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Public Service Labour Relations and Employment Board Act and *Public Service Labour Relations Act*

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

RUTH CAMERON

Grievor

and

DEPUTY HEAD
(Office of the Director of Public Prosecutions)

Respondent

Indexed as
Cameron v. Deputy Head (Office of the Director of Public Prosecutions)

In the matter of individual grievances referred to adjudication

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

For the Grievor: Herself

For the Respondent: Karen Clifford, counsel, Treasury Board Secretariat Legal Services

Heard at Ottawa, Ontario,
October 19 to 22, 2015.

I. Individual grievances referred to adjudication

[1] Ruth Cameron ("the grievor") referred two grievances to adjudication on July 3, 2013. They relate to the same events and were treated together at the final level of the grievance process by the deputy head ("DH") of the grievor's department, the Public Prosecution Service of Canada (PPSC or "the employer").

[2] Both grievances relate to the process in a PPSC classification review exercise. One is about the process itself; the other is about the employer's alleged failure to investigate a subsequent complaint that the grievor made about the process.

[3] The employer objected to the Public Service Labour Relations and Employment Board's ("the Board") jurisdiction in this matter, both before the hearing and at its outset. I decided to hear the evidence on the merits before deciding if I had jurisdiction.

[4] For the reasons set out below, I have concluded that the Board does not have jurisdiction to adjudicate the grievances. For them to be adjudicable, I would have had to find that the employer's actions were disciplinary in nature, and I did not have evidence to support such a finding.

[5] The grievances were referred for adjudication in July 2013. On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Board to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) before November 1, 2014, is to be taken up and continue under and in conformity with the *Public Service Labour Relations Act* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

II. Summary of the evidence

[6] The grievor called two witnesses, Noémie Boivin, who at the relevant time was a senior labour relations advisor classified at the PE-04 group and level, and

Rémy Nasreddine, who was a senior classification advisor also classified at the PE-04 group and level. The grievor also testified.

[7] The employer called one witness, Sue Kelly, who was at the relevant time manager of classification, and who later became manager of classification and labour relations.

[8] I have summarized the evidence for the purposes of this decision, which turns entirely on the issue of the Board's jurisdiction. I found all the witnesses credible, and there were no contradictions as to the facts. Their interpretations of the events are another matter, which will be highlighted when necessary. I will also refer to documents that the parties introduced and that are found in the Board's file.

[9] The two grievances that are before me were heard at the final level in May 2013, and the grievor received the employer's final response in July 2013. I did not accept any evidence beyond that date, except if it directly related to the process of the reclassification (and was arguably disciplinary), such as the notification of the eventual reclassification in June 2014.

A. <u>The grievor's recruitment and the creation of a new PE-05 position</u>

[10] The grievor is a certified human resources (HR) professional. She joined the federal public service 15 years ago and has always worked as a labour relations advisor. She worked at the Department of Justice ("DOJ") and then at the National Research Council where she won a promotion to the PE-05 group and level.

[11] The PPSC was created as a separate entity in 2006; it was formerly part of the DOJ. It developed the different units that serve the organization and that are common to all government departments, including HR.

[12] In 2009, Lyne Côté was director general of HR ("DG HR"), heading the Human Resources Directorate (HRD or "the Directorate"). The HRD tried to recruit a senior labour advisor at the PE-04 level, but the appointment process was unsuccessful. Ms. Côté suggested to Jason Buccino, then manager for staffing and labour relations, that he get in touch with the grievor to see if she would be interested. Ms. Côté and the grievor had previously worked together at the DOJ.

[13] The grievor did express interest in the job when Mr. Buccino contacted her in September 2009. HR at the PPSC offered her a new challenge, with the lawyers' unionization and a new structure being organized that would eventually repatriate the regional services that the DOJ still offered. Accepting a job at the PPSC meant a shorter commute, which was a practical advantage. Finally, the PPSC was a familiar setting, a former part of the DOJ, where the grievor had worked for seven years.

[14] There was one problem. The PPSC was offering a PE-04 position. The grievor had been promoted to the PE-05 level and was certainly not willing to accept a downgrade.

[15] Ms. Côté really wanted to have the grievor work in her directorate because of the grievor's labour relations skills. Mr. Buccino's background was staffing, and he had less experience in labour relations, so there really was a lack of depth in the HRD. The grievor was told that the classification problem could be solved. A new labour relations position was created in the HRD and was staffed at the PE-05 group and level. The letter of offer (Exhibit E-1) was for a ". . . full-time appointment for an indeterminate period as a Senior Labour Relations Advisor, at the PE-05 group and level", effective November 9, 2009.

[16] The new position was given a number. Underlying its creation was a work description (WD), a classification document that serves to document and justify the level attributed to a position. The WD in this case does not refer to labour relations, the grievor's area of expertise. Rather, it is a general HR document that covers people working in HR (in classification, labour relations, staffing, and compensation and benefits).

[17] Robert Desrosiers, a classification officer, and Ms. Côté, who was certified in classification, both signed a document that justified attributing the PE-05 group and level to that position. It stated that the WD used to create the new position was identical to one used at the DOJ for "position 00011882 (HR Policy and Planning Leader)", and it used the rating of the WD's three components to establish the rating for the new position, which were knowledge, decision making, and managerial responsibility.

[18] From November 2009 to spring or summer 2012, the grievor worked happily as a senior labour relations advisor. There was a lot of work and many challenges, and she consistently received high performance evaluations. She reported to Mr. Buccino.

Also reporting to Mr. Buccino was her colleague, Ms. Boivin, who was also a senior labour relations advisor but was classified at the PE-04 group and level.

B. A word about classification

[19] One of the employer's arguments challenging the Board's jurisdiction is that these are essentially classification grievances, which have specific recourse and cannot be referred to adjudication. The grievor is not of that view at all; she grieved the treatment she endured from the employer. In any event, classification played a major role in the events, and I find it necessary to explain briefly what I have gleaned from the two certified classification specialists who appeared before me, Ms. Nasreddine and Ms. Kelly.

[20] All positions in the federal public service are classified at a certain group and level. The group is the occupational category, and the level reflects the progression made in the occupation. The higher the number, the greater the responsibilities, and possibly the greater knowledge or education required; a higher number also commands a higher salary.

[21] Classification is not an easy process, and classification officers and advisors are trained and certified. Classification advisors will draw up the WDs for a large group (generic WDs) or for single positions (unique WDs). In general, generic WDs are much preferred, to give some uniformity to ratings and thus to ensure fairness in remuneration.

[22] All existing positions in the federal public service are already classified. As tasks and duties change over time, the need may arise to reconsider the WD of a given classification. In addition, managers or employees may request that the classification section revisit a given position's classification. Employees may feel that their positions have not been correctly assessed.

[23] The assessment will take the form of a desk audit or an on-site evaluation. The classification advisor will interview the employee to note all the duties he or she performs and their frequency as well as to note the decision making and managerial aspects of the job, if any. Once the report is prepared, the employee and his or her manager review it for accuracy, and then the classification advisor "maps" it to the WD,

which essentially involves finding the correspondence between the actual tasks and the activities, responsibilities, and skills as stated in the WD.

[24] Occasionally, exceptions may be made to this careful process. I heard of two: "DH-directed" decisions, and the "present incumbent only" (PIO) situation.

[25] A DH-directed decision occurs when the DH overrules a classification recommendation. It happens rarely, and it makes classification specialists unhappy. Despite a recommendation by the Classification Branch to attribute, say, level 3 to a given AS position, the DH, who has the delegated authority from the Treasury Board for classification, can order another level of classification, say level 4 or 5.

[26] A PIO situation occurs when the generic WD is restated but certain positions are excluded from that restatement, for example, if the incumbent is only a few weeks from retirement. The position will be reclassified only when the incumbent retires.

[27] If a given employee's position is reclassified to a lower level, automatic salary protection is then activated under the Treasury Board Secretariat's (TBS) *Regulations respecting pay on reclassification or conversion*. The salary protection at the employee's former classification level will last as long as the employee is the incumbent of the reclassified position.

C. PE-04 review

[28] Ms. Kelly first arrived at the PPSC's Ottawa, Ontario, office in 2009 as a team leader in classification, at group and level PE-05. She had previously been a team leader at the Yukon Regional Office, also at group and level PE-05. She eventually became manager of classification, at group and level PE-06.

[29] In 2010, Ms. Kelly brought to Ms. Côté's attention something that seemed to her to be an anomaly: the grievor and Ms. Boivin had the same job title and did essentially the same work, yet the grievor was classified PE-05 and Ms. Boivin PE-04. Ms. Côté explained that the grievor had been recruited at a time of need, that the PE-05 position had been created especially for her, and that the initial vision had been that the job would acquire additional duties to justify the PE-05 classification. Ms. Kelly stated her objection at the time, which was that the PE-05 position occupied by the grievor had no managerial duties, which to Ms. Kelly was the hallmark of a PE-05 position, a position she knew well, since that had been her most recent position. Ms. Côté countered that

in her opinion, the grievor's experience warranted the PE-05 classification. In any event, she was declaring it a PIO. Ms. Kelly did not have the authority to dispute Ms. Côté's decision and left it at that.

[30] In early 2012, Ms. Côté retired, and Denis Desharnais replaced her. As the new DG HR, Mr. Desharnais seemed determined to move the Directorate along. Ms. Kelly spoke of his "vision" for the Directorate, and the employer introduced a PowerPoint presentation depicting the various objectives Mr. Desharnais had in mind for the Directorate.

[31] Transformation was occurring at the HRD in early 2012, and one of the projects management had in mind was to review the PE-04 classification level. Several factors were at play. The TBS had announced a government-wide review of the classification system, but it could take time, and the PPSC was not prepared to wait. A satisfactory classification standard existed for the PE-06 level, as well as for the lower three levels. But the PE-04 level seemed in disarray and to not correspond to the reality of the work of PE-04s. As for the PE-05 level, there was no generic WD, and no need for it, according to the HRD, since there were only two PE-05s in the organization: the Whitehorse team leader and the grievor.

[32] There was yet another reason, which management hid from the grievor for over a year, citing privacy concerns.

[33] This is an example of the variance in narratives between the employer and the grievor. According to the employer, an employee had raised issues about her WD in the spring of 2012, which made the PE-04 review even more pressing.

[34] During the course of the final-level hearing in May 2013, the grievor learned for the first time that one of the triggers of the PE-04 review had been the "complaint" of another PE-04 employee. After the hearing, the grievor promptly called that employee, who denied making a "complaint". She had simply asked for her WD to be updated, as she considered that it did not fairly reflect her duties. She had used the grievor's PE-05 WD to illustrate to the employer that her job was more adequately reflected in that WD.

[35] The grievor was not apprised of this "complaint" for a full year, because the employer saw it as a privacy issue. The concerned employee was probably anxious not

to add to the grievor's concerns and so denied to her that she had made a complaint. This vagueness only added to the grievor's confusion and anger, and she accused Ms. Kelly of fabricating a complaint when there was none.

[36] I have no trouble finding that the employee in question did manifest to the employer that she was unhappy with her job classification and that she thought the PE-05 classification corresponded better, which can be seen in the emails between that employee and management.

[37] Her classification concerns added to the urgency to standardize the PE-04 generic classification at the PPSC. I also find that the PE-04 review had long been on Ms. Kelly's mind and that it included, among other concerns, the apparent anomaly of having two jobs with the same title classified differently.

[38] While management was contemplating the PE-04 review, the grievor received no information. Management sent an email in July 2012 to all PE-04s, informing them of the review exercise and asking for their input (this was done instead of a desk audit).

[39] By October 2012, the exercise had been completed. A document entitled "Organizational Design and Classification, Classification Rationale" was submitted to a Classification Expert Committee, comprised of two classification senior managers from other departments and chaired by Ms. Kelly. This was a proposal for a generic WD to be applied to all senior HR advisors, classified PE-04, at the PPSC. The effective implementation date was November 28, 2012.

[40] For some time, Ms. Kelly and Mr. Desharnais had been pressing Mr. Buccino to speak to the grievor and explain to her that the HRD was considering re-evaluating her position in light of the new PE-04 generic WD. Mr. Buccino was reluctant to speak openly to the grievor — Ms. Kelly and the grievor agreed on that point. The message he gave to the grievor, about a desk audit, was quite unclear. When, in November 2012, she was approached by Ms. Nasreddine, whom Ms. Kelly had charged with carrying out the desk audit, the grievor felt angry and frustrated. She thought the exercise was being done as a cover-up to simply downgrade her position and that she was not being given a full explanation. She did eventually cooperate with the audit, but she was upset by an exercise she deemed biased from the start.

D. December 3, 2012, meeting

[41] A week before she did the desk audit with Ms. Nasreddine, the grievor met with Mr. Buccino and Ms. Kelly. The purpose of the meeting was to finally enlighten the grievor about what was happening in terms of the PE-04 review and of her job.

[42] To put it mildly, the meeting did not go well. Again, the narratives differ, but the basic facts seem rather clear.

[43] Ms. Kelly explained that the grievor's position needed to be re-evaluated. The grievor said that there was no rationale for a re-evaluation — neither she nor her manager had asked for one, and the PE-04 exercise had nothing to do with her, since she was a PE-05. Ms. Kelly countered that the job had been inflated and was not truly a PE-05 job.

[44] It was not a pleasant scene. Harsh words were spoken on both sides. The grievor walked out; she felt hurt that the offer made to her originally was suddenly being presented as false. Ms. Kelly was no doubt insulted that her expertise and integrity were being questioned.

[45] The grievor complained in writing to her manager about the meeting, demanding clear explanations and demanding that Ms. Kelly be removed from a classification exercise in which she was clearly biased. According to the grievor, numerous problems arose with having the manager of classification, to whom at least one PE-04 reported, be the person responsible for the PE-04 review. In addition, in the past, Ms. Kelly and the grievor had had conflicts at work, and the grievor felt targeted by Ms. Kelly in a review of her position that could end only with a downgrade, given the clear position that Ms. Kelly had stated at the meeting.

E. The continuation of the PE-04 review

[46] Ms. Nasreddine completed the desk audit report in early 2013 and sent it to both the grievor and Mr. Buccino. Unfortunately, she sent her first draft, not her final report. The first draft was the verbatim interview with the grievor; the final draft would have been organized to show the grievor's different duties and activities.

[47] When the grievor met with Ms. Nasreddine, she spoke of the fact that she was ultimately responsible for labour relations in the office, since it was not her manager's

area of expertise. Therefore, the draft report could have been seen as rather critical of and hurtful for Mr. Buccino, which was devastating for the grievor — she liked and respected her manager, and the last thing she wanted was to hurt him. She had been upset and angry when she had met with Ms. Nasreddine. In short, sending the draft report was a major disaster.

[48] The grievor saw it as part of the efforts to discredit her. I believe Ms. Nasreddine's testimony as well as her email of January 31, 2013 that this was an honest, albeit very unfortunate, mistake on her part. Ms. Nasreddine's tone was sincere, and she showed no animosity in her relationship with the grievor.

[49] Ms. Nasreddine mapped the desk audit to the PE-04 classification, confirming that the PE-04-level WD was more suitable. The grievor viewed this finding as lacking credibility and she shared her opinion with her manager, Mr. Buccino.

[50] By the time the grievance process was finishing in May 2013, management had prepared a letter for the grievor, informing her of her position's reclassification to PE-04. Management hesitated, and in the end, the DH decided that her position would be mapped to the TBS standard, which was expected to arrive sometime later, which meant that until June 16, 2014, the grievor's position remained classified at the PE-05 level. On that date, she received a notification that her position had been reclassified to PE-04, in conformity with the TBS standard, and that her salary would be protected at the PE-05 level. This also meant that when the grievances were heard at the final level, the grievor was still in her PE-05 position.

[51] However, from the moment the PPSC PE-04 classification standard was implemented, contradictory postings appeared on the PPSC website, contributing in a large measure to the grievor's anxiety and stress.

[52] A report titled "PE- Personnel Administration, April 1, 2013 – June 30, 2013" was posted on the employer's website on July 14, 2013. The grievor's position number is indicated in it, as well as a reclassification action, from PE-05 to PE-04. The effective date is stated as November 28, 2012.

[53] Ms. Kelly explained that the PE-04 generic WD was implemented on that date. According to Ms. Kelly, that information was entered in the PeopleSoft human

resources information system. Once in, it is nearly impossible to change. Anyway, said Ms. Kelly, the reclassification was not done at that time.

[54] For the grievor, this is evidence that the employer's mind was made up before the desk audit and before any explanation had been given to her. On the face of it, that is exactly what the document shows. No interpretation is necessary for "position number" or "implementation date".

[55] I see it as the employer starting to correct the initial error it had made by hiring a PE-05 to fill a PE-04 vacancy. However, the employer was not consistent, and in the end, it did wait for the TBS standard to reclassify the position. There is evidence that HRD employees were wondering about the grievor's classification; in addition, contradictory organizational charts were published on the PPSC website. One, dated July 8, 2013, shows her position (with its position number and her name) classified PE-04. Another, dated August 28, 2013, shows her classified PE-05.

[56] In a letter addressed to the grievor and dated October 2, 2013, George Dolhai, deputy director, PPSC, responding to another grievance that is not before me, confirmed that the grievor would ". . . remain employed in a PE-05 position as a Senior Advisor, Labour Relations".

[57] The grievor took stress-related sick leave in early 2013. She learned in March 2013 that Ms. Kelly was to be head not only of Classification but also of Labour Relations; in other words, she would be the grievor's direct supervisor. This added to the grievor's distress, anger, and conviction that the employer was set on making life so unpleasant that leaving the PPSC or retirement would be her only ways out.

F. <u>The grievances</u>

[58] Ms. Cameron grieved the process by which her position was reviewed, as follows:

> *I grieve that the employer has failed to provide a transparent review of my current position and that it has not conducted this review in accordance with its policy and established procedures such that the review has been prejudicial to me.*
>
> *I also grieve that the employer has demonstrated bias in the conduct of this exercise such that the review has not been*

> *undertaken with objectivity and that it has been prejudicial to my interests.*

[59] She also grieved as follows the employer's failure to investigate the complaint she made immediately after the December 3, 2012, meeting:

> *I grieve that the employer failed to investigate (properly and in a timely manner) my formal complaint dated December 3, 2012 alleging bias and lack of transparency in the current review process related to my position.*

[60] As corrective measures, the grievor requested that the review be done independently, with no involvement from Ms. Kelly. She asked for a "full disclosure" of the exercise's true intention and to be informed of the detailed procedures that would be followed for the review, before it happened. Finally, she asked for the reinstatement of her sick leave since it had been used up due to ". . . management's failure to provide a fair, objective and transparent process", which had triggered undue stress. She also requested an explanation as to why her December 3 complaint had not been investigated.

[61] The PPSC's DH provided the final-level reply. He held a hearing with the grievor in May 2013 and issued a five-page response on June 27, 2013.

[62] The DH's response presents the employer's narrative — a review of the PE-04 classification was necessary, and attempts were made to explain it to the grievor, but she was unwilling to listen. The insult she might have felt on December 3, 2012, was discounted. The PE-05 position was expected to "grow"; apparently, it did not, which had nothing to do with the grievor or her qualifications.

[63] After that reply, the DH continued to reflect on the situation. It seems clear from an email exchange with the former DG HR, Ms. Côté, that the grievor's situation continued to be problematic for the employer. In an email dated June 24, 2013, Ms. Côté offered several options to resolve the situation. In explaining the context, she stated that she saw the grievor as the "subject-matter expert" [SME] in labour relations and added: "The model of a SME at the PE-05 exists in DOJ Labour Relations".

[64] The options she offered were the following:

- A PIO. An exceptional measure not favoured by Classification that might cause some morale issues for other PE-04s but that might satisfy the grievor.

- Downgrading the position to PE-04. The salary would be protected, and the grievor would become a "priority" for reassignment in another PE-05 position. Ms. Côté expressed considerable doubt that the priority reassignment could work, as according to her it seemed a rare occurrence in the public service.

- Creating a "Corporate (emphasis in the original)" (as opposed to "Operational") labour relations role in the PPSC, with the position reporting directly to the DG HR. Ms. Côté stated, "Create the role that Ruth was initially hired to do", and added the following:

> *Also, the fact that [Ms. Kelly]'s unit is responsible for all classification decisions in PPSC, creating an independent role to answer job related content 3rd level grievances might be better than having [Ms. Kelly] defending her own classification decisions.*

[65] One of the grievor's objections to the Directorate's new organization, with Ms. Kelly responsible for both classification and labour relations, was Ms. Kelly's potential conflict of interest. When asked about this at the hearing, Ms. Kelly denied that there was any conflict of interest. Different officers worked on classification and labour relations files, and they were free of interference.

III. Summary of the arguments

A. For the grievor

[66] The grievor submitted that management's action amounted to disguised discipline, which adversely affected her. Management was motivated to discipline her for behaviour it considered culpable, including the following:

- her frustrating a classification review exercise by objecting to its planned oversight and by refusing to sign the audit report;

- her walking out of a meeting with two managers on December 3, 2012;

- her filing a complaint against the manager of classification following that meeting;

- her challenging her supervisor to provide clear explanations;

- her filing multiple Access to Information and Privacy ("ATIP") requests and sharing the results with another employee;
- her transmitting her concerns directly to the DH; and
- her exposing HR management's manipulation of HR records to the DH.

[67] The grievor was seen as uncooperative and problematic. The stress of an abusive workplace led to a workplace-induced illness that management failed to report, contrary to its own occupational health and safety policy and procedures.

[68] The employer is responsible for several financial losses caused by this situation, which amount to a financial penalty. The grievor depleted her sick-day credits, incurred medical expenses not covered by workplace benefits, spent funds on ATIP fees, and assumed the costs to prepare for the hearing. Pain and suffering and loss of enjoyment damages also arose. Although the grievor's salary is protected, she suffered the loss of an economic increase.

[69] The employer's actions amounted to disguised discipline — it sought to punish the grievor, and its actions had a punitive effect.

[70] The grievor argued that the employer failed to investigate the December 3, 2012, complaint in a proper and timely manner. Upper management never sought to explain to her if and how her complaint was being investigated.

[71] The employer also failed to provide a transparent review of the grievor's position. It ignored its conflict-of-interest policies; it never answered her questions, and it provided no information. It asked a PE-04 to work on the classification review of PE-04s within the department, an obvious conflict of interest.

[72] The grievor referred to *Shelanu Inc. v. Print Three Franchising Corp.*, 2003 CanLII 52151 (ON CA), and to *Bhasin v. Hrynew*, 2014 SCC 71, to illustrate her point about the requirements of good faith.

[73] The grievor also referred to *Galarneau v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 1, as support for her contention that these were continuing grievances.

[74] Finally, the grievor referred to *Grover v. National Research Council of Canada*, 2005 PSLRB 150, for the proposition that an action may be disciplinary even if the employer says it is administrative.

[75] The grievor alluded to constructive dismissal. By altering her working conditions and rendering her position so unstable, the employer was modifying her working conditions, rendering her situation untenable, and basically pushing her out the door. This could be seen as constructive dismissal.

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

[76] The employer's submissions were essentially that the Board has no jurisdiction over these grievances; they are classification matters, over which the Board does not have jurisdiction, and moreover, they were referred under paragraph 209(1)(*b*) of the *PSLRA*, yet they have no disciplinary element.

[77] The employer's counsel submitted a number of arbitral and court decisions to support her arguments. I will not cite them all but will refer to those that seem determinative of the jurisdiction issue.

[78] At the start of her arguments, the employer's counsel invoked *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (F.C.A.), for the proposition that a grievance and the requested remedies cannot be altered at a hearing.

[79] The employer argued that discipline had not been raised in the grievances, and therefore, introducing the notion of discipline for adjudication purposes was also disallowed under the *Burchill* doctrine. The grievor was requesting remedies that had not been requested in the initial grievances.

[80] The employer argued that these are classification grievances, and as such, they cannot be adjudicated under the *PSLRA*. The Federal Court has jurisdiction to hear judicial reviews of the decisions rendered by classification grievance committees, which is the procedure the TBS established to deal with classification grievances. The Board cannot consider all the concerns the grievor expressed as to how the classification review was led since it has no jurisdiction over classification matters.

[81] The employer also argued that its actions had no disciplinary component. It led the classification review it had the authority to lead, and there was no culpable

behaviour on the grievor's part that it sought to punish. For a disciplinary action to be proven, a grievor has to show intent on the employer's part to sanction behaviour; the grievor was unable to identify anything in the employer's actions that would demonstrate intent to discipline.

[82] Several decisions can be cited on the distinction between an administrative measure and a disciplinary action. The latter is characterized by a disciplinary intent on the part of the employer. (See *Chamberlain v. Attorney General of Canada*, 2012 FC 1027, *Attorney General of Canada v. Frazee*, 2007 FC 1176, and *Lindsay v. Attorney General of Canada*, 2010 FC 389).

[83] The employer disputed that any financial penalty was imposed and cited *Chafe v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112, for the proposition that for a financial penalty to be found, both a financial loss and a disciplinary sanction must have occurred.

[84] The employer submitted that there is no basis for a constructive dismissal claim in the context of the federal public service.

IV. Reasons

[85] The Board does not have jurisdiction to hear referrals to adjudication of all grievances in the federal public service, no matter how meritorious. Jurisdiction has to be found in the enabling statute. In this case, it cannot be found.

[86] Individual grievances are referred to the Board under section 209 of the *PSLRA*, 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*
>
> *(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*
>
> *(*b*) a disciplinary action resulting in termination, demotion, suspension or financial penalty;*
>
> *(*c*) in the case of an employee in the core public administration,*

> *(i) demotion or termination under paragraph 12(1)*(d)*) of the* Financial Administration Act *for unsatisfactory performance or under paragraph 12(1)*(e)*) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or*
>
> *(ii) deployment under the* Public Service Employment Act *without the employee's consent where consent is required . . . .*
>
> . . .
>
> *(2) Before referring an individual grievance related to matters referred to in paragraph (1)*(a)*), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.*

[87] The grievor is not represented by a bargaining agent. The employer did not dismiss or demote her pursuant to its powers under section 12 of the *Financial Administration Act* (R.S.C. 1985, c. F-11; *FAA*). Therefore, the Board can only have jurisdiction to deal with the matter if the employer's actions can be shown to be disciplinary (section 209(1)(*b*)).

[88] I agree with the employer that a grievance and the remedies cannot be modified at adjudication, as stated in *Burchill*. If I had jurisdiction and were to allow the grievances, I would only consider awarding the remedies requested in the grievances. As for the grievances themselves, their scope is limited to the allegations that the employer failed to provide a proper and unbiased review of her position and that the employer failed to investigate her formal complaint about the alleged bias and lack of transparency in the review process. I will not deal with the grievor's submission made at the hearing about the employer's alleged failure to report a work-induced illness arising from stress in the workplace, as it was not part of the grievances before me.

[89] I do not agree with the employer's *Burchill* argument that the grievor introduced the notion of discipline only when referring her grievances to adjudication. In her final-level submissions, she refers to stages of the reclassification process that she perceives as disciplinary and harassing. The employer cannot state it was not aware of those allegations.

[90] The hallmark of disciplinary measures is the employer's intent to punish culpable behaviour or to seek to correct it. It is not sufficient for the employer to state that a measure is administrative; the adjudicator is allowed to consider the facts to

determine whether there has been disciplinary intent despite the pretense of administrative action. As stated in *Clark v. New Brunswick (Department of Natural Resources and Energy)*, [1995] N.B.L.A.A. No. 15 (QL), the ". . . pivotal issue is whether the Employer intended to punish the Employee."

[91] The Board similarly stated in *Chamberlain*, at para 56:

> *[56] Determination of whether an act is disciplinary is a fact-driven inquiry and may involve consideration of matters such as the nature of the employee's conduct that gave rise to the action in question, the nature of the action taken by the employer, the employer's stated intent and the impact of the action on the employee. Where the employee's behaviour is culpable or where the employer's intent is to correct or punish misconduct, an action generally will be viewed as disciplinary. Conversely, where there is no culpable conduct and the intent to punish or correct is absent, the situation will generally be viewed as non-disciplinary. . . .*
>
> [Emphasis added]

[92] The following quote from *Frazee*, at para 20 to 23, is also relevant to the present case:

> *[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. This point is made in* William Porter v. Treasury Board (Department of Energy, Mines and Resources) *(1973) 166-2-752 (PSLRB) in the following passage at page 13:*
>
> > *The concept of "disciplinary action" is not sufficiently wide to include any or every action taken by the employer which may be harmful or prejudicial to the interests of the employee. Certainly, every unfavourable assessment of performance or efficiency is harmful both to the immediate interests of the employee and his prospects for advancement. In such cases, it cannot be assumed that the employee is being disciplined. Discipline in the public service must be understood in the context of the statutory provisions relating to discipline.*
>
> *[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: see* Fermin Garcia Marin v. Treasury Board (Department of Public Works and Government Services Canada) *2006 PSLRB 16 at para. 85.*
>
> *[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: see* St. Clair Catholic District School Board and Ontario English Catholic Teachers Association *(1999) 86 L.A.C. (4th) 251 (*Re St. Clair*) at page 255 and* Re Civil Service Commission and Nova Scotia Government Employees Union *(1989) 6 L.A.C. (4th) 391 (*Re Civil Service Commission*) at page 400.*
>
> *It is accepted, nonetheless, that how the employer chooses to characterize its decision cannot be by itself a determinative factor. The concept of disguised discipline is a well known and a necessary controlling consideration which allows an adjudicator to look behind the employer's stated motivation to determine what was actually intended. Thus in* Gaw v. Treasury Board (National Parole Service) *(1978) 166-2-3292 (PSSRB), the employer's attempt to justify the employee's suspension from work as being necessary to facilitate an investigation was rejected in the face of compelling evidence that the employer's actual motivation was disciplinary: also see* Re Canada Post Corp. and Canadian Union of Postal Workers *(1992) 28 L.A.C. (4th) 366.*
>
> [Emphasis added]

[93] In *Grover*, the adjudicator had found that despite the employer's affirmation that its actions were administrative, its intention was truly disciplinary. The decision was upheld on judicial review by both the Federal Court (*Canada (Attorney General) v. Grover,* 2007 FC 28) and the Federal Court of Appeal (*Canada (Attorney General) v. Grover,* 2008 FCA 97). The Federal Court judge explicitly states what makes the action disciplinary as follows, at paragraphs 52 and 53:

> *[52] The NRC explicitly levied discipline on the grievor twice – a three day suspension and a five day suspension – for failing to attend with a physician chosen by the NRC, calling his actions "insubordination". It was only at the time of the second suspension that the NRC then purported to take administrative action by ceasing Dr. Grover's salary indefinitely.*

> *[53] The adjudicator also noted that the NRC did not offer Dr. Grover the opportunity to exhaust his sick leave and it refused his request for vacation leave. There was no reason to deny Dr. Grover in this way unless the motivation was to punish or otherwise compel a different course of conduct on his part. These are the very hallmarks of disciplinary action. . . .*
>
> [Emphasis added]

[94] The grievor had the initial burden of showing that the Board had jurisdiction to adjudicate her grievances — she had to establish through the evidence that the measures applied to her were disciplinary and that they sought ". . . to punish or otherwise compel a different course of conduct . . ." on her part.

[95] The grievor listed a number of behaviours that the employer could have wanted to sanction, which were related to her negative reaction to the reclassification exercise. However, they were a reaction to the employer's actions and did not precede them.

[96] The grievor failed to show in her evidence the employer's intent to punish her. I have no doubt that the employer's actions caused her pain and distress, but they resulted from several decisions that although they impacted her negatively, were not intended to do so. I am referring to both the PE-04 classification review and the HRD's restructuring. Both had been long in the making and were not meant to punish her, despite their negative effects.

[97] The lack of disciplinary intent is apparent in the obvious hesitancy in the employer's approach. The grievor was subjected to a period of uncertainty that was unsettling and unwarranted. However, the employer's lack of transparency, no matter how punitive it must have felt, was caused precisely by the fact that it did not want a negative outcome for her, and so it kept making contradictory decisions. The DH stopped Ms. Kelly's reclassification process. In the end, the position was reclassified only when the TBS standard was implemented. The grievor never questioned that decision.

[98] Ms. Kelly testified to the fact that from the start, she saw a problem with the grievor's classification. She told the DG HR, who was Ms. Côté at the time. Ms. Côté reacted by saying the job was a PIO, and that was the end of the discussion.

[99] It is no coincidence that the PE-04 review started in 2012. Ms. Côté had left; Ms. Kelly had become manager of classification, and it seems that the new DG was more willing to listen to her reasoning. Ms. Cameron felt targeted. This perception was not unfounded — her position was one anomaly that Ms. Kelly was seeking to correct.

[100] Again, I do not find a disciplinary intent. I find different managers applying different interpretations of the rules, to the grievor's detriment. The employer could have told Ms. Kelly to leave the PE-05 position alone. It did not. Ms. Kelly could have chosen to tolerate the anomaly of the PE-05 position but did not. The employer is right that I cannot address those decisions nor provide any remedy.

[101] In the same way, the HRD's restructuring, although not ideal in the grievor's view, was management's prerogative and was logical in the context of Mr. Desharnais' vision for it.

[102] The *FAA* vests in the Treasury Board the authority to organize the federal public administration and to manage HR, including terms and conditions of employment. Classification comes under its authority, which in turn is delegated to the DHs. That authority is specifically excluded from the Board's jurisdiction at section 7 of the *PSLRA* as follows:

> ***7.*** *Nothing in this Act is to be construed as affecting the right or authority of the Treasury Board or a separate agency to determine the organization of those portions of the federal public administration for which it represents Her Majesty in right of Canada as employer or to assign duties to and to classify positions and persons employed in those portions of the federal public administration.*

[103] Any public servant can understand the distress of being offered an indeterminate same-level job in another department only to see its classification questioned three years later. The employer understood it too, especially the grievor's direct supervisor, Mr. Buccino. He had recruited her, he had offered her the position, and he had witnessed the upward classification from PE-04 to PE-05 to win her over. Of course he avoided a confrontation; of course he avoided speaking to her. No wonder the process appeared so mysterious.

[104] The December 3, 2012, meeting was decisive. Despite the different narratives, I do not find that the grievor and Ms. Kelly contradicted each other. I believe the simple

facts of this case came out at that meeting; one was that Ms. Côté had recruited the grievor at a PE-05 level to be certain to have her in the Directorate. Ms. Kelly never agreed with the classification, but Ms. Côté overruled her as long as she was the DG. With the change of DG, the PE-05 classification was put into question.

[105] That is not punitive; that is managing. I have no jurisdiction.

[106] Because I do not find the employer's actions disciplinary, the financial losses incurred cannot be considered a financial penalty. The employer cited to this effect the *Chafe* decision. In fact, that decision simply confirms the obvious wording of paragraph 209(1)(*b*) of the *PSLRA*: ". . . a disciplinary action resulting in termination, demotion, suspension or financial penalty . . . (emphasis added)".

[107] The employer also argued against the Board's jurisdiction because these are classification grievances and so are not adjudicable.

[108] According to the grievor, the essence of her case is not classification; it is how the employer treated her during the classification review. Had I found the measures disciplinary, I would have had to determine whether in fact the essence of the grievances was classification. On one hand, the grievor did challenge the impartiality of the process; on the other hand, she never sought to challenge the Treasury Board classification standard that was applied to her position. In any event, I do not need to rule on this further question, as I have concluded that the employer's actions were not disciplinary in nature.

[109] At the hearing, the grievor invoked the contractual concepts of misrepresentation and good faith. They are valid notions, but they are not really at play in the narrow confines of the grievances before me.

[110] The grievor referred to *Shelanu* and *Bhasin*, case law that is not applicable in the circumstances. *Shelanu* deals with a franchisor-franchisee relationship, which is difficult to apply in an employment context, even more so in such a statutorily regulated one as the federal public service. *Bhasin* is an important Supreme Court of Canada pronouncement on the importance of good faith in contracts, a principle long applied in the civil law of Quebec but only now officially endorsed in Canadian common law. I take good faith to be an underlying premise of labour relations in the

federal public service, on the basis of the following words, found in the preamble of the *PSLRA*:

> *Recognizing that*
>
> . . .
>
> *effective labour-management relations represent a cornerstone of good human resource management and that collaborative efforts between the parties, through communication and sustained dialogue, improve the ability of the public service to serve and protect the public interest;*
>
> . . .
>
> *the Government of Canada is committed to fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment . . . .*

[111] However, the fact that the parties are presumed to act in good faith is not sufficient to give the Board jurisdiction.

[112] Similarly, I cannot see this case as one of constructive dismissal, as the grievor had also argued. As stated in *Hassard v. Treasury Board (Correctional Service of Canada)*, 2014 PSLRB 32, constructive dismissal is a private-sector employment concept. Essentially, it is the situation an employee finds herself or himself in when the employer changes so significantly her or his duties or remuneration that it can be considered a fundamental breach of contract and an end to the contract as it existed. The employee can then sue for wrongful dismissal. In *Hassard*, a demotion occurred, for disciplinary reasons, which was not a constructive dismissal, as Ms. Hassard asserted; there was no question that the employer had the statutory authority to carry it out.

[113] In the present case, at issue are the PE-04 classification review and its consequences for the lone PE-05 position. This exercise was entirely within the authority granted by statute to the employer through the *FAA*. Because the employment contract in the federal public service is determined by statute and collective bargaining, private law concepts such as constructive dismissal do not apply. Federal public service employees cannot be terminated except for cause, which is not the case under common law. The counterpart is that the employer can set the terms and conditions of employment and may vary them. Through its regulations, the

Treasury Board offers salary protection for downward classifications, which again is a particularity of the public service regime, not a feature of private employment law.

[114] This is not to say that elements of misrepresentation and constructive dismissal cannot be seen in this case but that they are insufficient to produce a legal argument on jurisdiction.

[115] As to the argument that these are continuing grievances, as described in *Galarneau*, I have no doubt that there are continuing sore points in the grievor's relationship with the employer; however, that is not the definition of a continuing grievance, and I cannot apply the concept. A continuing grievance, very briefly, is based on a repeated breach of the collective agreement that is grieved at one point. The classification review process has ended. The complaint was never solved, but it was related to a specific event, the December 2012 meeting.

V. Conclusion

[116] The facts in this case are unsettling. The PPSC hired Ms. Cameron because it needed her. It offered her a PE-05 job. She had no reason to doubt that it was a genuine offer. She was profoundly humiliated three years later when she was told in no uncertain terms that her position should be classified PE-04. Ms. Kelly was absolutely the wrong person to deliver this news, which she did on December 3, 2012. It should have been done by the PPSC's higher management, taking responsibility for the initial error. Ms. Cameron was right to see Ms. Kelly as having a preconceived idea of what her job was worth. Ms. Kelly did not deny it.

[117] Classification, as the evidence shows, is both a science and an art, as well as a requirement for a large and complex organization such as the federal public service. It is a means by which different levels of employment can be remunerated as fairly as possible. Classification can feel a little unreal. Often, what is formally known as a "Work Description" is not really a description of an employee's work. It does not tell an employee what she is going to do when she comes into work in the morning. Rather, it serves to establish the relative pay levels that will allow people to make sense of the salary scales found at the end of every collective agreement. It takes an expert to decipher the WD; ordinary public servants simply trust that their WD properly reflects their job classification.

[118] By its very nature, classification needs to be impersonal. A classification professional such as Ms. Kelly sees boxes, not people, as she herself stated.

[119] Ms. Cameron is not a box; she is a person. I have no doubt that when she was promoted to the PE-05 level, in her former department, she was proud. This was an achievement.

[120] It was crushing that the PPSC, the department that had sought her out and that had benefitted from her considerable labour relations expertise, signalled after three years that, in several ways, it doubted this achievement. The humiliation was compounded by the unharmonious relationship she had with Ms. Kelly and by the employer's many hesitations to correct a situation that was wrong from the start: offering a PE-05 position to fill a PE-04 position.

[121] Ms. Cameron expressed her feelings by making an analogy at the hearing. I wish to end on those remarks.

[122] Imagine, she said, a store that sells toasters. They advertise far and wide these new-fangled, four-toast toasters, chrome and all. You see the ad, you walk by the store, and you walk in; you've been looking for a toaster, and this one seems darn attractive. But curiously, on the shelves, this wonderful toaster is nowhere to be seen. You ask the salesman. 'Oh yes,' he says, 'Actually, I have only one of those left, it's in the back room, let me get it for you.' He brings it out; you're so delighted to find it, and you feel so lucky to be getting the last one that you buy it on the spot.

[123] And you go home with your brand-new toaster. Actually, you come to realize much to your dismay that it doesn't toast very well. It cannot hold four pieces of bread. And the chrome soon flakes off as paint.

[124] That would be a bait-and-switch, said Ms. Cameron.

[125] I do not have jurisdiction to adjudicate Ms. Cameron's grievances, but I certainly understand the disappointment.

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

(The Order appears on the next page)

VI. Order

[127] The objection to jurisdiction is allowed. The grievances are dismissed for want of jurisdiction.

December 22, 2015.

Marie-Claire Perrault,
a panel of the Public Service Labour Relations and Employment Board