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

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

BETWEEN

ANDREW TULK

Grievor

and

DEPUTY HEAD
(Department of National Defence)

Respondent

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

In the matter of an individual grievance referred to adjudication

Before: Margaret T.A. Shannon, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Harold Doherty and Jennifer Davis, counsel

For the Respondent: Christine Langill and Cristina St-Amant-Roy, counsel

Heard at Fredericton, New Brunswick,
May 14 to 17 and December 17 to 19, 2019, and January 7 to 10, 2020.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] The grievor, Andrew Tulk, was one of three Canadian Forces Base (CFB) Gagetown, New Brunswick, employees investigated pursuant to a harassment complaint filed by a fellow CFB Gagetown employee. The grievor retired before the employer, the Department of National Defence, acted on the investigation results. He filed a grievance against those results. The employer partially granted his grievance and set aside the results of the harassment investigation due to procedural defects. The grievor referred his grievance to adjudication under s. 209(1)(b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") without his bargaining agent's consent.

[2] According to the employer, during the grievance process, the nature of Mr. Tulk's grievance changed over time from a request that the harassment investigation be redone to the point that by 2015, he alleged that the employer had constructively dismissed him.

II. Preliminary objection

[3] The employer raised objections to the Board's jurisdiction to hear this matter because of mootness and because the grievor was not fired; he retired. It argued that since the harassment investigation was not redone and no disciplinary action was taken, the Federal Public Sector Labour Relations and Employment Board ("the Board") is without jurisdiction under the *Act*. It argued further that retirement is a voluntary termination of employment under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13), over which the Board has no jurisdiction. Even if it has jurisdiction, the matter is moot, since the grievance was allowed in part, the harassment investigation report was overruled, and no further action was taken against the grievor.

[4] For his part, the grievor argued that constructive dismissal is a remedy available to the Board but that the correct facts are required. Constructive dismissal was raised after the grievance was put in abeyance for an extended period, which the grievor believed was necessary to determine what he was facing. He raised the allegation at the first level of the grievance process and argued it at every succeeding level. According to *Elliot v. Deputy Head (Correctional Service of Canada)*, 2019 FPSLREB 4, constructive dismissal can be brought before the Board; it simply requires the right set of facts.

III. Summary of the evidence

[5] The grievor had more than 30 years of service at CFB Gagetown as of his retirement. According to him, the employer identified him as an employee to be fired, which it took extreme measures to achieve. He worked in the production shops, which were a section of Infrastructure Operations at CFB Gagetown, as a production superintendent. He reported directly to Major Tyler MacLeod who, between 2012 and 2013, was the infrastructure operations officer, 3 Area Support Group, Engineer Group, CFB Gagetown.

[6] According to Maj. MacLeod, in the grievor's production superintendent role, he was to oversee a number of shops that reported to him, including the structural, electrical, and plumbing and heating shops. He assigned maintenance requests as they came in and oversaw their completion. Over time, he came into conflict with one of the employees in the paint shop, Marcel McLaughlin, who did not report to him. However, their relationship was the source of much workplace conflict.

[7] Mr. Tulk was very difficult for Maj. McLeod to work with. The grievor stated that he would "tell [Maj. McLeod] something different everyday". When he posted a sign in his cubicle with his wage rate on it during a workforce adjustment process, it upset his co-workers. Maj. McLeod ordered him to take it down because it was offensive, which upset him, so he had t-shirts made with the information from the sign printed on them and wore them every day for months. Maj. McLeod testified that the grievor told him that he had posted the sign as a way of saying, "This is what you are paying me [to do —] to sit here and do nothing," as his job had been affected by the workforce adjustment, the elimination of other positions and functions, and reorganizations within the military. The sign was offensive to those employees whose positions had been eliminated but according to Maj. McLeod, the grievor did not care, as once he was told to take it down, he merely laughed and began wearing the t-shirts.

[8] Maj. McLeod also identified issues with the grievor's leave usage. In Maj. McLeod's opinion, Mr. Tulk blurred the line between his supervisor role and his union activities. He also had to address with Mr. Tulk his lack of respect for the chain of command. In general, the grievor was difficult to manage. A series of workplace-separation agreements were required, which were intended to keep the grievor and Mr. McLaughlin apart because of ongoing workplace violence allegations. The grievor violated them repeatedly.

[9] Mr. McLaughlin was a painter; he reported to one of the other employees named in the harassment complaint. Maj. McLeod discussed Mr. McLaughlin with Mr. Tulk many times. Mr. Tulk and Mr. McLaughlin had a long history of conflict, and many complaints had been filed over time. In June 2012, an altercation occurred involving Mr. Tulk and Mr. McLaughlin that was referred to the military police (MP) for investigation. They were both investigated for uttering threats. No charges were laid.

[10] In September 2012, Mr. Tulk brought Maj. McLeod a document in which he claimed that he feared for his life because of threats made by Mr. McLaughlin. Maj. McLeod testified that he reported it to the MP, which investigated Mr. McLaughlin again, this time for criminal harassment. Once more, no charges were laid.

[11] According to Maj. McLeod, Mr. Tulk had the greatest difficulty with Mr. McLaughlin compared to everyone else in the workplace. Maj. McLeod repeatedly had to remind Mr. Tulk that he and Mr. McLaughlin were to be separated in the workplace, but still, Mr. Tulk would go to the paint shop where Mr. McLaughlin worked. Each time Maj. McLeod and Mr. Tulk discussed the workplace separation, Mr. Tulk agreed not to go to the paint shop; he would then tell Maj. McLeod that he was going there. Despite telling Maj. McLeod that he feared for his life, Mr. Tulk was repeatedly seen associating with Mr. McLaughlin. According to Maj. McLeod, Mr. Tulk's words to him frequently did not match his actions.

[12] Very rarely, Mr. Tulk had a need to be in the paint shop. One time, which Maj. McLeod recalled, after Mr. Tulk had been told that Mr. McLaughlin would be there, Maj. McLeod witnessed Mr. Tulk enter the paint shop to see a colleague twice in a 30- to 45-minute period. Mr. Tulk also knew that Mr. McLaughlin would be in the paint shop every Thursday for safety meetings, and he insisted on being there when Mr. McLaughlin attended the meetings.

[13] At the same time, a workplace violence investigation was underway, which was put on hold while the MP conducted its investigation, as the employer had initiated a harassment investigation that involved the grievor. In December 2011, Mr. McLaughlin had filed a harassment grievance, alleging that the employer had not protected him from harassment in the workplace in the form of a failure to accommodate him. The employer determined that it should be investigated, as a complaint against Messrs. Tulk and two of his colleagues had alleged that they had committed bullying

and mental violence. An external company, Charron Human Resources Inc. ("Charron"), investigated the harassment complaints beginning in June 2012. It completed its investigation and submitted a report to the employer in January 2013 ("the Charron report").

[14] Lieutenant-Colonel Peter Madic was the responsible officer who received the Charron report. He knew that Charron had been created to provide professional human-resources investigation services to the military. For that reason, it had been selected to complete the investigation involving the grievor. As the responsible officer, he could have accepted or rejected Charron's conclusions, following which he was to advise the respondents of his findings. He reviewed the report, found it thorough, and believed that it accurately reflected the actions of the individuals involved at the relevant time. On that basis, he concluded that the allegations against the grievor were founded.

[15] The grievor then went on leave; it was May 2013. Efforts were made to ensure a safe and conflict-free workplace for everyone so that they all could come to work and be productive pending Lt.-Col. Madic's decision on the appropriate action to take based on the conclusions in the Charron report. Basic ground rules were established that the grievor and Mr. McLaughlin were to follow, pending the outcome. According to Lt.-Col. Madic, it was hoped that some semblance of normality would be restored and that day-to-day work would resume. Mr. Tulk signed the agreement and promptly went on leave.

[16] No further action was taken against him until he returned. In fact, he was never disciplined, despite having been found guilty of harassing Mr. McLaughlin, since he submitted his resignation before discipline could be imposed. When he was asked why he never disciplined the grievor, Lt.-Col. Madic responded that he determined that there was no point, since the grievor had retired. The grievor submitted his "Notice of Resignation" without notice and without prior discussion. The employer had no indication that he was considering retirement.

[17] Lt.-Col. David Burbridge was Maj. Burbridge between June 2012 and July 2015, when he was the base construction officer at CFB Gagetown. The contract with Charron was one of the first things he signed off on his arrival in Gagetown. Charron was used because of the level of expertise required in harassment investigations and the amount

of information involved. The employer determined that an external consultant was required, and Charron was selected.

[18] After the harassment investigation was launched, a number of collateral investigations involving the grievor and Mr. McLaughlin were also started into workplace violence allegations, which the MP investigated. When the MP investigates something, other administrative investigations are put on hold. Once the MP concluded its investigations, no charges were laid under the *Criminal Code* (R.S.C., 1985, c. C-46). It was determined that Mr. McLaughlin had committed acts of violence in the workplace even though they did not attract criminal charges. However, it did not mean that no discipline was imposed or that no other administrative action was taken. A clear distinction existed between the workplace violence investigations and the harassment complaint investigation. The parties, the actions, the dates and times, the policies, and the relevant legislation involved in the investigations were all different.

[19] Mr. Tulk and Mr. McLaughlin entered into workplace-separation agreements, with the intention of protecting the grievor, which required that they both comply with certain expectations while in the workplace. A series of agreements was signed over the period leading to the grievor's retirement. Limitations were put on him and Mr. McLaughlin to ensure that they would not interact in the workplace. This addressed the grievor's claim that he felt threatened by Mr. McLaughlin.

[20] Lt.-Colonel Burbridge was aware that the grievor had retired. He remembered being told by Lt.-Col. Madic in the summer of 2012 that Mr. Tulk would retire. He never saw or heard of anyone pressuring the grievor to retire.

[21] Maj. Nathan Price assumed command of construction engineering at CFB Gagetown from then-Maj. Burbridge in 2015. He was present at the first-level grievance meetings held before Lt.-Col. Cynthia MacEachern. She briefed him on her issues with the investigation and the lack of procedural fairness she saw in the investigation and the Charron report. She also briefed him on her reasons for rescinding Lt.-Col. Madic's findings on the harassment complaint.

[22] Maj. Price was present when Lt.-Col. MacEachern publicly apologized to the grievor and his colleagues at an open staff meeting called for that purpose. She explained to those assembled that she had cancelled Charron's findings, and she apologized for having put the grievor and his colleagues through the pain of the

investigation. In her first-level response letter, she committed to reassessing the original allegations.

[23] According to Maj. Price, a reassessment was not possible, given the passage of time, as was confirmed in the employer's second-level response from Lt.-Col. D.A. Orr, who concluded that a new investigation that would provide procedural fairness to the parties could not proceed. The final-level response concurred and found that Lt.-Col. MacEachern setting aside the findings in the Charron report was reasonable. For these reasons, the employer determined that the matter was finished, and it advised the grievor accordingly.

[24] After the harassment complaint was filed, the investigation was delayed by the two criminal investigations conducted by the MP into the workplace violence allegations involving Mr. McLaughlin and the grievor. The results of the investigations were released the day after the MP closed its file.

[25] The harassment report refers to nepotism in the CFB Gagetown workplace. Majors Burbridge, Parlee, and Price shared that opinion; so did others, according to Maj. Price. Things changed after that investigation. Appointment processes were run properly, and leave was managed properly. Supervisory staff had limited managerial authority, and delegations of authority were revisited for all civilian staff. Management was responsible for ensuring that the employer's policies were complied with, and employees who violated them were to be disciplined.

[26] The grievor was involved in two workplace violence incidents and was named as a respondent in Mr. McLaughlin's harassment complaint. Mr. McLaughlin was a full-time employee in the paint shop. His position was affected by the workforce adjustment at the base in 2011-2012. The grievor was often called in to deal with Mr. McLaughlin, as other supervisors could not deal with his "temper tantrums", as the grievor described them.

[27] Once, on June 8, 2012, after Mr. McLaughlin had left a worksite with a work truck, leaving a crew stranded, Mr. Tulk was asked to speak to him and to advise him that the truck was in the care and control of the tradesman on site and that if he wanted to use it, he had to ask for the tradesman's permission. This conversation resulted in one of Mr. McLaughlin's many outbursts, which the grievor and his supervisor, Bob Powell, were called in to handle.

[28] During this incident, Mr. McLaughlin charged at the grievor, who said to him, "Go ahead; lose it." Mr. McLaughlin again charged at the grievor but stopped short. According to the grievor, he knew that Mr. McLaughlin would not attack him. It was all just an act; he was not displaying real rage but was trying to provoke the grievor. The grievor admitted that Mr. Powell asked him to leave once, but since he feared for Mr. Powell's safety, he remained.

[29] After the incident, the grievor went directly to the Commanding Officer's office, who referred him to the Deputy Commanding Officer. The grievor wrote his statement and then left. No investigation was launched. The next day, it was business as usual, and Mr. McLaughlin was in the workplace. When the grievor followed up on his complaint, he was told that the workplace violence investigations had been cancelled by someone ranking higher than the Deputy Commanding Officer.

[30] On June 25, 2012, Major McLeod filed a report with the MP about an incident that day between the grievor and Mr. McLaughlin. The next day, the grievor was advised that his workplace violence complaint was on hold pending the outcome of the MP investigation. Then on September 19, 2012, he was advised that it had been cancelled. When he pursued the next step, which was making a complaint with Human Resources and Skills Development Canada, the Deputy Commanding Officer became very angry with him and threatened to cancel his complaint, according to the grievor's testimony. As a result, he filed a grievance related to how the military staff had handled his workplace violence complaint. He did not file grievances about the series of separation agreements, even though he considered them disciplinary.

[31] In the midst of everything, a reorganization was carried out. The grievor lost all his managerial authority and was moved out of his office, and his dedicated vehicle was taken away and returned to the motor pool. Management viewed his actions as confrontational. But according to his evidence, he tried to help them deal with civilians. As a result of a change in the delegation of authorities, he ended up with less supervisory authority than the managers below him (Exhibit 54).

[32] Meanwhile, in the background, the military continued to investigate the grievor, through the MP, for misconduct related to the ongoing workplace violence allegations. When he made a complaint against Mr. McLaughlin for standing and staring at him

when they were subject to a separation agreement, Maj. Burbridge told him that his complaints were frivolous.

[33] When Lt.-Col. MacEachern committed to conducting a second assessment of the original harassment allegation, the grievor looked forward to the claim being dismissed. That never happened because, according to the grievor, Maj. Price decided that in no reasonable way could it be redone. The grievor conceded that he did receive the public apology from Lt.-Col. MacEachern at the town-hall meeting for everything he went through, but he was looking for more.

[34] According to the grievor, Lt.-Col. MacEachern had agreed to look into the actions of the military and civilians involved in the numerous investigations that had included him. She had also accepted a long list of other demands that had been presented to her, including that civilians who supported Mr. McLaughlin be disciplined, that Mr. McLaughlin be disciplined, that the grievor be compensated for his medical issues, that he be reimbursed his legal and service buyback costs, and that he receive damages to recognize the loss of his marriage and for pain and suffering. Instead, the harassment investigation was closed on July 26, 2016, without explanation. Since the day of the public apology, the grievor has had no contact with Lt.-Col. MacEachern. On April 15, 2016, in a letter to the bargaining agent (Exhibit 2, tab 12), she explained her decision and stated that the specific additional corrective measures that the grievor sought could not be addressed until the allegations against some individuals were investigated. It had become impossible since a second investigation would not be done.

[35] The grievor testified that he retired in August 2013 because he could not go back to his work. He did so voluntarily. He was facing an investigation and the possibility of disciplinary action. The employer had taken away all his responsibilities, his office, and his vehicle. He would be required to work in a cubicle and to obtain a vehicle from the motor pool or hitch a ride, which he could not face.

[36] In cross-examination, the grievor conceded that the corrective action he sought in his grievance was an independent review of the Charron report. Nowhere did he mention constructive dismissal. The first-level response and public apology set aside the Charron report and its conclusions as well as those of Lt.-Col. Madic. The grievor disagreed with Lt.-Col. MacEachern's recollection that she did not accept the additional remedies requested at the first-level grievance hearing.

IV. Summary of the arguments

A. For the employer

[37] The grievor retired in 2013. In the time leading to his resignation, many things happened. He knew that he was being investigated with respect to harassment allegations when he became involved in a workplace violence incident with Mr. McLaughlin, who was the complainant in the harassment complaint. He agreed to and voluntarily entered into a series of three separation agreements, which he did not grieve, even though he claimed he had been disciplined. He testified that he was not forced or pressured to retire, which was confirmed by Lt.-Col. Burbridge. The grievor did grieve the findings of the Charron report, which Lt.-Col. MacEachern overturned at the first level, which is exactly what the grievor sought in his grievance.

[38] Lt.-Col. MacEachern confirmed as much in her first-level response, which was sent to the grievor's bargaining agent representative on August 15, 2016 (Exhibit 2, tab 12C). At the second level, Lt.-Col. Orr determined that a second investigation would not be carried out and confirmed that the findings of the harassment investigation were overturned (Exhibit 2, tab 11). This was again confirmed at the third and final level of the grievance process. Despite receiving exactly what he asked for, the grievor continued to insist that another investigation of the same allegations be conducted and that he was entitled to a lengthy list of additional remedies submitted during the grievance process, which management never accepted.

[39] It is important to note that this grievance alleged that the grievor had been disciplined and that it was referred to the Board under s. 209(1)(b) of the *Act*. That provision reads as follows:

> ***Reference to adjudication***
>
> ***209 (1)*** *An employee who is not a* member *as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act *may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> …
>
> ***(b) a disciplinary action*** *resulting in termination, demotion, suspension or financial penalty ….*
>
> [Emphasis added (in paragraph (b)]

[40] Key to that provision is that the grievor must have received disciplinary action; in this case, there was none. If the grievance does not relate to disciplinary action, the Board has no jurisdiction (see *Wercberger v. Canada Revenue Agency*, 2016 PSLREB 41). The grievor was never disciplined. To put his matter properly before the Board, his grievance required bargaining agent support. Since there is no bargaining agent support, and since no disciplinary action was taken, the Board is without jurisdiction to hear the grievance and must dismiss it without further consideration.

[41] The burden of proof was on the grievor to prove that on a basis of clear, cogent, and compelling evidence, his termination was done for disciplinary reasons. He had to establish that on a balance of probabilities, the employer's actions constituted a termination of employment, and that it was done for disciplinary reasons (see *Nadeau v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 31). Retirement is a *de facto* voluntary separation (see *Mutart v. Deputy Head (Department of Public Works and Government Services)*, 2013 PSLRB 90; and *Mutart v. Canada (Attorney General)*, 2014 FC 540). Therefore, the Board is without jurisdiction.

[42] In this matter, the grievor did not allege constructive dismissal in his grievance; therefore, he could not have referred it to the Board under s. 209(1)(b) of the *Act*.

[43] The grievor grieved the results of the Charron report into the harassment allegations raised by Mr. McLaughlin. The corrective actions requested in the grievance were granted, for the most part. The only corrective action left is to redo an investigation, which is no longer possible, given the time that has elapsed and the requirements for procedural fairness. There is no issue left to adjudicate. The grievance is moot. The grievor did not seek judicial review of the employer's decision not to redo the harassment investigation. There are no grounds left to adjudicate.

[44] The grievor is not permitted to change the nature of his grievance into something beyond the investigation scope or to add to the requested corrective measures (see *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.)). An adjudicator's jurisdiction is determined by the terms of the original grievance (see *Schofield v. Canada (Attorney General)*, 2004 FC 622). The grievor could not fundamentally alter the nature of his grievance, which was about the investigation report results. He sought that they be set aside and that the investigation be redone (see *Boudreau v. Canada (Attorney General)*, 2011 FC 868).

[45] The grievor did not successfully satisfy the two-part test to prove that a constructive dismissal occurred. He did not identify that an express or implied contract term was breached that was sufficiently serious to constitute constructive dismissal; nor did he show that the employer's conduct demonstrated that it did not intend to be bound by the employment contract (see *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10). He failed to present evidence supporting a finding of constructive dismissal. He was not stripped of duties, sent home, and later suspended. He voluntarily retired.

[46] He had the onus of proving that on a balance of probabilities, he was constructively dismissed and that the dismissal fell within the scope of s. 209(1)(b) of the *Act*. The employer kept him gainfully employed at his group and level, including his salary and supervisory differential. Moreover, it implemented a series of separation agreements to protect him from Mr. McLaughlin and workplace violence.

[47] In this case, no breach of the employment contract amounted to constructive dismissal. Pursuant to s. 12 of the *Financial Administration Act* (R.S.C., 1985, c. F-11), the employer has the authority to assign and modify duties and to determine the learning, training, and development needs of its employees. Consequently, it acted within its statutory rights when it made unilateral changes to the terms and conditions of the grievor's employment. It exercised its management rights fairly and reasonably.

[48] The concept of constructive dismissal relates to protecting employees from employers who would fundamentally change an employment contract, to deprive employees of their recourse for wrongful dismissal. An employee subjected to constructive dismissal is entitled to damages in lieu of reasonable notice (see *Potter*). There is no room for this in the public sector, where employees have express protections and statutory recourse.

[49] The public sector is heavily unionized. Adjudicators and the courts have concluded that constructive dismissal is inconsistent with the collective bargaining regime. The terms of a collective agreement and the grievance process it contains are mutually exclusive to common law concepts like constructive dismissal. Employees who resign within the terms of a collective agreement do not have recourse under the doctrine of constructive dismissal.

[50] Finally, the grievance is moot. The employer granted the remedy requested in it. The Board does not have jurisdiction to grant the corrective measures that the grievor requested, even with its broad powers under s. 228(2) of the *Act*.

B. For the grievor

[51] Section 209 of the *Act* states that employees who feel that their grievances have not been dealt with to their satisfaction may refer them to the Board. That is a personal right. It is irrelevant whether the employer considered its treatment of the grievor disciplinary; he did. How an employer chooses to characterize its decisions cannot be a controlling consideration when determining their true nature (see *Canada (Attorney General) v. Frazee*, 2007 FC 1176).

[52] In *Robitaille v. Deputy Head (Department of Transport)*, 2010 PSLRB 70, the reassignment of the grievor in that case constituted a demotion since he no longer supervised employees. The grievor in this case could have supervised employees other than Mr. McLaughlin but instead, pursuant to the revised delegation of authorities that applied to everyone, with specific additions that had been made for him, he no longer supervised anyone. That was disguised discipline. A formal notice of discipline was not required. The Board has jurisdiction under s. 209(1)(b) to look into disciplinary demotions and the impact of the employer's actions on the grievor.

[53] The harassment complaint cannot be severed from everything else occurring in the workplace at the relevant time. The grievor claimed that he was disciplined in the form of constructive dismissal because his job changed significantly and nothing was formally communicated to him. The employer took action as a result of the harassment complaint. Its actions were equivalent to a demotion, even though the grievor's salary did not change despite the change to his level of authority.

[54] The grievor believed that the delegation change applied only to him. It was clear that there were organizational difficulties at CFB Gagetown at the relevant time. One issue was the scope of responsibility or authority that civilian supervisors had over other civilians and the scope of the military's authority over civilian employees. The poor communication between the military chain of command and supervisors as well as the constant churning of military personnel resulted in the grievor having to constantly develop new relationships. All new officers had their individual styles and beliefs as to their role and authority. All this was compounded by the ongoing

workforce adjustment and internal reorganization. The grievor held the only supervisor position that was significantly changed by the workforce adjustment.

[55] After the two MP investigations into the workplace violence allegations produced nothing, the employer continued to pursue Mr. McLaughlin's harassment complaint. The second MP investigation was launched after the grievor filed his complaint with Human Resources and Skills Development Canada about the employer not investigating his complaint against Mr. McLaughlin. Obviously, there is a clear nexus between the criminal investigations and the harassment complaint.

[56] The entire process surrounding the harassment complaint was flawed. It lacked fairness and did not reflect procedural justice. Between December 2011 and August 2013, when the grievor retired, the employer failed to follow its policies, to the grievor's prejudice. It converted a harassment grievance into a harassment complaint against him. The grievance that gave rise to the harassment complaint was about bargaining unit supervisors failing to accommodate Mr. McLaughlin. The supervisors did not have the obligation or duty to accommodate Mr. McLaughlin; the employer did.

[57] The employer then adopted and acted upon a report that was clearly biased. Furthermore, no attempt was ever made to resolve the matter informally, as anticipated by the employer's policy, before the harassment complaint was investigated. Lt.-Col. MacEachern acknowledged that the harassment investigation process was not fair and that it lacked transparency when she allowed the grievance in part at the first level, which was then confirmed at each subsequent level.

[58] Throughout the process, the employer failed to communicate essential information. When the delegations were removed from the grievor's scope of authority, he never knew whether it was to be permanent. He was never told why they had been removed. All this is part of the larger picture of the employer not meeting its obligations to the grievor as an employee.

[59] The grievor seeks damages consistent with those awarded in *Robitaille*, *Tipple v. Attorney General of Canada*, 2012 FCA 158, and *Doro v. Canada Revenue Agency*, 2019 FPSLREB 6. The Board has the authority to right the wrong the grievor suffered at the employer's hands. There is no medical evidence of stress and mental suffering, but it is open to the Board to conclude from the evidence that the damaging effect the grievor

suffered at the employer's hands was not remedied by a public apology since by then, he was no longer in the workplace.

[60] Furthermore, the employer's cavalier approach to dealing with the harassment complaint and the grievor's feelings demands punitive damages. Employees have the right to expect that their employers will deal with them fairly and in an unbiased manner (see *Robitaille*). Just because the employer did not exercise its disciplinary authority does not mean that it should not be held accountable.

[61] The grievor argued that in fact, the employer did exercise its disciplinary authority even before he was found guilty of harassing Mr. McLaughlin. He was subjected to organizational changes and a workforce adjustment. His authority was stripped from him long before the investigation concluded. Instead of waiting for the disciplinary axe to fall, he chose to retire. However, without evidence of formal discipline, his only remedy is damages (see *Pronovost v. Canada Revenue Agency*, 2017 PSLREB 43).

[62] The employer granted the grievance in part at the first level, rescinded the investigation report findings, and committed to redoing the investigation, but the grievor could not wait for the second investigation to be conducted. Had the right thing been done in the first place, he would not have been in the workplace for approximately two years, feeling unfairly treated the whole time. When the corrective action granted at the first level was reversed at the second level, he continued to pursue his grievance. Only a truly innocent person would welcome a second investigation.

[63] The Board should seize its jurisdiction from the wording of the grievance. All the heartbreak and the constructive dismissal that the grievor claims occurred falls clearly within the wording "… results of the … Harassment … Report." His only remedy is damages for the employer's failure to follow its policies in a timely fashion.

V. Reasons

[64] The employer is absolutely correct. The case law supports the argument that retirement is a voluntary termination of employment under the *Public Service Employment Act*, over which this Board has no jurisdiction. The grievor signed his Notice of Resignation. He cited retirement as the reason for his resignation on

August 28, 2013, to take effect that same day. His resignation was accepted at 10:35 a.m. by the Commanding Officer of 5 Engineering Services Unit, CFB Gagetown, on that same day (Exhibit 2, tab 16). For that reason, his termination of employment was clearly a voluntary act contemplated under the *Public Service Employment Act*, over which I have no jurisdiction (see *Mutart at Board and FC*). The form he signed had space for comments, where he could have expressed his feelings or indicated that his resignation was not voluntary, but he put nothing there. On the face of the document, it was a voluntary action over which I have no jurisdiction.

[65] Furthermore, the grievor must be held to the grievance that he filed, or otherwise, he would run afoul of the principles enunciated in *Burchill*. He could not refer a different grievance to adjudication than the one filed at the first level. The grievance in this case dealt solely with Charron's harassment investigation results. The remedy sought was that all materials pertaining to the investigation be reviewed by an independent qualified harassment investigative team not affiliated with the employer.

[66] If the grievor felt that his treatment through the workforce adjustment process, the changes to the military's internal structure, and the changes to the delegation of authority were of much significance to his employment, it was within his ability to file grievances on each of them or on all, together. Not open to him was an attempt to broaden the scope of the grievance that was filed to include all the issues under the generic "… results of the … Harassment … Report," as argued by his counsel, when there was no obvious nexus established on the basis of clear, cogent, and compelling evidence between what was grieved and what was claimed to have resulted from what was grieved.

[67] He did not prove a nexus between any of these broader allegations and how they resulted from the Charron report. Indeed, they might well have been the results of the ongoing reorganization or his behaviour in the workplace, as described by Maj. MacLeod, or his dislike of Mr. McLaughlin. The evidence was that the grievor and others were affected by workforce adjustment and a reorganization of the military structure, which impacted the delegation of authorities. He did not establish that he was a target of the organizational changes.

[68] By all accounts, it was established that the grievor was very difficult to manage. In my opinion, it was clear at the hearing that from his actions and testimony, he is

addicted to workplace conflict and that he sought it. There was much of what I would describe as "noise" around his employment that was not related to the harassment complaint and that might have more suitably been the subjects of other grievances but that cannot be dealt with under the guise of the grievance that was filed and referred to adjudication before me.

[69] The matter of his alleged constructive dismissal was not properly brought before the Board pursuant to s. 209(1)(b) of the *Act*. Nowhere in its wording does the grievance raise discipline, disguised or otherwise. There is no mention of a constructive dismissal or of a dismissal of any type. In fact, the grievor's evidence was clear that he resigned voluntarily and that he was never disciplined. If he wished to pursue a grievance claiming that he had been constructively dismissed as a result of workforce adjustment, it should have been referred under s. 209(1)(a) of the *Act* using Form 20 and the grievor was obligated to obtain the bargaining agent's authorization to proceed. (Appendix I – Workforce Adjustment – of the Operational Services collective agreement between the Treasury Board and the Public Service Alliance of Canada, expiry date August 4, 2014 ("the collective agreement", explicitly stipulated that it was part of the collective agreement (Exhibit 39).)

[70] Even if I am wrong on the matters of jurisdiction, the grievance is moot. The grievor sought to have a harassment complaint against him set aside, which it was. The employer determined that it would not proceed with another investigation of the allegations against him as by the time the grievance was heard, he was no longer an employee. I question the employer's authority to investigate in such a situation and wonder what the outcome would have been had the grievor again been found guilty of harassment. The employer could not have disciplined him. What purpose would a second investigation have served? It would have been very expensive and lengthy and would not have been a good use of time or government resources.

[71] The parties provided me with numerous cases to support their arguments. While I read each one, I referred only to those of primary significance.

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

(The Order appears on the next page)

VI. Order

[73] The grievance is dismissed.

March 3, 2020.

Margaret T.A. Shannon,
a panel of the Federal Public Sector
Labour Relations and Employment Board