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

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

BETWEEN

KARIM MATTALAH

Grievor

and

TREASURY BOARD
(Department of Foreign Affairs, Trade and Development)

Employer

Indexed as
Mattalah v. Treasury Board (Department of Foreign Affairs, Trade and Development)

In the matter of an individual grievance referred to adjudication

Before: Nathalie Daigle, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Anne Clark-McMunagle, counsel

For the Employer: Kétia Calix, counsel

Heard at Ottawa, Ontario,
June 19 to 21, 2017.
(Written submissions filed July 14 and August 4 and 18, 2017.)

I. Introduction

[1] Karim Mattalah, the grievor, is an employee of the Department of Foreign Affairs, Trade and Development ("the Department" or "the employer"). He alleges that the employer violated clause 9.03 of the collective agreement between the Treasury Board and the Professional Association of Foreign Service Officers (PAFSO), which expired on June 30, 2014 ("the collective agreement"). In particular, he alleges that at the beginning of an assignment to Riyadh, Saudi Arabia, his work objectives were not established or shared with him. In addition, the grievor says that, during his assignment, the employer had concerns about his performance that were not brought to his attention in a timely manner and that he was not given a reasonable opportunity to bring his performance up to the required standard. He claims to have suffered significant damages as a result of this violation.

[2] The employer maintains that at the beginning of the grievor's assignment, his manager established his objectives, and the grievor was consulted on them. In addition, it contends that during his assignment, work performance issues were observed, noted, and discussed with the grievor weekly and that he received mentoring and training to bring his performance up to the required standard. As a result, the employer argues that it did not contravene clause 9.03 of the collective agreement.

[3] The notice of reference to adjudication for the grievance was filed with the Public Service Labour Relations and Employment Board on May 26, 2016.

[4] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act* and the *Public Service Labour Relations Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* ("the *Act*").

[5] As I will explain in this decision, I conclude that the employer did contravene clause 9.03 of the collective agreement.

II. Background

[6] The grievor has been a foreign service officer since April 2009. His position is classified at the FS-03 group and level. His substantive position is in a rotational pool.

[7] In the fall of 2011, the grievor was informed that his first posting, which was to start in 2014, would be in Riyadh, Saudi Arabia, for three years in a Global Security Reporting Program (GSRP) FS-03 position. His posting was confirmed in 2012.

[8] However, in late 2013, the FS-02 officer in Riyadh had to leave for personal reasons, and the Riyadh mission decided to ask the grievor to fill the position as an FS-02 assignment for one year, which he accepted.

[9] As a result, the grievor's posting was to be first a one-year assignment to the FS-02 position in Riyadh, followed by a two-year assignment to the GSRP FS-03 position. At the time, the grievor was a first posting officer; they usually occupy FS-02 positions. He was not told that the second assignment was conditional on him performing at a certain level in the FS-02 position.

[10] In the summer of 2014, the grievor moved with his family to Riyadh.

[11] Close to the end of his first assignment in the FS-02 position, on May 18, 2015, the grievor was notified that his assignment to the GSRP FS-03 position would not proceed. The letter informing the grievor of the end of his assignment indicated the following:

> *As you know, your current Performance Improvement Program, including the requirement to produce a certain number of weekly reports for assessment by the IDS/GSRP group and EMB at HQ, was intended to address issues of under-performance [sic] in the FS-02 position and to establish your readiness to assume the GSRP role. Unfortunately, both your Program Manager's assessment of performance under the PIP and that of IDS relative to the weekly reports that you recently produced, is that you are not meeting the full competencies expected of an officer at the FS-02 level or of what would be expected at the FS-03 level. As a consequence, it is no longer considered appropriate to move you into the GSRP position as this requires an incumbent who is fully capable of performing at the FS-03 level and in highly challenging circumstances.*

[12] The grievor was allowed to complete his first assignment, which lasted until July 2015. He then returned to Ottawa, Ontario, with his family and completed an assignment at his level (FS-03). His substantive position remained unaffected.

[13] On June 16, 2015, the grievor filed a grievance in which he alleged that the employer had violated clause 9.03 of the collective agreement, which reads as follows:

> *(a) At the beginning of an employee's assignment and annually thereafter, the manager in consultation with the employee, will establish the employee's objectives for the year.*
>
> *(b) If during an employee's assignment a concern arises with respect to the employee's performance, the Employer will bring those concerns to the attention of the employee in a timely manner. Except in cases of adverse impact on Canadian's interests abroad, the employee shall be given a reasonable opportunity to bring the performance up to the performance standard.*

[14] His grievance alleges that at the beginning of his assignment, the manager did not consult him on or establish any objectives for the year, contrary to clause 9.03(a) of the collective agreement. The grievance also specifies that he was given a performance improvement plan (PIP) for a six-week period starting in March 2015, due primarily to the employer's concerns over his report writing. The grievor goes on to explain that he wrote numerous reports over that period but that their quality was never discussed with him to identify areas for improvement until after the six-week period was completed. Thus, according to the grievor, he was not given the opportunity to improve from week to week, contrary to clause 9.03(b) of the collective agreement.

[15] The grievance also addressed the fact that the PIP was supposed to end on April 14, 2015; however, it continued to the end of his posting and into his next assignment in Canada, which the grievor claims damaged his career and reputation.

[16] On October 21, 2015, the response at the first level of the grievance procedure was the following:

> …
>
> *Although no formal performance objectives were established at the beginning of your assignment, you were made aware of the expectations by your managers and several discussions*

> *on performance were held between you and them during your assignment. Significant performance issues were noted in respect to your judgment, teamwork and communication skills, as well as your understanding of institutional chains of command. In my view, the decision to terminate your assignment was reasonable.*
>
> *I was also informed that the Performance Action Plan conducted in the Embassy of Canada to Saudi Arabia (RYADH) did not continue in your current assignment in the Maghreb and Regional Commercial Relations Division (EMC). It is my understanding that your performance is currently managed under the Performance Management Program (PMP).*
>
> *Consequently you grievance and the requested corrective measures are denied.*
>
> …

[17] On April 18, 2016, as a final response to the grievor's grievance, the employer stated the following:

> …
>
> *During the grievance hearing, you indicated that you did not receive any comments and/or feedback during the Performance Improvement Plan (PIP). Based on the information I have, your PIP was concluded on April 14, 2015, but you only received comments from Mr. Ken England, Head of the Global Security Reporting Program (GSRP), on May 11, 2015. I therefore agree with your statement that you did not receive any comments and/or feedback during the PIP.*
>
> *Nevertheless, management did address their concerns about your performance during your assignment in RYADH. Improvements in the quantity of reports produced and your adherence to non-reporting tasking deadlines were noted. However, despite several months of ongoing coaching and feedback, a significant gap (lack of judgment, teamwork and communication and lack of understanding of institutional chains of command) remained between your performance and the demonstration of the competencies required of an FS-02 employee, which raised concerns with your abilities to fulfill [sic] the role and responsibilities of the FS-03 position. Based on the above, the decision to end your assignment was reasonable.*

> *In light of the above, your grievance is partly allowed. The PIP will be removed from your personal file in Human Resources. However, the other requested corrective measures are denied.*
>
> …

[18] On May 26, 2016, the grievor referred his grievance to adjudication.

III. The issues

[19] This case involves answering the question of whether the employer violated clause 9.03 of the collective agreement.

[20] That question raises the following two issues:

(1) Did the employer fulfil its obligation, at the beginning of the grievor's assignment to Riyadh, to establish his work objectives in consultation with him and to share them with him?

(2) Did the employer fulfil its obligation to bring its performance concerns to the grievor's attention in a timely manner, and during his assignment, did it give him a reasonable opportunity to bring his performance up to the required standard?

IV. Summary of the evidence

[21] The grievor testified at the hearing in support of his position.

[22] The employer called the following witnesses: Mark Fletcher, Executive Director of the Assignment and Pool Management Division; Aliya Mawani, who was at the time of the grievor's posting in Riyadh Counsellor for Political and Economic Affairs at the Embassy of Canada, Riyadh; and Ram Kamineni, who was at that same time a GSRP officer at the Canadian embassy in Riyadh.

[23] The grievor explained that in 2011 and 2012, he was chosen for a three-year posting in Saudi Arabia that was to start two years later. He accepted the posting and received an "Assignment Confirmation Form" and a "Posting Confirmation Form", which confirmed (1) a one-year assignment into an FS-02 position in Riyadh, followed by (2) a two-year assignment into a GSRP FS-03 position in Riyadh. He took an Arabic language test and was exempted from language training. As he did not require the

two-year language training habitually offered for such postings, he continued as an assistant director in Ottawa until his posting.

[24] The grievor began his first assignment, as a junior political officer (an FS-02 position), on July 29, 2014. As his posting was for three years, his wife and three children moved with him to Saudi Arabia. His wife, a teacher working in Ottawa, took unpaid leave from work for one year, which could be renewed every year.

[25] The grievor explained that three times before he departed, he requested the training offered to GSRP FS-03 officers. However, since his first assignment was as an FS-02 officer, he was denied the training. He also testified that he later asked permission to follow two other training sessions on related subjects (crisis management and social media) but that they were also refused. Ms. Mawani, his program manager, confirmed this.

[26] At the beginning of his assignment, among other things, the grievor was asked to collect and analyze relevant information and carry out some reporting. The evidence indicates that on September 3, 2014, his manager, Ms. Mawani, provided him with feedback with respect to a report he had written. She wrote: “This is a good start.” However, she suggested that he provide supplementary information to improve his report. They had many more exchanges between September and December 2014 on the reports that he wrote. Ms. Mawani considered the reports he prepared unsatisfactory. She testified that she provided him with ongoing feedback.

[27] Ms. Mawani clarified that she had many discussions with the grievor throughout his assignment. They discussed embassy priorities, work assignments, and expectations. She stated that she provided him with objectives. She testified that the objectives established for him were, among other things, the following: he was required to work on the Semaine de la Francophonie file, to follow the domestic development of Saudi Arabia (particularly in human rights), and to work on the budget file. Ms. Mawani testified that the work objectives were described to him verbally in multiple meetings from the day he started at the mission and regularly in bilateral meetings. Ms. Mawani testified that the grievor had been asked to comment on those objectives.

[28] Ms. Mawani also mentioned that the grievor's performance was managed under the Performance Management Program (PMP). However, difficulties arose with its new electronic version. She did not have access to the electronic forms. She testified that she completed the grievor's annual assessment only at the conclusion of his one-year assignment, based on the general objectives under FS-02 duties.

[29] Ms. Mawani acknowledged that the PMP provides a form. Among other things, it serves to identify an employee's yearly objectives. However, she recognized that gaps could have appeared between what was supposed to be done and what was in fact done as the grievor's objectives had not been written down. The head of the mission at the time, the Ambassador, also advised the grievor later on, in March of 2015, of the Department's challenges with the forms in the electronic PMP system.

[30] On November 24, 2014, a Senior Advisor in the Labour Relations Unit of the Department responded to a request for information from Ms. Mawani. In her email, the Advisor provided guidelines to Ms. Mawani to help her prepare for a meeting with the grievor to discuss an action plan, which she also called a PIP. The objective of this plan was to help the grievor improve his performance. The Advisor specifically noted the following: "I would also encourage you to set follow-up meetings to provide him with feedback on the progress he has made in respect to the objectives that were set in the action plan."

[31] I note that the employer objected to the admissibility of this and similar documents, alleging that they are privileged communications between a labour relations advisor and a client. At law, some privileges are class privileges (i.e., solicitor-client privilege), while others are determined on a case-by-case basis according to what is known as the *Wigmore* test (see *Zhang v. Treasury Board (Privy Council Office)*, 2010 PSLRB 46). A class privilege for labour relations communications, on par with solicitor-client privilege, does not exist. However, those communications can still be considered privileged if the four conditions of the *Wigmore* test are satisfied. Two of those conditions are (1) that the communications originate in a confidence that they will not be disclosed; and (2) that this element of confidentiality be essential to the full and satisfactory maintenance of the relation between the parties. With respect to these conditions, a sign of privilege is that the element of confidentiality has been preserved. In this case, the grievor obtained the documents pursuant to an access-to-information request. Thus, the element

of confidentiality was not preserved. Therefore, I rejected the objection and accepted the documents given their relevance.

[32] Despite the advice Ms. Mawani had received about the possible implementation of an action plan, the grievor was not informed at that time that one was being considered for him. He was told about it only much later.

[33] On December 3, 2014, a person in charge of assignments in Ottawa emailed Ms. Mawani. He had heard that there were issues with the grievor in his current assignment. He noted as follows: "I was speaking to … and he signalled that there were issues with Karim in his current assignment, and possible implications for his future assignment. Perhaps we could have a chat about this and where things are at the moment."

[34] The grievor was not told at that time either about the possible implications for his subsequent two-year assignment in Riyadh.

[35] On December 4, 2014, the Senior Advisor in the Labour Relations Unit of the Department informed Ms. Mawani of the following:

…

> *We generally recommend to put in place the action plan for a period of a minimum of 6 months. I think what is most important is to inform the employee that if there is insufficient improvement with his performance over the next 3 months, that you may/will have to identify another candidate for the position. …*

[36] On December 15, 2014, Ms. Mawani took notes of a discussion she had with the grievor. They indicate that on December 14, 2014, she had shared with him the general FS-02 competencies, given the difficulties she had encountered with him, and had flagged to him the ones on which he was underperforming. According to her note, she had explained to him that they were building blocks to the GSRP FS-03 position. She mentioned that over the holidays, she would work on a PMP. She wrote that "… this will be a 'workplan' PMP to help increase his output and help to get him from where he is now, to where he needs to be …". She planned to use the FS-02 competencies in this workplan. She noted that a couple of areas needed work, which were judgment and digging deeper. At some point, Ms. Mawani also provided the grievor with a copy of the list of competencies for the FS group

(which included those for the FS-02 position).

[37] The grievor did not know that the PMP workplan would eventually be transformed into a PIP and that his next assignment was contingent on his performance in his FS-02 assignment. As the following emails and notes show, he was eventually informed that a PIP had been implemented, but only on February 15, 2015.

[38] Not knowing about the discussions Ms. Mawani was having with Headquarters (in Ottawa) about his upcoming two-year assignment, the grievor and his wife continued to assume that they would be in Riyadh with their children for all three years. Thus, at the beginning of the month of February 2015, his wife requested another year of unpaid leave from work, which was authorized.

[39] Mr. Kamineni, the GSRP officer occupying the FS-03 position that the grievor was to occupy as of the summer of 2015, testified at the hearing that like Ms. Mawani, he had habitually reviewed the grievor's draft reports and had provided him with feedback. In addition, an email shows that on February 9, 2015, Mr. Kamineni left a book for the grievor on his desk with a suggestion that he read it in detail. Mr. Kamineni also asked that the grievor copy it and return it as soon as possible, i.e., in the next day or so, which the grievor did.

[40] The evidence shows that the grievor and Ms. Mawani did not get along very well, for a variety of reasons. Each had a negative opinion of the other. Thus, they had difficulty cooperating in the common interests of everyone. Ms. Mawani described the grievor as an extremely secretive, defensive, arrogant, and aggressive person. In her view, he showed a lack of respect for his colleagues and for authority. She insisted that he demonstrated a lack of cooperation and that he did not communicate much. She mentioned that she obtained no engagement from him and that he seemed reluctant to share information.

[41] On the other hand, the grievor said that Ms. Mawani had adopted an intransigent attitude towards him, which thwarted his efforts. The tone and context of the emails they exchanged show that she had adopted stringent standards and that he did his best to cooperate and to prepare balanced reports. In his emails, the grievor continuously remained respectful towards Ms. Mawani and his colleagues.

[42] The evidence also shows that Ms. Mawani returned to the grievor every report he wrote, with many corrections and comments, such as, in her words: "I've done some editing (in red) to condense or re-order [*sic*] points, remove potential sensitivities given that it's a signet report, provide some more tone/description and correct some slightly awkward phrasing in parts." That comment is found in an email dated February 11, 2015.

[43] I note that the grievor was more accustomed to writing in French but that by necessity, he wrote his reports in English to ensure his English readers understood them. He was specifically told and Ms. Mawani confirmed that when he wrote in French, non-Francophones would not read his notes, and he would lose those people. He was encouraged to at least write the summaries of his reports in English.

[44] In response to Ms. Mawani's email dated February 11, 2015, the grievor thanked her for her comments. In reply, she instructed him to list both of them as the report's drafters, given the amount of editing she had done.

[45] The evidence shows that at that time, the grievor told Ms. Mawani that he felt marginalized, with little opportunity to provide his observations and perspectives. For example, she noted that pursuant to a conversation they had on January 29, 2015, in which, among other things, she had questioned his judgment and abilities, he reported that he felt marginalized within the team. Ms. Mawani noted that in response, she asked him if anything in his behaviour or attitude might be contributing to that feeling.

[46] Ms. Mawani also criticized the grievor for both taking and not taking initiative.

[47] For example, Ms. Mawani explained that the grievor should not have taken the initiative to meet the Grand Mufti (the highest religious authority in Saudi Arabia). She explained that he had set up a meeting with the Grand Mufti without informing management. She explained that the Grand Mufti should have been met by someone at the Ambassador's level. Ms. Mawani testified that she had found out about the meeting by accident. As it was decided that the interview with the Grand Mufti could not be cancelled, she indicated that she and Mr. Kamineni had coached the grievor for it. She testified that she had discussed this incident with the grievor, along with its impact.

[48] Ms. Mawani also described another similar incident that occurred a few months later, when the grievor had a phone conversation with the former Prime Minister of Yemen, without informing management, and Mr. Kamineni, who was the lead on the Yemen file. Ms. Mawani testified that she again had discussions with the grievor about this incident and its impact. At the hearing, the grievor explained that he knew the former Prime Minister as he had met him several times in his former position in Ottawa, which was why he took the initiative to have a discussion with him.

[49] But mostly, Ms. Mawani criticized the fact that the grievor did not take initiative. She testified that he did not seem to demonstrate interest in the work, that he did not meet deadlines, and that he had no plausible reasons or explanations for missing deadlines. She testified that when she addressed the poor quality of his reports, he did not try to understand. However, a positive comment from her is in a February 2, 2015, email in which she indicates that the grievor approached her and Mr. Kamineni before meeting with the Egypt Head of Mission to go over questions and themes.

[50] I note that in his written submissions, the grievor submitted that with respect to the issues of the Grand Mufti and the Prime Minister of Yemen, the PAFSO objected at the hearing to the introduction of further testimonial evidence on these topics because it was not relevant to the questions at issue. The PAFSO noted that the objection was upheld. However, I wish to point out that the PASFO did not object to introducing into evidence the 29 documents found in the employer's book of documents. The two topics at issue are discussed in (1) the email entitled *RYADH - 121 Rencontre inédite avec le grand mufti du royaume Saoudien – COMMENTAIRES* (translation: "RYADH -121 Unprecedented Meeting with the Grand Mufti of the Saudi Kingdom – Comments"), Exhibit E-8; and (2) the email entitled *Appel téléphonique avec le PM démissionaire du Yémen* (translation: "Telephone call with Yemen's resigned PM"), Exhibit E-20.

[51] The bargaining agent representing the grievor, the PAFSO, clarified at the hearing that it is not contesting the employer's right to address performance deficiencies. Thus, it agrees that the employer was able to decide to develop a PIP to help the grievor improve his performance. An email dated February 11, 2015, from the Ambassador to the grievor succinctly stated the employer's concerns with his performance, as follows:

> *Thanks* [for the report]. *I understand that this has gone through a lot of drafts since I last saw it more than a week ago.*
>
> *This took far longer than it should have and I know that Aliya* [Ms. Mawani] *had to do a lot of re-drafting [sic]. We need to have a discussion about timeliness and quality of reporting.*

[52] On February 12, 2015, Ms. Mawani informed the division in Ottawa responsible for managing the GSRP program (in her email she refers to the "IDSR" section) of the approach the Riyadh Embassy was taking with the grievor. On Sunday, February 15, she and the Ambassador were to announce to the grievor that an assessment period of six weeks would take place. Part of her email to the IDSR section reads as follows:

…

> *We feel it's important for IDSR to have the opportunity to make a timely and informed assessment regarding Karim's capacity to take on the RYADH GSRP position as envisaged for the fall of 2015. In order for IDSR to make such a determination, we propose an assessment period of 6 weeks commencing February 15, 2015, during which Karim will be tasked to produce one GSRP-style report per week on a topic related to RYADH's domestic and regional reporting priorities. The raw products would be sent directly by Karim to IDSR and a limited distribution for review (without input from the mission) in order that a determination can be made as to whether the reporting meets the standards required by the GSRP program.*

…

[53] The same day, the IDSR's representative in Ottawa emailed Ms. Mawani to let her know that the IDSR supported this approach.

[54] Thus, the IDSR and the Riyadh mission prepared a six-week "trial period" (the term used in a June 18, 2015, summary prepared by the Assignment and Pool Management Division (HFP) Deputy Director for the Assistant Deputy Minister, Human Resources) in which the grievor would be asked to prepare several GSRP-style reports in several weeks. GSRP reports are usually prepared by FS-03 officers. Initially, the trial period was supposed to be eight weeks, but it was changed to six weeks.

[55] This six-week trial period was presented to the grievor as a formal PIP. The Ambassador and Ms. Mawani were responsible for informing the grievor of the PIP's implementation.

[56] Thus, on February 15, 2015 (or February 18, 2015; the evidence refers to two dates), the Ambassador and Ms. Mawani informed the grievor that he needed some type of performance review. He was informed of the six-week plan.

[57] The grievor testified that he was in a state of shock at the rapid change in the situation and at learning that an assessment period of six weeks would take place. He then learned of the possible implications for his future assignment. He testified that the only reason the decision was made to have his family accompany him was the three-year posting that he had agreed to. Had he known that the FS-03 assignment was not certain, his wife and children would not have accompanied him to Riyadh.

[58] On February 15, 2015, Ms. Mawani also noted that she asked an experienced colleague of the grievor in Abu Dhabi for comments about the grievor and his work. The person answered that overall, most points (the small improvements he suggested) should be addressed with greater job experience.

[59] The evidence shows that after that, Ms. Mawani continued to carefully monitor the grievor's work. For example, in a February 16, 2015, email to him, she reminded him of the following: "As discussed, if you're sending out anything in writing, please send Jordan, HOM and me a draft."

[60] On February 23, 2015, Ms. Mawani emailed the grievor. She wrote that she and the Ambassador had met with him to outline their concerns about his performance in his FS-02 officer role. He was formally advised that a PIP was being put in place and was advised of the following:

…

> *-Based on observations of your under performance [sic] to date in the FS-02 position, there are concerns about a significant gap between your current performance and the standard expected of a FS-03 GSRP officer. This being the case, as part of the PIP, you will be required to produce one GSRP-style report per week over a period of six weeks commencing Wednesday February 25, 2015 and ending Tuesday, April 7.…*

> *-These reports will provide you with the opportunity to demonstrate your skills, and IDSR with occasion to appropriately assess your analytical and reporting capabilities and determine the level of gap, if any, between your current performance which, as observed, does not yet meet the requirements of the FS-02 role, and what is required of the FS-03 GSRP position.*
>
> …

[61] The grievor completed the six supplementary reports between the end of February and April 14, 2015, in addition to his regular work. The assessment period was extended from April 7 to 14 because he had been on sick leave during its first days. He testified that he worked very long hours and that he arrived home very late in the evening throughout this period. The situation impacted his relationship with his wife and children as he was too tired emotionally to give them attention.

[62] On March 12, 2015, after submitting two reports, the grievor asked for feedback in order to improve his reporting skills and to make the necessary adjustments in writing the next reports. The same day, the Head of IDSR informed him that he would receive feedback shortly. However, on the next day, the Head of IDSR got back to him and said that he was sorry and that he should have answered that under the terms of the grievor's PIP, they would provide him with consolidated feedback at the end of the process, so only after April 14.

[63] The Ambassador was copied on the response by the Head of IDSR to the grievor's request for feedback. He immediately emailed the following to the Head of IDSR:

> *Hi … I assume that you have checked with HR re how this will look in the face of a grievance against IDSR. Karim seems to be putting a lot of effort into working under the PIP. I have not read these 2 reports he referenced but he has done at least one quite good internal one on a short deadline and is also managing our Francophonie events for March reasonably well as far as I can see.*
>
> *I am just a little worried that, as we have put him on a PIP, he could argue in a grievance that we should have been giving him the feedback and coaching to enable him to improve.*

[64] The grievor testified that he was exhausted by all the work he had to accomplish. He sought psychological counselling and was prescribed medication

to help him get through that period. He also feared that he was being evaluated on two positions at the same time, the FS-02 and the FS-03 positions, yet he had not received training for the GSRP FS-03 position. He felt that something was not normal, and on March 14, 2015, he communicated his concerns by email to the Ambassador.

[65] In response, the Ambassador wrote to the grievor that his understanding was that his performance was not being assessed in the GSRP position at that stage, only in the FS-02 position. The Ambassador also wrote that the PIP was an ongoing process that would need to be reviewed and adjusted regularly until the grievor's performance improvement had been achieved. He added the following:

> *… although the weekly report assignment currently set out in the assessment only has a six-week timeframe [sic], it is very likely that the PIP itself could be extended beyond that so as to continue to work on performance and competencies at the FS02 level.*

[66] In other words, the grievor could be asked to write additional GSRP reports while in the FS-02 position.

[67] At the hearing, Ms. Mawani confirmed that the PIP was put in place for the following reasons: (1) to give the grievor an opportunity to demonstrate his skills and aptitude; and (2) to give the GSRP division and Headquarters an opportunity to evaluate his aptitude. She later admitted that because of the unusual circumstances of the case, i.e., a three-year posting divided into two assignments at two different levels, the PIP was really a test to ascertain whether the grievor could continue in the FS-03 position.

[68] At the same time, Ms. Mawani arranged a three-hour report-writing course, which was scheduled for March 18, 2015. A few persons from the mission, including the grievor, were invited to attend. The grievor confirmed his participation. At the end of the course, the participants were invited to draft a report and send it to the instructor. The grievor testified that he received positive feedback on this report.

[69] Around March 24, 2015, the PAFSO asked the employer to help the grievor. He was feeling overwhelmed by events as he was not receiving any feedback on his reports. The IDSR and Ms. Mawani discussed possible answers to this request for help. She clarified the following for the other officials in the Department:

…

> *I think the main thing to clarify here is that there are two parallel processes going on here. There is the assessment that IDS and EMB are conducting in order to determine his suitability for the GSRP position previous and ongoing concerns about performance, and there [sic] the ongoing coaching, mentoring and feedback being provided to him at mission in the FS-02 position with the aim of improving his performance (the note I sent him yesterday re: communication, sharing info, and attention to detail is an example). Another thing that's important to note is that it doesn't relate just to reporting – it's very much about assessing (in your case) and strengthening (in RYADH's case) core competencies such as initiative, networking, communication and judgment – all of which have been found significantly lacking thus far.*

…

[70] The IDSR sought guidance from an HR Representative. The HR Representative emphasized that the employee was to be provided with regular feedback. She specifically noted as follows: "Important to understand that Management has a responsibility as part of the performance management process to provide regular, continued and timely feed-back [*sic*] to assist the employee in improving his performance." She also added that a six-week period was a short time in which to assess the grievor's suitability for the FS-03 position.

[71] In the follow-up discussion with the HR Representative, the IDSR noted that two distinct processes were at play: the PIP process and the assessment process for suitability in the FS-03 position. The HR Representative then provided the following clarification:

> *The first purpose of the PIP should <u>aways</u> [sic] be to assist the employee in improving his performance. My understanding is that the PIP will be used for two purposes here; assist the employee in improving his performance in his current assignment and assess the employee's suitability for the FS-03.*

…

[72] The comments provided by the evaluators on the grievor's six drafted reports were filed in evidence. Some are positive, and some are negative. While Ms. Mawani testified that the grievor was completely incompetent in the FS-02 position, the evaluators noted that the reports reflected an FS-02 level of analysis. For the first

report, the following was specifically noted: "FS-02 level report so does not necessarily demonstrate competencies of FS-03". The general assessment reads as follows:

> *Overall, the reporting reviewed during the PIP timeframe reflects a standard normally associated with an entry-level FS-02 officer. While drafting was generally satisfactory from a stylistic and structural standpoint, the reports themselves were often lacking in analytic depth and strategic insight. These attributes could arguably be improved upon by having the officer take part in GSRP training this summer, but our collective assessment is that this would likely not achieve the gains needed to bring the reporting ability up to the FS-03 level required of the GSRP position… In sum, it is our assessment that the reporting produced over the PIP period falls below the average GSRP standard in terms of overall quality.*

[73] A summary of the grievor's situation prepared by an HFP Deputy Director to the Assistant Deputy Minister, Human Resources, also contained the following note: "HOM agrees to termination, but observes that he believes Karim is generally meeting expectations at FS02 level, but will accept recommendation of HQ and his program manager".

[74] In April 2015, Ms. Mawani went on maternity leave, and Mr. Kamineni became the acting manager. He supervised the grievor's work.

[75] The comments provided by "EMB" (designated as "home division for RYADH") and the IDSR on the six reports were provided to the grievor on May 11, 2015.

[76] On May 18, 2015, he was notified that his assignment to the FS-03 GSRP position in Saudi Arabia would not proceed.

[77] The grievor was stunned. His family had moved with him to Saudi Arabia, and this meant that they were going to be sent back home two years before the end of his three-year posting. In addition, the mission in Riyadh is small, and he felt that he had been humiliated before his wife and children. Mr. Kamineni confirmed that the mission was small and that everyone would have been aware that the grievor was leaving early.

[78] The grievor completed his assignment in Riyadh in July 2015. Mr. Kamineni testified that when he had become acting manager, he had assigned two human rights reports to the grievor (one on Saudi Arabia, and the other one on Bahrain) and had

given him almost two months to complete them. They had not been completed when the grievor left in the summer, and Mr. Kamineni had to complete them while he was packing to leave the mission.

[79] The grievor explained that given that his next assignment would not proceed, he then had to apply for another assignment at Headquarters. However, the PIP was to continue in his next assignment, which he claims prejudiced his "corridor reputation", meaning his work reputation. Thus, he had trouble finding his next assignment. The documentation filed shows that other managers did not support assigning him into their areas. They gave his candidacy little standing, probably given the PIP.

[80] The grievor managed to secure a one-year assignment in Ottawa to the only section in which his candidacy was not objected to.

[81] The grievor's wife had lost the opportunity to start teaching in September of 2015. She tried changing her leave status but was advised that it was too late. Someone else was occupying her position. Therefore, she was in Ottawa without work for the 2015-16 school year.

[82] At the time of the hearing, the grievor was posted in Bamako, Mali. His assignment was in the Maghreb and Regional Commercial Relations Division (EMC). Mr. Fletcher mentioned that the grievor is a valued FS-03 employee there and that his efforts are recognized and appreciated. He works in a different stream, as a management counsellor. His role is similar to a chief of staff assigned to the head of mission there. During the grievance procedure, the grievor was advised that the PIP did not continue in his Bamako, Mali, posting.

[83] At the hearing, Mr. Fletcher explained that he is in charge of assigning employees in the Department. He clarified that assignments are not staffing actions or appointments. Employees are appointed into their positions in the FS group, but they are not appointed into an assignment. An assignment is a temporary move of an internal employee to perform the duties and responsibilities of a position.

[84] Mr. Fletcher explained that assignments are agreements that management can amend based on operational requirements and for a variety of reasons. It remains the employer's prerogative to determine assignments. He highlighted that the following passage was included in the grievor's offer letter:

> *By accepting this offer of employment, you agree to meet this condition of employment, which requires that you accept postings anywhere in Canada or abroad. You confirm that you are able and available to serve in Canada or abroad as required by the Department. You understand and agree that you must inform your sub-delegated manager should you become unable to accept a posting abroad or comply with the principle of rotationality. Moreover, you understand that your inability, refusal or reluctance to accept a rotational assignment could result in the termination of your employment.*

[85] Mr. Fletcher insisted that employees must accept changes to assignments as they are a condition of employment. Employees are not compensated for these changes. For example, if for security reasons, employees must come back to Canada, they receive no compensation other than their relocation costs.

[86] Finally, Mr. Fletcher acknowledged that corridor reputations exist in the Department. They are an unfortunate result of the rotational assignment system.

V. Analysis

A. Clause 9.03(a) of the collective agreement

[87] With respect to clause 9.03(a), the grievor submits that at the beginning of his first assignment in Riyadh, his manager did not, in consultation with him, establish his objectives for the year. The grievor also refers to four decisions of the Board (*Bertrand v. Treasury Board*, 2011 PSLRB 92 at para. 5, *Kubinski v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 87 at para. 13, *Dupont v. Deputy Head (Office of the Director of Public Prosecutions),* 2012 PSLRB 82 at para. 2, and *Kalonji v. Deputy Head (Immigration and Refugee Board of Canada)*, 2016 PSLREB 31 at para. 33) in support of his position that the employer's performance review process requires written objectives.

[88] On the other hand, the employer submits that the grievor's manager established the grievor's objectives early in his posting and that they were established verbally. In this regard, Ms. Mawani had many work-related discussions with him in which she discussed the embassy's priorities, his assignments, and her expectations. She also mentioned to him several times that he needed to work on two of the FS-02 competencies, i.e., "Focus on quality and details" and "Initiative".

[89] In the employer's view, clause 9.03(a) of the collective agreement does not require that the objectives be established in writing. It insists that clause 9.03(a) does not include words such as "writing" or "written". In the employer's submission, requiring that the grievor's objectives be established in writing at the beginning of his assignment would be contrary to the wording of clause 9.03(a) and would require amending the collective agreement.

[90] In addition, the employer is of the view that Ms. Mawani established the grievor's objectives, in consultation with him. She said that she consulted him on his objectives. She asked him if he had any questions; he had none.

[91] Thus, the question that arises under clause 9.03(a) in the present case is whether by informing an employee of the organization's priorities and the work to be performed, the employer meets its responsibility under that clause.

[92] In my view, the answer is in the negative. Article 9 of the collective agreement is entitled "Employee Performance Reviews". Clause 9.01 provides that a formal assessment of an employee's performance means a "written assessment" and that the assessment "… be recorded in a form prescribed by the Employer for this purpose." When read in conjunction with clause 9.01, I find that clause 9.03(a) requires that an employee's objectives be established in writing at the beginning of the assignment and annually after that.

[93] I find that verbally describing work assignments in multiple meetings both at the beginning of an assignment and regularly in bilateral meetings is not sufficient to meet the collective agreement requirement. The yearly objectives, which will become evaluation criteria, need to be established before any assessment and need to be sufficiently clear so that both the supervisor and the employee know them. In fact, those objectives will be a guide for the employee throughout the year. The performance review process described in article 9 is formal and written; therefore, in my view, it requires that the establishment of objectives as part of that process also be done in writing.

[94] I note that the grievor's performance was managed under the PMP, which is similar to the performance review process described in article 9 of the collective agreement. It is a formal process that can have important impacts on an employee's career.

[95] However, as indicated earlier, because of difficulties the Department experienced with the electronic PMP, no formal performance objectives were established at the beginning of the grievor's assignment. In fact, the October 21, 2015, response at the first level of the grievance procedure explicitly stated that "… no formal performance objectives were established at the beginning of your assignment …". Furthermore, when questioned about whether in addition to the objectives, a learning and development plan had also been established for the grievor, Ms. Mawani responded that none had been established in writing. However, she added that in a sense, yes, one was established, as he was learning to do the work of a political advisor, and she was helping him with it.

[96] The *Directive on Performance Management* states at section 6.1 that deputy heads or their delegates are responsible for establishing an employee PMP, which includes the following minimum requirements: "Annual written performance objectives for all employees, including commitments that reflect Government of Canada priorities, expected behaviours and learning or development plans…".

[97] Moreover, at page 2 of the document entitled "Performance management program for employees", the following is stated: "At beginning of year … Employee's work objectives and learning and development plans are set or updated for the forthcoming fiscal year, and the performance agreement is signed".

[98] The employer submits that the *Directive on Performance Management* is not part of the collective agreement. Therefore, it is extrinsic evidence. The employer further submits that the wording of clause 9.03 of the collective agreement is clear and unambiguous, and hence, the directive is irrelevant and inadmissible to interpreting clause 9.03 of the collective agreement.

[99] I agree that in assessing the meaning of the collective agreement's language, its wording should be examined first.

[100] As the employer highlighted, extrinsic evidence is relevant and admissible only when the disputed language is patently or latently ambiguous (See *Professional Institute of the Public Service of Canada v. National Research Council of Canada*, 2013 PSLRB 88 at para. 61; *Federal Government Dockyard Trades and Labour Council East v. Treasury Board (Department of National Defence)*, 2012 PSLRB 118 at para. 38; and *Wamboldt v. Canada Revenue Agency*, 2013 PSLRB 55 at paras. 25 and 26).

[101] I find that the wording of clause 9.03 of the collective agreement is clear and unambiguous and that there is no need to use extrinsic evidence to interpret it. As explained earlier, clear yearly objectives had to be provided to the grievor in writing as part of the performance review process described in article 9 of the collective agreement. As the employer did not provide the grievor with any, I conclude that it breached clause 9.03(a). Its use of the PMP simply reinforces this finding in the circumstances of this case.

B. Clause 9.03(b) of the collective agreement

[102] With respect to clause 9.03(b), the grievor submits that during his assignment, the concerns that arose with respect to his performance were not brought to his attention in a timely manner. He also alleges that he was not given a reasonable opportunity to bring his performance up to the required standard.

[103] He submits that on one hand, he was never provided with the training that GSRP personnel automatically receive, and on the other hand, when he was put on the PIP for not meeting the full competencies expected of an FS-02 officer or of what would be expected of an FS-03 officer, he was not provided with any feedback. The employer specifically refused to respond to his requests for feedback.

[104] The grievor refers to *Raymond v. Treasury Board*, 2010 PSLRB 23, and to *Plamondon v. Deputy Head (Department of Foreign Affairs and International Trade),* 2011 PSLRB 90, in support of his position that a deputy head cannot consider an employee's performance unsatisfactory unless the employee received the tools, training, and mentoring required to meet the required standard within a reasonable time.

[105] The employer submits that it brought its concerns with the grievor's performance to his attention in a timely manner. In particular, Ms. Mawani testified and her emails show that he received ongoing feedback on his performance problems beginning with his first reporting assignment. She added that he was also provided with notes prepared by his predecessor upon his arrival. The employer insists that as it provided the grievor with ongoing feedback about his poor performance at the mission, it met its first obligation under clause 9.03(b), which was to bring its concerns to his attention in a timely manner.

[106] The employer also submits that it gave the grievor a reasonable opportunity to bring his performance up to the required standard. It submits that given the ongoing concerns about his performance in the FS-02 position, it provided him with continuous feedback, coaching, and mentoring with the goal of helping him improve his performance. He was also allowed to take a course on March 18, 2015, with the aim of improving his report writing. Thus, it claims that it met its obligation under clause 9.03(b) of the collective agreement.

[107] With this in mind, two questions arise under clause 9.03(b) of the collective agreement: (1) Did the employer bring its concerns with the grievor's performance to his attention in a timely manner? (2) Did it give him a reasonable opportunity to bring his performance up to the required standard?

[108] In my view, the employer did not meet these two obligations. It did not inform the grievor in a timely manner of its concerns with his poor performance and the fact that it questioned his suitability for the GSRP position. Further, during the PIP, it did not give him a reasonable opportunity to bring his performance up to the required standard.

[109] Firstly, the grievor's assignment began on July 29, 2014. However, the employer formally advised him that the PIP was being put in place and of the possible implications for his future assignment only in the second half of his assignment, i.e., on February 15, 2015. This despite Ms. Mawani already having had discussions with people in Ottawa about the possible implications for his future assignment over two months prior, in early December 2014. In my view, in the interests of transparency and fairness, the employer should have informed the grievor then that his future assignment was at stake. Therefore, I conclude that the employer did not bring its concerns to the grievor's attention in a timely manner.

[110] Secondly, on the issue of whether the grievor was provided a reasonable opportunity to bring his performance up to the required standard, I agree that he was provided with some feedback to help him improve his performance throughout his assignment. The evidence shows that Ms. Mawani constantly provided him with feedback about his performance. However, providing feedback is not the same as raising "concerns" pertaining to the employee's performance in the position. Feedback can be positive or negative or even neutral. On the other hand, a "concern"

has a negative connotation and, in the context of the collective agreement, implies a need to improve performance. Therefore, ongoing feedback, in my view, was not sufficient to comply with the obligation set out in the collective agreement. In this case, the "concerns" pertaining to the grievor's performance in his FS-02 position were not raised until the PIP was implemented.

[111] The evidence clearly shows that Ms. Mawani consulted the employer's HR section to implement a PIP for the grievor because of her concerns with his performance and because she questioned his suitability for the GSRP position. In March 2015, the HR Representative advised her that the first purpose of a PIP should always be to help the employee improve his or her performance. The HR Representative's understanding, then, was that the PIP in this case would be used for two purposes: to help the grievor improve his performance in his current FS-02 assignment and to assess his suitability for the FS-03 assignment.

[112] Thus, the employer specifically called the six-week trial period a PIP, which meant that it was developed in part to help him improve his performance in his current assignment. However, the facts demonstrate that the PIP did not help the grievor improve his performance. During the PIP, he received no comments or feedback on his reports, despite repeated requests. On viewing the evidence as a whole, it becomes clear that the PIP served only one purpose: to assess his suitability for the upcoming FS-03 position.

[113] The fact that the grievor received no feedback during the PIP is confirmed in several documents. In an email dated March 24, 2015, an IDSR representative specifically acknowledged the following: "The terms of the PIP make it clear that feedback will come at the end of the process, not during. Doing this in real time would require regular consultation with EMB and a considerable investment in time."

[114] In addition, the April 18, 2016, final response to the grievors' grievance stated the following:

…

> *During the grievance hearing, you indicated that you did not receive any comments and/or feedback during the Performance Improvement Plan (PIP). Based on the information I have, your PIP was concluded on April 14, 2015, but you only received comments from Mr. Ken*

> *England, Head of the Global Security Reporting Program (GSRP), on May 11, 2015. I therefore agree with your statement that you did not receive any comments and/or feedback during the PIP.*
>
> …

[115] In my view, the employer misled the grievor in suggesting the PIP was to help him improve his performance. By doing this, it did not comply with its obligation to give the grievor a reasonable opportunity to bring his performance up to the required standard. The only exception to this obligation is when Canada's interests abroad are in danger, which the employer has not alleged or argued was the case. It has argued only that the grievor's deficiencies resulted in an increased workload for others. What is important is that the employer chose to implement a PIP to address the grievor's performance because the day-to-day mentoring that he was offered was not sufficient.

[116] Since the employer suggested to the grievor that the PIP would serve the purpose of helping him improve his performance, the requirement that he write six additional reports should have been paired with ongoing feedback on those reports and guidance on what was required of him to bring his performance up to the expected level. While it remains the employer's prerogative to determine assignments, it cannot mislead an employee by suggesting to him or her that a PIP will serve to help him or her improve his or her performance if, in fact, the PIP is only an assessment of the employee's suitability for a future assignment or position.

[117] In addition, I note that a six-week period is a short time frame in which to help an employee improve his or her performance. As noted, the employer's HR section generally recommended a minimum of six months for an action plan.

[118] The grievor was given only six weeks under the PIP to demonstrate his performance and received no feedback during the six-week period. In my view, this did not give him a reasonable opportunity to bring his performance up to the required standard. Therefore, I conclude that the employer has also breached clause 9.03(b) of the collective agreement.

VI. Remedies

[119] Subsection 228(2) of the *Act* specifies that after considering a grievance, the Board must render a decision and make the order that it considers appropriate in the circumstances.

[120] The corrective measures that the grievor requested in his grievance are the following: (1) he asks that the letter of May 18, 2015, terminating his posting be removed from his file; (2) he claims reimbursement under different Foreign Service Directives (FSDs); (3) he requests reimbursement for his wife's loss of income for the year of teaching that she lost; and (4) he claims damages for pain and suffering for himself in the amount of $60 000 and the equivalent amount for his wife and children.

A. Positions of the parties

[121] The grievor submits that in *Cleroux v. Canada (Attorney General)*, 2002 FCA 242, the Federal Court of Appeal accepted that an adjudicator operating under the former *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35), has jurisdiction over a claim for damages arising out of a breach of the collective agreement. The grievor added that nothing in the *Act* has had any effect on this decision.

[122] The FSDs apply to federal public servants who are posted abroad. As Mr. Fletcher explained in his testimony, the FSDs are designed to compensate employees abroad, based on hardship. They are negotiated by the employer and the PAFSO. The Posting Confirmation Form activates the expenditures under the FSDs.

[123] The grievor requests the allowances provided under the FSDs to which he would have been entitled had his second assignment in Riyadh not been terminated. He submits that that money would have been paid to him had the employer not violated the collective agreement.

[124] He referred me specifically to FSD 50 (Vacation Travel Assistance). The total value of this allowance for the five individuals in the grievor's family for two years comes to approximately $41 220. He also referred me to FSD 55 (Post Living Allowance), FSD 56 (Foreign Service Incentive Allowances), and FSD 58 (Post Differential Allowance, post rating level 4). The values of these allowances for two years comes to, respectively, $12 089.98, $22 785.86, and $31 726.

[125] With respect to the grievor's request to be reimbursed his wife's salary for the year of teaching that she lost, he testified that had he been told the true story of his posting, his wife would have remained in Canada and would not have lost that year of teaching. In addition, had the employer acted in accordance with its policy on performance reviews and its directive, the grievor and his wife would have had the opportunity to reconsider her stay in Riyadh, and she could have had the opportunity to notify her employer that she would return to teaching for the 2015-16 school year.

[126] In particular, at the beginning of the month of February 2015, his wife requested another year of unpaid leave from work as their understanding was that his posting in Riyadh was for three years, that is, until the summer of 2017. Because of this, she did not receive her annual salary of $73 000 for the 2015-2016 school year. The grievor explained that after they returned to Ottawa, she could not replace absent teachers during the year. No contradictory evidence was presented on that point.

[127] The grievor also claims damages for pain and suffering for himself in the amount of $60 000 and an equivalent amount for his wife and children. He described the impact the employer's actions had on him. He was devastated. He sought psychological counselling and was prescribed medication to help him get through the PIP period. He had nightmares and trouble sleeping. It also impacted his relationship with his wife and children as he was too tired emotionally to give them attention. His corridor reputation was negatively impacted; he had trouble finding a position in Ottawa and eventually felt that he had to accept the position in Mali to re-establish that reputation. That position does not allow him to bring his family as it is a "Level V" posting, which means that it is an increased hardship post. Above all, the lack of candour about what was really going on was never revealed to him, resulting in him making decisions without all the facts.

[128] In support of his position, the grievor refers to *Tipple v. Deputy Head (Department of Public Works and Government Services)*, 2010 PSLRB 83. He submits that in that case, the adjudicator awarded Mr. Tipple $125 000 for pain and suffering even though he did not adduce medical evidence. In short, the Board accepted his testimony on the psychological effects that his unfounded termination had upon him. Although the Federal Court later quashed the psychological damages award in *Canada (Attorney General) v. Tipple*, 2011 FC 762, and remitted it back to the Board,

it did not ultimately reject the notion that such damages could be awarded on Mr. Tipple's evidence alone.

[129] The grievor further submits that the employer did not question his testimony about the impact everything had on him. While he was not terminated, his repatriation to Ottawa was nonetheless a loss of employment for him and carried with it the same feelings of vulnerability, humiliation, and uncertainty and the same employment consequences that come with outright termination.

[130] In addition, the grievor described what his wife and children went through. He claims that they suffered from the uncertainty of the situation, particularly given that in Riyadh they were part of a very small community in which news travelled quickly and in which one's repatriation could not be effected without everyone knowing about it.

[131] For its part, the employer submits that no damages should be awarded and that the remedy should be limited to a declaration.

[132] The employer highlighted that the grievor was allowed to finish his first assignment in Riyadh before being brought back, with his family, to Ottawa. Thus, it submits that the question of whether it provided him with a reasonable opportunity to bring his performance up to the required standard is irrelevant, since in any event, he experienced no adverse consequences as he was allowed to finish his first assignment in Riyadh. With respect to his next assignment, it was the employer's prerogative to determine what and where it would be.

[133] The employer adds that as mentioned in the grievor's offer letter, the Department has discretion to assign or reassign rotational employees anywhere in Canada or abroad and to terminate their assignments. Section 131 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13), s. 17 of the *Public Service Employment Regulations* (SOR/2005-334), and ss. 10 and 15 of the *Department of Foreign Affairs, Trade and Development Act* (S.C. 2013, c. 33, s. 174) confer discretion to the Department over its diplomatic personnel.

[134] In addition, the employer submits that an assignment is not a contract or a binding promise on its behalf. It explains that an assignment can be changed at its discretion. It is a move of an internal employee to temporarily perform the duties

and responsibilities of a position. Employees are appointed into their positions in the FS group, but they are not appointed into assignments. Mr. Fletcher explained that if the employer changes an assignment, it covers the relocation costs. However, if an employee requests to return before the end of an assignment, he or she is expected to pay the relocation costs.

[135] At the hearing, the employer explained that the Posting Confirmation Form, which originally confirmed the grievor's two assignments in Riyadh for 36 months, was later modified. A new one was issued that confirmed only the grievor's first assignment, in the FS-02 position, for a duration of 12 months. Based on this form, the grievor received the compensation under the FSDs to which he was entitled. The employer explained that an employee is entitled to receive these allowances only if he or she has fulfilled an assignment abroad. In this case, the grievor does not have the right to these allowances because he did not fulfil the second assignment.

[136] In response, the grievor submits that even if the employer were to allege that it was a change of assignment and not a change within an assignment, it would be purely semantics. He submits that such a defence cannot apply given that the employer alone controlled his assignments. It should not be permitted to use its ability to recall employees home and then take advantage of that power by denying an employee rights that he or she should have had had it not been for the employer's improper actions.

[137] With respect to the grievor's request to be reimbursed his wife's salary, the employer submits that there is an insufficient link between the breach of the collective agreement and the income loss claimed.

[138] As for the grievor's claim of damages for pain and suffering, the employer submits that damages are not warranted as its decision to modify the second assignment to address operational considerations was far removed from the sorts of situations in which such damages have been awarded. In support of its position, it refers to *Canada (Attorney General) v. Gatien*, 2016 FCA 3 at paras. 11 to 22, 43, and 46 to 48. It adds that the grievor did not adduce any medical evidence and that he did not prove any recognized psychiatric illness (see *Gatien*, at paras. 47 and 48).

[139] The employer also claims that the grievor's decision to have his spouse and children with him in Saudi Arabia was a personal decision. It is not liable for his

personal family decisions and the consequences stemming from them.

B. Conclusion on remedies

[140] Firstly, with respect to the letter of May 18, 2015, terminating the grievor's posting for performance reasons, I agree that it should be removed from his file because it could further affect his corridor reputation.

[141] Secondly, with respect to the FSDs, I have kept in mind that the basic purpose of a remedial order is to put the aggrieved party in the position it would have been in had there been no breach of the collective agreement. If the employer had not breached the collective agreement, the grievor would have had written performance objectives. Any concerns with his performance would have been brought up in a timely manner, and he would have been provided a reasonable opportunity to improve his performance.

[142] Six months is a reasonable opportunity for an employee to improve his or her performance. This was the six-month period recommended by HR.

[143] In the present case, if the grievor's assignment had continued at the FS-02 group and level, it is more than likely that if he had been given a reasonable opportunity to improve his performance, he would have improved it sufficiently to continue in that FS-02 assignment.

[144] However, given the facts of this case, the question is, what is the probability that the grievor, if given a reasonable opportunity to improve his performance in the FS-02 position, would have improved it such that his assignment as a GSRP officer at the FS-03 level would have continued?

[145] The employer concluded that since the grievor was struggling in the FS-02 position, he was not the best match for the GSRP FS-03 position. Ms. Mawani and Mr. Kamineni, a GSRP officer, explained that a GSRP officer's role is to generate focused reporting on security issues in difficult and sensitive places. Such officers collect information related to questions of strategic stability and security. Mr. Fletcher also explained that for this GSRP position, which is a key position at the embassy, the employer needed an employee with great ability and skills to generate focused reporting on security issues, such as terrorism. Therefore, his objective was to place a person with these developed skills into the GSRP position and to place the grievor,

who has different strengths and abilities, in a different position. At the time of the hearing, Mr. Fletcher affirmed that the grievor has highly developed skills in the management counsellor stream.

[146] In my view, given that the FS-03 position required highly developed skills in collecting, reporting, and analyzing information related to questions of strategic stability and security and that it was a more difficult position to fill than the FS-02 position, it is quite unlikely that the grievor's next assignment as a GSRP FS-03 officer would have crystalized. Simply put, even if there had been no breach of the collective agreement — had the grievor been made aware of the concerns earlier in his assignment, for example in December of 2014, and had he been given a reasonable opportunity to improve his performance in the FS-02 position — the employer still would have decided that it needed someone else to fulfil the tasks of the FS-03 position.

[147] In this regard, I have kept in mind that the rotation system was created to support the Department's complex domestic and international mandate. It gives management the flexibility to assign employees to positions for a specified period. The goal is to effectively match employees with positions for which they are best suited. Employee transfers are done in the summer.

[148] Thus, while one goal of the employer should have been to give the grievor a reasonable opportunity to improve his performance, I recognize that it also had to ensure that the person best suited to fulfil the tasks of the GSRP FS-03 position would be ready to start in the summer of 2015.

[149] Therefore, I find that even if given a reasonable opportunity to improve his performance in the FS-02 position, the grievor would not have improved it such that his assignment at the FS-03 level would have continued. Consequently, I decline his request to be reimbursed under the FSDs.

[150] Now, I must address the grievor's request to be reimbursed his wife's salary based on the claim that had he been told the true story of his posting, his wife would have remained in Canada and would not have lost her ability to teach the 2015-16 school year. I find that the difficulty with this argument is that it overlooks the fact that the Department always has the discretion to reassign employees. Based on the evidence provided, employees must accept changes to assignments as they are

a condition of employment. This was stated, to some extent, in the grievor's offer letter.

[151] In addition, the grievor's submissions include the following claim: "In addition, had the employer acted in accordance with its own policy on performance review and its *Directive [on Performance Management]*, the grievor and his wife would have had the opportunity to reconsider her stay in Riyadh …" (emphasis added). In my view, this statement indicates that the claim is speculative and that there is an insufficient link between the breach of the collective agreement and the income loss claimed. I do not have any concrete evidence that the grievor's wife would have, or even might have, returned to Canada if the grievor had been told earlier that his second assignment might not crystalize. Therefore, I deny his claim to be reimbursed his wife's salary.

[152] On the other hand, I find it warranted to award the grievor compensatory damages given my finding that the employer did contravene clause 9.03 of the collective agreement. It is clear from the evidence tendered by both parties that the grievor's subsequent assignment in Riyadh was ended for performance issues. Yet, employee performance is governed by clause 9.03, which the employer breached.

[153] At the hearing, the grievor provided a detailed explanation of the problems he and his family encountered because of the employer's actions. They impacted his health and his everyday life. His life was turned around, which also had an impact on his family.

[154] I found the grievor to be a credible witness. At the hearing, he explained that in his 17-year career, he had never been the subject of an action plan and was humiliated by the employer's practices in this regard. Despite everything, he cooperated and responded to its strict demands. He prepared all the additional reports asked of him, in addition to doing his daily work. He was physically and psychologically exhausted because of the very long hours of work and the stress caused by trying to meet the demands of the PIP.

[155] As for his health, he explained how his state of health deteriorated over the year. Ms. Mawani omitted to openly express to him that his future at the embassy was uncertain, and she continuously criticized him. He felt that she was harsh and humiliating towards him and that she systematically degraded his work. He also had to deal with both Ms. Mawani and Mr. Kamineni, who he felt had united against him.

He was emotionally stressed with a low morale, and his health weakened. He sought psychological counselling because he was stressed, anxious, and depressed. He was prescribed medication to help him get through that period. He testified that he still bears the consequences of his physical and mental exhaustion.

[156] The grievor, who is in his early fifties, explained that his corridor reputation is now tainted and that his career has been affected. His goal was to get to an EX-01 position during his career. However, he feels this is no longer possible given the tainting of his corridor reputation. In particular, he had great difficulty securing an assignment in Ottawa upon his return from Riyadh. When he completed his assignment in Ottawa, he accepted a position in Mali without his family. It is at the price of enormous sacrifices based on the hardship level of the post that he accepted this position to improve his work reputation. Mr. Fletcher acknowledged that the post in Mali was hard to fill.

[157] With respect to his wife and children, the grievor explained that they were exposed to the crisis he went through at work, and they were significantly affected by their sudden move back to Ottawa. The grievor highlighted that his wife, in particular, was affected by his difficulties and thus endured pain and suffering as well.

[158] I find that the grievor's testimony has shown that he suffered moral damages because of the employer's breach of the collective agreement.

[159] Thus, I am satisfied that the grievor is entitled to a compensatory remedy in this regard. I find that there are at least four elements in this case that argue in favour of awarding him aggravated damages.

[160] Firstly, contrary to clause 9.03(a) of the collective agreement, the employer did not provide the grievor with written objectives at the beginning of his assignment. I agree with the grievor that it would have been difficult for him to be assessed negatively against criteria that were not clearly identified at the start of his assignment.

[161] Secondly, contrary to clause 9.03(b), the employer was not forthright about the fact that the grievor's second assignment was being reconsidered in December of 2014 for performance reasons. As described by the grievor, these events had a direct effect on his life and welfare.

[162] Thirdly, contrary to clause 9.03(b), the employer hid the truth behind the PIP from the grievor, which did not help him improve his performance and was only a test of his potential to fill the FS-03 position. The whole PIP process was very difficult on the grievor. Given the employer's conduct, these difficulties went beyond the normal difficulties an employee might experience in being subject to a PIP. He requested feedback on his report writing but was provided with none. He worked hard to meet the employer's extra reporting requirements under the PIP, in addition to doing his regular work. His health deteriorated as a result.

[163] Fourthly, the employer's lack of forthrightness and clarity negatively affected the grievor's corridor reputation.

[164] In sum, during this period, because of the employer's breach of the collective agreement, the grievor experienced a lack of confidence, hurt feelings, low self-esteem, humiliation, stress, anxiety, and a feeling of betrayal. He sought medical treatment as a result. Based on the evidence presented, I find that his pain and suffering were significant and long-lasting and are ongoing.

[165] In *Robitaille v. Deputy Head (Department of Transport)*, 2010 PSLRB 70, the adjudicator found that the grievor had been improperly disciplined, as he had been demoted, and that the deputy head had breached its duties of transparency, diligence, prudence, and impartiality. The adjudicator reinstated the grievor in his management position and awarded him compensatory and punitive damages. With respect to the wrongful acts by the deputy head, namely, malicious, reprehensible, and harmful conduct toward the grievor, the adjudicator ordered the deputy head to pay the grievor the amount of $50 000 in punitive damages.

[166] In that case, the adjudicator retained jurisdiction to deal with any dispute about compensation for the grievor's loss of career advancement opportunities and the loss of personal property (including the sale of his house) he incurred to pay his counsel's fees and expenses. An application for judicial review before the Federal Court was allowed. The Federal Court referred the matter back to the same adjudicator for two purposes: (1) for her to recognize that she did not have jurisdiction to hear the respondent's grievance related to the written reprimand, and (2) for her to not directly or indirectly award the respondent compensation for his counsel's and legal fees (see *Canada (Attorney General) v. Robitaille*, 2011 FC 1218).

[167] The matter was thus referred back to the adjudicator. Then, in *Robitaille v. Deputy Head (Department of Transport)*, 2011 PSLRB 28, the adjudicator noted that the parties had agreed to $40 000 in compensation for the grievor's loss of career advancement opportunities.

[168] I also note that the Supreme Court of Canada in *Honda Canada Inc. v. Keays*, 2008 SCC 39, addresses, at paragraphs 56 to 59, situations in which aggravated (moral) damages are warranted in wrongful dismissal cases. It notes that generally, damages are not available for the actual loss of a job or for the pain and distress suffered as a consequence of being terminated. However, damages resulting from the manner of dismissal will be available if the employer engaged in conduct during the course of dismissal that was "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive".

[169] While the present case is not about a dismissal but a breach of a collective agreement, the principles outlined in *Keays* are instructive. That is, damages are not available to the grievor for any normal pain and distress suffered as a consequence of being subject to a PIP or being reassigned. Rather, it is any unfair, bad faith, untruthful, misleading, or unduly insensitive conduct on the part of the employer in implementing the PIP or reassigning the employee, in breach of the collective agreement, which needs to be considered when awarding any aggravated damages.

[170] The intangible collateral damage in terms of pain and suffering and of loss of reputation and morale is difficult to quantify in the present case. However, in my view, it is appropriate that the respondent pay the grievor a reasonable amount of damages for matters that cannot be objectively assessed — pain and suffering, loss of reputation and morale, hurt feelings, and other similar matters (including the complainant's pain of seeing his family suffer emotionally). In consideration of the evidence and argument noted earlier, I find that $20 000 is reasonable compensation.

[171] With respect to the grievor's claim for pain and suffering damages for his wife and children, I recognized earlier in my award that his relationship with his family was affected by all the ups and downs caused by the breach of the collective agreement. However, to the extent that he requests that I also make a separate award of damages for any pain and suffering endured by his wife and children, I am not prepared to. It is questionable whether I have the authority under the *Act* to make such an order (see for

example ss. 208(1) and 236(1)). In this regard, I note that no authority for such an award, whether in the *Act* or otherwise, was put before me. In any event, I do not consider that there is a sufficient evidentiary basis on which to award such damages in the circumstances of this case. The grievor's wife and children did not testify; nor did he present evidence about any actual injury that they suffered that would justify any additional award of damages.

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

(The Order appears on the next page)

VII. Order

[173] The grievance is allowed. I declare that the respondent violated clause 9.03 of the collective agreement. I order that the letter of May 18, 2015, terminating the grievor's posting be removed from his file. I also order that the employer pay the grievor aggravated damages in the amount of $20 000.

February 16, 2018.

Nathalie Daigle,
a panel of the Federal Public Sector
Labour Relations and Employment Board