of September 12, 2004 (Exhibit G-8), and to its reference to eligibility for compensation ". . . in accordance with the provisions of Article 27.08 of the Economics and Social Sciences collective agreement." The grievor stated that she did not know which of her three grievances was the subject of this reply. The employer then showed her the table of contents of the collective agreement, which identifies Article 27 as "Acting Pay" (Exhibit E-26). The grievor acknowledged that this was her collective agreement.

[128] Asked about the composition of the selection board for the ES-06 land claims position, the grievor recalled that there were three or four members and confirmed that Ms. Chalupa was one of those. The grievor could not remember whether Ms. Smith was a member, and was uncertain regarding Mr. Frielaender, though she thought he was there.

[129] The grievor confirmed having met twice with Ms. Smith and Mr. Friedlaender shortly after the competition. The grievor stated that the meetings were about the land claims position and not about her substantive position. She could not recall Ms. Smith and Mr. Friedlaender presenting her with the option of engaging a management coach and finding other training opportunities that might be helpful. She did remember Mr. Friedlaender mentioning ". . . lots and lots of courses . . . ." but not anything specific. The grievor did not agree when asked to confirm that she had been offered training and development. She did not recall receiving a follow-up telephone call at home from Ms. Smith to re-extend the earlier offer of training.

[130] The grievor did not agree with the employer that reclassification of her substantive position was an issue prior to Mr. Friedlaender's email of August 6, 2002 (Exhibit G-38). She said that the issue had earlier been her "exaggerated workload." The grievor stated that both she and Mr. Friedlaender knew that her duties were at a higher level, and that Mr. Friedlaender had acknowledged this. She had said to Mr. Friedlaender at some point, "if you don't want to pay me, reduce my duties" and "don't bully me."

VIII. Final evidence on behalf of the employer

[131] To address issues raised by the grievor in her reply evidence, the employer requested to call Ms. Smith as a witness, and indicated that it might also wish to recall Mr. Friedlaender to testify. The grievor objected that she had not received notice of these witnesses and was surprised that there should be further testimony for the employer. She stated that she felt unable to cross-examine these witnesses, and asked for a 48-hour adjournment in order to engage counsel for this purpose.

[132] After considering submissions on the grievor's request, I ordered an adjournment until 13:00 on the next day to permit the grievor to secure counsel. I indicated that the employer could proceed with Ms. Smith and/or Mr. Friedlaender at that time, and that the grievor would be entitled to cross-examine these witnesses through counsel or, if she had failed to arrange the attendance of counsel, to conduct cross-examination herself as she had done earlier in the hearing.

[133] The objective of my ruling was to accommodate the grievor's request in part while avoiding a significant delay in the hearing. I noted that my order of May 4, 2006, provided notice of the possibility of further testimony on behalf of the employer in response to the grievor's reply evidence, and that the grievor should thus not have been surprised by the employer's request. I indicated that, as the grievor had chosen throughout the process to date not to engage counsel, and as she had already demonstrated a capacity to conduct a cross-examination of a witness, I did not feel that I could order any longer adjournment at this late stage. I was also influenced in specifying the time for reconvening the hearing by information concerning the medical condition and availability of one of the prospective witnesses, Ms. Smith, who was preparing for major surgery in a few days.

[134] When the hearing reconvened at the appointed hour, the grievor indicated that counsel would not be coming.

[135] Prior to departing on her current medical absence, Ms. Smith provided labour relations and other human resources services, other than classification, to the FTNO in the capacity of Human Resources Consultant at the PE-04 group and level. Ms. Smith has 30 years of administrative and human resources work experience in the Public Service and has been assigned support responsibilities for the FTNO for the last six or seven years.

[136] In June 2002 Ms. Smith was a member of the selection board for the position of Senior Negotiator, Land Claims (ES-06). The other members were Mr. Friedlaender, Ms. Chalupa and Mr. Atkinson. The selection board's mandate was to staff the position in question as well as create an eligibility list for other ES-06 positions with similar responsibilities in the FACS. The competition was simultaneously open and closed and interdepartmental and national in scope.

[137] The selection board found that no candidate, including the grievor, met the qualifications established for the competition. In the grievor's case, Ms. Smith did not recall the detailed results, but did remember that she failed by "a good margin" in respect of at least one of the "knowledge" and "abilities" elements. All candidates were advised of the results in writing and were invited to contact a member of the selection board to discuss details. Ms. Smith did not recall whether the grievor took this opportunity. As the competition had been unproductive, there were no appeal rights.

[138] Shortly after the competition, Mr. Friedlaender discussed with Ms. Smith development options for the grievor. He stated that he continued to value the grievor's skills and abilities. Mr. Friedlaender and Ms. Smith decided to approach the grievor to review the possibilities. At their subsequent meeting with the grievor, Mr. Friedlaender stated his desire that she continue in the FACS, and indicated that he wanted to establish a development plan for her that could include provision of a coach and various other training opportunities, or other elements the grievor might suggest. He asked the grievor to think about this proposal and get back to him following the three-week leave he was about to take starting the following week.

[139] Ms. Smith testified that she received a call the following week from the acting director, Ms. Chalupa, relating that the grievor had telephoned her and indicated that

she was not interested in Mr. Friedlaender's proposal. Ms. Smith was taken aback by this news and called the grievor herself at home to express concern that the grievor might not have taken adequate time to consider the proposal or was perhaps still angry about the results of the ES-06 competition. The grievor responded that she had thought about the proposal and was not interested. Ms. Smith also heard later from Ms. Chalupa that the latter initiated another call to the grievor to ask her to reconsider. The grievor indicated to Ms. Chalupa that she had made her decision and did not want to discuss the matter further.

[140] Ms. Smith next encountered an issue related to the grievor when Mr. Friedlaender discussed with Ms. Smith the grievor's work description and reported that the grievor did not feel it captured all of the duties and responsibilities of her position. Ms. Smith was not involved in the classification review that followed, but did have a discussion with Mr. Friedlaender, after approval of the reclassification, during which he expressed concerns about the grievor's behaviour and work performance. They talked about why the employer should assess the grievor against the statement of qualifications for the reclassified position rather than hold a competition. Mr. Friedlaender outlined his concern that the grievor was not personally suitable for the position. Ms. Smith told him that he must prepare a board report to justify his assessment.

[141] Once Mr. Friedlaender conducted his assessment and concluded that the grievor was not qualified for the reclassified ES-06 position, Mr. Friedlaender asked Ms. Smith about the ramifications of this notice. Ms. Smith consulted with headquarters experts, who told her that the grievor would become surplus under the WFAD and, thus, entitled to the benefits of this directive. She advised Mr. Friedlaender of this fact.

[142] In cross-examination, Ms. Smith confirmed that the ES-06 Senior Negotiator, Land Claims, position was never the grievor's substantive position.

[143] The grievor referred Ms. Smith to the grievor's performance appraisal dated June 26, 2002, and its references to the grievor as "fully effective," as having "provided effective leadership" in her substantive position, and as taking on additional duties as a development opportunity (Exhibit G-1, tab 2). Ms. Smith indicated that she was not involved in this performance appraisal. She explained that it was Mr. Friedlaender who had contacted her after the competition ". . . to do something for the [grievor]."

[144] The grievor presented Ms. Smith with an email from Ms. Ryan-McNee to the Executive Committee dated February 2, 2003, which she stated mentioned the grievor's participation in an Action Learning Project. After determining that the witness could not identify this document, I ruled against its admission as an exhibit. I did allow the grievor to ask Ms. Smith whether she was aware that the grievor had successfully completed the program in question. Ms. Smith replied in the negative and said that she had not been involved.

[145] The grievor asked Ms. Smith about her recollection of a staff meeting called by Mr. Friedlaender around March 17, 2004, in which he announced in front of 14 people that he had concerns about the grievor's performance as a manager, and that ". . . an ES-06 was not in the stars" for her. Ms. Smith reported that she had been with the grievor at the meeting of March 17, 2004, and did not recall Mr. Friedlaender making the statement attributed to him by the grievor. Ms. Smith remembered that Mr. Friedlaender had initiated the meeting after the grievor had sent an email to all FACS staff (Exhibit G-51). In this email, the grievor informed her colleagues that the employer had found that she did not meet all of the qualifications for the ES-06 level and would declare her surplus. She asked for the forbearance of her colleagues at a difficult time and said, *inter alia*, that she was ". . . saddened at the prospect of being removed against my will from FTNO. . . ." (Exhibit G-51).

[146] Ms. Smith attended a subsequent meeting with the grievor, Mr. Friedlaender, and union representatives Derek Brackley and (by telephone) Catherine O'Brien. Ms. Smith could not recall what documents the employer gave the grievor at this meeting. She did not recall Mr. Friedlaender saying that "he was uncomfortable working with [the grievor]" as suggested by the grievor, or that an assignment would be worked out for the grievor. She did remember that the environment of the meeting was uncomfortable. The witness testified that it was her recollection that the grievor had initiated the idea of a different assignment with Mr. Goldie several times following the board report.

[147] The employer did not recall Mr. Friedlaender to testify.

IX. Arguments by the grievor

[148] For her closing argument, the grievor read a two-page summary of her case, as well as much of the contents of 78 single-spaced pages of speaking notes. The grievor

agreed to share these documents with the employer and myself as an *aide-mémoire* for use for our own notes. As such, the documents are not part of the formal record of the hearing *per se*, but the parties share an understanding that they can consider their full contents as having been read at the hearing. In this summary of the grievor's arguments, as well as in my reasons for decision, I have the opportunity to report the grievor's position based on excerpts from the documents as read by the grievor, or as deemed to have been read by the grievor.

[149] The grievor also submitted a book of authorities consisting of the following 16 documents: *Schofield v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2002 PSSRB 47; *Matthews v. Canadian Security Intelligence Service*, PSSRB File No. 166-20-27336 (1996); *Oriji v. Canada (Attorney General*), 2002 FCT 1151; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police* (1978), 88 D.L.R. (3d) 671; *Mallett v. Treasury Board (Indian and Northern Affairs)*, PSSRB File No. 166-02-15344 and 15623 (1986); *Deering v. Treasury Board (National Defence)*, PSSRB File No. 166-02-26518 (1996); *Lo v. Treasury Board (Treasury Board Secretariat)*, PSSRB File No. 166-02-27825 (1998); *Steen v. Northern Canada Power Commission*, PSSRB File No. 166-10-4186 (1978); *Laird v. Treasury Board (Employment and Immigration)*, PSSRB File No. 166-02-19981 (1990); *Fortin v. Canada (Attorney General)*, 2003 FCA 376; *Fortin v. Canada (Attorney General)* 2003 FCT 51; *Canada (Attorney General) v. Brault*, [1987] 2 S.C.R. 489; *Majdan*, PSC File No. 00-SVC-00080 (2000); *Keating*, PSC File No. 99-NAR-00788 (1999); *Storey*, PSC File No. 02-ENR-01524 (2003); the DIAND Human Resources document "Components of Discipline;" and the DIAND Human Resources Manual excerpt entitled "Discipline."

[150] The grievor submits that she must demonstrate that her case involves subject matter under paragraph 92(1)(*b*) of the *PSSRA*. The standard of proof required of the grievor, as supported by *Schofield*, is to establish a *prima facie* case that the subject matter of her grievance involves disciplinary action resulting in a suspension or financial penalty and/or a demotion. A "prima *facie* case" is defined as follows:

> *(Latin) A legal presumption which means 'on the face of it' or 'at first sight'. Law-makers will often use this device to establish that if a certain set of facts are proven, then another fact is established prima facie. For example, proof of mailing a letter is prima facie proof that it was received by the person to whom it was addressed and will be accepted as such by a court unless proven otherwise. Other situations may require a prima facie case before proceeding to another*

> *step in the judicial process so that you would have to at least prove then that at first glance, there appears to be a case.*
>
> *—Duhaime Law Dictionary*
>
> *Latin for 'at first look,' or 'on its face,' referring to a lawsuit or criminal prosecution in which the evidence before trial is sufficient to prove the case unless there is substantial contradictory evidence presented at trial.*
>
> *— Law.com Dictionary*
>
> *Prima Facie: Literally, 'at first appearance'; a Latin expression used to describe a proposition that, if unanswered, would be accepted as valid.*
>
> *— Jurist Canada, University of Toronto*

[151] The evidence presented at the hearing, scrutinized together and on the whole, reveals a series of efforts by the employer to disguise discipline. The concept of reviewing evidence "on the whole" was used in *Matthews* to assess disguised discipline:

> . . .
>
> *The jurisprudence of this Board's adjudicators and of its reviewing courts supports the notion that the employer cannot, under the guise of using an administrative means such as rejection on probation or lay off, in effect terminate the employee for disciplinary reasons and thereby deprive an adjudicator of jurisdiction.*
>
> *This is precisely what the employer has attempted in this case. It did not discipline the grievor early on, although it appears it could have been justified in so doing. It chose not to deal with the grievor's shortcomings. When the employer was faced with the prospect of downsizing some time later, it conducted what can only be characterized as a semblance of a ROM exercise leading to what the employer characterized as a lay off. In fact, the choice to terminate the grievor had already been made.* ***I find, based on the whole of the evidence that the employer acted in bad faith in arbitrarily ridding itself of the grievor under the guise of lay off. In effect, the grievor was terminated for disciplinary reasons.***
>
> . . .
>
> [Emphasis added]

[152] On October 30, 2000, the Executive Committee of the British Columbia Regional Office of the DIAND approved a new organizational structure for the FACS

(Exhibit G-24). The proposal established three management positions reporting to the director. The document that outlined the new structure noted that:

. . .

> *. . . the establishment of these positions at the ES-06 level will provide increased opportunities in the region for high performing senior officers to gain managerial experience, which in turn will assist them in preparing for senior management roles.*

. . .

[153] The employer implemented the proposal, as indicated by an organization chart dated September 2, 2003, with the exception that one of the three management positions was classified at the ES-05 level (Exhibit G-1, tab 21). The employer had conducted a competition for this position in late 2000 (Exhibit G-28) and notified the grievor of her appointment to the position effective January 2, 2001 (Exhibit E-1).

[154] Immediately upon being appointed to the position of Senior Advisor, Cost Sharing Operations, the employer assigned her all of the management duties intrinsic to the ES-06 management positions in the FACS. The increase in the level of responsibilities required of the grievor from the outset is demonstrated by the differences between her performance plans dated June 28, 2001, and April 4, 2000 (Exhibits G-30 and G-23). The grievor at all times carried out the assigned management duties effectively, appropriately and thoroughly, as attested to, for example, in consecutive performance appraisals (Exhibit G-1, tab 2). The grievor sought out and accepted opportunities to contribute to her professional development as a manager.

[155] The grievor contends that the employer, for all intents and purposes, appointed her to the ES-06 level when she was appointed to her substantive position on January 11, 2001, when she was assessed on the basis of her ES-06 duties over several years, and when she was recognized by the employer as performing these duties effectively, appropriately and thoroughly. The employer arbitrarily maintains that the grievor's position was classified at the ES-05 level.

[156] For a lengthy period of time leading up to the events of June 2002, Mr. Friedlaender demonstrated a hostile disposition towards the grievor, causing the

grievor on several occasions to express her concern to him about his attitude and treatment of her (Exhibit G-1, tab 13).

[157] In June 2002 Mr. Friedlaender advised the grievor that she and all other candidates had failed to qualify in an open, national competition for the ES-06 group and level position of Senior Negotiator, Land Claims. The employer provided no feedback, either orally or in writing, to substantiate the reasons for its determination. In a follow-up conversation, Ms. Chalupa, as Acting Director, told the grievor, "Oh, there's nothing specific. We just thought you weren't ready." Immediately after the competition, Mr. Friedlaender proposed to the grievor that she step into the vacant Land Claims position as a development opportunity while he backfilled the grievor's substantive position. The grievor, in her words,

. . .

> *. . . sized up this proposal in the larger context of Mr. Friedlaender's hostilities and bullying, his strange behaviour when he made the proposal including refusing to make eye contact and looking sideways down at his feet, and his refusal to come clean on what his plans were, and could come to no other conclusion than that this was a scheme to get rid of her, as she anticipated that there would be no position for her when the music stopped.*

. . .

On hearing this proposal, the grievor immediately instructed Human Resources to cease her acting pay in order to protect her career and livelihood.

[158] Immediately after the grievor refused to vacate her substantive position and terminated her acting assignment, Mr. Friedlaender initiated a rewrite of the grievor's ES-05-level job description (Exhibit G-38). While Mr. Friedlaender was away on extended health leave, Mr. McKenney, with whom the grievor had an excellent relationship, moved the rewrite process forward. When Mr. Friedlaender returned, he continued to demonstrate a hostile attitude towards the grievor by, in her words,

. . .

> *. . . continuing his long-standing pattern of making unreasonable demands, attempting to refuse her vacation requests, exaggerating the grievor's workload and applying*

> *an absolute performance standard to her which he did not apply to others.*
>
> . . .

[159] The grievor reviewed various events presented in her testimony that, she argues, demonstrate Mr. Friedlaender's hostility towards her. As an example, the grievor referred to Mr. Friedlaender's insertion of comments into the grievor's performance appraisal for 2003–2003 to the effect that ". . . Karen has been quite unpredictable in her reactions to perceived workplace difficulties. . . . At times her actions have led to tensions in the workplace . . . ." (Exhibit G-1, tab 2). The grievor, in her argument, described what then occurred:

> . . .
>
> *Mr. Friedlaender entered the grievor's office and, without referring the grievor to the paragraph he had added, and in a display of physical and institutional power, forced the greivor to sign the performance review. She was intimidated into signing the performance review on the spot and was fearful of asking for clarification of the last paragraph.*
>
> . . .

[160] The grievor met with Mr. Friedlaender on September 16, 2003. At this meeting, Mr. Friedlaender attacked the grievor as a person and as a professional, reading to her in a cold and calculated manner a prepared script that contained unexpected and unfounded allegations concerning her conduct. When asked on what standard he was assessing the grievor, Mr. Friedlaender arrogantly replied, ". . . against my standard for managers." The grievor described orally this encounter as a ". . .wholly unanticipated and unfounded disciplinary speech." Mr. Friedlaender alleged numerous and serious disciplinary offences without regard for the facts. One disciplinary allegation was that the grievor had supported a compressed work week request from an employee, as if this demonstrated poor management on the grievor's part.

[161] Mr. Friedlaender's speech violated the employer's employee performance review policy and natural justice. His actions breached administrative law principles, particularly the right of the grievor to be heard, as enunciated in *Nicholson*. He also demonstrated bad faith in that he had already decided to remove the grievor from his organization. The purpose of the disciplinary meeting of September 16, 2003, was to

create an incident on which Mr. Friedlaender could rely, and upon which he did rely, when he subsequently attempted to surplus the grievor.

[162] Mr. Friedlaender further contradicted employer policies and guidelines when he subsequently brushed aside the grievor's request for a complete and current job description (Exhibit E-8).

[163] Mr. Friedlaender's note to file on the meeting of September 16, 2003, obscures his real disciplinary intent and tries to cast his actions in the best possible light.

[164] The employer then initiated a fast-track process outside of the cyclical review schedule to surplus the grievor via the reclassification process. The grievor, on October 7, 2003, asked Mr. Friedlaender for clarification of the steps ahead with respect to reclassification (Exhibit G-1, tab 8), but he did not reply.

[165] In December 2003 the employer attempted to engage the grievor in a formal mediation process. The employer sought to intimidate the grievor into signing a mediation agreement that she understood would have required her to waive her rights to file future grievances. The grievor refused to sign, but indicated to the employer her willingness to proceed with an informal facilitated discussion without a signed agreement. The employer was unwilling to provide this service. On December 20, 2003, the grievor received an email from the prospective mediator (Exhibit G-50). The grievor was alarmed by the mediator's willingness to intimidate the grievor, and to reveal clearly where her sympathies lay.

[166] The proposal to reclassify the grievor's position had been approved by the Executive Committee on April 14, 2003, with an August 1, 2002, effective date for the reclassification (Exhibit G-44). Mr. Friedlaender, however, arbitrarily rescinded the effective date and the proposal for retroactive pay, and moved the proposal, in altered form, forward to the Regional Executive Committee. The amended proposal changed the effective date for reclassification to an undetermined point. This indicates that Mr. Friedlaender was not planning to reclassify the position while the grievor still occupied it. In essence, he intended to remove the grievor under a disguised workforce adjustment scheme before the reclassification came into effect. The fact that the reclassification was completed without a desk audit constitutes further evidence that the employer had already made its decision in November/December 2003 that the grievor would not be appointed to her reclassified position.

[167] A three-month freeze on reclassifications temporarily stalled Mr. Friedlaender's surplusing action. During January and February 2004, he called the grievor to his office for a series of meetings that further intimidated her. After each meeting, Mr. Friedlaender sent a self-serving note to file describing his version of what was said (Exhibits G-17 and G-18). Immediately after the freeze ended, Mr. Friedlaender was ready to implement his strategy.

[168] On March 24, 2004, a meeting took place between the employer, the grievor and her union representatives. The employer informed the grievor that she was not performing her duties to a satisfactory standard, and that the DIAND was putting in place the necessary steps to surplus her. The union representatives asked for the assessment on which this decision was based, and the employer undertook to provide it as soon as it was done. Fully six months after he had decided not to appoint the grievor to her reclassified position, Mr. Friedlaender finally performed the assessment. Mr. Goldie wrote to the grievor to confirm the employer's intent to surplus her (Exhibit G-2) and attached Mr. Friedlaender's assessment in the form of the board report dated April 8, 2004 (Exhibit G-1, tab 1).

[169] The employer's tactics were clearly betrayed: make serious allegations of a disciplinary nature against the grievor in the speech made at the September 2003 meeting, do not respond to the grievor's request to dispute the allegations made in that speech or, at least, do not give her an opportunity to provide her view of the allegations; do not perform an annual performance appraisal for 2003–2004 as this would create an opportunity for the grievor to respond to allegations; get rid of the grievor by a "surplus" tactic, evident already in October 2002, by reclassifying her position from the ES-05 to the ES-06 level and then declaring her surplus to requirements due to non-performance; appoint Mr. Friedlaender as the sole board member; make disciplinary allegations in the board report; disregard all departmental and Treasury Board guidelines and policies that would give the grievor avenues for recourse; and breach the requirement to prepare an annual review in 2004, the various requirements to process disciplinary allegations, and the policy governing the establishment of effective dates upon reclassification of a position.

[170] The grievor prepared and filed a number of grievances, one of which contested through the NJC grievance process, management's surplus decision as being contrary to the WFAD. The employer's decision concerning this grievance found that there was

not a WFAD situation, and confirmed that Mr. Goldie would rescind the "affected status" letter (Exhibit G-3), an action subsequently taken by Mr. Goldie (Exhibit E-18). However, the employer expressly did not rescind Mr. Goldie's letter of April 8, 2004, which was appended to Mr. Friedlaender's board report.

[171] Following the NJC grievance decision of December 9, 2004, the grievor wrote to Mr. Goldie on January 24, 2005, requesting that he rescind the April 8, 2004, letter and reverse the consequences flowing from it (Exhibit G-19). The employer's reply, dated February 16, 2005, stated management's intention to re-establish a generic work description for the grievor's position in the Cost Sharing team and submit it for classification (Exhibit G-20). The grievor understood from this letter and from conversations with management that she was expected to vacate her substantive position volontarily now that the surplusing action had failed. This action, in the grievor's view would move her into "an opportunity" where there was no position, no work description, no established level, no funding, no rights and no future. When the grievor refused, the employer notified her that it was reclassifying her position and demoting her to the ES-05 level.

[172] Another of the grievances filed by the grievor in April 2004 challenged the March 11, 2004, effective date for reclassification that Mr. Friedlaender had substituted for the earlier proposal of August 1, 2002. The grievance decision issued on September 12, 2004, on this issue found the grievor eligible for ES-06 group and level compensation for the period from August 1, 2002, through April 22, 2004 (Exhibit G-8). In reaching this conclusion, the decision maker would have had to be satisfied that ES-06 duties had officially been assigned to the grievor, and that the grievor had demonstrated the required standard of performance in carrying out the duties intrinsic to her position.

[173] The employer has to date refused to recognize both the NJC grievance decision and the grievance decision granting ES-06 group and level pay for what they represent. Although the former stated that the grievor is no longer "affected," the employer has done nothing to return to the conditions that existed prior to Mr. Goldie's letter of April 8, 2004. The second grievance decision on ES-06 pay was issued prior to the NJC grievance decision, and was falsely premised on Mr. Friedlaender's actions in the wake of the board report to end the grievor's ES-06 pay on April 22, 2004. The employer's subsequent failure in implementing the grievance decision to remove the erroneous

April 22, 2004, date as the date on which ES-06 pay ended constitutes a financial penalty.

[174] ES-06 pay would have continued had the employer not reassigned the grievor's duties to Mr. Greer. Mr. Friedlaender relied on his allegations of non-performance in the board report as the basis for taking away the grievor's substantive duties. This is discipline.

[175] The employer formally notified the grievor of her demotion in Ms. McKay's letter of April 18, 2005 (Exhibit G-7). Reclassification of the grievor to the ES-05 level at this time creates the reasonable inference that the grievor had, until this date, been at the ES-06 group and level. Despite this reasonable inference, the grievor was not paid accordingly. Her ES-06 group and level pay was terminated one year earlier on April 22, 2004. This is financial discipline prior to demotion. The employer replaced the grievor's ES-06 work description with a generic ES-05 work description, on the basis of Mr. Friedlaender's allegations in the April 2004 board report. This is disguised discipline leading to a financial penalty and a disciplinary demotion.

[176] The grievor submits that there are and can be significant financially adverse consequences to her attributable to the employer's refusal to rescind the April 8, 2004, letter as expressly contemplated by the NJC grievance decision. Left unrescinded, the letter retains legal life. This legal life means that the instrument that was used to effect the surplus — the Board report, attached to and relied upon by the letter — retains legal life.

[177] The employer's actions have resulted in the following damages, as expressed by the grievor:

. . .

> *The grievor has been demoted from an ES-06 to an ES-05 level, primarily reliant on allegations of disciplinary offences, but the demotions have no authority because the proper processes were not followed.*
>
> *As a result, since April 22, 2004, the grievor's remuneration has been reduced from the ES06 level to the ES05 level.*
>
> *The April 8, 2004 letter and its attachment — the Board report containing allegations of disciplinary offences which the letter relies upon — remain alive. The grievor says that*

> *the continued 'life' of the letter and the board report can harm her prospects for future employment. This amounts to a reasonably* [*sic*] *likelihood that a financial penalty will be or is being caused.*
>
> . . .

[178] The employer argues that the DIAND never prepared a document entitled "Job Offer for Karen Peters, ES-06 Level" and, accordingly, that the grievor has never been appointed at the ES-06 level. That is to say, the employer seeks to rely on its own neglect to do the standard paperwork that would have initiated the proper remuneration for the grievor. The Federal Court's decision in *Oriji* says otherwise. In *Oriji*, the Court overturned the decision under section 22 of the *PSEA* of an investigation officer who had incorrectly found that a document was required for an offer of employment to be enforceable. The decision states:

> . . .
>
> *[14] Section 22 of the Public Service Employment Act, earlier quoted, provides that an appointment under that Act only takes effect on the date specified in the instrument of appointment. It goes on to specify that the date specified may be any date before, on or after the date of the instrument of appointment. Thus, an appointment can have been taken up and pursued for an unlimited period of time before an instrument of appointment is issued.* ***In such circumstances, for the investigating officer to conclude that "a document is required for an offer of employment or appointment to be enforceable . . ." is, I am satisfied, perverse. It is, in fact, to conclude that employment that has commenced, with the consent of the employer as well as the consent of the employee, might well be not valid employment because, so the argument would have to go, no valid offer of employment had been made and accepted.***
>
> *[15] I conclude that the only reasonable interpretation in law of section 22 is that it speaks only to the "effective date" of an employment rather than to the enforceability of an employment arrangement based on an offer, whether verbal or written, that has been accepted and, in particular but not exclusively, to employment that has commenced where such a valid offer and acceptance have been exchanged. I conclude that the investigating officer erred in law in arriving at the decision under review.*
>
> . . .
>
> [Bolded section emphasized by the grievor]

[179] The logic of the *Oriji* decision applies to the grievor. It would be equally perverse for the employer not to acknowledge the reality of the grievor having worked for several years in an ES-06 position and having performed all such tasks successfully merely because the employer did not prepare a formal appointment document.

[180] A similar approach is found in *Storey*, in which the adjudicator ruled as follows:

. . .

> *. . . irrespective of the department's intentions, once Ms. Duquette assumed significant new duties for a period intended to be approximately fifteen and one-half months, an appointment occurred.*

. . .

Like the grievor in *Storey*, the grievor argued that she had assumed significant duties (in her case, on January 1, 2001) on an indeterminate basis. And, like the grievor in *Storey*, she should be considered to have been appointed as of that date.

[181] Following *Oriji*, the email exchange between Mr. McKenney and Ms. Smith and the Executive Committee decision of April 14, 2003, satisfy all of the requirements of an instrument of appointment (Exhibits G-43 and G-44). That the DIAND failed to follow through with the appropriate paper work that would have properly remunerated the grievor is an indication of bad faith, not an indication that the grievor was not legally appointed to the ES-06 level.

[182] The employer's grievance decision of September 12, 2004 (Exhibit G-8), is the third written confirmation of the effective date of the grievor's appointment to the ES-06 level and represents an instrument of appointment to that level.

[183] When Mr. Friedlaender assessed the grievor against the statement of qualifications for her reclassified position in 2004, he declared that she was not qualified. This assessment runs counter to all other indications of the grievor's satisfactory performance at the ES-06 level, and contradicts government documents that demonstrate that the grievor at all times carried out her duties effectively, appropriately and thoroughly from the time she was appointed to her management duties until the time they were taken away from her. Mr. Friedlaender's assessment also runs counter to the fact of reclassification, which implies satisfactory performance. As stated in *Majdan*:

. . .

> *. . . no manager is going to recommend reclassification of a position unless the incumbent is performing at at least a satisfactory level, and he is willing to promote them if the position is reclassified. In these cases there is no risk to the public interest, and the public interest would be at risk if a manager could not promote an incumbent of a reclassified position. . . . It simply would not have made any sense, or achieved any legitimate objective, to prescribe a discretionary qualification that the incumbent did not meet. How could she not be qualified to continue to perform at the AR-6 level, duties she has been performing for years at the AR-5 level.*

. . .

These were precisely the circumstances facing the grievor.

[184] The adjudicator's decision in *Guertin v. Treasury Board,* Board File No. 166-02-36 (1968) defines a disciplinary offence in the following way:

. . .

> *Any breach of the professional obligations of the worker in the execution of his obligation to work, or, more generally, any disturbance created by him in the proper operation of the enterprise, can be called a disciplinary offence, whether for example, there are instances of unpunctuality, unwarranted absences, violation of security rules, hygiene, insubordination, inaccuracy, negligence or disloyal acts.*

. . .

[Underlined section emphasized by the grievor]

[185] The board report contains many allegations that, if proven, would amount to "disciplinary offences" with the meaning suggested in *Guertin.*

[186] In the board report, the employer essentially accused the grievor of being a disturbance in the office. It states that:

. . .

> *. . . Eventually, Ms. Peters discontinued all communication with this employee* [Mr. Hornburg]*, and indicated that she would not be willing to participate in mediation to repair the relationship. The employee eventually chose to leave the department in large part due to the untenable relationship with Ms. Peters.*

. . .

The grievor submits that this is an accusation that the grievor caused such extreme disturbance that an employee found it unbearable and necessary to leave.

[187] The grievor submits that the board report alleges that the grievor made no attempt to manage a performance situation and to meet with an employee to discuss performance issues, despite offers of assistance from management. Here, the employer is trying to create the impression that the grievor was unwilling to comply, representing an allegation of insubordination.

[188] The grievor also submits that the board report contains severe criticism of negligent misconduct and alleges that the grievor deliberately refused to follow required processes in her alleged failure to prepare for the arrival and orientation of a new employee and in her failure to complete performance assessments for an employee.

[189] The grievor asserts that the board report alleges a disloyal act in the form of the grievor's refusal in 2002 to participate in establishing a development plan that would have included management training and coaching. The employer is essentially alleging that the grievor refused to be collegial.

[190] She also argues that the board report alleges an unwarranted absence on the part of the grievor when she abruptly absented herself from the workplace starting in October 2003 without taking into account the employer's operation in a responsible manner. These statements are very condemnatory and comprise inflammatory rhetoric.

[191] The grievor denies all of the board report allegations of disciplinary offences and stated:

. . .

> *It is not necessary for the grievor to demonstrate that the employer was wrong in formulating the particular disciplinary offences. The grievor must, rather, demonstrate on a prima facie basis that the Employer had put in place a disciplinary action for some alleged deficiency. If so, this satisfies the "disciplinary action" condition of section 92(1)*(b)*(i). The Grievor respectfully submits that she has demonstrated this condition on a prima facie basis (and beyond).*

. . .

[192] The employer's disguised discipline in this case is analogous to the two-pronged employer strategy described in the adjudicator's decision in *Mallett*. In the grievor's case, the employer first tried to surplus her, but this attempt failed after the grievor successfully pursued her NJC grievance. The grievor rightly believed that the rescission of the April 8, 2004, letter required by the grievance decision would be the end of the matter, but the employer did not rescind the letter and undertook further tactics, reliant on the still-damaging board report, that caused and can cause financial penalty and demotion.

[193] According to the grievor, the *Steen* decision unveiled a similar two-pronged employer strategy behind its discharge of the employee in question. *Steen* considered the employer's tactics on the whole and found at page 32:

. . .

> *. . . that Mr. Williams had the idea. He wanted to be rid of Doug Steen. It fell to Mr. Long to implement this desire, as best he could. He didn't do it very well, so Gordon Boddez took it upon himself to 'cover up' by declaring Steen to be redundant and by giving him a pay-off of three months salary. Mr. Boddez's purported lay-off of Steen is nothing more than that, a purported lay-off. There existed no valid and bona fide reason to lay-off the Head of the Planning and Development Department, yet none of the staff, as of September 13, 1976, divorced from adverse subjective considerations concerning Doug Steen.* ***The purported lay-off was really disciplinary action camouflaged as a lay-off . . . . No proper and just cause for discharge has been made out by the employer.***
>
> . . .
>
> [Emphasis added]

In the grievor's case, there was no discharge, but the sanction was demotion and financial penalty. A discharge is legally the same as demotion and financial penalty under section 91 of the *PSSRA*.

[194] *Lo* is another decision that found numerous instances where the employer attempted to disguise discipline in circumstances that closely resemble the grievor's case. The grievor outlined circumstances in her case that compare to facts considered in *Lo*, which, for its part, concluded the following:

. . .

> *The evidence is overwhelming and demonstrates clearly that placing the grievor on surplus status was not done in the normal course of surplus or lay-off, that this was not carried out in accordance with the PSEA, PSER and WFA policies. I am of the opinion that this situation is disguised discipline and surely was done in bad faith.*
>
> *Therefore, I take jurisdiction of this case pursuant to paragraph 92(1)(b) of the PSSRA and I will treat this action as being a disciplinary action equating to a termination for cause.*

. . .

The grievor submits that, given the similarities of her case to the situation described in *Lo*, her case as well ". . . was not carried out in accordance with the *PSEA*, *PSER* and *WFA* policies. . . ." and that ". . . this situation is disguised discipline and surely was done in bad faith."

[195] The grievor discussed the role of bad faith in adjudications under the *PSSRA*, and outlined the various ways that the employer had exhibited bad faith in its treatment of her. The grievor, in her oral submissions, referred me to the following definition:

. . .

> *The phrase "bad faith," according to Black's Law Dictionary (6th ed.) (West: St. Paul. Minn., 1990), means among other things, "the opposite of good faith," "a design to mislead or deceive another," "a refusal to fulfill some duty or some contractual obligation," "not prompted by an honest mistake as to one's rights or duties but by some interested or sinister motive," "the conscious doing of a wrong because of dishonest purpose or moral obliquity" and "a state of mind affirmatively operating with furtive design or ill will."*

. . .

[196] The grievor argues that the employer demonstrated bad faith in the following specific respects: failing to implement the NJC decision; moving the grievor to an ES-05 position, even after the NJC grievance decision; seeking to distinguish between the ES-05 and ES-06 statements of qualifications; subverting annual performance review requirements; making its choice of an effective date for reclassification; and what she described as "giving the September 2003 speech."

[197] The grievor also discussed at length what she submits were serious procedural and substantive defects in the board report. With respect to the former, the grievor argues that there is reasonable apprehension of bias in the circumstances of her case, evidenced first by Mr. Friedlaender's pre-existing hostile disposition towards the grievor, and then by the fact that he had made up his mind even before writing the board report. A further procedural defect exists in the employer's failure to give the grievor an opportunity to respond to the September 2003 "speech" containing disciplinary allegations, or to the board report, where disciplinary allegations were the basis for finding the grievor was not competent when assessed against the ES-06 statement of qualifications.

[198] Regarding substantive defects, the grievor contends that the board report does not satisfy the employer's own requirements for the treatment of disciplinary issues or the conduct of annual performance reviews. It contains allegations that are contradicted by evidence from the employer's sources. Examples of such contradicted allegations are: that the grievor did not complete performance assessments for an employee, that she failed to meet with the employee, that she did not accept the offer of management training, and that she did not attempt to provide a briefing to the director on the status of a high-priority project ". . . before being ordered by her physician to remove herself from Mr. Friedlaender's constant bullying in the fall of 2003."

[199] Many of the board report statements, moreover, are cast as ambiguous and subjective innuendo. Examples of statements in the board report as outlined by the grievor include: "she has made no attempt to manage the situation [regarding a problem employee]," "Ms. Peters discontinued all communication with this employee," "[the grievor] indicated that she would not be willing to participate in mediation to repair the relationship," "[the grievor] absented herself from the workplace . . . ultimately for health reasons," "despite several attempts to encourage her to reconsider she . . . remained firm in her refusal [to prepare a development plan]," and "[the grievor] has been erratic at times."

[200] The decision in *Deering* found that an appraisal must be founded on good faith and reasonableness. The grievor's evidence demonstrates that, apart from being disguised disciplinary action, the board report and the September 2003 meeting with Mr. Friedlaender were conducted in a patently unreasonable fashion.

[201] The grievor closed her submissions by offering responses to several of the employer's arguments.

[202] The employer's distinction between "owning" or "occupying" a position is not relevant and has no bearing on the fundamental issue of the case, namely, whether the employer used a disguised disciplinary action that caused the grievor to suffer a demotion or financial penalty.

[203] The employer's reference to "constructive dismissal" is irrelevant. The grievor does not allege constructive dismissal.

[204] Arguments about the "merit principle" are not relevant, as the grievance does not pertain to the application of the merit principle.

[205] The employer argues that the decision to use an individual merit assessment, rather than conduct a competition, reflected the employer's good faith. The grievor responded that neither good nor bad faith can necessarily be implied by this decision. In this regard, the decision in *Zilberman* cited by the employer is immaterial, as it is concerned merely with whether an employer can staff a position after reclassification by competition, as opposed to appointment by individual merit. The grievor does not take issue, one way or another, with this aspect of the employer's discretion.

[206] The facts of *Browne* have no relevance. Disguised discipline, conducted in bad faith and contrary to administrative law principles, and causing demotion and financial penalty are not elements found in *Browne*.

[207] The employer seems to suggest that the legal concept of "demotion" is exclusively governed by paragraph 11(2)(*g*) of the *FAA*. This clause, at most, allows Treasury Board to ". . . provide for the termination of employment, or the demotion . . . ." It certainly does not somehow trump the jurisdiction of the adjudicator to consider whether disciplinary actions have caused demotion or financial penalty. To limit the meaning of "demotion" as proposed by the employer would render meaningless the term "demotion" in section 91 of the *PSSRA*. This would be a perverse result, and contrary to Parliament's intent to allow independent adjudicators to determine if disciplinary actions have caused a demotion or financial penalty.

[208] The fact of other recourses being available to the grievor is wholly immaterial for purposes of this grievance. The employer fails to compare carefully the jurisdiction

of the *PSEA* and that provided under the *PSSRA*. Given the express wording of section 91 of the *PSSRA*, and the express purpose of the grievance to challenge disciplinary action leading to demotion or financial penalty, it is clear that the *PSEA* does not somehow trump the Board's jurisdiction.

[209] Surely the grievor cannot, as the employer appears to suggest, be denied access to a section 91 adjudication because she may at some point advance or launch other grievances respecting other issues.

[210] *Lawson* purely concerns a staffing action and has nothing to do with discipline, bad faith or breaches of administrative law procedures.

[211] *Endicott v. Canada (Treasury Board)*, 2005 FC 253, found in the employer's book of authorities, does not support the employer's argument that government policies, rules and requirements are not binding on the employer. Rather than giving support for the sweeping proposition urged by the employer, the Federal Court stated that whether an internal directive creates rights enforceable in law depends on the intent and context of the directive. It said nothing more that is relevant to this case. Essentially, the grievor argues that there is a reasonable expectation that the employer, in the interest of fairness and promoting a healthy work environment, will follow its own policies, rules and requirements.

X. Further arguments for the employer

[212] The employer referred me to its oral arguments presented at the hearing on March 9, 2006, on which it continues to rely.

[213] It is the grievor's burden to prove disguised discipline, and it is a heavy onus. As noted in *Schofield*, cited by the grievor, "Even if it could be argued that the early termination of the grievor's assignment can be viewed as disciplinary action (and this would be a heavy onus on the grievor to demonstrate). . . ." this heavy onus must be discharged on the facts: i.e. is there clear and cogent evidence establishing a sham? The grievor's allegations are very serious charges against representatives of the employer. She has effectively accused them of lying and of a conspiracy. In this light, it is clearly not enough that the grievor establish a *prima facie* case. There must be clear and cogent proof.

[214] The employer presented a summary chronology of the material facts in this case to support its contention that the employer acted on concerns about the managerial abilities of the grievor and not with an intent to discipline her. The employer's assignment of the grievor to perform ES-06 duties effective November 8, 2001, was an acting appointment that provided the grievor a development opportunity. The grievor's performance assessment for 2001–2002 provides evidence that the employer gave the grievor development opportunities and that her related managerial skills were an issue (Exhibit G-1, tab 2). There is a clear pattern of good faith here, showing that Mr. Friedlaender wanted to help the grievor develop. He testified that he invited the grievor to apply for the ES-06 Senior Negotiator, Land Claims, competition in spring 2002. When the grievor failed to qualify, Mr. Friedlaender then told Ms. Smith — as confirmed in her evidence — that he wanted to do something for the grievor, that he valued her skills and wanted to keep her in the unit. It was the grievor who turned down the employer's overture to undertake training and a mentorship, and it was her decision to return to ES-05 duties (Exhibit E-7).

[215] The performance appraisal conducted by Mr. Friedlaender for 2002–2003 (Exhibit G-1, tab 2) documented concerns about the grievor's managerial abilities well before the April 2004 board report. Based on several further months of experience and the results of the ES-06 competition, Mr. Friedlaender discussed his concerns in detail at his meeting with the grievor on September 16, 2003. The nature of the concerns outlined by Mr. Friedlaender was established by his notes of the meeting (Exhibit E-9). Two days after the meeting, Mr. Friedlaender sent an email to the grievor in which he recommended to her a course on Public Service management (Exhibit G-1, tab 8). This action was consistent with Mr. Friedlaender's depiction of the meeting as being focused on his concerns relating to the grievor's managerial abilities. Mr. Friedlaender received a sharply worded email from the grievor on October 10, 2003, but his response shows a very professional tone and indicates his good faith in moving forward with a new job description (Exhibit E-8).

[216] Later in October the grievor again turned down overtures about development training, this time from Mr. Goldie, and also turned down the offer of a facilitated dialogue (Exhibit E-17).

[217] Notes of meetings in January 2004 between Mr. Friedlaender and the grievor (Exhibits G-17 and G-18) once more disclose concerns about the grievor's abilities that

were later reflected in the board report, and show that the board report's focus on managerial issues was neither new nor somehow a sham. The board report itself shows no evidence of bad faith or a sham. Mr. Friedlaender was the grievor's direct supervisor and the person in the best position to assess her abilities. The issues he raised in the board report were not newly contrived but, rather, consistent with the record of concerns already established.

[218] There is no burden on the employer to prove the board report. The burden falls to the grievor, not simply to raise concerns about its contents or the decision itself, but to cross the high threshold of establishing that the board report is a sham, that it is completely without foundation and that it is a guise. There is no presumption of disguised discipline for administrative staffing actions.

[219] The cases relied on by the grievor — *Matthews*, *Mallett*, *Lo*, *Steen* and *Laird* — are all decisions where the adjudicator made a finding of fact that a lay-off was a guise, the necessary finding to locate jurisdiction. These cases, however, stand only for the proposition that in an alleged lack of work scenario where it can be established that there is not a lack of work the employer's attempt to lay off an employee is disciplinary in nature. This proposition does not apply to this case.

[220] *Deering* is also not relevant. The issue in *Deering* was whether the employer was justified in terminating an employee for non-disciplinary reasons based on the employer's decision to revoke the employee's driver's license. The factual finding of bad faith in the decision revolved heavily around the failure of the employer to accommodate the employee's disability, and does not support a finding of bad faith in the present case.

[221] All of the cases about disguised discipline cited by the grievor are fact-specific. A finding of bad faith or sham in one does not assist in making a similar finding in a different case.

[222] The employer submits that the evidence establishes the following: Mr. Friedlaender recruited the grievor into the unit. He provided her with acting opportunities. He encouraged her to compete for the ES-06 position in 2002. In June 2002 the grievor was deemed not to meet the requirements of the ES-06 position by a four-person panel, despite the fact that she had been acting in the position for eight months. (This confirms the testimony of Ms. Ryan-McNee that acting can be for

development purposes and does not indicate that an employee is performing all of the duties.) Mr. Friedlaender valued the grievor, wanted to help her develop and wanted to keep her in the unit. After the competition, the grievor was offered a personally tailored development plan and she refused it. After this point, the grievor's managerial skills and interpersonal abilities did not improve, but got worse. The grievor dug in and became confrontational with management. The board report raised concerns that were well-documented and had been brought to the attention of the grievor for a significant amount of time.

[223] As previously argued based on *Browne* and *Smith*, an employee must be moved to a position with a lower rate of pay to be demoted. There is no evidence that the grievor ever occupied an ES-06 position as a term or indeterminate employee. The only evidence is that she acted as an ES-06. The employer argued that the fatal flaw in the grievor's argument alleging a demotion is the assumption that "I act therefore I am."

[224] To be appointed to an indeterminate position at a higher level requires a formal instrument of appointment where someone with delegated staffing authority makes a written offer that is accepted. *Oriji* examined the issue of whether an oral offer of an appointment is good enough. We do not have this situation in the present case. *Oriji* does not stand for any proposition respecting an acting appointment. It has also been overturned by more recent Federal Court decisions that have found that a person does not become an employee until there is a valid instrument of appointment (see *Professional Association of Foreign Service Officers v. Canada (Attorney General)*, 2003 FCA 162).

[225] The decision in *Brault* also does not concern an acting appointment. *Brault*, in fact, stands entirely against the grievor's case in that the Supreme Court ruled in this decision that there must be a merit-based selection process as a prerequisite to an appointment.

[226] The adjudicator in the recent decision in *Estwick and Quintilio v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 14, agreed with the requirement for a formal instrument of appointment:

. . .

> [*79*] *Section 22 of the PSEA, which governs hiring in the Public Service, states that an appointment takes effect on the*

> *date specified in the instrument of appointment. There is no evidence that the grievors were given a formal instrument of appointment such as a letter of offer.*
>
> [*80*] *The grievors argued that the fact that there was no formal instrument of appointment was a mere technicality. I do not agree with their proposition.*
>
> . . .

[227] The grievor's argument that she was doing ES-06 work is an acting pay issue or a classification issue. Once an employee's position is reclassified upward, the employee must either compete for the position or be assessed against individual merit (Exhibits E-20 and E-21, section 10 of the *PSEA*, and subsection 5(2) of the *PSEA Regulations*). *Zilberman*, quoted above, confirms that appointment by individual merit is not mandatory. An acting appointment does trigger appeal rights under section 21 of the *PSEA*, but it does not become a term or indeterminate appointment.

[228] The grievor testified that the employer's grievance decision of September 12, 2004 (Exhibit G-8), appointed her to the ES-06 position. This is wrong. The decision simply provided acting pay arising out of the operation of a collective agreement provision (Exhibit E-26).

[229] *Storey*, cited by the grievor, concerns the possible unfair advantage that an employee temporarily assigned to perform higher-level duties may enjoy. It confirms that an individual has to be appointed through a merit-based selection process.

[230] *Majdan*, also cited by the grievor, shows clearly that the appropriate process for challenging a staffing decision lies under the *PSEA*.

[231] The summary of the decision in *Keating* found in the grievor's book of authorities is wrong. The full decision, tabled by the employer, includes a crucial comment of the decision maker to the effect that ". . . I know of no way a department can 'move' an employee to a higher level except by making an appointment."

[232] *Fortin*, in the grievor's book of authorities, has been overturned by *Canada (Attorney General) v. Fortin*, 2003 FCA 376.

XI. Final comments by the grievor

[233] The grievor offered brief comments on the employer's final arguments. She contested the depiction of one of her emails as "strongly worded," and indicated that it

had been composed on her behalf by her union. She also challenged the significance of the offer of development training initiated by Mr. Friedlaender on September 18, 2003 (Exhibit G-1, tab 8). She did, in fact, respond positively to his suggestion, but later learned that the course in question was full. This action by Mr. Friedlaender cannot be taken as a concerted effort to provide the grievor with development opportunities. Similarly, other development options allegedly offered to the grievor do not establish concern for the grievor on the part of the employer, because the management training suggested pertained to the Land Claims role that she had left. None of the so-called development opportunities suggested by the employer pertained to the grievor's development in her substantive position.

[234] The grievor observed, with respect to the June 2002 ES-06 competition that any employee who enters a competition is at risk. The employer can use the results for other purposes, as it did in the grievor's case.

[235] When both parties completed their arguments, I asked the grievor her opinion on what might be the effect on the rest of her case were I to find, hypothetically, that she had not been appointed to the ES-06 level and, therefore, not demoted to the ES-05 level. The grievor's response appeared to accept that the "fact" of her appointment to the ES-06 level was pivotal to her argument and that, without this fact, there is "nothing left." I also asked the grievor whether she anticipated presenting substantial further evidence on the merits in the event that my decision accepts jurisdiction over her reference to adjudication. She indicated that in that event she would probably have some further evidence to present regarding the board report and the September 2003 meeting with Mr. Friedlaender, but that I probably did have most of the evidence before me now.

XII. Reasons

[236] Through her evidence and submissions, the grievor has depicted a continuing and duplicitous strategy against her on the part of the employer. This strategy allegedly featured an effort to get rid of her by declaring her surplus in connection with the upward reclassification of her position. At the heart of the strategy was an assessment of her qualifications for the reclassified position that was motivated by bad faith and built upon disguised disciplinary actions. The employer found the grievor unqualified and, according to the grievor, demoted her and levied discipline resulting in a financial penalty. When the decision to surplus her was overturned, the

employer took other invidious actions against her to maintain her demotion and continue the financial penalty. In the course of drawing this picture, the grievor levelled many allegations against representatives of the employer that, if proven, would amount to a wide-ranging indictment of the integrity and honesty of some of the persons involved.

[237] As for the employer, counsel's final remarks at the hearing asked me, in effect, to protect the good name of the managers implicated in this case against charges that, according to the employer, misrepresent the nature of the actions taken in respect of the grievor, as well as the motivations underlying these actions. The employer did not demote the grievor, nor did it at any time impose a disciplinary penalty. The employer did find the grievor unqualified for her reclassified position, but then took steps to try to assist her and re-establish her in a secure position at her substantive level.

[238] Both parties, it seems to me, are looking for personal vindication in this decision, perhaps understandably so. This decision, however, is not in the first instance about endorsing one of the two conflicting portraits of what obviously became a very troubled relationship between a grievor and her employer. The primordial issue, instead, is whether I have statutory jurisdiction to consider the merits of the grievance at all. Answering this question, in my view, does not require addressing the full panoply of issues and allegations canvassed in the course of the hearing.

[239] The employer objects to my jurisdiction to hear the reference to adjudication filed by the grievor on the grounds that the facts of the grievor's case disclose neither discipline resulting in a financial penalty nor a demotion. As such, an adjudicator has no authority to consider the grievance under paragraph 92(1)(*b*) of the *PSSRA*. The employer also argues that the pith and substance of the grievor's case is a challenge to a staffing decision: i.e., the conclusion that the grievor failed to meet the qualifications established for her position as reclassified to the ES-06 level. As there exists an alternate administrative procedure for redress where an employee wishes to contest a staffing decision (filing a complaint or appeal under the *PSEA*), section 91 of the *PSSRA* serves to deprive the grievor of access to the grievance procedure. Section 92, in turn, deprives the adjudicator of jurisdiction.

[240] The grievor, for her part, responded that actions taken by the employer reveal a pattern of disguised discipline. In particular, the employer's finding in the April 2004

board report that she did not meet the qualifications for the reclassified ES-06 position, and the employer's consequent decision to re-establish her at the ES-05 level, represents a disguised demotion and a disciplinary financial penalty imposed on the grievor. As such, the grievor's reference to adjudication falls within the ambit of paragraph 92(1)(*b*) of the *PSSRA*.

[241] The mandate of an adjudicator is set out in subsection 92(1) of the *PSSRA*:

. . .

> *92(1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> *(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*
>
> *(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),*
>
> *(i) disciplinary action resulting in suspension or a financial penalty, or*
>
> *(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the* Financial Administration Act, *or*
>
> *(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,*
>
> *and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.*

. . .

[242] There is no allegation in this case that requires that I interpret a provision of the collective agreement applicable to the grievor and the employer. The grievor's reference to adjudication, therefore, does not engage paragraph 92(1)(*a*) of the *PSSRA*.

[243] Accepting jurisdiction in this matter, then, depends upon the grievor demonstrating that the subject of her grievance is ". . . disciplinary action resulting in suspension or a financial penalty . . . ." under subparagraph 92(1)(*b*)(i) or a ". . . demotion pursuant to paragraph 11(2)(*f*) or (*g*) of the *Financial Administration Act* . . . ." under subparagraph 92(1)(*b*)(ii).

A. Was there disciplinary action resulting in a financial penalty? (Part I)

[244] The grievor argues that events surveyed during her testimony represent discipline or disguised discipline on the part of the employer. Whether direct or disguised, discipline must result in a suspension or a financial penalty if it is to qualify as a subject for adjudication under subparagraph 92(1)(*b*)(i) of the *PSSRA*.

[245] The grievor contends that the board report of April 8, 2004 (Exhibit G-1 tab 1), relied on allegations of disciplinary offences in drawing the conclusion that she did not meet the qualifications established for the reclassified ES-06 position. The report, a disciplinary document for this reason, resulted in a reduction in the grievor's pay from the ES-06 level to the ES-05 level ". . . since April 22, 2004." She also states that the failure of the employer to rescind the board report opens the possibility of harm to her future employment prospects, amounting to a ". . . reasonably [*sic*] likelihood that a financial penalty will be or is being caused . . . ."

[246] Looking at the record, there appears to be some imprecision related to the timing of the grievance against the alleged discipline and, by extension, to the timing of the financial penalty to which it refers. The record shows that the grievor originally filed a reference to adjudication to the Board on June 16, 2005. In this original reference, the grievor indicated that she had submitted her grievance at the first level of the grievance procedure on March 24, 2005. The grievor further indicated that she had not received a final-level response from the employer to her grievance.

[247] At the hearing, the grievor tabled a grievance form, the subject of which was a notification dated March 24, 2004 (Exhibit G-32). The subject matter of the grievance described in this form is the effective date of the reclassification of the grievor's position to the ES-06 level. The grievor does not refer to this as a disciplinary penalty in her statement of the details of the grievance.

[248] There is, on file, a lengthy document dated March 23, 2005, attached to the original reference to adjudication form. In this document, the grievor states:

. . .

> *I hereby am resuming, in amended form, the grievance I presented to management June 29, 2004. I put the June 29, 2004 grievance in abeyance on July 8, 2004, as a result of Leda Smith's professed confusion on "sorting out the issues/concerns which are interlinked and establishing a*

> *proper process to address them" (email from Leda Smith dated June 7, 2004). I agreed to put my June 29, 2004 grievance in abeyance, pending satisfactory progress in other grievances already filed and on the understanding that I could resume my June 29, 2004 grievance at my discretion (email from me dated July 8, 2004). As progress has been unsatisfactory in the other grievances I am resuming my June 29, 2004 grievance, in amended form as described below.*
>
> *The grievance I filed June 29, 2005,* [*sic*] *and which I am now resuming, is of a continuous nature and refers to the course of conduct and actions which have been carried out by management from January 2001 and are continuing to the present date.*
>
> *I grieve that management's conduct and actions constitute disciplinary action resulting in termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act . . . . I am presenting this grievance at the final departmental level, in accordance with Article 40.18 of the Agreement between Treasury Board and the Canadian Association of Professional Employees.*
>
> *I grieve that management has taken various disciplinary actions leading to demotion or dismissal . . . The collective effect of these unlawful efforts to discipline, demote and dismiss me, which continues to this day, is that I have suffered, and continue to suffer, various forms of injury, including, without limitation, loss of salary, injury to my health, defamation, loss of professional reputation and loss of future career prospects. The most recent incident of management's disciplinary actions toward me resulting in injury is my receipt in the mail on February 21, 2005 of a letter dated February 16, 2005 from Mr. Jeff Goldie. I grieve that, had it not been for the disciplinary actions taken by management in violation of established policies, procedures, codes of conduct and directives governing human resources, I would have been properly appointed to my reclassified position . . . .*
>
> . . .
>
> [Emphasis added]

[249] The grievance form submitted on June 29, 2004, is not on file or in evidence.

[250] On June 22, 2005, the Board informed the grievor that she had incorrectly used a form introduced for the new *Public Service Labour Relations Act (PSLRA)* to submit her reference to adjudication. As she had indicated a date for the presentation of her grievance to the employer that predated April 1, 2005, the effective date of the new

legislation, the Board asked the grievor to resubmit her reference to adjudication on the Form 14 application that was appropriate under the *PSSRA* for grievances launched prior to April 1, 2005. The grievor complied and submitted a Form 14 reference to adjudication dated July 15, 2005. On this form, the grievor reported that her grievance was presented at the final level only on March 24, 2005. In a written letter accompanying her Form 14 (on file), the grievor noted:

. . .

> *Your June 22, 2005 letter requested a copy of the grievance that I originally filed at the first level in my department. I did not file this grievance at the first level. Two copies of the grievance which I filed at the final level, and which is the subject of this reference to adjudication, were included in my correspondence to you which you received June 16, 2005.*

. . .

[251] If I rely on this correspondence from the grievor, the grievance before me was presented only at the final level, and the presentation date for the grievance was March 24, 2005. How this grievance relates to the grievance allegedly filed at the first level on June 29, 2004, is unknown, since I do not have the text of the latter before me. Whether either grievance explicitly refers to the date of April 22, 2004, after which, according to the grievor, the employer reduced her pay from the ES-06 level to the ES-05 level — an alleged financial penalty of disciplinary origin — is also not exactly clear.

[252] The lack of precision on these points in the record and the evidence before me is disturbing. I do note, however, that the employer did not ask me at the hearing to consider any issue of timeliness in the submission of the grievance, to challenge a procedural defect, or to otherwise question the date of the grievance before me. There is, however, an earlier letter on file dated August 5, 2005, in which the employer took the position that the grievor never submitted her grievance at the final level, thus failing to comply with a precondition to jurisdiction stated in subsection 92(1) of the *PSSRA*.

[253] I believe that the safest interpretation of the evidence and the submissions in this case is that the grievor's pay did change from the ES-06 level to the ES-05 level beginning after April 22, 2004, and that this change is the primary financial penalty of disciplinary origin that the grievor alleges in her submissions. In Exhibit E-24, at least,

there is confirmation of the fact that a grievance decision later issued by the employer (Exhibit G-8) had the effect of paying the grievor at the ES-06 level only until April 22, 2004. There is no other official pay record before me on which I can rely to confirm this date or reach a different conclusion.

[254] While I remain concerned that I do not have a grievance form that clearly identifies April 22, 2004, as the day after which an alleged financial penalty was imposed, or a clear record of what may have transpired in the presentation of a grievance or grievances prior to the date of March 24, 2005, as subsequently specified in the grievor's Form 14, I will refrain from any ruling that there is a procedural defect in these circumstances, particularly given that the employer did not present arguments at the hearing on these points.

[255] On a different preliminary issue, I have read closely the grievor's definition of the nature of the disciplinary penalty or penalties that she contests. I am unable, in my view, to consider one aspect of her claim: The grievor alleges the possibility of harm to her future employment prospects, amounting to a ". . . reasonably [*sic*] likelihood that a financial penalty will be or is being caused . . . ." The grievance process and grievance adjudication pre-eminently address real actions taken by the employer and their effects, or the employer's lack of action in specific fact circumstances, rather than the likelihood of a harm or penalty that may or may not occur at an undefined moment in the future. The grievor's statement regarding the ". . . likelihood that a financial penalty will be . . . caused . . . ." in respect of "future employment prospects" lacks the specificity necessary for making a finding. This is not a situation, in my opinion, where there is sufficient certainty that a prospective harm will occur as to allow an adjudicator to find that element mature for purposes of making a ruling (see, in this regard, *Barr and Flannery v. Treasury Board (Department of National Defence)*, 2006 PSLRB 85, at paras. 126-7).

[256] Another element of the grievance, as stated by the grievor, requires special preliminary attention: "The grievance I filed . . . and which I am now resuming, is of a continuous nature and refers to the course of conduct and actions which have been carried out by management from January 2001 and are continuing to the present date." I understand that the grievor takes the position that I should not examine just one disciplinary event, but rather I should also consider as disciplinary a deliberate

course of conduct by the employer consisting of many individual acts, spread over a longer period.

[257] The theory of discipline here resembles the situation where a complainant relies on establishing a pattern of offending behaviour over time to substantiate a case of alleged harassment. In such a case, individual acts in and of themselves, if assessed discretely, may or may not conclusively amount to harassment, but taken together as a pattern, they reveal the alleged offence. In the grievor's cause of action, she contends that there is an overall pattern in the behaviour of the employer towards her which reveals discipline. She states that ". . . [t]he collective effect of these efforts to discipline, demote and dismiss me, which continues to this day, is that I have suffered, and continue to suffer, various forms of injury, including, without limitation, loss of salary, injury to my health, defamation, loss of professional reputation and loss of future career prospects." This pattern of employer actions builds up to the April 2004 board report, to the decisions which flow from that report, and then later to Mr. Goldie's letter of February 16, 2005. From the way the grievor argues her case, I believe that she goes further, however, by characterizing various of the preceding component events of the pattern as themselves disciplinary, and as having resulted in the various types of harm cited by the grievor, including financial. This raises some difficulties.

[258] I accept that a theory of discipline can be based on asserting the existence of a pattern of events comprising the discipline, or on arguing that a culminating act or acts can only be understood as disciplinary against the backdrop of a pattern of earlier decisions or events. This type of theory opens the history of a case to review in a way, or to a degree, that might not be appropriate elsewhere. Still, an adjudicator must consider such a theory within the normal jurisdictional limitations and conventions. I believe, for example, that I am not in a position to rule whether individual actions or events prior to the April 8, 2004, board report and the April 22, 2004, change in the grievor's pay were themselves disciplinary in nature, as the grievor alleges, in the absence of persuasive evidence that these individual actions or events resulted in a suspension or a financial penalty at the time the alleged discipline occurred, or within a reasonable period thereafter. My mandate as an adjudicator does not extend to a review of all instances of discipline, only those that result in a suspension or a financial penalty. Where the link between an alleged disciplinary event and the alleged financial penalty is distant in time, tenuous or otherwise indirect or merely speculative, it becomes difficult, if not impossible, to find that the discipline that

allegedly occurred itself resulted in a financial penalty. In my view, there can be no presumption that the employer intended to impose a financial penalty as a result of a specific disciplinary event or infraction if the penalty is not reasonably proximate in time to the event and demonstrably linked to that event in the employer's thinking and actions.

[259] Timeliness is also part of the issue here. If the grievor considered an earlier action or event to be disciplinary, the opportunity was available to her to grieve that action or event at the time, within the periods established by her collective agreement. The absence of such a grievance normally serves as an insurmountable bar to an adjudicator subsequently finding that the action or event in question was disciplinary within the meaning of subparagraph 92 (1)(*b*)(i) of the *Act*.

[260] The example of the grievor's encounter with Mr. Friedlaender on September 16, 2003, illustrates my concerns. The grievor has repeatedly described this event as disciplinary, or as involving disciplinary allegations made by Mr. Friedlaender, resulting in harm to her. As there is no evidence that the employer imposed a financial penalty in the period immediately following this meeting, or as a reasonably proximate result of this meeting, I do not believe that it is open to me in my decision to rule that this event was disciplinary. It is possible that the meeting was disciplinary in nature but, without a financial penalty, the alleged discipline was not of the type that can be reviewed under subparagraph 92(1)(*b*)(i) of the *Act*. Moreover, I have no evidence that the grievor presented a grievance at the appropriate time to contest the September 16, 2003, meeting as having imposed discipline resulting in a financial penalty. This further bars me from making any explicit ruling about this event. The same observations apply to other earlier events in the alleged pattern of continuing discipline that the grievor seeks to trace back to as early as January 2001.

[261] All of this said, it is nonetheless open to the grievor to use evidence about the September 16, 2003, meeting or about other prior events to support an argument that there was a discernible and significant pattern in the employer's actions leading up to the April 2004 board report, and to the change in the grievor's pay as of April 22, 2004. Such evidence may assist the grievor to establish disciplinary intent — or the disciplinary disguise — of the employer's actions in April 2004 or later. The key jurisdictional issue remains, however, whether these actions, and not the prior events, were disciplinary and resulted in a financial penalty. If the grievor cannot demonstrate

that the culminating actions were disciplinary and resulted in a financial penalty, viewed with the benefit of all of the evidence of prior events, then her case will probably fail. While it might be possible to conceive of a situation where discipline is found in a global pattern of employer actions where no culminating disciplinary event or penalty is established, or where none of the component elements making up the pattern individually are shown to comprise discipline or to involve a financial penalty, these scenarios strike me as being quite unlikely.

[262] Did the change in the grievor's pay from the ES-06 level to the ES-05 level beginning after April 22, 2004, resulting from the board report of April 8, 2004, constitute a disciplinary measure, direct or disguised, resulting in a financial penalty? To address this question, I believe that I need to turn first to the grievor's parallel allegation that the employer's actions should be interpreted as a demotion or a disguised demotion. Understanding whether there was a demotion immediately following April 22, 2004, or later is critical to determining the nature of the pay actions taken by the employer. As the grievor appeared to concede when I put the question to her at the end of the hearing, if the grievor's substantive position up to April 22, 2004, was not at the ES-06 level, she cannot have been demoted when her pay reverted to the ES-05 level. Put differently, the allegation that the end of ES-06 pay after April 22, 2004, comprises a disciplinary penalty depends, at least in substantial part, on asserting that the employee enjoyed a continuing entitlement to ES-06 pay by virtue of having been appointed to that level. If she was not substantively appointed to the ES-06 level, there was no demotion, and the subsequent change in pay to the ES-05 level is cast in a different light.

B. Was there a demotion?

[263] Subparagraph 92(1)(*b*)(ii) of the *PSSRA* identifies a demotion as an action taken by the employer pursuant to paragraph 11(2)(*g*) of the *FAA*:

. . .

> *11(2) Subject to the provisions of any enactment respecting the powers and functions of a separate employer but notwithstanding any other provisions contained in any enactment, the Treasury Board may, in the exercise of its responsibilities in relation to personnel management including its responsibilities in relation to employer and employee relations in the public service, and without limiting the generality of sections 7 to 10,*

. . .

> *(g) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed in the public service, and establishing the circumstances and the manner in which and the authority by which or by whom these measures may be taken or may be varied or rescinded in whole or in part;*

. . .

[264] I note that the grievor in her submissions challenged whether the legal concept of demotion is exclusively governed by this section of the *FAA*. She argues, to the contrary, that limiting the meaning of demotion to the parameters of the *FAA* is contrary to Parliament's intent to allow an independent adjudicator to determine whether disciplinary actions have caused a demotion or financial penalty. I respectfully disagree. An adjudicator must take the fact that paragraph 92(1)(*b*) cross-references paragraph 11(2)(*g*) of the *FAA* as a binding indication that Parliament intended that the concept of demotion must, for purposes of determining an adjudicator's jurisdiction, relate to the exercise of authority pursuant to paragraph 11(2)(*g*) of the *FAA*. To the extent that jurisprudence interpreting the exercise of authority pursuant to paragraph 11(2)(*g*) of the *FAA* has defined what a demotion is, an adjudicator must apply the law accordingly.

[265] As confirmed by the adjudicator in *Browne*, cited above by the employer, a demotion within the meaning of the *PSSRA* and the *FAA* to which it refers occurs where both an employee's classification and pay changes. An employee is demoted when she or he moves to, or is placed in, ". . . a position at a lower maximum rate of pay . . . ." A demotion, therefore, requires there to have been a prior appointment to a higher-level classification for which the higher-level pay is an entitlement.

[266] The employer argues in this case that it never appointed the grievor on a substantive basis to the ES-06 level. It contends that her substantive classification throughout remained at the ES-05 level. The employer did appoint the grievor on an acting basis to the ES-06 level, and the grievor received acting pay at this level. The employer argues that these two facts, however, cannot be taken to establish that the grievor had, at any point, acquired ES-06 as her substantive classification level. When the employer reclassified the grievor's substantive ES-05 position to the ES-06 level, the *PSEA* and its *Regulations* required the employer to conduct a merit assessment as a

precondition of appointing the grievor to the ES-06 level. This assessment disclosed that the grievor did not meet the newly established qualifications for the ES-06 position. As a result, she was not appointed to the ES-06 level. When the grievor ceased to perform ES-06 duties on an acting basis, acting pay ended.

[267] The grievor variously asserts that she was appointed to the ES-06 level "for all intents and purposes" when she was appointed to her substantive position effective January 2, 2001, when she continuously performed duties consistent with the ES-06 level thereafter, when her satisfactory performance of these duties was recognized by the employer through annual appraisals, and when her position was eventually reclassified to the ES-06 level in 2004. She rejects as arbitrary and unfounded the employer's position that her substantive position remained at the ES-05 level throughout. The employer, according to the grievor, conspired to remove her from the ES-06 level when it used the opportunity of rewriting her job description, reclassifying it, and then conducting a bad faith and biased assessment of her qualifications to determine that she did not meet the requirements of the ES-06 statement of qualifications. She was then demoted when the employer "took away" the duties of the ES-06 position and eventually established her in a different ES-05 role.

[268] There is a very considerable body of evidence before me elaborating these competing stories. There are, however, a few basic points that, in my view, determine the issue.

[269] The position of Senior Advisor, Operations, to which the employee was appointed effective January 2, 2001, was classified at the ES-05 level, as indicated in the formal letter of appointment accepted by the grievor (Exhibit E-1). There is no subsequent letter of appointment that indicates that the grievor was ever promoted to the ES-06 level. The grievor, in cross-examination, herself confirmed that she never successfully competed for an ES-06 position, or received at any subsequent time a letter of appointment to the ES-06 level analogous to the ES-05 appointment letter of 2001.

[270] When the grievor performed ES-06-level duties for the first time, the assignment took the form of an acting appointment to the position of Senior Negotiator, Land Claims. The appointment began November 5, 2001 (Exhibit E-6). The grievor's own testimony confirmed that this was an acting situation. Her performance appraisal dated June 24, 2002, stated that "In November 2001, Karen took on the responsibilities

of the position Senior Negotiator, Land Claims, ES-06, on an acting basis, in addition to her normal responsibilities. . . .” (Exhibit G-1, Tab 2) The employer wrote to the grievor on June 13, 2002, to offer her “. . . an extension of your acting appointment from July 4, 2002 to August 4, 2002. . . .” (Exhibit G-37). The grievor, adding a condition, accepted the extension. The grievor testified that shortly thereafter, she made the decision to end the acting situation, as confirmed, in her view, by Exhibit E-7. The record is thus clear that the grievor’s first performance of ES-06-level duties at no point involved her substantive appointment to the ES-06 level.

[271] The grievor’s second performance of ES-06-level duties relates to the employer’s reclassification decision. The employer reclassified the grievor’s substantive Cost Sharing position to the ES-06 level effective March 11, 2004 (Exhibit G-14). This reclassification decision triggered the requirement under the *PSEA* and its *Regulations* to conduct a merit assessment, which the grievor failed. It also involved a decision about the retroactive application of the reclassification, and whether this determination would then result in retroactive acting pay for the grievor.

[272] The grievor presented a grievance at the first level on April 30, 2004, contending that the effective date of the reclassification should be January 1, 2001 (Exhibit G-32), the date of her appointment to the ES-05 level. The evidence indicates that the grievor also presented two other grievances at this time, one claiming acting pay and the other contesting the assessment of her qualifications (Exhibit G-8), although the texts of these grievances are not on record. The employer’s second-level grievance response, dated September 12, 2004, granted the grievor acting pay “. . . at the ES-06 level for undertaking duties and responsibilities of the Manager, Cost Sharing Operations position for the period August 1, 2002 to April 22, 2004. . . .” (also Exhibit G-8).

[273] Here again, this record does not establish that the grievor was appointed substantively to the ES-06 level, only that she was paid for performing ES-06-level duties on an acting basis. The authority stated by the employer for this payment was the acting pay provision contained in Article 27 of the grievor’s collective agreement (Exhibit E-26).

[274] The employer notified the grievor on April 8, 2004, that she was an “affected employee.” It then confirmed in writing on April 21, 2004, that the grievor “. . . continue[d] to be an indeterminate ES-05 employee and you remain in position 29740

at the ES-05 level (even though the position has been reclassified to ES-06). . . ." (Exhibit G-5). The employer subsequently rescinded the notification of "affected status" as the result of a NJC grievance (Exhibit G-3).

[275] This grievance decision did not affect the fact that the grievor's substantive classification remained at the ES-05 level. The decision had the limited effect of verifying that the circumstances faced by the grievor in April 2004 were not a valid work force adjustment situation within the meaning of the WFAD. This determination did not and could not alter the grievor's substantive classification or have the effect of appointing her to the ES-06 level.

[276] Without unequivocal evidence of an official, substantive appointment to the ES-06 level in any of the above, I am left to consider the grievor's counterargument that the employer, through its actions, did make a *de facto* appointment. The grievor has advanced a variety of propositions to this effect. At one point in her argument, she contends that her original appointment, effective January 2, 2001, required her to assume significant new managerial duties on an indeterminate basis. These duties, according to the grievor, were parallel to those assigned to the two other management positions in the FACS, which were classified at the ES-06 level, and of no less responsibility or value. Invoking the decision in *Storey*, the grievor argues that she must be considered to have been appointed as an ES-06 on that date.

[277] Besides flying in the face of the ES-05 level indicated in the appointment letter effective January 2, 2001, (Exhibit E-1), this argument in effect requires that I find that the grievor's duties as of that date were really ES-06 duties. An adjudicator's decision cannot, of course, have the effect of making a classification determination, given the operation of section 7 of the *PSSRA:*

. . .

> ***7.*** *Nothing in this Act shall be construed to affect the right or authority of the employer to determine the organization of the Public Service and to assign duties to and classify positions therein.*

. . .

I note as well that *Storey*, an appeal board decision under the *PSEA*, is of questionable assistance to the grievor. It ultimately holds, in my view, that there must be a merit-based selection to the higher level for a valid appointment to have occurred. There was

no selection process in respect of the grievor's January 2001 appointment which involved the ES-06 level.

[278] The grievor points to the employer's satisfactory evaluation of her performance in the higher-level ES-06 position as supporting evidence (Exhibit G-1, tab 2). While I might find this evidence curious, or even troubling, when set against the employer's subsequent determination that the grievor was unqualified for the reclassified ES-06 position, it is abundantly clear that a performance rating in respect of acting duties cannot prove that the employer has made a substantive appointment.

[279] The grievor returns then to her thesis that the employer's reclassification decision, which recognized her long-standing performance of duties properly classified at the ES-06 level, establishes a valid and binding basis for finding that she was appointed to the ES-06 level. She stated this claim at one stage in these specific terms:

. . .

> *. . . the Grievor argues that she was appointed at the ES-06 level, and that this was recognized when the department issued three sets of documents that reflect a retroactive effective date* [for the reclassification] *. . . . The instrument of appointment has been issued, and the effective date has been established as August 2002. The Grievor was receiving an ES-06 salary level immediately prior to April 21, 2004, when her title and duties were removed and she was demoted to the ES-05 level.*

. . .

The grievor, citing the decision in *Oriji* for support, referred specifically to the email exchange between Mr. McKenney and Ms. Smith, the Executive Committee decision of April 14, 2003 (Exhibit G-44), and the grievance decision of September 12, 2004 (Exhibit G-8), as documents that satisfy all of the requirements of an instrument of appointment to the ES-06 level.

[280] Were any of these documents a valid "instrument of appointment" to the ES-06 level, as the grievor contends? The *PSEA* is clear in its requirement that an appointment must be based on ". . . selection according to merit . . . ." made ". . . by competition or such other process of personnel selection designed to establish the merit of candidates . . . .":

. . .

> *10(1) Appointments to or from within the Public Service shall be based on selection according to merit, as determined by the Commission, and shall be made by the Commission, at the request of the deputy head concerned, by competition or such other process of personnel selection designed to establish the merit of candidates as the Commission considers is in the best interests of the Public Service.*

. . .

[281] There was, in this case, a merit-based selection process for the ES-06 level. It was the determination made by the employer, using an individual merit assessment process under subsection 10(2) of the *PSEA* that the grievor did not meet the qualifications required for the ES-06 Manager, Cost Sharing Operations, position:

. . .

> *10(2) For the purposes of subsection (1), selection according to merit may, in the circumstances prescribed by the regulations of the Commission, be based on the competence of a person being considered for appointment as measured by such standard of competence as the Commission may establish, rather than as measured against the competence of other persons.*

. . .

[282] A decision to reclassify a position is not a selection process. The selection process is a second, separate determination subsequent to the reclassification. The decision to reclassify does not measure the merits of a candidate or candidates. It is neither a competitive process nor an evaluation of competence. It is a determination made by the employer under the authority of the *FAA* that the duties of a position, as determined by the employer, are properly classified at a higher level when measured against the requirements of the appropriate classification standard. This, too, is a decision over which an adjudicator has no review authority under section 7 of the *PSSRA*.

[283] I find that none of the three documents referred to by the grievor can be considered instruments of appointment. The email exchange involving Mr. McKenney — I believe with Cindy Cooke rather than Ms. Smith, though it was copied to the latter (Exhibit G-43) — simply concerns a possible retroactive date for the ES-06 reclassification, and its salary implications. The Executive Committee decision

(Exhibit G-44) does nothing more than endorse a retroactive date for the reclassification ". . . if a reclassification is agreed to. . . ." The grievance decision (Exhibit G-8) grants acting pay, nothing else. Indeed, to the extent that it touches in any way upon an appointment, it can only be interpreted as confirming that one never occurred:

. . .

> *I have, therefore, concluded that the assessment of your qualifications at the ES-06 level is properly documented and I support the conclusion of your manager that you do not meet the qualifications at this level, at this time.*

. . .

[284] As to the alleged support in *Oriji* for the grievor's position, I respectfully suggest that the grievor has misconstrued the significance of *Oriji*. I see nothing in this decision that could be viewed as allowing a determination about reclassification, or pay on reclassification, to be interpreted as an instrument of appointment. In *Oriji*, the Federal Court found at the time that a verbal offer of employment to a successful candidate following a competition can be enforceable. In the grievor's case, there is no evidence of either a competition, a successful candidacy on the part of the grievor, or a verbal offer of employment to the ES-06 level. Moreover, as argued by the employer, the reasoning in *Oriji* has probably been overtaken by more recent Federal Court decisions such as the ruling in *Professional Association of Foreign Service Officers*.

[285] I conclude from this analysis and from the wider scope of the information before me that the employer never substantively appointed the grievor to the ES-06 level. It follows, therefore, that the grievor was never demoted from the ES-06 level within the meaning of paragraph 11(2)(*g*) of the *FAA*.

[286] If, in the letter of the law, there was no demotion in this case, might it still be open to me to find that a "disguised demotion" occurred?

[287] Adjudicators frequently assess arguments that acts of the employer comprise "disguised discipline." Considerable jurisprudence has accumulated over the years that provides guidance as to the types of actions or the nature of evidence that may be germane in proving discipline in "disguise." The concept of a "disguised demotion" is much more unusual. My understanding is that this concept might apply, for example, where there is an argument that a change of duties or of positions, while not a

demotion in form, nevertheless discounts or devalues an employee's role or status in an organization in the same or similar way as a formal demotion. In this sense, the concept of a "disguised demotion" bears a familial relationship to the concept of "constructive dismissal," but applied to a situation where the negative impact of an employer's decision on an employee falls short of an effective termination of the employment contract.

[288] Applying the concept of a "disguised demotion" or something akin to a "constructive demotion" into this jurisdiction is at least as fraught with hazard as importing the notion of a "constructive dismissal," for the same reasons as cited in *Browne* above. I do not believe that the grievor has laid a sufficiently solid foundation to allow me to venture into this difficult area. The onus is on the grievor to argue the criteria that would need to be met to prove a disguised demotion, and then to satisfy these criteria. I find, with respect, that the grievor has not met this onus.

[289] Before moving on, I note that the grievor, at a later stage in her argument, suggested that the February 16, 2005, letter from Mr. Goldie (Exhibit G-20) was also part of the strategy — a second, alternate line of attack — to demote her. In this letter, Mr. Goldie indicated the intention of management ". . . to establish a generic ES-5 work description for your position in the Cost Sharing Operations team. . . ." My understanding is that this document would become the job description for the position to which the grievor was to be assigned if she did not take up the opportunity of a different position in another part of the organization, an option also discussed in the letter. She did not take up this latter option, and the employer then, in the grievor's word, "dumped" her ES-05 duties and her into an empty position, causing the grievor to continue ". . . to suffer demotion and financial penalty."

[290] For reasons parallel to those outlined in respect of the employer's reclassification decision, I do not see in the evidence related to the re-establishment of the grievor in her position following Mr. Goldie's letter any persuasive indication of a demotion or disguised demotion. The grievor, at this point, apparently moved from one position to another with no change in her substantive ES-05 status. By definition, the ES-05 to ES-05 change is not a demotion. For it to possibly be found a disguised demotion, evidence establishing devaluation or discounting of duties or organizational status would be necessary, at the very least. I do not believe that the grievor has presented convincing evidence to this effect.

C. Was there disciplinary action resulting in a financial penalty? (Part II)

[291] I have found that the employer did not demote the grievor. When the grievor reverted to her substantive ES-05 role in April 2004, she ceased to be paid at the ES-06 level. She reverted to ES-05-level pay, the normal pay for her position at the ES-05 level and for her substantive ES-05 classification. Receiving pay at the normal level established for an employee's position and classification cannot, by definition, be considered a financial penalty. Through this fact alone, the grievor cannot establish discipline resulting in a financial penalty.

[292] Is there some other basis for the grievor to argue successfully that the evidence reveals a pattern of disguised disciplinary action resulting in a financial penalty?

[293] I indicated at the outset of these reasons that the onus lies with the grievor to prove her case. The Federal Court in *Valadares v. Canada (Treasury Board)*, [1994] F.C.J. No. 1296 (FCTD)(QL), held that a grievor's failure to present evidence to support the allegation of discipline was sufficient to deprive the adjudicator of jurisdiction under paragraph 92(1)(*b*) of the *PSSRA*:

. . .

> *3. I am of the opinion that the Deputy Chairman committed no error of law in her decision. Her factual finding that the applicant failed to adduce evidence to establish disciplinary action was reasonably open to her and ought not to be interfered with by the Court. Furthermore, the failure of the applicant to adduce evidence in support of his allegation of disciplinary action deprived the Deputy Chairman of jurisdiction to entertain the grievance.* [See paragraph 92(1)(b) of the Public Service Staff Relations Act.]

. . .

[294] In adjudication decisions under the *PSSRA* where the issue is disguised discipline rather than an overt or conceded disciplinary penalty, the standard of proof that a grievor must meet in order to sustain an allegation of discipline in disguise is not always clear. The grievor has submitted that she must only make a *prima facie* argument to support her contention. The employer argues that there is, instead, a "heavy" onus on the grievor to prove disguised discipline.

[295] In private sector arbitration cases where the parties disagree on whether discipline has occurred and a jurisdictional objection is advanced as a preliminary matter, arbitral practice normally requires that the grievor establish the act of discipline or demotion on a *prima facie* basis. Brown and Beatty, *Canadian Labour Arbitration,* 3rd ed., at 3:2411, describe the standard as follows:

. . .

> *In matters of discharge and discipline, the initial burden on the grievor is to establish a* prima facie *case, which is satisfied by proving the existence of a collective agreement, its coverage of the grievor at all material times, the fact of employment, and the act of discipline or discharge. Once the grievor makes out such a* prima facie *case, or it is conceded by the employer, the burden of proving that the action taken was justified then shifts to the employer, even in the absence of an express provision that discharge must be for just cause.*

. . .

[296] From this perspective, if a grievor's allegation is that certain acts comprise "disguised discipline," the grievor's burden is to identify the disguise and successfully advance a *prima facie* argument of how the disguise conceals discipline. A *prima facie* case for discipline need not be fully convincing or compelling. Reasonable doubt can remain that the alleged act or acts occurred, but there must be at least some credible evidence for believing that the employer took an action or engaged in behaviour that could be considered as discipline, or as having the same effect as discipline.

[297] In *Grottoli v. Canada Customs and Revenue Agency,* 2001 PSSRB 87 (QL), the adjudicator faced a preliminary decision on whether the revocation of an appointment by the employer was, as alleged by the grievor, an act of disguised discipline. The adjudicator found himself unable to decide the jurisdictional issue without a full hearing on the merits of the case, but was satisfied that the case should proceed to an assessment of the merits once the grievor had established to his satisfaction the "possibility" that the employer's decision was disciplinary:

. . .

> *33. I believe the grievor has at least advanced the possibility that the matter could be disciplinary in nature. I am not saying it is a certainty that discipline ensued, but without hearing the full case I can not say discipline has not occu*rred.

. . .

[298] There is in *Grottoli* a glimpse of a standard of proof resembling the *prima facie* requirement described by Messrs. Brown and Beatty and argued by the grievor, but in the context of determining whether more complete evidence is required in a subsequent hearing phase to establish disguised discipline.

[299] In *Weiten v. Treasury Board (Revenue Canada – Customs and Excise)*, PSSRB File No. 24748 (1995) (QL), a case concerning termination on abandonment of position, the employer advanced the position that, ". . . since the grievor was alleging disguised discipline, the initial onus of establishing a *prima facie* case of disciplinary action rested with the grievor . . . ." In the adjudicator's reasons, however, the concept of a *prima facie* requirement is not mentioned. The adjudicator found against the grievor ". . . [i]n the absence of sufficient evidence . . . ." [*emphasis added*] of discipline.

[300] Elsewhere in adjudication decisions involving allegations of disguised discipline under the *PSSRA*, I find little explicit support for the proposition that the standard of proof required of the grievor is on a *prima facie* basis. Frequently, as suggested above, these decisions are not explicit on the standard of proof issue, and indicate only that it is the burden of the grievor to "prove" discipline. In *Bratrud v. Office of the Superintendent of Financial Institutions*, 2004 PSSRB 10, for example, the adjudicator, at para. 93, stated simply that ". . . the grievor bears the burden of proof in cases where disguised discipline is alleged." In *Gingras v. Treasury Board (Citizenship and Immigration Canada)*, 2004 PSSRB 7, the adjudicator observed that:

. . .

> *42. In order to establish an adjudicator's jurisdiction, the grievor had the burden of proving that he had been the object of "disciplinary action resulting in a financial penalty" as contemplated by paragraph 92(1)(*b*)(i) of the* Public Service Staff Relations Act (PSSRA).

. . .

In *Lundin v. Canada Customs and Revenue Agency*, 2004 PSSRB 167, the adjudicator notes that, ". . . [i]n the end, the grievor still has to demonstrate that the rejection on probation was disguised discipline . . . ." In *Owens v. Treasury Board (Royal Canadian Mounted Police)*, 2003 PSSRB 33, the grievor's bargaining agent representative states

". . . that the Board does have jurisdiction when the grievor can prove that it is a disguised disciplinary discharge . . . ."

[301] The grievor has advanced *Schofield* as support for use of a *prima facie* standard of proof. My reading of *Schofield* is somewhat different. I do not find in this decision a clear endorsement of the *prima facie* standard by the adjudicator, but rather a reply to the employer's initial jurisdictional argument that the grievor had failed to establish at least a *prima facie* case that the grievor had suffered a financial penalty. I note also that *Schofield* is a decision taken following the preliminary remarks and opening statements of the parties. No detailed evidence was led through witnesses. As such, the decision is more plausibly viewed as a preliminary finding on whether to move on to a detailed evidentiary phase, rather than a conclusion about how to weigh the main body of evidence itself.

[302] The grievor asks that I consider the *Matthews* decision. This decision does not refer to a *prima facie* standard. The adjudicator states only that he reached his conclusion on the basis of "the whole of the evidence." He does not specify an explicit standard of proof.

[303] The grievor later referred me to each of the *Mallett*, *Steen* and *Lo* decisions for guidance in assessing the existence of disguised discipline. *Mallett* references precedent decisions to the effect that the grievor must lead "clear and compelling evidence" of disguised discipline. In *Steen*, the adjudicator based his finding that there had been disciplinary action camouflaged as a lay-off ". . . on the basis of uncontested documentary evidence . . . ." He did not use a *prima facie* standard. Finally, in *Lo*, the adjudicator stated that the only decision he must make is whether there had been "in fact [emphasis in the original]" a termination of employment. He based his finding that there was disguised discipline on "overwhelming" evidence.

[304] What does all of this mean? Based on case law, there is evidently some room for argument as to what constitutes the appropriate standard of proof for sustaining an allegation of disguised discipline. Looking at the actual analysis of evidence in many of the cases cited above, and in others, I am persuaded that adjudicators under the *PSSRA* have normally applied a "balance of probabilities" test to assess whether discipline has occurred, without necessarily saying so explicitly. This is the same standard that they have applied to most other evidentiary situations. They asked, in short, "is it more likely than not that the challenged actions of the employer constitute disguised

discipline?" In this case, I am comfortable that I have adequate evidence before me to determine the jurisdictional issue of whether the employer imposed a disciplinary financial penalty, directly or by disguise. I believe, accordingly, that the "balance of probabilities" standard underlying the approach taken in many other decisions is appropriate in these circumstances.

[305] Discipline and disguised discipline are obviously linked concepts. What others have said about the nature of discipline can help in exploring the alleged existence of disguised discipline. I find two sources particularly useful. In the first, Arbitrator Pamela Picher offered a summary of the factors considered by arbitrators in other jurisdictions to assess whether an action taken by an employer is disciplinary rather than administrative in nature. In *St. Clair Catholic District School Board v. Ontario English Catholic Teachers Association v.* (1999), 86 L.A.C. (4th) 251, she suggested the following: (1) whether the employer intended to impose discipline; (2) the impact on the employee's career; (3) whether the action would be relied upon to support disciplinary action in the future; (4) whether the triggering incident could amount to culpable behaviour on the part of the employee; (5) whether there was an intent to punish or correct undesirable behaviour; (6) whether the action amounted to an expression of employer disapproval (non-disciplinary) or a punitive measure designed to correct (disciplinary); and (7) whether the action established standards to meet in the future and was prospective in nature (non-disciplinary) or had an immediate effect upon the grievor (disciplinary).

[306] In the second source, closer to home, the adjudicator in *Lundin* discussed the essential distinction between disciplinary and non-disciplinary matters, as argued in earlier precedent cases:

. . .

> *103. The considerations that differentiate "disciplinary action" from "non-disciplinary action" revolve around the distinction between voluntary and involuntary action on the part of the employee (*Robertson v. Treasury Board (Department of National Revenue), *PSSRB File No. 166-2-454 (1971), cited in* Smith v. Treasury Board (External Affairs Canada), *PSSRB File No. 166-2-19902 (1991) (QL). In* Smith (supra), *the adjudicator stated that discipline can only arise out of "voluntary, wilful acts of malfeasance":*

> *Discipline could not be justified for innocent or involuntary acts or for lack of ability or capacity to perform to certain standards. That did not mean that the employer could not deal with such issues through other means, simply that it could not support the discipline of an employee for such shortcomings. If it was improper for an employer to exert discipline for an innocent lack of ability, it was just as impossible for an employee to turn an otherwise administrative action relating to inability into a case of disguised discipline without first establishing a proper base upon which the employer could discipline.*
>
> . . .

[307] The observation in *Smith*, quoted by the adjudicator in *Lundin*, seems quite fitting in this case. Key acts of the employer impugned by the grievor, particularly the April 2004 board report, involved an assessment of her abilities. *Smith* cautions that an employer's finding of inability in respect of an employee cannot be construed as discipline unless a proper base for discipline is established: i.e., that there are voluntary, wilful acts of malfeasance on the part of the employee. The adjudicator in *Lundin* elaborated the point with what, I believe, is a crucial observation. He cautioned against turning ". . . an otherwise administrative action relating to inability into a case of disguised discipline without first establishing a proper base upon which the employer could discipline."

[308] In her submissions, the grievor drew my attention to a different definition of "disciplinary action" offered by the adjudicator in *Guertin*:

> . . .
>
> *Any breach of the professional obligations of the worker in the execution of his obligation to work, or, more generally, any disturbance created by him in the proper operation of the enterprise, can be called a disciplinary offence, whether for example, there are instances of unpunctuality, unwarranted absences, violation of security rules, hygiene, insubordination, inaccuracy, negligence or disloyal acts.*
>
> . . .
>
> [Emphasis added]

The grievor denied being guilty of any of the offences listed above. She asserted that the employer nevertheless made and acted on allegations against her that fall in to many of these areas. She then stated:

. . .

> *. . . it is not necessary for the Grievor to demonstrate that the Employer was wrong in formulating the particular disciplinary offences. The Grievor must, rather, demonstrate on a* prima facie *basis that the Employer had put in place a disciplinary action for some alleged deficiency. If so, this satisfies the "disciplinary action" condition of section 92(1)(b)(i). The Grievor respectfully submits that she has demonstrated this condition on a* prima facie *basis (and beyond).*

. . .

[309] Sources such as *St. Clair Catholic District School Board, Smith*, *Lundin* and *Guertin* — or the grievor herself — use different terms and emphasize different aspects, but there is something of a common thread. I draw from these sources that a grievor who alleges disguised discipline has an onus to show that the employer identified a culpable deficiency or an act of malfeasance on the part of the grievor and then undertook disguised disciplinary action to address this deficiency or act. Stated in a somewhat different way, a case for disguised discipline depends on the grievor demonstrating that the employer had the intent to discipline the grievor for a specific reason or reasons, but disguised its disciplinary action in a different form which nevertheless had the equivalent effect of correcting or punishing the grievor.

[310] Addressing all that the grievor said or inferred about disguised discipline in her testimony and her arguments would require a very long analysis. As with my earlier finding with respect to the demotion alleged by the grievor, however, I believe that I can reach a conclusion on disguised discipline based on a few central elements. For evidence concerning discipline to be relevant to a determination concerning jurisdiction under subparagraph 92(1)(*b*)(i) of the *PSSRA*, there must in this case be a demonstrable link to the imposition of something that qualifies as a financial penalty. If the grievor contends that an event or act was disciplinary, whether direct or disguised, but cannot associate this alleged discipline with a financial penalty, the evidence will not assist her claim that the adjudicator does have jurisdiction.

[311] In the narrative of this case there are three situations that might conceivably be said to involve a financial penalty: the end of the grievor's first ES-06 acting assignment in June 2002 and her failure to qualify for the ES-06 Senior Negotiator position, her reverting to ES-05 level pay as a result of failing to qualify for her reclassified position in March/April 2004, and her re-establishment by Mr. Goldie in 2005 to an ES-05-level position. Do any of these situations reveal disguised discipline?

[312] With respect to June 2002, the evidence is that a four-person panel found the grievor unqualified for the ES-06 Senior Negotiator position in a competition conducted at that time. One of the four panel members was Mr. Friedlaender who, in the grievor's submission, was a principal author of the employer's continuing strategy against her. The other three panel members were Ms. Chalupa, Mr. Atkinson and Ms. Smith. There is no persuasive evidence before me that the staffing determination made by these panel members identified any deficiency or malfeasance on the part of the grievor other than her failure to meet the qualifications measured in the competition "by a good margin", to use Ms. Smith's words. Ms. Smith testified that the grievor fell short of requirements in at least one of the "knowledge" and "abilities" dimensions. Insufficient knowledge or ability are not normally *per se* deficiencies of a voluntary or wilful nature that might attract discipline.

[313] If there was any element of disciplinary intent in the panel's decision, it would have to have been initiated by majority determination of the panel or, perhaps, because one or more of the panel members, motivated by an intent to achieve a disciplinary effect, were able to convince or manipulate their other colleagues into making a decision adverse to the grievor. Neither scenario stands up to the available evidence. I have no detailed information on how the panel conducted the competition, or on how it evaluated the grievor on the rated questions used. Even were this information available to me, it is clearly outside an adjudicator's mandate to review the correctness of the panel's evaluation of the grievor's qualifications. The review must be limited to searching for evidence of disguised discipline. Without a demonstrated basis for suspecting disguised discipline underlying the panel's work, I cannot and need not inquire further.

[314] I am satisfied, moreover, from the convergence of Ms. Smith's and Mr. Friedlaender's testimony that the employer did make efforts following the results

of the June 2002 competition to explore remedial assistance for the grievor in order to help her, for future purposes, address weaknesses identified in the competition. There is evidence of several employer contacts with the grievor at the office and at her home, during her vacation, urging her to consider various options. She did not agree. The efforts taken by the employer are not consistent with a strategy of disguising discipline, unless there was a truly Machiavellian plan in place. The grievor may well have had strong convictions about the *bona fides* of these post-competition efforts, or whether the suggested mentoring and training would have offered her appropriate or adequate development, but the grievor's convictions on these points do not make for proof of disguised discipline in the employer's actions.

[315] As for the termination of ES-06-level acting pay during this period, the grievor's own testimony insists that she was the one who took the initiative to end the acting assignment. In her words, she "marched" up to human resources and invoked the right she had claimed only days earlier to terminate the acting assignment ". . . at the discretion of either party." (Exhibits G-37 and E-7). Management's position as of June 13, 2002, had been to offer the grievor an extension of her acting duties until August 4, 2002. The end of this arrangement on an earlier date can only be traced to the grievor's intervention. Her stance in this regard does not support an inference of disguised discipline in the actions of the employer concerning acting duties and pay, at least at this moment.

[316] The second situation to be examined centres on the grievor reverting to ES-05-level pay as a result of failing to qualify in April 2004 for her reclassified position.

[317] The grievor has focused much of her critical attention in this regard on the board report dated April 8, 2004 (Exhibit G-1, tab 1). She has argued variously that the board report was factually wrong, that it was based on hearsay in places, and that it was central to a pattern of decisions that "reeked of bad faith." Most importantly for this analysis, she argued that many of the "allegations" in the board report amount to disciplinary offences of the type discussed in *Guertin*. She sees in the report allegations that she caused a "disturbance," was insubordinate, negligent and disloyal, and had unwarranted absences. Rather than dealing with any of these alleged deficiencies or wilful acts as disciplinary matters when they occurred, the employer chose to avoid formal disciplinary measures so as to preclude giving the grievor access

to corrective action through the grievance procedure. The employer, instead, conspired to manipulate a reclassification of her position and the consequent board report assessment of her qualifications to achieve the disciplinary effects it desired.

[318] On the basis of the evidence before me, I cannot find that this depiction of the board report and of the "disciplinary" subject matter it allegedly contains offers a better explanation of what happened, and why it happened, than the quite different perspective given in the testimony of the employer's witnesses. There may be a fine line at play here between some of the employer's observations in the board report about weaknesses or problems in the grievor's past performance and what might, in certain circumstances, represent culpable acts or wilful deficiencies. The onus is on the grievor, however, to prove the latter on a balance-of-probabilities basis. I do not believe that she has done so.

[319] The grievor argues, for example, that the employer accused the grievor of ". . . such extreme disturbance in the report that an employee found it unbearable and necessary to leave . . . ." I have no objective evidence of "extreme disturbance" before me and, in particular, nothing that has the employer stating that there was an "extreme disturbance." The board report does refer to "an untenable relationship" between the grievor and the subject employee (presumably Mr. Hornburg), and links this issue to the grievor's failure to complete a performance review for the employee, her suspension of communication with him, and her refusal to participate in mediation to repair the relationship. These deficiencies could be taken to suggest an element of culpability on the grievor's part that might be the subject of discipline, but they could equally comprise indicators of poor managerial skills and judgment identified by part of an assessment of the grievor's qualifications, based on past performance — the portrait that tends to emerge from the employer's evidence and documents.

[320] The counterhypothesis of an employer concerned about managerial abilities rather than discipline has good support in the evidence. Mr. Friedlaender testified that he had increasing concerns about the grievor's managerial skills and abilities beginning in 2003. These emerging issues are evident, to some extent, in Mr. Friedlaender's assessment of the grievor's performance dated May 22, 2003, (Exhibit G-1, tab 2). Mr. Friedlaender stated that he outlined his concerns about the grievor's managerial abilities to the grievor at their meeting of September 16, 2003. His note to file summarizing this meeting lists examples of issues he raised ". . . about the way [the

grievor] is carrying out her management responsibilities . . . .” and divided his concerns under two categories: “managing her own team” and “managing up” (Exhibit E-9). The issue of the grievor failing to complete a performance assessment of an employee whom she supervised — mentioned by the grievor in conjunction with her comments on the “extreme disturbance” — is one of the items listed under the “managing her own team” category. There is no mention anywhere by Mr. Friedlaender of a disciplinary offence or of a sense that he might be required to initiate corrective or punitive action at some point in the future.

[321] The grievor suggests that Mr. Friedlaender’s note to file is simply an example of his obscuring his real disciplinary intent and casting his actions in the best possible light. This is a very difficult charge to prove, and I do not believe that the grievor has done so. The grievor herself indicated in her testimony that she understood Mr. Friedlaender at this encounter to be saying that she was failing to meet “. . . [his] standard for managers, especially ES-06 managers.” Failing to meet a standard for managers is, in my view, more suggestive of a performance issue as a disciplinary one. I note that the grievor did not, at the time, contest her encounter with Mr. Friedlaender, as disciplinary. She did subsequently meet with Mr. Goldie to outline her concerns about Mr. Friedlaender but neither her testimony nor his suggests that the grievor identified Mr. Friedlaender’s previous comments or actions as disciplinary. The grievor suggested to Mr. Goldie a mediated discussion between her and Mr. Friedlaender to address concerns. Mr. Goldie pursued the suggestion. Regardless of why the subsequent efforts to set up mediation failed, the fact remains that there is no clear evidence to establish that discipline, direct or disguised, was on the agenda for the mediator.

[322] Several other notes from this period written by Mr. Friedlaender and tendered as exhibits by the grievor certainly confirm that there were issues and tensions between Mr. Friedlander and the grievor, but they once again do not reveal, in my view, content that can be persuasively linked to a strategy of disguised discipline. Mr. Friedlaender’s note of January 16, 2004, includes a listing of concerns that the grievor expressed about Mr. Friedlaender in his actions as her supervisor, as well as his understanding of the grievor’s “. . . wishes/aspirations for the future. . . .” (Exhibit G-17). His note of January 27, 2004, focuses again on improving their relationship and on “. . . options for structuring a new role for Karen. . . .” (Exhibit G-18). Neither the tone nor the content of these notes reveal that discipline was in the air.

[323] On the subject of "insubordination," the grievor argues that the board report ". . . attempts to create the impression that the grievor was unwilling to comply with the employer's wishes . . . ." when she failed to meet with an employee to discuss his performance, despite offers of assistance from her manager. Was this failure a culpable act on the part of the grievor that potentially merited discipline, or part of a pattern of poor judgment and weak performance by the grievor as a supervisor? I do not entirely discount the former possibility, but, as indicated above, stronger evidence to this effect would be needed to overcome other testimony and documents before me that point in the direction of an employer concerned about the grievor's managerial performance.

[324] The grievor contends that the board report included ". . . severe criticism of negligent misconduct. . . ." in reaction to her alleged failure to prepare for the arrival and orientation of a new employee, as well as comments on her "deliberate refusal" to complete a performance assessment. The report does mention these shortcomings, but I do not discern content in the report that conveys the sense of negligent misconduct or of a deliberate refusal to comply with the employer's instructions that the grievor would have me find. I also am unable to identify references in the report that might be interpreted as alleging a disloyal act. In her argument, the grievor suggested that the employer effectively considered her decision to decline management training and coaching as falling under the title of "disloyal acts." She herself goes on to state, however, that the employer was alleging that the grievor had ". . . refused to be collegial." Lack of collegiality is not, in and of itself, a valid indicator of disloyalty.

[325] Finally, the grievor asserted that comments in the board report about her "abrupt" departure from work on extended sick leave constituted "inflammatory rhetoric" and suggested that her absence from work was "unwarranted" in the eyes of the employer. If it was, in fact, the case that the employer judged her absence to be unwarranted and potentially deserving a disciplinary response, it seems reasonable to expect that I would have received some evidence that the employer challenged the grievor's claim for sick leave for this period. There is no evidence to this effect.

[326] I have reached the conclusion that the evidence better supports an interpretation of the employer's assessment of the grievor in the board report, and its "allegations" about the grievor's behaviour, as non-disciplinary than disciplinary. As the onus rests with the grievor to demonstrate the contrary — that the employer's

actions surrounding the reclassification and board report qualify as disguised discipline, on a balance of probabilities — I find that the grievor has not succeeded in making her case.

[327] I wish to note that I have approached issues related to the board report with considerable caution. The employer describes the board report as a staffing decision. The evidence given by the employer's witnesses locates the report as part and parcel of a staffing process linked to a reclassification of a position. While I do not ultimately find it necessary to rule in this decision on the employer's second objection that the subject matter of the grievor's case and of the board report is, in pith and substance, a staffing issue outside my jurisdiction, I think it is nonetheless appropriate for an adjudicator to approach a document such as the board report with care. It is clearly not the adjudicator's role to re-evaluate the employee nor assess whether there might be evidence of a procedural defect in the contents of the evaluation report. Exploration of the document, and of how the employer used the document, must be limited to a search for indications of the alleged disciplinary intent or effect. If disciplinary elements are not established, and absent evidence that the document is manifestly untrue in its totality, the adjudicator's scrutiny of the document reaches its end.

[328] The third situation identified for analysis in this section was Mr. Goldie's re-establishment of the grievor in 2005 to an ES-05 position.

[329] I find the grievor's arguments about the significance of what happened to her once the employer rescinded its notice to the grievor of her "affected status" difficult to understand. She contends that, despite the success of her grievance on this subject (Exhibit G-8) and the employer's subsequent confirmation that it had rescinded the "affected letter" (Exhibit E-18), the employer violated the NJC grievance decision or failed to implement it by not also rescinding the April 2004 board report and reversing the loss of her ES-06 level duties that was its result. When Mr. Goldie then took steps to re-establish her in another ES-05 level position, he perpetuated the disguised discipline and the financial penalty. The board report, according to the grievor's submission, continued to live on.

[330] There is no question that the board report continued to live on in the sense that the employer never altered or reversed its March/April 2004 decision that the grievor was unqualified for the ES-06-level duties of the reclassified position at issue at the time. I suggest that the fundamental error in the grievor's argument is her apparent

contention that the NJC grievance decision required the employer to rescind the board report, not just the employer's impugned notice of "affected status." I indicated earlier my view that the NJC grievance decision did not and could not alter the grievor's substantive classification or have the effect of appointing her to the ES-06 level. This means, as well, that it could not and did not vitiate the board report.

[331] What then follows is that the employer turned to the task of finding a position for the grievor at her substantive ES-05 level. When Mr. Goldie eventually re-established the grievor in another ES-05 position, he was meeting the employer's obligation to protect the grievor's employment, classification level and pay level. He did not have as a real option preserving the *status quo ante*. Reclassification of the ES-06-level Cost Sharing position had been implemented. The employer had appointed Mr. Greer to the position. The grievor had held a position that, in effect, had ceased to exist. The employer took action to regularize her status by establishing another ES-05 position and appointing the grievor to it.

[332] The grievor has not provided evidence that persuades me that this chain of events disguises discipline. Given that I have not agreed that the grievor has shown that the employer's decision to revert her to ES-05-level duties and pay in April 2004 constituted disguised discipline, the grievor would need to provide — and she has not — separate and convincing evidence that the follow-up actions of the employer in 2005 to move the grievor to a different position at her same substantive ES-05 level represent disguised discipline resulting in a financial penalty. Even were I to have found some evidence of a new deficiency or act of malfeasance that led the employer to impose new disguised discipline in the form of re-establishing the grievor to another ES-05 position, there is no new financial penalty here that I can review. The change to the grievor's pay level from ES-06 to ES-05 originated with the decisions made by the employer in March/April 2004. There is no new financial harm to the grievor.

[333] As regards any other claims advanced by the grievor about incidents where the employer allegedly disciplined her, I find that the grievor has not demonstrated the necessary linkage between these incidents and a financial penalty that might bring them under the ambit of subparagraph 92(1)(*b*)(i) of the *PSSRA*, presuming their disciplinary character had been satisfactorily established.

[334] For the foregoing reasons, I conclude that the grievor has not discharged her burden to demonstrate, on a balance-of-probabilities basis, that she was the subject of disguised discipline resulting in a financial penalty. As I have already made a similar finding with respect to her allegation of a demotion or disguised demotion, there remains no basis for me to accept jurisdiction over this grievance under paragraph 92(1)(*b*) of the *PSSRA*.

[335] Given this finding, and as indicated above, I do not need to rule on the employer's second jurisdictional objection: i.e. that there is available to the grievor an alternate administrative procedure under the *PSEA* for redress of the employer's staffing decision, the existence of which serves to deprive the grievor of access to the section 91 grievance procedure of the *PSSRA*, and, in turn, to deprive an adjudicator of jurisdiction under section 92 of the *PSSRA*.

[336] In the course of the grievor's submissions, she argued that the employer failed to respect its own policies regarding discipline and/or the conduct of performance assessments. The employer cited *Glowinski* and provided the text of *Endicott* as authorities for the counter proposition that an adjudicator may not rule on the enforceability of employer policies in the absence of legal grounds within the adjudicator's jurisdiction for such enforcement. I do not believe that I need to rule on this disagreement. There is no allegation before me that the employer violated the discipline provisions of the collective agreement that might have been a basis for assuming jurisdiction. The jurisdictional issue decided here, in my view, does not depend on whether the employer adhered to any particular policy regarding disciplinary processes or the procedures for conducting performance appraisals. The issue was the existence of discipline. Failure by the employer to apply an employer policy, rule or requirement within its discretionary domain may be relevant for establishing the context within which the employer acted or failed to act, or for weighing the reasonableness of what occurred, but it is not itself proof that discipline has been imposed.

[337] I have also not considered as a separate line of argument the grievor's submissions to the effect that the employer acted in bad faith. Good faith is presumed. The onus is on the grievor to prove otherwise. Examining the details of her submission in this area, I found that the issues canvassed by the grievor in alleging bad faith repeat, in very substantial part, the same material that was the subject of her

allegations about demotion and discipline. I do not find that this "bad faith" evidence discloses substantially different facts or issues on which I must make further conclusions. This is probably not surprising. There is a strong sense that proof of an employer's design to impose discipline in disguise assumes a motivation on the part of the employer that likely falls within the definition of "bad faith" suggested by the grievor. It is difficult to imagine an employer having the intent to discipline in disguise, and acting on this intent, without there being an element of bad faith. To this extent, at least within the context of this case, I do not believe that there is a conceptually or factually distinct issue of bad faith to be determined.

[338] Finally, I do not believe that I should, or need to rule further on the grievor's additional submissions alleging procedural or substantive defects in the board report or the employer's conduct of performance appraisals, or in respect of the meeting of September 16, 2003. Apart from searching for evidence of disguised discipline, I am not of the view that I have the authority to rule on other issues pertaining to the April 2004 board report. If the grievor believed that the assessment by the employer of the grievor's qualifications in the board report was defective in procedural or substantive terms, recourse was available to the grievor within the staffing domain regulated by the *PSEA*. If the grievor felt that the employer had violated any of the provisions of her collective agreement relating to the conduct of performance appraisals, she had the opportunity of presenting a grievance to this effect. If the grievor held that the meeting of September 16, 2003, was a disciplinary meeting at which her employer violated collective agreement requirements in respect of discipline, she again had the opportunity to present a grievance on this claim within the appropriate grievance timeframe.

[339] Though I find that the grievor has not established a case on the balance of probabilities that she was demoted or suffered discipline or disguised discipline resulting in a financial penalty, I wish to note that some of the evidence presented to me, in my view, casts some doubt on whether the employer handled the events of this case in the best way. A part of the grievor's submission involves evidence of interpersonal problems she allegedly experienced in her relationship with her employer. That the relationship between the grievor and her supervisor became dysfunctional at some point is apparent. In my opinion, it would be unrealistic and unfair to absolve the employer of any responsibility for the deterioration in this relationship, or for the breakdown in effective communications that seems to have

occurred. I might question, for example, whether the employer was sufficiently persistent in its efforts to draw to the grievor's attention the problems it saw in her performance as a manager beginning in 2003, or whether it followed up with an adequate and concerted effort to involve the grievor in remedial measures that might have increased her chances of success in the eventual reclassification assessment. This said, I recognize that it is not always easy for an employer to be persistent and helpful if an employee declines assistance, rejects overtures made to him or her, or interprets the employer's actions with a presumption of a hostile intent.

[340] For all of the above reasons, I make the following order:

(The Order appears on the next page)

XII. Order

[341] The grievance is dismissed.

January 12, 2007.

Dan Butler,
adjudicator