Date: 20191011

File: 566-02-8856

Citation: 2019 FPSLREB 102

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

STEVEN GILL

Grievor

and

DEPUTY HEAD
(Correctional service of Canada)

Respondent

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

In the matter of an individual grievance referred to adjudication

Before: John J. Jaworski, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Himself

For the Respondent: Cristina St-Amant-Roy

Heard at Edmonton, Alberta,
July 31 to August 2, 2018.
(Written submissions filed August 24 and September 14 and 25, 2018.)

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Steven Gill ("the grievor") was employed by the Treasury Board (TB or "the employer") with the Correctional Service of Canada (CSC) as a correctional educator, classified in the Education and Library Science group, level 1 (ED-EST-01), in the CSC's Prairie Region at its Edmonton Institution ("the institution") in Edmonton, Alberta.

[2] On September 18, 2012, the employer terminated the grievor's employment by rejecting him on probation. On August 1, 2013, the grievor referred his grievance to the Public Service Labour Relations Board (PSLRB) for adjudication under s. 209(1)(b) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*).

[3] The employer objected to the jurisdiction of an adjudicator to hear the grievance on the ground that s. 211 of the *PSLRA* does not allow referring a grievance to adjudication about any termination made under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*).

[4] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (PSLREB) to replace the PSLRB as well as the former Public Service Staffing Tribunal (PSST). On the same day, the consequential and transitional amendments contained in ss. 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 s. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *PSLRA* before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[5] 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 PSLREB and the titles of the *PSLREBA*, the *PSLRA*, and the *Public Service Labour Relations Regulations* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, the *Federal Public Sector Labour Relations Act*

("the *Act*"), and the *Federal Public Sector Labour Relations Regulations* ("the *Regulations*").

[6] This matter was initially scheduled to be heard between October 31 and November 3, 2017. However, the grievor and his bargaining agent had a parting of the ways, and at his request, it was rescheduled to the week of March 12, 2018.

[7] Between March 13 and 16, 2018 ("the initial hearing days"), the respondent called five witnesses, including Sherry Leslie. During the grievor's employment, she was a program manager with the CSC at the institution. Her duties and responsibilities included overseeing all rehabilitation, leisure, and anger-management programs as well as inmate pay and employment there. She functionally oversaw the institution's education department in that she was responsible for tracking correctional educators' attendance and their supplies and for handling concerns about education issues with respect to the department's operation within the institution. She was not the grievor's supervisor.

[8] The grievor's direct supervisor was Shelly Sealy, who also testified during the initial hearing days. Her office was located at Bowden Institution, which is approximately halfway between Calgary and Edmonton. She reported to the warden of Bowden Institution, who was the delegated authority for the correctional educators.

[9] The grievor called as witnesses Micky Sahib and Rose Waskowich, both also former teachers at the institution classified at the same group and level as he had been. They testified during the initial hearing days, pursuant to summonses that he requested. He testified in chief but was not cross-examined.

[10] During the course of the evidence in the initial hearing days, an issue arose with respect to the timing of the termination of the grievor's employment. The parties opted to continue to lead evidence over the balance of those days and to address the issue in written submissions. At the conclusion of the initial hearing days, with all the evidence but the grievor's cross-examination completed, I instructed the parties to submit their arguments with respect to whether the termination was done outside the probationary period. The employer also submitted that it would provide an alternative argument or application; namely, it terminated the grievor for cause under the *Financial Administration Act* (R.S.C., 1985, c. F-11; *FAA*).

[11] On July 3, 2018, I issued a preliminary decision for these same parties (2018 FPSLREB 55; "*Gill* No. 1"), which addressed the question of whether the grievor's employment had been terminated within the probationary period, along with the employer's alternative argument. I made the following findings:

- the grievor was terminated outside the probation period and therefore was not terminated under s. 62 of the *PSEA*;
- the Board had jurisdiction to deal with the grievance as the termination of employment was not under s. 62 of the *PSEA*;
- the grievance against the termination was allowed;
- I remained seized of the matter to deal with the issue of remedy; and
- the grievor was to provide to the employer the following documents, which would be relevant when addressing the remedy:
    - his T4 tax slips for the years 2012 to 2017,
    - his notices of assessment (NOA) from the Canada Revenue Agency (CRA) for the years 2012 to 2017,
    - his income tax returns (ITRs) for the years 2012 to 2017,
    - a list of all the jobs he applied for after the termination of his employment in September of 2012, and
    - a list of all the jobs he held after the termination.

[12] Before the issuance of *Gill* No. 1, the continuation of the hearing had been scheduled for July 31 to August 3, 2018, in Edmonton. Notices of the hearing dates were emailed to the parties on March 22, 2018, and the official "Notice of Hearing" was sent on July 3, 2018.

[13] After I had issued *Gill* No. 1, but before July 31, 2018, I presided over two case-management conferences, on July 17 and 25, 2018. Discussed at both was the production of the documents set out in *Gill* No. 1 and the purpose of the continued hearing. I told the grievor that the hearing would address only a remedy with respect

to his termination and not any difficulties or grievances (actual or perceived) he might have had with respect to his employment relationship that might have occurred during the course of his employment.

[14] During those conferences, I told the grievor that before the hearing reconvened on July 31, 2018, I would seek from him an indication of what he was looking to obtain as a remedy for his termination, including whether he wanted to return to his position. I told him that I had the jurisdiction to reinstate him into the position he had held at the time his employment was terminated; however, I did not have jurisdiction to put him into any other position. The grievor said that he understood what I said.

[15] Before the initial hearing days got underway, the grievor had forwarded to counsel for the respondent 15 additional allegations, without any details, about his termination of employment, as follows:

> …
>
> 1. *Dismissal by Camouflage & due to Mental Health leading to a poor performance evaluation*
> 2. *Systematic Discrimination at CSC*
> 3. *Sexual Harassment & Assault*
> 4. *Ignoring 2 Complaints filed by me to Sherry: Sexual Harassment*
> 5. *Entrapment by Sherry & Rose*
> 6. *Pay Discrimination*
> 7. *Breaking a legally binding Employment Contract dually signed by both parties with an illegal pay reduction.*
>
> …
>
> 8. *Not letting me accept a position at Corcan as Assistant Manager but letting others accept it.*
> 9. *Discrimination in pay based on other school districts for years of education & experience.*
> 10. *Not recognizing teacher/Admin experience at Canadian Federal First Nations Schools & schools overseas such as UK & a Canadian school in China for salary & pay grid purposes.*
> 11. *Failure to pay wages in a timely fashion as per contract, every 2 weeks. As long as almost 2 months delayed.*
> 12. *Failure to send someone home on a sick day despite on-site Doctors & Nurses telling you to go home.*
> 13. *Discrimination against someone with a disability, visual.*
> 14. *Institutional Racism*

15. Toxic Work Environment ….

…

[Sic throughout]

[16] On March 2, 2018, in a 10-page response, the employer responded to those allegations. In essence, it stated that the grievor had never raised them in any grievance and that he should not be permitted to raise them at this late juncture. It relied on *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.), *Baranyi v. Deputy Head (Canada Border Services Agency)*, 2012 PSLRB 55, and *Shneidman v. Canada (Attorney General)*, 2007 FCA 192. On March 9, 2018, the grievor replied to the employer's response, in essence providing details of his 15 additional allegations.

[17] At the outset of the continuation of the hearing (July 31, 2018), I again outlined its purpose, which was to determine the remedy I should grant the grievor due to the inappropriate termination of his employment. For his benefit, I again reiterated that it was up to him to tell me what he was looking for in a remedy, which could include a return to his former position, monetary damages, or a combination of the two.

[18] Also at that outset, the grievor provided me with a large binder of documents. Given the difficulties set out in *Gill* No. 1 with respect to the document binder he provided, this binder was not marked for identification purposes. I accepted to hold on to it during the course of the evidence portion of the hearing, should documents in it be relevant to the testimony or if it were agreed to enter some, on consent. With the exception of one document he produced, entitled "Remedies Sought", unless they were entered and marked as exhibits, the documents and binder were returned to him on August 2, 2018. The Remedies Sought document set out the remedy he sought from me.

[19] When the continuation got underway, the grievor indicated that he likely did not wish to return to work for the CSC in his teaching position; however, he was not definitive in his statement. His Remedies Sought document stated as follows:

- *I should be:*
  1. *paid all missing salary for the last 7 years after being illegally terminated after the probationary period had expired*
  2. *All missing benefits or their value for the last 7 years*

     a) Pension

b) Medical, Dental, Extended Health

3. *I should be paid for inflation and any reasonable amount of interest on the remedy*

a) For missed opportunity costs

b) Missed opportunities due to the loss of Time: Value of money

c) Home prices doubled in Surrey, from $200/ft2 to $400/ft2 and had I invested the $, it would have doubled

4. *Financial hardship causes 90% of divorces including mine… and CSC terminating me was a contributing factor*

5. *Had Sherry minded her own business and not made arrangements with EPS* [Edmonton Police Service] *and Alberta Hospital to meet with me in the Board Room and get picked up on CSC parking lot property, I would not have been admitted to the hospital; for 6 weeks, endured months of experimental drugs and side effects like being out of it and drowsy ….*

6. *And 2 broken toes due to the experimental meds, which I asked a low dose and which Dr. … gave me a medium dose.*

a) The meds made my body less away of spatial relations by about 1 inch which led me to breaking my toes

7. *Financial … pain and suffering for 7 years ….*

8. *Costs of the both hearings, hotels, gas, ferry, meals, car rental, flights.…*

9. *Pay for attending the hearings and preparing my case, $120/hour*

…

10. *Award damages for CSC doing nothing when I complained that Rose sexually assaulted and harassed me.…*

11. *Damages for CSC Staff, the VP of UCCO* [Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN], *and his staff discriminating against me from seeing my students in G-Unit and Segregation.*

12. *CSC staff damaging my car in the CSC parking lot after telling a joke that didn't go over well at all ….*

13. *Sherry keeping me at work after my arms and legs broke out in hives ….*

14. *More Institutional and Systemic Discrimination from Shelly, denying me a management position I applied for and was awarded as Corcan Assistant Manager, which Mick later applied for and got….*

…

[Sic throughout]

[20] After the grievor provided me with the Remedies Sought document and made an opening statement, I again reiterated that my jurisdiction and authority were to grant a remedy that flowed from the inappropriate termination of his employment. I told him that I did not have jurisdiction over and would not consider the difficulties he had experienced and the complaints and grievances he might have had with respect to how the employer had treated him or other employees, along with actions or inactions and events that took place during the course of his employment that were not related to the termination of his employment.

[21] The grievor was the only witness to give evidence when the hearing reconvened on July 31, 2018. He gave his evidence-in-chief on the first hearing day and was cross-examined by counsel for the employer over the balance of the hearing days. At the completion of his evidence, the parties provided written submissions as follows:

- the grievor's on August 24, 2018;
- the respondent's on September 14, 2018; and
- the grievor's reply on September 25, 2018.

II. Summary of the evidence

A. Contextual evidence

[22] Based on the grievor's cover letters and curriculum vitae (CV), it appears that he received his Bachelor of Education degree from the University of Victoria in British Columbia in 1995 and that he obtained his licence to teach that same year.

[23] At the time the grievor was terminated from his CSC position, he was married. However, as of the hearings, he and his wife had divorced, and the division of their matrimonial assets was the subject of a Supreme Court of British Columbia decision rendered on February 27, 2017 (see *Dheenshaw v. Gill*, 2017 BCSC 319; "the civil proceedings"). According to the civil proceedings, they married on October 9, 1999, separated on January 11, 2014, and divorced on March 31, 2016. They had no children. His wife was also a teacher. Still according to those proceedings, she had spent her career teaching in Surrey, B.C.

[24] As of his start at the CSC, the grievor and his wife owned a home in Surrey ("the Surrey property"). According to him, it was purchased in 2005. In addition to their living space, it included two self-contained residential units that generated income. He

did not produce the leases or rental agreements in full for those units. According to him, one was rented at either $625 or $650 per month, and the other at $600 per month, for a gross annual income of either $14 700 or $15 000. According to the civil proceedings, they sold the property on July 30, 2014.

[25] The grievor testified that sometime in 2012, he and his wife purchased a yet-to-be-built residential condominium in southwest Edmonton. In fact, entered into evidence was a document titled "Addendum Attached to and Forming Part of the Purchase Agreement" for that condominium dated September 5, 2011 ("the Edmonton property"). In cross-examination, when he was asked when he took possession of it, he said, "I don't know. It took two years to build. I took possession after it was built." If the two-year time frame is accurate, they took possession in September of 2013. According to the civil proceedings, it was sold in September of 2016. The grievor never lived in it. After the grievor and his wife took possession of it, he testified that he thought they rented it for $1000 per month. The civil proceedings state that it was rented for $520 per month.

[26] After selling the Surrey property, the grievor purchased a home in Port Alberni on Vancouver Island ("the Port Alberni property"). He said that he believed he purchased it in late December of 2014 or early January of 2015. No documents were produced with respect to this purchase.

B. Pre-termination work-related issues raised by the grievor

1. CORCAN job

[27] CORCAN is a CSC division that provides inmates with employment and employability skills while incarcerated. The grievor testified that within six weeks of starting in his correctional educator position (in September of 2011), he applied for and successfully obtained a CORCAN manager job at the institution. He testified that within an hour of having a discussion with Sandy Moorehead (the assistant operations manager for CORCAN), she offered him the job. He said that later, he was told that he could not have it because he was one of only a few teachers at the institution.

[28] The grievor produced and entered into evidence copies of incomplete emails dated March 2 and 5, 2012. The March 2 email was from a human resources assistant at the institution and was sent to what appears to be all CSC users at the institution. The subject identified was, "Acting/Assignment Opportunity Corcan Business Manager

FI-01 Edmonton Institution". The email simply read, "Good Morning. Please view attached opportunity (see below). Thanks." It is clear from the document that another document was attached, but it was not produced.

[29] The email that immediately follows that one (in the chain) is the one of March 5 that the grievor sent from his work email address to his personal email address. It had the same subject in the subject line, with the addition of "FW:", and read, "Apply to: [Sandy Moorehead's email address] Assistant Operations Manager, Corcan Thank You/Merci". That was followed by the grievor's electronic signature and the signature block of his work email. No other emails forwarded this one; nor was there any attachment or anything to indicate that an application was made.

[30] Ms. Leslie was cross-examined about the CORCAN job. She stated that she understood that it was a short-term assignment, which she believed was two weeks.

[31] Ms. Moorehead did not testify. I was not shown any statement of merit criteria or posting for the CORCAN manager position. I was not shown any application for it or any written offer or acceptance of it. The grievor did not say that he filed a complaint with the PSST, which at the time handled complaints and disputes involving appointments in the federal public sector and under which recourse for appointments in staffing matters were dealt with, under the *PSEA*. There was also no evidence that any grievance was ever filed.

2. Rash or hives

[32] In early November of 2011, the grievor broke out in a rash or hives on his arms and legs. He said that he went to see a doctor as well as two nurses on-site at the institution, all three of whom he said told him to go home. He said that Ms. Leslie told him that he could not go home because he was one of the only teachers available.

[33] The grievor did not identify either the doctor or the nurses he said he spoke to at the institution on that day.

[34] Ms. Leslie was asked if she had any recollection of telling the grievor he could not go home. She stated that she had no recollection and that as a manager, if someone mentioned being sick, she would have asked if he or she wanted to and was able to go home (depending on the person's condition). The grievor did not cross-examine Ms. Leslie on this point.

[35] Entered into evidence were copies of two prescriptions dated November 10, 2011, for topical creams for the rash. The grievor identified the rash as having been caused by dander from the cats at his residence at the time.

[36] There is no evidence that the grievor ever filed a grievance about this.

3. Letter to the prime minister and salary reduction

[37] In early November of 2011, the grievor received a notice with respect to the level of salary he was receiving. His interpretation of it was that the employer had unilaterally reduced his pay, which was a breach of contract. He wrote a two-page email to the prime minister of the day, which he was later told he should not have done on CSC time with CSC equipment.

[38] While the grievor spent a considerable amount of time talking about it, he did state that the matter was cleared up within an hour of him receiving the notice and that his pay never changed. No grievance was ever filed about this.

[39] In his evidence, in his cross-examination of the employer's witnesses, and in both his initial and reply submissions, the grievor references these events. He infers and suggests that the matter was resolved due to what he referred to as "heat" or "pressure" from more senior ranks of the public sector cadre. He alluded to the Prime Minister's Office or Privy Council Office influencing the resolution. There is absolutely no evidence of this.

4. Interactions with the Edmonton Police Service's Police and Crisis Team; hospitalization and broken toes

[40] As set out at paragraph 50 of *Gill* No. 1, at the end of the working day on January 5, 2012, the grievor left the workplace, went on leave due to an illness, and did not return until February 16, 2012.

[41] In September of 2011, shortly after starting to work at the CSC, the grievor got in touch with the Edmonton Police Service (EPS) as he believed that his vehicle had been damaged and that he and his vehicle were being targeted.

[42] Sergeant Kevin Harrison of the EPS attended the hearing and testified about the EPS's involvement with the grievor. In 2011, Sgt. Harrison was a constable and a member of the police and crisis team ("the PAC team"), which was a partnership

between the EPS and the Alberta Health Services in which police officers (usually patrol constables) and staff from crisis services (usually registered psychiatric nurses) responded to persons experiencing mental health crises. He said that persons came onto their radar in a variety of ways and that the team's job was to primarily assess them and determine if they should be referred for treatment, follow-up services, or both.

[43] Entered into evidence (Exhibit E-8) were several documents from the EPS's file on the grievor, including EPS occurrence reports setting out the EPS's contact with him, documents that he provided to it, and information it obtained from the Surrey detachment of the Royal Canadian Mounted Police (RCMP).

[44] The evidence and Sgt. Harrison's testimony disclosed that the EPS's first contact with the grievor was on Monday, September 5, 2011, when he reported damage to his vehicle. Its next contact with him was on Sunday, September 18, 2011, at his residence, again with respect to reported damage to his vehicle. The police occurrence report for that day stated that the grievor had accused a neighbour of carrying out the damage. It also indicated that the police did not believe that the neighbour was involved.

[45] At a point that is unclear but that was confirmed by the grievor, Sgt. Harrison, and an EPS occurrence report, the grievor provided the EPS with a 13-page PowerPoint presentation entitled, "Group Stalking Group Vandalism", which included comments about his parents, their marriage and divorce, and photos of different vehicles and people. Sgt. Harrison testified that the EPS concluded that the damage to the grievor's vehicle appeared minimal, if there was any damage at all; that it appeared to have resulted from normal use, wear, and tear; and that the real issue might have been the grievor's mental health. Sgt. Harrison said that the PAC team tried to contact him several times, to no avail. However, eventually, they were successful and met with him on November 5, 2011, at a neutral site, where an initial assessment was done. Sgt. Harrison said that at that time, the grievor appeared hyper-vigilant, paranoid, and very guarded. He said that despite its concerns, based on the assessment, the PAC team did not feel that it had sufficient grounds to detain him under the Alberta *Mental Health Act* (RSA 2000, c. M-13), and he indicated to them that he was agreeable to attending follow-up meetings with the team.

[46] Sgt. Harrison said that after the November 5 meeting, despite making efforts to follow up with the grievor, the PAC team had been unsuccessful in contacting him. As the team was concerned and knew that he worked at the institution, it contacted Ms. Leslie. On January 5, 2012, it asked her if it could use a meeting room in the administrative area of the institution to meet with the grievor. In her testimony, she confirmed that she arranged for a room. At the end of his workday on January 5, 2012, she advised the grievor that members of the PAC team were at the institution and wanted to talk to him. She testified that her only involvement on January 5, 2012, was to arrange for the meeting room and to advise him that the team was there to see him. She stated that she did not attend the meeting; nor did anyone else from the CSC. The evidence disclosed that the PAC team members who attended the institution that day included EPS officers, a psychiatrist, a registered psychiatric nurse, and a social worker.

[47] Sgt. Harrison testified that on November 5, 2011, the grievor was interviewed, assessed, and transported to the Alberta Hospital Edmonton. The grievor testified that he stayed in the hospital for approximately six weeks and was then discharged. He testified that he was placed on a medium dose of an undisclosed **experimental** medication that made him drowsy and spatially unaware. He said that he had asked for a low dosage. He stated that within the first week after he was discharged from the hospital, due to the medication, while at his residence, he broke two toes.

[48] Entered into evidence was a letter dated February 9, 2012, to the CSC from his treating doctor at the Alberta Hospital. It states that from January 5, 2012, to the date of the letter, the grievor had been under his care, and with respect to medication, the letter stated that he was on a single medication that was to be taken twice a day, once at breakfast and once at dinner, and that it would not affect his ability to perform his work duties; nor would he need to take the medication at work.

[49] No documentary evidence was produced with respect to the grievor's broken toes; nor did any medical professional testify.

5. Difficulty accessing units at the institution

[50] The grievor testified that he had trouble entering units at the institution, especially one particular unit. He said that there was always a problem and that he was

always denied access. He stated that he sent a PowerPoint presentation to management about all the difficulties. No dates were provided.

[51] Entered into evidence as a series of emails (a number of which post-dated the termination of the grievor's employment) was a document that referenced a PowerPoint presentation about the grievor having trouble entering units. Attached as part of it was one page that appears to be page 13 of a PowerPoint presentation and suggests that the cause might have been the local vice-president of the correctional officers' bargaining agent. The entire presentation was not provided. Two other presentations, which the grievor provided to CSC management about other issues, were provided and entered as exhibits.

[52] The evidence disclosed that at times, the teachers and other staff were challenged in terms of access to units.

[53] There is no evidence that the grievor filed either a harassment complaint or a grievance about his inability to access the units.

6. Allegations of assault against Ms. Waskowich

[54] The grievor testified that at some point in November of 2011, specifically when, he did not know, Ms. Waskowich sexually assaulted him by poking him in the behind when they were in the institution's library. He said that she was on her way to the bathroom. He said that he reported it to Ms. Leslie. However, he said that he could not recall if he wrote anything down about it.

[55] The grievor called Ms. Waskowich as a witness on his behalf. He asked her if she recalled poking him in the behind. She stated that she did not poke him in the behind. They had been in the library, and he lifted a computer, which they were not supposed to do, so she tapped him on the elbow and reminded him of that. When he pressed and suggested to her that it did happen, she categorically denied it and stated that he had not only accused her of doing that but also of hacking into his computer, which she also categorically denied. She also stated that later, the grievor admitted that he had been mistaken.

[56] Mr. Sahib stated that he recalled that Ms. Waskowich had poked the grievor because he was moving a computer in the library, which they were not allowed to do,

and that she told him to not do it. He did state that he believed that she had poked him from behind.

[57] In her evidence-in-chief, Ms. Sealy stated that she had heard that the grievor had made an accusation that Ms. Waskowich had touched him and that Ms. Waskowich had said that she had brushed up against him. She said that she also recalled an in-person apology. With respect to this issue in cross-examination, the grievor asked Ms. Sealy about this as follows: “Rose brushed up against me and we made amends?”

[58] There is no evidence that the grievor filed a harassment complaint over this incident; nor is there any evidence that he filed a grievance. There is no evidence that he thought that it was sufficiently serious to report it to the police.

C. Employer’s position with respect to the grievor’s performance

[59] This hearing arose from the grievance that the grievor filed when he was terminated from his position on September 18, 2012, when the employer ostensibly rejected him on probation. Section 61 of the *PSEA* establishes probationary periods for new employees, while s. 62 provides for a termination of employment while on probation, which is colloquially referred to as a “rejection on probation”. Section 211 of the *Act* provides that the Board has no jurisdiction with respect to rejections on probation effected under s. 62 of the *PSEA*.

[60] Despite the existence of s. 211 of the *Act*, employees grieve rejection-on-probation terminations, which are then regularly referred to the Board for adjudication. Then, the employer objects to the Board’s jurisdiction, citing s. 211 of the *Act*. A panel is assigned to the file and conducts a hearing, of which the initial issue is its jurisdiction.

[61] In such cases, in which the employer has terminated an employee under s. 62 of the *PSEA*, it merely has to demonstrate that it did so within the probationary period and that it provided the employee either with the appropriate notice or with pay in lieu of that notice. The hearing then changes gears; the grievor has to establish on a balance of probabilities that the purported termination of employment under s. 62 was a sham, a camouflage, or in bad faith, thus giving the Board jurisdiction under the *Act*.

[62] In short, the employer cannot simply terminate an employee while on probation for no reason but instead for what are (or appear to be) legitimate employment-based

reasons. When grievances against rejections on probation come to a hearing, the employer puts those reasons forward to dispel the grievor's allegations that the rejection was a sham, a camouflage, or in bad faith. Basically, the employer puts forward evidence to demonstrate that its actions were employment-related. This is how the grievor's case unfolded.

[63] The respondent's evidence during the initial hearing days was largely about problems and issues with the grievor, as an employee, some of which were performance related. Had he been rejected on probation, they would dispel any suggestion that the termination was a sham, a camouflage, or in bad faith and would show that it was truly a rejection on probation. That evidence came from Ms. Sealy, who was his immediate supervisor. She was responsible for all the CSC's correctional educators in Alberta. The issues she flagged with respect to him were as follows:

- repeated and continuing difficulties with report writing, including:
    - not meeting the educational standards of report writing,
    - putting too much personal information in the reports,
    - not putting enough detail in them,
    - making errors in them,
    - inconsistencies in his report writing,
    - putting extraneous information in the reports,
    - missing information in the reports,
    - writing in the first person, and
    - inputting reports into CSC databases;
- falling asleep at work;
- making inappropriate use of the CSC's Internet and information technology (IT) systems, including but not limited to writing to the prime minister and the Alberta minister of education;

- moving a computer from the library to the school area without authorization from IT;
- being absent without leave and having problems with leave usage; and
- having difficulty communicating, both orally and in email.

[64] With respect to writing reports, Ms. Sealy's evidence was that correctional educators received both orientation and training, including a binder that set out how to write reports.

[65] With respect to the grievor falling asleep while he was at work, the evidence disclosed that at times, he travelled to Surrey at the end of one workweek and then returned to Edmonton for the start of the next workweek.

D. Facts related to the remedy arising from the termination of employment

1. The collective agreements

[66] At the date of the termination of the grievor's employment, the terms and conditions of his employment were partially governed by an agreement entered into between the TB and the Public Service Alliance of Canada for the Education and Library Science Group, which was signed on March 1, 2011, and expired on June 30, 2014 ("collective agreement No. 1"). That collective agreement was replaced by a new one between the same parties for the same group, which was signed on June 14, 2017, and expired on June 30, 2018 ("collective agreement No. 2").

[67] Appendix A of both collective agreements sets out the annual rates of pay and pay notes. The rates of pay are set out depending on which group the employee works in and the workplace location. The grievor would have been covered by the rates of pay for Alberta. Furthermore, upon his entry into the correctional educator position, his starting salary was governed by Level 4, as at July 1, 2011, Teaching Experience Gridline 6. This annual salary was $57 781. However, the salary grids were based on a 10-month year, and the grievor worked a 12-month year. This was dealt with by a pay note that provided that his annual salary was multiplied by a factor of 20%, so it was $69 337.20. Based on the pay grids in collective agreement No. 1, his annual salary for the year starting August 9, 2012, would have been $73 429.20, and for the year starting August 9, 2013, it would have been $78 002.40.

[68] Collective agreement No. 2 also contains pay grids and pay notes for the correctional educator position based on same criteria as those set out in collective agreement No. 1.

[69] According to the grievor's offer letter, he was also entitled to further remuneration in the form of a Penological Factor Allowance, which is paid to employees who work with inmates. Based on his position, he was to receive an annual allowance of up to $2000. That allowance is paid in monthly installments for any month in which he received a minimum of 10 days' pay.

E. Pre-CSC employment

[70] Introduced into evidence were eight copies of the grievor's cover letters and CVs, which he created at different times and submitted to prospective employers. They are all similar but not the same; it is difficult to determine the period for which each was relevant as none is dated. However, they provide certain information with respect to his education and work experience, both before and after his CSC employment. Based on the CVs, before working at the CSC, he was employed as follows:

- between August of 2010 and April (or May) of 2011 (depending on the CV), he was the principal of Sturgeon Lake School in Valleyview, Alberta;
- between August of 2009 and July of 2010, he was the business department head at the Sino-Canada High School in Wujiang, China;
- between June and August of 2009, a reference appears to the CSC and to Cascade College (it is unclear if he was employed by the College or the TB);
- between January of 2008 and June of 2009, he was a realtor at Gilco Real Estate Services in Surrey;
- between April and June of 2008, he was a data entry clerk at the CRA's Surrey Tax Centre in Surrey;
- between September of 2006 and June of 2007, he was the IT department head at Prince Rupert Secondary School in Prince Rupert, B.C.;

- between August of 2005 and June of 2006, he was the business department head at King David Jewish High School in Vancouver, B.C.; and

- between August of 2004 and August of 2005, he was an assistant manager at Moore's Clothing for Men in Surrey, Langley, and Coquitlam, B.C.

[71] While his CVs list a variety of very specific volunteer and sporting experiences as well as education (not including any further university degrees) dating to 1986, they do not reference any specific employment before August of 2004. However, one CV has a generic reference that states as follows:

> …
>
> | | |
> |---|---|
> | **Governor** | ***College/Secondary Teacher, Public & Private School*** *09/91-06/03* |
> | **IT Dept. Head** | *Taught: Business 10-101, English 8-12, Math 7-9 Honours, CAPP 9-10, I.T.7-12, CELD, LA, PE 6-7, Resource Room 10-12 and was the I.T. lab administrator both PC/Apple labs + In charge of supervising 1500 staff: students, teachers, & administrators* |
>
> …
>
> [Emphasis in the original]

[72] It is unclear what this entry, about the period between September of 1991 and June of 2003, means. While it does reference what appear to be subjects at schools at particular levels, it is unclear how many schools are involved, their locations, and when the grievor was at them. He did not testify about them. And according to the evidence, he received his licence to teach in 1995.

[73] According to the civil proceedings, during 2003 and 2004, he resided in and taught school somewhere in the United Kingdom. But he did not disclose it in his evidence before me.

[74] Sturgeon Lake School is approximately 360 km northwest of Edmonton. The grievor admitted in cross-examination that he was terminated from his position there.

F. Post-termination employment

[75] In *Gill* No. 1, I ordered the grievor to provide to the employer a list of jobs he held after he left the CSC as well as copies of his ITRs, T4s, and NOAs from 2012

onward. Entered into evidence was a copy of the list of jobs he provided to the employer ("the post-termination list of jobs"), a list of residences he said he occupied from August 26, 2011, to September 15, 2016 ("the list of residences"), and copies of his ITRs for 2013 to 2015 and 2017, NOAs for 2012 through 2017, and T4s.

[76] Based on the post-termination list of jobs and the grievor's testimony, after September of 2012, he was employed as follows:

- between December of 2012 and February of 2013, he was a baker with PriceSmart foods in Vancouver;
- between July 2 and August 1, 2013, he was a parking-lot bylaw patrol officer for Precise Parking in Surrey;
- between August 26 and November 1, 2013, he was as a math teacher for the Fond du Lac First Nation in Saskatchewan;
- between November 1, 2013, and May 14, 2014, he was the chief executive officer, director of finance, and director of education for the Hatchet Lake Dene First Nation in Saskatchewan;
- between August 26, 2014, and February of 2015, he was the director of education for the Tl'azt'en Nation in Tachie, B.C.;
- between August 29 and December of 2015, he was the campus director and instructor at Northern Lakes College (on Lesser Slave Lake) in Alberta;
- between August 29 and September of 2016, he was an English teacher at the Natuashish School of the Mushuau Innu First Nation in northern Labrador;
- between November 16 and December 19, 2016, he was a grades 5 and 8 teacher at the Sakku School in Coral Harbour, Nunavut;
- between March of 2017 and January of 2018, he was a commercial real estate agent with Marcus and Millichap in Vancouver;
- in September of 2017, he was the principal of the Chateh Community School in Chateh, Alberta;

- in November of 2017, he was as a secondary school (grades 8 to 12) teacher at the Seabird Island Community School for the Seabird Island Band near Chilliwack, B.C.;

- between February and May of 2018, he was a residential and commercial real estate agent with Gilco Real Estate Services in Surrey; and

- between May and July of 2018, he was the band administrator for the Dease River First Nation in Good Hope Lake, B.C.

[77] The evidence that the grievor set out in the list of post-termination jobs and in his testimony was at times contradicted by his testimony and the documentary evidence in the ITRs, NOAs, and T4s.

1. 2012

[78] The grievor's testimony and the list of post-termination jobs stated that his first job after he left the CSC was as a baker at PriceSmart foods in Vancouver between December of 2012 and February of 2013. However, based on the facts that there is no T4 for this job, it is not referenced in his 2012 and 2013 ITRs, and there is a reference in one of the other exhibits to him working as a baker in 2009, he conceded that he might have been mistaken and that he could have worked as a baker in 2009 and not after he was employed by the CSC.

[79] There is no evidence that the grievor worked anywhere after his termination in September of 2012 to the end of 2012.

[80] The Government of Canada issued the grievor a T4 for 2012 for Employment Insurance (EI) in the amount of $3880.

2. 2013

[81] The Government of Canada issued the grievor a T4 for 2013 for EI of $14 162.

[82] The grievor's testimony and the list of post-termination jobs stated that his next job after the termination was as a parking-lot bylaw patrol officer at Precise Parking in Surrey for just under a month, in July of 2013. However, according to his 2014 ITR, the T4 issued by Precise Parking, and the 2014 NOA, this employment was in 2014.

a. Fond du Lac First Nation, Saskatchewan

[83] According to the list of post-termination jobs and the grievor's testimony, the third job he held after being at the CSC was with the Fond du Lac First Nation between August 26 and November 1, 2013. His 2013 ITR and NOA and a T4 from Fond du Lac First Nation disclosed that in 2013, he earned $19 893.72 for his time there. According to the list of residences, he lived in Fond du Lac between August 25 and November 1, 2013.

[84] The grievor stated in cross-examination that he believed that he found the Fond du Lac job through a website called "Education Canada". According to the list of post-termination jobs, his testimony, and his 2013 ITR, he moved there in late August of 2013.

[85] In his 2013 ITR, the grievor claimed moving expenses for the move from the Surrey property to Fond du Lac. He claimed a distance of 2702 km. Fond du Lac is in the extreme northwestern corner of Saskatchewan. In this part of the ITR, he stated that he moved there from Surrey on August 24, 2013, and that he started his new position there on August 26, 2013.

[86] The grievor said that as part of the employment package, he received a two-bedroom house to live in. He said that he worked there for 5 or 6 weeks (although his list of post-termination jobs indicates roughly 10 weeks). No documents with respect to this job were produced into evidence.

[87] When he was asked about benefits (medical, dental, or others), the grievor stated, "I don't think so. I can't recall unless I look at the paycheck. Most teaching positions have [them] but not all." When he was asked why he was terminated from this position, he said that he was not terminated; a chief from the Hatchet Lake Dene First Nation flew down with a contract offering him a director of finance position, which he accepted.

b. Hatchet Lake Dene First Nation, Saskatchewan

[88] According to the list of post-termination jobs and the grievor's testimony, after the Fond du Lac First Nation, for the balance of 2013 and into 2014, he was employed by the Hatchet Lake Dene First Nation. His 2013 ITR and NOA and the T4 from that First Nation disclosed him working there and earning $9969.24 in 2013. The list of

residences indicates that between November 11, 2013, and April 2, 2014, he lived in Wollaston Lake, Saskatchewan, which is where the Hatchet Lake Dene First Nation is located.

[89] The grievor testified that at the Hatchet Lake Dene First Nation, he was initially the director of finance, and that in the second month, he was asked to also be the director of education (which he said he accepted). In the third month, he said he became the Band's chief executive officer.

[90] When counsel for the employer asked the grievor about benefits received while he was with the Hatchet Lake Dene First Nation, he said that he probably received medical benefits and $2500 per month to fly in and out and attend meetings. With respect to housing, he said, "I don't know if housing was free or I paid. It was a brand new two-bedroom house. I can't recall. I think it was probably provided to me."

[91] In his 2014 ITR, the grievor claimed expenses for the move from the Surrey property to Wollaston Lake, claiming a distance of 1568 km. Wollaston Lake is in the extreme northeastern corner of the province, approximately 270 km east and slightly south of Fond du Lac. In this part of the 2014 ITR, the grievor stated that he moved there on October 31, 2014, and that he started his new position on November 1, 2014. This is incorrect, as the Hatchet Lake Dene First Nation issued T4s to him in both 2013 and 2014.

3. 2014

a. Hatchet Lake Dene First Nation, Saskatchewan

[92] The grievor's 2014 ITR disclosed that he received remuneration of $11 076 from the Hatchet Lake Dene First Nation. The list of post-termination jobs shows that he was in its employ until May 1, 2014.

[93] In cross-examination, the grievor was asked why he left this job. His exchange with counsel for the respondent was as follows:

> Q: Why did you terminate this employment?
>
> A: I was forced into a position of transferring $210 000.
>
> Q: You left because you suspected fraud?
>
> A: I was let go two months later.

> Q: You were let go?
>
> A: Yes; and there was an assault too. I reported to the RCMP. I was assaulted by the human resources manager, who is related to the Chief. I called Indian and Northern Affairs Canada and was told it was my call [with respect to the transfer of the money], so I didn't transfer it.

[94] There are no documents with respect to the grievor's employment contract with that First Nation (despite his testimony that its chief flew down to Fond du Lake with a contract); nor are there any documents with respect to the termination of this contract or the alleged assault. When he was asked if he brought a court action as against that First Nation for wrongful dismissal or the assault, he said that he did not.

b. Precise Parking, Surrey B.C.

[95] The grievor's 2014 ITR and NOA and the T4 from Precise Parking disclose that it employed him in 2014 and that he earned $648. While there are no dates on any other documents to indicate when he worked there, the only time he could have worked there was sometime after he left the Hatchet Lake Dene First Nation at the beginning of May of 2014 and before he started a new position as the director of education for the Tl'azt'en Nation, at Tachie (Fort St. James), B.C.

4. 2015

a. Tl'azt'en Nation, central interior, B.C.

[96] According to the list of post-termination jobs, the grievor started as the director of education for the Tl'azt'en Nation on August 26, 2014, and stayed in that position until February of 2015. However, his 2014 ITR does not have a T4 from the Tl'azt'en Nation for that year, and the T4 from it included in the evidence is only for 2015. In addition, his 2014 ITR and NOA do not disclose working for or receiving any remuneration from it in 2014. Either he was mistaken about when it employed him or he did not report income from it on this ITR for that year.

[97] The grievor's 2015 ITR and the T4 from the Tl'azt'en Nation disclosed that he received remuneration from it for that year in the amount of $22 430.73.

[98] When the grievor was asked how he secured the job at the Tl'azt'en Nation, he said that he applied online. When he was asked how long he held that position, he said a few months. When he was pushed, he said three or four months. When he was asked

if in addition to his income he received any benefits, he said, “Dental and medical. I can’t recall. I am guessing.”

[99] In cross-examination, in responding to a question by counsel for the employer about where he lived in 2014, he stated that he lived at home (referring to the Surrey property) until he moved to Fort St. James on August 26, 2014. It was put to him that he had testified that that property had been sold and that the sale closed in July of 2014. He responded that he probably had a two-bedroom house up the road. He then quickly said that he rented a basement suite in the city (Vancouver?) and then said that he did not know. It was put to him that he lived at the Surrey property until July 31, 2014, and then rented after that, to which he responded: “Could’ve been; I wasn’t home.”

[100] When counsel for the employer asked the grievor why he left the job with that nation, he stated that one day, he had a discussion with a counsellor, and the next day, he left. When it was suggested to him that he was told to leave, he said “No” but stated that he was still on probation. He said that all was going fine, and then, he received a letter and left. No copy of the letter was produced for the hearing, and its contents were not disclosed.

b. Northern Lakes College, northern Alberta

[101] The list of post-termination jobs states that the grievor worked at Northern Lakes College as the campus director and as an instructor from August 29, 2015, to December of 2015. A T4 for the year 2015 issued by Northern Lakes College disclosed his remuneration from it in the amount of $18 640.30. The 2015 ITR references that he worked in High Level, Alberta; however, the income from Northern Lakes College does not appear to have been declared.

[102] With respect to Northern Lakes College, the grievor stated that he applied for the job through Education Canada. When he was asked how long he held the job, he said, “I think a few months. I don’t know. Three or four it says [referring to the list of post-termination jobs].” When he was asked what type of benefits he received while in this position, he said, “College-level instructor? I am guessing. I am assuming, dental, medical?”

[103] When the grievor was asked why his employment with Northern Lakes College was terminated, he said, "I can't recall. I don't think I was probationary. I will have to look into it." When he was asked what he did for Northern Lakes College, he said that he scheduled all courses and that he taught a first-year course over the Internet. He then said that he thought he had a contract. When he was asked if it was a term position, he replied, "Probably; could have been temporary. I recall a letter of termination. A couple of emails. I don't think there was any letter of termination." Counsel for the employer then asked him if there had been discussions about his performance. He answered that he had had no performance issues.

[104] When counsel for the respondent pressed the grievor by stating that he had been out of work for several months before landing the Northern Lakes College job and that he then left it for no reason, he said that he thought it had a policy that he did not agree with, so he left. When counsel pressed him on that, he said, "Well sort of; they were going to implement a policy, and I disagreed, so I was terminated." Counsel then asked him to specify the policy he was terminated for disagreeing with. He answered that it was a health policy. After more pressing, he stated that his employer wanted him to undergo a psychiatric assessment but that he had already received one from a nurse stating that he was fine. However, his superiors were not satisfied with that assessment and wanted him to undergo another one. He chose not to and then said that his employment was terminated via email.

[105] Counsel asked the grievor if Northern Lakes College gave him a reason for terminating his employment. He said, "I don't know. Likely not complying with the second request [for a psychiatric assessment] or not complying with the policy." He then told the hearing that he was informed that he was terminated at a meeting and then said, "Who knows? There could be a letter or an email."

[106] No letters, emails, or documents whatsoever were entered into evidence with respect the events that the grievor described about leaving his Northern Lakes College employment.

c. Wayne Reece novel

[107] The list of post-termination jobs states that during 2015 the grievor worked as an editor and promotor for a "Wayne Reece" novel. However, in his testimony, he admitted that he received no remuneration for it.

5. 2016

a. Natuashish School, Labrador

[108] According to the list of post-termination jobs, after he left his job at Northern Lakes College, the grievor was a homeroom and English teacher for grades 7 to 9 at the Natuashish School for the Mushuau Innu in northern Labrador from August 29 to September of 2016. He stated that as part of his employment contract, as a benefit, he had a three-bedroom house and that he believed that he also was entitled to medical and dental coverage (after a few months). He then said that he did not believe that he was there for more than two months. According to the list of residences, he lived in a teacher's residence from August 28 to September 15, 2016 (just under three weeks).

[109] The grievor stated that he applied for that position likely through Education Canada and that he interviewed via telephone and was offered a job. He said that he signed an employment contract, flew there from B.C., took up residence in a three-bedroom house supplied by his employer, and taught English for grades 7 through 9. When asked why he left, he said that it was because he had no contract and therefore no job. He said that he asked for a signed copy of his contract. When one was not produced after two weeks, he left. Counsel for the respondent asked him if he had had any issues with other employees or a performance problem. He answered in the negative to both. He said that the only reason he left was that the employer had not signed the employment contract.

[110] No employment contract, copy of the written employment offer, or the grievor's acceptance was produced at the hearing.

[111] The grievor was unable to produce his 2016 ITR. According to his 2016 NOA and T4s for that year, he earned $2199.03 from the Natuashish School.

b. Sakku School, Coral Harbour, Nunavut

[112] According to the list of post-termination jobs, after he left his job at the Natuashish School, the grievor's next employment was as a grades 5 and 8 teacher at the Sakku School in Coral Harbour, Nunavut, between November 1 and December 19, 2016. He said that he obtained this job through Education Canada and that he was employed there for six weeks. When he was asked if he received any benefits with the job, he said that he did not know. He then said that he believed that he received a one-bedroom apartment. When asked why he left this position, he said

that he believed that there was a contract issue in that that employer would not provide him with a contract.

[113] Counsel for the respondent asked the grievor if he had any employment issues. He replied that he did not.

[114] A T4 issued by the Government of Nunavut for the 2016 tax year showed that the grievor received employment income of $10 983.06. However, it does not appear as income in the 2016 NOA.

c. Other

[115] Also produced into evidence was a T4 from the Government of Alberta in the amount of $2209.34. When the grievor was asked about it, he could not explain it. However, he mused that he probably had worked as a teacher somewhere. He suggested that it should be on the list of post-termination jobs; it is not. This income is not in the 2016 NOA.

[116] While discussing the grievor's employment for 2016, counsel for the respondent asked him if he recalled an organization called the Auctus Group Inc. He said that he did work there as a consultant, on commission; however, he was not paid anything.

6. 2017

a. Chateh Community School, northern Alberta

[117] According to the list of post-termination jobs, in September of 2017, the grievor worked at the Chateh Community School in northern Alberta as its principal. When he was asked how long he was in that position, he said that it was not for very long, that no one would sign a contract, and that no one would speak to him. He said he was in the job for only a couple of days.

[118] When he was asked how he obtained the job, the grievor said that he was quite sure it was through Education Canada. When he was asked if there were any benefits, he replied that there were none but then said that he received a two-bedroom mobile home to reside in while he was there. When he was asked how he travelled to this job, he said that he drove there. When he was asked why he left it, he said that the only reason he left was that he did not have a contract. When he was asked if he was paid, he said that he had not been paid.

[119] When he was pressed about this job, he said that he was principal and that he had met and had dinner with the Director of Education. When he was asked if there was a letter terminating his employment, the grievor said there was none. When it was put to him that he just up and left, the grievor said, "No" and that he told someone (he could not recall who) that if there was no contract, he would leave.

[120] There is no record of a T4 from the Chateh Community School for 2017. However, his 2017 ITR does include a claim for a moving expenses deduction in which he lists moving from the Port Alberni property to Chateh, Alberta, on September 22, 2017, and states that he started work on September 25, 2017. His moving expense claim included travelling 8000 km and was for one day and one night of travel. In another part of the same section, the distance listed between the two locations is 4800 km. He claimed moving expenses of $3500.

[121] The distance by car from Port Alberni to Chateh is between 1824 and 2118 km, depending on the route travelled. The distance of 4800 km is roughly from Port Alberni to Ottawa, Ontario, by highway.

b. Seabird Island First Nation, Chilliwack, B.C.

[122] According to the post-termination list of jobs, the grievor secured employment with the Seabird Island First Nation in November of 2017 as a teacher at the Seabird Island Community School located just east of Chilliwack, B.C. When counsel for the respondent asked him how long he held this job, he said two or three weeks and then said that it could have been longer. When he was asked if he received benefits with it, he said that he did not know. He said he left because he had not received a contract. When he was asked if he received an offer letter, he said that he did. When he was asked if he accepted that offer by signing it, he said that he did. When he was asked if he was paid, he said that he was. Counsel for the employer then asked him, "So one morning, you wake up and decide to go back to Port Alberni?" He replied, "Yes."

[123] When he was asked if he spoke to someone before he left the Seabird Island Community School, he answered as follows: "Yes. I don't know. I think I spoke to the principal. I think I spoke to the human resources person. I don't know names. I said I submitted everything and you guys can't sign anything." He said that that employer kept stalling. When he was asked if he received a termination letter, he said that

several weeks after the fact, he received an email. He did not say what was in the email; nor was a copy produced for the hearing.

[124] According to the grievor's 2017 ITR and a T4 issued by Seabird Island First Nation, he earned $773.50.

c. Marcus and Millichap, Vancouver

[125] According to the list of post-termination jobs, from March of 2017 to January of 2018, he was employed by Marcus and Millichap, a real estate firm in Vancouver, as a commercial real estate agent. When he was asked how long he worked there, he said that it was 1 year but then said that it could have been 10 months. He said that he worked on commission and that his area was Surrey to Chilliwack. He said that he received no pay because he sold nothing. He said that he did not receive any benefits. The 2017 ITR disclosed a $25 512 loss related to this employment as well as tuition fees of $1030 associated with a real estate course.

7. 2018

a. Gilco Real Estate, Surrey

[126] According to the list of post-termination jobs, from February through May of 2018, the grievor returned to Gilco Real Estate in Surrey, where he had been employed before working at the CSC. He testified that he earned nothing there and that he incurred business losses.

b. Dease River First nation, B.C.

[127] The list of post-termination jobs indicates that between May and July of 2018, he was employed by the Dease River First Nation as the band administrator. The grievor testified that he started there in April of 2018, stayed for two months, and that the employment ended in July. He was uncertain of when it ended in July of 2018 although he thought it could have been July 13. He testified about it on August 2, 2018.

[128] When he was asked why he left that job, the grievor said it was because the probation was three months. He was asked if he was terminated from the position. He replied in the negative. When he was asked if the Band Chief had a discussion with him, the grievor said, "Yes." When he was pressed about receiving a termination letter,

he maintained that he was not terminated. He then stated that he had given a letter of reprimand to a band councillor, who told him, "What goes around comes around."

[129] The grievor did not testify as to his salary with that First Nation.

III. Summary of the arguments

A. For the grievor

[130] The grievor submitted 34 pages of written submissions, which are generally not helpful with respect to the issues I have to decide. However, some of his submissions bear setting out as they are pertinent to addressing allegations or other issues raised during the course of the hearing or in the submissions.

[131] The grievor submitted that while he was not opposed to reinstatement, he did not want to work for the CSC; nor did he want to live in Edmonton.

[132] In his written submissions, the grievor restated, more than once, the remedies he set out in his Remedies Sought document.

[133] The grievor also requested, more than once, total damages of $11.7 million, along with several other amounts of damages for different things throughout his written submissions.

[134] Much of the grievor's written submissions were repetitive. In addition to not being relevant, in them, he often attempted to introduce evidence after the fact. He also repeatedly made arguments that would have been more appropriate if the issue were jurisdiction based on the employer's objection that the termination was a rejection on probation under the *PSEA*. However, this issue was already dealt with in *Gill* No. 1 and has no relevance to the submissions on remedy.

[135] In the first paragraph on page two of his written submissions, the grievor stated as follows: "I also think the EPS and RCMP talked to the Arbitrator separately and that might have a negative impact on any decision, including awarding no settlement just reinstatement."

[136] In the second full paragraph on page two, the grievor stated as follows:

> *I also feel that there is a slight Conflict of Interests since: Mr. Jaworski's office is right across the street from Ms. St-Amant-Roy's*

> *office in Ottawa, and maybe Mr. Jaworski worked for the Treasury Board before and Ms. St-Amant-Roy maybe an Arbitrator in the future. And both see each other at legal cases all the time and I only get to see them for about 2 weeks, not months and years of working together, which breeds familiarity and mutual respect. I'd prefer if my office was right across the street from Mr. Jaworski's, and we could go for lunch, would that be a conflict of interests? I'm not a lawyer.*
>
> [*Sic* throughout]

[137] On page 3, he stated as follows:

> *Another conflict of interests I believe is that both Mr. Jaworski and Rose (Waskowich) Logozar are Ukrainian. Is that why Rose's testamony is so much easier to believe that mine and my credibility is questioned, when she was clearly committing perjury? There is an RCMP file # from Wollaston Lake, Saskatchewan where the HR Manager who wanted all my perks as CEO, assaulted me in the Chief's doorway, instead of going around me, she tried to go through me, and the Chief is her cousin and all the rest, so no charges for assault. When I had 3 car accidents, ICBC didn't even ask me a teacher and "visible minority" they only asked and believed the Caucasian drivers and I lost every-time. Luckily for me when the 2 Constables in the Vancouver Police Department cruiser hit me, a witness said I was going straight through a green light but the VPD officer said it was yellow, 50:50!!!*
>
> *Sure there were some discrepancies in my 2 spreadsheets with dates, where I lived and where I worked and for how long. Some were due to memory issues after taking anti-psychotic drugs and others were due to just working 1-2 days at a location and making it look better on a spreadsheet or resume because it's embarrassing. Dr. … in White Rock told me to, "Tell potential employers I have a staring problem." But, if I told that before getting a job and signed contract, I'd never get the job!!!*
>
> …
>
> *Finally, I wanted to state that the Leader of the Federal NDP, Jagmeet Singh, is a lawyer, and he's running in BC Provincial seat in Burnaby. But Canadians in a poll voted and the majority voted they would never elected a turbaned male PM of Canada.…*
>
> [*Sic* throughout]

B. For the respondent

1. Sealing Order

[138] The respondent submitted that the EPS's package of documents (Exhibit E-8) as well as the grievor's financial information be sealed. It referred me to the *Dagenais/Mentuck* test set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835, and *R. v. Mentuck*, 2001 SCC 76.

2. Remedy

[139] The grievor should not be reinstated into the workplace, and the appropriate amount of compensation in lieu of reinstatement would be the equivalent of between four and six months' salary and benefits.

[140] The respondent submitted that the following two issues must be considered:

i. the appropriateness of an award of pay in lieu of reinstatement; and

ii. the amount of the pay-in-lieu award.

[141] The grievor's evidence and submissions indicate that in the seven years since his termination, he has not held a position longer than a year.

a. Reinstatement is not appropriate

[142] In *Alberta Union of Provincial Employees v. Lethbridge Community College*, 2004 SCC 28, the Supreme Court of Canada noted that pay in lieu of reinstatement should occur only if the arbitrator's findings reflect concerns that the employment relationship is no longer viable. In making this determination, the arbitrator is entitled to consider all the circumstances relevant to fashioning a lasting and final solution to the dispute.

[143] As set out in *Lâm v. Deputy Head (Public Health Agency of Canada)*, 2011 PSLRB 137, *Bahniuk v. Canada Revenue Agency*, 2014 PSLRB 73, reversed on other grounds, 2016 FCA 127, and s. 228 of the *Act*, an adjudicator has the authority to award compensation in lieu of reinstatement in appropriate circumstances. In *Atomic Energy of Canada Ltd. v. Sheikholeslami*, [1998] 3 F.C. 349, the Federal Court of Appeal established that reinstatement is not a right, even after a finding of unjust dismissal.

[144] In his written submissions, the grievor stated, "Reinstatement is the last option I want … I am not opposed to reinstatement but I don't want to work at CSC anymore and I don't want to live in Edmonton …". He stated that while he did not wish to close any doors, he would prefer to receive monetary compensation instead of being reinstated into a work environment that he characterized as discriminatory.

[145] The most commonly accepted test to determine if the employment relationship has been undermined or has deteriorated to the extent that it is beyond repair was

established in *DeHavilland Inc. v. CAW Canada, Local 112* (1999), 83 L.A.C. (4th) 157, which was also referred to in *Highland Ford Sales Ltd. v. CAW- Canada, Local 4502* (2007), 160 L.A.C. (4th) 132. It states as follows:

> a. the refusal of co-workers to work with the grievor;
>
> b. the lack of trust between the grievor and the employer;
>
> c. the grievor's inability or refusal to accept responsibility for any wrongdoing;
>
> d. the grievor's demeanour and attitude at the hearing;
>
> e. the grievor's animosity towards management or co-workers; and
>
> f. the risk of a "poisoned" workplace atmosphere.

[146] The respondent submitted that most if not all the factors set out in *DeHavilland Inc.* are present and that the employment relationship has broken. The un-contradicted evidence was that the grievor was unable to establish a healthy working relationship with his co-workers as he made inappropriate jokes, was hyper-vigilant, and made wild accusations against them. In addition, he was unable to perform at the required level and had performance issues. As set out in his termination letter, "… management has a complete lack of confidence that you can effectively and professionally carry out your duties as an employee of the CSC." He could not accept responsibility for wrongdoing, such as sleeping at work, or admit to his inappropriate use of the employer's email system. He also lacked accountability with respect to the information in his written reports.

[147] During the course of the hearing, the grievor was confused and provided misleading and incorrect information. He was dismissive of his supervisor's opinion. Rather than demonstrate any insight into his shortcomings or a willingness to improve, he made several allegations of conflict of interest in his written submissions against me and of perjury against some of the witnesses.

[148] The grievor accused the employer of being responsible for sending him to a mental health institution and for him breaking his toes. He also alleged that one of his witnesses sexually assaulted him. It is clear that he does not trust the employer and

that he made serious, unsupported allegations. In addition, it is clear that he believes that the work environment was toxic as described in his additional allegations provided in February of 2018.

[149] These circumstances, combined with the length of time that has elapsed since the grievor was discharged, would render it most unlikely that a viable employment relationship could be re-established. The employer requested that the Board order compensation instead of reinstatement.

b. Quantum of pay in lieu of reinstatement

[150] The respondent submitted that there are three different approaches to take when determining the appropriate quantum to be awarded in lieu of reinstatement, as follows:

a. common law decisions on pay in lieu of notice, as the Board's predecessor used;

b. a "*Bahniuk*, *Lâm*, and *Hay River*" analysis ("the economic loss approach"); and

c. the contractual or contemplation-of-damages approach.

[151] The respondent submitted that the common law approach on pay in lieu of notice provides well-established principles that provide a clear and fair result and that the predecessor Board used that approach. In addition, the grievor's employment was of very short duration, and he was 41 years of age at the time of his discharge. The economic loss approach requires a high level of speculation, with discounts for contingencies, which leaves the parties with a potentially questionable outcome.

c. Common law decisions on pay in lieu of notice

[152] At common law, a monetary award is made to compensate for eliminating the right of an improperly dismissed employee to notice that he or she would lose his or her job. The amount of notice is supposed to correspond to the length of time it will take the employee to obtain a comparable position. The courts have developed parameters for calculating the notice period for terminations without proper and sufficient cause based on the employee's age, years of service, position held, and

qualifications. The respondent referred me to *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140, *Filice v. Complex Services Inc.*, 2018 ONCA 625, and *Lâm*.

[153] Using this framework, since the grievor was 41 and had 1 year of service with no management responsibilities, his service does not warrant compensation at a high level. A 4-to-6 month monetary award instead of reinstatement is appropriate. This amount is reached by a review of the following jurisprudence: *Hartley v. Treasury Board (Solicitor General Canada-Correctional Service)*, PSSRB File No. 166-02-17326 (19880308), [1988] C.P.S.S.R.B. No. 72 (QL), *Ashby v. EPI Environmental Products Inc.* (2005), 43 C.C.E.L. (3d) 90, *Bellini v. Ausenco Engineering Alberta Inc.* (2016), 1187 A.P.R. 107, *Lutes v. Treasury Board (Citizenship and Immigration Canada)*, PSSRB File No. 166-02-26706 (19951221),[1995] C.P.S.S.R.B. No. 118 (QL), *Atkey v. Valley Reefer Services, a Division of Kenbrent Holdings Ltd.*, [1994] C.L.A.D. No. 1234 (QL), *Daoust-Savoie v. South Okanagan Montessori School Society* (2008), 68 C.C.E.L. (3d) 104, *Michela v. St. Thomas of Villanova Catholic School*, 2015 ONSC 15, and *Doucette v. Treasury Board (Department of National Defence)*, 2003 PSSRB 106.

[154] It is recognized that the common law approach focuses on pay in lieu of notice and not pay in lieu of reinstatement. However, on the facts of this case, this distinction has no material impact because the evidence suggests that the grievor would not have remained in the employ of the TB at the CSC due to the high potential for a termination for either misconduct or poor performance.

d. The economic loss approach

[155] This approach was developed to compensate unionized employees for the loss of earnings and benefits. It involves projecting forward and estimating the approximate value of what the employee would have earned had he or she remained at work until his or her retirement date, and then discounting that figure to take into account contingencies, which include what can be termed as “life’s uncertainties”.

[156] The contingencies include the chance of layoff, illness, or quitting for another job or other personal situations. The amount is then further discounted to reflect the employee’s obligation to mitigate by obtaining other employment during the identified period. In addition, factors such as the grievor’s age, education, and employment record are also taken into account. The Board adopted that approach in *Bahniuk* and *Lâm*, and the analysis in *Lâm* was based on the private-sector decision in *Hay River*

Health and Social Services Authority v. Public Service Alliance of Canada (2010), 201 L.A.C. (4th) 345 ("*Hay River*"). In addition, the respondent referred me to *George Brown College of Applied Arts and Technology v. Ontario Public Service Employees Union*, [2011] O.L.A.A. No. 459 (QL).

[157] The respondent submitted that the economic-loss-analysis approach should not be used in this case due to the following:

- it necessitates a certain amount of guesswork and subjectivity; the contingencies related to the life uncertainties are necessarily "best guesses";
- unlike in *Lâm*, in which the grievor was 59 years old and had 8 years of service, and in *Bahniuk*, in which the grievor was 52 years old and had 24 years of service, there is minimal information upon which to base any kind of forecast;
- the grievor's obligation to mitigate and likelihood of mitigation between age 41 and retirement is so high, it requires putting significant weight on the contingency such as to render the formula inapplicable; and
- there is an underlying problem in the *Hay River* test as the focus is on employment security in a unionized environment with seniority protections. This formula does not apply in the federal public service, in which there is no job security based on seniority, and layoffs are governed by a workforce adjustment policy.

[158] As such, the economic-loss-analysis approach does not translate well into the federal public sector and should be used only with caution.

3. Other forms of remedy

[159] This case is not appropriate for awarding damages. There is no grievance alleging discrimination; nor did the grievor file the appropriate notice with the Canadian Human Rights Commission, as required under the *Act* and *Regulations* when pursuing such a grievance. He was not represented by his bargaining agent, and thus, the no-discrimination clause in the relevant collective agreement is not before the

Board. The Board has no jurisdiction to award damages under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6).

[160] No damages should be awarded because the adjudicator did not make any findings of bad faith, and the employer has denied liability for punitive damages as there was no bad faith on its part.

[161] The Board has no jurisdiction to award costs. The respondent referred me to *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, *Tipple v. Canada (Attorney General)*, 2012 FCA 158, and *Grant v. Deputy Head (Canada Border Services Agency)*, 2016 PSLREB 37.

[162] Interest should be awarded under the Alberta *Judgment Interest Regulation*, Alta Reg 215/2011, pursuant to the Alberta *Judgment Interest Act* (RSA 2000, c. J-1) because the employment relationship was based in Alberta and the hearing was held there. The respondent referred me to *Bahniuk*.

C. The grievor's reply

[163] The grievor submitted 89 pages of reply submissions together with a 9-page table of contents (which appeared to also contain reply submissions) and a 2-inch binder with 69 tabs that were haphazardly populated; 42 had nothing in them.

[164] A large portion of it did not consist of proper reply submissions as it repeated what was already set out in his submissions. In addition, he also incorporated into those submissions actual documents (not excerpts from evidence entered or quotes from legislation or jurisprudence), which had not been entered into evidence. Nor did they seem to have any relevance to the matter I have to decide.

[165] The grievor referred me to *R. v. M.Y.*, 2004 SKPC 147, *Smith v. Rover's Rest*, 2013 HRTO 700, *National Capital Alliance on Race Relations v. Canada (Department of Health and Welfare)*, 1997 CanLII 1433 (CHRT), *R. v. A.J.B.*, 2007 MBCA 95, *Hamel v. Prather*, 1974 CanLII 292 (AB QB), *Curling v. Victoria Tea Co Ltd.*, 2000 CanLII 20870 (ON HRT), *Millott (Estate) v. Reinhard*, 2002 ABQB 761, *Bageya v. Dyadem International*, 2010 HRTO 1589, *Fish, Food and Allied Workers v. Molson Coors Canada*, 2015 CanLII 82086 (NL LA), *Saskatchewan Association of Health Organizations v. Health Sciences Association of Saskatchewan*, 2011 CanLII 20278, *Tobin v. Treasury Board (Correctional Service of Canada)*, 2011 PSLRB 76, *Chambers v. Axia Netmedia Corporation*, 2004

NSSC 24, *Canadian Union of Public Employees, Local 1975 v. First Nations University of Canada*, 2005 CanLII 78432 (SK LA), *Boutziouvis v. Financial Transactions and Reports Analysis Centre of Canada*, 2010 PSLRB 135, *Schmidt v. Katz*, 1954 CanLII 154 (SK QB), *Alberta (Attorney General) v. Alberta (Provincial Court)*, 1983 ABCA 1, *Fowler v. North American Life Assurance Company*, 1998 CanLII 13307 (NL SC), *North v. McCready*, 2016 BCSC 2016, *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, *Pepper v. Deputy Head (Department of National Defence)*, 2008 PSLRB 71, *Fisher v. Fisher*, 1983 CanLII 2021 (SK QB), and *Kareway Homes Ltd., v. 37889 Yukon Inc.*, 2014 YKSC 35.

[166] I have not attempted to summarize the grievor's reply submissions, as they are confusing and more often than not do the following:

- mischaracterize the evidence that was before me;
- attempt to insert evidence that was not before me;
- attempt to make connections between allegations and facts that cannot be made;
- attempt to make connections between allegations and facts that cannot be made because the facts are not before me;
- are quite simply irrelevant; and
- provide irrelevant jurisprudence.

[167] I took from his submissions that the grievor disagreed with the respondent's submissions and jurisprudence and that he wishes to be paid all his lost salary and benefits from the time he was terminated until the date of the end of the continuation of the hearing (August 2, 2018), together with interest, which he believes should be adjusted for the rate of inflation and compounded. He also requested significant damages for wrongs he perceived occurred to him during the course of his CSC employment.

[168] The grievor did request that the EPS's package of documents (Exhibit E-8), as well as his ITRs, NOAs, and T4s, be sealed.

IV. Reasons

A. Request to seal documents

[169] The employer submitted the EPS's package of documents (Exhibit E-8), which include occurrence reports as well as documents provided to the EPS by the grievor and the Surrey RCMP. It contains unproven allegations as well as photos of persons and vehicles not connected to the grievor's employment with the TB at the CSC. The employer produced it to explain his interactions with the EPS, which eventually led to his hospitalization, and that are related to several of his allegations.

[170] Also entered into evidence were documents with respect to the grievor's income and his income tax filings with the CRA, namely, his ITRs, NOAs, and T4s.

[171] Both the grievor and the employer requested that these documents be sealed.

[172] In *Basic v. Canadian Association of Professional Employees*, 2012 PSLRB 120 at paras. 9 through 11, the PSLRB stated as follows:

> *[9] The sealing of documents and records filed in judicial and quasi-judicial hearings is inconsistent with the fundamental principle enshrined in our system of justice that hearings are public and accessible. The Supreme Court of Canada has ruled that public access to exhibits and other documents filed in legal proceedings is a constitutionally protected right under the "freedom of expression" provisions of the* Canadian Charter of Rights and Freedoms*; for example, see* Canadian Broadcasting Corp. v. New Brunswick (Attorney General), *[1996] 3 S.C.R. 480;* Dagenais v. Canadian Broadcasting Corp., *[1994] 3 S.C.R. 835;* R. v. Mentuck, *2001 SCC 76,* Sierra Club of Canada v. Canada (Minister of Finance), *2002 SCC 41 (CanLII).*
>
> *[10] However, occasions arise where freedom of expression and the principle of open and public access to judicial and quasi-judicial hearings must be balanced against other important rights, including the right to a fair hearing. While courts and administrative tribunals have the discretion to grant requests for confidentiality orders, publication bans and the sealing of exhibits, it is circumscribed by the requirement to balance these competing rights and interests. The Supreme Court of Canada articulated the sum of the considerations that should come into play when considering requests to limit accessibility to judicial proceedings or to the documents filed in such proceedings, in decisions such as* Dagenais *and* Mentuck. *These decisions give rise to what is now known as the* Dagenais/Mentuck *test.*
>
> *[11] The* Dagenais/Mentuck *test was developed in the context of requests for publication bans in criminal proceedings. In* Sierra

> Club of Canada, *the Supreme Court of Canada refined the test in response to a request for a confidentiality order in the context of a civil proceeding. As adapted, the test is as follows:*
>
> …
>
> 1. *such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and*
> 2. *the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.*
>
> …

[173] The EPS's package is a series of documents for which the salutary effects of a confidentiality order outweigh its deleterious effect. Those documents contain information about persons who did not know they were being reported on or potentially investigated, and they have no idea that this information was used at the hearing. Therefore, I order it sealed.

[174] Much of the information in the grievor's ITRs, NOAs, and T4s is personal to him and has no relevance to these proceedings. The information relevant to this proceeding has been reproduced in this decision. The salutary effects of a confidentiality order outweigh its deleterious effect with respect to the personal information in those documents. Therefore, I order sealed the ITRs, NOAs, and T4s filed as Exhibits G-12, G-15, and E-12.

B. The grievor's conflict of interest allegations in his submissions

[175] Before I address the merits of the remedy portion of the grievance, I am compelled to address certain allegations the grievor made in his submissions.

[176] The grievor testified during both phases of the hearing, over the course of four days. Both his evidence-in-chief and his cross-examination were very much akin to a verbal stream of consciousness. He would often jump from point to point with no connection between the statements or answers. It became clear that he gave little to no thought either to the fact he was trying to establish or to the question put to him. He would often make a statement of fact related to a particular event, such as where and

when he lived or was employed, only to change it moments later and then change it again shortly after that. He would often guess about things, despite counsel for the employer asking him not to and me telling him to not guess and to just say so if he did not know. Information he provided through documents he created often contradicted his oral testimony and at times contradicted other documents he had created or produced at the hearing. In short, it was extremely difficult to determine what if anything was accurate when it came from the grievor.

[177] Therefore, I relied largely on facts set out in documents that have as their genesis a source other than the grievor and relied on information from him only when there was no other information source.

[178] This conduct appears to have carried through to the grievor's initial and reply submissions, in which he made serious allegations against not only my integrity but also that of others, including counsel for the employer and members of the EPS and the RCMP, of which three must be addressed.

[179] In his submissions, the grievor suggested that I and the officers of the EPS or the RCMP spoke about his case outside the hearing. No one from the RCMP testified at the hearing; nor did it contact me or to my knowledge the Board or its support services about the grievor or his case. Sgt. Harrison of the EPS testified on March 15, 2018. He did not speak to me outside the testimony he gave on that day; nor have I seen or spoken to him after he was dismissed as a witness on that day. To my knowledge, neither Sgt. Harrison nor anyone else from the EPS has contacted anyone at the Board or its support services to discuss the grievor or his case.

[180] The grievor also alleged that somehow, I am in a conflict of interest because the Board's offices are across the street from that of the employer's counsel. This is not only insulting but also absurd and incorrect. Counsel for the employer has offices in downtown Ottawa. However, they are not across the street from the Board's offices. Ms. St-Amant-Roy has appeared before me only twice, both times in Edmonton related to this matter. She and I have never worked together, eaten together, or spent time together outside the time she was in the hearing room in Edmonton during the course of the grievor's hearing days.

[181] The grievor also alleged that somehow, I am in a conflict of interest because he assumes that my family's heritage and background is the same as that of one of his

witnesses, Ms. Waskowich. His allegation is that because of this connection through a common heritage, I accepted her evidence over his. He called her as a witness, and her evidence was not relevant to the matters that I have to decide. Before the hearing, I had never met her or known anyone with that name. Again, his allegation is incorrect, insulting, and absurd.

C. Alleged losses and claims for damages for things that occurred while the grievor was employed by the CSC

[182] The grievance process in the federal public service is currently set out in the *Regulations* and is a continuation of the process that has been in place, largely unchanged, for decades. The process was initially implemented at the time of the Board's predecessor, the Public Service Staff Relations Board, under the *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35) and was then continued under the *PSLRA* and now the *Act*.

[183] The process set out by the *Regulations* provides that if an employee who has filed an individual grievance is unsatisfied with a decision at a level in the grievance process, he or she can refer the grievance forward in the process until it is exhausted. When that happens, depending on the nature of the grievance, the grievor may refer it to the Board for adjudication, if the Board has jurisdiction over it (currently, under s. 209 of the *Act*).

[184] While s. 208 of the *Act* permits filing grievances with respect to virtually every aspect of the employee-employer relationship, s. 209 circumscribes the matters that can be brought to the Board for adjudication. Not every grievance filed under s. 208 is within the Board's jurisdiction.

[185] Section 209(1)(a) of the *Act* allows grievances that involve the interpretation or application in respect of an employee of a provision of a collective agreement or an arbitral award. Section 209(1)(b) gives the Board jurisdiction over a disciplinary action that results in a termination, demotion, suspension, or financial penalty. Section 209(1)(c)(i) gives the Board jurisdiction in the case of an employee in the core public administration with respect to a demotion or termination under s. 12(1)(d) of the *FAA* for unsatisfactory performance or under s. 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct. Section 209(1)(c)(ii) gives

the Board jurisdiction with respect to a deployment without an employee's consent and is not relevant to this matter.

[186] Terms and conditions of employment that are set out in a collective agreement may be grieved under s. 208 of the *Act* only if the grievor has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement applies. Those grievances may be referred to the Board for adjudication under s. 209(1)(a), which provides jurisdiction over matters involving the breach of a term of a collective agreement, only if the grievor has the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.

[187] In addition, the *Regulations* provide that the grievance process requires employers, who are bound by the *Act*, to have a maximum of three grievance process levels. A grievor must file a grievance against his or her employer within a specified time at a specified level, failing which he or she is barred from doing so without seeking an extension of time as per the *Regulations*.

[188] The *Regulations* provide further that if a grievance is filed within the appropriate timelines at the appropriate level, the employer is required to respond to it within a specified time. Once that time has expired (even if the employer has not responded), the grievor has a deadline within which to move his or her grievance to the next level. This process for advancing a grievance and replying to it is repeated at each level of the grievance process until the final level is reached. There, again, the employer has a specified time limit within which to reply to the grievance, after which the grievor has a specified time within which to refer it to the Board for adjudication, assuming the Board has jurisdiction to hear it.

[189] Section 225 of the *Act* further circumscribes the Board's jurisdiction, stating as follows:

> ***Jurisdiction***
>
> ***Compliance with procedures***
>
> *225 No grievance may be referred to adjudication until the grievance has been presented at all required levels in accordance with the applicable grievance process.*
>
> [Emphasis in the original]

[190] Section 225 means that as a condition precedent to the Board having jurisdiction over a grievance, it must first be presented at all levels of the grievance

process. This means that even if a grievance is initially filed by a grievor properly and in time, if it is not moved to the appropriate next level within the time frames set out in the *Regulations*, it cannot move further in the process without either the consent of the other party (in this case, the CSC's deputy head) or by Board order.

[191] In addition, s. 236 of the *Act* states that the right of an employee to seek redress by way of a grievance for any dispute relating to his or her terms or conditions of employment is in lieu of any right of action that the employee may have in relation to any act or omission giving rise to the dispute. This applies whether or not the employee avails himself of herself of the right to present a grievance in any particular case and whether or not the grievance could be referred to adjudication.

[192] The grievor made a number of claims with respect to things that either happened to him or that he believed happened to him while he was employed at the CSC, which he believes are the responsibility of the CSC or the employer, and that he should be compensated for them. There is no evidence that he filed a grievance about any of them, let alone moved them through the grievance process. For those reasons, which are set out in more detail later in this decision, I am without jurisdiction to deal with them.

1. The CSC was responsible for the EPS's PAC team picking up the grievor and committing him involuntarily

[193] The grievor claimed that the CSC was responsible for the EPS picking him up and for him being involuntarily committed to the Alberta Hospital under the provincial *Mental Health Act*.

[194] The evidence disclosed that the EPS's PAC team was concerned about the grievor's mental health, so much so that it contacted management at the institution and asked it to arrange a room for the team to use to meet with him. The CSC acquiesced to this request. A meeting was held. The team assessed the grievor, and he was involuntarily committed to the Alberta Hospital. While he suggested that he was involuntarily committed for about six weeks, the evidence disclosed that while that was the case initially, the majority of his stay at the hospital after his admittance was voluntary.

[195] The evidence also disclosed that the PAC team's involvement with the grievor arose out of him contacting it about alleged damage to his vehicle and then later his suggestions to it that he was being stalked.

[196] Except for the fact that Ms. Leslie arranged a meeting room for the PAC team to meet with the grievor, I fail to see how this is related to his employment. Even if it was, his appropriate recourse was to file a grievance, which he did not do. Had he filed one, for the Board to have jurisdiction, the grievor would have had to move that grievance through the stages of the grievance process, and if he remained unsatisfied with the result at the final stage, to refer it to the Board for adjudication if it fell within the jurisdiction set out in s. 209 of the *Act*. Since none of that happened, and the only grievance he filed was against the termination of his employment, I have no jurisdiction to deal with this.

2. The CSC was responsible for the grievor's broken toes

[197] The grievor claimed that the CSC was responsible for two toes which he broke while at home, allegedly due to medication prescribed by his psychiatrist either while he was at the Alberta Hospital or upon his release in early February of 2012.

[198] According to the grievor, he was prescribed experimental medication either while he was at the Alberta Hospital or upon his release. He stated that he asked for a low dose but received a moderate or medium dose. A letter forwarded to the CSC from his treating psychiatrist at that hospital indicated that while the grievor was prescribed medication that he was to take at breakfast and dinner, it should have had no effect on his ability to do his job.

[199] I was provided with no evidence about the medication from anyone qualified to speak about it.

[200] The essence of the grievor's claim is that somehow, the employer is responsible for damages that he might have incurred in breaking his toes while at his home, not at work at the CSC, and while voluntarily taking medication prescribed by his doctor. He appears to be attempting to piggyback liability onto the employer because of its original action of arranging a room for the PAC team to meet with him at the institution. There is absolutely no link to his broken toes and his employment relationship with the TB and the CSC. Even if there were one, his recourse would have

been through a grievance filed under the *Act*, which he did not do. Therefore, I have no jurisdiction to deal with this.

3. The CSC was responsible for the grievor's assault while at work

[201] The grievor claimed that at some point during his employment, while in the institution's library, a colleague poked him in the behind.

[202] The grievor did not file either a harassment complaint or a grievance about it. The Board and adjudicators appointed under the *Act* are not courts of inherent jurisdiction. They do not have the authority to address and deal with each and every issue that occurs in the federal public service, only those that Parliament set out in the *Act*.

[203] While harassment and assault in the workplace were certainly something the grievor could have filed a grievance about and perhaps referred to adjudication as a breach of the no-discrimination clause of collective agreement No. 1, he did not file one. Even if he had, he is not represented by his bargaining agent. As such, he would have been foreclosed from pursuing a grievance of this nature because it requires the agreement and support of his bargaining agent. Since none of that occurred, I have no jurisdiction to deal with this.

4. The CSC should pay the grievor damages because other employees and persons treated him discriminatorily

[204] The grievor suggested that he was discriminated against on the basis of race and ethnic origin for the most part by correctional officers, and specifically by the local vice-president of the correctional officers' bargaining agent. This discrimination came in the form of denial of access to units within the institution so that he could fulfil his job requirements as a correctional educator.

[205] The employer acknowledged that there were difficulties accessing units. Perhaps with the grievor, discrimination was involved. However, again, the appropriate mode of recourse would have been for him to file a harassment complaint, a grievance, or both. He did neither. As already set out, the Board and adjudicators appointed under the *Act* have the jurisdiction given to them by Parliament. The only grievance that he filed was against his discharge. Therefore, I have no jurisdiction to deal with this.

5. The CSC should pay the grievor damages because his car was damaged in its parking lot

[206] The grievor alleged that his car was damaged in the CSC parking lot by other CSC employees. Other than his testimony about it, there is no evidence that the damage occurred in the CSC parking lot and that other CSC employees did it. This is merely conjecture on his part.

[207] If this was a matter of alleged harassment, then the grievor should have filed a harassment complaint, a grievance, or both. Again, as he did neither, I have no jurisdiction to deal with this.

6. The CSC should pay the grievor damages because he was required to stay at work after he suffered a rash or broke out in hives

[208] The grievor alleged that he was told that he could not leave work due to a rash or hives that had broken out on him. I have difficulty accepting this. If he truly had been too sick to work, he should have told his supervisor and gone home. He stated that Ms. Leslie told him that he could not go, while she said that had he had told her that he was sick, she would have told him to go home.

[209] The use of sick leave is a matter that comes under collective agreement No. 1, and the grievor could have filed a grievance when this occurred. As he did not, I have no jurisdiction to deal with this.

7. The CSC should pay the grievor damages because it discriminated against him by not assigning him the CORCAN management position

[210] The grievor alleged that within six weeks of joining the CSC, in early September of 2011, he was offered and accepted a position as a manager with CORCAN. Oddly, there is no evidence of it other than his testimony, which at best was sketchy.

[211] When a position is staffed by advertised process in the federal public service, a poster is made setting out the position and details such as location, duration, language requirements, and salary, as well as a statement of merit criteria setting out the required qualifications. The process usually requires applicants to apply and provide proof with their applications that they meet the qualifications. There is usually a deadline to apply. After the closing date, there could also be interviews and background checks before a formal written offer is made, which the successful candidate would have to accept. Once a person is selected for appointment, notices of

consideration and appointment or proposed appointment are published. Such notices are issued even if the appointment process is non-advertised.

[212] There is no evidence that any of this took place, including of the grievor applying.

[213] Among the scant evidence produced were two emails that appear dated March 2 and 5, 2012, or shortly after the grievor returned to work after his extended sick leave. The first is an email to all staff at the institution about an acting appointment as a CORCAN business manager, which had a document attached. The attachment was not produced at the hearing. The second is an email in which the grievor forwarded the March 2 email to his personal email address, with a reference to himself to apply to Ms. Moorehead. There is no other documentation. There is no evidence about the duration of the appointment except for Ms. Leslie's evidence. She believed that it was for two weeks.

[214] Recourse in staffing matters is dealt with under the *PSEA*. Currently, complaints filed in staffing matters come before the Board. However, in 2011 and 2012, they went before the PSST. Other than the grievor's testimony that he was offered this position only to be told that he could not have it, there is absolutely no evidence that there was even a position to be filled, on any basis, or that he applied and was offered it. The only paperwork he produced was from March of 2012, long after the time frame in which he said the aborted appointment took place.

[215] If the grievor did apply for a job at CORCAN and something happened as he suggests, his recourse would have been through the complaint process as set out in the *PSEA*. There is no evidence that he filed any such complaint. While filing a grievance is not the appropriate recourse with respect to a staffing matter, there is no evidence that he filed a grievance either. Therefore, I have no jurisdiction to deal with this issue.

D. Remedy arising from the termination of employment

1. Damages in lieu of reinstatement

[216] The evidence disclosed that the grievor was inappropriately terminated from his position with the CSC on September 18, 2012. From both his comments during the course of the reconvened hearing in July and August of 2018 and his written

submissions, it is clear to me that he does not wish to be reinstated into his position as a teacher classified at the ED-EST-01 group and level at the institution; nor does he wish to live in Edmonton. Likewise, the employer has indicated that it would prefer that he not return to its employ. I am prepared to accept these wishes and shall not order the grievor reinstated. This leaves me with determining the damages, if any, in lieu of reinstatement, due him that arise out of the inappropriate termination of his employment (see *Lâm; Bahniuk)*.

[217] Based on the evidence before me, the grievor was a prolific job seeker. He appeared to constantly apply for jobs, even when he had just newly secured and started one. Based on the information before me, I have no doubt that he actively looked work after the termination of his employment with the CSC. Also based on the evidence before me, it would appear that he did not secure employment until he was hired by the Fond du Lac First Nation and starting working with it on August 26, 2013.

[218] The evidence disclosed that the grievor was at Fond du Lac from August 26 to November 1, 2013, and that during that period, he earned $19 893.72. August 26 was a Monday, and November 1 was a Friday. It was not clear if he started working on August 26. However, if he did, his time with the Fond du Lac First Nation would have been 10 weeks.

[219] Using this information and extrapolating to a year, the grievor would have earned $103 447.24. If he did not work the first week he was at the Fond du Lac First Nation but worked for only 9 weeks, extrapolating to a full year would bring his salary to $114 941.32. If I am incorrect in assuming that he was paid for a full 52 weeks, if I reduce the amounts by 20% (to reflect a 10-month school year), the salary range based on the evidence before me would have been between $82 757.79 and $91 953.06. In addition, he testified that he received a two-bedroom house to live in.

[220] Had the grievor remained in his correctional educator position, as at September of 2013, his salary would have been $78 002.40 per annum. Assuming that he met the criteria set out for the full year for the Penological Factor Allowance, his gross annual income with the CSC would have been $80 002.40.

[221] The grievor testified that he voluntarily left the Fond du Lac First Nation after he had been actively recruited by the Chief of the Hatchet Lake Dene First Nation. His

evidence was that the Chief flew in with a contract for him to be the director of finance for that First Nation.

[222] It is clear that by securing his position with the Fond du Lac First Nation, on the evidence, the grievor provided that he earned substantially more per annum, either $103 447.24 (or $82 757.79), or $114 941.32 (or $91 953.06), versus the $80 002.40 that he would have earned with the CSC. In addition, the Fond du Lac First Nation job also included the benefit of having living quarters provided, something that he did not receive with the CSC and paid for when he lived in Edmonton.

[223] Therefore, the grievor had fully mitigated his damages when he secured the position with the Fond du Lac First Nation. He then voluntarily left it for another one with the Hatchet Lake Dene First Nation.

[224] The grievor's employment record, both before and after his CSC employment, disclosed a pattern of securing different jobs in which he remained for relatively short periods and from which he either voluntarily left or was discharged. His employment after the CSC showed a striking pattern of applying for and being offered teaching jobs across the country, only to leave because he felt he had no contract. From the little information he provided, they appeared to be good-paying jobs, many of which he just suddenly left. While this did not occur with every job, it happened at least four times. At least three times, covering a period of almost two years, he engaged in enterprises that earned him no money. However, he took those actions after he voluntarily left the job at the Fond du Lac First Nation, where his income exceeded what he would have been earning if his employment with the employer had continued. In my view, in leaving that job, the grievor acted unreasonably and did not reasonably avoid future income loss (see *Michaels v. Red Deer College*, [1976] 2 S.C.R. 324, at p. 331.) Thus, any liability for damages or losses with respect to income ceased as of the day when he arrived at his job at the Fond du Lac First Nation, on Friday, August 24, 2013.

[225] Based on the unique circumstances that the grievor found himself in, I believe that the appropriate remedy to be provided to him are damages in lieu of reinstatement, to be calculated from the date on which he last received pay from the TB to the last day before he commenced his employment with the Fond du Lac First Nation.

[226] It is not uncommon before the Board, in termination cases in which a grievance against a termination of employment has been allowed but the grievor had not been able to successfully secure employment after termination, for the adjudicator to, in addition to reinstating the grievor into his or her previous position with the employer, award him or her damages equal to the value of the salary and benefits lost, including the adjustment of pension benefits that would have been earned and paid, as well as leave.

[227] The basis for these damages would be the salary or other monetary benefits that the grievor would be entitled to under the collective agreement in force at the relevant time, as set out in the next section of this decision.

2. Calculation of damages

[228] The evidence disclosed that upon his termination (September 18, 2012), the grievor was paid 30 days' pay in lieu of notice. As he worked a regular 37.5-hour workweek from Monday to Friday, the 30 days' pay in lieu of notice would cover the period ending October 31, 2012. Therefore, the period of loss to the grievor would be between Thursday, November 1, 2012, and Friday, August 23, 2013. This amounts to 42 weeks and 2 days.

[229] According to collective agreement No. 1, the grievor's annual salary as of the termination of his employment was $73 429.20. Had he not been improperly terminated, he would have received a salary increase on the anniversary of his employment, being August 9, 2013, which would have brought his annual salary up to $78 002.40. Therefore, he is entitled to lost salary for the period between November 1, 2012, and August 8, 2013, based on his annual salary of $73 429.20, and from August 9, 2013, to August 26, 2013, based on an annual salary of $78 002.40. The total loss of salary for November 1, 2012, to August 26, 2013, is as follows:

November 1, 2012, to August 8, 2013	$56 766.42
August 9, 2013, to August 26, 2013	$ 3 300.11
Total	$60 066.53

[230] According to the collective agreements and the grievor's offer letter, he was also entitled to be paid a Penological Factor Allowance not to exceed the sum of $2000 per annum for any month in which he received pay for at least 10 days. The 42 weeks and 2 days breaks down to 10 months. Therefore, he is entitled to $1666.66. The total salary and Penological Factor Allowance loss equals $61 733.19.

[231] The evidence disclosed that in 2012 and 2013, the grievor received EI benefits, $3880 in 2012, and $14 162 in 2013, for a total of $18 042. The grievor's NOAs for 2012 and 2013 disclose that these were gross amounts. In accordance with s. 46(1) of the *Employment Insurance Act* (S.C. 1996, c. 23), the employer will be required to withhold these benefits and remit them to Service Canada.

[232] Thus the grievor shall be paid the sum of $61 733.19 less the overpayment of EI benefits received in 2012 and 2013 as well as the normal statutory and other deductions (all taxes, EI deductions, and union-dues deductions that would have ordinarily been retained and remitted to his bargaining agent).

[233] Although it is not entirely clear, it appears that the grievor cashed out whatever value had been paid into his public service pension. However, given my findings and award, he would have had the benefit of paying into that pension, and his employer would have made its contribution. Therefore, I order the respondent to pay the grievor the sum that otherwise would have been paid into his pension and that he could cash out, the amount being what the employer would have been required to pay only for the period of 42 weeks and 2 days at the rate that would have been applicable between November 1, 2012, and August 23, 2013.

[234] Had the grievor been reinstated, he would have been credited sick leave and vacation leave credits as well and would have been entitled to a personal day, all of which he could have taken over the course of that time, which would have entitled him to take time off without losing pay. However, as he was not actually working, and the total amount of his compensation would not have been any greater, there is no value for the loss of leave. As such, I do not award any amount for any loss of leave.

[235] The grievor is entitled to interest on the net amount of this award after the statutory and union-dues deductions at the rate (or rates) of interest in accordance with the laws of British Columbia,, as provided for in s. 36(1) of the *Federal Courts Act* (R.S.C., 1985, c. F-7), accruing from August 26, 2013.

3. Other damages claimed by the grievor that allegedly arose from the termination of employment

a. Costs

[236] It is well-settled that the Board and an adjudicator appointed to hear matters under the *Act* do not have the authority to award costs (see *Mowat*, *Tipple*, and *Grant*). As set out by the Supreme Court of Canada in *Mowat*:

> *[T]he term "costs" in legal parlance, has a well-understood meaning that is distinct from either compensation or expenses.*
>
> …
>
> *It is a legal term of art because it consists of "words or expressions that have through usage by legal professionals acquired a distinct legal meaning" . . . . Costs usually mean some sort of compensation for legal expenses and services incurred in the course of litigation.*

[237] The expenses covered by costs include other claims the grievor made in his submissions for disbursements related to the hearing itself including travel and travel related expenses such as airfare, ferry fees, hotel costs, parking fees, mileage, meals and incidentals, photocopying, binders, dividers and witness fees.

[238] I note that the grievor could have reduced or eliminated some of these costs had he requested a change in venue. He did not.

[239] The grievor also claimed the cost of haircuts and dry cleaning related to his attendance at the hearing. These are everyday expenses that the grievor would have at some point incurred in any event. There is not a special link to the termination of his employment or related to the litigation.

[240] As such, I cannot order any costs that the grievor has claimed.

b. Financial hardship: divorce and marriage failure

[241] The grievor claimed that financial hardship causes 90% of divorces and that the CSC's termination of his employment contributed to the failure of his marriage. Other than his allegation, there is no evidence of this whatsoever. There is evidence of him and his wife owning the Surrey property, where it appears he spent a significant portion of his time away from before their separation and after.

[242] According to the civil proceedings, the grievor and his spouse began living separately and apart on January 11, 2014. This was 18 months after he lost his

correctional educator job and after he had moved from Surrey to Fond du Lac in August of 2013 and then on to Wollaston Lake. His evidence disclosed that starting in August of 2009, until the respondent terminated him in September of 2012, he had full-time jobs away from the metro Vancouver area, including Surrey, as follows:

- August of 2009 to July of 2010 in Wujiang, China;
- August of 2010 to April (or May) of 2011 in Valleyview, Alberta; and
- August of 2011 to September of 2012 in Edmonton.

[243] The grievor presented no evidence of how the loss of the correctional educator job after a little more than 1 year was any different from the loss of the jobs in China or Valleyview, which also were of durations of between 9 and 12 months. He also appeared to be in Surrey for some time after losing his CSC job before he went to teach in northern Saskatchewan.

[244] Indeed, the evidence provided by the grievor, including his CVs, list of post-termination jobs, and ITRs, NOAs, and T4s, clearly disclose that for whatever reason, he had difficulty remaining in a job for more than one year.

[245] As there is no evidence to support the grievor's contention that the loss of the correctional educator job had any nexus to the failure of his marriage, this claim is denied.

c. Missed opportunity costs due to the loss of time: value of money

[246] While the grievor did produce income tax documentation in the form of ITRs, NOAs, and T4s, he provided no evidence of his financial circumstances, except some information about the rental income he received from the Surrey and Edmonton properties.

[247] Under this heading of damages, the grievor referenced in his Remedies Sought document the doubling of the price of homes in Surrey. His statement was vague and contained no other information and details. From the very little information he provided, the Surrey property was sold as a consequence of the marriage failure. When the property was sold in the summer of 2014, the grievor was almost two years past the termination of his CSC employment.

[248] The evidence disclosed that upon the sale of the Surrey property, the grievor received a significant cash payment that, according to him, enabled him to purchase the Port Alberni property mortgage-free.

[249] The grievor also referred to spending, along with his spouse, a considerable amount of time and money over the years travelling to both India and Greece with respect to in-vitro procedures, in an attempt to conceive. One trip took place over the summer of 2012, while he was still employed with the CSC.

[250] Given the limited information that the grievor provided, it is difficult to comprehend exactly what loss if any he alleged was caused by lost opportunities and the value of money.

d. Miscellaneous medical, dental, and drug expenses

[251] At times both during the course of the hearing and after it was completed, and after the submissions process was completed, the grievor made comments about medical or dental issues and stated that he had issues that needed addressing.

[252] The grievor is responsible for taking care of his health. If procedures, medical or dental, were required, it was incumbent upon him to have them done. If he did and they would have been covered by the medical or dental coverage provided by the employer, then they could have been addressed in the evidence before me when addressing remedy. However, he provided no details, specifics, or invoices.

[253] In addition, at least based on the grievor's testimony, in some of the positions he held after his termination from the CSC, he either had or did not have additional health and dental coverage. It is not at all clear.

[254] As the grievor either chose not to have procedures carried out or did not bring forward the requisite evidence to establish that the work was done and would otherwise have been covered under his public service health care plan benefit, there are no damages to award.

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

(The Order appears on the next page)

V. Order

[256] The grievor shall not be reinstated into his position as an ED-EST-01 correctional educator or into any other position with the employer.

[257] The grievor shall be paid the sum of $61 733.19, less the sum equivalent to the overpayment of EI benefits, which shall be remitted by the employer to Service Canada, and less all the usual statutory deductions (including taxes and EI) as well as union dues, all of which would otherwise have been deducted from his pay in the normal course of him receiving it.

[258] The grievor shall be paid interest on the net amount after the deductions mentioned earlier in this decision and at the appropriate rate of interest in accordance with the laws of British Columbia, as provided for in s. 36(1) of the *Federal Courts Act*, pre-judgment interest to be calculated from August 26, 2013, until the date of this decision and post-judgment interest thereafter.

[259] Exhibits G-12, G-15, E-8, and E-12 shall be sealed.

October 11, 2019

John G. Jaworski,
a panel of the Federal Public Sector
Labour Relations and Employment Board