Date: 20191203

File: 566-02-14406

Citation: 2019 FPSLREB 116

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

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

BETWEEN

JOSIAH SMITH

Grievor

and

DEPUTY HEAD
(Department of National Defence)

Respondent

Indexed as
Smith v. Deputy Head (Department of National Defence)

In the matter of an individual grievance referred to adjudication

Before: Augustus Richardson, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Douglas Hill, Public Service Alliance of Canada

For the Respondent: Jena Montgomery, counsel

Heard at Fredericton, New Brunswick
August 7 to 9, 2019.

REASONS FOR DECISION

[1] Does the Board lack or lose jurisdiction with respect to a disciplinary grievance when a deputy head subsequently rescinds the discipline and alleges that it has returned the affected employee to his or her condition as it was before the discipline was imposed? Can that employee complain that the decision was not to his or her satisfaction, and if so, who bears the burden of proof? These are two of the questions stemming from the grievance before me.

I. The grievance

[2] The grievance numbered "2014-6327" ("Grievance 6327") arose from the decision of the Department of National Defence ("the employer") to discipline the grievor, Josiah Smith, on March 28, 2014, by suspending him for eight days without pay following a founded harassment allegation against him. It is the grievance before me. However, I note that the events surrounding the investigation into the harassment allegation generated a number of grievances that overlapped Grievance 6327. One, numbered "2014-6280" ("Grievance 6280"), had a direct impact on the outcome of Grievance 6327. In Grievance 6280, the grievor alleged that he was denied union representation before that disciplinary decision was made. On the other hand, in Grievance 6327, he alleged that in essence, the decision was reached without due process, lacked just cause, and was contrary to the collective agreement for the Operational Services Group bargaining unit that expired on August 4, 2014 ("the collective agreement").

II. The employer's preliminary objection to the Board's jurisdiction

[3] Before and at the start of the hearing, which was scheduled for August 7 to 9, 2019, in Fredericton, New Brunswick, the employer made repeated objections to my jurisdiction. I have set them out in this decision as my interim rulings on them affected the hearing and the onus of proof.

[4] The employer submitted that sometime after the grievance was filed, it rescinded the discipline in its entirety and returned to the grievor the eight days of pay he had originally lost. The employer submitted that since the discipline had been entirely rescinded, there was no live dispute between the parties, and hence no jurisdiction on my part, under s. 209(1)(b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), to hear the grievance.

[5] In response, the grievor admitted that he had received his lost eight days of pay. However, he noted that he alleged that the employer had not granted other aspects of his desired remedy. He also alleged that the discipline had not been limited to an eight-day suspension but had resulted in the following:

1. a loss of 10 days of pay, not 8;
2. a transfer to a position that was a demotion; and
3. a suffering of loss or damage by way of emotional stress and anxiety caused by the employer's disciplinary actions, which had led to him leaving work on an extended period of sick leave.

[6] The grievor submitted that since the employer did not fully rescind its disciplinary decision or did not fully remedy the consequences of it, I have jurisdiction to consider the matter; see *OPSEU v. Ontario (Ministry of Community Safety and Correctional Services)*, 2019 O.G.S.B.A. No. 51 (QL) at para. 18.

[7] After considering the submissions of the employer and the grievor, I ruled as follows:

1. The employer objected to the Board's jurisdiction to hear this grievance, which challenges only the disciplinary suspension. Although the parties agree that the suspension was rescinded before the grievor referred his grievance to adjudication, he remained dissatisfied with how the employer dealt with his desired remedies.
2. A live dispute remains between the parties on the appropriate remedies in the circumstances and is inextricably linked to the disciplinary suspension.
3. Under s. 209(1)(b) of the *Act*, and in light of *Amos v. Canada (Attorney General)*, 2011 FCA 38, the Board held the hearing to address the appropriate remedies.

[8] In essence, I made that ruling because s. 209(1)(b) of the *Act* states that an employee may refer to adjudication an individual grievance "… that has not been dealt with to the employee's satisfaction …" if the grievance is related to "… a disciplinary action resulting in termination, demotion, suspension or financial penalty …". In this case, while there was no dispute that the employer had in fact rescinded the decision with respect to the loss of eight days of pay (and had returned that pay to the grievor), the grievor alleged that the grievance had not in fact "… been dealt with to … [his] satisfaction."

[9] After I made the ruling, and a few days before the hearing started, the employer sought clarification as to the scope of my ruling and its impact on how the hearing should proceed.

[10] I ruled that in the normal course, the onus of proof in discipline cases falls on the employer. However, since the grievor maintained that the employer had not dealt with the grievance to his satisfaction, he had the onus. In particular, he had to establish the following:

a. that he was penalized 10 rather than 8 days' pay and hence was entitled to recover an additional 2 days' pay;
b. that the position into which he was transferred was a demotion; and
c. that he had suffered a loss or damage for which he was entitled to compensation.

[11] Accordingly, I directed that the grievor proceed first at the hearing and present evidence in support of his allegations. The employer then presented its evidence in support of its position that the discipline complained of in the grievance had been fully rescinded, that the grievor had been made whole, and that his transfer had not been a demotion.

[12] Finally, I should note that at the beginning of the hearing, the employer renewed its objection to my jurisdiction. It added a new objection, stating that the grievor's allegations were new or at least had not been raised during the grievance process. That being the case, the Board would lack jurisdiction to consider them because the employer had not had an opportunity to address them during the grievance process ("the *Burchill* principle", from *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.)). See also *Shneidman v. Attorney General of Canada*, 2007 FCA 192; and *Baranyi v. Deputy Head (Canada Border Services Agency)*, 2012 PSLRB 55 at para.104.

[13] I took the objections under advisement and proceeded to hear the parties' evidence and submissions.

III. The hearing

[14] The grievor testified on his behalf. The following two people testified for the employer:

a. Ryan Gannon, a labour relations advisor with the Department of National Defence (DND), who testified as whether the grievor had been docked 8 or 10 days of pay; and
b. Major Christian Gagnon, the commanding officer of DND's Real Property Operations at Canadian Forces Base Gagetown, New Brunswick ("the base"), who testified as to changes that had taken place in the operations, job duties, and organizational structure there during the period in question.

[15] The parties also put forward two versions of what was intended to be a joint book of exhibits; they overlapped almost entirely, although they differed slightly in organization. The grievor's version was marked as Exhibit 1. The employer's version was not used much during the hearing, but I will refer to it as "JEB" in my references to it in this decision. The two versions contained documents relevant to the issue of the scope of the discipline imposed on the grievor in March 2014.

[16] There was really no conflict in the testimonies of the three witnesses. The issues were related not to credibility but to the inferences or legal conclusions to be drawn from the facts. That being the case, I will simply set out my findings of fact based on the evidence and will refer to specific testimony only when necessary.

[17] I should also repeat the observation that the events that led to the discipline in question appear to have generated a number of other grievances at several stages in the events leading to, and after, the imposition of discipline in March 2014. Unfortunately, for reasons not revealed to me, the parties chose not to provide much evidence about the background to or contexts of the other grievances, the lack of which made it difficult at times to determine what exactly took place or when or why it did.

IV. Background to the grievance

[18] As of 2011, the grievor had worked for 36 years with DND, the entire time at the base. Over the years, he held a number of permanent and acting positions. In 2009, he took on a senior project manager position in the Production Officer section, within the Construction Engineers Branch (Exhibit 1, Tab 2). His key duties included managing and directing tradespeople performing construction and maintenance projects on the base, as well as managing the branch's vehicle fleet. He would supervise upwards of 20 to 100 workers, depending on the season. He worked under the immediate supervision of the production officer.

[19] In June 2011, the grievor took on a production officer position on an acting basis. He held it until March 2012, when he returned to his regular senior project manager position. Roughly six months after that, he was asked to assume, on an acting basis, a senior structural supervisor position. Its duties were nearly identical to those of his senior project manager position. However, on May 31, 2012, just before he was to move into it, he was notified that a harassment complaint had been filed against

him in December 2011. (Based on the material before me, it would appear that at least three respondents, including the grievor, were alleged to have committed acts of harassment against the complainant.)

[20] An investigation of the complaint followed. The grievor was provided with a draft report in September 2012. He was also provided with a copy of the final report on May 30, 2013 (JEB, Tab 8).

[21] The base commanding officer at the time was Lieutenant Colonel P. D. Madic. On June 25, 2013, he wrote to the grievor (JEB, Tab 2) about the complaint. He advised the grievor as follows: "In light of my recent decision to uphold aspects of a harassment grievance from Mr. Marcel McLaughlin … I am temporarily reassigning you to alternate duties pending the outcome of further assessment of this harassment case."

[22] The temporary position into which the grievor was assigned was that of a quality management officer. In it, he was to work directly for a Captain Beauchamp and was to have no subordinates. It was "… well-suited [sic] to … [the grievor's] project management skills." LCol Madic added as follows: "The results of this further assessment may trigger a reassessment of the decision to move you into the new position." The grievor testified that his salary in the temporary position remained the same as that of the senior project manager position. He remained in it until April 2014.

[23] I was not provided with a copy of LCol Madic's "recent decision". Nor was there any evidence as to what "aspects" of the harassment grievance had been upheld. The only evidence I have is that the complainant was in the chain of command several levels below the grievor and that his complaint appears to have been that the harassment consisted of the failure of a number of respondents (including, apparently, the grievor) to accommodate an alleged injury, despite that the complainant had been found fit to work.

[24] The relative paucity of the evidence surrounding the reasons for the decision to reassign temporarily the grievor to another position made it difficult to read anything more into the decision other than that it was to remove a respondent from a complainant's chain of command pending a further assessment of the harassment allegations.

[25] Returning to the chronology, a notice of alleged misconduct was provided to the grievor on July 25, 2013 (JEB, Tab 13, for all quotations in this paragraph). It indicated that an investigation would be conducted into six of the seven harassment allegations that had been founded. As a result, the notice advised the grievor "… that this matter has now been referred to the disciplinary process for further action." It explained that once the investigation was completed, but before any final decision was made, he would be afforded the opportunity to present "… any clarifications or extenuating circumstances that [he felt] have not been addressed in the course of the investigation or need to be taken into consideration." The notice concluded with the observation that "… upon conclusion of this process, disciplinary measures may be taken." The grievor testified that he read the letter as meaning that he would be disciplined as a result of the harassment investigation.

[26] A meeting was then held on November 28, 2013. During that meeting, the grievor was provided with "… the opportunity to provide an explanation in relation to the harassment investigation findings" (Exhibit 1, Tab 5). He advised that he had filed access-to-information (ATIP) requests for information that he believed would help explain the events surrounding the allegation and its investigation. LCol Madic agreed to wait.

[27] By March 2014, no ATIP information had yet been released. LCol Madic was to be transferred to a different command. He decided that he could no longer wait for the ATIP results. Accordingly, he issued a disciplinary letter dated March 28, 2014. He found that harassment had occurred and that as a result, the grievor would be suspended without pay for eight days from April 2 to 11, 2014 (JEB, Tab 11). The suspension was the only discipline that the letter expressly set out. (The evidence was not clear as to which position the grievor occupied in March 2014, but for purposes of this decision, I have assumed that it was the one as the quality management officer into which he had been reassigned temporarily in June 2013.)

[28] The grievor received the disciplinary letter on April 1, 2014 (JEB, Tab 8, page 2). On the same day, he grieved the "… receipt of a disciplinary [letter] dated March 28, 2014 which is a suspension without pay for 8 days …" (JEB, Tab 3), which was Grievance 6280. It appears that one of the grounds for the grievance was that he was not provided with 24 hours' notice of the discipline letter or afforded a chance to have

union representation, contrary to clause 17.02 of the collective agreement. He sought the following as remedy:

a. that his suspension be removed from his personal file;
b. that he be reimbursed for "all benefits and compensation losses";
c. that he be made whole; and
d. that he be compensated.

[29] No reference was made to the reassignment of June 2013.

[30] The grievor was off work without pay from Wednesday, April 2, to Friday, April 11, 2014. On that Friday, he filed Grievance 6327 from the bargaining agent's office. He grieved the "… receipt of a disciplinary [letter] dated March 28, 2014 which is a suspension without pay for 8 days …" (JEB, Tab 3). He sought the following as remedy:

> *1. That my suspension be removed from my personal file*
> *2. That I be reimbursed for all benefits and compensation losses*
> *3. That I be made whole*
> *4. That I be compensated*

V. Sick leave and 10 vs. 8 days lost

[31] The grievor did not return to work on Monday, April 14, 2014. He testified that the disciplinary letter and the fact that a notice of the complaint had been posted on the base's intranet site hosting its SharePoint collaborative electronic documents had caused him so much distress and embarrassment that his family physician put him off work, on sick leave. The grievor testified that that was done because of the anxiety and depression that he was experiencing from being accused of what he considered a baseless harassment allegation. He remained off work for 14 months. He received three prescriptions, for depression and anxiety and to help him sleep. He testified that while he was off work he was angry, upset, and depressed by what he thought was false or colluded evidence from co-workers and military personnel.

[32] The stress, anxiety, and depression negatively impacted his relationships with his immediate family. His emotional reaction became worse the more he dug into how the investigation had been conducted and the evidence that had been collected as a result of his ATIP request. Every two months, he saw his doctor, who eventually urged him to return to work, which he did on Wednesday, April 1, 2015.

[33] The grievor testified that his doctor had provided regular reports of his condition to the employer during his time off. However, the only medical evidence of

his condition and the reason for his absence from work that he introduced at the hearing was a brief two-paragraph letter from his doctor dated April 5, 2017 (that is, well after his eventual return to work in 2015), which stated as follows (Exhibit 1, Tab 15):

> *I have been the family physician of Mr. Smith since 2003. He developed anxiety and depression in the summer and fall of 2013 requiring medical treatment and leave from work from April 2014 until June 2015.*
>
> *According to my information this disorder seemed precipitated by work stress of an unusual nature. I doubt that this disorder would have occurred in him without this stress.*

[34] The date that the doctor provided for the grievor's return to work seems erroneous, inasmuch as the grievor testified that he returned after March 31, 2015. He testified that the employer's "Leave Summary" (Exhibit 1, Tab 7) accurately set out the time he was off sick as from April 14, 2014, to March 31, 2015.

[35] The grievor testified that while he was on sick leave, he received one biweekly pay (which in ordinary course, included 10 days' pay) for an amount of nil. He testified that it happened in June 2014. He contacted the employer's pay department, which emailed him an explanation of what had happened (Exhibit 1, Tab 10).

[36] On June 18, 2014, a compensation advisor with the employer's Human Resources department advised the grievor that overpayments of 6 and 2 days had been recovered from his pay. They arose because his pay for the periods that included April 2 to 11, 2014, had not been reduced by 8 days. However, because of peculiarities in the employer's pay system, and rather than simply deducting 8 days of pay, the following happened (JEB, Tab 6):

> *a. 36-day overpayment (for April 2 to May 21, 2014) was set up, representing a notional overpayment of 36 days;*
>
> *b. pay was then re-entered for April 22 to May 21, 2014, being a notional payment of 28 days; and*
>
> *c. the notional payment meant that the 8 days of overpayment were recovered.*

[37] The grievor did not have any evidence (other than his memory) supporting his statement that he had received a nil pay cheque for one pay period. However, email correspondence from the Employer's Compensation Advisor on June 18, 2014 stated that the notional 28 days payments "then gets taxed, CPP & EI premiums on this 28

days payment and it looks like you end up paying more taxes, etc because of the way or procedures dictates how to do this:" JEB, Tab 6. In cross examination Mr Gannon testified that, in his opinion at least, the fact that the grievor's pay may have had a larger tax withholding, and higher CPP and EI deductions on that one particular pay would have ended up being corrected at tax time in the grievor's T4 reflecting his actual total annual income.

VI. The processing of Grievance 6327

[38] The processing of Grievance 6327 proceeded while the grievor was on sick leave. On May 15, 2014, LCol Madic sent the first-level decision (JEB, Tab 4). He referred to the first-level grievance hearing, stating as follows to the grievor: "… at which time you did not present any particular argument specific to this grievance and further explained that you believed the decision I would be making on [Grievance 6280] heard at the same time would have an impact on this grievance." He went on to recognize that "… the two grievances are linked to the disciplinary letter received …" and added that "… since [he had] addressed [his] decision for [Grievance 6280] separately …", he would not grant corrective measures for Grievance 6327. A copy of that separate decision was not entered into evidence.

[39] The second-level grievance hearing was held on June 11, 2014, at which the grievor "presented the details of" (JEB, Tab 8) the grievance to LCol Hart, who had become the base commanding officer. The grievor's information included "… a written statement to substantiate [his] grievance", as well as some documentation. LCol Hart noted that as a result, the meeting was adjourned to June 19. (Note that the grievor did not provide me with a copy of his written statement or the documentation.)

[40] On June 19, 2014, at the second meeting with LCol Hart, the grievor provided "… additional information in writing as to what was meant by "*That I be compensated*" as found …" in the remedies sought in grievance 6327 (JEB, Tab 8).

[41] A copy of the June 19, 2014 statement was entered into evidence (JEB, Tab 7, which is the source of all quotations in this paragraph). It included a list of corrective measures for four grievances, including Grievances 6280 and 6327. With respect to the former, the grievor sought only the following: "Due Process be conducted as per Collective Agreement and Treasury Board of Canada Guideline to Discipline [sic]". With

respect to the latter, which he characterized as "… Suspension of 8 days turned 6 days …", he set out the following (JEB, Tab 7):

…

1. Suspension lifted and all days lost without pay reinstated fully.

2. Copy of disciplinary decision removed from my personal file

3. To be made whole

a. All ~~earned~~ used leave be returned since 4 June 2012

b. The Production Superintendent position that was "eliminated" by LCol Madic be reinstated as a civilian position and offered to me or at the very least deploy into Senior Structural shop supervisor(pay nearly the same) as I requested twice.

c. Restore my workplace and if possible damage control of my reputation as a result of my Protect B info was released to the organization. I've been humiliated and disgraced publicly.

d. Actions/Behaviour of LCol Madic are reviewed.

[*Sic* throughout]

[42] I pause to note that based on the evidence before me, I have concluded that the reference to "8 days turned 6 days" is a reference to a decision made by the employer during the processing of Grievance 6280 to reduce the suspension from 8 days to 6 in recognition that the collective agreement had been breached when the grievor was denied his right to union representation (Exhibit 1, Tab 17).

[43] LCol Hart then sent the employer's second-level decision on Grievance 6327 on June 19, 2014. After considering all the grievor's information, LCol Hart concluded that the grievance should be denied at the second level (JEB, Tab 8).

VII. The grievor's return to work after March 31, 2015

[44] The evidence was unclear on what happened with respect to the grievor's position on his return to work after March 31, 2015. The position to which he returned was not the same one he had originally held (senior project manager) or the one to which he had temporarily been assigned in June 2013 (quality management officer). He testified that he was told he would be in a senior civil engineering technologist position (Exhibit 1, Tab 1). He was asked to sign the job description but refused because on paper, at least, it would have involved a reduction in pay. However, in fact, he remained classified at the GL-COI-11 group and level, with the same rate of pay (including the supervisory differential) as in his senior project manager position.

[45] At any event, by April 2019, he was in the senior project manager position, although the grievor testified that he was not recognized as such. In cross-examination, he agreed that he was in the same position classification and rate of pay and that he was listed in the organization chart as a senior project manager as of 2017. The one substantive difference from his position in 2013 that he could point to was that he no longer had any supervisory responsibilities.

[46] Major Gagnon testified that to his understanding, in his previous position, the grievor had supervised a large number of tradespeople. In his new position, he was a project manager in the engineering department working on projects with consultants and contractors but with no subordinates. He also testified that the new position had been part of a larger countrywide reorganization in the military's administration that took place while the grievor was on sick leave.

[47] The organizational structure change had come about as part of a reorganization in the Canadian military's real property support services that had evolved over 2013 and 2014 under the title, "Army Support Base (ASB) Transformation." Headquarters staff in Halifax, Nova Scotia, had developed the reorganization. One aspect of it was a realignment of the roles and responsibilities of different sections of the real property division to centralize responsibility for providing real property support services with a base construction officer. The reorganization applied to all real property divisions across Canada, not just at the base.

[48] On December 16, 2014, the "Master Implementation Plan" for the base was issued. Its purpose was to guide the implementation of the overall reorganization, and its aim was as follows (JEB, Tab 18):

> …
>
> *a. Clearly establish roles and responsibilities under the new Unit organization;*
>
> *b. Provide direction on financial allocations within the Unit; and*
>
> *c. Provide direction on specific tasks, timelines and methods by which this transformation will occur.*
>
> …

[49] Returning to the grievance, on April 15, 2016, LCol MacEachern issued a decision after a five-day hearing that was held in December 2015 with respect to four grievances (JEB, Tab 14) consisting of one joint and three individual grievances filed by

three employees; one was the grievor. The grievances were numbered 5590, 5592, 5593, and 5594. Although they did not include the one before me, it appears that they were related to the same set of facts and, in particular, the harassment allegations that Mr. McLaughlin had made.

[50] LCol MacEachern found the grievances "partially founded" in that there had been a lack of procedural fairness, findings not supported by the evidence, and improper conduct on the part of some of the witnesses. She also noted the significant discrepancy that existed in a finding of harassment against Mr. McLaughlin "… by failing to accommodate his needs due to a… injury … [when the Workers' Compensation file] clearly indicated he had no workplace restrictions".

[51] LCol MacEachern went on to state the following, given that she had partially upheld the grievances (JEB, Tab 14):

…

> *… I ordered that the RO's finding of founded harassment be overturned and the associated financial sanctions assigned to Mr. Joey Smith undone. I agreed to order another investigation. I also agreed to explain this in a public Unit forum, which I did on the morning of 04 April 2016….*

…

[52] LCol MacEachern's decision also appears to suggest that the four grievances and their remedies sought (not the grievance before me) could not be addressed "… at any level of the grievance process until another harassment investigation is concluded" (JEB, Tab 14, page 2).

[53] I pause to note that the evidence and testimonies of the witnesses at the hearing before me pointed to the existence of some other grievances of the grievor (perhaps including the ones mentioned by LCol. MacEachern) that ran parallel to but independent of the one in this case. Neither party provided me with anything other than vague references to those proceedings.

[54] Doing the best I can, and focusing on the comments in LCol MacEachern's April 15, 2016, decision, I have decided as a matter of fact that her decision reversed entirely the findings in the harassment report and the disciplinary decision of March 28, 2014. In effect, the grievor's disciplinary suspension was quashed. The issues of whether harassment had occurred and whether the investigation of the harassment

complaint or management's conduct had been appropriate were still in play as the subjects of the four new grievances that by LCol MacEachern mentioned.

[55] On June 8, 2017, Gilles Moreau, Director General, Workplace Management, for the employer, provided the employer's final-level decision on Grievances 6280 and 6327, the one before me, along with another grievance, numbered 5915. He noted that Grievance 6280 related to an alleged denial of union representation in respect of the discipline that had led to Grievance 6327. Management had apparently recognized this breach of the collective agreement and had reduced the eight-day suspension to six days. He also noted that LCol MacEachern's decision of April 15, 2016, had "… quashed the remaining six (6) day suspension, effectively rescinding the eight (8) day disciplinary suspension" (JEB, Tab 10).

[56] It appears that by the time Grievance 6327 came before Mr. Moreau, the grievor was also complaining that "… ten (10) days of pay were actually taken from [the grievor's] pay at the time of the suspension being served" (JEB, Tab 10). Mr. Moreau advised that he had asked that the matter be looked into and that the grievor be advised of the findings.

[57] On July 28, 2017, the grievor referred Grievance 6327 to adjudication with the Board.

VIII. Submissions

[58] The parties' submissions on jurisdiction essentially repeated those already made in advance of the hearing. The facts, issues, and submissions on jurisdiction overlapped those with respect to the three issues the grievor raised as not having been dealt with to his satisfaction. Accordingly, I do not believe it necessary to repeat them. I will deal with them as part of my reasons with respect to the substance of the grievor's claims.

IX. Analysis and decision

[59] I return to the employer's submission that I lack jurisdiction because it had rescinded the eight-day suspension and had returned the eight days of lost pay to the grievor.

[60] I agree with the submission that the Board's jurisdiction under s. 209(1)(b) depends upon the existence of "… a disciplinary action resulting in termination,

demotion, suspension or financial penalty …" that has been "… presented up to and including the final level in the grievance process …" and that "… has not been dealt with to the employee's satisfaction …". If the action complained of is not disciplinary, there is no jurisdiction, see, for example, *Canada (Attorney General) v. Assh*, 2005 FC 734; *Browne v. Canada (Treasury Board)*, *Browne v. Treasury Board (Revenue Canada - Customs, Excise and Taxation)*, PSSRB File Nos. 166-02- 27650-27652 and 27657 to 27660 (19971201); *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 115; and *Finlay v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 59 at para. 98.

[61] There was no question that before me was a disciplinary action within the meaning of s. 209(1)(b). It was also clear that the grievor was not satisfied that his grievance had been dealt with to his satisfaction. What remained at issue as far as jurisdiction was concerned was whether the aspects of the grievance that the grievor had placed before me were part of the "… individual grievance that [had] been presented up to and including the final level in the grievance process …" (per s. 209(1) of the *Act*). I say this because if his complaints were not made during the grievance process, they could not be raised now, under the *Burchill* principle.

[62] Since this issue depended to some extent on the facts, it was necessary to hear evidence as to what the grievor said had not been dealt with to his satisfaction and whether it had been raised at any point up to and including the final level of the grievance process. With that in mind, I will deal with that issue in the context of each of his allegations made before me.

[63] The grievor alleged that 4 aspects of the discipline that had been imposed on him had not been dealt with to his satisfaction. However, in my view, the last 2 — damages for pain and suffering and for alleged recklessness on the part of the employer — were versions of the same thing. As a consequence, I have treated them as one, leaving the following 3 issues or allegations:

a. the grievor in fact lost 10 rather than 8 days of pay;
b. the positions into which he was unassigned in June 2013 or in which he found himself after his return to work at the beginning of April 2015 represented demotions that were part and parcel of the discipline of March 2014; and
c. he suffered a loss or damage (by way of emotional distress and defamation of character) in addition to the lost pay as a result of the March 28, 2014, discipline as well as damages from the employer's reckless, wilful, and wrongful conduct.

[64] I now turn to those three issues,

A. Was the grievor docked 10 rather than 8 days' pay?

[65] I was satisfied that this part of the grievor's complaint had been raised during the grievance process. The employer's final-level response, dated June 8, 2017, refers to it, mentioning an undertaking on its part "… that this matter be looked into …" (Exhibit 1, Tab 17).

[66] The grievor had the onus of proof of establishing that the employer's discipline of March 28, 2014, resulted in him losing 10 rather than 8 days of pay. I was not persuaded that he met that burden.

[67] First, the employer's express discipline was limited to eight days. There is no dispute that eight days' pay was eventually returned to the grievor.

[68] Second, there was no evidence that the grievor had lost two additional days of pay. The fact that he may have received a nil pay cheque for one pay period (assuming the grievor's memory of something that happened roughly five years ago was accurate) is not proof that he lost two days of income. The fact that his tax withholding, or CPP or EI deductions, were higher than they might be in June 2014 does not necessarily translate into a loss of two days pay. A higher tax withholding in one pay period does not establish a higher tax liability at the end of the year, or that the Employer had deducted two additional days pay. I note as well that the grievor did not raise any issue about a loss of two additional days pay until long after June 2014, a fact which limits the weight of his evidence that the loss related to his pay rather than to his deductions for one pay period.

B. Was the assignment a demotion based upon the disciplinary action?

[69] This involves two issues. First, there is the question of whether either position the grievor found himself in, in June 2013 or on his return to work after March 2015, represented a demotion within the meaning of s. 209(1)(b) that was part of the March 2014 disciplinary decision.

[70] In answering this question, I accept that as the grievor noted, I must consider not just what the parties say about an action but the facts and substance underlying the change; see *Gauthier v. Deputy Head (Department of National Defence)*, 2013 PSLREB 94 at para. 59; and *Courtmanche v. Parks Canada Agency*, 2007 PSLRB 119. I

also accept that evidence that an allegedly administrative or non-disciplinary action on the employer's part has a serious and severe impact on an employee's employment (such as, for example, termination) may be evidence that the employer's action is in fact a form of disguised discipline: *Basra v. Attorney General of Canada* 2010 FCA 24 at para. 18; *Bergey v. Attorney General of Canada* 2017 FCA 30 at paras. 34-40, 55-56 and 76-77. That does not mean, however, that an employer's express intent is irrelevant. It remains one of the facts to consider in determining whether the employer's action was disciplinary or not.

[71] Second, there is the question of whether the allegation that they were demotions was raised during the grievance process. If not, then the *Burchill* principle would apply, which states that neither a grievor nor a bargaining agent can change the nature of a grievance or add different elements to it after it has been referred to adjudication; see *Hurley v. Treasury Board (Department of National Defence)*, 2018 FPSLREB 35 at para. 255.

[72] The grievor had the onus of establishing that either change of position, in June 2013 or April 2015, represented a "demotion" within the meaning of s. 209(1)(b) and that either change was disciplinary or a form of disguised discipline. He also bore the onus of establishing as he had alleged that the transfer to the temporary position or the assignment to the new position on his return to work had been raised during the grievance process.

[73] The facts relevant to the two issues are covered in the following six points.

[74] First, the assignment to the temporary position took place in June 2013. The only evidence I have is that LCol Madic made it because certain aspects of the harassment grievance were upheld. Since I was not provided with a copy of whatever finding he referred to, without more, I cannot find that any such findings called for discipline or that the assignment was considered disciplinary. There is certainly no reference to the possibility of discipline in the assignment letter itself.

[75] Moreover, an employer's decision to reassign a respondent who is in the chain of command over a subordinate complainant would not be an unusual step. Reassignments in such cases make sense and do not necessarily reflect a disciplinary intent. The fact that after reading the letter, the grievor might have suspected that discipline could ensue, was not enough to make it so.

[76] Second, it was not until a month later, in July 2013, that the grievor was formally notified that a complaint had been made, and that an investigation had decided that some of the allegations were founded, and that as a result, the formal disciplinary process had been initiated. There was no actual discipline. Rather, there was a notice that an investigation would be conducted as part of the disciplinary process and that he would be provided an opportunity to respond before any final decision was made. Only after that process was completed was it possible that, "disciplinary measures **may** be taken" [emphasis added].

[77] Third, the March 28, 2014, discipline letter does not refer to the position the grievor occupied at that time. It did not confirm the position. It made no reference to his permanent senior project manager position.

[78] Fourth, the grievor did not appear to have read the March 28, 2014, discipline decision as including either a demotion or the conversion of the temporary assignment into a permanent transfer. Grievance 6327 did not refer to the reassignment and contained no grievance about the position he occupied at the time. The same can be said about the list of corrective measures that he prepared on June 19, 2014.

[79] Fifth, there was no reference in any of the first-, second- or final-level employer decisions to any issue that the position the grievor was occupying, either as of March 28, 2014 discipline, or after that, was part of the discipline that had been imposed: (Exhibit 1, Tabs 8, 12 and 17). But jobs, positions, and work assignments are central concerns of any employee. One would have expected to see some reference to that change in position had the grievor thought or understood that it had been the result of discipline or that it was a demotion.

[80] Sixth, and finally, the evidence, such as it was, did not support a conclusion that the grievor's position after his return to work was a demotion or that it was disciplinary in nature. A change in duties brought about by organization-wide changes is not in and of itself evidence of discipline or of a demotion just because one part of a grievor's duties (in this case, supervisory responsibilities) is no longer present, at least when his or her classification and pay rates remain the same.

[81] In my view, these facts do not support a conclusion that, on a balance of probabilities, the grievor's position changes were disciplinary or constituted a demotion within the meaning of s. 209(1)(b).

[82] Even had jurisdiction in general under s. 209(1)(b) been made out, there would remain the question of whether the transfer or the positions the grievor found himself in after March 2014 had been part of the discussions about the disciplinary decision during the different levels of the grievance process. The evidence, as detailed earlier in this decision, failed to establish that it had been. That being the case, the *Burchill* principle would apply and would bar me from hearing it.

[83] In saying that, I acknowledge that the June 19, 2014, list of corrective measures includes the following comment: "b. The Production Superintendent position that was 'eliminated' by LCol Madic be reinstated as a civilian position and offered to me or at the very least deploy [*sic*] into Senior Structural shop supervisor (pay nearly the same) as I requested twice" (JEB, Tab 7, for all quotes in this paragraph). However, I do not read this as a complaint about the transfer into the temporary position or as an objection that the transfer was disciplinary. Rather, I read that it was part of the grievor's negotiation strategy over how he was "to be made whole" The fact that he also sought "All used leave … since 4 June 2012 …", which is a date that appears nowhere in the chronology of events leading up to the discipline of March 28, 2014, supports this interpretation.

C. Did the grievor suffer a loss or damage over the loss of pay due to the suspension or due to reckless and wilful conduct by the employer?

[84] The grievor alleged that he was so upset, stressed, and anxious as a result of the March 28, 2014, disciplinary letter and the fact that some information about the suspension had been posted on the employer's SharePoint site that he went off work for 14 months. The grievor also submitted that the employer's conduct was reckless and wilful, which warrants an award of damages.

[85] There was simply no substantive evidence to support these claims. Insofar as causation is concerned, the medical note from the grievor's family physician was vague at best and was dated long after his return to work. I was not provided with any contemporary medical notes or reports to substantiate the existence of a stress reaction so severe as to keep the grievor off work.

[86] While I can appreciate that he might have suffered some stress from the discipline and the harassment investigation, stress is a normal part of working life. It is not enough in and of itself enough to establish cause for disability or inability to work;

see, for example, *Attorney General of Canada v. Gatien*, 2016 FCA 3 at para. 48. To conclude otherwise would be to elevate subjective feelings alone to proof of causation on a balance of probabilities. And that is not the law or the arbitral jurisprudence, as I understand it.

[87] Insofar as the allegation of reckless and wilful conduct is concerned, again, there was no evidence to support such a finding. Nothing about the employer's conduct suggested that LCol Madic acted recklessly, without considering the evidence before him. All I had was that a harassment complaint had been made, some parts of it were found sufficiently grounded to warrant temporarily reassigning a respondent who would otherwise have been in a supervisory position over the complainant, and a decision that was made after an investigation apparently found the complaint valid. Nothing in those facts would support on its face the type of findings associated with reckless and wilful conduct. There was no evidence of the egregious conduct that warranted the awards outlined in two decisions the grievor relied upon, which were *Doro v. Canada Revenue Agency*, 2019 FPSLREB 6; and *Reeves v. Deputy Head (Department of National Defence)*, 2019 FPSLREB 61.

[88] I appreciate that LCol MacEachern's decision of April 15, 2016, with respect to four different (albeit related) grievances suggests that there might have been due process problems or problems with the evidence presented during the harassment investigation such that a new investigation had to be ordered. But none of the evidence underlying that decision was before me. Nor, because those grievances were not before me, can I simply assume that LCol MacEachern's decision is or was tantamount to a finding that LCol Madic acted recklessly in reaching his disciplinary decision.

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

(The Order appears on the next page)

X. Order

[90] The employer's objection that the grievance is moot is denied.

[91] The employer's objection to my jurisdiction to address issues that have not been raised within the individual grievance process is upheld.

[92] The grievance is dismissed.

December 3, 2019.

Augustus Richardson,
a panel of the Federal Public Sector
Labour Relations and Employment Board