Date: 20110413

File: 566-02-2632

Citation: 2011 PSLRB 45

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

STUART FREDERICK KING

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Indexed as
King v. Deputy Head (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Dan Butler, adjudicator

For the Grievor: Marie-Pier Dupuis-Langis, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

For the Respondent: Anne-Marie Duquette, counsel

Decided on the basis of written submissions
filed July 5, 2010, and February 24 and 25 and March 17 and 24, 2011.

I. Individual grievance referred to adjudication

[1] Stuart Frederick King ("the grievor") works as a correctional officer at the Pacific Institution/Regional Treatment Centre (PI/RTC) in Abbotsford, British Columbia. On September 8, 2008, the warden of the PI/RTC suspended him without pay pending a disciplinary investigation, prompting him to file a grievance with the support of his bargaining agent, the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN).

[2] The grievor stated the corrective action required as follows:

> *I request to be immediately re-instated in my position at PI/RTC Institution;*
>
> *I request that all mentions of this disciplinary action and investigations be destroyed from my files;*
>
> *I request that to be paid for all wages lost since this suspension(regular wages, shift differential, week-end prmiums, stat pay);*
>
> *I request that my sick leaves, annual leaves and all other leaves that I have taken resulting of this measure be credited back;*
>
> *I request to be compensated for the missed overtime opportunities;*
>
> *I request to be credited the leaves I would have earned if it was not of the suspension without pay;*
>
> *I request an adjustment on my credit of my pension and CPP resulting of this measure;*
>
> *I request interest on the money owed to me;*
>
> *I request that this grievance be immediately sent to 3rd level (1st and 2nd levels waived)*
>
> [*Sic* throughout]

[3] In the absence of a reply at the third level of the grievance procedure on behalf of the deputy head of the Correctional Service of Canada ("the respondent"), the grievor referred the matter on December 5, 2008 to the Public Service Labour Relations Board ("the Board") for adjudication under paragraph 209(1)(*b*) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 ("the *Act*").

[4] On July 5, 2010, the respondent filed written submissions, including an objection to an adjudicator's jurisdiction to consider the grievance on the basis that it was moot. The respondent stated that its disciplinary investigation determined that there was no misconduct. The respondent rescinded the suspension without pay, replaced it with leave with pay and compensated the grievor ". . . for lost wages, premium pay, shift differential and missed overtime." The respondent maintained that, in the end, the grievor was never disciplined.

[5] The respondent also argued in its submissions that, despite its position that the grievance was moot, the suspension without pay pending the disciplinary investigation was an administrative measure, that it was not disciplinary in nature and that it could not be referred to adjudication under section 209 of the *Act*.

[6] The Registry of the Board sought the grievor's position on the objections raised by the respondent. On July 20, 2010, the grievor submitted that there was a disciplinary suspension in this case and that such a suspension comprises a matter within the jurisdiction of an adjudicator. With respect to mootness, the grievor maintained at a subsequent pre-hearing conference that a substantive issue remained in dispute — interest on the salary and overtime not paid during his suspension.

[7] Based on the pre-hearing conference and on the record, I rejected the respondent's argument that the grievance was moot. I was satisfied that the parties remained apart on the grievor's claim of interest on the salary and overtime not paid during the grievor's suspension without pay. In my view, the claim of interest comprised a live issue directly arising from the original request for corrective action.

[8] Discussions at the pre-hearing conference also led me to conclude that the parties could proceed, and were prepared to proceed, by way of written representations on the matter of my jurisdiction. I identified the issue to be addressed as follows:

> *The respondent has taken the position that the suspension without pay pending the disciplinary investigation was an administrative measure, that it was not disciplinary in nature and that it could not be referred to adjudication under section 209 of the* Public Service Labour Relations Act *("the* Act*"). Therefore, the issue to be determined is whether an adjudicator has jurisdiction under paragraph 209(1)(*b*) of the* Act *to consider the grievance in the circumstances of this case.*

[9] This decision is limited to the identified issue of jurisdiction.

II. Summary of the evidence

[10] According to the respondent's submission, the basic facts of the case are as follows.

[11] On August 20, 2008, Mike Gordon, a real estate agent and former Correctional Service of Canada (CSC) correctional officer, was murdered in Chilliwack, B.C. The grievor had listed his property for sale with Mr. Gordon and had met with him to discuss the sale on the day before his murder.

[12] Media releases immediately following the murder indicated that Mr. Gordon had been known to the police and that he had been involved with a criminal gang. On August 21, 2008, the grievor contacted the PI/RTC to disclose that he was aware of Mr. Gordon's death, that he had met with him and that he was unaware that Mr. Gordon had been known to the police or that he had been involved with a criminal gang.

[13] The grievor attended Mr. Gordon's funeral on August 29, 2008, despite being advised by the respondent that his attendance might be misinterpreted. Following the funeral, the grievor joined a group of people, who gathered at a local pub. Royal Canadian Mounted Police (RCMP) officers entered the premises to conduct a bar check. They asked several patrons for identification, including the grievor. The grievor showed his correctional officer badge and then a second piece of identification.

[14] On August 30, 2008, the respondent received information from the RCMP that the grievor was observed on August 29, 2008 associating with persons who allegedly had gang affiliations and that he had been in the presence of at least one known gang member. The RCMP reported that the grievor had flashed his CSC badge.

[15] Stating that the events reported to it were serious, the respondent suspended the grievor without pay on September 8, 2008, pending the completion of a fact-finding investigation into the following allegations:

> *1. That he misused his Correctional Service of Canada identification in Chilliwack on August 29, 2008;*

> *2. That he was observed associating with persons that have alleged gang affiliations in Chilliwack on August 29, 2008.*

[16] On September 25, 2008, the investigators met with the grievor. On October 10, 2008, they completed their report and submitted it to the warden, Judy Campbell.

[17] On October 20, 2008, Warden Campbell advised the grievor that she had reviewed the investigation report and that she had decided to rescind the grievor's suspension without pay because his presence in the workplace no longer posed a serious or immediate risk to staff, inmates, the public or the reputation of the CSC. She authorized his return to work and reinstated his pay as of October 20, 2008. She also advised the grievor that a disciplinary hearing would be scheduled once he received a vetted copy of the investigation report.

[18] On October 30, 2008, the respondent changed the grievor's leave without pay for the duration of the suspension to leave with pay and reimbursed him accordingly. It credited annual sick leave credits that would have accrued during the suspension. During the following three months, the respondent compensated the grievor for all lost wages and benefits, including premium pay, shift differential and missed overtime opportunities.

[19] On February 23 and 24, 2009, Warden Campbell conducted a disciplinary hearing. On March 16, 2009, she wrote to the grievor, confirming that the disciplinary process was completed and that she had determined that no disciplinary sanctions were necessary.

[20] In his submission, the grievor described the facts alleged by the respondent as "not corroborated." He contended that the respondent relied on evidence that should have been "introduced by witnesses (hearsay)" in an oral hearing and asked that the Board not take that evidence into consideration. However, the grievor excepted from his request the following five paragraphs from the "Facts" section of the respondent's submission:

. . .

> *14. On September 8, 2008, considering the seriousness of the events, the employer suspended the grievor without pay pending the completion of a fact finding investigation into the following allegations:*

> *1. That he misused his Correctional Service of Canada identification in Chilliwack on August 29, 2008;*
>
> *2. That he was observed associating with persons that have alleged gang affiliations in Chilliwack on August 29, 2008.*
>
> > *Letter from Judy Campbell to Stuart King, dated September 8, 2008. Re: suspension without pay pending completion of investigation, copy attached;*
> >
> > *Memorandum from Judy Campbell to John Wiseman and Don Trenaman, dated September 8, 2008. Re: Disciplinary Investigation: Stuart King, copy attached.*

15. On September 11, 2008, the Employer received the grievance which is the subject of this reference to adjudication, file number 566-02-2632. The grievance details read as follows: "On September 8th, 2008, Judy Campbell (name), warden of PI/RTC Institution, suspended me without pay pending a disciplinary investigation. I grieve that this disciplinary action is unwarranted, excessive and unfounded in facts and law."

> *Grievance Presentation Form dated September 09, 2008, copy attached.*

. . .

18. On October 20, 2008, Warden Judy Campbell wrote to the grievor. She advised him that she had received and reviewed the investigation report and that she had decided, as a result, that there was no longer a serious or immediate risk to staff, inmates, the public, or the reputation of the CSC. Therefore, she advised the grievor that she had decided to rescind the grievor's suspension without pay, to authorize the grievor to return to his regular duties and to reinstate pay as of October 20, 2008.

> *Letter from Judy Campbell to Stuart King dated October 20, 2008. Re: Disciplinary Investigation and suspension without pay, copy attached.*

19. In the same letter, Warden Judy Campbell advised the grievor that the investigation report would be vetted in accordance with the Access to Information and Privacy Act *and that a vetted copy would be provided to him. She also advised that once the grievor had reviewed the vetted copy, a disciplinary hearing would be scheduled.*

> *Letter from Judy Campbell to Stuart King dated October 20, 2008. Re: Disciplinary Investigation and Suspension without pay, copy attached.*
>
> . . .
>
> *24. On February 23-24, 2009 a disciplinary hearing was conducted. The grievor was counselled by Warden Judy Campbell, but not disciplined. On March 16, 2009, Warden Judy Campbell wrote a letter to the grievor confirming that the disciplinary process was completed and that it was determined that no disciplinary sanctions were necessary.*
>
> *Memorandum from Judy Campbell to Stuart King, dated March 16, 2009. Re: Disciplinary investigation. Copy attached.*

[21] The grievor stated his version of the chronology of events as follows:

> . . .
>
> *12. On September 8th 2008, the grievor was suspended indefinitely without pay pending the completion of a disciplinary investigation.*
>
> . . .
>
> *13. On September 11th 2008, the grievor grieved:*
>
> . . .
>
> *14. On September 22nd 2008, the investigator notified the grievor about a disciplinary hearing to be held on September 25th 2008.*
>
> . . .
>
> *15. On September 22nd 2008, the employer also notified the grievor that the investigators had been unable to meet the deadline for the completion of their investigation. The employer outlined that an extension had been granted until October 8th 2008.*
>
> . . .
>
> *16. On October 10th 2008, the employer notified the grievor that it still had not received the formal investigation report.*
>
> . . .
>
> *17. On October 20th 2008, the suspension without pay was rescinded.*

. . .

> *On October 30th 2008, the grievor's leaves without pay were changed to leaves with pay. He was reimbursed accordingly. . . .*
>
> . . .
>
> *. . . Ms Sandy Rowe (Human Resources Advisor at PIRTC) sent an email to Ms Corinne Blanchette (UCCO-SACC-CSN Union Advisor for the Pacific Region) on December 10th 2008 outlining that the Warden was not prepared to grant the request for interest as an adjudicator would have the power to do so under section 20.25 of the collective agreement and section 226(1)(i) of the PSLRA. . . .*

. . .

III. Summary of the arguments

A. For the respondent

[22] An adjudicator has jurisdiction if he or she is convinced that, on a balance of probabilities, there was a disciplinary action that resulted in a termination, a demotion, a suspension or a financial penalty.

[23] Suspending the grievor without pay pending a fact-finding investigation was an administrative decision and not a disciplinary action.

[24] A decision to suspend without pay does not, on its own, reflect disciplinary intent; see Brown and Beatty, *Canadian Labour Arbitration*, 4th ed, at para 7:4210: That principle was recently affirmed by the Federal Court in *Canada (Attorney General) v. Frazee*, 2007 FC 1176, at para 20 to 22 and 33, and in *Canada (Attorney General) v. Basra*, 2008 FC 606 (decision varied in *Basra v. Canada (Attorney General)*, 2010 FCA 24). Those authorities indicate that there must be an intent to impose discipline, specifically, an intent to correct what the employer has concluded comprises wrongful behaviour. A disciplinary suspension is an employer's response when it has concluded that an employee's conduct warrants a penalty short of termination. It is finite and does not depend on another determination. Administrative suspensions, on the other hand, are indefinite in that they are implemented pending an investigation and a resulting determination as to whether discipline will be imposed.

[25] The law is clear. The simple fact that an employer decided to suspend an employee indefinitely without pay pending an investigation does not prove on its own that the action is disciplinary; see *Clark v. New Brunswick (Department of Natural Resources and Energy)*, [1995] N.B.L.A.A. No. 15 (QL)(McAllister).

[26] The respondent notes an earlier letter to the Registry of the Board in which the grievor claimed that the Federal Court of Appeal's decision in *Basra* and the Supreme Court of Canada's decision in *Cabiakman v. Industrial Alliance Life Insurance Co.*, 2004 SCC 55, support his position regarding jurisdiction. Neither *Basra* nor *Cabiakman* ruled that a suspension without salary pending a disciplinary investigation constitutes, in and of itself, a disciplinary action within the meaning of paragraph 209(1)(*b*) of the *Act*. *Basra* dismissed the appeal and simply varied the Federal Court's decision on other grounds. The respondent submits that the Federal Court's reasons in *Basra* about the approach to take to determine whether an administrative suspension is in fact a disciplinary measure stand.

[27] The letter dated October 20, 2008, in which Warden Campbell rescinded the administrative suspension without pay clearly shows that she had no intent to discipline the grievor when she decided to suspend him without pay pending an investigation. She wrote as follows:

. . .

> *I have had an opportunity to revisit my reasons for suspending you without pay and am satisfied that there is no longer a serious or immediate risk to staff, inmates, the public, or the reputation of CSC; therefore, I am rescinding your suspension without pay and am authorizing your return to your regular duties as of today.*

. . .

[28] That said, Warden Campbell concluded that the factual findings of the investigation report warranted a disciplinary hearing and possible discipline. The procedure followed by the respondent clearly demonstrates that it had no intent to correct or punish bad behaviour on September 8, 2008. Bad behaviour had not been established. Only once the facts were established by the investigation report did the respondent consider whether discipline was warranted.

[29] The respondent asks the adjudicator to grant its objection and to dismiss the grievance without a hearing.

B. <u>For the grievor</u>

[30] The respondent's statement that it suspended the grievor without pay pending the completion of a fact-finding investigation is incorrect. The respondent's documents clearly outline that it suspended the grievor pending completion of a "disciplinary investigation." Fact-finding investigations do not exist under the collective agreement for the Correctional Officer Group between the Treasury Board and the UCCO-SACC-CSN ("the collective agreement"). By referring to a fact-finding process, the respondent is trying to disguise its disciplinary action.

[31] The jurisprudence cited by the respondent is not applicable. *Basra* (2008 FC 606) was appealed to the Federal Court of Appeal, which referred the matter back to the original adjudicator. In *Clark*, the grievor was suspended with pay following an investigation in which criminal charges were subsequently laid.

[32] Through letter dated December 10, 2008 from Sandy Rowe (Human Resources Advisor at PI/RTC) to Corinne Blanchette (UCCO-SACC-CSN Union Advisor, Pacific Region) referring to clause 20.25 of the collective agreement and paragraph 226(1)(*i*) of the *Act*, the respondent *prima facie* acknowledged that an adjudicator has jurisdiction to consider the present matter.

[33] Despite suggesting that the respondent's case law, including the *Basra* court decisions, was not applicable, the grievor referred me to the *Basra* case as follows in his submissions:

. . .

> *20. . . . [T]he jurisprudence is clear. In* Basra v. Canada (Attorney General) *2010 FCA 24, the Federal Court of Appeal (FCA) concluded that the formal adjudicator did not err in: (a) evaluating and confirming his jurisdiction; (b) addressing the question of CSC's intent while rendering his decision; (c) making a distinction between disciplinary and administrative on a valid ground. The FCA concluded in one error kin law on the part of the adjudicator: disconsidering evidence that qualified as hearsay. The FCA concluded that he should have considered whether the evidence was reliable or not. The matter was referred back to the adjudicator. However, the majority of his former conclusions and arguments still stand.*

> *21. In* Basra v. Deputy Head (Correctional Service of Canada) *2007 PSLRB 70, Adjudicator Love outlined:*
>
> > Para 99: "I note that paragraph 209(1)(b) of the *Act* uses the words "disciplinary action" and not "disciplinary decision." The word "action" is broader than "decision" and is a word capable of embracing the CSC's decision to appoint investigators and indefinitely suspend an employee as part of that investigation. The CSC has suspended Mr. Basra indefinitely based on an allegation of a serious wrongdoing that the CSC determined must be investigated. Clearly, the decision to suspend was part of a disciplinary process, although the CSC has not yet convened a disciplinary hearing or reached a final conclusion on discipline. The respondent's documents establish that an investigator was appointed to convene a disciplinary investigation (Exhibit E-8);
> >
> > Para. 100: "Also, an indefinite suspension prevents an employee from working. It is an interruption of the employee's right to work. In this case the disruption of work, as well as the loss of wages, are penalties; they are disciplinary actions that flow directly from the CSC's decision to convene an investigation and suspend Mr. Basra without pay: *Massip v. Canada* (1985), 61 N.R. 114 (F.C.A.); *Lavigne v. Treasury Board (Public Works)*, PSSRB File Nos. 166-02-16452 to 16454, 16623, 16624 and 16650 (19881014); and *Côté v. Treasury Board (Employment and Immigration Canada)*, PSSRB File Nos. 166-02-9811 to 9813 and 10178 (19831017);
> >
> > Para. 101: "For the above reasons, it is my view that there is jurisdiction to review this indefinite suspension under paragraph 209(1)(b) of the *Act* (…);
> >
> > Para. 102: **"**Employees have a right to work. It is a right that should not be lightly interfered with, and it is up to the respondent to demonstrate that a continued suspension without pay is justified. The CSC has not terminated Mr. Basra but is preventing him from earning a living (…);
> >
> > . . .
>
> [*Sic* throughout]

[34] The Supreme Court's decision in *Cabiakman* established that a suspension must be administered by observing the following conditions: the employer must act in good faith and equitably; the suspension must be short; the suspension must in principle be

with pay except for exceptional circumstances; and the employer cannot unilaterally ignore its obligation to pay the employee's salary. The Supreme Court concluded by noting that an employee on whom a suspension without pay has been imposed is right to believe that that action constitutes a disguised termination and, hence, a disciplinary action or measure.

[35] In *Larson v. Treasury Board (Solicitor General Canada — Correctional Service)*, 2002 PSSRB 9, the adjudicator established the following test (at paragraph 161) to determine whether a suspension without pay would be appropriate: Does the presence of the grievor as an employee present a reasonably serious and immediate risk to the legitimate concerns of the employer? The onus is on the employer to prove the risk and to show that it has taken reasonable steps to ascertain whether the risk of continued employment might be mitigated through closer supervision or a transfer to another position.

[36] On the face of the documents presented by the parties, there is absolutely no possibility of concluding that the grievor's indefinite suspension without pay was an administrative measure. The respondent used the words "suspension without pay" and "disciplinary investigation." It had the opportunity to conduct an administrative investigation. An administrative measure would have been to suspend the worker with pay or to reassign him to other duties — the protocol that should be followed under Appendix G of the collective agreement. An investigation does not turn into an administrative measure simply because no disciplinary action is taken upon its completion.

[37] The grievor had no idea of the length of his suspension without pay when the respondent notified him of its decision on September 8, 2008. Obviously, the respondent's intent was to discipline him. The decision to suspend him was part of the disciplinary process, although the respondent had not reached a conclusion at that time. The respondent delayed the investigation process, and it took almost two months for the suspension without pay to be rescinded. The grievor was clearly punished before the outcome of the investigation.

[38] Withholding pay is *prima facie* punitive since it deprives an employee of the salary to which he or she is otherwise entitled. A suspension prevents an employee from working. The disruption of work and wages are penalties; see *Massip v. Canada (Treasury Board)*, [1985] F.C.J. No. 12 (C.A.)(QL). They are disciplinary actions that flow

directly from an employer's decision to convene an investigation and to suspend without pay.

[39] In summary, an indefinite suspension without pay pending the completion of a disciplinary investigation constitutes a disciplinary action resulting in a financial penalty that falls within an adjudicator's jurisdiction under paragraph 209(1)(*b*) of the *Act*. A debate on whether an administrative measure constitutes a hidden disciplinary measure is not justified in this case as it is obvious on the face of the documents presented that the suspension was a disciplinary measure.

[40] The grievor cited several cases about an adjudicator's authority to award the payment of interest in disciplinary cases. Assessing that case law is premature because this decision is limited to the preliminary issue of jurisdiction, as outlined in my direction to the parties.

C. Respondent's rebuttal

[41] On the one hand, the grievor requested that the Board ignore facts presented by the respondent as hearsay. On the other hand, the grievor himself introduced hearsay evidence and acknowledged that the Federal Court of Appeal in *Basra* reaffirmed the principle that hearsay evidence is admissible if it is reliable and relevant.

[42] The grievor is asking the adjudicator to decide whether he has jurisdiction under paragraph 209(1)(*b*) of the *Act* without providing the essential factual background of the case. Considering the jurisprudence, the respondent fails to see how the adjudicator can decide whether its decision was disciplinary without looking at the circumstances surrounding the decision to suspend the grievor without pay. The grievor should have provided his view of the facts, if he disputed them. His position defeats the purpose of arguing the issue through written submissions.

[43] The grievor's assertion that the respondent is trying to disguise disciplinary action by using the term "fact finding investigation" in its written submissions has no merit. The grievor argues that the reference in the respondent's documents to suspending him "pending a disciplinary investigation" demonstrates that the suspension without pay was disciplinary in nature. For him, only a suspension with pay could be considered an administrative measure. He supports his position by referring to Appendix G of the collective agreement entitled, "Removal from duties

pending the outcome of disciplinary investigations in regards to incident involving offenders." However, Appendix G only addresses a situation in which an employee is involved in an incident with an offender. While the grievor considers a suspension with pay or a reassignment under Appendix G an administrative measure, the parties still refer to the investigation as "disciplinary." Simply put, the grievor's argument that the wording used in the respondent's documents is evidence of a disciplinary action is a red herring and does not help the adjudicator.

[44] The grievor contends that a suspension without pay pending an investigation is always disciplinary in nature, no matter the circumstances, and cites the adjudicator's decision in *Basra* in support. By doing so, he misunderstands or mischaracterizes that decision as well as the current state of the jurisprudence in labour law.

[45] The adjudicator in *Basra* ruled that the suspension without pay was initially an administrative measure but that it became disciplinary after one month. The Federal Court found that the adjudicator erred by not considering whether the employer's intention in suspending the employee was to punish him, as required by the jurisprudence. It also ruled that the adjudicator failed to consider hearsay evidence and to determine what weight it should be given. As a result, the Federal Court allowed the application for judicial review and sent the matter back to the adjudicator for redetermination.

[46] The Federal Court of Appeal maintained the Federal Court's decision but varied its order. It held that an adjudicator must consider the intent of the employer to determine whether a measure was disciplinary. However, it ruled that the adjudicator had, in fact, analyzed the employer's intent and had determined that the suspension without pay became disciplinary after 30 days.

[47] What remains from all the *Basra* cases and the jurisprudence submitted by the respondent is that an adjudicator must assess the intent of the employer when it decides to suspend an employee without pay. While the Federal Court of Appeal in *Basra* suggested that withholding pay could be *prima facie* evidence of discipline, it decided not to rule on that issue and maintained the Federal Court's ruling on the intent behind a decision to discipline, as supported by the existing jurisprudence.

[48] To refer a grievance to adjudication under paragraph 209(1)(*b*) of the *Act*, there must be a disciplinary action that results in a termination, demotion, suspension or

financial penalty. The fact that the grievor may have suffered a financial loss, which the respondent denies, does not establish the adjudicator's jurisdiction. Financial loss is not enough. There must be a penalty; see the interpretation of "financial penalty" in *Chafe et al. v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112.

[49] In addition, for an adjudicator to have jurisdiction, there must be a disciplinary action. It is not sufficient, as the grievor contends, that the decision be made as "part of a disciplinary process." The decision to suspend without pay pending an investigation must be proven to comprise a disciplinary action.

[50] The grievor's assertion that the respondent ". . . *prima facie* acknowledged the adjudicator's jurisdiction . . ." in an email from Ms. Rowe is bogus. Ms. Rowe simply acknowledged that paragraph 226(1)(*i*) of the *Act* gives an adjudicator the power to award interest in specific cases. That acknowledgment cannot be characterized as a concession that an adjudicator has jurisdiction over this matter. Moreover, Ms. Rowe's email formed part of confidential settlement discussions between the parties and should not have been disclosed by the grievor.

[51] In conclusion, the respondent's decision to suspend the grievor without pay pending an investigation was not a disciplinary action as evidenced by the documents submitted both by both parties and by the fact that the respondent reinstated the grievor in his position and reimbursed his full salary and benefits once the disciplinary investigation was concluded. Had the respondent intended to punish the grievor when it decided to suspend him without pay pending investigation, it would have simply reinstated him without reimbursing salary and benefits. In this case, there was no disciplinary action and no financial penalty. In such circumstances, the redress option available to the grievor was to challenge the respondent's final-level grievance decision by way of judicial review before the Federal Court — not by referring the matter for adjudication.

IV. Reasons

[52] The live substantive issue in this case is the grievor's claim for interest on the salary and overtime not paid during his suspension without pay (but subsequently reimbursed). The alleged amount of interest owing is not in evidence, although my discussions with the parties during the pre-hearing conference left me with the impression that it was not large. Apparently, the underlying dispute between the

parties concerns a principle — whether the respondent should be required to pay interest when it retroactively restores salary and overtime for a period of suspension without pay.

[53] I may consider that question only if the grievance is properly before me under paragraph 209(1)(*b*) of the *Act*, which reads as follows:

> ***209.*** *(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> *. . .*
>
> *(*b*) a disciplinary action resulting in termination, demotion, suspension or financial penalty;*
>
> *. . .*

[54] The respondent objects to my jurisdiction on the grounds that there is no basis to characterize its decision to suspend the grievor without pay as disciplinary. As such, the subject matter of the grievance does not come within the ambit of paragraph 209(1)(*b*) of the *Act*. The grievor disagrees, maintaining that the respondent's decision to suspend him without pay was punitive from the beginning and disciplinary by its very nature.

[55] Before evaluating the arguments presented by the parties, I turn to the grievor's submissions on the evidence. The grievor takes the position that some of the facts alleged by the respondent are "not corroborated." Giving that expression its normal meaning, I take the grievor to be arguing that the facts proposed by the respondent in its submission were not supported by statements from another source or that no additional evidence was presented that tended to confirm those facts. However, the grievor also appears to suggest that the evidence is tainted hearsay. He maintains that, short of an oral hearing, the purportedly uncorroborated facts should not be considered.

[56] I found the statement of the grievor's position on the facts alleged by the respondent rather confusing. The grievor never directly stated that those facts were incorrect or unproven, only that they were "not corroborated." In the context of a proceeding based on written submissions, it is unclear to me why, or how, a

requirement to corroborate applies. It is also unclear to me what it means in that context to infer that evidence comprises hearsay. The nature of a process based on written submissions is that one or both parties allege facts to be true and make their arguments assuming their veracity. Both parties are free to dispute the facts proposed by the other side. The decision maker must determine whether the written submissions allow him or her to decide the issues. If there are relevant facts in dispute, an oral hearing may be required to permit the decision maker to rule on the evidence. At such a hearing, corroboration, or its lack, can be a consideration in weighing the facts. Allegations that evidence constitutes hearsay may also play a role, requiring that the decision maker rule either on the admissibility of evidence or on the weight that it should be given, or on both.

[57] I have reviewed the parties' written submissions closely and have concluded that they permit me to assess and rule on the respondent's objection to my jurisdiction. The grievor's comments indicate that some alleged facts are in dispute although he fails, in my view, to offer sufficient elaboration to establish the impact of the purportedly uncorroborated facts on the central issue of jurisdiction. My reading of the submissions has satisfied me instead that, within the undisputed elements of the chronology of actions taken by the respondent, there is a sufficient basis to allow me to make a ruling on jurisdiction without an oral hearing. To that extent, there is no need to inquire further into those other facts that may be contentious.

[58] In my view, suspensions without pay held out as administrative by an employer pose a significant challenge. The removal of an employee from the workplace and the discontinuation of his or her salary and employment benefits normally raise the apprehension that discipline may have occurred. Some observers argue that — not without reason, in my opinion — suspending an employee with pay is a measure that can be more readily characterized as non-disciplinary and administrative in nature.

[59] Regardless of such views, my reasons in this case are guided by the direction that has been given to adjudicators under the *Act* or under the former *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35, by the supervising courts. I note, in particular, the Federal Court's ruling in *Frazee*, with a cross-reference to Brown and Beatty, to the following effect:

. . .

[19] Whether an employer's conduct constitutes discipline has been the subject of a number of arbitral and judicial decisions from which several accepted principles have emerged. A useful summary of the authorities is contained within the following passage from Brown and Beatty, Canadian Labour Arbitration *(4th ed.) at para. 7:4210:*

[…]

> *In deciding whether an employee has been disciplined or not, arbitrators look at both the purpose and effect of the employer's action. The essential characteristic of disciplinary action is an intention to correct bad behaviour on an employee's part by punishing the employee in some way. An employer's assurance that it did not intend its action to be disciplinary often, but not always, settles the question.*
>
> *Where an employee's behaviour is not culpable and/or the employer's purpose is not to punish, whatever action is taken will generally be characterized as non-disciplinary. On the basis of this definition, arbitrators have ruled that suspensions that required an employee to remain off work on account of his or her health, or pending the resolution of criminal charges, were not disciplinary sanctions. . . .*

[20] The authorities confirm that not every action taken by an employer that adversely affects an employee amounts to discipline. While an employee may well feel aggrieved by decisions that negatively impact on the terms of employment, the vast majority of such workplace adjustments are purely administrative in nature and are not intended to be a form of punishment. . . .

[21] The case authorities indicate that the issue is not whether an employer's action is ill-conceived or badly executed but, rather, whether it amounts to a form of discipline involving suspension. Similarly, an employee's feelings about being unfairly treated do not convert administrative action into discipline. . . .

[22] It is not surprising that one of the primary factors in determining whether an employee has been disciplined concerns the intention of the employer. The question to be asked is whether the employer intended to impose discipline and whether its impugned decision was likely to be relied upon in the imposition of future discipline. . . .

. . .

[Footnotes omitted]

[60] In *Basra* (2008 FC 606), the Federal Court referred to, and applied, the ruling in *Frazee* to attack the adjudicator's decision for failing to properly assess the employer's intention in imposing a suspension without pay. The Court wrote as follows at paragraph 19:

> *[19] In this case, the Adjudicator considered that the existence of a disciplinary investigation, and the fact that the applicant had been suspended without pay, was sufficient to give him jurisdiction over the matter under paragraph 209(1)*(b)*) of the PSLRA. However, the Adjudicator did not consider, as he is directed to by the jurisprudence, whether the employer's intention, in suspending the applicant, was to punish him. Rather, it appears that the Adjudicator merely considered that, due to the length of time the investigation was taking, the suspension became disciplinary by default. Therefore, I conclude that this is a serious error, as the Adjudicator applied the incorrect test, which is sufficient in itself to warrant the intervention of this Court. . . .*

[61] The Federal Court of Appeal found in *Basra* (2010 FCA 24) that the Federal Court erred in drawing that conclusion. However, in reversing the Federal Court's ruling in that specific regard, the Federal Court of Appeal did not disturb the requirement that adjudicators must consider the intent of the employer in evaluating the disciplinary nature of a decision. The relevant paragraphs of 2010 FCA 24 read as follows:

. . .

> *[14] It was suggested by this Court during the course of the hearing that the fact that the suspension was without pay may have been sufficient in itself to allow for the conclusion that the measure was disciplinary in nature. That is, the withholding of the pay is* prima facie *punitive since it deprives the employee of the salary to which he or she is otherwise entitled (compare* Cabiakman v. Industrial Alliance Life Insurance Co.*, [2004] 3 S.C.R. 195, at paras 68 and 69). It is no answer to say, as the respondent suggests, that had the investigation exonerated the appellant, he would have been entitled to his full pay retroactively (Memorandum of the respondent, para. 65). It remains that while he was suspended the appellant was deprived of his salary.*
>
> *[15] Confronted with this, Counsel for the respondent requested the opportunity to make further submissions on this issue. In a letter dated December 23, 2009, Counsel pointed out that the withholding of the pay is a mandatory*

> *aspect of any suspension according to the CSC's long established policy (reference is made to CSC's Guide to Staff Discipline and Non Disciplinary Demotion or Termination of Employment for Cause). Since the "without pay" aspect of the suspension is mandatory, Counsel submitted that it cannot be viewed as reflecting a punitive intent on the part of the employer (Submission of December 23, p. 2).*
>
> *[16] Counsel for the appellant vigorously challenges that assertion. He contends that the CSC is authorized to suspend employees with or without pay and has done so in the past (Submission of January 5, 2010).*
>
> *[17] We need not dwell on this issue because it is apparent from a careful reading of the reasons that the adjudicator did in fact consider the intent of the employer in reaching his decision.*
>
> *[18] In this respect, the adjudicator found that the measure was administrative in nature during the first thirty days and became disciplinary thereafter. In drawing this distinction, the adjudicator was of the view that, although there was no intention to punish on the part of the employer during the initial thirty days, this ceased to be the case when the employer allowed the suspension to run indefinitely, pending the outcome of the prosecution (Reasons, paras. 99 and 100). The reasons cannot be read otherwise as there is no other basis upon which the adjudicator could have drawn the distinction.*
>
> *[19] It therefore cannot be said that the adjudicator failed to consider the intention of the employer in reaching his decision and the Federal Court Judge erred in holding otherwise.*
>
> . . .

[62] The essential point that I draw from *Frazee* and from the *Basra* decisions is that I am required to examine the specific circumstances of this case for evidence depicting the respondent's intent when it decided to suspend the grievor without pay and thereafter. If I am satisfied that the respondent has proven that, on a balance of probabilities, the intent underlying its "administrative" decision was non-disciplinary at the time of the decision and that it continued to be non-disciplinary during the resulting suspension, I must decline jurisdiction. Conversely, if the respondent has failed in its burden, then I must find that its decision was disciplinary in its essential character regardless of how the respondent described it and that, as a consequence, I have jurisdiction to consider the grievance under paragraph 209(1)(*b*) of the *Act*.

[63] The decision in *Cabiakman*, cited by the grievor, does not dissuade me from that view. The Supreme Court's ruling in *Cabiakman* concerned an individual contract of employment governed by the *Civil Code of Quebec*, S.Q. 1991, c. 64. In that context, the Court confronted the question ". . . as to whether an employer has a unilateral power to suspend the effects of an individual contract of employment for administrative reasons . . ." (at paragraph 46). It ruled, in part, as follows:

. . .

> *61. The employer may always waive its right to performance of the employee's work, but it cannot avoid its obligation to pay the salary if the employee is available to perform the work but is denied the opportunity to perform it. By choosing not to terminate the contract of employment, with its associated compensation, the employer will, as a rule, still be required to honour its own reciprocal obligations even if it does not require that the employee perform the work.*

. . .

The Court proceeded, as noted by the grievor, to outline exceptional circumstances in which the requirement to continue to pay in accordance with the contract of employment may be disregarded (at paragraph 62).

[64] Apart from the clearly different statutory context in which the Supreme Court examined administrative suspensions in *Cabiakman*, its analysis does not directly consider the circumstances in which an administrative decision becomes disciplinary. It poses a quite different question than the courts answered in *Frazee* and in the *Basra* cases. As such, I believe that *Cabiakman* can and should be distinguished.

[65] *Massip*, argued by the grievor, does not apply. Its subject matter was forthrightly a disciplinary termination described as such by the employer. There was no claim in that case that the employer's action was administrative.

[66] As for *Larson*, also argued by the grievor, the central issue addressed by the adjudicator does not arise in this case. The grievance at hand claims that the respondent owes interest beyond its restoration of salary and benefits for the period of suspension without pay. In *Larson*, the question was whether the employer proved that it acted with justification when it imposed a suspension without pay in the first place. The adjudicator's ruling in *Larson* assigned an entirely different onus to the employer than operates in this jurisdictional matter — the onus to prove the risk of

keeping an employee who has been charged with a criminal offence in the workplace and to show that it has taken reasonable steps to ascertain whether that risk can be mitigated.

[67] Having found no case law in the grievor's submissions that overcomes what I believe to be the governing direction given in *Frazee* and in the *Basra* decisions, I return to the facts — specifically, to the subset of facts not disputed by the grievor. The most telling of those facts, in my opinion, emerges from Warden Campbell's letter to the grievor dated October 20, 2008. In her letter, the warden states that the investigation report that she received alleviated her concern that the grievor's presence in the workplace posed the possibility of ". . . a serious or immediate risk to staff, inmates, the public, or the reputation of the CSC." With that concern set aside, the warden returned the grievor to the workplace and rescinded his suspension without pay. Critically, Warden Campbell's letter makes it clear that the disciplinary process was not over. The facts reveal that the possibility of discipline continued until March 16, 2009, when the warden notified the grievor that the process had ended (in the wake of the discipline hearing of February 23 and 24, 2009) and that she had determined not to impose discipline. In those specific circumstances, I believe that the respondent has successfully demonstrated that, on a balance of probabilities, the warden's primary intent in suspending the grievor in the first place was not to impose a disciplinary sanction — instead, it was to manage a risk that she felt could exist if the grievor remained in the workplace, given the situation as she knew it. Once she judged that that risk was removed, she ended the suspension. Had Warden Campbell continued the grievor's suspension without pay after October 20, 2008 despite concluding that, on the input of the investigators, the risk no longer existed, a different view of the situation might be possible.

[68] In my respectful view, it matters very little in the circumstances of this case whether the investigation that the respondent initiated in September 2008 is properly called a "fact-finding" process or a "disciplinary" process. The label that the respondent used then or now does not definitively determine the nature of the decision that it made. Instead, the unique facts of the situation allow me to accept that Warden Campbell's decision to suspend the grievor was not primarily disciplinary in character when initially made and that it remained non-disciplinary until it was rescinded by her letter of October 20, 2008.

[69] I note that the grievor referred several times in his submissions to provisions of the collective agreement. I have declined to consider those references. The grievance in this case was referred to adjudication as a matter involving paragraph 209(1)(*b*) of the *Act*. As such, no issue of adherence to the purported requirements of a collective agreement has been properly placed before me. Moreover, as submitted by the respondent in rebuttal, it is far from apparent that the parties intended that Appendix G of the collective agreement would apply to fact circumstances of the type in this case.

[70] On the basis of the preceding analysis, I find that the respondent has substantiated its objection to my jurisdiction to consider the grievance. As the subject matter of the grievance does not comprise a disciplinary action within the meaning of paragraph 209(1)(*b*) of the *Act*, I have no lawful basis to proceed to consider the grievor's claim of interest.

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

(The Order appears on the next page)

V. Order

[72] The grievance is dismissed.

April 13, 2011.

Dan Butler,
adjudicator