Date: 20200317

Files: 566-02-11308 and 11309

Citation: 2020 FPSLREB 28

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

KEITH HERBERT

Grievor

and

DEPUTY HEAD
(Parole Board of Canada)

Employer

Indexed as
Herbert v. Deputy Head (Parole Board of Canada)

In the matter of individual grievances referred to adjudication

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

For the Grievor: Himself

For the Employer: Michel Girard, counsel

Decided on the basis of written submissions,
filed September 25, 2019.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] Keith Herbert ("the grievor") was employed by the Parole Board of Canada (PBC or "the employer") as a strategic planning analyst. By letter dated April 23, 2015, he was terminated from his position effective May 22, 2015.

[2] On April 24, 2015, the grievor grieved the decision to terminate his employment and alleged that the employer had discriminated against him with respect to his disability in an ongoing manner, violating both the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*) and the collective agreement entered into between the Treasury Board (TB) and the Public Service Alliance of Canada ("the Alliance") for the Program and Administrative Services Group that was signed on March 1, 2011, and that expired on June 20, 2014 ("the collective agreement"). His request for relief included the following:

- that he be reinstated immediately;
- that he be accommodated in accordance with the *CHRA* and the TB's *Policy on the Duty to Accommodate Persons with Disabilities in the Federal Public Service*;
- that he be compensated for all losses, including pay and benefits and any additional expenses that resulted from the termination;
- that he be compensated $20 000 for pain, suffering, and psychological and physical damages, due to the employer's neglect, and that he receive an additional $20 000 for the reckless and wilful discrimination he has suffered;
- that the employer be responsible for any tax implications resulting from any award made pursuant to the grievance; and
- that he be made whole.

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

[4] Before his termination, the grievor had referred to the Board (or to one of its predecessors) other grievances for adjudication that I heard at the same time as the termination grievance. After the evidence portion of the hearing and at the outset of the arguments, he withdrew the following four grievances: file 566-02-8688, dated August 2, 2012; file 566-02-8689, dated October 12, 2012; file 566-02-9976, dated December 20, 2013; and file 566-02-11310, dated December 19, 2014. In addition to the termination grievance (files 566-02-11308 and 11309), those withdrawals left the following three grievances outstanding:

1. file 566-02-8829, dated February 14, 2013;
2. file 566-02-8830, dated August 2, 2012; and
3. file 566-02-10258, dated August 22, 2014.

[5] The parties requested that the hearing be bifurcated and that the remedy be dealt with after I had determined if there was liability. I agreed to the request.

[6] The matter proceeded before me on January 4 to 8 and 17, August 8 to 10, and November 1 and 2, 2016. On September 11, 2018, I issued a decision with respect to the liability issues in all the grievances before me. I dismissed the grievances in files 566-02-8829, 8830, and 10258 and I allowed the grievance in files 566-02-11308 and 11309 (see 2018 FPSLREB 76).

[7] Files 566-02-11308 and 11309 deal with the same grievance, which was against the termination of the grievor's employment. As set out at paragraph 383 of 2018 FPSLREB 76, this grievance was referred to the PSLREB on two separate grounds, one against the decision to terminate his employment (under s. 209(1)(c)(i) of the *Act*), and the other being the employer's failure to accommodate his disability, which breached articles 17 and 19 of the collective agreement (under s. 209(1)(a) of the *Act*).

[8] Throughout the hearing, the grievor was represented by legal counsel retained by the Alliance.

[9] As far as the Board is aware, no application was made to the Federal Court of Appeal for judicial review of 2018 FPSLREB 76.

[10] As part of my order at paragraph 425 of 2018 FPSLREB 76, within 15 days of the date of the issuance of that decision, the parties were to consult each other and

provide the Board's registry with mutually convenient dates for an additional hearing to address the outstanding issue of remedy.

[11] The parties were left to discuss their mutual availability along with production and witness issues. On October 24, 2018, counsel for the grievor emailed the Board's registry, stating that he and counsel for the employer had spoken about the matter, sought and obtained instructions from their clients, and determined that it was necessary to proceed with the remedy portion of the hearing. In the email, he stated that it was difficult to estimate the amount of time that would be required to complete the hearing; however, three to five days should suffice.

[12] A case-management conference (CMC) was held by telephone on November 2, 2018. The scheduling of the remedy portion of the hearing was discussed. It was left to the parties to discuss potential hearing dates and get back to the Board's registry. Unfortunately, no mutually convenient dates could be agreed to, and the process of finding those dates continued into the New Year.

[13] On February 22, 2019, and again on March 8 and 14, 2019, the Board's registry offered hearing dates to the parties in May, September, and October of 2019. On March 25, 2019, the Board's registry confirmed with the parties their mutual availability to schedule the remedy portion of the hearing for September 30 through October 2 and for October 21 to 23, 2019.

[14] On August 18, 2019, counsel for the grievor requested that summonses be issued for two potential witnesses. They were issued and sent to the grievor's counsel.

[15] On August 30, 2019, a "Notice of Hearing" was issued for the hearing dates of September 30 through October 2, 2019, and was sent to the parties.

[16] On September 12, 2019, the Board's registry received correspondence from Howard Markowitz indicating that he was now acting for the grievor and requesting a postponement of the September and October 2019 hearing days.

[17] After that request, I instructed the Board's registry to canvass potential times and dates for a further telephone CMC. On September 19, 2019, the parties were advised of my potential availability, and the CMC was set for September 25, 2019, at 11:30 a.m. (EDT) or 8:30 a.m. (PDT), as I was hearing a matter in British Columbia that week.

[18] On September 24, 2019, at 6:07 and 6:09 p.m. respectively, Mr. Markowitz forwarded via email and fax two documents, totalling 54 typed, single-spaced pages, which were entitled "REQUEST THAT JOHN JAWORSKI RECUSE HIMSELF And REQUEST TO HAVE MY REMEDY HEARING PROFESSIONALLY RECORDED" ("the recusal request") and "The Litany of Errors Justifying the Request for the Recusal of John Jaworski Prior to my Remedy Hearing and to have Keith Herbert v. Deputy Head (Parole Board of Canada), 2018 FPSLREB 76, Recorded by a Certified Court Reporter During Said Remedy Hearing" ("the litany of errors").

[19] The CMC proceeded on September 25, 2019, at the appointed time. It was confirmed at that time that although Mr. Markowitz was representing the grievor in the continuation of his grievance, he had not received the grievor's file from the Alliance. The request to postpone the hearing that was scheduled to start on September 30, 2019, was granted.

[20] The grievor alleges that I should recuse myself as there is a reasonable apprehension of bias. The basis of the request appears to be as follows:

> . . .
>
> *The litany of errors that favour the government have been sent in the form of a separate document by my lawyer Howard Markowitz for your consideration. I believe that this list of errors unto themselves [sic] is ample evidence and justification for my request that John Jaworski recuse himself and that I be permitted to hire a certified court reporter to record my remedy hearing, no matter who the adjudicator is going forward.*
>
> *In that I canvassed three reasonable, well-informed and right-minded people (practicing [sic] lawyers), prior to making these requests and they indicated that given the specifics of my case and the errors that favour the government in the liability decision, a reasonable apprehension of bias is justified. I believe my requests are meritorious and should be granted. To phrase this another way, I canvassed opinions beyond my own, from people who have the requisite background knowledge to weigh in on the issues so that these requests have entirely objective validity and the requests are made in the most objective fashion possible.*
>
> *In that these lawyers indicated that a reasonable apprehension of bias is justified, a natural culmination request from there is that the remedy hearing be professionally recorded by a certified court reporter no matter who the adjudicator for my remedy hearing may be.*
>
> . . .

> *. . . I consulted three other lawyers about my case and based on the inventory of facts contained herein they were all of the opinion that by delaying the release of the liability decision for my case, John Jaworski was attempting to place me in a weakened position in every way possible including financial and psychological so that I would be more amenable to accepting any offer of settlement made by the employer. Along those lines they also agreed that a reasonable apprehension of bias is justified.*
>
> . . .

[21] At one point in the recusal request, in just a little over 3 pages, the grievor sets out 10 points, entitled "A summary of the reasons for my request that John Jaworski recuse himself". In brief, he claims that although 99% of the Board's decisions in wrongful termination cases are issued within a year, it took me almost twice as long to issue 2018 FPSLREB 76. In the meantime, I rendered nine other decisions on termination cases heard after his. The grievor claims this delay was an attempt by me to "break" him financially, psychologically and physically so that he would be "… more malleable when it comes time for the employer to make me an offer to settle . . .".

[22] Point 5 of his summary refers to correspondence that he states his psychologist sent to the Board on his behalf about his illness, and to the release of the decision. In particular, on these issues, the grievor states as follows:

> . . .
>
> [Referencing correspondence from Dr. Moustgaard, a clinical psychologist:]
>
> *5) . . .* ***It was only upon receipt of her letter to the tribunal, (a second such letter being sent to the tribunal) asking when the decision was going to be released, was it finally released . . . If my psychologist had not written that letter and it had not been sent to the tribunal, I'm convinced that the adjudicator would have continued to drag things out by releasing decisions for cases heard after mine. Proof of this is that within twelve days of the tribunal's receipt of the letter from my psychologist which indicated that my treatment would not progress and I would continue to experience depressive symptoms, the decision was finally released. . . .***
>
> . . .
>
> [Emphasis in the original]

[23] The grievor also claims that the decision contains a significant number of errors that favour the employer. He says that these errors were incorporated in the decision

as an act of reprisal by me as a result of him "…going over [my] head so that the decision would finally be released."

[24] At page 22 of the recusal request, in referencing evidence at the hearing, he identifies the testimony of a witness that he characterized as a self-serving inaccuracy and states that I, as ". . . an agent of the employer should have sought to initiate the reparation process in as expeditious a fashion as possible."

[25] Also at page 22, the grievor sets out what he believes was discussed with respect to a potential mediation-arbitration ("med-arb") that took place at the outset of the first hearing day.

[26] On page 23, he states as follows:

> ***In that when the liability decision was finally released, the impetus behind it was a prompt sent to you Ms. Ebbs, Virginia Adamson and to John Jaworski, and there were a significant number of errors included in that decision, I came to the conclusion that the litany of errors that favour the employer are an act of reprisal by Mr. Jaworski as a result of the request to have said decision rendered just shy of the two year mark. . .almost double the release time of 99% of other wrongful termination decisions. Again it should be noted that I held my opinion in abeyance until I consulted with lawyers who came to the same conclusion as myself.***
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> [Emphasis in the original]

[27] The employer has made no submissions on the grievor's motion.

II. Reasons

[28] This decision shall deal only with the grievor's request that I recuse myself. I will deal with the grievor's request to record the hearing after this decision is issued.

[29] The test for determining whether a reasonable cause exists for the apprehension of or a reasonable likelihood of bias was developed as follows by the Supreme Court of Canada in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369:

> . . .
>
> *The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by*

> *reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. . . ."*
>
> . . .

[30] In *Adams v. British Columbia (Workers' Compensation Board)* (1989), 42 B.C.L.R. (2d) 228 (B.C.C.A.) at para. 13, the Court raised the question of the nature of the evidence required to demonstrate an appearance of bias, stating in part the following: ". . . sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause . . . suspicion is not enough. . . ."

[31] It is up to Board members to determine whether they should recuse themselves.

[32] The grievor was terminated on April 23, 2015. I was assigned his termination grievance, which, as stated, was opened under two file numbers because it had been referred to adjudication under both ss. 209(1)(a) and (1)(c)(i) of the *Act*. In addition to those files, I was also assigned to hear, in concurrence with the termination grievance, seven other grievances filed by the grievor and referred for adjudication that formed the basis of eight other files, for a total of eight grievances in nine files. As set out earlier in this decision, the grievor withdrew four of the grievances after the completion of the evidence, which left a total of four grievances captured by five files.

[33] The hearing took place over the course of 10 months, of which the hearing days were broken up between the beginning of January, mid-January, early August, and early November of 2016. As noted, 2018 FPSLREB 76 was issued on Tuesday, September 11, 2018.

[34] Board members are not employees of the TB or of any other arm of the federal government (including the PBC). They are appointed by the Governor in Council (GIC). They are assigned to hear cases almost exclusively as a panel of one and are identified as "a panel of the Federal Public Sector Labour Relations and Employment Board" ("panel of the Board"). They hear cases across the country, at locations most convenient to parties. Depending on a number of factors, including location and witness, counsel, and Board member availability, cases can encompass as little as one issue involving one employee, multiple issues involving one employee, or multiple

issues involving many employees. They can take as little as under a day to be heard to sometimes many days or weeks or, in some circumstances, months to hear.

[35] The Board schedules hearings many months in advance. As such, if a particular case is scheduled for a particular week and does not finish, continuation dates have to be found at some point in the future that are convenient to all the parties. This often involves hearings being continued over the course of several weeks, sometimes over the course of a year, and sometimes over more than a year, depending on the circumstances.

[36] Depending on their preferences, Board members record evidence either by hand or by typing, usually on a laptop. Only in very rare circumstances has a hearing before a panel of the Board, or an adjudicator of one of the Board's predecessors, recorded a hearing using what would be commonly known as a court reporting service.

[37] The grievor alludes to certain facts in his recusal request about the number of decisions I issued over a period and those that other Board members issued. He states that other decisions were issued faster and that I issued decisions on other matters faster than the one with respect to his grievances. He states that I did so intentionally to personally cause him damage and to benefit the employer.

[38] I have no doubt that some Board members issue decisions faster than I do in some circumstances and that at the same time, in other circumstances, they do not. Not all of us carry the same caseload; nor do we all handle the same types of cases or hear the same number of cases.

[39] As a rule, generally, a Board member is scheduled to hear cases sitting as a panel of the Board almost every week, except for the period encompassing Christmas and New Year's Day (roughly December 21 to January 2), when they are on leave, or when they near the end of their appointment terms. Sometimes, scheduled hearings may not proceed. If so, during these periods, the Board members write their decisions if they are not engaged in other work-related functions or are away, on a form of leave.

[40] It is trite to state that the number of cases that any given Board member has heard, and their lengths and complexities, can have a bearing on how quickly a decision is issued. It is inaccurate to simply point out that other decisions have been issued faster. The workloads of any individual Board members can differ radically,

depending on any number of factors and circumstances. More recently appointed Board members, who have held fewer hearings, have fewer decisions to write. A Board Member with a lighter caseload will likely have fewer decisions to write and more time to write them. A Board Member who has heard only short, simple cases as opposed to lengthy and complex ones will also likely issue decisions more expeditiously.

[41] When a panel of the Board has completed a draft of a decision, it is put through an editing process and review process. The Administrative Tribunals Support Service of Canada (ATSSC) provides support services to the Board. The review process may (or may not) give rise to comments, suggestions, or discussions with the panel of the Board, after which the decision is finalized and issued. In short, once a draft decision has left a panel of the Board's hands and is sent to editing, it can take weeks and at times months for it to be finalized and issued.

[42] As a matter of personal practice, I try to write decisions with respect to the cases I have heard on a first-in, first-out basis. However, it is not a hard-and-fast rule, and depending on the circumstances, decisions in newer cases can be written before those in older ones. There are only so many days that I (and my colleagues) have available to write decisions. Depending on my schedule, if I have some time between hearings or time away from writing, I may review a decision immediately after it has come back from one of the steps of the review process, or I may complete or try to complete a simpler decision or one that is closer to completion than others.

[43] When I draft decisions, I do not start one and carry on writing it, doing nothing else until it is finished. In addition to matters I am hearing, I often have several decisions at different draft stages. This allows me to move from one to another if I require a break from writing a particular decision. In any case, when you take a break from writing a decision, for whatever reason, you must reacquaint yourself with it, which is time consuming.

[44] During the period between the end of the grievor's hearing and the issuance of 2018 FPSLREB 76, I was scheduled to preside over 93 hearings across Canada, of which over 40 proceeded, for a total of 91 days. The number of hearing days is not inclusive of days spent travelling, nor does it include written submissions. During the same period, I issued twenty-two decisions, of which 6 cases involved employment terminations. In four of the termination decisions, the hearings were completed before

the grievor's case; 1 was heard just weeks after his, and 1 was heard in the spring of 2018. Of the 4 cases that were heard and that had decisions issued before the grievor's, 1 involved complex scientific evidence and was heard in a period of 8 weeks over 2 years; one was heard over the course of close to a year and, like the grievor's, over the course of 3 weeks, roughly 10 months apart; one was heard over the course of 2 weeks and involved forensic accounting; and the last was heard over the course of 2 weeks. Like the decision in the grievor's case, they were all lengthy. The one heard over 8 weeks resulted in 890 paragraphs contained in 207 pages. The others were 496 paragraphs and 119 pages, 372 paragraphs and 82 pages, and 551 paragraphs and 129 pages. In short, the writing process takes as long as the writing process takes.

[45] The *Act* provides for the Board to have a chairperson and 2 vice-chairpersons. As of the hearing of the grievor's case, it had 10 full-time Board members. Currently, more than 6000 individual files with matters referred to the Board are awaiting hearings. I can say that I have been assigned and have heard termination cases in which the terminations predated the grievor's and were scheduled to be heard long after his case was not only heard but also decided. The Board and its members have only so many resources and have to work within their framework, created by the legislation.

[46] As described above, once a draft is completed, it goes through an editing and review process before issuance. In the grievor's case, this process began at the end of June 2018. Considering the various stages of the process, as well as the impact of availability due to summer holidays, nothing is remarkable or unremarkable about the steps taken or the amount of time they took.

[47] I have not looked at every termination case heard by Board members over the years and will not comment on the lengths of time to issue them. Every case, and every termination case, is different. As set out earlier in this decision, different factors affect the decision-writing and issuance process, including the Board Member's caseload, the length of the hearing, and the complexity of the issues.

[48] I can say that the grievor's case was multi-issue, multifaceted, and complex. It involved a number of grievances over an extended period, health and accommodation issues, and differing medical opinions. At paragraph 63 of 2018 FPSLREB 76, Dr. Moustgaard spoke about her meeting with the grievor on November 14, 2012, and

stated that at that time, his anxiety disorder was not otherwise specified, meaning that he presented with a disorder that was so multifaceted that it was difficult to assess it exactly. His case was far from simple. It deserved an appropriate amount of time for it to be written and for the correct decision to be made.

[49] I note that the grievor requested ' in that there were likely two other Board members involved in writing the decision after the liability hearing, I ask that one of these additional Board Members that formed a "panel of the FPSLREB" conduct my remedy hearing and adjudicate on remedy at the conclusion of that hearing for my case'. On this, point, I will state that there were not any additional Board members involved in the grievor's decision. I sat as a panel of one, as provided by the *Federal Public Sector Labour Relations and Employment Board Act* at section 37.

[50] In the recusal request, the grievor sets out that he believes that I am biased because of correspondence Dr. Moustgaard sent to the Board and because of my reaction to it. He did not include a copy of the correspondence in the 54 pages. He states that Dr. Moustgaard had sent a letter to the Board's offices at some point close to when the decision was issued that influenced me through some duress or pressure from the Board's chairperson or executive director to issue it. He states that I rendered my decision due to that correspondence and that I incorporated errors in the decision as an act of reprisal on my part against him.

[51] I can state that a review of the material on the grievor's file did not disclose a letter from her to the Chairperson or the Executive Director of the Board. I made my decision only on record that was before me and my handwritten notes.

[52] I can also say that as a matter of course, it is not uncommon for parties to contact the Board's registry and inquire into the status of matters both before and after a hearing. In the matter of cases awaiting decisions, sometimes, as a Board member, I am advised that an inquiry has been made, and sometimes, I am not advised. I am aware that the Board's registry has a standard practice when such inquiries are made to advise the inquiring party that the decision is in process and that it will be issued when it is issued.

[53] The only knowledge I had of the grievor's health and its status before I issued 2018 FPSLREB 76 was set out in the documents submitted during the course of the hearing and testified to by witnesses at the hearing.

[54] The grievor raised the specific case of *Gill v. Deputy Head (Correctional Service of Canada)*, 2018 FPSLREB 55. He correctly noted that it was a termination case and that I heard the grievance in mid-March of 2018 in Edmonton, Alberta. It is one of the termination cases that I issued a decision for before the grievor's case. But he did not set out that Mr. Gill was terminated from his employment in September of 2012, almost three years before the grievor was terminated, and that his case was not scheduled to be heard until the week of October 30, 2017. Those dates were postponed at his request (as he and his bargaining agent had parted ways) and were rescheduled for March of 2018.

[55] During the *Gill* hearing, a unique set of circumstances arose that required a decision on one specific issue, which was the determination of whether Mr. Gill had been terminated within the probationary period. It was an interim decision, and the hearing was scheduled to continue during the week of July 30, 2018. While that decision was issued in a relatively short time after the hearing closed in March of 2018, only the one issue had to be dealt with, and the facts were largely not in dispute. Indeed, the character of the continuation of the hearing in the week of July 30 was contingent on my interim decision.

[56] In the recusal request, the grievor alleges that I am an agent of the employer and that the delay issuing the decision was somehow an attempt by me as that agent to break him and make him more malleable with respect to a settlement. As stated earlier in this decision, Board members are appointed by the GIC and are not employed by the TB. I am not and never have been employed by or at the PBC. While the Board as a whole and Board members individually encourage parties to settle their cases (which they often do), once a case has been heard, we are required to make a determination, on the evidence. The grievor has suggested that somehow the delay would give the employer some advantage in a settlement; I note, however, that the grievor is represented and has counsel to advise him should he choose to engage in settlement discussions. Apart from settlement, any monetary award in this matter would be decided by the panel of the Board flowing from the termination grievance, which I allowed. The parties asked that the hearing be bifurcated, and I acceded to that request. The parties were represented by legal counsel. Had they determined that they wished to settle the outstanding issues between them on terms satisfactory to them, it was up to them to proceed in that manner.

[57] If any discussions with respect to a settlement (other than the very short med-arb that took place on the first day of the hearing) have taken place, they would have been between the parties, and I would not be privy to them. With respect to the med-arb, the parties requested it at the very outset of the hearing and with their strict understanding that if the discussions failed or did not progress, they would be discontinued, and the hearing would be recommenced. They were fully aware that I would hear the matter despite acting as a mediator and that as a condition of the med-arb, they would have to consent to it, which they did.

[58] While I would have made brief notes of discussions that took place that day, they would have been shredded on that day, as I do with any notes made with respect to any mediation I am involved in as a Board member.

[59] The grievor also references the litany of errors as a reason for my recusal.

[60] While I cannot speak to the particular unique format that each Board member may apply to drafting his or her decisions, most use the same general format as I do, which I used in 2018 FPSLREB 76. The decisions start with a brief introduction as to what the grievance, complaint, or application is about, followed by a section setting out a summary of the evidence, a section summarizing the arguments, a section setting out the reasons, and finally, a section setting out the order.

[61] Cases before panels of the Board are, in general, largely in-person oral adversarial hearings in which most of the evidence is sourced from either witnesses or a combination of oral testimony and documents identified or submitted on consent. In writing a decision, panels do not set out every statement made by witnesses. A witness may say many things in the course of oral testimony, some of it relevant, and some of it not even remotely relevant. The hearing itself, the issues to be resolved, and the Board's jurisdiction, as well as the relevance of the evidence from the witnesses and the documents (or a combination of it all), determines what does and what does not go into the facts summarized and set out in the decision.

[62] A panel of the Board hearing a matter is circumscribed by his or her jurisdiction as set out in the relevant legislation and collective agreements and in the given grievance. Sometimes, facts are set out in the decision not because they are of particular relevance to the issue to be decided but because they may give some context to the narrative. The evidence is largely summarized, at times based on an

interpretation of different bits of the testimony of one witness, of the testimonies of several witnesses, of documents, and sometimes, of a combination of documents and testimonies. As a panel of the Board hearing a case, particularly with many different facets and issues, I have to assess the evidence as it comes forward from all the different sources and determine what it means. It is not as simple as one person saying "X" and another saying "Y". It is also not as simple as one person lying and another being truthful. In the end, I am required to make a determination on a balance of probabilities, based on the evidence and the law, which I did. If the grievor was unhappy with the decision I rendered, it was open to him to seek judicial review of it. He did not.

[63] That decision is now final. While the purpose of the upcoming hearing is not to revisit or re-litigate the facts in the decision on the merits, the grievor will have the opportunity to present evidence and make argument on the remedy he feels is appropriate in this case. Those submissions, along with those of the employer, will be considered impartially and a decision, with reasons, provided to the parties.

[64] The grievor's suspicion that I purposely acted as I did in issuing 2018 FPSLREB 76 to cause him harm, that I did so knowing it would cause him harm or to provide the employer with some form of an unfair advantage, or that I acted in reprisal against him does not constitute sufficient evidence. His suggestions are allegations based on unfounded and mistaken assumptions. Applying the test set out in *Committee for Justice and Liberty et al. v. National Energy Board*, I do not believe that an informed person, viewing the matter realistically and practically and having thought the matter through would conclude that I am biased against the grievor and that I cannot decide on the remedial aspect of his case in a fair and impartial manner.

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

(The Order appears on the next page)

III. Order

[66] The request for recusal is denied.

March 17, 2020.

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